Wyoming Law Review

Volume 6 | Number 2 Article 9

January 2006

Conservation Easements - Preserving Privately Owned Natural Habitats: Guidance for Interpreting

Nicholas M. Agopian

CASE NOTE

CONSERVATION EASEMENTS—Preserving Privately Owned Natural Habitats: Guidance for Interpreting 26 U.S.C. § 170(h)(4)(A)(ii), *Glass v. Commissioner of Internal Revenue*, 124 T.C. 258 (2005).

INTRODUCTION

In *Glass v. Commissioner of Internal Revenue*, petitioners, Charles and Susan Glass, Michigan land owners, donated three conservation easements over the course of four years.[1] The Internal Revenue Service (IRS) challenged petitioners' compliance with I.R.C. § 170(h)(1) and their subsequent charitable contribution tax deductions asserting that the Glass' easement donations do not protect a relatively natural habitat for wildlife and plants.[2] Petitioners brought suit alleging full compliance with the code arguing that the conservation easements do "protect a relatively natural habitat for wildlife and plants."[3] The court held that "petitioners' respective contributions in 1992 and 1993 of the conservation easements [were] qualified conservation contributions under § 170(h)(1) because, in relevant part, they

---

1. Glass v. Comm'r. Of Internal Revenue, 124 T.C. 258 (2005). Easement donations were made in 1992 and 1993. *Id.* at 259. "Conservation easements are voluntary restrictions on the use of the land negotiated by a landowner and a private charitable conservations organization or government agency chosen by the landowner to 'hold' the easement." C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1, 5 (2005). Conservation easements offer a flexible template for conservation efforts on private lands by creating federal and state tax incentives for easement donors. *Id.*

2. *Glass*, 124 T.C. at 259. "Petitioners petitioned the Court to redetermine deficiencies of $26,539, $40,175, $26,193, and $22,771 in their federal income taxes for 1992, 1993, 1994, and 1995 respectively." *Id.* I.R.C. § 170(h)(1) is the section of the tax code pertaining to the deductibility of conservation easement donations on federal income taxes. I.R.C. § 170(h)(1) (2004). This case note will reference both the U.S.C. and the applicable C.F.R. Sections of the code will be limited to title 26 and referred to as the "Code." Sections of the C.F.R. will also be limited to title 26 and will be referred to as "Regulations." The I.R.S. also asserted that the easement donations did not preserve open space for public enjoyment nor did it preserve open space pursuant to a clearly delineated government conservation strategy. *Glass*, 124 T.C. at 275-76. The court only addressed whether the encumbered property protected relatively natural habitat for wildlife and plants. *Id.* at 277.

3. *Glass*, 124 T.C. at 275. Petitioners also asserted that their easement donations served to "preserve open space for the scenic enjoyment of the general public, which will yield a significant public benefit, and . . . preserve open space pursuant to clearly delineated public policies set forth in the Emmet County zoning ordinances and in the Endangered Species Act of 1973." *Id.* at 275.

protect a relatively natural habitat of wildlife and plants and are exclusively for conservation purposes."[4]

The Glass' ten acre property is located in Harbor Springs, Michigan on the eastern shore of Lake Michigan.[5] The property has three buildings: a single story 1278 square foot cabin; a single story 512 square foot guest cottage; and a 525 square foot garage.[6] The property runs 460 feet in width from North to South and 1055 feet in depth from East to West.[7] The eastern boundary of the property borders Michigan Highway 119 (M-119).[8] The western boundary of the property is the shore of Lake Michigan.[9]

Known Species on the Property

Two threatened species of plants are known to exist on the shores of Lake Michigan in the vicinity of the property: Lake Huron Tansy and pitcher's thistle.[10] Bald eagles, piping plovers, and kingfishers are also

---

4. *Id.* at 284.
5. *Id.* at 261.
6. *Id.*
7. *Id.*
8. *Id.* at 261 n.3. Highway M-119 runs North to South adjacent to Lake Michigan. *Id.* Generally, the property to the west of the highway is residential and the property to the east side is undeveloped. *Id.*
9. *Glass*, 124 T.C. at 261. The high water mark on Lake Michigan is 582.35 feet. *Id.* at 262 n.4. The following description identifies the specifics of the property:

> A portion of the property that generally includes the property's total width and extends approximately 900 feet from M-119 is relatively flat and is generally open, grassy, and well lawned around petitioners' home and wooded and bushy in other places, especially along M-119. The rest of the property (approximately 155 feet in depth and 460 feet in width) slopes down a steep bluff at an angle of about 100 degrees to the shoreline of Lake Michigan or, more specifically, to Lake Michigan's ordinary high water mark. The bluff is approximately 100 feet high, and a stairway goes down it to the shoreline. The shoreline is level and consists of rocks, sand, grass, and weeds. The side of the bluff contains many trees (e.g., white pine, cedar, spruce, oak, maple, balsam fir) and dense vegetation (e.g., juniper bushes and other shrubs).

Id. at 261-62.

10. *Id.* at 262. Lake Huron Tansy is listed as a threatened species by the Michigan Department of Natural Resources because it can only be found on the coastal dunes on the northern shores of Lakes Michigan, Huron, and Superior. Michigan Department of Natural Resources, *Lake Huron Tansy* (Apr. 11, 2006), *available at* http://www.michigan.gov/ dnr/0,1607,7-153-10370_12146_12213-61331--,00.html (last visited Apr. 11, 2006). Pitcher's Thistle is listed as an endangered species by

known to roost in the area of the property.[11] A large old growth tree located on the property is a known roosting site for bald eagles.[12]

The properties to the North and South of the Glass' encumbered property are mostly developed single family residences and are used as vacation homes.[13] Three high density developments on similar pieces of property are located in the immediate vicinity.[14] Although the three subdivisions are not the norm for the area they demonstrate the development potential of a similarly sized lot.[15]

During 1992 and 1993 petitioners' property was subject to two different local zoning classifications.[16] The 400 feet west from highway M-119 was zoned "scenic resource 2," and the remainder of the property was zoned "recreational residential 2."[17] Scenic Resource 2 zoning requires that a building lot be no less than 30,000 square feet, with one side measuring no less than 150 feet.[18] Recreational Resource 2 zoning requires that a building

---

the Michigan Department of Natural Resources because it is only found on the shorelines or sand dunes of Lakes Michigan, Huron, and Superior. Michigan Department of Natural Resources, *Pitcher's Thistle* (Apr. 11 2006), *available at* http://www.michigan.gov/dnr/0,1607,7-153-10370_12146_12213-61406--,00.html (last visited Apr. 11, 2005). It is threatened by human encroachment and development. *Id.*

11. *Glass*, 124 T.C. at 262.

12. *Id.* The court stated,

> The property also has attracted kingfishers and has Lake Huron tansy growing on it, especially on the bluff. The property is not an ideal habitat for Lake Huron tansy or pitcher's thistle, another threatened species of plant, but the property, in its natural state, allows for the creation or promotion of the habitat of those species as well as the habitat of bald eagles and piping plovers.

Id.

13. *Id.* at 263. The court stated, "Approximately one home is sited on that shoreline every 250 feet in the half mile north of the property and in the half mile south of the property; i.e. approximately 21 homes are in the immediate 1-mile vicinity of the property." *Id.*

14. *Id.* For example, "the Sequoia Yacht Club, which is approximately 1 to 2 miles south of the property, is a platted subdivision which was developed on 300 feet of lake frontage and 1,000 feet of depth and includes 3 lakefront lots and 19 to 20 back lots." *Id.*

15. *Id. at* 263. The Glass' property is larger than the lot used to develop the Sequoia Yacht Club. *Id.* The property encompasses 460 feet of shoreline versus 300 feet of shoreline on the yacht club lot. *Id.*

16. *Glass*, 124 T.C. at 264.

17. *Id.*

18. *Id.* The portion of the property governed by Scenic Resource 2 zoning could be developed into four home sites. *Id.*

lot be no less than 22,000 square feet, with one side measuring no less than 100 feet.[19] The Recreational Resource 2 portion of the Glass property is also subject to a sixty foot waterfront setback where no building or development is allowed.[20] Exceptions to the zoning regulations are made if the property owner connects the property to municipal sewer and water lines.[21] The exception allows a minimum lot size of 12,000 square feet, with one side measuring no less than 100 feet.[22]

Easements in Question

The first conservation easement in question was signed on December 28, 1992 (deed 1).[23] Deed 1 covers the northern 150 feet of shoreline and the areas 120 feet east from the shoreline (encumbered shoreline 1).[24] The stated purpose of deed 1 is to ensure the scenic and natural resource values of the property.[25] The petitioners received an appraisal for their conservation easement donation.[26] The appraiser valued the easement at $99,000.[27] In addition to the $99,000 noncash easement donation, the peti-

---

19. *Id.* at 265.

