

No. 06-1398

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES F. GLASS, SUSAN GLASS,

Petitioners-Appellees

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

REPLY BRIEF FOR THE APPELLANT

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This reply brief is directed only toward those contentions in taxpayers' answering brief and the brief *amici curiae* of the Little Traverse Conservancy and the Land Trust Alliance that we believe warrant a further response. In all other respects, we rely upon our opening brief.

INTRODUCTION

In our opening brief, we argued that the Tax Court erred in concluding that the conservation easements here at issue were exclusively for the protection of a relatively natural habitat of plants or wildlife, *see* I.R.C. § 170(h)(4)(A)(ii), such that taxpayers were entitled to tax deductions under I.R.C. § 170(f)(3)(B)(iii) and (h). The easements do not serve to protect and preserve in a natural state the encumbered areas. They are riddled with exceptions permitting inconsistent uses that would damage the habitat they purport to protect. Their small size, combined with taxpayers' retained right to develop houses on the abutting property and outbuildings within the easements themselves, also renders them ineffective to protect any significant relatively natural habitat. The Tax Court disregarded these considerations, focusing instead on whether the encumbered area contained a habitat, and whether the easements were perpetual. The decision thus effectively reads out of the statute what may be its most central requirement: that a conservation easement must actually serve to protect and preserve any habitat it may contain.

Taxpayers defend the Tax Court decision by maintaining that the encumbered areas contained significant habitats, and would remain

encumbered in perpetuity. They argue that the small size of the easements, and their right to develop the abutting property, are irrelevant to whether the easements qualify under the statute. And they contend that their retained rights to use and develop the encumbered areas do not undermine the purpose of the easements. Taxpayers are seconded in their defense of the decision by the Little Traverse Conservancy (LTC) and the Land Trust Alliance as *amici curiae*, which echo taxpayers' arguments and suggest that the LTC's decision to accept the easements is sufficient, in and of itself, to establish their conservation purpose. As we shall show, the arguments made by taxpayers and the *amici* fail to establish that taxpayers qualified for deductions under I.R.C. § 170(f)(3)(B)(iii) or (h).

1. Taxpayers fail to establish that the Tax Court's decision did not read the term "significant" out of the law

In our opening brief, we explained (pp. 39-41) that, for an easement to have a conservation purpose under I.R.C. § 170(h)(4)(A)(ii), the habitat to be protected must be "significant." *See* Treas. Reg. (26 C.F.R.) § 1.170A-14(d)(ii)(3)(i) ("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.”) Accordingly, we explained, the Tax Court erred when it read the statute “to mean that the protection of a relatively natural habitat of wildlife or plants, in and of itself, is a significant conservation purpose” (R.53 Opinion at 39 n.17, Apx. p. __), because this reading effectively eliminates the significance requirement.

In their brief, taxpayers concede that the area encumbered by a conservation easement must encompass a significant habitat.¹ Instead, they effectively argue (Br. 29 n.4) that the Tax Court did not mean what it said in footnote 17 of its opinion. To be sure, as taxpayers point out (*id.*), the footnote occurs in the part of the Tax Court opinion devoted to finding that the encumbered area did encompass a significant habitat. But taxpayers cannot reduce the matter to an issue of fact. Because it misread the statute, the Tax Court applied the wrong legal standard for determining whether a habitat was significant. Thus it concluded (R.53 Opinion at pp. 38-39, Apx. pp. __-__) that the encumbered areas contained significant habitat merely because in their natural states, they could be a natural habitat for

¹ The *amici curiae* also agree that the habitat must be “significant.” (A.Br. 26.)

various plants and birds. As we explained in our opening brief (pp. 39-41), however, if, as the Tax Court held, a relatively natural habitat, in and of itself, is significant, adding the adjective "significant" before the phrase "relatively natural habitat" in the regulation would have been an unnecessary redundancy. Just as is the case with statutory interpretation, however, regulations should be interpreted to give every word meaning. *Rosenberg v. XM Ventures*, 274 F.3d 137, 141-142 (3d Cir. 2001); *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999). Because the Tax Court's interpretation of the "significant" requirement gives that requirement no independent meaning, it is wrong as a matter of law. To be a "significant" relatively natural habitat, the subject land must actually be a quality habitat for endangered species, and not merely a potential habitat, or one where an endangered species may on rare occasion be found.² As might be expected, the smaller the

