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HICKS V. DOWD: THE END OF PERPETUITY?

*C. Timothy Lindstrom**

I. INTRODUCTION

This article examines the improper¹ termination or modification of conservation easements. It does so by (i) examining the termination of a conservation easement by Johnson County, Wyoming, dealt with in the recent Wyoming case of *Hicks v. Dowd*,² which is a case of first impression in the United States; (ii) overviews the common and statutory law pertaining to conservation easements in the United States and in Wyoming, including existing common and statutory law restraints on improper easement termination or modification; (iii) reviewing the doctrine of *cy pres* and its possible application to, and implications for, conservation easements; (iv) reconsidering the *Hicks* case in the light of existing common and statutory law remedies for improper easement termination, and in the light of the *cy pres* doctrine; and (v) comparing the results, and making a recommendation for an alternative to application of the *cy pres* doctrine to conservation easements.

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¹ For purposes of this article, the “improper” termination or modification of a conservation easement is intended to refer to those terminations or modifications that confer a net financial benefit on a private person or entity and/or fail to meaningfully advance land conservation on the protected property or some other property in the vicinity of the protected property.

² *Hicks v. Dowd*, 157 P.3d 914, 2007 WY 74 (Wyo. 2007).

While the *Hicks* decision may be one of first impression, it comes at a time of increasingly intense debate nationally among academics and practitioners regarding whether, and how, a conservation easement could (or should) be terminated or modified.³ The rapid growth of land protected by private land trusts⁴ in Wyoming through the use of conservation easements⁵ makes it likely that the termination and modification of conservation easements will become a legal issue confronted increasingly by practitioners. This is particularly true given the aging of conservation easements and the turnover in ownership of lands subject to conservation easements.⁶

As the cache of conservation easements in this country continues to grow, and as those easements, the vast majority of which are perpetual, begin to age, it will become increasingly important to determine whether, when, and how easements that no longer accomplish their intended conservation purposes can be modified or terminated.⁷

³ Easement termination is a rare occurrence. Easement modification (amendment) is a relatively common occurrence, as discussed *infra*, at notes 70–97 (and accompanying text). There are, generally speaking, many justifiable and important reasons for easement modification. However, easement termination is a different matter.

⁴ A “land trust” is typically a not-for-profit corporation recognized as a public charity (a “publicly supported organization”) under §501(c)(3) of the Internal Revenue Code of 1986, as amended, whose purpose is land conservation. As described, a land trust is a qualified “holder” of conservation easements under WYO. STAT. ANN. § 34-1-201(b)(ii)(B) (2007) as follows:

‘Holder’ means:

(A) A governmental body empowered to hold an interest in real property under the laws of this state or the United States; or

(B) A charitable corporation, charitable association or charitable trust, a primary purpose or power of which includes retaining or protecting the natural, scenic or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological or cultural aspects of real property.

⁵ According to the “2005 National Land Trust Census” prepared by the Land Trust Alliance (a national umbrella organization for land trusts), the number of acres protected by land trusts (*excluding* land protected by government agencies) in Wyoming increased by 159% between 2000 and 2005, to a total acreage protected privately in 2005 of 105,760 acres, of which 49,358 acres were protected by conservation easements. The total number of acres protected by private land trusts nationally in 2005 was reported by the census to be 11,890,109 of which 6,245,969 acres were protected by conservation easements. 2005 National Land Trust Census, published by the Land Trust Alliance.

⁶ For example, the first conservation easement in Wyoming was granted in 1978 to The Nature Conservancy on a several hundred-acre tract of land along Wyoming Highway 22 in Teton County. The land subject to this easement has changed hands twice since 1978 and is now again on the market.

⁷ Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HAV’D ENV’T L. REV., 422, 424 (2005).

Using the *Hicks* case as a starting point, it is the general purpose of this article to provide a legal, factual, and practical basis for the future evaluation of conservation easement termination and modification.

II. *HICKS v. DOWD*

A. *Factual Background*

On August 6, 2002, the Board of County Commissioners of Johnson County, Wyoming (“Board”) adopted “Resolution 257.”⁸ Resolution 257 authorized the Board to execute a quit-claim deed to Fred and Linda Dowd, owners of an approximately 1,043-acre ranch (referred to by the Court, and in this article, as the “Meadowood Ranch”) lying along Clear Creek outside of the Town of Buffalo, in Johnson County.⁹ The deed did two things. It conveyed a one-acre parcel of land (“One-Acre Tract”) adjoining Meadowood Ranch to the Dowds, and it released a conservation easement (“Meadowood Easement”) over the Ranch held by the Johnson County Scenic Preserve Trust (“Trust”).¹⁰ This Resolution and the actions taken pursuant to the Resolution appear unique in the United States.¹¹

The Meadowood Easement had been granted to the Board in 1993 by an instrument titled “Deed of Conservation Easement and Quitclaim Deed.” The grantor of the Meadowood Easement was the Lowham Limited Partnership. The Meadowood Easement followed a format used in Wyoming prior to the enactment of the Wyoming Uniform Conservation Easement Act (the “WYUCEA”) in 2005.¹² The format was one in which a parcel of land (in this case the One-Acre Tract) was conveyed in fee to the prospective easement holder followed by the conveyance of the conservation easement, which was conveyed as an appurtenance to the fee parcel.¹³ The reason for this format was the lack of formal enabling authority for conservation easements in Wyoming, see footnote, *infra* and related text.¹⁴

⁸ *Hicks v. Dowd*, 157 P.3d 914, 917, 2007 WY 74, ¶9 (Wyo. 2007).

⁹ *Id.* at 915, 917.

¹⁰ *Id.* at 917.

¹¹ No reported cases can be found in which a conservation easement was terminated voluntarily by the holder without payment of valuable consideration (although the Dowds contended that the indemnification provided by them as part of the conveyance and termination was valuable consideration).

¹² WYO. STAT. ANN. §§ 34-1-201-207 (2007).

¹³ For example, paragraph 10 of the Deed and Easement provided: “**Appurtenant.** The Easement granted herein is appurtenant to the real estate, described above at note 3 (and accompanying text), conveyed to Grantee contemporaneously with the conveyance of this Easement.”

¹⁴ See also Michael R. Eitel, *Wyoming’s Trepidation Toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming State Legislature*, 4 WYO. L. REV. 57 (2004); C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1 (2005), for descriptions of Wyoming’s method of conservation easement conveyance prior to enactment of the WYUCEA.

The Meadowood Easement was intended to protect the natural resources of Meadowood Ranch.¹⁵ The parties to the Meadowood Easement expressly intended its provisions to apply to the Ranch in perpetuity.¹⁶ Among other prohibited activities, the Meadowood Easement prohibited mining and the removal of minerals from the Ranch.¹⁷ In the event that Johnson County as Grantee could not carry out the purposes of the Meadowood Easement, the Meadowood Easement provided that it could be assigned pursuant to the doctrine of *cy pres*.¹⁸ Furthermore, if, due to “unforeseeable circumstances,” a court determined that the continuation of the Meadowood Easement was impossible and could not be “reformed” to substantially accomplish its purposes, then the Meadowood Easement provided that, with the approval of a court, “may transfer their respective interests in the Ranch” provided that any proceeds were distributed as provided for in the Treasury Regulations governing conservation easements.¹⁹

¹⁵ The purpose of the Easement conveyed by the Deed and Easement was described in paragraph 1 of the Deed and Easement as follows: “**Purpose.** It is the purpose of this Easement to preserve and protect in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch.”

¹⁶ Paragraph 5 of the “Background” of the Easement expressed Johnson County’s intention to carry out the intentions of the Grantor in perpetuity as follows:

The Grantee has the resources to carry out its responsibilities hereunder, intends, by acceptance of the grant made hereby, forever to honor the intentions of the Grantor stated herein to preserve and protect in perpetuity the natural elements and ecological and aesthetic values of the Ranch, and further intends to enforce the terms of this instrument.

The Easement further provided in paragraph 10 of the “Conveyance of Conservation Easement” as follows: “This Easement shall be a burden upon and shall run with the Ranch in perpetuity and shall bind the Grantor and its successors and assigns forever.”

