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The Meaning and Application of the "Relatively Natural Habitat" Conservation Purpose of the Internal Revenue Code

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Tax incentives work. In the conservation field, they have dramatically increased the use of conservation easements to protect lands with important natural and historic resources across the United States. Tax deductions for conservation easements come with a host of requirements, one of which is that the easement must protect in perpetuity at least one of the four conservation purposes set forth in the Internal Revenue Code. This Article focuses on a conservation purpose frequently relied on by landowners – the protection of a property's "relatively natural habitat of fish, wildlife, or plants, or similar ecosystem." The IRS regulations impose an additional requirement: the relatively natural habitat must be "significant." A review of the statute, its legislative history, the IRS regulations, and judicial decisions reveals considerable confusion about the scope and meaning of this purpose. Thus, this Article proposes a multi-factor analysis to guide the determination of whether a conservation easement satisfies the purpose.

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www.bit.ly/JLPS-Wyche

I. Introduction

The conservation easement has become one of the most widely used and effective ways to ensure the permanent protection of the natural and historic resources on real property. A conservation easement is essentially an agreement between a nonprofit land trust (or government agency) and the owner of the property in which the latter agrees to protect in perpetuity specific conservation values of the property through either the prohibition or limitation of certain uses and activities.[1] The property owner retains title and can sell or donate the land, but the easement is an encumbrance of record that applies to all future owners.

Over the last twenty years, we have witnessed a dramatic increase in both the number of land trusts and the amount of land protected by conservation easements in the United States: from 887 land trusts and 1.9 million acres in 1990[2] to 1,363 land trusts and 56.4 million acres in 2015.[3] The total amount of land protected by conservation easements as of 2015 was equivalent in size to the State of Minnesota.

One major reason for the increase is a set of provisions in the U.S. Internal Revenue Code designed to incentivize landowners to use conservation easements to protect their properties.[4] In general, the

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[1] An outstanding source of current information about conservation easements is the Land Trust Alliance website, www.landtrustalliance.org. Now outdated but still useful is ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK (2d ed. 2005).

[2] LAND TR. ALL., 2000 NATIONAL LAND TRUST CENSUS (2001).

[3] LAND TR. ALL., 2015 NATIONAL LAND TRUST CENSUS (2016). A new census with data through the end of 2020 is expected by the end of this year.

[4] 26 U.S.C. § 170(a), (b), (f) and (h). A simple example illustrates the tax benefits: Assume a tract of land owned by an individual with a pre-easement value of $3 million and a post-easement value of $1 million. The potential income tax deduction for the owner is $2 million, with the deduction limited to 50% of the owner's adjusted gross income per taxable year and a fifteen-year carryforward.

Code does not allow a taxpayer to deduct a charitable contribution of less than his or her entire interest in property, but an exception is provided for a "qualified conservation contribution."[5] This term is defined as a contribution "(A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes."[6] A "qualified real property interest" includes "a restriction (granted in perpetuity) on the use which may be made of the real property;"[7] this provision is often referred to as the "granted-in-perpetuity requirement."[8] A "qualified organization" includes land trusts with Section 501(c)(3) tax-exempt authorization and government entities.[9] The Code defines four "conservation purposes"

> (1) The preservation of land areas for outdoor recreation by, or the education of, the general public.
> (2) The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.
> (3) The preservation of open space (including farmland and forest land) where such preservation is (I) for the scenic enjoyment of the general public and will yield a significant public benefit, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy and will yield a significant public benefit.

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§ 170(b)(1)(E)(i)-(ii). Qualified farmers and ranchers can deduct 100% of their adjusted gross income per taxable year. § 170(b)(1)(E)(iv). At the owner's death, the property will be valued in the estate at its post-easement value, with additional estate tax benefits potentially available under § 2031(c). *See generally* TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS (2d ed. 2016). In addition, some states provide their own tax incentives for conservation easements.

[5] § 170(f)(3)(B)(iii).

[6] § 170(h)(1).

[7] § 170(h)(2)(C). The definition also includes the donor's entire interest in the property (other than a qualified mineral interest) and a remainder interest. §§ 170(h)(2)(A) & (B). A "qualified mineral interest" is defined in § 170(h)(6).

[8] *See, e.g.*, Pine Mountain Preserve, LLLP v. Comm'r, 978 F.3d 1200,1207 (11th Cir. 2020).

[9] § 170(h)(3).

> (4) The preservation of an historically important land area or certified historic structure.[10]

The contribution is deemed made "exclusively for conservation purposes" if it satisfies at least one of these purposes.[11] In addition, the conservation purpose(s) must be protected in perpetuity;[12] this provision is often referred to as the "protected-in-perpetuity requirement."[13] The IRS regulations extend this requirement to the protection of "other significant conservation interests" on the property even if these interests are not related to the conservation purpose relied on for the deduction.[14] There is an exception for uses that are destructive of these interests if necessary to protect the conservation purpose.[15]

In short, to qualify for the deduction, the contribution must satisfy both the granted-in-perpetuity and the protected-in-perpetuity requirements of the Code. But there is much more to be done. The donor also must meet a host of other "unusually complicated rules,"[16] which are beyond the scope of this Article. A useful resource for understanding these rules is the IRS audit guide.[17]

The conservation purpose frequently relied on by landowners in claiming the tax benefits is the second one—the "relatively natural

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[10] § 170(h)(4)(A).
[11] Butler v. Comm'r, T.C.M. 2012-72 (2012) at 23 ("In order for a contribution to be deductible, it must satisfy one of the conservation purposes under section 170(h)(4).").
[12] § 170(h)(5)(A).
[13] *See, e.g.,* PBBM-Rose Hill, Ltd. v. Comm'r, 900 F.3d 193, 201 (5th Cir. 2018).
[14] Treas. Reg. § 1.170A-14(e)(2).
[15] Treas. Reg. § 1.170A-14(e)(3). The regulation illustrates this exception with the example of allowing the impairment of a scenic view (a significant conservation interest) by the excavation of an archaeological site whose protection is the conservation purpose.
[16] Rajagopalan v. Comm'r, T.C.M. 2020-159 (2020) at 4.
[17] INTERNAL REVENUE SERV., PUB. 5464, CONSERVATION EASEMENT AUDIT TECHNIQUE GUIDE (2021), https://www.irs.gov/pub/irs-pdf/p5464.pdf.

habitat" purpose. According to the Land Trust Alliance, the number one priority among land trusts in the United States is the protection of "important natural areas or wildlife habitats."[18]

What exactly does "relatively natural habitat" mean? How does the IRS interpret the term? How have the courts construed it? Is there a framework for analysis that would be helpful in understanding and applying it? What gaps in understanding remain? How can relatively natural habitats be protected in the face of climate change? These questions, which are examined in this Article, are of great importance to both landowners and land trusts. Landowners who rely on the relatively natural habitat conservation purpose in claiming tax deductions, along with their advisors and attorneys, seek as clear an understanding of this purpose as possible.

Land trusts, too, share this interest. One of the standards of the Land Trust Alliance, which are binding on all nationally accredited land trusts and serve as guidelines for other land trusts, requires land trusts to "work diligently to see that every charitable gift of land or conservation easement meets federal and state tax law requirements."[19] One of the practices under this standard requires that land trusts review "each transaction for consistency with federal and state income tax deduction or credit requirements."[20]

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[18] 2015 Land Trust Census, *supra* note 3, at 19; *see also* William J. Snape, Laura Harris, & Theresa Geib, *Conservation Easements as a Tool for Nature Protection,* TAX NOTES (May 10, 2021) (study of 201 conservation easements across the country found protection of wildlife habitats as the primary purpose).

[19] LAND TR. ALL., STANDARDS AND PRACTICES, STANDARD NO. 10 (2017), http://s3.amazonaws.com/landtrustalliance.org/LandTrustStandardsandPractices.pdf.

[20] *Id.* at Standard No. 10, Practice C (1). At the same time land trusts must not provide "individualized legal, financial or tax advice" to property owners. Standard No. 9, Practice B (1).

II. Legislative History

A. Prior to 1980

The use of conservation easements in the United States dates back to the 1930s with the protection of scenic vistas along the Blue Ridge and Natchez Trace Parkways.[21] In 1964, the IRS issued a Revenue Ruling upholding the validity of a charitable income tax deduction for a conservation easement to protect scenic land along a federal highway.[22]

The Tax Reform Act of 1969[23] did not mention conservation easements, but the accompanying Conference Report,[24] reflecting "some last minute regrets" that the act itself did not address easements,[25] stated that "a gift of an open space easement in gross is to be considered a gift of an undivided interest in property where the easement is in perpetuity."[26] The 1969 statute was followed by IRS regulations and rulings over the next several years that allowed deductions for "contributions of certain kinds of perpetual easements, including open space, historical, and recreational easements."[27]

Congress made sure to address conservation easements in the Tax Reform Act of 1976.[28] This law allowed deductions for

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[21] Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic*, 1 J. L. PROP. & SOC'Y 107, 115 (2015). As the authors explain, the validity of conservation easements is determined by state law. *Id.* at 134-71. Tax incentives for easements are authorized by federal law and some state laws.
[22] Rev. Ruling 64-205, 1964-2 C.B. 62 (1964).
[23] Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.
[24] H. CONF. REP. NO. 91-782 (1969).
[25] Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 L. & CONTEMP. PROBS. 29, 35 (2011).
[26] H. CONF. REP. NO. 91-782, at 292 (1969).
[27] S. REP. NO 96-1007, at 9 (1980).
[28] Pub. L. No. 94-455, 90 Stat. 1520 (1976).

easements with a duration of at least thirty years that were "exclusively for conservation purposes," which were defined as the preservation of land areas for public outdoor recreation, education or scenic enjoyment; the preservation of historically important land areas or structures; and the protection of natural environmental systems.[29] The last purpose—"natural environmental systems"—is the ancestor of the current relatively natural habitat purpose.

The conservation easement provision in the 1976 law was set to expire twelve months after its enactment, but the following year, the Tax Reduction and Simplification Act extended it to June 14, 1981.[30] This act also made other changes, including adding the requirement that the conservation easement be in perpetuity. No changes were made to any of the required conservation purposes, but the conference report made it clear that the intent is for "the term 'conservation purposes' [to] be liberally construed."[31]

B. 1980 Legislation

The game-changer for conservation easements came in 1980 with passage of the Tax Treatment Extension Act.[32] This law established the basic principles and requirements for conservation easement deductions, revised the four conservation purposes, and contained no sunset provision. At last, conservation easement deductions had become a permanent part of the Internal Revenue Code.

The Senate Report explains the relatively natural habitat conservation purpose in detail:

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[29] *Id.*
[30] Pub. L 95-30, 91 Stat. 126 (1977).
[31] H. CONF. REP. 95-263, at 30 (1977).
[32] Pub. L. 96-541, 94 Stat. 3204 (1980).

> Under this provision, a contribution would be considered to be made for conservation purposes if it will operate to protect or enhance the viability of an area or environment in which a fish, wildlife, or plant community normally lives or occurs. It would include the preservation of a habitat or environment which to some extent had been altered by human activity if the fish, wildlife, or plants 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 if the lake or pond is a 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. Examples include habitats for rare, endangered, or threatened native species of animals, fish or plants; natural areas that represent high quality examples of a native ecosystem, terrestrial community, or aquatic community; 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. These natural habitats and ecosystems might be protected by easements or other restrictions regarding, for example, the development or use of property that would affect the habitat or ecosystem to be protected.[33]

III. Regulations

In 1986, the Treasury Department relied heavily on the 1980 Senate report in issuing regulations that explain and implement the four conservation purposes. The regulation on the relatively natural

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[33] S. REP. NO. 96-1007, at 10-11 (1980).

habitat purpose, which has not changed since its issuance in 1986, provides as follows:

> (3) Protection of environmental system
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> ***(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 [sic] feeding area for a wildlife community that included rare, endangered, or threatened native species.
>
> ***(ii) Significant habitat or ecosystem.*** Significant habitats or ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animals, 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.
>
> ***(iii) Access.*** 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.[34]

One notable difference between the statute and the regulations is the latter's use of the word "significant" to modify "relatively natural habitat." Thus, the habitat must be not only "relatively natural" but also "significant." In *Champions Retreat Golf Founders, LLC v. Commissioner,*[35] the landowner argued that the IRS exceeded its authority by adding this requirement of significance to the conservation purpose. The Eleventh Circuit disagreed, holding that "even without the regulation, the Code would not be construed to apply to a completely trivial habitat—a few commonly occurring ants plainly would not do, nor would many other species not in need of conservation. Requiring some level of significance thus is unobjectionable."[36]

Although not relied on or cited by the court, the 1980 Senate report expressly uses the word "significant" in explaining the intent of the relatively natural habitat conservation purpose: "[to] protect and preserve significant natural habitats and ecosystems in the United States."[37]

Another notable difference between the Code and the regulations is the latter's reference to "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" as an example of a "significant

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[34] Treas. Reg. § 1.170A-14(d)(3)(i)–(iii).
[35] 959 F.3d 1033 (11th Cir. 2020).
[36] *Id.* at 1036. Judge Grant would not have addressed the issue because the landowner failed to present it to the tax court. *Id.* at 1041-42 (Grant, J., concurring in part and dissenting in part).
[37] S. REP. NO. 96-1007, *supra* note 33, at 11.

habitat or ecosystem."[38] Again, there is no such provision in the statute, but the same example is found in the Senate report. This example represents another way to meet the relatively natural habitat purpose. The focus is on the condition and location of the property rather than on the actual quality of the habitat. Yet oddly, it is included in the relatively natural habitat regulations. Perhaps the justification is that most parks, preserves, refuges, and similar areas already provide relatively natural habitats themselves so the protection of adjoining or nearby natural areas should qualify for the deduction. But there is no explanation of the rationale in either the legislative history or the regulations.