² Throughout their brief *amici* accuse the Government of too narrowly reading the various requirements of Section 170(h), including the "significant" requirement, as requiring an endangered species. This is simply incorrect. We recognize that there are other avenues to a deduction, but they are not relevant here. The fact of the matter is that the Tax Court grounded the allowance of the deduction on its belief (incorrect, we submit) that endangered species were being protected. Therefore, the only relevant question now presented is whether the Tax Court correctly so held.

area subject to a conservation easement, the less likely it is to qualify as a "significant" relatively natural habitat for an endangered species.³ Such a reading of the regulation is consistent with the meaning of the word "significant,"⁴ gives import to each word in the regulation and, we submit, is plainly reasonable. It is well-settled that an agency's interpretation of its own regulation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Stinson v. United States*, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); see also *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (holding that the IRS's interpretation of a Treasury Regulation was entitled to substantial deference). Because the Tax Court erred as a matter of law in its construction of the "significant" requirement, its

³ Thus, we do not contend, as taxpayers suggest (Br. 38), that the fact that an easement only covers a small area of property necessarily precludes a deduction. Rather, we contend only that the smaller the area covered, the more difficult it will be to demonstrate significance.

⁴ The definition of the word "significant" is "having or likely to have influence or effect: Important" and "of a noticeably or measurably large amount." Merriam-Webster's Collegiate Dictionary, 10th Ed. (1998).

determination that the encumbered areas contained significant relatively natural habitats cannot stand.

Moreover, in our opening brief (at 41-43), we demonstrated that the record does not establish that the endangered species cited by the Tax Court in support of its decision were actually found on the property. In response taxpayers point to testimony (Br. 26) where Ms. Glass states that she saw eagles and Lake Huron tansy (and perhaps piping plovers) on the encumbered property. They also point to testimony of Thomas Bailey regarding the easements' role in protecting wildlife. (Br. 26-27.) But Mr. Bailey's testimony concerns the general benefits of easements, and does not actually state that he has seen endangered species on the encumbered property. And while Ms. Glass's testimony could be construed as so stating, it subsequently became clear that she was mistaken as to the extent of the encumbered property. Thus, as noted in our opening brief (Br. 43), when so testifying she incorrectly believed that the encumbered property extended to the top of the bluff. (Susan Glass at TR 364, 379, Apx. p. __.)

Taxpayers further argue (Br. 28) that the testimony is "replete" with references to white pine trees on the encumbered property.

Although there was some testimony regarding white pine trees, nothing places the white pine trees on the encumbered property, as opposed to taxpayers' property that remained unencumbered or the portion of the property subject to the 1990 easement. In any event, the Tax Court made no determination as to whether the white pine trees, even if on the encumbered property, would make the encumbered property a significant relatively natural habitat within the meaning of the regulation.

Taxpayers next argue (Br. 29-36) that the Government's interpretation of the regulation is unreasonable. They assert that, from an ecological standpoint, the conservation of a possible habitat for an endangered species is important. Even if so, this is simply beside the point here. The question is not whether taxpayers' putting the easements on their property had some ecological benefit. Instead, the question is whether taxpayers satisfied the particularized requirements of the statute and regulation to be entitled to an income tax deduction.

In any event, taxpayers' argument misses the mark. The Government appreciates taxpayers' point that an ecosystem is frequently made up of a community of plants and animals, living in an overlapping patchwork of areas. (*Id.*) Indeed, this is the insight

underlying the provision that a habitat or ecosystem may be significant if it is a "high quality example[] of a terrestrial *community* or aquatic *community*" (emphasis added). Treas. Reg. § 1.170A-14(d)(3)(ii). But the regulations do not suggest that a tiny postage-stamp sized corner of such a community may qualify as a significant habitat. To the contrary, they indicate that an area may qualify as significant if, e.g., a whole island is protected and "the coastal ecosystem is relatively intact." *Id.* Alternately, the regulations provide that a smaller area may qualify for as a significant habitat if it is "included in, or . . . contribute[s] to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area." *Id.*; Treas. Reg. § 1.170A-14(f), Example 2. Thus, the regulations recognize the significance of the broader community of organisms that makes up an ecosystem. But they also suggest that no deduction should be available for an easement that would protect only a portion of such an interrelated ecosystem, where other integrated parts are not already protected.