20. *Id.* Both conservation easements include space that is covered by the waterfront setback. *Id.* at 265. The sixty foot waterfront setback can be used as part of the minimum lot size as long as no building takes place within the sixty foot area. *Id.*

21. *Id.*

22. *Glass*, 124 T.C. at 265.

23. *Id.* at 267. The document was properly recorded at the Register of Deeds for Emmet County on December 29, 1992. *Id.* The court stated,

> [T]hat encumbered shoreline 1 'contains a relatively intact forested ecosystem, providing wildlife habitat, as well as habitat for old growth white pine trees,' that lake front property in and around the area of the Property is under intense development pressure thereby causing or at least exacerbating the impact on rare and protected flora and fauna of the area such as the piping plover . . . and Huron Tansy.

Id. at 268.

24. *Id.* at 268.

25. *Id.*

26. *Id.* at 267, 269. The appraisal was attached to the Glass' Federal income tax forms. *Id.*

27. *Id.* at 269. The following is the court's description of the easement appraisal:

> [The appraiser] stated in the letter that he had estimated that the fair market value of the encumbered shoreline 1 was $249,000 before conservation easement 1 was imposed, that the fair market value of encumbered shoreline 1 was $99,500 after conservation easement 1 was imposed, and that conservation easement 1 enhanced by $50,500 the fair market value of the portion of the

tioners claimed $9,957 in cash contributions for a total of $108,957.[28] On their 1992 Federal tax return, petitioners claimed a deduction of $95,569 for charitable contributions and carried over the $13,388 balance to 1993.[29]

The second conservation easement in question was signed by petitioners on December 28, 1993 (Deed 2).[30] Deed 2 covers 260 feet of the southernmost portion of the shoreline and the area 120 feet east of the shoreline (encumbered shoreline 2).[31] Petitioners stated on their 1993 income tax returns that the fair market value of their conservation easement donation was $241,800.[32] In addition to the $241,800 noncash contributions, petitioners claimed cash contributions totaling $11,414 and the $13,388 carryover from 1992 for a total of $266,602 in charitable contributions for 1993.[33] The Glass' deducted $128,473 on their 1993 tax return and carried over the

---

> property not covered by conservation easement 1. [The appraiser] concluded in the letter that these numbers resulted in the claimed $99,000 fair market value for conservation easement 1 ($249,000 – ($99,500 + $50,500) = $99,000).

Id. at 269.

28. *Glass*, 124 T.C. at 269.

29. *Id.* at 269-70.

30. *Id.* at 270. The title of the document was *Lakefront Conservation Easement #2. Id.*

31. *Id.* Both the 1992 and the 1993 conservation easements were drafted by the Lake Traverse Conservancy (LTC). *Id.* at 267, 270. The language of both easements are nearly identical in terms of intent of both the donor and donee. *Id.* at 267-72. The difference comes with the area covered by the conservation easement. *Id.* at 267-68, 270. Both easements stipulate that the covered area is 120 feet east from the high water mark on the lake. *Id.* at 267-72. The 120 was a mistake; the intent was that the easement would cover all 150 feet of the bluff area. *Id.* at 274. Mr. Glass filed suit against the LTC for a correction of the deed to include the full area of the bluff. *Id.*

32. *Id.* at 271-72. An appraisal letter was attached to the couples' federal income tax return. *Id.* at 272. The following is the courts description of the appraisal:

> [The appraiser] stated . . . he estimated that the fair market value of encumbered shoreline 2 was $483,600 before easement 2 was imposed, that the fair market value of encumbered shoreline 2 was $193,400 after conservation easement 2 was imposed, and that conservation easement 2 enhanced by $48,400 the fair market value of the portion of the property that was not covered by conservation easement 2. [The appraiser] concluded . . . that these numbers resulted in the claimed $241,800 fair market value for conservation easement 2 ($483,600 – ($193,400 + $48,400) = $241,800).

Id.

33. *Id.* at 272.

$138,129 balance.[34] Petitioners deducted $86,939 of the balance on their 1994 tax return and the remaining $51,190 on their 1995 tax return.[35]

Petitioners' donations of conservation easements 1 and 2 created encumbered shorelines 1 and 2 respectively, and protected 410 of the 460 feet of shoreline owned by the petitioner.[36] The two conservation easements left fifty feet of shoreline without restrictions (unencumbered) allowing petitioners to develop the unencumbered portion consistent with local zoning.[37]

The Glass' charitable contribution was made to the Little Traverse Conservancy (LTC).[38] LTC qualifies as a nonprofit organization under I.R.C. § 170(c).[39] LTC is exempt from Federal income tax pursuant to § 501(c)(3).[40] LTC has more than 4200 members and a four million dollar endowment.[41]

For more than three decades, LTC has operated to preserve land and wilderness in trust for conservation and for the recreation and education of the people of Michigan.[42] LTC's mission statement states,

> LTC's purpose is to protect the natural integrity and scenic beauty of northern Michigan for the enjoyment of future generations. LTC supports its purpose by: (1) Acquiring property by contribution or purchase, (2) obtaining easements such as the conservation easements by gift or through purchase, and (3) educating the public about the purposes of LTC. LTC currently owns approximately 75 miles of shoreline on rivers, lakes, and streams in northern Michigan. [43]

Initially this case note will describe the legal background upon which the Tax Court ruled. Three main areas will be addressed in the back-

---

34. *Glass*, 124 T.C. at 272.
35. *Id.*
36. *Id.* at 274.
37. *Id.* at 274 n.11. Petitioners did not place any restrictions on the middle portion of their property, and they were allowed to develop it consistent with the local zoning regulations. *Id.* at 269, 271.
38. *Id.* at 266-67.
39. *Id.* at 274. LTC's status as a qualified organization was not challenged by the IRS. *Id.* Section 170(c), *charitable contribution defined*, outlines who is qualified to receive a charitable contribution. I.R.C. §170(c) (2000).
40. *Glass*, 124 T.C. at 274. I.R.C. § 501(c) provides a detailed list of organizations exempt from taxation. I.R.C. § 501(c)(3) (2000).
41. *Glass*, 124 T.C. at 274. Between 1992 and 1995, LTC's endowment was between $1.2 and $2.5 million. *Id.*
42. *Id.*
43. *Id.* LTC does not have a standard program in place to monitor the conservation easement properties. *Id.* at 275.

ground section: 1) legislative history, 2) previous court rulings, and 3) IRS Private Letter Rulings. Second, this case note will address the case history and judicial reasoning of *Glass v. Commissioner*. Finally, this case note will analyze how the Tax Court correctly interpreted the code and regulations in its precedent-setting decision and highlight the far-reaching potential of the *Glass* decision to preserve and protect our nation's remaining viable wildlife habitat.

BACKGROUND

Statutory Compliance

With some exception, the code generally does not allow for income tax deductions for charitable donations where the taxpayer donates less than his whole interest in the donated property. [44] Conservation easement donations represent an exception to the tax code, by allowing for deductions when the taxpayer retains a substantial interest in the property.[45] A conservation easement donation can be a "qualified conservation contribution" if it meets a three-prong test.[46] For a conservation easement to be deemed a "qualified conservation contribution," the easement must 1) be a "qualified real property interest," 2) the contributee must be a "qualified organization," and 3) the contribution must be "exclusively for conservation purposes."[47]

---

44. I.R.C. § 170(f)(3)(A) (2000). An exception to this non-deductibility would be a landowner who places partial interest in a qualified trust. *Id.* Under § 170(a)(1) of the code, a charitable contribution deduction is permitted when the contribution meets the requirements of § 170(c). *Id.* § 170(a)(1). Section 170(a)(1) states, "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary." *Id.*

45. *See* I.R.C. § 170(f)(3)(A)(iii) (2000); Treas. Reg. § 1.170A-14(a) (2004) (listing compliance requirements for the "conservation purposes test").

46. I.R.C. § 170(f)(3)(B)(iii) (2000). This section is an exception to § 170(b)(3)(A) that states,

> 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.

Id. § 170(b)(3)(A).

47. *Id.* § 170(h)(1).

The first prong of the test requires that a conservation easement be a "qualified real property interest."[48] To meet this requirement the land owner must place restrictive covenants on the property in perpetuity.[49] Typically, conservation easements place restrictions on the future development of the property.[50] It is the donation of the development potential that qualifies as a real property interest.[51] For example, suppose an owner has seventy acres of property, but can only develop one home per thirty-five acres. The owner can only develop two homes on his property. If the owner decides to donate a conservation easement on his property he will likely reserve the right to develop one residence. Thus, he is donating the rights to develop one more residence. It is the right to develop the second residence that is the "qualified real property interest." To ensure the protection of the conservation easement in perpetuity, the donor must record the conservation easement with the county clerk's office.[52]

The second prong of the qualified contribution test requires that the donee organization be a "qualified organization."[53] More than 1500 land trust organizations nationwide are qualified to accept conservation easement donations. [54] Wyoming has four native land trust organizations: Green River

---

48. *Id.* § 170(h)(1)(A).