In sum, there are three ways that a conservation easement can satisfy the relatively natural habitat conservation purpose. It must protect:

- A habitat of fish, wildlife, or plants or similar ecosystem that is both significant and relatively natural;
- A property that is natural and located within a park, preserve, refuge, wilderness area, or similar conservation area; or
- A property that is natural and contributes to the ecological viability of a park, preserve, refuge, wilderness area, or similar conservation area.

There is no definition of any of these key terms in the Code, legislative history, or regulations: "habitat," "ecosystem," "significant," "relatively natural," "natural," and "ecological viability." The absence of such definitions is a major reason why the precise contours

[38] Treas. Reg. § 1.170A–14(d)(3)(ii).

of the relatively natural habitat conservation purpose present, as Judge Grant noted in *Champions Retreat,* a "thorny" question.[39]

IV. Overview of Lists and Rankings of Species

The diversity of life across the United States and its territories is extraordinary, with more than 200,000 species documented by scientists.[40] They range from the iconic, such as the bald eagle and grizzly bear, to ones known only by a few specialists. Their status also ranges widely, from common to critically endangered. Fortunately, government agencies and nonprofit organizations have done admirable work in determining which species are in trouble and the nature and extent of the risks they face. The lists and ranking systems of these researchers often play an important role in determining whether a particular conservation easement satisfies the requirements of the relatively natural habitat purpose. Thus, a brief overview would be helpful.

A. Endangered Species Act

The Endangered Species Act (ESA) is the landmark federal law that authorizes the listing of any plant or animal species (except pest insects) as either "threatened" or "endangered."[41] "Endangered" means a species that is in danger of extinction throughout all or a significant portion of its range,[42] while "threatened" means a species

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[39] 959 F.3d at 1042. (Grant, J., concurring in part and dissenting in part).
[40] NAT'L WILDLIFE FED'N, REVERSING AMERICA'S WILDLIFE CRISIS: SECURING THE FUTURE OF OUR FISH AND WILDLIFE 1 (2018).
[41] 16 U.S.C. §§ 1531 *et seq*.
[42] 16 U.S.C. § 1532(6).

that is likely to become endangered within the foreseeable future.[43] The ESA is administered by the United States Fish and Wildlife Service (FWS) for terrestrial and freshwater species, and the National Marine Fisheries Service (NMFS) for marine species. Once listed, a species receives certain protections.[44] As of September 2021, there were 1,271 species listed as endangered and 395 species listed as threatened.[45]

The FWS and NMFS have considerable discretion in determining whether to list a species, but those determinations are subject to judicial review under the arbitrary, capricious, and abuse of discretion standard of the Administrative Procedures Act.[46] The ESA has been "highly effective, saving more than 99 percent of species under its protection and putting hundreds more on the road to recovery."[47] The statute, however, only works for species which are listed as threatened or endangered. More than forty species of animals and plants have gone extinct waiting for protection.[48]

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[43] 16 U.S.C. § 1532(20).

[44] *See generally* U.S. FISH & WILDLIFE SERVICE, ENDANGERED SPECIES, www.fws.gov/endangered/index.html (last updated Aug. 4, 2021).

[45] U.S. FISH & WILDLIFE SERV., ENVIRONMENTAL CONSERVATION ONLINE SYSTEM, LISTED SPECIES SUMMARY (BOXSCORE), https://ecos.fws.gov/ecp/report/boxscore (last updated Sept. 28, 2021).

[46] *See, e.g.,* Safari Club Int'l v. Salazar, 709 F.3d 1, 8 (D.C. Cir. 2013) ("We will uphold an agency action unless we find it to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A). This standard applies to our review of ESA listing decisions."); Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 981–82 (9th Cir. 1985). *See also* Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361 (2018) (holding that FWS's assessment of costs and benefits of designating area as "critical habitat" under ESA and its resulting decision not to exclude area are subject to judicial review under the arbitrary, capricious and abuse of discretion standard).

[47] William J. Snape, Sidebar, *Judging Obama's Endangered Species Legacy*, 34 ENV'T F. 33 (Sept.-Oct. 2017).

[48] *Id.*

The ESA also requires that when a species is listed as threatened or endangered, the Secretary of the Interior must, "to the maximum extent prudent and determinable," also designate the "critical habitat" of the species.[49] Critical habitat includes both areas occupied by the species and areas that are not occupied but deemed essential for its conservation.[50]

"At risk" species include those proposed for listing as threatened or endangered; those considered by the FWS or the NMFS as candidates for listing; and those petitioned by a third party for listing.

B. State Lists of At-Risk Species

In 2000, Congress established the State and Tribal Wildlife Grants Program for the purpose of preventing the nation's fish and wildlife from becoming endangered.[51] Since then, Congress has appropriated funds each year under this program; the total amount now exceeds $1 billion.[52] To receive funding, the state must adopt an "action plan" that identifies "the species of greatest conservation need" within its jurisdiction and establishes strategies for protecting them and their habitats.[53] The plans are not required to include plants, but some states address them. Today approximately 12,000 species of greatest conservation need are identified in the action plans of the

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[49] 16 U.S.C. § 1533(a)(3)(A)(i).
[50] 16 U.S.C. § 1532(5). The FWS and NMFS, however, have proposed adding a definition of "habitat" to their regulations which would exclude areas that species do not presently depend on or use from being designated as "critical habitat." 85 Fed. Reg. 47,333-37 (Aug. 5, 2020).
[51] *See generally* U.S. FISH & WILDLIFE SERV., THE STATE AND TRIBAL WILDLIFE GRANTS PROGRAM: 20 YEARS OF CONSERVATION SUCCESS (Sept. 2020).
[52] *Id.* at 2.
[53] *Id.* at 4.

states.[54] The plans often place these species in different categories of priority.[55]

The action plans typically list far more species than those on the ESA lists of endangered and threatened. For example, the thirty-four species on the federal list that are found in South Carolina comprise less than 5% of the number described in the state's action plan.[56] The federal lists essentially represent the tip of the biological iceberg. Sadly, below the tip are thousands of species in trouble of varying degrees.

Some state action plans also make ESA-like critical habitat designations for species of greatest conservation need. The designations may be specific or refer to maps that generally show the ideal or potential habitats of the species. Every state has adopted its own action plan; therefore, land trusts, landowners, and their advisors should become familiar with the plans for the states where they work.

The federal ESA is not preemptive. Thus, some states have enacted their own laws that require the listing of rare, threatened and/or endangered species and measures to protect their habitats.[57] These listing requirements differ from state to state, but typically species listed under the state law will also be identified in the state action plans, and there are usually more species listed in the latter than on the statutory lists.

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[54] NAT'L WILDLIFE FED'N, *supra* note 40, at 10.

[55] For example, the South Carolina action plan lists over 800 species in fourteen taxa (including plants) in three categories of priority (highest, high and moderate). S.C. DEP'T NATURAL RES., SOUTH CAROLINA'S STATE WILDLIFE ACTION PLAN (SWAP) (2015), https://www.dnr.sc.gov/swap/index.html.

[56] U.S. FISH & WILDLIFE SERV., CONSERVATION IN SOUTH CAROLINA, https://www.fws.gov/southeast/south-carolina (last updated March 25, 2019).

[57] *See, e.g.,* Texas Endangered Species Act, Texas Code Ann. §§ 68.001 *et seq.;* Florida Endangered Species Act, Title XXVII, § 379.221.

A species can be on both the federal and state lists or only on the latter. For example, a species can be considered rare, threatened, or endangered within the boundaries of a particular state but not at risk from a federal perspective.

C. Lists Compiled by Nonprofits

Nonprofit organizations also compile lists and rankings of species. NatureServe collects and analyzes data on over 100,000 species and ranks their status from both global and state perspectives.[58] The rankings are levels 1 (critically endangered), 2 (imperiled), 3 (vulnerable), 4 (apparently secure), and 5 (secure), with G referring to global and S referring to the state. A question mark indicates some uncertainty associated with the ranking, and NR means not ranked.[59]

The International Union for the Conservation of Nature (IUCN) maintains a "Red List of Threatened Species," which evaluates the risks facing plants and animal species on a global scale.[60] The rankings are Critically Endangered, Endangered, Vulnerable, Near Threatened, Least Concern, Data Deficient, and Not Evaluated.[61]

Other nonprofits include Partners in Flight, the Atlantic Coast Joint Venture, and the North American Bird Conservation Initiative, whose lists were involved in the *Champions Retreat* case, and the American Fisheries Society and the Xerces Society (for invertebrates).

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[58] NATURESERVE, WHO WE ARE, ww.natureserve.org (last visited Sept. 16, 2021).
[59] NATURESERVE, DEFINITIONS OF NATURESERVE CONSERVATION STATUS RANKS, https://help.natureserve.org/biotics/content/record_management/Element_Files/Element_Tracking/ETRACK_Definitions_of_Heritage_Conservation_Status_Ranks.htm (last visited Sept. 16, 2021).
[60] THE IUCN RED LIST OF THREATENED SPECIES, ABOUT, iucnredlist.org (last visited Sept. 16. 2021).
[61] THE IUCN RED LIST OF THREATENED SPECIES, FREQUENTLY ASKED QUESTIONS, https://www.iucnredlist.org/about/faqs (last visited Sept. 16, 2021).

V. Court Decisions

This section describes all of the court decisions (in chronological order) that have interpreted the relatively natural habitat conservation purpose. As the review reveals, the decisions are inconsistent and confusing, adding to the uncertainty about the meaning of the purpose and demonstrating the need for an analytical framework to address and clarify the issue.

A. Glass v. Commissioner

This case was the first federal appellate court decision on the relatively natural habitat conservation purpose.[62] It involved a small privately-owned tract of shoreline along Lake Michigan owned by Charles and Susan Glass. Over a period of four years, the Glasses granted three separate conservation easements to the Little Traverse Conservancy, a land trust that works in the northern Michigan area. One of its priorities is the protection of plants and animals that live along the Lake Michigan shoreline.[63]

The entire tract owned by the Glasses was slightly more than eleven acres, with about 460 feet of frontage on Lake Michigan. The first easement, granted by the Glasses in 1990, covered about 2.6 acres on the back part of the property and was not involved in the litigation.[64] The second and third easements, which were granted in 1992 and 1993 and together covered a little more than one acre along the shoreline, were the subject of the case. Thus, most of the Glasses' property (about 7.5 acres) was not covered by any of the three easements. On these acres were the Glasses' residence, cottage, and

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[62] 471 F.3d 698 (6th Cir. 2006).
[63] *Id.* at 702.
[64] *Id.* at 713 n.1.

garage.[65] Each easement permitted the construction and maintenance of a shelter, storage shed, deck, patio, boathouse, and footpaths.[66]

The Glasses claimed income tax deductions for the easements based on the relatively natural habitat and open space conservation purposes. The IRS disallowed the deductions, and the Glasses appealed to the United States Tax Court. The tax court did not consider the open space conservation purpose but ruled in favor of the landowners on the relatively natural habitat purpose.[67] The IRS appealed to the Sixth Circuit Court of Appeals, which affirmed.

The tax court found credible the following testimony of Mrs. Glass and the executive director of the Little Traverse Conservancy: (1) the property provides suitable habitat for pitcher's thistle, a threatened plant, although it had not been found on the property;[68] (2) Lake Huron tansy, another threatened plant, has been seen on the property;[69] (3) the property is "a famous roosting spot" for bald eagles,[70] which are regularly seen on the property; (4) at least one bald eagle roosts on a tree that is covered by one of the easements;[71] and

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[65] The 1993 easement allowed the existing cottage to be replaced or expanded within the protected area as long as the new or expanded structure did not exceed 2,500 square feet in size. *Id.* at 705.
[66] *Id.* at 710.
[67] 124 T.C. 258 (2005).
[68] 471 F.3d at 709.
[69] *Id.*
[70] 124 T.C. at 281.The bald eagle is one of the great success stories of the ESA. Originally endangered, it made a remarkable recovery and was proposed for delisting at the time of the *Glass* litigation. It was removed from the list in 2007 but remains protected under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. U.S. FISH & WILDLIFE SERV. MIDWEST REGION, HISTORY OF BALD EAGLE DECLINE, PROTECTION AND RECOVERY, https://www.fws.gov/midwest/eagle/history/index.html (last updated May 5, 2020).
[71] 124 T.C. at 281.

(5) other wildlife uses the property, including piping plovers, kingfishers, and bears.[72]

The court of appeals found no error in these factual findings. Nor did the court find any error in the tax court's construction of the words "habitat" and "community" in the relatively natural habitat regulations.[73] In the absence of statutory or regulatory definitions, the tax court applied the "plain meaning" of those terms. "Habitat" is the "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."[74] The term "community" is "[a] group of plants and animals living and interacting with one another in a specific region under relatively similar environmental conditions."[75] Neither the tax court nor the court of appeals considered the meaning of three other important terms: significant, relatively, and natural.

The tax court held, and the court of appeals affirmed, that the conservation easements protected "relatively natural habitat" for the Lake Huron tansy, pitcher's thistle, bald eagle, and other species.

The IRS was a determined adversary, making several arguments on why the easements did not protect a relatively natural habitat. In addressing and rejecting all of the agency's contentions, the tax court and the court of appeals shed considerable light on the meaning and scope of this conservation purpose.

