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## CONSERVATION EASEMENTS, COMMON SENSE AND THE CHARITABLE TRUST DOCTRINE

*C. Timothy Lindstrom\**

Being on the receiving end of Nancy McLaughlin's and William Weeks's "response"<sup>1</sup> reminds me of a story attributed to Abraham Lincoln about a man being ridden out of town on a rail who, according to Lincoln's story, said "If it weren't for the honor of the thing, I'd rather walk." Having just re-read *Hicks v. Dowd: The End of Perpetuity* (hereinafter "*Perpetuity*"), I believe that it stands up satisfactorily under the criticism lodged against it by *In Defense of Conservation Easements: A Response to The End of Perpetuity* (hereinafter "*Defense*"), and I hope that those who read *Defense* will read, or re-read, *Perpetuity*. However, *Defense* calls for a brief *surrebuttal*; not only to correct the record, but also because it is likely that the unfortunate termination of a conservation easement by Johnson

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<sup>1</sup> *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1, 4 (2009) [hereinafter *Defense*] written in response to *Hicks v. Dowd: The End of Perpetuity*, 8 WYO. L. REV. 25 (2008) [hereinafter *Perpetuity*].

County, Wyoming that triggered the writing of *Perpetuity* may come before the Wyoming Supreme Court once again.<sup>2</sup> The *Defense* and *Perpetuity* articles shed important light on some of the issues raised by the *Hicks* case that are likely to resurface should that occur. It would be unfortunate if, should the Wyoming Supreme Court pay any attention to these articles, the record were devoid of any response to *Defense*.

The application of the charitable trust doctrine<sup>3</sup> to conservation easements is a proposition that has been ably and vigorously advocated in a number of articles authored by Professor McLaughlin.<sup>4</sup> Without taking anything away from that work, the charitable trust doctrine and its implications for conservation easements are not well understood in the land trust community, nor is application of the doctrine to conservation easements broadly accepted. The application of the doctrine to conservation easements has been hotly debated in certain circles, but that debate has not been particularly visible—at least thus far.

Furthermore, while the application of the doctrine has appeal for a number of reasons, the implications of such an application for the administration of conservation easements on a day-to-day basis, and for the future of easement contributions, raise a number of issues.<sup>5</sup> These issues should be thoroughly considered before this doctrine, grounded in the law of trusts, is injected into what has traditionally been considered a part of real property law, *i.e.*, the law of easements.<sup>6</sup>

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<sup>2</sup> As noted in *Defense*, *supra* note 1, at n.3, the Wyoming Attorney General has filed a complaint in the Johnson County District Court styled *Salzburg v. Dowd*, seeking to reverse termination of the Meadowood easement examined in the *Hicks* case. It is interesting to read in *Defense* that one of the co-authors is “counsel to The Nature Conservancy as prospective amicus curiae in the *Salzburg* case.” *Id.* at 1. The Nature Conservancy currently submits certain proposed easement amendments to attorneys general in the states in which it operates for review. See *Amending Conservation Easements, Evolving Practices & Legal Principals*, Research Report of the Land Trust Alliance, Washington, D.C., August, 2007 [hereinafter *Amending Conservation Easements*]. The Nature Conservancy has a chapter in Wyoming and has done a great deal for land conservation. However, comparing The Nature Conservancy to most land trusts is like comparing General Motors (or the former General Motors) to entrants in the Soapbox Derby. With hundreds of millions in resources, thousands of staff including a significant team of lawyers, and worldwide operations, The Nature Conservancy is in a position to handle amendments in ways that are simply not practical for the normal land trust. Therefore, what is good for The Nature Conservancy may or may not be good for the land trust community in general.

<sup>3</sup> Throughout *Perpetuity* this doctrine is referred to as the doctrine of *cy pres*.

<sup>4</sup> See *Defense*, *supra* note 1 (listing numerous citations to the works of Nancy A. McLaughlin).

<sup>5</sup> *Perpetuity*, *supra* note 1, at 69.

<sup>6</sup> *Id.* at 59.

*Setting the Record Straight*

*Defense* repeatedly, and *incorrectly* represents the central thesis of *Perpetuity* to be that “. . . land trusts have the *right* to modify and terminate the perpetual conservation easements they hold ‘on their own’ and as they ‘see fit,’ subject *only* to the agreement of the owner of the encumbered land and the general constraints imposed by federal tax law on the operations of charitable organizations.”<sup>7</sup> In fact, the statement in *Perpetuity* from which this characterization was drawn was this:

In addition to changing the *authority* of the holder of a conservation easement to modify or terminate the easement as it sees fit (*taking into account the constraints on such decisions imposed by common law and statutory law* described *supra* beginning at note 70); and vesting standing to challenge easement modifications or terminations in a potentially broad range of new persons; application of the *cy pres* doctrine to conservation easements would also alter the criteria for the modification or termination of a conservation easement.<sup>8</sup>