49. *Id.* § 170(h)(2)(C). This section states that "[f]or purposes of this subsection, the term 'qualified real property interest' means any of the following interests in real property: . . . (C) a restriction (granted in perpetuity) on the use which may be made of the real property." *Id.*

50. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 4 (2004).

51. *Id.*

52. Treas. Reg. § 1.170A-14(g)(1) (2004). In pertinent part this section states,

> In the case of any donation under this section, any interest in the property retained by the donor . . . 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 uses of the retained interest inconsistent with the conservation purposes of the donation.

Id. (emphasis added).

53. I.R.C. § 170(h)(1)(B) (2000).

54. Land Trust Alliance, *Find a Land Trust* (Apr. 9, 2006), *available at* http://www.lta.org/findlandtrust/WY.htm (last visited Oct. 1, 2005). The Land Trust Alliance is a non-profit organization whose main goal is promoting voluntary private land conservation to benefit communities and natural systems. Land Trust Alliance, *About Us*, *available at* http://www.lta.org/aboutlta/index.html (last visited Apr. 9, 2006). The organization's current goals are to 1) dramatically expand the pace of conservation easements (through tax incentives), 2) build strong land trusts, 3) defend the permanence of conservation easements, and 4) ensure that the work of land trusts is as strategically directed as possible. *Id.*

Valley Land Trust, Jackson Hole Land Trust, Platte River Parkway Trust, and the Wyoming Stock Growers Agricultural Land Trust.[55] Section 170(h)(2)(C) of the code outlines the requirements for a "qualified organization."[56] The regulations for "qualified organizations" require that the organization be committed to protecting the intended purpose of the conservation easement.[57] To meet this requirement, a donee organization needs to have been established with one of the conservation goals outlined in § 170(h)(4)(A) of the code.[58] The regulations also require the easement instrument restrict the donee organization's ability to transfer the conservation easement.[59] A donee organization can only transfer an easement to another organization that likewise meets the code's requirements.[60]

The third prong of the "qualified conservation contribution" states the contribution must be "exclusively for conservation purposes."[61] To comply with § 170(h)(1)(C) of the code, "exclusively for conservation purposes," the taxpayer must meet the requirements under §§ 170(h)(4)(A) and 170(h)(5)(A).[62] Section 170(h)(4)(A) of the code states,

> For the purposes of this subsection, 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 . . . (iv) the preservation of an historically important land area or certified historic structure.[63]

The taxpayer need only meet one of the four requirements under § 170(h)(4)(A) for his or her donation to qualify as a legitimate conservation purpose.[64] Section 170(h)(5)(A) states, "A contribution shall not be treated

---

55. *Find a Land Trust*, *supra* note 54. The Green River Valley Land Trust is located in Pinedale, Wyoming. *Id.* The Jackson Hole land Trust is located in Jackson, Wyoming. *Id.* The Platte River Parkway Trust is located in Casper, Wyoming. *Id.* The Wyoming Stock Growers Agricultural Land Trust is located in Cheyenne, Wyoming. *Id.*

56. I.R.C. § 170(h)(2)(C) (2000). This section of the code identifies criteria for a qualified donee organization to hold the conservation easement. *Id.*

57. Treas. Reg. 1.170A-14(c) (2004).

58. *Id.* This section of the regulations identifies three major points for donee organization status: 1) organizational purpose, 2) enforcement ability, and 3) conservation easement transfers. *Id.*

59. *Id.* § 1.170A-14(c)(2).

60. *Id.*

61. I.R.C. § 170(h)(1)(C) (2000).

62. *Id.*

63. *Id.* § 170 (h)(4)(A).

64. 26 C.F.R. § 1.170A-14(d) (2004).

as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity."[65] Essentially this requirement is a function of the donee organization; the donee organization must establish that it has the means to enforce the conditions of the conservation easement in perpetuity.[66]

The following discussion will specifically address compliance with § 170(h)(4)(A)(ii) ("conservation purposes test") and § 170(h)(5)(A) ("exclusivity test"). The "conservation purposes test" traces its roots to the Tax Reform Act (TRA) of 1969.[67] This act was the first time that Congress allowed an individual to deduct a charitable contribution for real property when the donor retained an interest in the property.[68] Congress intended to allow for charitable deductions of open space easements in gross.[69] At the time of TRA, Congress envisioned easements that would restrict the types and specifications of buildings, removal of trees, construction of utility lines, waste disposal, and roadside signs on the property.[70] The deductibility of conservation easements was addressed by congress again in the Tax Reform Act of 1976 (TRA 1976).[71]

TRA 1976 was the first time that Congress introduced the phrases "conservation purposes" and "exclusively for conservation purposes."[72] "Conservation purpose" is the first prong in the two-prong, "exclusively for conservation purposes test."[73] Congress in TRA 1976 defined the term "conservation purposes" as (1) "the preservation of land areas for public outdoor recreation or education, or scenic enjoyment;" (2) "the preservation of historically important land areas or structures;" or (3) "*the protection of natural environmental systems.*"[74] Although it was introduced, Congress failed to define "exclusively for conservation purposes."[75]

---

65. I.R.C. § 170 (h)(5)(A) (2000).
66. *See* 26 C.F.R. §§ 1.170A-14(e)-(g) (2004).
67. Tax Reform Act of 1969 (TRA 1969), Pub. L. 91-172, sec. 201(a), 83 Stat. 549 (codified as I.R.C. § 170(h)(1)(C) (1969)).
68. *Glass*, 124 T.C. at 278 (citing TRA 1969 § 201(a)(1)).
69. H. Conf. Rept. 91-782 at 294 (1969), 1969-3 C.B. 644, 654. *See also* Tax Reform Act of 1969 (TRA 1969), Pub. L. 91-172, sec. 201(a)(1), 83 Stat. 549. TRA 1969 was the initial step toward allowing conservation easement donations to qualify as charitable contributions. *Id.* An "easement in gross" is "a mere personal interest in, or right to use, the land of another; it is not supported by a dominant estate but is attached to and vested in, the person to whom it is granted." Treas. Reg. § 1.170A-7(b)(1)(ii) (2004).
70. I.R.C. § 1.170A-7(b)(1)(ii) (2000).
71. Tax Reform Act of 1976 (TRA 1976), Pub. L. 94-455, sec. 2124(e)(1)(C) and (D), 90 Stat. 1919 (codified as I.R.C. § 170(f)(3)(C) (1976)).
72. *Id.*
73. I.R.C. § 170(h)(1)(C) (2000).
74. Tax Reform Act of 1976 § 2124(e)(1)(D) (emphasis added).
75. *Id.*

In the Tax Reduction and Simplification Act of 1977 (TRSA 1977), Congress enacted § 170(f)(3)(B)(iii) of the code.[76] TRSA 1977 stated that an exception to § 170(f)(3)(A) is "for an easement with respect to real property granted in perpetuity to an organization described in subsection (b)(1)(A) exclusively for conservation purposes."[77] The conference report on TRSA 1977 offers a clear understanding of Congress' intent when it enacted § 170(f)(3)(B)(iii).[78] The conference report addressed "conservation purposes," perpetuity, donee organizations, and exclusivity.[79] With regard to "conservation purposes," the intent was to liberally construe this term to include contributions of perpetual easements that protect the integrity of the property.[80] Throughout, the conference report addresses the notion of perpetuity.[81] Tax deductions for conservation easements are only to apply to those easements whose conservation and preservation purposes are protected in perpetuity.[82]

The Tax Treatment Extension Act of 1980 (TTEA) extended the provisions of § 170(f)(3)(B)(iii) permanently.[83] The extension of § 170(f)(3)(B)(iii) was a clear indication by the Senate that conservation easements provide a valuable means to preserve the nation's natural and historical treasures.[84] The Senate Report addresses the meaning of "conser-

---

76. Tax Reduction and Simplification Act of 1977 (TRSA), Pub. L. 95-30, sec. 309(a), 91 Stat. 154 (codified as I.R.C. § 170(f)(3)(B)(iii) (1977)).