¹⁷ Paragraph 5 of the “Conveyance of Conservation Easement” provided:

Prohibited Uses and Practices. The following uses and practices are inconsistent with the purposes of this Easement and shall be prohibited upon or within the Ranch:

. . .

(d) The filling, excavating, dredging, mining or drilling, removal of minerals, hydrocarbons, and other materials on or below the surface of the land . . .

¹⁸ Paragraph 9(a) of the “Conveyance of Conservation Easement” provided:

Assignment of Grantee’s Interests. (a) . . . If Grantee dissolves, becomes insolvent, ceases to exist as a ‘qualified organization,’ or for any other reason becomes unable to enforce effectively the conservation purposes of this Easement then Grantee shall be required to assign its interest in the Easement to a ‘qualified organization,’ and if such Grantee is unable to so transfer the Easement, the Easement shall be transferred to such ‘qualified organization’ as a court of competent jurisdiction applying the doctrine of *cy pres*, or analogous principles shall determine.

For a description of the doctrine of *cy pres* see *infra* notes 146–70 (and accompanying text).

¹⁹ Paragraph 9(b) of the “Conveyance of Conservation Easement” provided:

(b) The Grantor wishes to express again its intent that this Easement be maintained in perpetuity for the purposes expressed herein. However, if due to unforeseeable

Six years after contributing the Meadowood Easement, the Lowham Limited Partnership conveyed Meadowood Ranch to Fred and Linda Dowd.²⁰ The conveyance provided that it was

Subject to all prior easements, reservations, restrictions and exceptions of record, including but not limited to that certain Deed of Conservation Easement and Quitclaim Deed granted by the Board of County Commissioners of Johnson County, Wyoming by instrument recorded December 29, 1993 in Book 86A-41 of Miscellaneous, Page 672, of the Johnson County, Wyoming records.²¹

According to the Appellees' Brief filed with the Wyoming Supreme Court in the *Hicks* case, Paul Lowham assured the Dowds at the time of the sale of the Ranch that "there would be no mineral activity on the ranch and that Lowham had a study done which showed that the probability of surface disturbing mineral activities were so remote as to be negligible."²² Such a study would typically be done as part of the "due diligence" prior to the conveyance of a conservation easement to insure that the easement complied with federal tax code provisions governing the deductibility of conservation easement contributions.²³ Nevertheless, at the time of the conveyance of the conservation easement (and the conveyance to the Dowds) Northwest Energy held title to the subsurface minerals on the Ranch.²⁴

On April 15, 1997, prior to the conveyance to the Dowds, the Meadowood Easement was assigned by the Board to the Trust. The Trust was established pursuant to Resolution 145 adopted by the Commissioners and effective

circumstances a final binding non-appealable judicial determination is made that continuation of this Easement is impossible, or if such determination renders the continuation of the Easement impossible (e.g. pursuant to a condemnation proceeding), and if a judicial determination is made that the Easement cannot be so reformed as to accomplish substantial compliance with the purposes of this Easement, then Grantor and Grantee, with the approval of the Court, may agree to transfer their respective interests in the Ranch, provided that Grantee shall be entitled to such proceeds from the transfer as provided for in Treasury regulation section 1.170A-14(g)(6)(ii), as amended, to the extent that regulation applies to this transaction.

Note how closely this provision of the Meadowood Easement follows the operation of the doctrine of *cy pres* cited, *infra* note 154.

²⁰ *Hicks*, 157 P.3d at 915–17, 2007 WY 74, at ¶9.

²¹ Warranty Deed filed in the Johnson County, Wyoming records 2/2/99 in Book 87A, beginning at page 293.

²² Brief of Appellees, page 62, filed with the Wyoming Supreme Court in Appeal No. 06-02.

²³ See 26 C.F.R. §1.170A-14(g)(4)(ii) (2007).

²⁴ Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment filed in Civil Action No. 2003-0057, at 17.

December 21, 1993.²⁵ According to Paul Lowham, the Trust had been initiated by him with Johnson County in 1993 for the express purpose of holding the Meadowood Easement. However, the Trust was not ready by the end of 1993 and so the Meadowood Easement was conveyed directly to Johnson County which, under federal tax law, was qualified to hold deductible conservation easements.²⁶ According to Lowham, the Trust did not actually achieve its tax-exempt status under § 501(c)(3) of the Internal Revenue Code (the “Code”) (such status is required for a non-governmental organization to hold deductible conservation easements) until 1997.²⁷

In 2001 coal bed methane development was proposed on the Ranch²⁸ by Northwest Energy. In June of 2002 the Dowds requested that the Board terminate the Meadowood Easement on the grounds that “coal bed methane development was unpreventable, unanticipated, and inconsistent with” the Meadowood Easement. The Dowds proposed to the County that they buy²⁹ back the One-Acre Tract and the Meadowood Easement.³⁰ As of August 6, 2002, when the Board terminated the Meadowood Easement, Northwest Energy had two wells located on the Ranch occupying slightly less than one acre.³¹

As previously described, in response to the Dowd’s request the Board adopted Resolution 257,³² pursuant to which it re-conveyed the One-Acre Tract to the

²⁵ *Hicks*, 157 P.3d at 916, 2007 WY 74, at ¶6.

²⁶ See 26 C.F.R. § 1.170A-14(c)(i) (recognizing governmental agencies as qualified to hold deductible conservation easements).

²⁷ Affidavit of Paul Lowham filed in Civil Action No. 2003-0057 (*Hicks v. Dowd*).

²⁸ *Hicks*, 157 P.3d at 916–17, 2007 WY 74, at ¶8.

²⁹ There is no evidence, however, that Dowds paid anything other than the \$10.00 consideration represented in the deed and the indemnification they offered to the County.

³⁰ *Hicks*, 157 P.3d at 917, 2007 WY 74, at ¶8.

³¹ Affidavit of Kenneth M. Quinn, General Manager of Northwest Energy, filed in Civil Action No. 2003-0057 (*Hicks v. Dowd*).

³² The Resolution stated, in pertinent part, as follows:

WHEREAS, the mining, drilling or removal of minerals or hydrocarbons on or below the surface of the Surface Lands was to be prohibited by the Conservation Easement (Conservation Easement Paragraph 5(d), and

WHEREAS, the mineral rights associated with the Surface Lands were severed from the Surface Lands prior to grant of the Conservation Easement to the Board and therefore the mineral rights and associated access rights (“Dominant Mineral Rights”) were not and are not subject to the Conservation Easement, and

WHEREAS, coalbed methane development was unknown, unforeseen and unanticipated on the Surface Lands at the time the Conservation Easement was conveyed to the Board in 1993, and

WHEREAS, due to changes in technology, unforeseen coalbed methane development, incident to the Dominant Mineral Rights, has occurred and is occurring on the Surface Lands, and

Dowds and terminated the Meadowood Easement in exchange for the Dowd's agreement to indemnify the Board.³³

B. Procedural Background

On July 14, 2003, ten months after the Board's action, Robert Hicks, *et al*, filed Civil Action No. 2003-0057 in the District Court for the Fourth Judicial District, Johnson County (the "District Court"), naming the Dowds and the Board as defendants. The suit alleged (1) that the Board's violation of the Wyoming Public Meetings Act on grounds that the Board's action was not preceded by the required public notice, which violation allegedly rendered the conveyance to the Dowds void; (2) that termination of the Meadowood Easement could only occur after a judicial determination that continuation of the Meadowood Easement was impossible, failing which the conveyance to the Dowds allegedly breached the Meadowood Easement; (3) that the Board breached its fiduciary duty to only transfer its assets for "a reasonable and prudent sum of money;" and (4) that the Meadowood Easement required payment of a specified percentage of the proceeds of any sale of the Ranch in the event that the Meadowood Easement was extinguished.³⁴

The remedies sought by Hicks included (1) a declaration that the conveyance was void; (2) issuance of a writ of mandamus directing the Board to rescind the conveyance; (3) judgment against the Trust equal to the fair market value of the One-Acre Tract and the value of the Meadowood Easement; and (4) imposition of a constructive trust upon Meadowood Ranch to secure the value of the Meadowood Easement, such value to be as determined pursuant to § 1.170A-14(g)(6)(ii) of the Treasury Regulations (the "Regulations") (governing distribution of proceeds of the sale of land subject to a conservation easement in the event of termination of the easement).³⁵

WHEREAS, the coalbed methane development, which is not subject to the Conservation Easement, is and will be in the future inconsistent with the purposes of the Conservation Easement, makes enforcement of the Conservation Easement impossible as to the coalbed methane development and exposes the Board to liability under the terms of the Conservation Easement, and

WHEREAS, Fred L. Dowd and Linda S. Dowd have agreed to indemnify and hold harmless the Board and the County from all liability, claims and causes of action, including reasonable costs and attorneys fees, that arise out of or by virtue of transfer of the One Acre Tract and Conservation Easement to them

³³ *Hicks*, 157 P.3d at 917, 2007 WY 74, at ¶9.