There is a difference between the word “right” (which *Defense* used and *Perpetuity* did not), which implies a moral imperative, and “authority” (*Perpetuity’s* word) which, in this case described (and describes) the current state of the law in the United States, including Wyoming.<sup>9</sup>

Compounding *Defense’s* incorrect characterization of this statement taken from *Perpetuity* is the dismissive manner in which *Defense* deals with the constraints on land trusts imposed by existing law.<sup>10</sup> These constraints, as explained in *Perpetuity*,<sup>11</sup> are significant and pertinent to easement administration and call into question the necessity for the imposition of new constraints, such as the charitable trust doctrine. To minimize the impact of the existing law governing conservation easements and easement holders is akin to saying that people have the right to operate slaughterhouses, subject *only* to legal prohibitions. *Defense*

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<sup>7</sup> *Defense*, *supra* note 1, at 4 (emphasis added).

<sup>8</sup> *Perpetuity*, *supra* note 1, at 67 (emphasis added).

<sup>9</sup> *Perpetuity*, *supra* note 1, at 35–62.

<sup>10</sup> *Defense*, in its repeated use of the “sees fit” reference only once includes *Perpetuity’s* extensively described *caveat* that easement administration is subject to significant existing legal constraints, says that the right of land trusts to modify or terminate easements is “subject *only*” to the “*general* constraints imposed by federal tax law.” *Defense*, *supra* note 1, at 4 (emphasis added). In the remainder of its repeated assertions that *Perpetuity’s* position is that “land trusts have the *right* to modify and terminate the perpetual conservation easements they hold ‘on their own’ and as they ‘see fit,’” fails to include this rather important condition. *Id.* at 9, 14, 16, 18, 28, 86, 96. (emphasis added).

<sup>11</sup> *Perpetuity*, *supra* note 1, at 45–56.

ignores the point that the legal constraints are significant and compelling—which was a central point of *Perpetuity*.

*Defense* later states: “. . . the aggressive approach to the amendment and termination of conservation easements *advocated* in *The End of Perpetuity* is inconsistent not only with the law governing restricted charitable gifts, but also with the land trust community’s longstanding position with regard to amendments and terminations.”<sup>12</sup> There is a major difference between “advocacy” and “reporting.” *Perpetuity*, as anyone reading it can determine, does not advocate an “aggressive approach” to the administration of conservation easements. *Perpetuity* reports the state of practice and law relating to conservation easements *as it now exists*. Furthermore, to assert that *Perpetuity* advocates an aggressive approach to amendment and termination of conservation easements utterly ignores the emphasis that *Perpetuity* places on the significant constraints imposed on such practices by existing law<sup>13</sup>—and ignores *Perpetuity*’s advocacy of *an expansion* of those constraints.<sup>14</sup>

### *The State of the Law*

*Perpetuity* extensively addresses the fact that conservation easements are based in property law and that the doctrine of charitable trusts is not a part of that law.<sup>15</sup> *Defense* relies exclusively on various comments to uniform laws, restatements, letters from offices of attorneys general, and treatises to support its assertion that the charitable trust doctrine applies to conservation easements.<sup>16</sup> *Defense* also relies upon the mention made in a study by the Land Trust Alliance (“LTA”) regarding conservation easement amendments that includes consideration of the charitable trust doctrine.<sup>17</sup> However, neither that study, nor the LTA itself, *advocate* application of the doctrine to conservation easements.<sup>18</sup> Notwithstanding the

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<sup>12</sup> *Defense*, *supra* note 1, at 18 (emphasis added).

<sup>13</sup> *Perpetuity*, *supra* note 11.

<sup>14</sup> *Id.* at 82–83.

<sup>15</sup> *Perpetuity*, *supra* note 1, at 35–39.

<sup>16</sup> *Defense*, *supra* note 1, at 7–8.

<sup>17</sup> *Id.* at 15.

<sup>18</sup> LTA’s amendment report states:

Legal constraints may also include the charitable trust doctrine (which includes the doctrine of *cy pres*), the public trust doctrine and the doctrine of changed circumstances, all of which may be known by different names in different states. *These doctrines have existed for many years applicable to charitable gifts outside the realm of land trusts and conservation easements, such as gifts of real property, cash and personal property. Their application to conservation easements is the subject of widely differing views in the land trust legal community.*

*Amending Conservation Easements*, *supra* note 2, at 13 (emphasis added).

academic resources relied upon by *Defense*, the fact remains that the doctrine has not been applied to conservation easements by a single reported case anywhere in the United States, a fact confirmed by the LTA study.<sup>19</sup>