First, the court of appeals rejected the IRS's argument that the property was too small to achieve the purpose of protecting relatively natural habitat. Noting the absence of any minimum size

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[72] *Id.* at 262.
[73] 471 F.3d at 708.
[74] 124 T.C. at 281–82.
[75] *Id.* at 282.

specified in the statute or regulations, the court cited an IRS private letter ruling that upheld the deduction for a conservation easement on a property of only three-fourths of an acre.[76] The court held: "It is not the size of the Conservation Easement that matters; rather, it is whether any retained use undermines its stated conservation purpose."[77]

The IRS made that argument as well, namely, that the uses retained by the Glasses undermined the relatively natural habitat purpose. These uses included constructing a shelter, shed, deck, patio, and boathouse on each property; cutting trees and vegetation for preserving views of the lake and for safety; and building footpaths. The exercise of these rights, however, required the land trust's prior approval, and the land trust could deny approval if the exercise would be inconsistent with the conservation purpose of the easement.[78] The court rejected the IRS's position, emphasizing the land trust's authority to prohibit such inconsistent uses.[79]

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[76] I.R.S. Priv. Ltr. R. 8546112 (Aug. 21, 1985). A private letter ruling is a statement issued by the IRS in response to a request submitted by a taxpayer. The IRS relies on the facts and representations made by the taxpayer in the request and does not investigate or verify them. The ruling cannot be relied on as precedent by the IRS or other taxpayers. *See generally* Julia Kagan, *Private Letter Rulings (PLR),* INVESTOPEDIA (Oct. 29, 2020), https://www.investopedia.com/terms/p/plr.asp. The private letter rulings on the relatively natural habitat conservation purpose are discussed in Section VI of this Article and summarized in Appendix I.

[77] 471 F.3d at 711. Jonathan M. Burke, Note, *A Critical Analysis of Glass v. Commissioner: Why Size Should Matter for Conservation Easements*, 61 TAX LAW. 599 (2008) (supporting the IRS's position on size of the property).

[78] 471 F.3d at 711.

[79] *Id.* at 710. Neither the tax court nor the court of appeals addressed the potential impacts of development on the portions of the Glasses' property that were not subject to any of the easements. It would seem that these impacts would have a much greater potential to adversely affect the property's habitat than the exercise of any of the reserved rights, and the land trust would be powerless to stop or control them. Such impacts would be subject only to local government regulations and controls.

The IRS also argued that the lack of restrictions on neighboring properties would make it impossible to achieve the conservation purpose on the Glasses' property. Again, the court of appeals rejected the IRS's position, noting that the law and regulations do not require consideration of the rights of neighbors to build on their properties. The court noted that such a policy "would also preclude larger conservation benefits achieved by aggregate donations of relatively small conservation easements, each serving their own stated conservation purpose."[80] In any event, there was no evidence that building on neighboring properties or the local government's development regulations would preclude protecting the relatively natural habitat on the Glasses' property. The court distinguished the tax court's decision in *Turner v. Commissioner*,[81] which did take into account restrictions on neighboring properties, as involving a different conservation purpose (scenic enjoyment of open space by the public). Obviously, the extent of development on neighboring properties could adversely affect the quality of the public view of the property in question.

The IRS also contended that there must be evidence that the species of concern were present on the property at the time the easements were signed and recorded. The court of appeals disagreed, again noting the lack of any such requirement in the law or regulations.[82] The testimony by Mrs. Glass and the land trust's executive director were sufficient to show that the property provides a suitable habitat for the Lake Huron tansy, pitcher's thistle, and bald eagle.[83]

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[80] *Id.* at 712.
[81] 126 T.C. 299 (2006).
[82] 471 F.3d at 709.
[83] *Id.* at 708-9.

In any event, the Lake Huron tansy and bald eagles had been actually observed on the shoreline of the Glasses' property.[84]

B. Butler v. Commissioner[85]

This case involved four conservation easements on a total of approximately 4,600 acres near Columbus, Georgia. James Butler owned 393 acres and his wife, Susan Butler, owned 12.7 acres, while Kolomoki LLC, a limited liability company solely controlled by the Butlers, owned two tracts of 1,780 acres and 2,450 acres.[86] The recipient of the easements on the individually owned tracts was the Chattahoochee Valley Land Trust (CVLT); the recipient of the easement on the Kolomoki tracts was the Chattowah Open Land Trust (COLT).[87]

The Butlers and Kolomoki LLC claimed that the easements protected relatively natural habitats on all the properties. The IRS disallowed the deductions, and the owners appealed. The tax court agreed with the owners.

1. Butler Easement

The easement on the 393-acre Butler tract allowed the subdivision of the property into eleven lots, with the right to construct a single-family residence and garage on a two-acre building site on each lot.[88] Other reserved rights included keeping livestock, raising crops,

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[84] *Id.* at 709.
[85] T.C.M. 2012-72 (2012).
[86] *Id.* at 1.
[87] *Id.* The Kolomoki tracts were initially subject to two separate easements, but an amendment to the later one effectively made the properties subject to the same restrictions. The court, therefore, considered the case as involving only one easement. *Id.* at 39.
[88] *Id.* at 12.

commercial timber harvesting, constructing roads and fences, and building an unlimited number of barns and sheds.[89]

The scope of CVLT's authority under the easement is not entirely clear. Apparently, certain reserved rights, such as the eleven single family residences, "small scale" agricultural activities, and development of water resources (including ponds, irrigation systems, and animal watering facilities), could be exercised without CVLT's prior review and approval of specific plans.[90] The building areas for the residences were shown in the baseline report but could be "reconfigured" (but not enlarged) with CVLT's approval[91]. Ancillary structures could be constructed as long as they did not "materially impair" the property's conservation values.[92] Commercial timber harvesting required CVLT's prior approval of a plan, while various recreational activities were permitted, provided they did not cause a "demonstrable degradation" of conservation values.[93] CVLT had the authority to inspect the property and, upon determining that any conservation values had been damaged, to require restoration.[94]

The evidence confirmed the presence on the property of plumleaf azalea, a plant classified as threatened by the State of Georgia.[95] The property may also have provided habitat for a number of rare, threatened, or endangered species, but none of those species was found on the property.[96] A report by the Butlers' consultant stated that "high quality aquatic and terrestrial communities" were found

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[89] *Id.* The easement on the 12.7 acre-tract reserved the right to build one single family residence on a two-acre site and to engage in certain other uses and activities. *Id.* at 6 and 35. The discussion here pertains to the 363-acre tract.
[90] *Id.* at 5-6.
[91] *Id.* at 6.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 14.
[95] *Id.* at 9.
[96] *Id.*

on the property and that there was "a high likelihood" of federally and state protected mussel and fish species in a particular creek and its tributaries.[97] But again, there was no confirmation of their actual presence.

The tax court concluded that the easement satisfied the requirements of the relatively natural habitat conservation purpose because it protected property with "high-quality examples of several different ecosystems, as well as habitat where rare, endangered or threatened species normally live."[98] In addition, the tax court found credible evidence that even if all the reserved rights in the easement were fully exercised, the significant relatively natural habitat on the property would remain protected.[99] Shifting the burden of proof to the IRS,[100] the court found no contrary evidence or anything to suggest that CVLT would likely abandon its right to enforce the easement.[101]

2. Kolomoki Easement

The reserved rights under the Kolomoki easement were extensive and included maintaining all existing agricultural, grazing and horticultural activities; converting forested areas to agricultural uses; operating the hunting clubs; harvesting timber; disposing of biodegradable waste at least 200 feet away from watercourses; subdividing the properties into up to fifteen tracts, with each tract containing a minimum of 200 acres; building on each subdivided tract a single-family residence, one secondary residential building per 100 acres

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[97] *Id*.
[98] *Id.* at 13.
[99] *Id.* at 15.
[100] *Id*. Section 7491 of the Code provides that when a taxpayer introduces credible evidence with respect to any factual issue relating to the liability for payment of any tax, the IRS shall have the burden of proof. 26 U.S.C. § 7491.
[101] T.C.M. 2012-72 at 15. The court held that the easement on the 12.7-acre tract also protected a significant relatively natural habitat.

(not counting the first 100 acres), and an unlimited number of non-residential buildings; on a tract of at least 500 acres, building a headquarters site, two residences, one lodge for guests, three guest houses, and an unlimited number of barns and sheds, with a total footprint not to exceed 15,000 square feet; and building a private grass airstrip.[102]

Most of these rights apparently could be exercised without prior review and approval of specific plans by COLT, but the easement contained an overarching prohibition against any use or activity that impaired or destroyed significant conservation values.[103] Prior approval by COLT was required for the construction of agricultural and recreational structures, for new ponds and lakes, and for the location and building envelopes of structures on tracts of 500 acres or more.[104] Commercial timber harvesting had to be consistent with a plan approved by COLT.[105] The land trust had the authority to monitor the property and upon determining that conservation values had been damaged, to require restoration.[106]

The evidence showed that the properties contained upland hardwoods, longleaf pine forests, and open fields that provided habitat for "high quality aquatic and terrestrial communities."[107] Several rare, threatened or endangered species would "normally" be found on the properties;[108] however, there had been no confirmed sighting of any of them. With little discussion, the court determined that this was sufficient to establish a significant relatively natural habitat on

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[102] *Id.* at 39-40.
[103] *Id.* at 40.
[104] *Id.*
[105] *Id.* at 39.
[106] *Id.* at 41.
[107] *Id.*
[108] *Id.* at 42.

the property.[109] Then, for the same reasons expressed for the Butler easement and again shifting the burden of proof to the IRS, the tax court concluded that the easement preserved this conservation purpose in perpetuity.[110]

C. Atkinson v. Commissioner[111]

This case involved two conservation easements on portions of two golf courses and wetlands at the St. James Plantation, a gated private development near Cape Fear, North Carolina. One easement, received in 2003, covered six non-contiguous tracts totaling about seventy-nine acres that included the nine-hole "Cate 9" golf course and wetlands and ponds in and around the course.[112] In 2005, an easement on three non-contiguous tracts totaling about ninety acres was received, covering most of the 18-hole "Reserve Club" golf course at the development.[113]

Two other conservation easements, although not challenged by the IRS, were involved in the case: one on a thirty-two-acre tract of wetlands and swamps near the Cate 9 gold course called the "Middle Swamp,"[114] and the other on a 256 acre-tract of Carolina bays that adjoined one of the three 2005 easement tracts, called "Wetlands II."[115]

The entire development, including the golf courses in question, is located within the Cape Fear Arch, a region of over 9,000 square miles that contains the highest biological diversity on the Atlantic

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[109] *Id.* at 43.
[110] *Id.*
[111] T.C.M. 2015-236 (2015).
[112] *Id.* at 2.
[113] *Id.* at 4.
[114] *Id.* at 2.
[115] *Id.* at 4.

coast north of Florida.[116] Part of the Reserve Club course is within the boundaries of the 2,700-acre Boiling Springs Lake Wetland Complex, a portion of the Cape Fear Arch, that is deemed nationally significant and once was dominated by longleaf pine forests.[117]

Under the 2003 and 2005 easements, the owner reserved extensive rights to operate and maintain the golf courses, including the right to cut trees and to use herbicides and pesticides.[118]

The owner claimed deductions on both easements based on the open space and relatively natural habitat purposes. The IRS determined that the purposes were not met and disallowed the deductions. The owner appealed to the tax court, which affirmed.

The tax court evaluated each easement separately and held that neither one satisfied the requirements of the relatively natural habitat purpose. The owner appealed the decision to the Fifth Circuit and settled the case with the IRS while the appeal was pending. Nonetheless, the tax court decision remains published and relevant.

1. 2003 Easement

The owner's expert testified that the most significant species on the property was the longleaf pine, which once spanned across ninety million acres of the Southeast's coastal plain but is now found in only 5% of its original range.[119] The longleaf pine ecosystem, sustained by fire, hosts remarkably diverse plant and animal communities. No one disputed the importance of the longleaf pine, but based on the evidence, it was not clear that any of the trees were located within the easement area. The trees were found "in a thin line" along

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[116] *Id.* at 3 and 5.
[117] *Id.* at 5.
[118] *Id.* at 2-3 and 5.
[119] *Id.* at 9. *See generally* L. KATHERINE KIRKMAN & STEVEN B. JACK, ECOLOGICAL RESTORATION AND MANAGEMENT OF LONGLEAF PINE FORESTS (2018).

the edge of the Cate 9 golf course in close proximity to private homes, which were not subject to the easement.[120] Even if the trees were within the easement area, the easement allowed any tree within thirty feet of the fairways to be removed.[121] Moreover, there were no large longleaf trees (more than one hundred years old with a diameter of at least three feet) anywhere in the development, and there was neither a management plan for the trees nor a plan for prescribed burning to maintain the ecosystem.[122]

The owner also argued that the ponds on the property provided a relatively natural habitat for fish. Under the IRS regulations, the man-made nature of the ponds was not automatically disqualifying,[123] but the court found that the way the ponds were managed did not meet the conservation purpose. Few of the ponds had a natural edge.[124] Many of them had no edge at all and were regularly sprayed with chemicals, and water quality tests revealed low levels of dissolved oxygen and high levels of nitrogen and salinity.[125] The court held that a conservation area must "sufficiently mimic nature so that plants and animals would be able to use it"[126] and that ponds with no natural edges fall short of this standard.