This problem of scale undermines taxpayers' claim that the encumbered areas represent significant habitats, regardless of whether taxpayers look to the Lake Huron tansy identified by the Tax Court

(Br. 25) or to the stands of pine trees on the bluff (Br. 28). Taxpayers can hardly claim that the small easements they donated encompass a "large-scale" ecosystem (Br. 31), and neither they nor the Tax Court identified a larger park or wilderness area to which their small donations contributed. See Treas. Reg. 1.170A-14(d)(3)(ii). Moreover, the encumbered areas are so small that they fail to eliminate the primary environmental threat identified by the LTC, that development would crowd out plants and animals by disturbing their habitats. (Thomas Bailey at TR 50, 62-63, 72, Apx. pp. __, __.) Thus the very small areas covered by taxpayers' easements, and the proximity to their houses and the neighboring houses, precludes the areas from qualifying as "significant."

The fundamental problem with taxpayers' efforts to establish the environmental significance of the encumbered areas by looking to the unprotected, surrounding area is further demonstrated by taxpayers' subsequent assertion that development occurring outside the boundaries of their easements should not be a factor in determining whether the easements can protect a significant habitat. (Br. 36.) That is, taxpayers would have the Commissioner look to the "large-scale ecology" of the entire area to establish its significance (Br. 31), but

ignore that broader area in determining whether the encumbered area effectively can be protected by the terms of the easement (Br. 36-38). There is no justification for such an inconsistent approach. To the contrary, the confessed inability of taxpayers' small easements to protect the larger area that purportedly gives them their ecological significance demonstrates why the examples in the regulations permit deductions only for easements that either encompass an undeveloped and intact community, or that contribute to a larger conservation area. Treas. Reg. § 1.170A-14(d)(3)(ii).

Taxpayers' assertion that all conservation easements could be rejected by looking to the possibility of development on unencumbered land (Br. 36) suffers from this same error. Organisms that require undisturbed habitats to survive (see R.53 Opinion at 7, Apx. p. ___), that are crowded out by development (Thomas Bailey at TR 50, 62-63, Apx. pp. ___-___), and that benefit from a large-scale ecosystem of interrelated parts (see Br. 31), may benefit from a conservation easement that sets aside enough area to establish a buffer zone from development (as the *amici* point out, A.Br. 29-30), and to permit internal relocation if the organisms are disturbed by development. A small conservation easement that contributes to a larger conservation area may provide

the same benefits. See Treas. Reg. § 1.170A-14(d)(3)(ii). But a small conservation easement surrounded by unencumbered land cannot claim to provide such benefits. And it certainly cannot rely on the surrounding, unprotected land to establish its ecological significance, while at the same time disclaiming any ability to control whether that land will retain its own ecological benefits. Nor can taxpayers rely on Private Letter Ruling (P.L.R.) 8546112, which permitted a conservation easement on an area only slightly larger than each of taxpayers' easements. (See Br. 40.) The deduction for that easement was permitted because the easement protected open space for the scenic enjoyment of the general public, see I.R.C. § 170(h)(4)(A)(iii)(I): it protected a view from a public road, across the protected area. Its ecological significance was not at issue.⁵

Taxpayers err when they argue (Br. 34) that the Government reads the word "normally" out of Treas. Reg. § 170A-14(d)(3)(i). The use of the word "normally" in the regulation was not meant to denote that property could be a significant relatively natural habitat even if no

⁵ Moreover, as both taxpayers (Br. 40) and the *amici curiae* (A.Br. 31) confess, taxpayers cannot rely on these private letter rulings here because each applies only to the taxpayer requesting the ruling. I.R.C. § 6110(k)(3).

endangered species can be found there. Quite to the contrary, it was to make clear that the mere fact that an endangered species might, on occasion, be found on a particular piece of property is not sufficient to support a deduction.