³⁴ "Complaint for Declaratory Judgment, Mandamus Relief, Breach of Fiduciary Duties and Constructive Trust" filed by Hicks, *et al*, in Civil Action No. 2003-0057 (*Hicks v. Dowd*).

³⁵ *Id.*

Defendants' answers alleged that plaintiffs lacked standing to bring the suit. Defendants soon thereafter filed a Motion for Summary Judgment.³⁶ Plaintiffs responded with their own Motion for Summary Judgment, arguing, among other things that they had standing "because this matter involves issues of substantial public interest and importance."³⁷

On April 14, 2004, the district court denied both Motions and ruled as follows: (1) that the conservation easement was transferred to a charitable trust; (2) that under W.S. § 4-10-103, a beneficiary of such a trust would include any person with a present or future beneficial interest in the trust, including all Wyoming citizens, of which Robert Hicks was one; (3) that under Title 4 of the Wyoming Statutes, district courts have exclusive jurisdiction concerning the administration of charitable trusts and that no appeal is required by the Wyoming Administrative Procedures Act before seeking judicial resolution of controversies concerning charitable trusts; (4) that W.S. § 4-10-110 recognizes that the Wyoming Attorney General has the right to act as a beneficiary with respect to charitable trusts; (5) that there was no violation of the Wyoming Open Meetings Act; and (6) that the propriety of the County's transfer of the One-Acre Tract and termination of the Meadowood Easement is an issue for resolution by the district court.³⁸

The district court ordered the parties to notify the Wyoming Attorney General of the suit and seek his assistance.³⁹ The Attorney General responded that

The Attorney General's Office does not need to intervene in this matter. The issues are squarely before the Court and the interests of the public, as beneficiaries of the conservation easement at issue here, are being represented by arguments of counsel on all sides.⁴⁰

After the case was set for trial, Dowds filed an additional Motion to Dismiss the remaining claims in the suit for lack of subject matter jurisdiction on grounds that the plaintiffs had failed to file a petition for review of agency action under Wyoming Rule of Appellate Procedure ("W.R.A.P.") 12. In a telephonic hearing the district court agreed with the Dowds and subsequently entered an order dismissing plaintiffs' remaining claims. The district court's order essentially reversed its earlier ruling and found that the conveyance to the Dowds by the

³⁶ *Hicks*, 157 P.3d at 917, 2007 WY 74, at ¶13.

³⁷ *Id.*

³⁸ "Order Denying Motions for Summary Judgment" entered in Civil Action 2003-0057 (*Hicks v. Dowd*), April 12, 2004.

³⁹ *Id.*

⁴⁰ *See Hicks*, 157 P.3d at 918, 2007 WY 74, at ¶15 (quoting from letter of Wyoming Attorney General Pat Crank dated May 3, 2004).

County was “agency action,” any challenge to which was governed by W.R.A.P. 12 requiring filing of an appeal within thirty days of the action. The district court found that the plaintiffs’ failure to timely file the appeal deprived it of any jurisdiction in the case.⁴¹ Plaintiffs appealed the district court’s decision to the Wyoming Supreme Court and the decision was rendered May 9, 2007.

C. *The Supreme Court Ruling*

The Wyoming Supreme Court upheld the district court’s ruling dismissing the action, but rejected the district court’s decision that it lacked jurisdiction because plaintiffs failed to timely file an appeal under W.R.A.P. 12.⁴² In essence, the Supreme Court’s ruling boiled down to the following: (1) Because neither party challenged the district court’s finding that the Trust was a charitable trust, the Supreme Court accepted that the Trust was a charitable trust and that Appellant’s action was one to enforce the Trust⁴³; (2) applying charitable trust rules, and based upon its review of common law and the Wyoming Uniform Trust Code relating to charitable trusts, the Court found that plaintiffs lacked standing to enforce the charitable trust created by conveyance of the Meadowood Easement;⁴⁴ and (3) because the Attorney General’s determination not to participate in the suit was based upon the district court’s ruling that plaintiffs did have standing, the Supreme Court invited the Attorney General to reassess his position not to participate in the case.⁴⁵

Given the national controversy over conservation easement termination and modification, it seems likely that someone, somewhere, will misconstrue this decision as (1) applying the charitable trust doctrine as a matter of law governing all conservation easements in Wyoming, and/or (2) sanctioning the termination of conservation easements in Wyoming.

The decision really does neither. First, as a matter of Wyoming law “unspecified errors will not be considered” by the Wyoming Supreme Court on appeal.⁴⁶ Therefore, because neither party challenged the district court’s determination that the Trust was a charitable trust and that Trust actions were governed by charitable trust rules, the Supreme Court merely accepted the district court’s determination regarding these important legal principles as the law of the case. How the Supreme

⁴¹ “Order Dismissing Remaining Claims for Lack of Subject Matter Jurisdiction” entered in Civil Action 2003-0057 (*Hicks v. Dowd*) October 11, 2005.

⁴² *Hicks*, 157 P.3d at 918–19, 2007 WY 74, at ¶17.

⁴³ See *id.* at 919; “Given the district court’s unchallenged finding, we must agree that the Scenic Preserve Trust is a charitable trust.”

⁴⁴ *Id.* at 919.

⁴⁵ *Id.* at 921.

⁴⁶ See generally *Alleman v. Alleman*, 319 P.2d 871, 873, 78 Wyo. 135, 142 (Wyo. 1958); *Chicago, B. & Q. R. Co., et al., v. Lapman*, 104 P. 533, 536, 18 Wyo. 106 (Wyo. 1909).

Court might rule had the Trust's status as a charitable trust been challenged is unknown. However, had the Supreme Court found the district court's ruling on these points clearly erroneous, it could have addressed that part of the district court's ruling even if the matter had not been raised on appeal.⁴⁷

Furthermore, the Court could easily have disposed of the case by affirming the district court's dismissal for lack of jurisdiction under W.R.A.P. 12. This would have eliminated any need to address the charitable trust doctrine or its application in the case. Instead, the Supreme Court chose to decide the case on the basis of who has standing to enforce a charitable trust, an issue to which it addressed the bulk of its decision.⁴⁸ It would seem doubtful that the Supreme Court would have devoted such attention to the charitable trust doctrine if it felt that the application of the doctrine was inappropriate.

Second, the Supreme Court disposed of the case on a technical basis common to many environmental cases: lack of standing. Such a ruling says nothing about how the Supreme Court felt about the termination of the Meadowood Easement. In fact, the Supreme Court's deliberate invitation to the Attorney General could be construed evidence that the Supreme Court would like the opportunity to address the termination issue directly.⁴⁹

D. Conclusion

While the Supreme Court's ruling in *Hicks* may not itself be of great significance nationally, or even in Wyoming, it raises some issues (along with a hint of how those issues may be addressed by the Court in the future) central to conservation

⁴⁷ Note that the Wyoming Court does not appear to have specifically stated whether failure by the parties to raise the application of the charitable trust doctrine as an issue on appeal barred the Court from reviewing the matter, or simply excused the Court from doing so. This distinction is an important one. Were the Court to follow the rule in Texas that "[u]nless the trial court's findings are challenged by a point of error on appeal, they are binding upon the appellate court" *Wade v. Anderson*, 602 S.W. 2d 347, 349 (1980), then its acceptance of the district court's ruling regarding application of the charitable trust doctrine would be without significance. However, if the court were to follow the rule in Alaska that even though not raised on appeal, "plain error" (i.e. the error affects substantive rights and is "obviously prejudicial") may be addressed on appeal, *Matter of L.A.M.*, 777 P.2d 1057, 1059 (1986), then the court's acceptance of the district court's ruling regarding the charitable trust doctrine may be a significant signal that the court accepts the application of the charitable trust doctrine to conservation easements. Should the Attorney General elect to pursue Johnson County's actions further the court may have a chance to clear the air on this point.