In the over one hundred years of land trust history,<sup>20</sup> with nearly 1,700 private land trusts now in business,<sup>21</sup> and with over six million acres subject to thousands of *privately held* conservation easements,<sup>22</sup> there is *only one recorded case of an improper conservation easement termination*: that of Wyoming's own *Hicks v. Dowd*.<sup>23</sup> Furthermore, the circumstances of the *Hicks* case are novel<sup>24</sup> and not representative of conservation easement administration in either Wyoming or in the other 49 states.<sup>25</sup>

Although a recently revised comment to the Uniform Conservation Easement Act<sup>26</sup> ("UCEA") advocates application of the doctrine to conservation easements, it does not change the UCEA itself, which continues to provide that conservation easements may be terminated or modified *the same as any other easement*.<sup>27</sup>

The revised comment itself acknowledges that the charitable trust doctrine does not apply to easements currently: "the Act is intended to be placed in the real property law of adopting states *and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes*."<sup>28</sup> The UCEA comment proceeds, as *Defense* points out (and as was pointed out in *Perpetuity*), to state that the charitable trust doctrine "should" be applied to conservation easements. However, there is a good deal of territory between "should" and "is."

The bottom line is that there is nothing in Wyoming law,<sup>29</sup> or established by precedent elsewhere, that requires application of the charitable trust doctrine

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<sup>19</sup> *Id.* at 20. ("Whether the charitable trust doctrine applies to conservation easements and their amendment has not been definitively decided in any state.")

<sup>20</sup> See *Perpetuity*, *supra* note 1, at n.53.

<sup>21</sup> Land Trust Alliance website, <http://www.landtrustalliance.org/about-us/land-trust-census/data-tables>, (reflecting 2005 data) (last visited Apr. 12, 2009).

<sup>22</sup> *Id.* (reflecting 2005 acreage subject to easements held by private land trusts (as opposed to government agencies)).

<sup>23</sup> *Hicks v. Dowd*, 157 P.3d 914, (Wyo. 2007).

<sup>24</sup> *Perpetuity*, *supra* note 1 discusses *Hicks* extensively beginning at 27.

<sup>25</sup> There are cases that came close. *Defense* cites two, the *Myrtle Grove* case (*Defense*, *supra* note 1, at 37) and the *Wal-Mart* case (*Id.* at 61); but both of these cases were resolved without the judicial application of the charitable trust doctrine.

<sup>26</sup> Uniform Conservation Easement Act ("UCEA"), comment to § 3.

<sup>27</sup> *Id.* § 2(a).

<sup>28</sup> *Id.* comment to § 3 (emphasis added).

<sup>29</sup> The only case to apply the charitable trust doctrine in Wyoming was *Town of Cody v. Buffalo Bill Mem'l Ass'n*, 196 P.2d 369 (1948). That case involved the transfer by a charitable

to conservation easements. Instead of creating a “special judicial exemption”<sup>30</sup> as *Defense* would have us believe is the thrust of *Perpetuity*, *Perpetuity’s* point is that the doctrine has never been applied to conservation easements and is generally unsuitable to easements as property law constructs.<sup>31</sup>

*Defense*, understandably, seeks to make it appear that the charitable trust doctrine already applies to conservation easements and that those objecting to this proposition are trying to re-write the law, when it is *Defense* that seeks to re-write the law. While the *appropriateness* of such a re-write may be subject to debate, the fact that a re-write would be *required* in order to extend the doctrine to conservation easements should not.

#### A. Question of Intent

Both *Perpetuity* and *Defense* agree that application of the charitable trust doctrine to conservation easements requires finding that the grantor of the easement intended to create such a trust in the first place.<sup>32</sup> *Defense* argues that such intent may be legally implied in the conveyance of the conservation easement, even though there is no express provision for the creation of a trust in the conveyance itself.<sup>33</sup> The Uniform Trust Code, adopted in Wyoming, provides that “A trust is created only if the settlor indicates an intention to create a trust.”<sup>34</sup>

Wyoming law permits inference of intent to create a trust, but the “. . . inference is not to come easily . . .” and “. . . clear, explicit, definite, unequivocal and unambiguous language or conduct establishing the intent to create a trust is required . . . .”<sup>35</sup>

Conservation easements in Wyoming, and elsewhere, typically do not state that the rights to enforce the restrictions on the use of lands that comprise the easement are conveyed “in trust.”<sup>36</sup> However, *Defense* states that conservation easements, because they are donated to governmental entities or public charities for a specific purpose, “. . . *should* create a charitable trust . . . .”<sup>37</sup>

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corporation of assets which, according to the articles of incorporation governing the corporation, could only be transferred with the consent of the state legislature, which had not been obtained prior to the transfer. *Id.* at 373, 483.

<sup>30</sup> See *Defense*, *supra* note 1, at 19.

<sup>31</sup> See *Perpetuity*, *supra* note 1, at 59.

<sup>32</sup> See *Defense*, *supra* note 1, at 20; *Perpetuity*, *supra* note 1, at 59.