Nor do taxpayers derive any support (Br. 34-35) from P.L.R. 200403044. As taxpayers themselves concede (*id.*), that private letter ruling involved a tract that was an actual habitat for endangered species.⁶

2. **In light of the small size of the easements, and their retained rights to develop both the surrounding unencumbered property and the encumbered property, taxpayers cannot show that the easements protected any habitat on the encumbered property**

As we explained in our opening brief (at p. 43), an easement has a conservation purpose within the meaning of I.R.C. § 170(h)(4)(A)(ii) only if it “protect[s] a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem normally lives.” Treas. Reg. § 1.170A-14(d)(1)(ii), (d)(3)(i). Thus, to show that an easement will protect such a habitat, a taxpayer must do more than

⁶ In addition, as taxpayers further concede (Br. 34-35), private letter rulings are without precedential value. I.R.C. § 6110(k)(3).

show that the encumbered area is worthy of protection as a significant habitat. He must also show that the easement actually *will protect* that habitat against incursions by taxpayers, their guests, or their successors in interest.

a. In our opening brief, we argued (pp. 47-49) that the small size of the areas encumbered by the easements at issue necessarily compromised their ability to protect any wildlife, especially in light of the possible development of neighboring land, including taxpayers' own abutting property. Because of their small size, the easements provide no buffer between the wildlife living on the land and present and future development: no part of either easement is more than 120 feet from a possible future house, and both are quite close to existing houses.

In response, as they did with respect to their argument regarding the requirement that the relatively natural habitat be "significant," taxpayers assert that the ability to protect must be viewed from a larger ecological standpoint. For the same reasons this argument lacks merit with respect to the "significant" requirement, it also lacks merit here. As demonstrated above and in our opening brief, the fact of the matter is that the small size of the easements does defeat the easements' ability to protect the endangered species that the easements

sought to protect and which formed the basis of the Tax Court's opinion.

b. In our opening brief (at 42-46), we also demonstrated that, given the rights retained by taxpayers, the easements could not satisfy the requirement of actually protecting the endangered species. Thus, we noted that taxpayers retained the rights: (1) to move, prune, trim, or cut trees, shrubs or other vegetation to provide views of Lake Michigan or for safety purposes, (2) to maintain, repair or replace the existing footpath to the beach, (3) to construct new footpaths to the beach, (4) to construct, maintain, repair and replace a day shelter, storage shed, scenic overlook deck, patio or similar structure, (5) to construct, maintain repair, and replace a wooden boat house, and (6) to build additions onto their house and guesthouse. Plainly, the exercise of these rights would have a substantial negative impact on any protection that the easements could afford.

Taxpayers contend that their right to construct buildings within the encumbered area does not interfere with the protection of that area, because, they say, "every single right reserved by the Petitioners is carefully limited so as to ensure that the significant wildlife habitat remained protected." (Br. 41.) Taxpayers assert (Br. 41-46) that these

many reserved rights are permissible because, by their terms, they must be done in a manner that minimizes the interference with the conservation purpose of the easement. But even if done in a manner that minimizes the impact as much as possible on the conservation purpose, the fact of the matter is that, given the small size of the easements, exercise of the many retained rights could not help but have a significant impact on the encumbered land.⁷ Thus, catch-all language in the easement, to the effect that the retained rights may not impair significant conservation interests, is not sufficient to eliminate the rights specifically reserved by taxpayers. To be sure, the matter might be different if a large area was covered by the easements. In such a case, construction of, for example, a building or footpath, may have only a minimal effect on the protected habitat. If that was so, a deduction

⁷ In this regard we note that the *amici curiae* argue that the determination whether the donation of an easement qualifies for a deduction should be made "without regard to any activities on adjacent property." (A.Br. 42.) They do not recognize any minimum area for this claim. But the authorities cited (Br. 40-41) involve much larger areas than is the case here. See *Johnston v. Commissioner*, T.C. Memo. 1997-475 (easement covered nearly 5,000 acres); *Clemens v. Commissioner*, T.C. Memo. 1992-436 (easement covered 40 acres); P.L.R. 9318017 (about 500 acres); P.L.R. 9218071 (same). Those large areas make the use of neighboring properties less significant.

under I.R.C. § 170(h) may well be available. But that is not the case here.