⁴⁸ Four pages of this thirteen-page ruling were devoted to the issue of standing to enforce a charitable trust, *see supra* note 2, pages 8–11.

⁴⁹ While they may rue the termination of the Meadowood Ranch conservation easement, easement holders throughout Wyoming should breathe a sigh of relief that the Supreme Court did not rule that any and every Wyoming citizen has standing to challenge how these holders deal with conservation easements.

easements. This article will next briefly examine the legal context within which conservation easements exist. An understanding of this context provides a basis for considering improper termination and modification of conservation easements.

III. LEGAL CONTEXT

A. *The Nature of Conservation Easements*

“Conservation easements do not fit easily into any previously existing category of property interests”⁵⁰ Perhaps the best conclusion is that, given the existence of statutory provisions for conservation easements in virtually all 50 states,⁵¹ conservation easements are creatures of statute and their attributes, limitations, and applications are all governed by the statutes that authorize them. “The statutory conservation easement prevalent today arguably is an entirely new type of property interest that does not fit into the traditional categories of easement, real covenant, and equitable servitude.”⁵²

However, even though conservation easements are now creatures of statute, they have a common-law history dating back to the late 1800s.⁵³ Conservation easements were not used extensively until after the 1930s.⁵⁴ Furthermore, when the Meadowood Easement was granted Wyoming had not yet enacted the WYUCEA, so common law controlled that conveyance.⁵⁵

Finally, the Uniform Conservation Easement Act (“UCEA”) itself provides in § 2(a):⁵⁶ “[e]xcept as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” Thus, the common law of easements is the statutory frame of reference for conservation

⁵⁰ Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1190 (1989); see also Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. Rev. 883, 891 (2005).

⁵¹ Wyoming was one of the last states in the nation to enact enabling legislation authorizing conservation easements.

⁵² Blackie, *supra* note 50, at 1194.

⁵³ *Id.* at 1191. The first “land trust” was created in 1891 through the efforts of Charles Eliot. It became known as the “Trustees of Reservations of Massachusetts;” J. Breting Engel, *The Development, Status, and Viability of the Conservation Easement as a Private Land Conservation Tool in the Western United States*, 39 URB. LAW. 19, 32-33 (2007).

⁵⁴ Engel, *supra* note 53, at 36.

⁵⁵ Note; however, that the WYUCEA (WYO. STAT. ANN. § 34-1-205(b) (2007)) applies retroactively to the Meadowood Easement: “This article shall apply to any interest created before its effective date if it would have been enforceable had it been created after the effective date of this article unless retroactive application contravenes the constitution or laws of this state or the United States.”

⁵⁶ WYO. STAT. ANN. § 34-1-202(a) (2007).

easements. Common-law easements fit into a somewhat confused category of non-possessory property interests generally known as “servitudes.” A recent Wyoming case, borrowing heavily from the Restatement (Third) of Property, provides some important definitions and distinctions:

(1) A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land.

(a) Running with the land means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs.

(b) A right that runs with land is called a “benefit” and the interest in land with which it runs may be called the “benefited” or “dominant” estate.

(c) An obligation that runs with land is called a “burden” and the interest in land with which it runs may be called the “burdened” or “servient” estate. Restatement (Third) of Prop.: Servitudes § 1.1(1) (2000 & Cum. Supp. 2006).

A ‘servitude’ is a general category that includes a variety of non-possessory interests in land, including easements . . . *Id.* § 1.1(2). An easement is defined as ‘an interest in land which entitles the easement holder to a limited use or enjoyment over another person’s property.’ *Hasvold v. Park County Sch. Dist. No. 6*, 2002 WY 65, ¶ 13, 45 P.3d 635, 638 (Wyo. 2002) (quoting *Mueller v. Hoblyn*, 887 P.2d 500, 504 (Wyo. 1994)).

[E]asements may be appurtenant to a dominant estate or held in gross. 25 Am.Jur.2d Easements and Licenses §§ 3, 8, 9; 28A C.J.S. Easements §§ 9-11. An ‘appurtenant’ non-possessory interest in land ‘means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land.’ Restatement (Third) of Prop.: Servitudes § 1.5(1). An interest is ‘in gross,’ however, when the right ‘is not tied to ownership or occupancy of a particular unit or parcel of land.’ *Id.* § 1.5(2).

Finally, we note that ‘An easement is normally irrevocable. Easements . . . can be revoked only if the right to revoke is expressly reserved and properly exercised.’ *Id.* § 2.2 cmt. h.⁵⁷

Given the foregoing definitions, a conservation easement appears to be a “servitude,” as it is “a legal device that creates a right or an obligation that runs with land or an interest in land.”⁵⁸ However, is it an “easement” (“an interest in land which entitles the easement holder to a limited use or enjoyment over another person’s property”⁵⁹) or is it something else, such as a restrictive covenant or an equitable servitude, neither of which are considered “interests in land” but contractual rights.⁶⁰

A conservation easement, in contrast to a traditional easement, imposes a “negative” burden on the use of land rather than conferring on the holder a “limited use or enjoyment” over land. “A traditional easement allows the holder to make some use of the servient owner’s land, while a restrictive covenant restricts the servient owner’s use of his land.”⁶¹ At common law “negative easements” were only recognized for four distinct purposes, none of which included the general protection of open space or natural resources.⁶²

Also in contrast to the traditional easement, a conservation easement is “in gross.” An easement in gross benefits its holder whether or not the holder owns or possesses other land. There is a servient estate, but no dominant estate. Hence, an easement in gross may be described as an irrevocable personal interest in the land of another.⁶³ Historically, the type of restriction on land imposed by a conservation easement could only be achieved by a covenant.⁶⁴ “Traditionally, an easement was an interest in property while a covenant was merely a promise respecting the use of land.”⁶⁵ As can be seen from the foregoing discussion, a conservation easement has characteristics found in a number of different common law interests.

However, the drafters of the UCEA chose to put conservation easements into that class of interests known as “easements.” The National Conference of

⁵⁷ *Seven Lakes Development Company, LLC v. Maxon*, 144 P.3d 1239, 1245, 2006 WY 136 (Wyo. 2006).

⁵⁸ *Id.* at 1245.

⁵⁹ *Id.*

⁶⁰ Blackie, *supra* note 50, at 1197.

⁶¹ Blackie, *supra* note 50, at 1199.

⁶² *Id.* (“At common law there could only be four types of negative easements: easements for light, air, support of buildings, and flow of artificial streams.”).

⁶³ James W. Ely, Jr. and Jon W. Bruce, *THE LAW OF EASEMENTS AND INTERESTS IN LAND* § 2.2 (2007).

⁶⁴ Blackie, *supra* note 50, at 1199.

⁶⁵ *Id.* at 1197.

Commissioners on Uniform State Laws (“NCCUSL”), which drafted the UCEA, chose deliberately to classify conservation easements as

The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act’s less demanding requirements as ‘easements.’ Hence, the Act’s easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes, although the converse would not be true.⁶⁶

Thus, while there has been, and will continue to be, much academic analysis of the nature and origin of conservation easements under the common law,⁶⁷ for all practical intents and purposes today, they can be considered “easements.”⁶⁸ Both the UCEA and the WYUCEA apply retroactively to such “interests” provided that such interests would have been enforceable under them had they been created after its enactment.⁶⁹

Therefore, as a matter of law in Wyoming, and in most states that have enacted some form of the UCEA, whatever a conservation easement might

⁶⁶ UNIF. CONSERVATION EASEMENT ACT, Introduction (1981).