77. *Id.*

78. H.R. REP. NO. 95-263, at 30-31 (1977) (Conf. Rep.).

79. *Id.*

80. *Id.* The conference report states, "[I]t is also intended that contributions of perpetual easements and remainder interests qualify for the deduction only in situations where the conservation purposes of protecting or preserving property will in practice be carried out." *Id.*

81. *Id.*

82. *Id.* References in the report are made to the purpose being "carried out" and that the donee organization be able to enforce the terms of the easement. *Id.* Further, the report makes reference to transfers of the easement. *Id.* The report specifically states that a donee organization not be allowed to transfer the easement for money, other property, or services. *Id.*

83. Tax Treatment and Extension Act of 1980 (TTEA), Pub. L. 96-541, sec. 6(a), 94 Stat. 3206 (codified as I.R.C. § 170(f)(3)(iii) (1980)).

84. S. REP. NO. 96-1007 at 9 (1980). The Senate report stated,

> The committee believes that the preservation of our country's natural resources and cultural heritage is important, and the committee recognizes that conservation easements now play an important role in preservation efforts. The committee also recognizes that it is not in the country's best interest to restrict or prohibit the development of all land areas and existing structures. Therefore, the committee believes that provisions allowing deductions for conservation easements should be directed at the preservation of

vation purpose."[85] The report establishes the framework for the "conservation purposes test."[86] The report states,

> The bill revises in several respects the present definition of conservation purposes. The bill defines the term "conservation purpose" to include four objectives. Although many contributions may satisfy more than one of these objectives (it is possible, for example, that the protection of a wild and scenic river could further more than one of the objectives), it is only necessary for a contribution to further one of the four.[87]

The four possible purposes that meet the test are 1) preservation for recreation and public use, 2) protection of natural habitat, 3) preservation of open space, and 4) preservation of a historically important land area or structure.[88]

The conservation purposes test outlined in the Senate Report is clear and concise.[89] "The conservation purpose" is to include the protection of a relatively natural fish, wildlife, or plant habitat, or similar ecosystem.[90] In order to ensure the protection of fish, wildlife, or plant habitat a conservation easement will pass the test if it "enhances the viability of an area or environment in which fish, wildlife, or plant community *normally lives or occurs*."[91] A property that has been altered to an extent but still retains its natural character and provides viable species habitat can still pass the conservation purposes test.[92] The committee intended to make tax incentives

---

> unique or otherwise significant land areas or structures. Accordingly, the committee has agreed to extend the expiring provisions of present law on a permanent basis and modify those provisions in several respects.

Id.

85. *Id.*

86. *Id.*

87. *Id.* at 10-11.

88. *Id.* I.R.C. § 170(h)(4)(A) (2000) codifies the overall conservation purposes test. The following will only address the conservation purposes test with regard to (ii), "natural habitat." *Id.* § 170(h)(4)(A)(ii).

89. S. REP. No. 96-1007 (1980).

90. *Id.* at 10.

91. *Id.* (emphasis added).

92. *Id.* at 10-11. In pertinent part the section states,

> It would include the preservation of a habitat or environment in which to some extent had been altered by human activity if the fish, wildlife, or plants existed there in a relatively natural state; for example, the preservation of a lake formed by man-made dam or salt pond formed by a man-made dike if the lake or pond is a

available to private land owners whose conservation easement donation ensured development would not degrade the quality of natural habitats and ecosystems.[93]

Regulatory Framework

The treasury regulations outlining compliance with the "conservation purposes test" were promulgated in 1986.[94] The rulemaking process was initiated in 1983.[95] Several issues arose throughout the comment period for the proposed regulations. Two main points raised by private citizens concerned companies and public access.[96] The first point was made by "Patricia A. Sullivan [an environmental attorney with Covington & Burling,] . . . urg[ing] clarification of proposed regulations on qualified conservation contributions under § 170. Sullivan complain[ed] that the proposed regulations are so vague that donors will be forced to request a letter ruling before making a contribution."[97] Robert Pierce, staff counsel for the National Parks and Conservation Association, requested that a deduction be allowed for an open space easement that restricts public access.[98] Ultimately, the final

---

> natural feeding area for a wildlife community that includes rare, endangered, or threatened native species. The committee intends that contributions for this purpose will protect and preserve significant natural habitats and ecosystems, in the United States.

Id.

93. *Id.* at 11. In pertinent part the section states,

> Examples include habitats for rare, endangered, or threatened native species of animals, fish or plants; natural areas which are included in, or which contribute to the ecological viability of local, state, or national park, nature preserve, wildlife refuge, wilderness area or other similar conservation area.

Treas. Reg. §1.170A-14(d)(3) (2004).

94. *See generally* Treas. Reg. § 1.170A-14 (2004). The regulations for the "conservation purposes test" are found in Treas. Reg. § 1.170A-14(d)(3) (2004). These regulations follow closely the intent and language of the 1980 Senate Report. *Id.*

95. T.D. 8069, Treas. Dec. Int. Rev. 8069 (1986). This decision offers a background section describing the history of the proposed rules. *Id.* The report states, "The House and Senate Committee reports accompanying the legislation also provided, for the first time, an in-depth statement of congressional intent concerning the donation of partial interests for conservation purposes." *Id.*

96. 20 Tax Notes 447, Covington & Burling Criticizes Lack of Clarity in Conservation Contribution Rules (Section 170 – Charitable Deduction) (Doc 83-7186; Doc 83-7187; Doc 83-7188; Doc 83-7189; Doc 83-7190).

97. *Id.* at 447 (Doc. 83-7186).

98. *Id.* at 447 (Doc. 83-7187). The comment states, "Robert Pierce, staff counsel for the National Parks & Conservation Association, also finds the proposed regulations to offer little guidance. In addition, Pierce says that the regulations should

regulations, Treas. Reg. § 1.170A-14, adhered to the congressional intent that the regulations mirror the 1980 senate report.[99]

Exclusivity

The "exclusivity test" for conservation purposes requires that the reserved rights of the donor be consistent with the conservation purpose of the conservation easement and in addition that the restrictions be legally en-

---

permit contributions of open space easements without requiring public access to the lands." *Id.* Mr. Pierce's concerns about public access were addressed by the final regulations as Treas. Reg. § 1.170A-14(d)(3)(iii) (2004). *Id.* This section states,

> 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.

Treas. Reg. §1.170A-14(d)(3)(iii) (2004).

99. Treas. Reg. §1.170A-14(d)(3) (2004). This section states,

> (i) In general. 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 were a nature feeding area for a wildlife community that included rare, endangered, or threatened native species.
>
> (ii) Significant habitat or ecosystem. Significant habitats and ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animal, fish, or plants; natural areas that represent high quality examples of a terrestrial community or aquatic community, such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact; and natural areas which are included in, or which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.

Id.

forceable by the donee organization against the donor and their successors.[100] Congress intended to promote compliance with the conservation easement standards by providing that reserved rights of the donor did not conflict with the easement's conservation purpose.[101] The regulations for the "exclusivity test" followed closely the language of the 1980 Senate report.[102] The exclusivity test reiterates the "qualified real property interest" and "qualified organization" requirements by requiring the recordation of the easement with an appropriate land agency and that the donee organization have the means to ensure the enforcement of the conservation easement.[103]

---

100. *Id.* § 1.170A-14(e); § 1.170A-14(g) (requiring perpetual enforcement of the easement on the encumbered property). Section 1.170A-14(e)(2) outlines inconsistent uses:

> Except as provided in paragraph (e)(4) of this section, 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. . . . 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.

Id. § 1.170A-14(e)(2).

101. S. REP. NO. 96-1007 at 13-14. "[T]he bill explicitly provides that this requirement is not satisfied unless the conservation purpose is protected in perpetuity. The contribution must involve legally enforceable restrictions on the interest in the property retained by the donor that would prevent uses of the retained interest inconsistent with the conservation purpose." *Id.* at 13.

102. *See* Treas. Reg. § 1.170A-14(e)-(g) (2004). This section of the code identifies compliance with the "exclusivity test":

> In the case of any donation under this section, any interest in the property 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 uses of the retained interest inconsistent with the conservation purposes of the donation. In the case of a contribution of a remainder interest, the contribution will not qualify if the tenants, whether they are tenants for life or a term of years, can use the property in a manner that diminishes the conservation values which are intended to be protected by the contribution.

Id. § 1.170A-14(g)(1).

103. *Id.* § 1.170A-14(g).