Taxpayers also contend that, under the terms of the easements, the day shelters, boathouses, and other outbuildings “could not be built on the bluff or on a sensitive part of the beach.” (Br. 42.) But the area covered by the easements includes only bluff and beach, and taxpayers have argued (Br. 35-36) that the entire beach constitutes potential habitat for threatened species. To win their point, then, they must show that the specifically reserved rights to construct, remodel, and maintain buildings within the boundaries of the easements are, effectively, nullities. Taxpayers themselves do not construe the easement this way. Noting testimony that “all of the reserved rights allowed under the easement . . . were consistent with protecting [conservation] values,” they “presume” that this includes the construction of outbuildings. (Br. 43.) In the end, if taxpayers had meant to surrender all these rights, they could simply have declined to reserve the right to construct outbuildings within the boundaries of the easements. Having reserved that right, they can hardly pretend it does not exist.

Taxpayers also contend (Br. 43) that the easement protects significant habitat because the development it permits is less destructive than the development that otherwise would be permitted. Specifically, they note that their major concern "was to prevent the construction of 'bluff-hangers,' large homes that are built right on the bluff and that cause irreparable damage due to their size and location." (Br. 43.) But the fact that structures larger than those permitted by the reserved rights would destroy the habitat for endangered species does not mean that the construction that is permitted by the reserved rights would protect that habitat. Indeed, the easements permit taxpayers' home to be expanded to, or be replaced by a new home of, 5,000 square feet. (R.31 Stipulation, Ex. 11-J at 3.) Because the encumbered area did not reach the top of the bluff (Charles Glass at TR 246, 347, Apx. p. __), this 5,000 square foot home could be built "right on the bluff." (Br. 43.) A 50-foot wide house could be built down the face of the bluff between the two easements. (See Charles Glass at TR 246, 296-297, Apx. pp. __- __.) And there are no stated limits on the size of the boathouses or other outbuildings permitted within the boundaries of the easements themselves. (R.31 Stipulation, Exs. 11-J at 3, 12-J at 3, Apx. pp. __, __.) In this regard it should be noted that

the garage/workspace/studio permitted to be built in the 1990 easement was limited to 3,200 square feet (R.53 Opinion at 14, Apx. p. ___), that is, over one-sixth the area of the 1992 easement. That the donee had the right to return the property to its original state is of little help in view of taxpayers' admission that the damage to the bluff would be "irreparable." (Br. 43.)

Finally, taxpayers also claim that, if the Government requires easements actually to protect the habitats they are intended to protect, virtually all deductions for conservation easements will be denied. (Br. 41.) As noted above (at pp. 16-17), depending upon the circumstances, the mere reservation of rights in a donated easement will not defeat a deduction under I.R.C. § 170(h). But it does not follow that any right may be reserved without destroying the conservation purpose. To the contrary, inconsistent uses are only permitted "if, under the circumstances, those uses do not impair significant conservation interests." Treas. Reg. § 1.170A-14(e)(2). Taxpayers may not claim that the fragile bluff and beach represent significant conservation interests because they are a habitat for threatened plant species, and then retain the right to impair that delicate habitat by building boathouses on the beach and patios on the bluff. If the retained uses

impair the very habitat the easement is intended to protect, then the easement cannot accomplish its goal. And it should be noted that the regulation uses the term “impair,” not “destroy”: merely because the exercise of a retained right would cause *less* damage to an ecosystem than would otherwise have been permitted, it does not follow that the ecosystem will be protected. Similarly, retained rights are not merely a matter of valuation, as taxpayers claim. (Br. 46.) A retained right that permits taxpayers, or their successors in interest, to impair the very values ostensibly to be preserved may certainly reduce the value of the donation (because taxpayers are giving away less), but it also undercuts the conservation purpose of the donation.

3. Taxpayers’ retained rights also undermine the exclusivity of the conservation purpose

In our opening brief we explained (pp. 49-55) that the Tax Court erred in construing the term “exclusively” in the requirement that the easement be “exclusively for conservation purposes,” I.R.C.

§ 170(h)(1)(C), to be satisfied by the requirement, set forth in I.R.C.