The court also noted the widespread use of chemicals on the golf course. The principal pesticide, Oxadizon, runs off when applied to porous soils and is toxic to fish and invertebrates.[127] The principal insecticide, Bifenrin, is toxic to mammals, birds and bees and is a

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[120] T.C.M. 2015-236 (2015) at 9.
[121] *Id*.
[122] *Id.* at 10.
[123] Treas. Reg. § 1.170A-14(d)(3)(i).
[124] T.C.M. 2015-236 (2015) at 10.
[125] *Id.* at 11.
[126] *Id*.
[127] *Id.* at 12.

possible human carcinogen.[128] The court found no difference between these practices and the example in the IRS regulations of a disqualified conservation easement that allowed the use of pesticides which destroyed or injured an ecosystem.[129]

The easement did require the use of best environmental practices "then prevailing in the golf industry," but the court held that this is not the same as best conservation practices.[130]

The owner further claimed that the golf course provided a "relatively natural open space" for foraging, migration, and feeding for animals such as squirrels, owls, coyotes, foxes, and racoons.[131] The court dismissed the claim, finding persuasive the IRS expert's testimony that the golf course contained no natural fruits and seeds for foraging and no cover.[132]

The owner asserted that all it had to show to meet the relatively natural habitat purpose was at least one threatened or endangered species on the property and it had done so by proving that Venus flytraps and pitcher plants were found in the easement area. The court rejected this argument, noting that neither Venus flytrap nor pitcher plant is designated as a threatened or endangered species; rather, they are rare and only one level above "apparently secure."[133]

Even assuming the areas outside of the golf course provided an ideal habitat for Venus flytrap and pitcher plant, those areas constituted only 24% of the property, which, in the court's view, was "too insignificant a portion of the 2003 easement to lead us to conclude

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[128] *Id.*
[129] Tres. Reg. § 1.170A-14(e)(2).
[130] T.C.M. 2015-236 (2015) at 13.
[131] *Id.* at 11.
[132] *Id.*
[133] *Id.* at 12. For this reason, the court found the decision in *Glass* unpersuasive because some of the species there were threatened or endangered. *See* discussion at notes 68-72 *supra.*

that the whole 2003 easement property is a significant natural habitat."[134]

With respect to the golf course itself (the fairways, greens, and tee boxes), the court found that soil samples, water samples, and the use of non-native grasses showed the lack of a relatively natural habitat for the Venus flytrap and pitcher plant.[135]

The court next considered the owner's contributory role argument. As previously noted, the IRS regulations qualify an easement that protects "natural areas which … contribute to the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area."[136] The owner claimed that the golf course "contributes to the ecological viability" of the Middle Swamp, the thirty-two-acre area that was subject to a separate easement. The court first found that the Middle Swamp is a "wilderness area or other similar conservation area" within the meaning of the regulations and then addressed whether the easement protects a "natural area" that contributes to the Middle Swamp's ecological viability.[137]

The owner relied on the Greenacre/Farmacre example in the IRS regulations where Greenacre is a nature preserve that contains a high quality tall grass prairie ecosystem, next to which is Farmacre, an operating farm.[138] Conversion of Farmacre to a more intensive use, such as a housing development, would adversely affect the continued use of Greenacre as a nature preserve because of human traffic generated by the development. The donation of a conservation

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[134] T.C.M. 2015-236 (2015) at 12.
[135] *Id.*
[136] Treas. Reg. § 1.170A-14(d)(3)(ii). *See* discussion at note 38 *supra.*
[137] T.C.M. 2015-236 (2015) at 14.
[138] Treas. Reg. § 1.170A-14(f) (example 2).

easement preventing future development of Farmacre but allowing normal agricultural practices would qualify for the deduction.

The court rejected the argument, finding no similarity between Farmacre and the golf course. Most of the golf course was surrounded by private homes, and the evidence showed that the rest of the course did not benefit the Middle Swamp.[139] Moreover, there was heavy human traffic in and around the course, a concern specifically mentioned in the Greenacre/Farmacre example.[140]

2. 2005 Easement

The reserved rights in the 2005 easement were almost identical to those in the 2003 easement, giving the owner extensive authority to manage and maintain the golf course. The property itself, however, had fewer developed areas and contained more species of concern than the 2003 easement property.[141] For example, almost one-third of the property was an "undisturbed woodland" and located within the boundaries of the nationally significant Boiling Springs Lake Complex.[142] The species included longleaf pine, American alligator, eastern fox squirrel, Venus flytrap, purple pitcher plant, yellow pitcher plant, and shortleaf yellow-eyed grass. The latter three species were recognized by the State of North Carolina as either

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[139] T.C.M. 2015-236 (2015) at 14.

[140] The Greenacre/Farmacre example is one of five examples whose purpose is to illustrate the provisions of the regulations "relating to conservation purposes." Treas. Reg. § 1.170A-14(f) (introductory sentence). Three of the other four examples specifically mention the preservation of open space as the conservation purpose that is being illustrated; the fourth one mentions protection of open space pursuant to a clearly delineated government policy. Although the conservation purpose being illustrated in the Greenacre/Farmacre example is not stated, it appears to be the one on how a natural area can contribute to the ecological viability of a park, preserve, refuge, wilderness area, or similar conservation area within the meaning of Treasury Regulation § 1.170A-14(d)(3)(ii).

[141] T.C.M. 2015-236 (2015) at 8.

[142] *Id.* at 15.

"exploited" or "significantly rare—peripheral."[143] The property also provided potentially suitable habitat for the red-cockaded woodpecker, which is listed as an endangered species under the ESA.[144]

The court found that the 2005 easement did not satisfy the relatively natural habitat requirement for many reasons. First, the court was unimpressed with the woodland. The longleaf pine trees consisted only of "remnants" between the golf course and private homes, and there was no management or prescribed burning plan.[145]

Second, the evidence was not clear if the squirrels on the property were southern fox squirrels or eastern fox squirrels. Even if they were the latter, this species was not "threatened or endangered by national standards;" rather, it was considered only "significantly rare" by the State of North Carolina.[146] In addition, there was no confirmed sighting of the red-cockaded woodpecker on the property.[147] One of the experts testified that he saw a bald eagle flying overhead, but the court refused to "equate one sighting of a Bald Eagle flying over the property with a conclusion that the area is 'famous' as a roosting spot for eagles," as had been the case in *Glass*.[148] Roughly half of the property supported populations of Venus flytraps and pitcher plants. But the court determined that this was not enough:

> While the plants cannot grow on the fairways or mowed parts of the rough, they can and do grow on the 53% of the 2005 easement property designated "other" and "wetlands." Such facts, however, are insufficient for us to conclude that the 2005 easement property qualifies as a "significant relatively natural

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[143] *Id.* at 5.
[144] *Id.* at 16.
[145] *Id.* at 15.
[146] *Id.* at 16.
[147] *Id.*
[148] *Id.*

> habitat." As discussed above, this partial provision of a proper place for growth is insufficient to justify protecting the entire easement area, and the status of Venus Flytraps and Pitcher Plants is not sufficiently dire to qualify as "imperiled."[149]

The evidence showed that an American alligator, a federally threatened species at the time of the litigation,[150] frequented two golf course holes, but it was not clear whether these holes were covered by the easement.[151] Most species could not use the property as a travel corridor, much less as habitat.[152]

The court also considered soil quality and golf course maintenance practices. It noted that the quality of the soil differed from what is found in undeveloped areas.[153] In addition, there was widespread use of chemicals in maintaining the golf course, with no consideration of their environmental impacts,[154] and many of the trees and plants on the property were at risk of being removed.[155]

The owner contended that the 2005 easement qualified on the grounds of its contribution to the ecological viability of the Wetlands II area. The court rejected the argument, finding that the houses, concrete paths, lack of fruits and seeds for foraging, use of chemicals,

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[149] *Id*.

[150] The American alligator was delisted as an endangered species in 1987 but retains a threatened status because of its similarity in appearance to other crocodilians, which are endangered. *See* Endangered and Threatened Wildlife and Plants: Reclassification of the American Alligator to Threatened Due to Similarity of Appearance Throughout the Remainder of its Range, 52 Fed. Reg. 21059 (June 4, 1987).

[151] T.C.M. 2015-236 (2015) at 16.

[152] *Id*.

[153] *Id*.

[154] *Id*.

[155] *Id*.

and limited proximity to the Wetlands II area precluded qualification under the contribution provision of the regulations.[156]

The court considered, but did not decide, whether a golf course is inherently incompatible with the relatively natural habitat purpose.[157] The court, however, concluded that for these two courses, the easement did not satisfy the purpose.

D. PBBM-Rose Hill, Ltd v. Commissioner[158]

Another golf course was involved in this case. The conservation easement covered twenty-five of the twenty-seven holes that were largely interspersed among residences in a private gated community in Beaufort County, South Carolina.[159] Under the easement, the owner reserved the rights to maintain, operate, and alter the golf course; build twelve tennis courts; build a tennis pro shop; construct two houses; and install 6,000 square feet of parking areas.[160]

In a bench opinion, the tax court rejected the owner's argument that the easement protected all the conservation purposes except historic preservation. First, the court held that the reserved rights for non-golf course uses did not alone constitute a basis for disallowing the deduction because those rights did not impair a conservation purpose to any greater degree than the golf course.[161]

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[156] *Id.* at 17. The court also rejected the argument that the easement met the open space conservation purpose, noting that the development and golf course were part of a private gated community and there was no evidence that the public could see the properties. *Id.* at 18-19.
[157] *Id.* at 17.
[158] *PBBM-Rose Hill, Ltd. v. Comm'r*, No. 26096-14 (U.S.T.C., Sept. 9, 2016) (unpublished bench opinion).
[159] *Id.* at 4.
[160] *Id.* at 8.
[161] *Id.* at 9.

With respect to the relatively natural habitat purpose, the court found that the following testimony by the IRS's expert ecologist was credible and corroborated by other evidence in the record: (1) most of the property covered by the easement consists of the golf course;[162] (2) the golf course is dominated by non-native grasses, requires continued application of pesticides and fungicides, and is not conducive to wildlife;[163] (3) most of the bird species are "common backyard species;"[164] (4) the wood stork, a threatened species, forages on the property, but the property does not provide a suitable habitat for it;[165] (5) the American alligator lives on the property but is "a relatively unimportant species ecologically;"[166] (6) the quality of the ponds is similar to that of waterways in urban areas;[167]and (7) many of the trees are in isolated patches or thin strips, while other trees are outside of the easement area.[168]

For these reasons, the court concluded that there was no significant relatively natural habitat on the property.[169]

E. Champions Retreat Golf Founders, LLC v. Commissioner

This case involved a conservation easement on most of three golf courses (nine holes each) in a private gated community along the Savannah River in Georgia. The property subject to the easement

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[162] *Id.* at 15.
[163] *Id.*
[164] *Id.* at 14.
[165] *Id.* at 14-15.
[166] *Id.* at 15.
[167] *Id.*
[168] *Id.*
[169] On appeal, the Fifth Circuit held that the easement satisfied the first conservation purpose (outdoor recreation by the public) but affirmed the denial of the deduction for failure to comply with the proceeds requirement in the regulations. PBBM-Rose Hill, Ltd. v. Comm'r, 900 F.3d 193 (5th Cir. 2018). The relatively natural habitat purpose was not an issue on appeal.

consisted of approximately 348 acres. Across the river from the golf courses in South Carolina is the Sumter National Forest. The owner claimed a substantial deduction for the easement, relying on all of the conservation purposes except historic preservation. The tax court upheld the IRS's denial of the deduction,[170] but the Eleventh Circuit reversed.[171]

The easement included twenty-five holes in their entirety, most of the remaining two holes, and the driving range. It did not cover the parking lot, pro shop, restaurant, locker room, or any of residential lots, homes, cottages, and bungalows in the development.[172] More than 80%of the total acreage covered by the easement consisted of the golf courses.[173]

The owner reserved the rights to build additional structures up to an aggregate of 10,000 square feet; to remove trees for these structures; to pave and widen (by ten feet) existing roads; to use chemicals on the golf courses; and to maintain in "good and manicured condition" all parts of the courses, including the rough, lakes and ponds.[174] The easement required use of "the best environmental practices then prevailing in the golfing industry" and a 100-foot wide buffer on the lakes and ponds, and it prohibited construction of new roads, removal of surface water and groundwater, and subdivision of the property.[175]

The maintenance of the golf courses was meticulous and thorough, consisting of mowing the fairways every other day; pumping water from Little River, a tributary to the Savannah River that flowed

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[170] T.C. Memo 2018-146 (2018).
[171] 959 F.3d 1033 (11th Cir. 2020).
[172] T.C. Memo 2018-146 (2018) at 4.
[173] 959 F.3d at 1042 (Grant, J., concurring in part and dissenting in part).
[174] T.C. Memo 2018-146 (2018) at 3.
[175] *Id*.

through the easement area, to irrigate the courses; and the use of fungicides, herbicides, insecticides, and fertilizers.[176] The grasses on the fairways and greens were non-native.[177] Runoff from some of the holes drained directly into the creeks and ponds and into the undisturbed wetlands and forests.[178]

The tax court focused on eleven bird species of conservation concern that had been observed on the property by at least two of the three expert witnesses. The Partners for Flight ranked all eleven at the lowest or second lowest threat level; the Atlantic Coast Joint Venture ranked four as facing a moderate threat and one (brown-headed nuthatch) as facing a high threat; and the North American Bird Conservation Initiative listed only one as facing a moderate threat.[179] The U.S. Fish and Wildlife Service listed only the brown-headed nuthatch as a species of conservation concern.[180]

There were two other species of concern: southern fox squirrel and denseflower knotweed. The latter, an herb that favors wet conditions, was ranked by NatureServe at the lowest threat level on a global scale (5) but at the highest state level (1), although the state ranking was noted as uncertain.[181] The State of Georgia's Heritage Trust program ranked it at level 3, but again the ranking was noted as uncertain.[182]

The southern fox squirrel had a NatureServe global ranking of 5 and is not tracked by the State of Georgia. It is a game species in

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[176] *Id.* at 5-6.
[177] *Id.* at 5.
[178] *Id.* at 6.
[179] *Id.* at 4-5.
[180] *Id.* at 5.
[181] *Id.*
[182] *Id.*

Georgia and can be hunted during a six-month season, which allows a catch of up to twelve per day.[183]

The tax court held that "'[r]are, threatened and endangered,' which is undefined in the regulations, should not be limited to species listed under the [federal] Endangered Species Act," but there must be "a sufficient presence of rare, threatened and endangered species in the easement area to satisfy the conservation purpose requirement."[184] The court did not explain what a "sufficient presence" means.