<sup>33</sup> *Defense*, *supra* note 1, at 20–28.

<sup>34</sup> WYO. STAT. ANN. § 4-10-403.

<sup>35</sup> *Meima v. Broemmell*, 117 P.3d 429, 445 (Wyo. 2005).

<sup>36</sup> *Amending Conservation Easements*, *supra* note 2, at 18. (“Few, if any, conservation easements are formally written as charitable trusts.”).

<sup>37</sup> *Defense*, *supra* note 1, at 6 (emphasis added).

While it is correct that conservation easements are granted to governmental agencies and public charities and that such grants include specific purposes, whether they “should” create a charitable trust is an open question.<sup>38</sup> Whether a conservation easement conveyance is intended by the grantor to create a charitable trust, “. . . even though the deeds of conveyance typically do not contain the words ‘trust’ or ‘trustee,’ even though many easement donors may not know that the intended relationship is called a trust . . .”;<sup>39</sup> and even though creation of a charitable trust may add a dimension to the relationship between the landowner and easement holder that neither contemplated and that may substantially complicate that relationship; is not something to be lightly inferred.

Landowners who contribute conservation easements intended to be deductible necessarily convey those easements to “qualified organizations” (*i.e.*, public agencies or public charities) “in perpetuity” for “conservation purposes.”<sup>40</sup> Federal tax law subsidizes such conveyances on the grounds that they generate significant public benefits, just as it subsidizes other qualified charitable contributions. However, a conservation easement is a “split interest gift”<sup>41</sup> making it one of only four types of such gifts<sup>42</sup> with respect to which the tax law allows a deduction. As such, a conservation easement contribution is one in which the donor retains significant, on-going rights to use that which is the subject of the contribution—the land. This fact, which fundamentally distinguishes conservation easements from most all other contributions, complicates the *inference* of an intention to create a trust, even though such an inference may be appropriate to other types of gifts.

The conveyance of a conservation easement creates a permanent partnership between the landowner and the holder of the easement on that land. The course of action between landowners and easement holders<sup>43</sup> belies any intent by either party to the easement that the easement conveyance was intended to create a charitable trust under which modification or termination was not a matter, *within the context of existing legal constraints*, solely within the purview of the landowner and the easement holder.

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<sup>38</sup> *Amending Conservation Easements*, *supra* note 2, at 13.

<sup>39</sup> *Id.*

<sup>40</sup> These are the requirements imposed by 26 U.S.C. § 170(h) for “qualified conservation contributions.”

<sup>41</sup> C. Timothy Lindstrom, *At Tax Guide to Conservation Easements*, Island Press 2008, 15–16.

<sup>42</sup> The other types of gifts are contributions of remainder interests in personal residences and farms; certain contributions in trust; and the contribution of all of a donor’s undivided partial interest in property. *See id.*

<sup>43</sup> While easement amendments are certainly not the rule, they are not a minor occurrence. The author has drafted many amendments in the course of his practice. The LTA certainly would not have gone to the trouble of convening the panel of experts that drafted *Amending Conservation Easements* which runs to nearly 80 pages of text providing guidance to land trusts regarding amendments, if easement amendment was a rare practice.



When a landowner conveys a conservation easement, and the holder accepts the easement, they do so subject to the existing law of the state of the conveyance. As a matter of law, those who enter into an agreement are charged with knowledge of and make their agreements subject to, existing law:

Parties to an agreement are presumed to know the law and to have contracted with reference to existing principles of law. These existing principles of law enter into and become a part of a contract as though referenced and incorporated into the terms of the agreement.<sup>44</sup>

In Wyoming, prior to enactment of the Wyoming Uniform Conservation Easement Act<sup>45</sup> (“WYUCEA”), there was no statute providing for conservation easements and such easements were controlled by the common law pertaining to appurtenant easements.<sup>46</sup> Subsequent to the enactment of the WYUCEA the modification or termination of conservation easements became governed by the following provision: “Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected *in the same manner as other easements*.”<sup>47</sup> *Defense* adds as a *caveat* to this provision, the following from another section of the WYUCEA: “This article shall not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.”<sup>48</sup> However, WYUCEA’s provision that it does not affect pre-existing judicial authority to modify or terminate conservation easements in accordance with the principles of law and equity cannot be assumed to incorporate into Wyoming conservation easements an entire body of law that directly contradicts the WYUCEA’s explicit provision that conservation easements can be modified or terminated in the *same manner as other easements*, and contradicts Wyoming’s common law governing the creation, modification, and termination of easements.

In other words, easement grantors can reasonably assume that the easements they convey may be modified or terminated *in the same manner as other easements*, *i.e.*, if both parties to the easement agree.<sup>49</sup> Such a reasonable assumption by easement grantors must be considered part of their intention in granting a conservation easement.