Previous Compliance Decisions

The enforcement and compliance record of conservation easements donated under § 170(h)(1)(C) of the code is limited.[104] Of the 115 times the IRS challenged the deductibility of a conservation easement, only three cases, *Great Northern Nekoosa Corporation v. United States, McLennan v. United States,* and *Glass*, were challenged for substantive compliance with the code's "exclusively for conservation purposes" reguirements.[105] The remainder of cases challenged the valuation of the easement donation.[106] Neither *Nekoosa* nor *McLennan* focused on the "conservation purposes test."[107]

In *Great Northern Nekoosa Corporation v. United States*, the plaintiff's donation of two conservation easements failed to be "exclusively for conservation purposes," specifically the "exclusivity part."[108] The conservation easement donor, a timber company, retained the right to maintain roads using gravel from the property.[109] The court granted summary judgment to the defendant based on the donor's reserved right under the easement to collect gravel and sand for road maintenance on the encumbered property.[110] The *Nekoosa* court held that the reserved right to collect sand and gravel was in violation of § 170(h)(5)(B) which states there is "no surface mining permitted."[111] Thus, the donor failed to meet the "exclusivity" prong of the "exclusively for conservation purposes" requirement under § 170(h)(1)(C).[112]

In *McLennan v. United States*, the deduction for a donation of a scenic easement was challenged by the IRS.[113] The IRS claimed that the donor was not entitled to a deduction because there was evidence to suggest he had

---

104. *See* McLaughlin, *supra* note 50, at 4.
105. Great N. Nekoosa Corp. v. United States, 38 Fed Cl. 645 (1997); Mclennan v. United States, 994 F.2d 839 (Fed. Cir. 1993); *Glass*, 124 T.C. 258.
106. *See* McLaughlin, *supra* note 50, at 4.
107. *Nekoosa*, 38 Fed Cl. 645; *Mclennan*, 994 F.2d 839.
108. *Nekoosa,* 38 Fed. Cl. at 660-61.
109. *Id.* at 650.
110. *Id.* at 660.
111. *Id. See also* I.R.C. § 170(h)(5)(B) (2000). The court found that the reserved right to remove sand and gravel for road maintenance violated § 170(h)(5)(B) because the sand and gravel in this case were subsurface minerals that would require surface mining techniques to extract. *Nekoosa*, 38 Fed. Cl. at 660-61. Section 170(h)(5)(B) states, "In the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method." I.R.C. § 170(h)(5)(B) (2000).
112. I.R.C. § 170(h)(1)(C) (2000).
113. *McLennan*, 994 F.2d at 840.

no intent of developing the property.[114] The court held that regardless of intent, the reduced valuation of the property based on the development restrictions in the conservation easement entitled the donor to the deduction.[115]

Private Letter Rulings

IRS PLRs offer a more detailed understanding of compliance standards. In *Glass*, the court found petitioner passed the "conservation purposes test" by complying with § 170(h)(4)(A)(ii) of the code.[116] Eleven PLRs specifically address compliance with § 170(h)(4)(A)(ii) of the code.[117] The eleven PLRs fall into two categories: 1) those that find compliance with § 170(h)(4)(A)(ii) based on the presence of or available habitat for an endangered or threatened species, and 2) those that find compliance based on a property's role in the ecological viability of a public park or wildlife refuge.[118] Despite this categorization, it is common for a conservation ease-

---

114. *Id.* at 841.

115. *Id.*

116. *Glass*, 124 T.C. at 282.

117. Eleven Private Letter Rulings (PLRs) have been issued by the IRS that deal specifically with I.R.C. § 170(h)(4)(A)(ii). I.R.S. Priv. Ltr. Rul. 200403044 (Oct. 9, 2003) (stating property is habitat for state species of special concern and potential habitat for several endangered and threatened species); I.R.S. Priv. Ltr. Rul. 9632003 (May 7, 1996) (finding for compliance based on the presence of numerous plant and animal species including two globally rare species); I.R.S. Priv. Ltr. Rul. 9537018 (June 20, 1995) (finding for compliance based on presence of, and potential for, endangered and threatened species, plus role in ecological viability of neighboring public land); I.R.S. Priv. Ltr. Rul. 9420008 (Feb. 10, 1994) (finding for compliance based on presence of, and potential for endangered and threatened species, plus role in ecological viability of neighboring public land); I.R.S. Priv. Ltr. Rul. 9318017 (Feb. 3, 1993) (finding for compliance based on contribution to ecological viability of a state park); I.R.S. Priv. Ltr. Rul. 9218071 (Jan. 31, 1992) (finding for compliance based on presence of one endangered species); I.R.S. Priv. Ltr. Rul. 9407005 (Nov. 12, 1993) (ruling not based on I.R.C. § 170(h)(4)(A)(ii)); I.R.S. Priv. Ltr. Rul. 8721017 (Feb. 17, 1987) (finding for compliance based on combination of presence of endangered species and role in ecological viability of neighboring public park); I.R.S. Priv. Ltr. Rul. 8810009 (Sept. 25, 1987) (finding for compliance based on combination of presence of endangered species and role in ecological viability of neighboring public park); I.R.S. Priv. Ltr. Rul. 8247024 (Aug. 18, 1982) (ruling not based on I.R.C. § 170(h)(4)(A)(ii)); I.R.S. Priv. Ltr. Rul. 8302085 (Oct. 14, 1982) (finding for compliance based on property's importance in the ecological viability of surrounding National Park). Pursuant to § 6110(j)(3) of the code PLRs are not to be used or cited as precedent. I.R.C. § 6110(j)(3) (2000). However, these eleven rulings offer an indication of how the IRS evaluates charitable gift deductions for donated conservation easements.

118. According to the regulations an easement will comply with § 170(h)(4)(A)(ii) if it protects habitat or increases the ecological viability of a public park or wildlife refuge. Treas. Reg. § 1.170A-14(d)(3) (2004).

ment to benefit a specific species and contribute to the ecological viability of a public park at the same time.[119]

Two specific PLRs offer insight into how the IRS determines compliance with the tax code.[120] On January 31, 1992, the IRS issued PLR 9218071 allowing a tax deduction for a conservation easement donation intended to protect the habitat of one species.[121] The wood stork, a federally recognized endangered species, inhabited a 500 acre tract of costal land owned by the taxpayer.[122] Adjacent properties had recently been developed with higher density residential units.[123] The intent of the conservation easement was to protect the coastal wetlands habitat for the wood stork.[124] The IRS ruled that "the conservation purpose achieved by the covenant in this case was a qualified conservation purpose as being for the protection of a significant relatively natural habitat of wood storks under § 170(h)(4)(A)(ii) of the code and § 1.170A-14(d)(3) of the regulations."[125] This PLR is a clear indication that the presence of a federally designated endangered or threatened species on an encumbered property will satisfy the "conservation purposes test."

On February 17, 1987, the IRS issued PLR 8721017 allowing a tax deduction for the preservation of a large working cattle ranch.[126] This ruling is an example of how an easement is in compliance with the regulations for the preservation of endangered or threatened species along with promoting the ecological viability of public lands and wildlife refuges. The ranch is located in a small high mountain valley, surrounded by two National Forests.[127] Bordering the property is a refuge designated to protect the rare trumpeter swan.[128] The refuge also provides habitat for sandhill cranes, great

---

119. *See supra* note 118 and accompanying text.

120. I.R.S. Priv. Ltr. Rul. 9218071 (Jan. 31, 1992); I.R.S. Priv. Ltr. Rul. 8721017 (Feb. 17, 1987).

121. I.R.S. Priv. Ltr. Rul. 9218071 (Jan. 31, 1992).

122. *Id.* Several other unnamed species exist on the property. *Id.* It is believed that development of the property would decrease the chance that the wood stork would feed on the property: "The property contains brackish marshes and fresh-to-brackishwater ponds, a mixed hardwood forest, some limited cultivation, two residences [and] a veterinary hospital . . . ." *Id.*

123. *Id.* The adjacent properties were developed with condominiums and townhouses. *Id.*

124. *Id.*

125. *Id.* at 10. The IRS in its ruling reiterates that conservation easement donations are deductible even if they protect a property that has been altered by human activity. *Id.*

126. I.R.S. Priv. Ltr. Rul. 8721017 (Feb. 17, 1987). The ranch is a cow-calf operation with some producing hayfields. *Id.*

127. *Id.* Seventy-five percent of the surrounding valley is publicly owned. *Id.* Both National Forests contain federally designated wilderness areas. *Id.*

128. *Id.*

blue herons, willets, avocets, long-billed curlews, ducks, and many varieties of fish (including arctic grayling), moose, elk, deer, and prong-horn antelope.[129] A National Park is located twenty-five miles to the east of the property.[130] A bald eagle's nest is located two miles north of the ranch and bald eagles are often seen on the ranch.[131] Another federally protected species seen on the ranch is the peregrine falcon.[132] The ranch, if placed on the market unencumbered by a conservation easement would likely fetch top dollar for its development potential.[133] The IRS's favorable ruling for the taxpayer in this PLR is a clear indication of what a rancher in the greater Yellowstone ecosystem in Wyoming could expect if he was inclined to donate a conservation easement limiting his property's development.[134]