The court emphasized that none of the eleven birds was on any list at the highest threat level.[185] In fact, the evidence showed only one rare, threatened or endangered species on the property—denseflower knotweed, and this species was found on only a 26-acre swath of bottomland forest, which comprised 7.5% of the total easement area.[186] It was possible that the plant existed in another swath of bottomland forest and if so, its total suitable habitat would be less than 17% of the property.[187] The tax court held that this was "not enough" to qualify as a relatively natural habitat.[188]

The tax court also addressed the same contributory role issue that was involved in *Atkinson.* The court held that the Sumter National Forest across the river from the property is a "national park" within the meaning of the regulations but that the easement property was not a "natural area" that contributed to the forest's ecological viability.[189] The fairways, greens, and tee boxes obviously were not natural, and the other sections of the property did not contain the "rich

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[183] *Id*.
[184] *Id*. at 8.
[185] *Id*. at 9.
[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] *Id*. at 10.

plant and animal diversity that generally characterizes" true natural areas.[190] Moreover, the court noted the lack of certainty that any of the species of concern could reach the national forest, which was across the river 700 feet away.[191]

The entire three-judge panel of the Eleventh Circuit agreed that the easement met the open space conservation purpose but was divided on the relatively natural habitat issue. The majority first addressed the meaning of "rare, threatened and endangered species" in the IRS regulations: "[These] terms distinguish species that reasonably warrant protection, on the one hand, from commonly occurring species for which the loss of habitat is not of significant concern. That the regulation explicitly says qualifying habitats are 'not limited to' the listed categories supports this flexible reading."[192] The majority then turned its attention to the species of concern on the property.

1. Birds

Three experts testified at the trial: two for Champions and one for the IRS. The tax court considered only the eleven species of birds that both of Champions' experts had observed on the property, but there were fourteen more species of concern that at least one of Champions' experts confirmed on the property, and some of those fourteen had also been seen by the IRS's expert. The majority held that the "Tax Court's implicit finding that the only birds on the property were those seen by both Champions experts is clearly erroneous."[193]

The majority listed all twenty-five bird species and their respective rankings on the lists compiled by Partners in Flight, the Atlantic

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[190] *Id*.
[191] *Id.* at 11.
[192] 959 F.3d at 1036.
[193] *Id.* at 1039.

Coast Joint Venture, the North American Bird Conservation Initiative, and the U.S. Fish and Wildlife Service. But it then noted:

> Of critical importance here, though, is not precisely which bird ranks precisely where on one or more of these lists, but the more general question whether the presence of these many species, including some of substantial conservation concern, shows that the property is a significant habitat for "rare, endangered, or threatened species." It plainly does.[194]

2. Southern fox squirrel

The majority determined that the golf course itself provides a "hospitable" habitat for the southern fox squirrel and that the species has suffered declines "caused by diminishing habitat, due in part to forest-management practices."[195] The fact that Georgia allows hunting of the species "hardly seems a reason to deny whatever protection is available under *federal* law. Protecting fox squirrels would not alone be sufficient to establish a conservation purpose, but they add to the weight on Champions' side of the scale."[196]

3. Denseflower knotweed

The majority rejected the tax court's application of a "sufficient area" test in determining that habitat for the denseflower knotweed was inadequate to meet the conservation purpose. It pointed out that this plant, "whatever its proportion, is worthy of protection. Full coverage of a species is not required and might even cut the other

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[194] *Id.* at 1037.
[195] *Id.* at 1038.
[196] *Id.* at 1038–39 (emphasis in original).

way; one might reasonably doubt that land consisting entirely of knotweed would provide a relatively natural habitat or would support the many bird species present on this land."[197]

The majority also dismissed the tax court's concern about chemicals running off the golf course into the bottomland forests where the denseflower knotweed is found. The relevant question, in the majority's view, is not whether chemicals may harm the plant, but whether the easement improves the chances of the species' preservation.[198] The majority determined that "[t]he answer is yes for two reasons: first, because the obligation to use best environmental practices would not exist without the easement; and second, because unrestrained development of the land where the knotweed is located would pose a greater risk than the golf course."[199]

The majority drew a distinction between land and habitat: "What matters under the Code and regulation is not so much whether all the *land* is natural, but whether the *habitat* is natural."[200] With this perspective, the majority concluded that the property, considered as a whole, provided a significant relatively natural habitat that was protected by the easement.

4. Dissenting Opinion

Judge Grant agreed that the easement met the open space conservation purpose and would have upheld the deduction solely on that basis, "spar[ing] ourselves the trouble of solving" the relatively natural habitat issue.[201] She conceded that the owner's argument on the

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[197] *Id.* at 1039.
[198] *Id.*
[199] *Id.*
[200] *Id.* at 1038 (emphasis in original).
[201] *Id.* at 1042 (Grant, J., concurring in part and dissenting in part).

prevalence of species using the property had "some force,"[202] but this was not enough:

> And no matter how many animals live on the Champions easement, the reality remains the same: with the chemicals, imported grasses, large fans, artificial drainage, and water pumping, it is not at all clear that the easement amounts to a 'relatively natural habitat.' I do not mean to say that a golf course could never qualify; it's simply not clear that this one does.[203]

F. Pine Mountain Preserve, LLLP v. Commissioner[204]

Three conservation easements were involved in this case. The 2005 easement, covering 559 acres, allowed the owner to build a single-family residence on each of ten one-acre lots within specified "building areas" but authorized, with approval of the easement holder (the North American Land Trust (NALT)), modifying the location of these areas as long as the total acreage did not change.[205] The easement also allowed other uses, including a barn, two scenic

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[202] *Id.*

[203] *Id.* The IRS reserved the right to challenge the easement on other grounds, including failure to comply with the inconsistent uses regulation and insufficient baseline documentation. Having determined that the easement did not protect a conservation purpose, the tax court did not address these issues. The Eleventh Circuit also did not address these issues and remanded the case to the tax court to determine the proper amount of the deduction. The IRS filed a motion requesting the Eleventh Circuit to include the inconsistent uses and baseline documentation issues within the scope of its remand. At the IRS's request, the motion was considered as a petition for panel rehearing. The motion was denied by order dated Oct. 28, 2020.

[204] 151 T.C. 247 (2018).

[205] *Id.* at 255.

overlooks, five ponds, fourteen piers and boat launches, and hunting blinds.[206]

The 2006 easement, covering 499 acres, allowed a single-family residence on each of six building areas but not specify their locations. The locations, when identified by the owner, required NALT's approval.[207] The 2006 easement allowed other uses similar to those permitted by the 2005 easement.

The 2007 easement, covering 225 acres, did not permit any structures except a water tower and utility lines.[208]

In all three easements, the landowner relied on the relatively natural habitat and open space conservation purposes.

Eleven judges of the tax court heard and decided the case. The court held that the reserved rights provisions disqualified the 2005 and 2006 easements from being "granted-in-perpetuity" within the meaning of Section 170(h)(2)(C) of the Code. In reaching this conclusion, the court relied on its decisions holding that provisions in easements that allowed for protected land to be swapped with unprotected land,[209] for exterior boundaries of the easement area to be changed,[210] and for building envelopes and interior boundaries of the easement area to be modified[211] ran afoul of the granted-in-perpetuity requirement. The Eleventh Circuit reversed, finding no violation of this requirement in any of the three easements.[212]

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[206] *Id.* at 256-57.
[207] *Id.* at 259.
[208] *Id.* at 260-61.
[209] Belk v. Comm'r, 140 T.C. 1 (2013) and T.C.M. 2013-154 (2013), *aff'd,* 704 F.3d 221 (4th Cir. 2014).
[210] Balsam Mountain Invs., LLC v. Comm'r, T.C.M. 2015-43 (2015).
[211] Bosque Canyon Ranch, L.P. v. Comm'r, T.C. Memo 2015-130 (2015), *vacated and remanded sub nom.,* 867 F.3d 547 (5th Cir. 2017).
[212] 978 F.3d 1200 (11th Cir. 2020).

Our focus here is on the protected-in-perpetuity requirement for relatively natural habitat. The tax court addressed that requirement only for the 2007 easement and found no evidence disputing the testimony of NALT's biologist regarding the quality of the habitat and open space on the property. Thus, the court found that both purposes were protected,[213] and that finding was not an issue on appeal.

The analysis of Tax Court Judge Morrison, in a lengthy dissent, is interesting and instructive. His view was that all three easements met the granted-in-perpetuity requirement and that the 2005 and 2007 easements met the protected-in-perpetuity requirement for both conservation purposes. But the 2006 easement, in his opinion, fell short of complying with the latter because there was no evidence on where the six reserved homesites would be located; not even a building area for the homes was indicated. For Judge Morrison, the "vague hope" that NALT would veto building sites harmful to conservation values was not sufficient to comply with the protected-in-perpetuity requirement.[214]

In remanding the question of whether the 2005 and 2006 easements satisfied one or both of the conservation purposes, the Eleventh Circuit emphasized the scope of its decision:

> Lest anyone worry that our interpretation of § 170(h)(2)(C) gives the Pine Mountains of the world a free pass, we make two observations in closing our discussion of the 2005 and 2006 easements. First, we have dealt only with § 170(h)(2)(C). Even after passing through the granted-in-perpetuity gateway, a conservation easement must still satisfy § 170(h)(5)(A)'s protected-in-perpetuity requirement; that, it seems to us, is likely where Congress envisioned the heavy lifting—

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[213] 151 T.C. at 280.
[214] 151 T.C. at 317 (Morrison, J., dissenting).

> the more rigorous analysis of the degree to which the grant protects conservation purposes—should occur. Second, recall that NALT has extensive advance-approval rights under these easement contracts. NALT is a sophisticated land-conservation organization, and we have little doubt that when it comes to negotiating conservation easements, it is well positioned and equipped to look after conservation interests.[215]

VI. IRS Private Letter Rulings

Private letter rulings issued by the IRS are not binding precedent,[216] but they do provide useful insights into the agency's consideration and interpretation of statutory and regulatory provisions. To date the IRS has issued twelve private letter rulings that directly involve the relatively natural habitat conservation purpose. In all of these rulings, the IRS determined that the conservation easement in

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[215] 978 F.3d at 1212 n.4. In *Carter v Commissioner*, T.C. Memo 2020-21 (2020), the easement in question, covering 500 acres, allowed the construction of a single-family residence on each of eleven "building areas" of no more than two acres. The locations of these areas were to be determined at a later date, subject to the land trust's approval. The owner relied on both the relatively natural habitat and open space conservation purposes. Citing *Pine Mountain*, the tax court held that the "to be determined" provision for the building areas violated the granted-in-perpetuity requirement. In doing so, the court made this astonishing statement about the protected-in-perpetuity requirement: "Moreover, *Pine Mountain* rests on the proposition that the building of single-family homes is antithetical to preservation of natural habitats and open spaces." T.C.M. 2020-21 at 21. Such a sweeping proposition, however, flies in the face of the Code, the IRS regulations, and the tax court's own precedent. The landowner appealed the tax court's decision to the Eleventh Circuit, and while the appeal was pending, the IRS conceded the granted-in-perpetuity requirement. As of October 2021, the parties were awaiting a ruling on the scope of the remand to the tax court. For a comprehensive critique of the IRS's multiple challenges to the perpetuity of conservation easements and tax court rulings upholding many of these challenges, see Jessica Jay, *Down the Rabbit Hole with the IRS' Challenge to Perpetual Conservation Easements, Part One*, 51 ENV'T L. REP. 10136 (2021) and *Part Two*, 51 ENV'T L. REP. 10239 (2021).

[216] 26 U.S.C. § 6110(k)(3) (private letter rulings cannot be used or cited as precedent unless a regulation allows such reliance).

question satisfied the requirements of the purpose. But this unanimity is misleading because the IRS typically contacts the taxpayer prior to issuing an adverse ruling to explain the result and give the taxpayer the opportunity to withdraw the request; most taxpayers do so and either modify or abandon the transaction.[217] The rulings are summarized in Appendix I to this Article.

VII. A Proposed Framework for Analysis: Finding A Way Through the Thorny Thicket

As Judge Grant noted in *Champions Retreat,* the proper scope of the relatively natural habitat purpose presents a "thorny" issue.[218] One major reason for the predicament is the courts' scattershot set of approaches to the inquiry. In this Part, a framework for addressing the issue for specific easements is proposed. Hopefully, this framework will provide some light and coherence to the subject.

In the Tax Code and many other statutes, Congress often establishes broad requirements but provides little or no guidance on their precise meanings. When regulations issued by agencies charged with the responsibility for implementing the law also lack helpful guidance, the courts are placed in the challenging position of interpreting and applying the requirements in specific cases. A recent example is *County of Maui v. Hawaii Wildlife Fund*, which involves the meaning of "discharge" under the federal Clean Water Act.[219] The county's wastewater facility collects sewage, partially treats it, and then uses wells to inject it into the ground. Most of this wastewater eventually makes its way through groundwater to the Pacific Ocean.