§ 170(h)(5)(A), that the easement be granted in perpetuity to a qualified donee. On appeal taxpayers largely repeat the rationale of the Tax Court. (Br. 46-50.) As we pointed out (Br. 5), the statute does not limit

that phrase to the perpetuity requirement. On the other hand, the legislative history requires a broader construction: it provides that “[t]he contribution must involve legally enforceable restrictions on the interest in the property retained by the donor that would prevent uses of the retained interest inconsistent with the conservation purposes.” S. Rep. No. 96-1007, at 13 (1980), 1980-2 C.B. 599, 605; H.R. Rep. No. 96-1298, at 18 (1980). Consistent therewith, the regulations also provide that a donation is not exclusively for conservation purposes if it permits inconsistent uses. Treas. Reg. § 1.170A-14(e)(2) and (3). As we demonstrated in our opening brief (at 53-55), taxpayers retained extensive rights that directly conflicted with the conservation purpose of the easements.

The *amici curiae* argue (A. Br. 37-38) that the term “exclusively” should be interpreted here as it is in I.R.C. § 501(c)(3), which provides that an organization may be exempt from taxes if it is “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.” The regulations implementing this provision provide that an organization will qualify as tax exempt only if (*inter alia*) its articles “[d]o not expressly empower the organization to engage, otherwise than as an

insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.” Treas. Reg. § 1.501(c)(3)-1(b)(1)(i)(B). We fail to see how this standard, even if relevant, aids taxpayers here. The many rights retained by taxpayers simply were not insubstantial. As discussed, the exercise of the retained rights would, at the least, severely impair, if not make impossible, the satisfaction of the purported conservation purpose of the easements.

Moreover, the private letter rulings mentioned by the *amici* (A.Br. 35-36) do not support their case (and indeed, illustrate the Commissioner’s longstanding practice of analyzing inconsistent uses under the rubric “exclusively for conservation purposes”). Though the donors in P.L.R. 9632003 retained the right to build some structures within the encumbered area, the donor had the right to veto any construction outside of a specified building site. Likewise, none of the retained rights mentioned in P.L.R. 9537018 were permitted in areas identified as sensitive wetlands, nesting areas, etc. Notably, in both cases the encumbered property was much larger than the areas at issue here, and abutted property owned by the Federal Government. In any event, as noted above, neither private letter ruling may be used or cited

as precedent. I.R.C. § 6110(k)(3). The court cases raised by taxpayer (Br. 50) and the *amici* (A.Br. 36) are similarly inapposite. See *McLennan v. Commissioner*, 23 Cl. Ct. 99 (Cl. Ct. 1991) and 24 Cl. Ct. 102, 107 (Cl. Ct. 1991) (scenic easement; protection of habitats and ecosystems not at issue), *aff'd* 994 F.2d 839 (Fed. Cir. 1993); *Johnston v. Commissioner*, T.C. Memo. 1997-475 (only valuation at issue); *Fannon v. Commissioner*, T.C. Memo. 1989-136 (same).

At bottom, both taxpayers (Br. 45-51) and the *amici curiae* (A.Br. 47-48) seek to suggest that a taxpayer can establish that the easement serves a conservation purpose within the meaning of I.R.C. § 170(h)(4) merely by showing that the easements were donated to a qualified organization that meets the requirement of I.R.C. § 170(h)(3), and that in granting the easement the taxpayers' intent, and in accepting the easements the organization's intent, was to protect the encumbered area. But it is not merely the intent of the parties that controls, but the objective realities.⁸ Indeed, the question here is not whether the

⁸ It is for this reason that the emphasis of the *amici* (Br. 18-21) on the alleged clarity of the statement of the conservation purpose in the easements is misplaced. While a clear statement of a conservation purpose is necessary, it is not sufficient; the purpose, as an objective matter, must also be achieved.

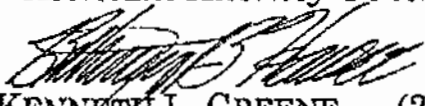
donee can and will enforce the easement, but whether the donation rises to the level of supporting a deduction for the donor. To qualify as being "exclusively for conservation purposes" under I.R.C. § 170(h)(4)(A)(i), the easement objectively must be able to protect an objectively significant habitat.

CONCLUSION

For the reasons stated above and in our opening brief, the Tax Court's decision is incorrect and should be reversed and decision entered for the Commissioner. In the alternative, the case should be remanded to the Tax Court for consideration of taxpayers' open space argument.

Respectfully submitted,

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AUGUST 2006