⁶⁷ See, e.g., Blackie, *supra* note 50; Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984).

⁶⁸ From a practical standpoint perhaps the most critical question is how the federal tax law considers conservation easements. For its part, the Regulations have created a very large tent within which to include deductible interests, granting deductions to “perpetual conservation restrictions” (26 C.F.R. § 1.170A-14(a)(i)(2) (2007)), defined by the Regulations as follows:

A ‘perpetual conservation restriction’ is a restriction granted in perpetuity on the use which may be made of real property—including, an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude). For purposes of this section, the terms easement, conservation restriction, and perpetual conservation restriction have the same meaning.

⁶⁹ UCEA, *supra* note 66, at § 5(b); WYO. STAT. ANN. § 34-1-205(b) (2007).

have been considered prior to the WYUCEA, it is now considered an interest in property within that class of interests known as an “easement,” regardless of the date the conservation easement was created. Thus, the Meadowood Easement is to be considered an “easement” for all purposes under Wyoming law. This leads to the question of how the class of interests known as easements may be terminated or modified.

B. Termination and Modification of Easements

There is no developed body of law regarding the termination or modification of conservation easements. As noted previously, the UCEA, including Wyoming’s version thereof, provides that conservation easements may be modified or terminated in the same manner as other easements.⁷⁰ The UCEA and the WYUCEA both provide that they do “. . . not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.”⁷¹ Therefore, this article will next examine the common law governing the termination of traditional easements because the UCEA and WYUCES apply this body of law to the termination of conservation easements.

According to *The Law of Easements and Interests in Land*⁷² there are at least fourteen principal means by which traditional easements may be terminated⁷³ of which the following, at least, would appear applicable to conservation easements:

1. Express Limitations

At common law easements can be terminated based upon an express limitation included in the terms of the easement.⁷⁴ “Term easements,” which are recognized under the UCEA and WYUCEA, include express termination dates. For example, a conservation easement could expressly provide that it terminates on the twentieth year after its execution. Or it could provide that it terminates on, for example, December 31, 2020. Either constitutes an easement with an express limitation. While term easements are enforceable, the inclusion of such a

⁷⁰ UCEA, *supra* note 66, at § 2; WYO. STAT. ANN. § 34-1-202(a) (2007).

⁷¹ UCEA, *supra* note 66, at § 3(b); WYO. STAT. ANN. § 34-1-203(b) (2007).

⁷² Ely & Bruce, *supra* note 63.

⁷³ Ely & Bruce, *supra* note 63, Chapter 10 “Termination of Easements,” lists the following general categories: express limitations; inherent limitations (including cessation of purpose and end of necessity); destruction of the dominant and/or servient estate; death of the holder of an easement in gross; release; abandonment (including abandonment by nonuse and abandonment by the affirmative action of the holder); termination by estoppel; termination by prescription; merger; sale of the servient parcel to a *bona fide* purchaser without notice; tax sale of the servient parcel; mortgage sale of the servient parcel; and condemnation.

⁷⁴ Ely & Bruce, *supra* note 63, at § 10.2.

provision in a conservation easement will disqualify that easement for federal tax benefits because those benefits depend upon easements being perpetual.⁷⁵

2. *Inherent Limitations—Cessation of Purpose*

Common law easements are considered to contain the inherent limitation that, if the purpose of the easement no longer exists, the easement terminates.⁷⁶ Thus, if an easement exists to provide access to a public road, and the road is abandoned and removed, the easement would terminate. A conservation easement for the limited purpose of protecting habitat for the black-footed ferret, for example, would be considered to contain an inherent limitation causing it to terminate in the event of the extinction of the ferret.

3. *Intentional Release*

At common law when the holder of an easement released that easement to the owner of the parcel servient to the easement, it was considered terminated. By the same token, if the owner of the easement and the owner of the servient estate were to agree to a modification of the easement, it would be considered modified.⁷⁷

One caveat to the argument that the holder of an easement (in the case of an easement in gross) or the owner of the dominant parcel (in the case of an easement appurtenant) and the owner of the servient parcel can agree to the termination of an easement is the common law rule that a release is only effective as to those with an ownership interest in the easement who agree to the release.⁷⁸ This rule would also appear applicable to easement modifications.

⁷⁵ *Supra* note 68.

⁷⁶ Ely & Bruce, *supra* note 63, describes this limit in § 10.8 as follows:

An easement created to serve a particular purpose ends when the underlying purpose no longer exists. This cessation of purpose doctrine is designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose.

Inquiry in cessation of purpose cases begins with determining the particular purpose of the easement in question. A provision in the easement instrument often indicates the parties' intent in this regard. When an easement purpose provision is ambiguous, courts examine the surrounding circumstances to ascertain the parties' intent and tend to favor the grantee with a broad interpretation. Next, one must decide whether the contemplated purpose still exists. If not, the easement is considered to have expired." (citations omitted).

⁷⁷ *See, e.g.*, Ely & Bruce, *supra* note 63, at § 10.20.

⁷⁸ Ely & Bruce, *supra* note 63, at § 10.17: "When two or more parties hold interests in the dominant estate, a release executed by one interest holder is binding solely on that party. Likewise, when an easement benefits two or more estates, a release granted by one dominant owner does not affect the rights of the owners of the other dominant estates." (footnotes omitted).

Typical conservation easements provide little, if any, documentary basis for finding that there are any parties to the easement other than the holder of the easement and the owner of the parcel servient to the easement. The terms of the typical easement, and expressions of the intentions of the parties rarely, if ever, indicate that either party intended anyone other than the grantee named in the easement to have an interest in, or right of control over, the easement. With respect to conservation easements granted as appurtenant easements, as is the case with most Wyoming conservation easements, there is even less doubt that the grantee is the sole owner of the easement because the grantee of the easement is almost always the sole owner of a dominant parcel for the benefit of which the conservation easement has been granted.

In the author's experience⁷⁹ landowners contemplating the contribution of a conservation easement are quite interested in the philosophy and operation of the prospective holder of their conservation easements and, to the extent it is possible, will "shop around" for that organization whose philosophy and operation most closely fit their own goals for the future of their property. Landowners are, in effect, inviting a land trust or government agency, to become a "partner" in the ownership and management of their land by granting a conservation easement and landowners are normally very particular about who this partner is and how it will be to deal with them in the future. Given this understandable concern by landowners, it is hard to imagine that easement donors intend to grant the future ownership and control of a conservation easement over their land to other than the original grantee.

4. Estoppel

Where the owner of a servient parcel takes actions that are inconsistent with terms of an easement and the holder of the easement knowingly allows that action to take place, the easement owner may be estopped, on equitable principles, from later objecting to the servient owner's actions.⁸⁰ However, in the Massachusetts case of *Weston Forest & Trail Association v. Fishman*, 849 N.E.2d 916 (Mass. App. Ct. 2006), the Massachusetts Appellate Court rejected a claim that a conservation easement was no longer valid based on estoppel, laches and waiver theories, because the court determined that such theories do not apply where there is a potential loss of public rights and benefits involved.

Courts may be unlikely to allow termination or modification of a conservation easement on the grounds of estoppel if they view conservation easements as being

⁷⁹ The author represents and has represented a number of land trusts and landowners with respect to the conveyance of conservation easements over the past fifteen years and has, himself, granted conservation easements on farms in Michigan and Virginia.

⁸⁰ Ely & Bruce, *supra* note 63, at § 10.21.

for the benefit of the public at large.⁸¹ However, suppose that a land trust held a conservation easement that prohibited any construction on the servient parcel and that the land trust knowingly ignored the construction of a new house on the servient parcel but later sought removal of the house after it was completed. It seems unlikely in such a case that a court would require removal of the house, or even the payment of substantial damages by the landowner to the land trust. In such a case it seems probable the court would apply equitable estoppel to protect the landowner.