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[217] Personal communication with Cary Hall, tax attorney with Wyche, P.A. in Greenville, S.C.
[218] 959 F.3d at 1042 (Grant, J., concurring in part and dissenting in part).
[219] 140 S. Ct. 1462 (2020).

The Clean Water Act requires a permit to discharge pollutants from a point source into navigable waters.[220] The parties agreed that the effluent is a pollutant, the wells are point sources, and the Pacific Ocean is a navigable water but strongly disagreed on whether injecting the waste into the ground was a "discharge."[221] The county and the Solicitor General advocated for a narrow reading that focuses on the immediate origin of the pollutants into the ocean; that origin is the groundwater and thus the permitting requirement does not apply.[222] The Ninth Circuit agreed with the environmental organizations' broad interpretation—as long as the pollution is "fairly traceable" to a point source such as an injection well, the permitting requirement applies.[223]

The United States Supreme Court rejected both interpretations and adopted a functional equivalent standard: The permitting requirement is "applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling though groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters."[224] The Court noted seven factors that should be considered[225] and remanded the case to the Ninth Circuit to apply this functional equivalent standard to the case.

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[220] 33 U.S.C. § 1311.
[221] 140 S.Ct. at 1470.
[222] *Id.*
[223] *Id.*
[224] *Id.* at 1477.
[225] The factors are transit time; distance traveled; the nature of the material through which the pollutant travels; the extent to which the pollutant is diluted or chemically changed as it travels; the amount of pollutant entering navigable waters relative to the amount of the pollutant that leaves the point source; the manner by or area in which the pollutant enters navigable waters; and the degree to which the pollutant (at that point) has maintained its specific identity. *Id.* at 1476-77.

There are many other examples of the Supreme Court's use of multi-factor analyses in resolving cases that involve broad constitutional and statutory standards, such as probable cause,[226] regulatory takings,[227] due process,[228] issuance of permanent injunctions,[229] and the fair use defense in copyright law.[230]

A multi-factor approach would serve us well in grappling with the meaning of "significant relatively natural habitat" and its application to specific properties and easements. The factors discussed below fall into two basic categories: *Principal Factors*, which are based directly on the statutory and regulatory requirements of significance and relatively natural habitat, and *Secondary Factors*, which are relevant but should be considered only when serious questions still remain after an analysis of the *Principal Factors*.

A. Principal Factors

1. Quality, Diversity, and Habitat of Species

The first factor to assess is the quality, diversity, and habitat of the species on the property in question. This factor is critically important in determining whether the habitat is significant. There are

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[226] Florida v. Harris, 133 S. Ct. 1050, 1055-56 (2013) (lower courts must reject "rigid rules, bright-line tests, and mechanical inquiries in favor of a more flexible, all things considered approach").

[227] Penn Central Transp. Co. v. City of New Yor*k*, 438 U.S. 104 (1978) (establishing a three-factor test for determining whether a regulation "goes too far" and results in an unconstitutional taking of private property).

[228] Matthews v. Eldridge, 424 U.S. 319, 334 (1976) ("[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances") (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

[229] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (a four-factor test applies in determining whether to issue permanent injunctions).

[230] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (fair use defense is "not to be simplified with bright line rules").

different ways to make this assessment. At one end of the spectrum, the presence of any species, no matter how common, would qualify, and at the other end is a requirement for the presence of ESA-listed endangered species on the property. Close to the latter are the sufficiency tests adopted by the tax court in *Atkinson* and *Champions Retreat*, which require the species to be sufficiently imperiled and sufficiently present on a sufficient area of the property.[231]

In *Atkinson,* the court held that the presence of Venus flytrap, which at the time of the litigation had a NatureServe ranking of G3 (today it is ranked G2),[232] on 53 percent of the property was not significant enough to qualify the easement, suggesting instead that a species must be ranked as G1 or G2 to be sufficiently imperiled. A G1 "Critically Imperiled" ranking indicates that the species is at a "very high risk of extinction or elimination due to very restricted range, very few populations or occurrences, very steep declines, very severe threats, or other factors," while a G2 "Imperiled" ranking indicates that the species is at a "high risk of extinction or elimination due to restricted range, few populations or occurrences, steep declines, severe threats, or other factors."[233]

Relying on *Atkinson,* the tax court in *Champions Retreat* determined that the presence of denseflower knotweed, with a G5 global

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[231] *See* discussion at notes 134, 149 and 184-88 *supra.*

[232] In February, 2020, the Center for Biological Diversity filed suit against the Fish and Wildlife Service for failing to decide whether 241 plants and animals across the country, including Venus flytrap, should be protected under the Endangered Species Act. Center for Biological Diversity v. Bernhardt and Skipwith, Case No. 1: 20-cv-00573 (D.D.C. 2020). The case is still pending.

[233] NATURESERVE, DEFINITIONS OF NATURESERVE CONSERVATION STATUS RANKS, https://help.natureserve.org/biotics/content/record_management/Element_Files/Element_Tracking/ETRACK_Definitions_of_Heritage_Conservation_Status_Ranks.htm (last visited Sept. 16, 2021).

ranking and an uncertain S3 state ranking, on at most 17% of the property did not qualify.

The sufficiency tests adopted by the tax court in *Atkinson* and *Champions Retreat* are astonishing and troubling. Not only do the tests contravene the regulations, legislative history, and other decisions by the tax court itself, such as *Glass* and *Butler*, but they also undermine important conservation work by land trusts and property owners across the country. G1 and G2 species are certainly top priorities, but there are thousands of other species that also deserve attention and protection.

Fortunately, the Eleventh Circuit restored some order by reversing the tax court's highly restrictive approach in *Champions Retreat.* The reversal does not directly affect *Atkinson,* which is still on the books and arises from a different circuit. In fact, under the *Golsen* principle, the tax court can continue to apply *Atkinson* in all circuits except the Eleventh.[234]

Whether or not one agrees with the Eleventh Circuit's conclusion, its flexible approach is consistent with the IRS regulations, the legislative history, and the multi-factor analysis proposed here. The regulations include this provision almost verbatim from the legislative

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[234] The *Golsen* principle requires the tax court to follow a court of appeals decision only when the decision is "squarely on point" and appeal lies only to that court of appeals. Golsen v Comm'r, 56 T.C. 742, 757 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir. 1971), *cert. denied,* 404 U.S. 940 (1971). *Atkinson* was issued in memorandum form, and there is some case law indicating that memorandum decisions have limited precedential value. *See, e.g.,* Singer v. Comm'r, T.C.M. 2016-48 (2016) at 14 (memorandum opinions are "nonbinding precedent"). Yet the court in *Champions Retreat* did not hesitate to cite and rely heavily on *Atkinson*. Moreover, as a former tax court judge explains: "The official position of the Tax Court appears to be that, with respect to memorandum opinions, we are not bound by the doctrine of stare decisis. Yet, that position notwithstanding, Tax Court case law, for decades, has simultaneously affirmed a significant persuasive value for memorandum opinions." James S. Halpern, *What Has the U.S. Tax Court Been Doing? An Update,* TAX NOTES (May 30, 2016) at 1287.

history: "Significant habitats or ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animals, fish, or plants."[235] While rare, endangered, and threatened species are clearly of paramount importance, the phrase "include but not limited to" opens the door to deeming as "significant" the habitat of many less imperiled but still important species. But the next example of "significant habitats" in the regulations, also adopted from the legislative history, indicates that "but not limited to" has some limits: "natural areas that represent high-quality examples of a terrestrial community or aquatic community."[236] This principle was applied by the tax court in *Rose Hill* in holding that the habitat for "common" and "ecologically unimportant species" did not qualify.

The assessment of this factor should include carefully reviewing the species lists noted in Section IV of this Article and determining whether the property in question provides habitat for any of the species on these lists and if so, the number and ranking of those species. The greater the number and the higher the risk ranking, the more the scale will tip in favor of qualification.

Also relevant are critical habitat designations under the ESA, State Wildlife Action Plans, and other lists. If part or all of the property is included within the designation, this should tip the scale even further toward qualification.

2. Presence of Species

Another important factor is whether the species that the conservation easement purports to protect are actually found on the property. In *Glass* and *Butler,* such proof was not required; rather, expert testimony that the property provided a suitable habitat for the

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[235] Treas. Reg. § 1.170A-14(d)(3)(ii).
[236] *Id.*

species was sufficient.[237] But evidence that some or all of the species of concern actually use the property as habitat should weigh strongly in favor of qualification.

It seems prudent, therefore, to document in the baseline report the actual presence and extent of all species of interest on the property (including, at a minimum, any rare, threatened and endangered species), and to incorporate by reference this evidence in the easement itself.

If such documentation is beyond the capability of the land trust's staff, biological assessments of the property by qualified professionals should be seriously considered, and it is certainly reasonable to ask the landowner to pay for it. An alternative, which some land trusts use, is the "bio blitz" where volunteers, supervised by professionals, locate, and identify important flora and fauna on protected properties.[238]

3. Nature, Extent and Location of Existing and Permitted Uses and Activities

The term "relatively natural" indicates that some human uses, activities, and impacts are not disqualifying. As the IRS regulations confirm: "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."[239] This is followed by the example of a man-made pond or lake that became a "feeding area

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[237] *See* discussion at notes 83, 96-97 and 107-9 *supra.*

[238] *See, e.g.,* Lancaster Conservancy, Engaging Our Community, https://www.lancasterconservancy.org/engaging%20our%20community/ (last visited Sept. 16, 2021); Bear Yuba Land Trust, Bioblitz Field Trips, www.bylt.org/youth-programs/bioblitz/ (last visited Sept. 16, 2021).

[239] Treas. Reg. § 170A-14(d)(3)(i).

for a wildlife community that included rare, threatened or endangered native species."[240] This example indicates that even an intensive human impact, such as damming a stream, will not be disqualifying.

This policy is reflected in judicial decisions and IRS rulings. None of the private letter rulings (summarized in Appendix I to this Article) determined that the relatively natural habitat purpose would not be achieved because of the nature and extent of the reserved rights in the easement.

In *Glass,* neither the tax court nor the Sixth Circuit was persuaded that the reserved rights in each easement to build a shelter, storage shed, deck, patio, boathouse, and footpaths undermined the conservation purpose. In *Butler,* the court held that extensive reserved rights on both the 393-acre tract (agriculture, timber management, and eleven homes) and the two Kolomoki tracts (fifteen homes, guest homes, hunt club, lodge, private airstrip, and others) were not disqualifying. In *Champions Retreat,* the IRS's winning streak against golf course easements came to end, with the Eleventh Circuit's ruling that the habitat across the entire property—the golf course and the undeveloped portions—qualified as "relatively natural."[241] Not every golf course will qualify, as the *Rose Hill* decision confirms, but

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[240] *Id.*

[241] Kiva Dunes Conservation, LLC v. Comm'r, T.C.M. 2009-145 (2009), involved a public golf course and surrounding sand dunes, scrub oaks, hammocks, and natural wetlands and lakes on the Fort Morgan Peninsula in Alabama in close proximity to a national wildlife refuge. The property provided confirmed or suitable habitat for over 200 species, including a federally endangered mouse. In addition, many neotropical birds used the property as "stopover habitat" on their migration from North America to South America. The IRS conceded that the easement protected a significant relatively natural habitat. The concession received much attention and publicity and was a major reason that golf course owners became interested in conservation easements.

the Eleventh Circuit's decision now gives golf course owners a fighting chance.[242]

The *Pine Mountain* case continues its journey through the courts and merits close attention. As previously noted, the Eleventh Circuit remanded the case to the tax court to do "the heavy lifting"[243] of deciding whether the easements satisfy the relatively natural habitat and/or open space purposes. While we await the tax court's decision and the outcome of a potential appeal of that decision to the Eleventh Circuit, it behooves landowners and land trusts to proceed with great caution in addressing the issue of reserved rights for building areas in conservation easements. Options recommended by the Land Trust Alliance include the exclusion of building areas from the easement (or having them subject to a non-deductible easement); fixed sites that are not subject to change; alternative building areas where after one is selected, the others are extinguished; and clustering building sites in one area of the property.[244]

This factor should assess the specificity of the easement's controls and restrictions on both existing and future uses. With respect to the latter, for easements that clearly identify areas on the property where reserved rights can be exercised, especially where new buildings can be constructed, it will be easier to determine the impacts, if any, on habitat and other conservation values.[245]

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[242] Some golf course owners are making commendable efforts to reduce the negative environmental impacts of their operations. *See, e.g.*, Linda K. Breggin, *Initiatives Tee Up Sustainability on Golf Courses Throughout the Country,* 37 ENV'T F. 11 (January/February 2020).

[243] 978 F.3d at 1212 n.4.

[244] LAND TR. ALL. CONSERVATION DEFENSE INITIATIVE, POINTERS FOR BALANCING RISK ON CONSERVATION EASEMENT PERMITTED STRUCTURES FOLLOWING THE FULL TAX COURT DECISION IN *PINE MOUNTAIN RESERVE V. COMMISSIONER* (2019).