The congressional intent and subsequent PLRs offer a clear indication of how the IRS interprets the code and regulations regarding the deductibility of charitable contributions of conservation easements and the conservation purposes test. A taxpayer will likely meet the requirements of the code if his or her property contributes to the ecological viability of a public park or wildlife refuge, or has known endangered or threatened species living on or in the vicinity of the property. The IRS's favorable PLR rulings question why the IRS chose to challenge the Glass' charitable gift tax deductions for their conservation easement donations when the restrictions were

---

129. *Id.* Part of the refuge is a designated wilderness area. *Id.* The refuge's director stated that the ranch is critical to the viability of the refuge's ecosystem, and that development of the ranch would likely adversely affect the refuge. *Id.*

130. *Id.* The ranch is considered part of the greater park ecosystem. *Id.* Deer, elk, moose, and grizzly bear range freely within the ecosystem. *Id.* Development is considered one of the greatest threats to the ecosystem. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* The IRS in their ruling stated,

> Based on the facts and representations in the instant case, the Ranch that is subject to the easement is in an area that represents a wilderness community and that is still relatively intact in its natural state. The Ranch serves as a habitat for the rare and protected species of the bald eagle, the peregrine falcon, and the grizzly bear, thus meeting the description of a significant habitat as set forth in section 1.170A-14(d)(3)(ii) of the regulations. The Ranch is within two miles of the Refuge, abuts the Area and is within the Park ecosystem, further meeting the descriptions of section 1.170A-14(d)(3)(ii). Consequently, we conclude that the contribution to the Trust will be made for a conservation purpose within the meaning of section 170(h)(4)(A)(ii) of the Code.

Id.

intended to protect the relatively intact natural habitat of a federally listed species.

PRINCIPAL CASE

Judge David Laro's lengthy findings of fact in *Glass v. Commissioner* allowed a methodical application of the law.[135] The court determined whether petitioners had complied with § 170(h)(1) of the code.[136] The court outlined the three-prong test for a qualified conservation contribution under the code.[137] Although the court stated that "Respondent concede[d] that the first and second requirements [were] met," the court addressed the requirements for compliance.[138] The focus of the decision was placed on prong three, "exclusively for conservation purposes."[139] Petitioners Mr. and Mrs. Glass argued that their donated conservation easements met the requirements of the "exclusively for conservation purposes test" because it protected a natural habitat for wildlife and plant species, and it preserved open space for enjoyment of the public pursuant to clearly delineated government conservation policy.[140] The Commissioner of the IRS, as respondent, argued that the conservation easement donations were not "qualified conservation contributions."[141]

Before the court tackled the two-prong "exclusively for conservation purposes test," it went through a lengthy discussion of the legislative history of § 170(h)(1) of the code.[142] The court addressed the passage of the tax

---

135. *Glass*, 124 T.C. at 259-75.

136. *Id.* at 275.

137. *Id.* The test for compliance is outlined under § 170(h)(1) of the code.

138. *Glass*, 124 T.C. at 280. The court chose to limit discussion on these two aspects of compliance because the IRS does not contest that the Glass' have met these requirements. *Id.*

139. *Id.*

140. *Id. at* 275-76. The court reiterated the petitioners' argument for compliance:

> Petitioners' conclude that the conservation easements: (1) Protect a relatively natural habitat for wildlife and plants, (2) preserve open space for the scenic enjoyment of the general public, which will yield a significant public benefit, and (3) preserve open space pursuant to clearly delineated public policies set forth in the Emmet County zoning ordinances and in the Endangered Species Act of 1973 . . . .

Id. at 275.

141. *Id.* at 275. The court stated, "Respondent argues that petitioners have not proven that the conservation easements did any of those things. Respondent concludes, argues, and determined that the conservation easements are not qualified conservation contributions under § 170(h)(1)." *Id.*

142. *Id.* at 277-80.

reform acts that deal with conservation easements, highlighting the need for private conservation efforts and Congress' intent to promote private conservation efforts as means to supplement government action through tax incentives.[143] The court's decision was based on its understanding of the statute and its legislative history.[144] The opinion failed to address in any specific detail the government's argument that the Glass easement does not meet the conservation purposes test.[145] The one sentence synopsis of the government's argument suggests that the respondent's argument carried little weight.

The court, with its heightened understanding of the statute's legislative history, turned to the treasury regulations that interpret § 170(h)(4)(A)(ii) of the code.[146] The court stated that petitioner will pass the "conservation purposes test" if the interest "is contributed to protect a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem, normally lives."[147] The court then identified the examples of significant habitats and ecosystems set forth in the regulations:

> (1) Habitats for rare, endangered, or threatened species of animals, fish, or plants, (2) natural areas that represent high quality examples of a terrestrial or aquatic community, such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact, and (3) natural areas which are included in, or which contribute to, the ecological viability of a local, State, or National park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.[148]

The court also reemphasized that compliance with the statute does not require the donor to provide public access to the encumbered property.[149] Before applying the facts to the regulatory framework, the court again looked to the legislative history.[150] The court stated, "legislative history emphasizes

---

143. *Id.* at *277*-80. *See also supra* notes 73-101 and accompanying text.
144. *Glass*, 124 T.C. at 279-80. The court indicated that its decision is based on its understanding of the statute and its legislative history. *Id.* at 280. The court stated, "With our understanding of the statute and its relevant legislative history in mind, we now turn back to the three requirements for a qualified conservation contribution." *Id.*
145. *Id.* at 275. *See supra* note 142.
146. *Id.*
147. *Glass*, 124 T.C. at 280 (quoting Treas. Reg. § 1.170A-14(d)(3)(i) (2004)).
148. *Id.* (quoting Treas. Reg. § 1.170A-14(d)(3)(ii) (2004)).
149. *Id.*
150. *Glass*, 124 T.C. at 280.

that [t]he committee intends that contributions for this purpose will protect and preserve significant natural habitats and ecosystems."[151]

The court gave significant authority to the testimonies of Thomas Bailey, LTC's executive director and Mrs. Glass and stated it did not agree with respondent's argument that the easements did not satisfy the examples set forth in the regulations.[152] Mrs. Glass testified that she had observed bald eagles roosting on a tree located on the encumbered shoreline 1, and that Lake Huron tansy was growing on the property.[153] The court further stated that the record sufficiently established that both Lake Huron tansy and pitcher's thistle are threatened species.[154]

Next, the court, using the plain meaning, defined "habitat" and "community" in order to interpret the code and regulations.[155] The court defined "habitat" as "[t]he area or environment where an organism or ecological community normally lives or occurs or the place where a person or thing is most likely to be found."[156] The court defined "community" as "[a] group of plants and animals living and interacting with one another in a specific region under relatively similar environmental conditions."[157] The court went on to state, "We read sec[tion] 170(h)(4)(A)(ii) to mean that the protec-

---

151. *Id.* at 281 (internal quotations omitted).

152. *Id.*

153. *Id.* With regard to Mr. Bailey's and Mrs. Glass' testimony the court stated,

> LTC's executive director, Thomas Bailey (Bailey), testified credibly that the property is a "famous" roosting spot for bald eagles and that the conservation easements establish a proper place for the growth and existence of Lake Huron tansy and pitcher's thistle. Bailey also testified credibly that he has toured the property on various occasions, that the habitat on the encumbered shoreline is a proper and normal environment for Lake Huron tansy, pitcher's thistle, and bald eagles, among other species, and that the staff of LTC has seen Lake Huron tansy growing on the property. Mrs. Glass testified credibly that she also has seen Lake Huron tansy growing on the property and that she has regularly seen bald eagles there as well. She also testified credibly that at least one of those eagles roosts on a tree growing on encumbered shoreline 1.

Id.

154. *Id.* at 281. The court "[found] in the record probative evidence that both Lake Huron tansy and pitcher's thistle are considered threatened species . . . ." *Id.*

155. *Glass*, 124 T.C. at 281-82.

156. *Id.* (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 786 (4th ed. 2000)).