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<sup>44</sup> Kirkwood v. CUNA Mut. Ins. Soc’y, 937 P.2d 206, 211 (Wyo. 1997); *see also* 11 WILLISTON ON CONTRACTS § 30:19 (4th ed.) (citations omitted).

<sup>45</sup> WYO. STAT. ANN. §§ 34-1-201 to -207 (2007).

<sup>46</sup> *Perpetuity*, *supra* note 1, at 44.

<sup>47</sup> WYO. STAT. ANN. § 34-1-202(a) (emphasis added).

<sup>48</sup> WYO. STAT. ANN. § 34-1-203(b).

<sup>49</sup> Perhaps it is necessary to again state that the parties’ intent that they can modify or terminate easements is subject to the understanding that one party, the easement holder, is constrained by law in how it does so.

How do we reconcile the grantor's intent that modification or termination of a conservation easement can be done *in the same manner as other easements* with the statements found in most conservation easements that they are granted in perpetuity; are intended to bind future owners; and are granted for the purpose of protecting publicly significant conservation values? The answer is that the landowner, in granting the easement, relinquishes in perpetuity, for himself and for all future owners, any *unilateral* right to change the restrictions of the easement. That is the essence of the contribution. What particularly distinguishes the grant of a conservation easement from other contracts and grants is that one of the parties, the holder of the easement, is substantially constrained by law from using the easement in a manner that does not serve the public interest. This is why the contribution of a conservation easement is subsidized by federal tax law.

In summary, in the absence of an express provision to the contrary in individual easement documents, there is no basis in the common law of appurtenant easements as it existed in Wyoming prior to the enactment of the WYUCEA, or in the WYUCEA itself, for imputing to easement grantors the intent to create a charitable trust. Because the common law of appurtenant easements, and the WYUCEA, both allow the parties to a conservation easement to modify or terminate such easements *in the same manner as other easements* it must be presumed that such is the intent of the parties to conservation easements.

A word here about *Hicks v. Dowd*: As noted in *Perpetuity*<sup>50</sup> neither party to this case challenged application of the charitable trust doctrine to the *Hicks* conservation easement, and the issue presented to the Supreme Court of Wyoming on appeal was not whether the doctrine applied. The Court felt constrained to agree that a charitable trust was involved because the trial court's finding on that point was never challenged by the parties.<sup>51</sup>

Since *Hicks* was decided by the Court, the Wyoming Attorney General filed a complaint in Johnson County District Court (as he was invited to do by the Court) asserting the charitable trust doctrine.<sup>52</sup> That case may end up in the Wyoming Supreme Court as well. If the application of the doctrine to the *Hicks* conservation easement does come before the Court, the previous decision of the Court in *Hicks* would not appear to dictate that the Court adopt, or reject, application of the doctrine.

From the foregoing discussion it can be seen that conservation easements have not been made subject to the charitable trust doctrine, notwithstanding

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<sup>50</sup> *Perpetuity*, *supra* note 1, at 33.

<sup>51</sup> *Hicks*, 157 P.3d at 919 ("Given the district court's unchallenged finding, we must agree that the Scenic Preserve Trust is a charitable trust.").

<sup>52</sup> *Salzburg v. Dowd*, Complaint for Declaratory Judgment filed in the District Court for Johnson County, Wyoming, July 8, 2008.

arguments that the doctrine *should* apply. Furthermore, it can be seen that the essential element of intent to create a trust that is a pre-requisite to extending the doctrine to conservation easements cannot be automatically inferred from the conveyance of a conservation easement. Lack of such intent remains a major stumbling block to the application of the doctrine to conservation easements. This takes us to the proper question of whether or not the charitable trust doctrine *should* apply to conservation easements.<sup>53</sup>

### *Creating Uncertainty*

*Perpetuity* discusses at some length the potential problems associated with a strict application of the charitable trust doctrine to conservation easements.<sup>54</sup> At the very least, application of the doctrine to conservation easements will inject considerable uncertainty into the administration of conservation easements in the future.

In considering application of the charitable trust doctrine it is important to keep in mind that conservation easements are very different from the types of gifts to which the doctrine has been applied in the past. With the exception of the four types of partial interest gifts, when a donor makes a gift the donor is completely divested of the object of the gift.

For example, when a donor makes a gift of land for the express purpose of providing a site for a church there is no remaining private ingredient involved. The land is in the hands of the charity and the donor is out of the picture. Application of the charitable trust doctrine to ensure that the land is used as a church site makes sense. However, when a person makes a gift of a right to control the future private use of land in the form of a conservation easement, a significant private ingredient remains that is intrinsic to the gift: The easement holder must necessarily take into account the continued private use of the land, and the donor has assumed a continuing relationship with the holder of the easement restrictions with which restrictions the donor will be confronted every day of ownership of that land. This essential partnership in the future use and management of the land, which is characteristic of conservation easement gifts, fundamentally distinguishes such gifts from other forms of gifts.