[245] The tax court has relied on the lack of specificity for building areas in determining that easements did not meet the granted-in-perpetuity requirement. *See, e.g.*, Belk v. Comm'r, 140 T.C. 1 (2013) and T.C.M. 2013-154 (2013), *aff'd,* 774 F.3d 221

B. Secondary Factors

Consideration of the *Principal Factors* may resolve the issue. For example, a conservation easement that protects the habitat of several federally endangered species on an undeveloped property and allows no structures or disturbances would clearly qualify. Thus, there would be no reason to extend the inquiry and consider the *Secondary Factors*. But where there is doubt (for example, the property already has substantial development and there is abundant wildlife but no species is on the endangered, threatened, or "species of greatest conservation need" lists), it would be appropriate to consider the following factors:

1. Size of Property

In *Glass,* the court rejected the IRS's argument that the small size of the protected property (a little more than an acre) was automatically disqualifying.[246] Size, however, is a relevant factor that can and should be considered.

2. Nature of Surrounding Property

Glass also determined that protection of the property surrounding the tract in question is not a prerequisite to qualification. But the nature of the surrounding properties—size, condition, conservation

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(4th Cir. 2014) (disqualifying easement that allowed substitution of unprotected land for equal or lesser amounts of protected land); Balsam Mountain Invs., LLC v. Comm'r, T.C.M. 2015-43 (2015) (disqualifying easement that allowed limited adjustment of external boundary of protected property). There is every reason to believe that an easement's lack of specificity for building areas will present similar challenges to landowners seeking to show compliance with the protected-in-perpetuity requirement. Judge Morrison's dissenting opinion in *Pine Mountain*, *see* discussion at note 214 *supra*, may well be a sneak preview of how many tax court judges will evaluate the issue.

[246] *See* discussion at notes 76-77 *supra.*

values, and the extent of protection, if any, of those values—is certainly a relevant factor.

3. Extent of Land Trust's Authority Over Exercise of Reserved Rights

A provision found in many conservation easements is the land trust's authority over the exercise of some or all of the property owner's reserved rights. For example, the land trust may have the authority to review and approve the exercise of a right to ensure that it will not impair, or be inconsistent with, conservation purposes and values. Such authority can include imposing certain conditions on the exercise of the right in order to reduce or eliminate adverse impacts. In *Glass* and *Butler,* this authority was an important factor in determining that the easement would ensure perpetual protection of the property's habitat.[247] Thus, the extent to which the easement in question gives the land trust authority over the exercise of reserved rights is a factor that should be considered.

C. Summary

With *County of Maui* and other multi-factor analyses as our guides, we can put all of these factors (and perhaps others) into the mix, review them carefully, and apply them to the specific property and easement in question. No one factor will be conclusive, the analysis will be difficult in many cases, and the final decision may be controversial. But the goal here is not elimination of the thorns, but a thoughtful way to navigate through them.

In cases where both parties present substantial evidence and much of it is in conflict (such as differing opinions from experts), the burden-shifting provision of Section 7491 of the Code would be a

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[247] *See* discussion at notes 79 and 101 *supra.*

useful way to resolve the dispute. This section provides that where the taxpayer introduces credible evidence on any factual issue relating to a tax liability, the IRS will have the burden of proof.[248] Thus, where the landowner produces credible evidence on any or all of the factors, the burden can be shifted to the IRS as a way to assist the court in deciding the case.

VIII. The Inholding or Contributing Property

As previously noted, the IRS regulations on the relatively natural habitat conservation purpose essentially establish a different purpose—allowing a property to qualify if it is a "natural area" and either (a) is located within a park, preserve, wildlife refuge, wilderness area, or similar conservation area or (b) contributes to the ecological viability of such a place. Notably, there is no reference to the quality of the habitat on the property itself. A property that is a "natural area" can qualify because of its status as an inholding within an area that is already protected or because it contributes to the ecological viability thereof; the quality of its habitat is not determinative.

This provision was addressed in both *Champions Retreat* and *Atkinson,* where the tax court held that the golf courses did not qualify as "natural areas" within the meaning of the regulations. The Eleventh Circuit affirmed this ruling in *Champions Retreat*, stating:

> Champions asserts the easement "contributes to…the ecological viability" of the forest—an assertion that, if true, would show a conservation purpose…
>
> The presence of the national forest across the river is relevant—it supports the species that live on the

[248] In *Butler v. Commissioner,* while not citing Section 7491, the tax court shifted the burden to the IRS on the issue of whether the easement protected the conservation purpose in perpetuity. *See* discussion at notes 100-1 and 110 *supra.*

> easement, as the Commissioner's expert acknowledges, and it contributes to the scenic enjoyment from, and public interest in, preventing development of the easement property. But contributing to the ecological viability of the forest, standing alone, does not establish a conservation purpose.[249]

This part of the opinion is confusing. First, it is not correct that contributing to the ecological viability of the forest would itself establish a conservation purpose because the owner must also show that the contributing area is "natural." Perhaps the last sentence of the quoted section—such a contribution, standing alone, does not establish a purpose—essentially represents a correction of the error in the preceding paragraph.

There are several private letter rulings determining that easements on operating ranches located within or next to national parks and forests qualified under the regulations.[250] This indicates a broad interpretation of "natural area" and is consistent with the Greenacre/Farmacre example considered by the tax court in *Atkinson*.[251]

The lack of statutory and regulatory definitions of "relatively natural" and "natural areas" makes it difficult to clearly understand and apply these important terms. It is reasonable to assume that an area that is "natural" is less developed and less affected by human impacts than an area that is "relatively natural." A property with limited development, such as the tracts involved in *Glass* and *Butler*, can certainly provide a "relatively natural habitat" for fish, wildlife, and plants. But it seems a stretch to describe those tracts as well as the operating ranches involved in the private letter rulings as truly

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[249] *Id*. at 1039-40.
[250] *See* PLR 9420008 (1996), PLR 9318017 (1993), PLR 8810009 (1987), PLR 8721017 (1987), PLR 86300056 (1986), and PLR 8302085 (1982), summarized in Appendix I.
[251] *See* discussion at notes 138-40 *supra.*

"natural areas." To clarify its intent, the IRS should amend the regulations to read "relatively natural areas."

IX. Climate Change and the Relatively Natural Habitat Purpose

None of the conservation purposes of the Code is more imperiled by climate change than the protection of relatively natural habitat. Climate change impacts have already destroyed or degraded habitats that once would have qualified as "relatively natural," and sadly, this outcome is likely to continue at accelerated rates in the years ahead.[252] In fact, because of climate change, there is probably no purely natural spot left on the planet.[253] Every habitat is now at best "relatively natural."

How do land trusts and property owners protect relatively natural habitat in the face of this massive challenge? There are many difficult questions for land trusts to consider, including:

What are the specific impacts and threats of climate change in the area where the land trust works? Obviously, a land trust working in a coastal area will answer this question much differently than a land trust focused on mountain properties.

Should the land trust give high priority to lands and habitats directly affected by climate change or should the focus be on less vulnerable and more resilient lands?[254] For example, if a low-lying salt

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[252] *See generally* Sarah Weiskopf et al., *Climate Change Effects on Biodiversity, Ecosystems, Ecosystem Services, and Natural Resource Management in the United States*, 733 SCI. TOTAL ENV'T 137782 (2020). The article begins with this statement: "Climate change is a pervasive and growing global threat to biodiversity and ecosystems."

[253] GORDON STEINHOFF, NATURALNESS AND BIODIVERSITY: POLICY AND PHILOSOPHY OF CONSERVING NATURAL AREAS (2016) at 64-65.

[254] Both The Nature Conservancy and The Open Space Institute have identified resilient lands in the United States that are less vulnerable to climate change impacts. CONSERVATION GATEWAY, RESILIENT AND CONNECTED LANDSCAPES,

marsh is likely to be completely inundated by sea level rise within the next 100 years, does it make sense to try to protect it? Another example where protection might make more sense is a property with significant elevation change that can accommodate climate-caused shifts in plant and animal habitats.

A parcel-by-parcel approach to addressing climate change can be an exercise in futility. Thus, should the land trust initiate or join partnerships with government agencies and other land trusts for establishing and protecting extensive conservation areas that can accommodate changes in habitat?

Should the conservation easement require the landowner to implement specific adaptation and mitigation measures to protect the property's habitat? Easements are typically "negative," that is, they prohibit or restrict certain uses and activities on the property, while "affirmative" easements which require the landowner to do certain things on the property are unusual. Thus, landowners may resist, or refuse to agree to, affirmative adaptation and mitigation provisions. If so, should the land trust itself seek the authority to implement these measures at its own expense?

Should the conservation easement itself expressly recognize and acknowledge climate change, its threats and impacts and state that one of the purposes of the easement is to address it through carbon sequestration?

Should the conservation easement make it clear that even if the property's habitat is destroyed or severely degraded, the intent of the parties is not to terminate the easement as long as one or more

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https://www.conservationgateway.org/ConservationByGeography/NorthAmerica/UnitedStates/edc/reportsdata/terrestrial/resilience/Pages/default.aspx (last visited Sept. 16, 2021); OPEN SPACE INSTITUTE, RESILIENT LANDSCAPES FUNDS, https://www.openspaceinstitute.org/funds/resilient-landscapes-funds (last visited Sept. 16, 2021).

other conservation purposes are protected? These purposes are not necessarily limited to the statutory ones but can include "other significant conservation interests," such as carbon sequestration.[255] The IRS regulations allow conservation easements to be terminated with judicial approval where "a subsequent unexpected change" makes it "impossible or impractical" to achieve the conservation purpose(s).[256] A provision making clear that the basic goal of the easement is to protect not only habitat but also other significant conservation interests will make termination difficult. In short, termination of the easement should be the last resort.

How should land trusts handle existing easements? Older easements may not even mention climate change.[257] Should land trusts make a serious effort to amend their prior easements to address it? This may be a difficult task for at least three reasons: reluctance or refusal by landowners to change the easements, potential state law challenges, and the IRS's stringent policies on amendments.[258]

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[255] The IRS regulations provide that with one exception, "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." Treas. Reg. § 1.170A-14(e)(2). The exception allows a use that is destructive of other significant conservation interests "only if such use is necessary for the protection of the conservation interests that are the subject of the contribution." Treas. Reg. § 1.170A-14(e)(3).

[256] Treas. Reg. § 1.170A-14(g)(6)(i).

[257] Neither the Code nor the IRS regulations, promulgated in 1986, mention climate change. Hopefully, the agency will amend its regulations in the near future to address the issue.

[258] In litigation before the tax court and courts of appeal, the IRS has argued that a provision in a conservation easement that allows the easement to be amended is, in and of itself, fatal to Section 170(h) deductibility. The courts have consistently rejected this argument. *See, e.g.*, Pine Mountain Preserve, LLLP v. Comm'r, 978 F.3d 1200, 1209 (11th Cir. 2019) ("If the possibility of amendment were a deal-killer, then there could be no such thing as a tax-deductible conservation easement."); BC Ranch II, L.P. v. Comm'r, 867 F.3d 547, 553 (5th Cir. 2017) ("The need for flexibility to address changing or unforeseen conditions on or under property subject to a conservation easement clearly benefits all parties, and ultimately the flora and

The goal here is merely to point out some of the questions that land trusts and property owners must consider in addressing the impacts of climate change on the protection of significant relatively natural habitats. Fortunately, the Land Trust Alliance is willing and able to assist in finding the answers in specific cases.[259]

X. Conclusion

It is remarkable that the four conservation purposes in the Internal Revenue Code have remained unchanged for over forty years. In 2003, the *Washington Post* published a series of articles revealing

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fauna that are their true beneficiaries."). In 2020, the Associate Chief Counsel of the IRS softened the agency's position and stated in a guidance memorandum that "[t]he fact that a conservation easement includes an amendment clause does not necessarily cause the easement to fail to satisfy the requirements of section 170(h)." Memorandum from John Moriarty, Associate Chief Counsel, IRS Office of Chief Counsel, to James C. Fee, Jr., Senior Lead Counsel, and Robert W. Dillard, Area Counsel 1 (March 27, 2020) (Memorandum No. AM 2020-001). The memorandum recommends a case-by-case evaluation of the easement and the surrounding facts and circumstances but then offers a "safe harbor" amendment provision that would comply with Section 170(h). The provision must meet all seven conditions set forth in the memorandum. An amendment aimed at reducing or avoiding climate change impacts on the property, however, may run afoul of one or more of these conditions, depending on the specific measures under consideration. The memorandum states that it "should not be used or cited as precedent." *See also* LAND TR. ALL., PRACTICE NO. 11H, STANDARDS AND PRACTICES (2017), http://s3.amazonaws.com/landtrustalliance.org/LandTrustStandardsandPractices.pdf.

[259] LAND TR. ALL., CLIMATE CHANGE, https://www.landtrustalliance.org/topics/climate-change (last visited Sept. 16, 2021). Scholars and practitioners are devoting increasing attention to the subject. *See, e.g.*, Jessica Owley, Federico Cheever, Adena Rissman, Rebecca Shaw, Barton H. Thompson & William Weeks, *Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies, and Tools*, 95 DENV. L. REV. 727 (2018); COLLIN MILLS, HOW BEST TO ADDRESS CLIMATE CHANGE IN CONSERVATION EASEMENTS: A PUBLIC AGENCY PERSPECTIVE (2019), https://www.calandtrusts.org/wp-content/uploads/2019/03/Conservation-Easements-and-Climate-Change-Presentation-Colin.pdf.

serious abuses of the tax incentives for conservation easements.[260] This was soon followed by demands for the reduction or even elimination of the tax incentives[261] and for other changes,[262] and conservation advocates feared that those demands would become a reality. But Congress' response was to make the incentives even better.[263] This reflects a strong and unwavering commitment by Congress to the continued use of tax incentives to protect the nation's natural, scenic, and historic resources through conservation easements. Also notable is Congress' recent enactment of the Great Outdoors Act, which provides full and dedicated funding for the Land and Water Conservation Fund ($900 million per year) to protect important land, water and recreation areas across the country.[264] The bill passed the House by a vote of 310-107 and the Senate by a vote of 73-25, a remarkable and rare bipartisan achievement.