157. *Id.* at 281-82 (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 374 (4th ed. 2000)).

tion of a relatively natural habitat of wildlife or plants, in and of itself, is a significant conservation purpose within the intent of the statute."[158]

The court ruled in favor of compliance with the tax code, specifically the "conservation purposes test" and stated,

> The encumbered shoreline fits those definitions of "habitat" and "community." In its natural undeveloped state, it is a "relatively natural habitat" for a community of Lake Huron tansy, of pitcher's thistle, and of bald eagles, among other species of plants and wildlife. Each of the conservation easements will therefore protect and preserve significant natural habitats by limiting the development or use of the encumbered shoreline. By the same token, petitioners' contributions of the conservation easements operate to protect or enhance the viability of an area or environment in which a wildlife community and a plant community normally live or occur. Both portions of encumbered shoreline also have natural values that make them possible places to create or promote the habitat of Lake Huron tansy as well as the habitat of bald eagles. We hold that petitioners have proven that their contributions of the conservation easements were for a conservation purpose under section 170(h)(4), specifically, section 170(h)(4)(A)(ii).[159]

Once the court found compliance with § 170(h)(4)(A)(ii), it did not address the petitioners' argument for compliance with the "conservation purposes test" under § 170(h)(4)(A)(iii).[160]

The court began its analysis of the second prong of the "exclusively for conservation purposes" by defining the "exclusivity test."[161] The court determined that "exclusivity" places the burden on the donee organization to hold a conservation easement "in perpetuity exclusively for one or more of the conservation purposes listed in § 170(h)(4)."[162] The court determined that its reading of § 170(h)(5) is consistent with the legislative history of TRSA 1977, which established the "exclusively for conservation purposes" language.[163]

---

158. *Id.* at 282 n.17.
159. *Id.* at 282.
160. *Id.* at 282 n.18.
161. *Glass*, 124 T.C. at 282.
162. *Id.* at 282.
163. *Id.* at 283. The court quoted the legislative history of "exclusively for conservation purposes":

The court found in favor of compliance with the "exclusivity test" and stated that the LTC was a qualified organization with sufficient resources to ensure the enforcement of the conservation easements in perpetuity.[164] It further stated that LTC's organizational purpose was consistent with the conservation purpose of the Glass' conservation easements.[165]

The court held that petitioners' conservation easement donations were "exclusively for conservation purposes" and adhered to the congressional intent of the Statute.[166] The court stated,

> Congress through the enactment of section 170(h) intended in relevant part to encourage preservation of our country's natural resources through the contribution of easements such

---

> [I]t is intended that a contribution of a conservation easement . . . qualify for a deduction only if the holding of the easement . . . is related to the purpose or function constituting the donee's purpose for exemption . . . and the donee is able to enforce its rights as holder of the easement . . . and protect the conservation purposes which the contribution is intended to advance. The requirement that the contribution be exclusively for conservation purposes is also intended to limit deductible contributions to those transfers which require that the donee hold the easement . . . exclusively for conservation purposes (i.e., that they not be transferable by the donee in exchange for money, other property, or services).

Id. (quoting H.R. REP. NO. 95-263, 1977-1 C.B. at 523).

164. *Id.* at 283. The court's findings included the following:

> We conclude that petitioners' contributions meet the 'exclusively for conservation purposes' requirement of section 170(h)(5). The contributee, LTC, is a legitimate, longstanding nature conservancy dealing at arm's length with petitioners, and LTC has agreed (and has the commitment and financial resources) to enforce the preservation-related restrictions included in deed 1 and deed 2 in perpetuity. LTC's holding of the conservation easements also is directly related to its tax-exempt purposes. We also note that petitioners through the restrictions in deed 1 and deed 2 have gratuitously surrendered valuable property rights in the encumbered shoreline, that those restrictions are legally enforceable to limit in perpetuity any inconsistent use of the encumbered shoreline, and that any subsequent holder of the conservation easements must be an entity fully committed to carrying out the contributions' charitable purposes.

Id.

165. *Id.*

166. *Id.* at 284.

> as the conservation easements, . . . and petitioners' contributions of the conservation easements, which serve to preserve this Nation's natural resources of bald eagles, Lake Huron tansy, and the bluff, among other things, are consistent with the statute's objective.[167]

In conclusion, the court held that "petitioners' respective contributions in 1992 and 1993 of conservation easements are qualified conservation contributions under § 170(h)(1) because, in relevant part, they protect a relatively natural habitat of wildlife and plants and are exclusively for conservation purposes."[168]

ANALYSIS

The *Glass* case presents a positive and favorable ruling, establishing long-awaited precedent for the utilization of conservation easements to preserve our nation's wildlife through the preservation of privately owned open space. As a result of the *Glass* decision, private land owners are afforded new-found certainty that a conservation easement intended to protect the habitat of a rare, threatened or endangered species will likely survive IRS scrutiny.

In January of 2005, the Joint Committee on Tax (JCT) issued a report entitled, *Options to Improve Tax Compliance and Reform Tax Expenditure*.[169] The report in part addressed the current tax incentives for qualified conservation contributions; it specifically dealt with § 170(h) of the code.[170] The report was initiated by the JCT in response to a belief that taxpayers are abusing the available tax deductions under § 170(h). Specifically, the main concern is that donors are over-estimating the valuation of their conservation easement donations and that conservation easement donations are being deducted that retain inconsistent uses with the stated conservation purpose of the easement.[171]

---

167. *Id.* at 283-84 (citing S. REP. NO. 96-1007, 1980-2 C.B. at 603).
168. *Id.*
169. STAFF OF THE JOINT COMM. ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURE 1 (Jan. 27, 2005).
170. *Id.*
171. *Id* at 286. The report's reason for regulation change is that

> Charitable deductions of qualified conservation contributions, including conservation and façade easements, presents serious policy and compliance issues. Valuation is especially problematic because the measure of the deduction (i.e., generally the difference in fair market value before and after placing the restriction on the property) is highly speculative, considering that, in general, there

The report recommends several measures to curb the perceived abuses.[172] The reforms suggested will change the "conservation purposes test" outlined in the current regulations and decrease the percentage amount an individual can deduct from her federal taxes.[173] One of the greatest incentives for private landowners to donate conservation easements is the current

---

> is no market and thus no comparable sales data for such easements. In many instances, present law does not require that the preservation or protection of conservation be pursuant to a clearly delineated governmental conservation policy, only requiring such a policy in cases of open space preservation if the preservation is not for the scenic enjoyment of the general public. As a result, taxpayers and donee organizations have considerable flexibility to determine the conservation purpose served by an easement or other restriction, enabling taxpayers to claim substantial charitable deductions for conservation easements that arguably do not serve a significant conservation purpose.

Id.

172. *Id.* at 281-92.

173. *Id.* The report recommends that the following changes be implemented:

> In General
>
> Under the proposal, a contribution of a qualified real property interest for: . . . (2) the protection of a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem; . . . is exclusively for conservation purposes only if the preservation or protection is pursuant to a clearly delineated Federal, State, or local governmental conservation policy.
>
> The proposal provides that the amount of the charitable deduction for a qualified real property interest . . . is reduced from 100 percent to 33 percent of the fair market value of such contributed interest.
>
> Personal residence use
>
> A qualified real property interest is not considered as contributed exclusively for a conservation purpose if the donor (or a family member of the donor) has a right to use all or a portion of the real property as a personal residence (principle or otherwise) at any time after the contribution. Thus, under the proposal, no deduction is allowed for a contribution of a conservation easement if the donor or a family member may use all or a portion of the underlying real property as a residence at any time after the contribution.

Id. at 282-83.

ability to deduct 100% of the value of the conservation easement donation.[174] A reduction in the percentage of the values available for deduction could, as proposed by the committee, significantly reduce the current incentives for taxpayers to donate conservation easements.[175] The changes to the "conservation purposes test" could impact the number of private acres available for protection through a conservation easement if no deduction was available for individuals continuing to use encumbered land or whose conservation purpose is not in conjunction with a clearly delineated governmental conservation policy.[176] Such regulations could discourage farmers and ranchers from donating conservation easements if they intend to continue their farming and ranching.[177] Further, such new restrictions based on government conservation policy and continued use goes against the legislative intent of the TTEA 1980 and TRSA 1977 which were enacted to promote private conservation efforts as a means to supplement government conservation efforts.[178]

In the JCT report, the authors described the present state of the law, specifically addressing what types of conservation easement transactions will survive IRS scrutiny under the "conservation purposes test."[179] The JCT, in accordance with the regulations, restated that a qualified real property interest will meet the "conservation purposes test" if it protects the natural habitat of a fish, wildlife or plant community.[180] The JCT made a distinc-

---

174. C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1, 2 (2005). Mr. Lindstrom outlined the underlying incentives for conservation easements:

> Tax benefits can be a substantial factor in motivating easements donations. Between federal income tax benefits and estate tax benefits, the donor of a conservation easement and the donor's family can potentially recover over 100% of the value of a donated conservation easement. For a landowner who is not interested in using the development potential of his or her land, a conservation easement can be an effective way of turning that development potential into cash while keeping the land intact.

Id. at 3.

175. *Id.* Adopting the committee's suggestions could affect conservation efforts in Wyoming where vast open spaces and healthy wildlife populations need further protection. *Id.* at 12.

176. OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURE, *supra* note 169, at 282-83.

177. *Id.*

178. See *supra* notes 81-92 and accompanying text.

179. OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURE, *supra* note 169, at 279.

180. *Id.* The report reiterated the regulatory framework for compliance with Treas. Reg. § 1.170A-14(d)(3)(i) by explaining, "Treasury Regulations provide that

tion between different types of plants and animals that will qualify for protection.[181] The report indicated that if the species being protected is endangered, it is likely to meet the conservation purposes requirement.[182] The report goes one step further by indicating it is likely that if a species is identified as unique to a particular area or is likely to be listed as endangered it will meet the conservation purposes requirement.[183]

In response to the JCT's report and proposal there has been significant political outcry in favor of maintaining current tax regulations. Numerous governors, senators, and policy-makers have spoken out in favor of conservation easements and their ability to supplement government conservation efforts.[184] Both the National Governors' Association and the Western Governors' Association passed resolutions in support of current conservation easement tax incentives.[185] The list of individual gubernatorial support (by state) is long and includes Arizona Governor Janet Napolitano, Colorado Governor Bill Owens, Georgia Governor Sonny Perdue, Maryland Governor Robert Ehrilich, Oregon Governor Ted Kulongoski, Rhode Island Governor Donald L. Carcieri, South Carolina Governor Mark Sanford, Wisconsin Governor Jim Doyle, and Wyoming Governor Dave Frudenthal.[186] All seem to agree that curbing valuation abuses is necessary to promote good conservation, but feel that increased enforcement of current regulations will curb such valuation abuses.[187] Stating individual successes, each Governor is reluctant to support a proposal that will result in a decrease in tax incentives for conservation easement donors.[188]

In Wyoming, Governor Dave Frudenthal voiced his opposition to the JCT report and recommendations in a letter addressed to Senator Charles

---

the donation of a qualified real property interest to protect a significant natural habitat in which a fish, wildlife, plant community, or similar ecosystem normally lives will satisfy the conservation purpose requirement." *Id.*

181. *Id.* The report explains that "[w]hether a donation satisfies the conservation purpose requirement generally depends on the type of animal or plant life that exists on the property being protected." *Id.*

182. *Id.* The report states, "If a property is a habitat for any endangered species of plant or animal life, a restriction protecting that habitat likely satisfies the conservation purposes requirement." *Id.*

183. *Id.* The report states, "Administrative rulings provide that if a particular species has been identified as unique to a particular place or is approaching an endangered or other protected status, protection of the habitat will suffice." *Id.*

184. Land Trust Alliance, *Successes and Accomplishments* (Apr. 15, 2006), *available at* http://www.lta.org/publicpolicy/ppc_success.htm (last visited Apr. 15, 2006).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Successes and Accomplishments*, supra note 184.

Grassley and Senator Max Baucus.[189] Governor Frudenthal stated that the committee's recommendations "could serve to undermine the future of open space and wildlife conservation in Wyoming and elsewhere."[190] The governor proposed increased standards for valuations and appraisers and land trust organizations as a means to curb abuses.[191] The statement of Governor Dave Frudenthal of Wyoming is representative of a majority of gubernatorial opinions.[192]

Further support for the court's ruling is found in its' consistency with the JCT's findings. The court found that the encumbered portions of the Glass property provide viable habitat for bald eagles (endangered) and Lake Huron tansy and pitcher's thistle (both threatened).[193] The court's finding of the presence of threatened and endangered species provides the necessary support for a finding in favor of compliance under § 170(h)(4)(A)(ii).[194]

The *Glass* court's ruling is consistent with PLR 92108071,[195] which ruled that the donor of a conservation easement was entitled to a tax deduction for a conservation easement donation because it served to protect the critical habitat of the wood stork, a federally listed endangered species.[196] The finding by the IRS that the presence of just one endangered species on the protected property will suffice to meet the conservation purposes test is

---

189. Letter from Dave Frudenthal, Governor of Wyoming, to Charles Grassley, Chairman, United States Senate Committee on Finance, and Max Bacus, Ranking Member, United States Senate Committee on Finance (Apr. 8, 2005), *available at* http://www.lta.org/ publicpolicy/ppc_success.htm (last visited Apr. 15, 2006).

190. *Id.* Governor Frudenthal identified two major problems with the JCT's recommendations: "I am troubled by two specific suggestions: reducing deductions for conservation easements from 100% of the fair market value of the easement to 33% of the easement's value and eliminating deductions for conservation easements on land containing the personal residence of the donor." *Id.*

191. *Id.* The Governor suggested that

> [T]he Committee put aside those more overreaching reforms suggested by the JCT staff in favor of a more measured response, including: establishing an accredited process for land trusts, requiring greater training certification standards for conservation easement appraisers and enhancing penalties for appraisers that don't play by the rules and unlawfully inflate the value of certain properties.

Id.

192. Letter from Dave Frudenthal, *supra* note 189. Other letters are available at the Land Trust Alliance website, *supra* note 184.

193. *Glass*, 124 T.C. at 281.

194. I.R.C. § 170(h)(4)(A)(ii) (2004).

195. Priv. Ltr. Rul. 9218071 (Jan. 31, 1992). *See supra* notes 121-25 and accompanying text.

196. *Id.*

consistent with the *Glass* court's ruling based on the presence of bald eagles, Lake Huron tansy, and pitcher's thistle.

The *Glass* decision has far reaching potential for the preservation of habitat critical to rare, threatened, and endangered species. In Wyoming the potential for habitat conservation based on the *Glass* decision is real.[197] The Cowboy State is home to fourteen species listed as either threatened or endangered.[198] Throughout the country, 394 animal and 599 plant species are listed as either threatened or endangered.[199] The *Glass* decision offers practitioners the necessary certainty to advise clients on the tax benefits of donating a conservation easement intended to protect the habitat of an endangered and threatened species.

Since the enactment of the TTEA of 1980 when congress expressly defined conservation purposes, there has been a significant increase in land trust organizations and acres protected.[200] Prior to 1980, 431 land trusts existed and protected 128,001 acres of private land.[201] Since the enactment of the current statute in 1980 there has been an increase in the number of land trust organizations to 1263, protecting nearly 2.5 million acres.[202] These numbers support the notion that the current statutory and regulatory scheme encourages citizens to protect their properties from development.

Glass is a success story for the use of conservation easements to preserve privately owned habitat for rare, threatened and endangered species. As the *Glass* court stated, its decision is clearly in-line with the legislative intent of § 170(h).[203] The Glass property, located on the shores of Lake

197. C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1, 12 (2005). Mr. Lindstrom's article indicates that Wyoming has a unique situation that will allow for habitat preservation: "Given the significant amount of publicly owned land in Wyoming, habitat protection is a likely category for many conservation easements here. Even protection of small parcels situated near public land may qualify as having a valid conservation purpose under this category." *Id.*

198. These species include grizzly bear, whooping crane, kendall warm springs dace, bald eagle, black-footed ferret, Canada lynx, Preble's meadow jumping mouse, Pikeminnow, razorback sucker, Wyoming toad, gray wolf, Colorado butterfly plant, blowout penstemon, Ute ladies'-tresses, and desert yellow head. United State Fish and Wildlife Service, *TESS, Wyoming: Listings by State and Territory as of 8/28/05* (Apr. 15, 2006), *available at* http://ecos.fws.gov/tess_public/servlet/gov.doi.tess_public.servlets.UsaLists?state=WY (last visited Apr. 15, 2006).

199. United States Fish and Wildlife Service, *General Statistics for Endangered Species* (Apr. 15, 2006), *available at* http://ecos.fws.gov/tess_public/TessStatReport (last visited Apr. 15, 2006).

200. *See* McLaughlin, *supra* note 50, at 4-5.

201. *Id.*

202. *Id.*

203. *Glass*, 124 T.C. at 281-82.

Michigan, had significant development potential. Such development potential would certainly have had detrimental impact on the natural state of the bluff. The encumbered shorelines are now protected forever.

CONCLUSION

The *Glass* decision promotes preservation of our nation's natural habitats through private action. Our government has promoted the donation of conservation easements over private lands for the last thirty-six years by offering taxpayers specific tax incentives. The *Glass* decision represents the first time in thirty-six years that a court has outlined the "conservation purposes test." It is clear, based on the court's extensive findings of fact and its overview of legislative history that conservation easements intended to protect relatively natural habitats will meet the requirements of the code as "qualified conservation contributions." The *Glass* decision reaches throughout the nation and sends a message to taxpayers and qualified organizations that our government intends for its citizens to help preserve out nation's remaining wild lands. The JCT's recent report outlining suggestions for reforming § 170(h) of the code could substantially effect the current tax incentives for conservation easements in the face of numerous success. Tax reform of this nature could prove detrimental to our nation's wildlife. Conservation easements in compliance with the code, and now the *Glass* decision, will help to ensure the viability of this nation's wildlife and plant communities.

NICHOLAS M. AGOPIAN

University of Wyoming

College of Law

WYOMING LAW REVIEW

Volume 6 2006 Number 2

GENERAL LAW DIVISION