*Defense* argues that *Perpetuity's* concern regarding the application of the charitable trust doctrine is misplaced (“incorrect”).<sup>55</sup> Yet the concern expressed in

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<sup>53</sup> Addressing this question was done extensively in both *Perpetuity* and *Defense* whose extensive discussions will not be recapitulated here. However, addressing the question of *should* the doctrine extend to conservation easements assumes that the required intent to create a trust has been established because no one is arguing that a trust can exist in the absence of such intent, express or implied.

<sup>54</sup> *Perpetuity*, *supra* note 1, at 62–69.

<sup>55</sup> *Id.* at 41.

*Perpetuity* is based directly upon precedent in the application of the doctrine and upon commentaries by those who advocate the application of the doctrine—all cited in *Perpetuity*.<sup>56</sup> The following commentary on the results of applying the charitable trust doctrine to conservation easements illustrates the basis of the concern expressed in *Perpetuity*:

Except to the extent granted the power in the deed of conveyance, the holder of a donated easement should not be permitted to agree with the owner of the encumbered land to modify or terminate the easement unless and until: (i) compliance with one or more of the administrative terms of the easement threatens to defeat or substantially impair the conservation purposes of the easement, and a court applies the doctrine of administrative deviation to authorize the modification or deletion of such term or terms, or (ii) the charitable purpose of the easement has become impossible or impracticable due to changed conditions, and a court applies the doctrine of *cy pres* to authorize either a change in the conservation purpose for which the encumbered land is protected, or the extinguishment of the easement, the sale of the land, and the use of the proceeds attributable to the easement to accomplish the donor's specified conservation purpose or purposes in some other manner or location.<sup>57</sup>

This position is reiterated in *Defense*.<sup>58</sup> In its essence, it comes down to this: (1) no amendments should be agreed upon between landowner and a holder of an easement without court approval under any circumstances and (2) even with court approval, no amendments should be approved unless compliance with easement terms would “defeat or substantially impair” the purpose of the easement, or unless the charitable purpose of the easement becomes “impossible or impracticable.” Imposing such constraints on the day-to-day administration of conservation easements is the heart of the concern about application of the charitable trust doctrine to conservation easements expressed in *Perpetuity*.<sup>59</sup>

*Defense* argues that express and implied powers to amend conservation easements essentially overcome these constraints, at least for amendments.<sup>60</sup> However, with respect to express powers, many conservation easements do not contain provisions allowing amendment for the very reason that the law under

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<sup>56</sup> *Perpetuity*, *supra* note 1, at 62–69.

<sup>57</sup> Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 435–436 (2005).

<sup>58</sup> *Defense*, *supra* note 1, at 42.

<sup>59</sup> *Perpetuity*, *supra* note 1, at 69.

<sup>60</sup> *Defense*, *supra* note 1, at 41.

which they were created expressly allows for amendment.<sup>61</sup> Furthermore, it is a fundamental principal of all agreements that they are amendable if the parties thereto agree to amend them, even if the agreements in question expressly prohibit amendment (because even a prohibition against amendment can be amended away by the parties to the agreement).

Only in the event of application of the charitable trust doctrine (or similar doctrines) to easement agreements are the parties precluded from jointly agreeing to amendments. Because the charitable trust doctrine has never been applied to conservation easements, parties to conservation easements have had no reason to assume that they could not jointly agree to amendments. It would be unjust to deny the opportunity to amend to those parties to easements who failed to expressly provide for amendments because they believed that, as a matter of law, they could amend their easements whether or not such a provision was included.

*Defense* acknowledges that implied powers to amend conservation easements, under the charitable trust doctrine, are unpredictable, saying that easement holders “could be deemed to have implied power to agree to amendments”<sup>62</sup> and that “the boundaries of a holder’s implied power to agree to amendments” are “uncertain” given that “courts have traditionally been reluctant to find that a trustee has powers not expressly granted in the trust instrument.”<sup>63</sup>

Rather than alleviating concerns over the impact of application of the charitable trust doctrine on conservation easement modification, *Defense* reinforces that concern. Requiring the parties to conservation easements to rely on infrequently included express powers, and entirely uncertain implied powers, will create precisely the sort of uncertainty and expense in easement administration, and disincentive to easement contributions, discussed in *Perpetuity*.

More uncertainty arises when one attempts to answer the question: If the charitable trust doctrine is applied to conservation easements, how will it be enforced? Standing to intervene in the modification or termination of a conservation easement under the charitable trust doctrine has been explored thoroughly in both *Defense* and *Perpetuity*. While these articles do not agree on the extent of the expansion of standing under the doctrine,<sup>64</sup> they agree that standing will be expanded under the charitable trust doctrine.