5. *Termination by Merger*

Merger occurs when the owner of a dominant parcel acquires the servient parcel, or *vice versa*, so that both the dominant and servient parcels come into common ownership. In such a case the easement is considered to “merge” into the fee ownership and disappear.⁸² Merger also applies to easements in gross.⁸³ It would appear that a conservation easement could merge with the fee that is subject to the easement if a land trust acquired both the easement and the servient parcel. However, where the common owner of the dominant and servient interests owns one interest as a trustee, for example, the interests may not merge.⁸⁴ If a land trust is considered to hold a conservation easement in trust for the public⁸⁵ this rule would appear to preclude the possibility that the easement could be terminated by merger.

6. *Tax Sale*

Taxing authorities typically have an inchoate lien on land for the payment of delinquent taxes, whenever that delinquency occurs. Unless a tax lien is expressly subordinated to a conservation easement (which is unheard of), a sale of land to pay delinquent taxes may extinguish the easement.⁸⁶ Taxing authority varies greatly from state to state and the effect of a tax sale on a conservation easement is beyond the scope of this article.

7. *Mortgage Sale*

An easement will be terminated by the sale of the servient parcel pursuant to a prior mortgage.⁸⁷ Unless the holder of a mortgage existing at the time of

⁸¹ *Id.* “Courts are reluctant to extinguish public easements by estoppel. Indeed, in some jurisdictions, the extinguishment-by-estoppel doctrine apparently cannot be employed to terminate public rights-of-way.” *Id.*

⁸² Ely & Bruce, *supra* note 63, at § 2.27.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *E.g.*, McLaughlin, *supra* note 7.

⁸⁶ *See* Ely & Bruce, *supra* note 63.

⁸⁷ Ely & Bruce, *supra* note 63, at § 10:41.

conveyance of a conservation easement agrees to subordinate its interest to the easement, a future default in payment of the sum secured by the mortgage can result in a mortgage sale in which the property is sold free of the conservation easement. For this reason federal tax law requires that outstanding mortgages be subordinated to any conservation easement for which a tax deduction is sought.⁸⁸

8. *Condemnation*

A privately held easement may be terminated directly by an exercise of eminent domain. In addition, if the parcel servient to an easement is condemned the easement over that parcel will also terminate.⁸⁹ Conservation easements held by private conservation organizations are private property and, as such, are subject to condemnation by governmental agencies, and others invested with the power of condemnation, such as utilities. Conservation easements held by public agencies are not subject to condemnation; however, other circumstances may lead to the termination of such easements.⁹⁰ In addition, and more frequently, land subject to a conservation easement is subject to condemnation and the future use of the property after such condemnation is likely to be such as to eliminate the purpose for the conservation easement, leading to its *de facto* termination, or termination by judicial decree.

9. *Easement Termination and Modification in Wyoming*

Prior to enactment of the WYUCEA in 2005, Wyoming had no statutory provision for conservation easements. Until then a conservation easement in Wyoming, like any other easement, needed to meet the following requirements:

An 'easement' is an interest in land which entitles the easement holder to a limited use or enjoyment over another person's property. RESTATEMENT OF PROPERTY § 450(a) (1944). *See also* BLACK'S LAW DICTIONARY 509 (6th ed. 1990). This court has recognized that an easement has five essential qualities: first, an easement is incorporeal or without material nature; second, an easement is imposed upon corporeal property, not the owner of the property; third, an easement confers no right to participate in the profits arising from the property; fourth, an easement is

⁸⁸ 26 C.F.R. § 1.170A-14(g)(2) (2007).

⁸⁹ Ely & Bruce, *supra* note 63, at § 10.42.

⁹⁰ *E.g.*, a conservation easement held by a local government is not subject to the federal power of condemnation, and *vice versa*. However, if the Federal Highway Administration decides to construct a road through such an easement it will likely have sufficient leverage with the locality to induce it to terminate the easement in favor of the highway project. Localities are creatures of the state; therefore it is axiomatic that the state has power to over-ride a locally held conservation easement.

imposed for the benefit of corporeal property and; *fifth, there must be two distinct estates, the dominant estate, the one to which the right belongs, and the servient estate, the one upon which the obligation is imposed.* Belle Fourche Pipeline Co. v. State, 766 P.2d 537, 543 (Wyo.1988) (quoting Day v. Buckeye Water Conservation & Drainage Dist., 28 Ariz. 466, 237 P. 636, 640 (1925)).⁹¹

It is clear from the traditional easement cases in Wyoming⁹² that a traditional easement in Wyoming, absent some statutory authority, requires both a servient and dominant parcel. For this reason, prior to enactment of the WYUCEA, most conservation easements in Wyoming were created as appurtenant easements.⁹³ The WYUCEA eliminates, for conservation easements, the traditional requirements applicable for the creation of easements, including the requirement for a dominant and servient parcel.⁹⁴ However, the WYUCEA, which has retroactive application, also provides that conservation easements are to be terminated or modified in the same manner as other easements.⁹⁵ Therefore, although the **creation** of conservation easements in Wyoming has been freed from compliance with common law rules by the WYUCEA; **modification or termination** of conservation easements continues to be governed by the common law.

Under the common law the parties to an easement (the holder of the easement or owner of the dominant parcel, and the owner of the servient parcel) have the right to “release” the easement back to the owner of the servient parcel.⁹⁶ An easement may also be terminated when the purpose of the easement can no longer be fulfilled under the common law principles applicable to the termination of easements for “cessation of purpose.”⁹⁷ In the absence of case law to the contrary, it is presumed these principles apply to traditional easements, and therefore to conservation easements, in Wyoming.

⁹¹ Mueller v. Hoblyn, 887 P.2d 500, 504 (Wyo. 1994); Seven Lakes Development Company, LLC v. Maxon, 144 P.3d 1239, 1245 (Wyo. 2006) (emphasis added).

⁹² “Traditional” refers to easements as recognized at common law.

⁹³ This was done by having the prospective easement grantor first convey a small parcel of land in fee to the prospective holder of the conservation easement. Once the fee parcel was conveyed the grantor then (typically in a contemporaneous transaction) conveyed the conservation easement, which was conveyed expressly for the benefit of and appurtenant to the fee parcel. This was the approach taken by the Lowham Limited Partnership in creating the Meadowood Easement.

⁹⁴ WYO. STAT. ANN. § 34-1-204 (2007).

⁹⁵ WYO. STAT. ANN. § 34-1-202(a) (2007).

⁹⁶ See the discussion of “release,” *supra* text accompanying note 77. Note that neither of the parties to the *Hicks* suit, and neither of the courts considering the suit, appeared to consider this line of reasoning which clearly suggests that, in this case of first impression, no one was thinking of the conservation easement in the common law terms that seem dictated by the nature of the Meadowood Easement and the terms of the Act.

⁹⁷ See the discussion of “cessation of purpose,” *supra* note 76.

B. Tax Code Restrictions on the Right to Terminate or Modify Conservation Easements

Thus far, this article has examined the common law as it pertains to conservation easements, and the termination or modification of such easements. However federal tax law is another body of law that is highly relevant, increasingly vigorous, and that governs the administration of a great many conservation easements throughout the United States.

1. Mandatory Conservation Easement Provisions

Federal tax law applies in several ways to conservation easements. First, in order for a conservation easement to be eligible for federal tax benefits (and many state tax benefits), the easement must comply with § 170(h) of the Code and § 1.170A-14 of the Regulations. These rules expressly address the termination and modification of deductible conservation easements and, in so doing, tie the hands of the grantor of the conservation easement; the grantor's successors in ownership of the land that is subject to the easement; and the holder of the easement. There are several ways in which the tax law does this:

- a. Deductible conservation easements must be “in perpetuity.”⁹⁸
- b. Deductible conservation easements can only be held by a “qualified organization.”⁹⁹
- c. Deductible conservation easements must *require* that, in the event the holder of the easement goes out of existence, or decides to transfer the easement, the holder must transfer the easement to another “qualified organization” that agrees, in writing, to carry out the conservation purposes of the easement.¹⁰⁰

⁹⁸ See 26 C.F.R. § 1.170A-14(g)(6)(2) (2007). Neither the Code nor Regulations provide for or contemplate that, deductible conservation easements can be amended or voluntarily terminated except by a court due to changed circumstances. Nevertheless, it is clear that conservation easements are amended and, as evidenced by *Hicks*, even voluntarily terminated on rare occasion.