A key element of this Congressional commitment to conservation remains the relatively natural habitat conservation purpose. Not every property will qualify for the deduction, but as the legislative history, regulations, private letter rulings and most of the court decisions make clear, this purpose has a broad scope and should be liberally construed in favor of qualification. Such an interpretation will enable landowners and land trusts to continue their vital work

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[260] *See, e.g.*, Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss*, WASH. POST, May 6, 2003, at p. A1; David B. Ottaway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, WASH. POST, May 4, 2003, at p. A1.

[261] *See, e.g.,* Halperin, *supra* note 25; Burke, *supra* note 77.

[262] *See, e.g.*, JOINT COMMITTEE ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES (Jan. 27, 2005), https://www.jct.gov/CMSPages/GetFile.aspx?guid=0c8c7d1a-35d9-4590-b608-c65180ef5dd9.

[263] H.R. 2029, Division Q, Section 111 (Dec. 2015). The Land Trust Alliance's outstanding advocacy campaign to maintain and expand the tax incentives deserves much of the credit for this remarkable legislative achievement.

[264] H.R.1957- Great American Outdoors Act, 116th Congress (2019-2020).

in protecting important properties and habitats across the United States. With species vanishing at unprecedented rates,[265] this work has never been more important.

[265] The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services report, *Global Assessment of Biodiversity and Ecosystem Services* (2019), revealed that up to one million animal and plant species are on the brink of extinction and that species and habitats are vanishing at a rate never before seen in human history. *See also* ELIZABETH KOLBERT, THE SIXTH EXTINCTION: AN UNNATURAL HISTORY (2014); Rodolfo Dirzo, Frank Hawkins, William Magnusson & Patrick Parenteau, The Debate, *Global Biodiversity Is Falling Fast, Imperiling Humanity. Can Better Policy Avert a Collapse?*, 36 ENV'T F. 52 (May-June 2019) ("Remarkably, about 96 percent of the total mammalian biomass on Earth is now humans and domestic mammals, and 75 percent of the total bird biomass is domestic fowl. It is truly the age of the Anthropocene"); Sara Barker, *3 Billion Birds Gone*, SAVING LAND 22 (Spring 2020) (reporting on research showing a net population loss of three billion birds in the continental United States and Canada).

APPENDIX I: Summary of IRS Private Letter Rulings on the Relatively Natural Habitat Conservation Purpose

PLR 200836014 (2008)

This property contains extensive and diverse habitats, including saltwater and brackish-water marshes, maritime forests, upland pines, and hardwoods. The property is home to a significant concentration of endangered birds and lies within a "core area" for protection under the state's Conservation Vision. The easement allows forest management, agriculture, and the construction of an undisclosed number of residential and agricultural structures, provided that none of these uses and activities adversely impacts the conservation values of the property. The easement prohibits any subdivision of the property and imposes limits on the amount and location of impervious surfaces. The easement qualifies under both the relatively natural habitat and preservation of open space purposes.

PLR 200403044 (2004)

This property consists of agricultural fields, wooded areas, and freshwater wetlands and has seven "different habitat types" and frontage along one of the major rivers in the state. The property provides "actual habitat for numerous plants and animal species, including a State-listed species of concern" and potential habitat for several endangered, threatened, and rare species.

The easement allows the subdivision of the property and the construction of single-family residences on specified "building areas," with the land trust having the authority to approve the design and location of the residences. Alternatively, the owner can construct a hunting lodge and related cabins and structures on any of the building areas in the southern part of the property. The ruling does not disclose the number of residences that can be built but states that the

reserved rights "are not so significant as to impact the habitat purposes" of the easement.

The ruling, which is cited in the *Glass* decision,[266] determines that the easement meets the requirements of the relatively natural habitat purpose.

PLR 200208019 (2002)

This property is a former racehorse training facility, one of the largest tracts under single ownership in the county, and the site of a Revolutionary War battle site. The property provides habitat for eight species of plants listed by state and/or federal authorities as threatened or endangered.

The conservation easement permits the construction of eight single-family residences and two ancillary structures; a barn and riding ring for each residence; and keeping a certain number of grazing animals for each residence. These reserved rights "are not so significant as to impact the endangered or threatened species on the property." Over 80% of the property will remain in its presently undeveloped state.

The ruling determines that the easement "qualifies as a donation for the protection of an environmental system under section 170(h)(4)(A)(ii), the second of the four enumerated tests. Because of this, the remaining three tests will not be considered."

PLR 9632003 (1996)

This property is a ranch in the western United States that provides habitat for a wide variety of species, including two globally rare plants, bear, elk, cougar, moose, mule deer, game birds, and songbirds. In addition, the property is a source of prey for some

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[266] 471 F.3d at 709.

endangered raptors and provides more than five miles of riparian habitat.

The conservation easement reserves, among other things, the right to continue existing ranching and agricultural activities; to operate and maintain the ranch compound (which includes a lodge and corporate offices); to maintain and expand (by up to 150%) the existing buildings; and to construct one additional residence and associated improvements in a specified building envelope without the land trust's approval or in another area with such approval. All permitted activities must not be incompatible with protection of the conservation values of the property. Mineral rights were retained by a previous owner, but a report from an experienced geologist states that the probability of surface mining on the property is "so remote as to be negligible" (the regulatory standard).

The ruling determines that the easement meets both the relatively natural habitat and preservation of open space purposes.

PLR 9420008 (1996)

This property adjoins a national forest and provides habitat for many species of plants and animals, including the chorus frog and goshawk "that are being monitored by the State Division of Wildlife Management as potential additions to the endangered and threatened species list." In addition, deer and elk depend on the property as a migration corridor, and the county has designated the property as "elk production habitat and critical habitat area." The governing body of the county passed a resolution in support of the conservation easement.

The easement allows the maintenance and replacement of existing structures; the growing and harvesting of hay and other agricultural products; and limited forestry activities, but new structures of any kind and commercial harvesting of timber are prohibited.

The ruling determines: "The property is a relatively undisturbed natural habitat for many species of plants and animals, including potentially endangered or threatened species, and represents a high-quality terrestrial community. In addition, the proposed transaction would contribute to the ecological viability of the National Forest immediately adjacent to the property."

PLR 9537018 (1995)

This property is in the center of a tract that adjoins a national forest. The surrounding property, also owned by the taxpayer, is managed as timberland and may be subject to a similar easement at a later date. The property subject to the easement provides habitat for elk, moose, deer, and turkey and "to a lesser extent" for many other species, including wolverine, cougar, black bear, grouse, badger, lynx, bobcat, goose, duck, heron, osprey, hawk, pileated woodpecker, northern goshawk, and bald eagle. The bald eagle is federally endangered, while the wolverine and northern goshawk are "species of concern." There are numerous lakes, ponds, and wetlands on the property, and one of the lakes may provide habitat for the westslope cutthroat trout, another species of concern. The property is located within a management zone designated by the National Forest Service as essential for yearlong game habitat.

The conservation easement allows the owner to maintain the two existing residential structures; to construct five additional residential structures and additional outbuildings subject to certain maximum sizes; to graze and pasture horses, cattle, and mules in field areas; to grow and harvest field crops; to harvest timber in accordance with specific restrictions; to use agricultural chemicals "in a limited manner;" and to use biological weed and insect control agents. The easement prohibits logging within seventy-five feet of all wetlands, lakes, streams, and bird of prey nesting sites; imposes specific limits

on the number and size of clearcuts; and requires adherence to best management practices. In addition, the easement requires the elimination of uncontrolled cattle grazing by confining the herd to fenced pasture areas by a specific deadline; the seeding of logging roads and other areas; preserving one area as a winter range for wildlife; the planting of grains near the lakes to attract waterfowl; and establishing "an old growth unit" of 150 acres that will not be subject to any logging. The dislocation of wildlife resulting from the uses and activities permitted by the easement "generally will be temporary."

The ruling determines that "the contribution is made for the conservation purpose of protecting a relatively natural habitat under section 170(h)(4)(A)(ii) of the regulation."

PLR 9318017 (1993)

This property adjoins a state park and provides habitat for a variety of wildlife, including brook trout, a fish rarely found in the state and the state's only native trout species, and Indian paintbrush, a plant of "special concern" in the state. Two state officials indicate that the conservation easement will contribute to the ecological viability of the park. The easement is highly restrictive, prohibiting any agricultural or commercial activity, new or widened roads, alteration of the topography, and disruption of tidal or other waters. In addition, based on the ruling's summary of the easement, it appears that no residential use or subdividing of the property is allowed. The ruling relies on the easement's contribution to the ecological viability of the adjoining state park as the basis for qualification.

PLR 9218071 (1992)

This property is a 500-acre tract of coastal land with extensive marshes and ponds that provide habitat for a wide variety of plants and animals, including wood stork, a federally endangered species.

This ruling involves a perpetual restrictive covenant rather than a conservation easement. The covenant does not apply to several small tracts which can be used for residential purposes. The ruling does not identify the location of these tracts, but presumably they adjoin or are close to the property.

The covenant allows the continued operation of the existing farm but prohibits, among other things, the building of any new structures; the building of new roads or the widening of existing ones; changing the topography in any way; and the alteration of any natural water course. The covenant qualifies because it protects a significant relatively natural habitat for the wood stork.

PLR 8810009 (1987)

This property is a ranch located in a valley that is within the boundaries of a national park. The valley, once a refuge for bear, beaver, and wolves, "has since become a center for moose and a junction for the gathering of elk as well as numerous other game animals and species of birds, including some species of rare and endangered wildlife." The National Park Service has identified the ranch as an integral part of the park due to its significant wildlife habitat and outstanding natural, scenic, and recreational values.

The easement reserves the right to continue operating and maintaining the ranch but prohibits any use or activity that "will be destructive of any significant conservation interest."

The ruling determines that the easement qualifies because it "would make a substantial contribution to the ecological viability of [the park]."

PLR 8721017 (1987)

This property is a private ranch located at the end of a high mountain valley, over 75% of which is publicly owned. Less than

two miles from the ranch is a federal refuge, which was established in 1935 to protect the trumpeter swan and today provides habitat for a variety of other wildlife, including moose, elk, deer, pronghorn antelope, sandhill cranes, herons, willets, avocets, long-billed curlews, and ducks. A large portion of the refuge is designated as a wilderness area. A creek that flows through the ranch supplies water to the refuge. The director of the refuge considers the protection of the ranch essential to preserving the refuge's ecosystem. The ranch itself provides habitat for the bald eagle, peregrine falcon, and grizzly bear, all of which are federally endangered species, and also for many of the species found on the refuge. The ranch is also part of the greater ecosystem of a national park. Protection of the ranch would "contribute to the ecological viability of the entire Greater Park ecosystem."

The conservation easement allows the ranch to continue operating as "a viable, economic unit," but subject to "certain explicit exceptions," the easement prohibits, among other things, subdividing the property, altering or impairing "the natural ecological values of the property," surface mining, and significantly depleting the topsoil. The ruling does not explain the "certain explicit exceptions."

The ruling determines: "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 [designated primitive] Area, and is within the Park ecosystem, thus meeting the descriptions of section 1.170A-14(d)(3)(ii)."

PLR 8630056 (1986)

This property is in a valley that includes a national park, an elk refuge, and elk feeding grounds. The property provides habitat for a

diversity of wildlife, including the bald eagle, osprey, great blue heron, wintering moose, trumpeter swan, and cutthroat trout.

The easement "confines the future use of the property to agricultural use, preservation of wildlife habitat, and open space, and provides limitations on residential and other uses to prevent any significant injury to or the destruction of a significant conservation interest." On some sections of the property there are mineral interests owned by the United States that allow the strip mining of coal, but the probability of surface mining occurring on the property is so remote as to be negligible.

The ruling determines that the property "contains an abundance of undisturbed and relatively natural riparian wildlife habitat which contributes to the ecological viability of the National Park and other nearby federal and state lands." The easement also qualifies under the preservation of open space conservation purpose.

PLR 8302085 (1983)

This property is a cattle ranch within the boundaries of a national forest and adjoins the publicly owned lands of the forest. In addition, the property has over three miles of frontage on a major river. Within a sixty-mile radius of the national forest is the "greatest diversity of wild animals in the United States," including mule deer, antelope, moose, elk, bear, mink, badger, fox, coyote, beaver, and muskrat. All of these animals are found on the property at one time or another during the year.

The easement prohibits any subdivision of the property; any commercial or industrial uses except farming; and any buildings or other improvements except as necessary for farming purposes. Mineral rights are reserved but must be exercised in a way that results in only a "limited localized impact" and in "no permanent destruction of significant conservation interests."

The ruling determines that the property "is a natural area included in and contributing to the ecological viability of [the national forest]."[267]

[267] There are other private letter rulings as well as some revenue rulings that do not directly involve the relatively natural habitat purpose but may have some relevance because they consider the types of lands, habitats and other natural resources whose protection qualifies an organization for tax-exempt authorization under Section 501(c)(3) of the Code. *See* PLR 201234029 (2012); PLR 201109030 (2011); PLR 201048045 (2010); PLR 201044026 (2010); Revenue Ruling 78-384, 1978-2 C.B. 174 (1976); Revenue Ruling 76-204, 1976-1 C.B. 152 (1976); Revenue Ruling 70-186, 1970-1 C.B. 129 (1970); Revenue Ruling 67-292 (1967).