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<sup>61</sup> UCEA § 2(a); WYO. STAT. ANN. § 34-1-202(a).

<sup>62</sup> *Defense*, *supra* note 1, at 48 (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> *Defense* argues that the “trust” with respect to which standing is ascertained is the “restricted grant of the easement rather than the entity holding the easement.” *Supra* note 1, at 67. However, the Wyoming Supreme Court in deciding *Hicks* itself accepted without discussion the District Court’s ruling that the Scenic Preserve Trust itself was the charitable trust with reference to which standing was to be determined. *Hicks*, 157 P.3d at 919.

It is clear under any variation of the doctrine that states' attorneys general would have standing.<sup>65</sup> That being the case, exactly how does the attorney general learn of a conservation easement modification or termination in order to be able to apply the doctrine? In the *Hicks* case the Attorney General learned of the easement termination because suit was brought challenging that interpretation, although the plaintiff was ultimately found to be without standing.<sup>66</sup> It is unlikely that private suit will be effective in providing notice of easement modifications or terminations.

Will every easement holder be required to report all amendments or terminations to the Attorney General? If so, must the Attorney General approve or disapprove each proposed change and, if so, how long will that take; what staff will it require; what kind of budgetary considerations are involved? Or, will review of proposed easement actions be delayed due to a shortage of funds and manpower to undertake the review? If, as is implied by *Defense*, amendments or terminations for which there is express or implied authority are exempt from the charitable trust doctrine, do we rely on the easement holders to make these determinations? In the relatively murky world of implied authority, what guidance will an easement holder have in making the determination that it has, or does not have, implied authority for a proposed modification or termination? How these questions will be answered in the context of the day-to-day administration of conservation easements will have a tremendous influence on the future effectiveness of what has been an extremely successful, privately administered, voluntary land conservation movement in the United States.

One other point from *Perpetuity* needs repetition: opening up private easement administration to intervention by political officials in the form of the states' attorneys general may be counterproductive.<sup>67</sup> According to Wyoming's former Attorney General, that is possible. As he said, some attorneys general may be conservation-minded and support conservation easements; others may be development-minded and undercut them.<sup>68</sup> In this same conversation, a senior Wyoming state legislator expressed a concern that Wyoming could be "locked up" with conservation easements; he saw the charitable trust doctrine as a mechanism to modify or terminate conservation easements should they threaten to lock up the state and the public interest require modification or termination to prevent

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<sup>65</sup> 88 AM. JUR. 3D *Proof of Facts* 469 § 8 (2007); Uniform Trust Code § 110(d); WYO. STAT. ANN. § 4-10-110(d) (2007); *Hicks*, 157 P.3d at 919.

<sup>66</sup> *Id.*

<sup>67</sup> *Perpetuity*, *supra* note 1, at 80.

<sup>68</sup> Phone conference with former Wyoming Attorney General Patrick Crank, June 4, 2007.

such an outcome.<sup>69</sup> This is precisely the view that could change the charitable trust doctrine from a shield to defend conservation easements to a sword to pierce them.<sup>70</sup>

The problem remains: how and when the charitable trust doctrine might be applied to conservation easements, once the principal is established that it should be applied, is unpredictable and potentially damaging to the kind of relationship that is necessary between a landowner and the holder of a conservation easement. As *Perpetuity* notes,<sup>71</sup> the unpredictable and potentially intrusive effect of application of the doctrine to conservation easements is highly likely, once word gets around, to discourage many landowners from contributing them in the future.

*Defense* says that the “primary issue addressed in this article is whether . . . [conservation] easements constitute restricted or unrestricted charitable gifts for state law purposes.”<sup>72</sup> *Defense* misses the point that the *primary issue* is that the essence of a conservation easement fundamentally distinguishes it from the types of gifts to which the charitable trust doctrine has been applied in the past. In missing this all important point, *Defense* makes of the charitable trust doctrine a procrustean bed to which those parts of conservation easement conveyances that fail to fit (most essentially the partnership between landowner and easement holder) will simply be lopped off.

### Hicks v. Dowd

Inevitably, at least in Wyoming, the debate over application of the charitable trust doctrine must address the *Hicks* case. As noted, *Hicks* is not only the sole reported case of an outright easement termination to come before the judicial system; it is an example of the very worst kind of easement administration imaginable. Here was an outright easement termination without *any* offsetting conservation benefit or even any effort to achieve such a benefit. The termination conferred a direct, significant, and unmitigated economic benefit on the landowner.

Had the easement holder been a private land trust rather than a public agency, such an action would be grounds for the imposition of severe sanctions under the tax code and possible loss of charitable status, or loss of eligibility for holding deductible easements in the future. However, Johnson County, which took these actions (with nearly complete disregard for the quasi-independent status of the

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<sup>69</sup> *Id.*; *Perpetuity*, *supra* note 1, at 82.