⁹⁹ 26 C.F.R. § 1.170A-14(c) (2007). A qualified organization is either a governmental agency, or a public charity recognized under 26 U.S.C.A § 501(c)(3), and meeting the public support test of 26 U.S.C.A. § 509(a), or is an organization described in 26 U.S.C.A. § 170(b)(1)(A)(vi). In any case, and significantly, the agency or organization must “have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.” Perhaps one of the most practical questions raised by the *Hicks* case is whether it should be assumed that a government agency, or creature of such an agency, should automatically be considered to have the commitment to protect the conservation purposes required by the tax law.

¹⁰⁰ C.F.R. § 1.170A-14(c)(2) (2007).

d. Deductible conservation easements must *require* that, in the event of a termination of the easement for any reason, proceeds from the sale of the underlying property must be shared between the owner of that property and the holder of the easement in proportion to the value of the easement and value of the parcel servient to the easement.¹⁰¹

Subject to the three-year statute of limitations limiting audits of non-fraudulent returns (*see, e.g.* Steven J. Small, *The Federal Tax Law of Conservation Easements*, p. 16-4.03) these requirements must be met by the terms of every deductible conservation easement and thereby become binding on the parties to the easement. Of course, as *Hicks* vividly demonstrates, even though a conservation easement meets all of these requirements, that will not prevent the parties from ignoring these requirements and terminating or modifying an easement as they see fit. However, there are external constraints on the parties as well.

2. *The “Tax Benefit Rule”*

For a landowner who contributes a conservation easement, receives a tax deduction, and later is a party to the modification or termination of the easement in a manner that is personally financially beneficial, the “tax benefit rule” requires “recovery” of the amount of income tax benefit generated by the deduction.¹⁰² However, where an easement termination or modification benefits a taxpayer other than the original donor, as in the *Hicks* case, the tax benefit rule has no application.

3. *Limitations Imposed on Public Charities*

Some of the most potent tax rules are those prohibiting an organization exempt from tax under § 501(c)(3) of the Code (known as “public charities”) from engaging in “excess benefit transactions.” Recall that in order to hold a tax deductible conservation easement the easement holder must be a “qualified organization.”¹⁰³ There are two categories of qualified organizations: (i) governmental agencies; and (ii) public charities recognized as exempt from taxation pursuant to § 501(c)(3) of the Code.¹⁰⁴ Public charities, for purposes of holding conservation easements, may be further classified as purely private organizations, or as government-affiliated organizations (such as the Johnson County Scenic Preserve Trust).¹⁰⁵

¹⁰¹ C.F.R. § 1.170A-14(g)(6)(ii) (2007).

¹⁰² *Nash v. U.S.*, 398 U.S. 1, 3 (1970) (describing the requirements of § 111 of the Internal Revenue Code).

¹⁰³ 26 U.S.C.A. § 170(h)(3) (2007).

¹⁰⁴ *Id.*

¹⁰⁵ *See* Instructions to Form 990, Items A and B under “General Instructions,” and Rev. Proc. 95-48, *infra* note 110.

Public charity status provides two significant benefits to an organization. First, such status relieves the organization from liability for the payment of income tax on its earnings. Second, contributions made to a public charity by taxpayers are deductible from the taxpayer's income for federal taxation purposes. These benefits are fundamental to maintaining public charity status, which is central to the survival of private land trusts.

The description of the type of organization that qualifies as a public charity is found in Code § 501(c)(3) and provides the basis for the restrictions imposed upon the operation of public charities:

Corporations, and any community chest, fund, or foundation, **organized and operated exclusively** for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, **no part of the net earnings of which inures to the benefit of any private shareholder or individual**, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.¹⁰⁶

The requirement that a public charity “be organized and operated exclusively” for charitable purposes, and the requirement that none of the net earnings of such an organization “inure to the benefit of any private shareholder or individual,” significantly affect the ability of private land trusts to terminate or modify conservation easements.¹⁰⁷ The first of these two requirements is sometimes described as the prohibition against “private benefit” and applies to all transactions in which a public charity engages. The second requirement is often referred to as the prohibition against “private inurement” and applies specifically to transactions between a public charity and an “insider.” More generally, these two requirements are referred to as the prohibition against “excess benefit transactions;” however, as described *infra*, the effect of the excess benefit rule only applies to transactions involving insiders.

The constraints imposed on public charities by Code § 501(c)(3) do not apply to government agencies, like Johnson County, which are qualified to

¹⁰⁶ 26 U.S.C.A. § 501(c)(3) (2007) (emphasis added).

¹⁰⁷ See the discussion of “excess benefit transactions,” *infra* notes 129-34 (and accompanying text).

hold deductible conservation easements without regard to Code § 501(c)(3). In addition, government-affiliated public charities, such as the Johnson County Scenic Preserve Trust, while technically subject to the same limitations and penalties as purely private land trusts, are distinct from private land trusts in several significant ways: (i) they are generally not dependent upon donor generated funds for their operations; (ii) they are controlled by a government agency; and (iii) they are exempt from the reporting requirements that apply to other public charities.¹⁰⁸

The distinction between conservation easement holders that are purely private land trusts; those that are government-affiliated land trusts; and those that are government agencies; are significant because they affect the application and effectiveness of federal restrictions. A typical private land trust must depend upon public support (and approbation) for its continued existence. Indeed, a land trust that is qualified to hold deductible conservation easements must derive at least one-third of its support from the general public.¹⁰⁹ In addition, it is required to report, in detail, its activities on an annual basis to the IRS on Form 990. Form 990, as of 2006, requires any exempt organization that holds conservation easements to attach a special schedule detailing its management of the easements that it holds.¹¹⁰

¹⁰⁸ Rev. Proc. 95-48 (1995). This discretionary ruling by the Secretary of the Treasury exempts government-affiliated organizations, such as land trusts set up and controlled by a locality (e.g. the Johnson County Scenic Preserve Trust) from filing Form 990, an information return required to be filed annually by most exempt organizations to insure their continued qualification under § 501(c)(3), among other things.

¹⁰⁹ *Supra* note 99.

¹¹⁰ Form 990, Schedule A, line 3c asks: “Did the organization receive or hold an easement for conservation purposes, including easements to preserve open space, the environment, historic land areas or historic structures? If “Yes,” attach a detailed statement.”

The Instructions to Form 990, Schedule A, line 3c are as follows:

Answer ‘Yes’ if the organization received or held one or more conservation easements during the year. In general, an *easement* is an interest in the land of another. A *conservation easement* is an interest in the land of another for purposes that include environmental protection; the preservation of open space; or the preservation of property for history, education, or recreation purposes. For more information see Notice 2004-41, 2004-28 I.R.B 31.

Attached Schedule. If ‘Yes,’ the organization must attach a schedule that includes the following information.

1. The number of easements held at the beginning of the year, the acreage of these easements and the number of states where the easements are located.
2. The number of easements and the acreage of these easements that the organization received or acquired during the year.

3. The number of easements modified, sold, transferred, released, or terminated during the year and the acreage of these easements. For each easement, explain the reason for the modification, sale, transfer, release or termination. Also, identify the recipient (if any), and show if the recipient was a qualified organization (as defined in section 170(b)(3) and the related regulations at the time of transfer).

A government-affiliated land trust, although it may be qualified as a public charity under Code § 501(c)(3) and be subject to the restrictions on its activities imposed by that law, is not required to report its activities annually on Form 990, and is typically not reliant on donor contributions or public support in general. A government agency that holds conservation easements is not subject to the provisions of Code § 501(c)(3) or the excess benefit rules; it does not depend upon donor support, and it may have many agendas in addition to, or in conflict with, the careful management and enforcement of the conservation easements that it holds.

