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CHANGES IN THE LAW REGARDING CONSERVATION EASEMENTS: AN UPDATE

C. Timothy Lindstrom

The previous issue of *Wyoming Law Review* included an article entitled *Income Tax Aspects of Conservation Easements*.¹ Soon after publication, the Wyoming legislature enacted substantial legislation that codifies modifications to Wyoming law pertaining to conservation easements, changes that are summarized for interested readers in this brief update.

Wyoming Easement Legislation

On February 25, 2005, Wyoming Governor Freudenthal signed into law the Uniform Conservation Easement Act (the Act).² The new law substantially conforms to a model statute of the same name (the Model Act)³ drafted by the National Conference of Commissioners on Uniform State Laws in 1981 and adopted in twenty-two other states.⁴ Prior to the passage of the Act, Wyoming was only one of two states that had yet to statutorily recognize conservation easements.⁵

Conservation easements are generally considered "easements in gross" because, in most cases, such easements are not appurtenant to other

1. C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1 (2005).

2. Uniform Conservation Easement Act of 2005, S. 149, 58th Leg. (Wyo. 2005) (codified at WYO. STAT. ANN. §§ 34-1-201 to -207 (LexisNexis 2005) (effective date July 1, 2005)).

3. UNIFORM CONSERVATION EASEMENT ACT (1981), available at <http://www.cals.ncsu.edu/wq/LandPreservationNotebook/PDFDocuments/uniform.pdf>.

4. See The National Conference of Commissioners on Uniform State Laws, A Few Facts About The Uniform Conservation Easement Act, available at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Apr. 5, 2005).

5. North Dakota is now the lone hold-out.

real property but run to the benefit of the public in general.⁶ Easements in gross, in the absence of statutory recognition, are generally unenforceable against the successors in title of the grantor of the easement. Prior to the Act, Wyoming land trusts avoided this problem by structuring conservation easements as appurtenant easements, acquiring a small parcel in fee from the easement donor, to which the easement became appurtenant.⁷

One of the most immediate consequences of adoption of the Act is that Wyoming land trusts will no longer have to ask easement donors for a small parcel in fee. The Act expressly provides that conservation easements are valid even though they do not comply with the common law requirements for appurtenant easements.⁸ The Act also validates conservation easements created prior to the July 1, 2005 effective date of the Act, provided that such easements otherwise comply with the Act,⁹ and does not affect easements valid under other Wyoming law.¹⁰ Generally speaking, this means that most existing conservation easements in Wyoming should be valid and enforceable as appurtenant easements both under the common law and under the Act.

Given these changes, one question certain to arise is whether land trusts will choose to convey fee parcels back to the original donor, or the donor's successor in title. In most cases, the answer is likely to be no. First, by doing so, land trusts would be giving up the means to enforce their easements under the common law pertaining to appurtenant easements, independent of the new and untested Act. Second, the fee parcels represent an asset of the land trusts that hold them, even though they may be only marginally valuable. Conveying these parcels back to private individuals in the absence of any legal obligation to do so, or in the absence of payment equivalent to the value of the fee parcels, may constitute "excess benefit transactions" in violation of federal tax law pertaining to public charities.¹¹

Two issues of concern led to the defeat of a similar measure in the Wyoming legislature during the 2002 legislative session. First were questions about whether the Wyoming prohibition against perpetuities¹² and the requirement that conservation easements be perpetual to be eligible for federal tax benefits¹³ were in conflict. Perhaps as an indicator of changing pub-

6. See Michael R. Eitel, Comment, *Wyoming's Trepidation Toward Conservation Easements Legislation: A Look at Two Issues Troubling the Wyoming State Legislature*, 4 WYO. L. REV. 57 (2004).

7. Lindstrom, *supra* note 1, at 9.

8. WYO. STAT. ANN. § 34-1-204 (LexisNexis 2005) (effective date July 1, 2005).

9. *Id.* § 34-1-205(b).

10. *Id.* § 34-1-205(c).