<sup>70</sup> *Perpetuity*, *supra* note 1, at 79.

<sup>71</sup> The Wyoming Supreme Court in deciding the *Hicks* case determined that “in Wyoming, a charitable trust may be enforced by a settlor, the attorney general, or a qualified beneficiary of the trust.” *Hicks*, 157 P.3d at 921.

<sup>72</sup> *Defense*, *supra* note 1, at 3.

Scenic Preserve Trust) as a governmental entity, is not subject to these sanctions nor, for the same reason, are the landowners.<sup>73</sup>

On the other hand, the fact that the easement holder in *Hicks* is a governmental agency does provide what would appear to be a simple and direct solution for the County's easement termination under Wyoming law. Essentially what Johnson County has done is to confer a unique, private economic benefit upon the landowners in violation of Article 16, § 6 of the Wyoming Constitution which provides: "Neither the state nor any county, city, township, town, school district, or any other political subdivision, shall loan or give its credit or make donations to or in aid of any individual, association or corporation . . . ." As such, the easement termination is voidable.<sup>74</sup> Furthermore, the Attorney General of Wyoming has the standing and authority to challenge the validity of such action as unconstitutional<sup>75</sup> as he has done in his complaint filed in *Salzburg v. Dowd*.<sup>76</sup> Because of this there is no need to expand the charitable trust doctrine to conservation easements in Wyoming to set aside the termination of the Meadowood conservation easement. A similar remedy is likely available in most states where the action is taken by a governmental agency similar to the action taken by Johnson County.

Even if the charitable trust doctrine is applied to cure the problem created by Johnson County, unless its application goes far beyond the facts of *Hicks* in some form of *dictum*, the precedent created will necessarily apply only to an outright, unmitigated easement termination. Were it possible to contain application of the charitable trust doctrine to such cases, the implications of the doctrine for conservation easement administration might be of less concern.

However, *Defense* advocates application of the doctrine not only to the extreme and straightforward case of an unmitigated easement termination, but for easement modifications as well. It is in the application of the doctrine to modifications that negative implications for efficient and reasonable easement administration arise. Of course, the problem is that one can effectively terminate an easement by amendment nearly as effectively as by outright termination.

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<sup>73</sup> Penalties are not imposed on the recipients of improper benefits from governmental agency action of this nature, as they are if the benefits accrue from the action of a public charity.

<sup>74</sup> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. *State v. Campbell County Sch. Dist.*, 32 P.3d 325, 331 (Wyo. 2001).

<sup>75</sup> WYO. STAT. ANN. § 9-1-603 (2007).

<sup>76</sup> *Defense*, *supra* note 1, at n.3.



### *Conclusion*

The vigorous assertion by *Defense* that the charitable trust doctrine should be applied to conservation easements reflects a concern that most of us working with conservation easements share: How well will these unusual legal constructs stand the test of time? As an easement donor myself, the last thing I want to see is reversal of the conservation of two family farms to which I made an economic and emotional commitment, particularly as the ownership of these farms is no longer mine.

On the other hand, voluntary land conservation through conservation easements has been tremendously effective in the United States, in large part because much of it is privately administered. The effect of imposing the kind of uncertainty and potential bureaucratic burden on the daily administration of conservation easements that could arise from a broad application of the charitable trust doctrine is sure to discourage many landowners from the use of conservation easements. The potential for injecting political considerations into the administration and enforcement of existing conservation easements in the form of attorney general oversight is a matter of genuine concern for a number of conservation easement practitioners.

As noted, the law on the books now, law that is applicable not only to deductible conservation easements, but to all conservation easements held by public charities, is ample to prevent abuse of the administration of conservation easements. Increased reporting (again expanded for tax years beginning in 2008 with the new Form 990) by land trusts of easement modifications or terminations, as well as reporting of efforts to monitor and enforce easements required by federal tax law; increased scrutiny of land trusts and easements by the IRS; intensified training and guidance from the Land Trust Alliance, and the Alliance's recent accreditation program; all are likely to result in a better understanding by easement holders of their duties and vastly improved easement administration. However, in the entire history of conservation easements prior to these recent efforts, all that can be found of record in the form of clear abuse of easement administration is the *Hicks* case, and the attempted, but voluntarily corrected, problems described in the *Myrtle Grove* and *Wal-Mart* cases.

Conservation easements, as documented in *Perpetuity* and elsewhere, are a peculiar mixture of legal concepts. Their nature does not lend them to a doctrine designed for entirely different kinds of charitable gifts. However, that is not to say that some remedy for improper easement administration cannot be created which is suited to their nature. Creation of such a remedy is a job that needs to involve the entire land trust community, not just academicians, but practitioners, land trusts, and landowners. It needs to be done openly, deliberately, and collegially rather than by default. There is time. After all, one bad case in the history of conservation easements hardly creates an emergency requiring precipitate action.