11. Lindstrom, *supra* note 1, at 19, 20.

12. WYO. CONST. art. I, § 30; WYO. STAT. ANN. § 34-1-139 (LexisNexis 2005). See also Eitel, *supra* note 6, at 94-105.

13. Lindstrom, *supra* note 1, at 18.

lic attitudes regarding conservation easements, the issue of perpetuity was not even discussed in the legislative debate leading up to passage of the Act. This may have been due to the circulation of several articles prior to the legislative session that described why conservation easements do not violate the prohibition.¹⁴ As explained in one such commentary:

Because conservation easements *vest* immediately upon transfer, the Rule [against perpetuities] is not violated. The fact that conservation easements are generally held “in perpetuity” is not contrary to the Rule because the perpetuity provision in most conservation easements refers to *how long* the transfer is in effect, not when it vests.¹⁵

The Act specifically provides that, unless otherwise specified in the easement deed, a conservation easement “is unlimited in duration.”¹⁶ This is a provision of the Model Act.

The second concern, and one that was expressed again by some legislators during this year’s legislative session, dealt with the potential impact of conservation easements on Wyoming’s real estate tax base.¹⁷ However, a modification of the Model Act incorporated into the Act provides that land subject to a conservation easement may not be taxed less than comparable land would be taxed under sections 39-13-101(a)(iii) and 39-13-103(b)(x) of the Wyoming tax code, which set forth Wyoming’s agricultural use value taxation provisions.¹⁸ There was no formal debate of this issue on the floor of either the House or Senate.

Another modification to the Model Act was incorporated into the Act in response to concerns expressed by mineral extraction interests, and reaffirms existing law that conservation easements cannot impair interests in minerals unless the owners of those interests consent to the conservation easement.¹⁹ To further assure the extractive industry and reaffirm existing law, the Act provides that the law regarding the primacy of the mineral estate is not altered, and conservation easements shall not limit the right of mineral owners or lessees to reasonable use of the surface for exploration and production unless all such owners and lessees consent to the conservation easement.²⁰ In a final modification of the Model Act, the Act also reaf-

14. See Eitel, *supra* note 6; see also Melissa Harm Benson, “Perpetuity”—*What Does It Mean for Conservation Easements and the Wyoming Constitution?*, WYO. OPEN SPACES (William D. Ruckelshaus Inst. of Env’t and Natural Res., Univ. of Wyo., Pub. No. B-1158, Nov. 2004).

15. Benson, *supra* note 14, at 4.

16. WYO. STAT. ANN. § 34-1-202(c) (LexisNexis 2005) (effective date July 1, 2005).

17. See Eitel, *supra* note 6, at 68-91.

18. WYO. STAT. ANN. § 34-1-207(b) (effective date July 1, 2005).

19. *Id.* § 34-1-202(d).

20. *Id.* § 34-1-202(e).

firms existing law that conservation easements are subject to condemnation.²¹

The other provisions of the Act are consistent with those of the Model Act. Included are provisions regarding the creation, termination, and modification of conservation easements (each of which may be done in the same manner as other easements);²² provisions allowing the grantor of a conservation easement to designate a third party to enforce the terms of the easement;²³ provisions conferring standing upon the owners of land subject to easements, holders of conservation easements, and persons with third-party enforcement rights to bring actions affecting conservation easements;²⁴ and a provision to insure that the existing powers of courts to modify or terminate conservation easements are not affected by the Act.²⁵

The Act should simplify conservation easement transactions in the future, and provides a new legal basis for the defense of easements. Furthermore, because the Act so closely tracks the Model Act, and because the Act expressly provides that it is to be "applied and construed . . . to make uniform the laws [pertaining to conservation easements] among the states enacting it,"²⁶ it brings with it not only the explanation of provisions of the Model Act provided by its drafters, but also that body of judicial interpretation already existing in the twenty-two states that have enacted the Model Act.

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21. *Id.* § 34-1-207(a).
 22. *Id.* § 34-1-202(a).
 23. *Id.* §§ 34-1-201(b)(iii), 34-1-203(a)(iii).
 24. *Id.* § 34-1-203(a)(iii).
 25. *Id.* § 34-1-203(b).
 26. *Id.* § 34-1-206.