4. *Prohibition on “Excess Benefit Transactions”*

As noted previously, the definition of “exempt organization” provided by Code § 501(c)(3) excludes from exempt status organizations “any part of the net earnings of which inures to the benefit of any private shareholder or individual.”¹¹¹ Transactions in which an exempt organization allows such benefits to accrue to a private shareholder or individual are known as “excess benefit transactions” and are expressly prohibited by federal law.¹¹² Transactions violating this prohibition confer “private inurement” and are sometimes referred to as “private inurement transactions.”

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4. Show the number of easements held for each of the following categories:
 - a. Easements on buildings or structures;
 - b. Easements that encumber a golf course or portions of a golf course;
 - c. Easements within or adjacent to residential developments and housing subdivisions, including easements related to the development of property; and
 - d. Conservation easements that were acquired in a transaction described under *Purchase of Real Property from Charitable Organizations* in Notice 2004-41 and if the organization acquired any such easements during the year.
 5. The number of easements and the acreage of these easements that were monitored by physical inspection or other means during the tax year.
 6. Total staff hours and a list of expenses devoted to (legal fees, portion of staff salaries, etc.) incurred for monitoring and enforcing new or existing easements during the tax year.
 7. Identify all easement on buildings or structures acquired after August 17, 2006, and show if each easement meets the requirements of section 170(h)(4)(B). (emphasis added).

¹¹¹ 26 U.S.C.A. § 501(c)(3) (2007).

¹¹² 26 U.S.C.A. § 4958 (2007).

The Code defines excess benefit transaction, and excess benefit, as follows:

(1) Excess benefit transaction

(A) In general. The term ‘excess benefit transaction’ means any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit. For purposes of the preceding sentence, an economic benefit shall not be treated as consideration for the performance of services unless such organization clearly indicated its intent to so treat such benefit.

(B) Excess benefit. The term ‘excess benefit’ means the excess referred to in subparagraph (A).¹¹³

The class of persons covered by the prohibition against excess benefit transactions are referred to by the Code as “disqualified persons,” and often as “insiders,” and includes:

Any person who was in a position to exercise substantial influence over the affairs of an organization at any time during the five-year period ending on the date of a transaction is a disqualified person with respect to that transaction. The spouse, ancestors, siblings, children, grandchildren, and great grandchildren of such a person (and the spouses of his or her siblings and descendants) are also disqualified persons. A 35% controlled entity (a corporation, partnership or trust 35% owned by disqualified persons) is also a disqualified person.¹¹⁴

A “substantial contributor” is included within the class of “disqualified persons.” The rules governing excess benefit transactions incorporate the definition of “substantial contributor” that applies to private foundations:¹¹⁵

the term ‘substantial contributor’ means any person who contributed or bequeathed an aggregate amount of more than \$5,000 to the private foundation, if such amount is more than 2 percent of the total contributions and bequests received

¹¹³ 26 U.S.C. § 4958(c)(1) (2006).

¹¹⁴ 9 MERTENS LAW OF FEDERAL INCOME TAXATION § 34:254. (citations omitted).

¹¹⁵ 26 C.F.R. § 53.4958-3(e)(2)(ii) (2007).

by the foundation before the close of the taxable year of the foundation in which the contribution or bequest is received by the foundation from such person. In the case of a trust, the term ‘substantial contributor’ also means the creator of the trust.¹¹⁶

The amount of contributions considered in determining whether a person is a “substantial contributor,” for purposes of determining whether such person is a disqualified person, are contributions made in the tax year of the transaction plus the four preceding years.¹¹⁷ In other words, a contributor is a substantial contributor if his or her contributions over a five year period aggregate more than 2% of the donee’s total contributions **and** exceed \$5,000.

Given the value attributable to many conservation easements for the donor’s tax deduction purposes, it is likely that many conservation easement contributors, even if they contribute nothing else to an organization, fall within the category of “substantial contributor.” This assumes, however, that an easement contribution is, or should be, valued in the same manner as the contribution of other property or cash. However, a conservation easement has no real fair market value because there is no “market” for conservation easements once they have been contributed. In fact, a conservation easement in the hands of the holder represents a liability to the holder.¹¹⁸

There is no guidance with respect to how a conservation easement contribution would be valued by the IRS for purposes of determining whether the contributor of such an easement was a “substantial contributor” by reason of such contribution. However, the real question is whether such a contribution places the contributor in a position to have substantial influence over the holder of the easement. The answer to this question “depends upon all relevant facts and circumstances.”¹¹⁹ Suffice it to say that there are respectable arguments to be made on both sides of the question.

The penalty for an individual who engages in an excess benefit transaction with a public charity is two-fold: the individual is subject to an excise tax in the amount of 25% of the excess benefit¹²⁰ **and** the individual must “correct” the transaction.¹²¹ Correction of the transaction requires the beneficiary of the transaction to restore the benefit received. In other words, the beneficiary of an

¹¹⁶ 26 U.S.C.A. § 507(d)(2)(A) (2007).

¹¹⁷ 26 C.F.R. § 53.4958-3(e)(2)(ii) (2007), incorporating the definition of “substantial contributor” provided by 26 U.S.C.A. § 507(d)(2)(A) (2007).

¹¹⁸ For example, the liability for the costs of monitoring and enforcing the easement in perpetuity.

¹¹⁹ 26 C.F.R. § 53.4958-3(e)(1) (2007).

¹²⁰ 26 U.S.C. § 4958(a)(1) (2006).

¹²¹ 26 C.F.R. § 53.4958-7 (2007).

excess benefit transaction must give back the benefit, plus a 25% excise tax on the amount of the benefit. If the transaction is not corrected and the excise tax is not paid within the “correction period”¹²² a penalty in the amount of 200% of the excess benefit is imposed on the individual.¹²³

Managers of an exempt organization knowingly engaging in an excess benefit transaction are also subject to an excise tax of 10% of the excess benefit, not to exceed \$20,000.¹²⁴ Furthermore, the IRS has the authority to revoke the exempt status of an organization that engages in an excess benefit transaction,¹²⁵ and the Regulations make clear that the excise tax provisions do not replace the other requirements for qualifying for and maintaining exempt status.¹²⁶ Revocation of public charity status is the death knell for most public charities; consequently the excess benefit rules provide a strong incentive to public charities not to engage in excess benefit transactions; provided that these rules are understood.

There is no distinction made in the Code or Regulations between assets acquired by a deductible contribution, or otherwise, with respect to application of the excess benefit rules, or the requirement that assets be used exclusively for charitable purposes, *infra*. Thus, the improper termination or modification of a conservation easement, regardless of whether the easement was acquired by contribution, purchase, or exaction, and whether the grantor of the easement enjoyed any tax benefits for the conveyance of the easement, is subject to the excess benefit prohibition.

5. *Prohibition Against Conferring Private Benefit*

In addition to the prohibition against “excess benefit transactions” involving “disqualified persons,” the tax code also requires that exempt organizations be “organized and operated exclusively” for charitable purposes.¹²⁷ This rule is sometimes referred to as the prohibition against “private benefit” to distinguish it from the prohibition against “private inurement.”

¹²² *Id.*

¹²³ 26 C.F.R. § 53.4958-1(c)(2)(i) (2007).

¹²⁴ 26 U.S.C.A. §§ 4958(a)(2) and (d)(2) (2007).

¹²⁵ *Ferguson v. Centura Health Corp.*, 358 F. Supp. 2d 1014, 1017 (D. Colo. 2004). *See also*, *Universal Life Church v. United States*, 128 F.3d 1294, 1298 (9th Cir. 1997), where the 9th Circuit Court stated:

when the IRS revokes the tax exempt status of organizations which do not meet the 501(c)(3) requirements, it serves a public trust function in assuring the public that 501(c)(3) tax exempt status is conferred and retained only by organizations engaged in appropriately charitable functions

¹²⁶ 26 C.F.R. § 53.4958-8(a) (2007).

¹²⁷ *Supra* note 107.

(c) Operational test—(1) Primary activities. An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.¹²⁸

Among other things, this requirement says that an exempt organization may not engage in the equivalent of an excess benefit transaction with anyone, regardless of whether they fall within the definition of “disqualified person.” This is because engaging in the equivalent of an excess benefit transaction¹²⁹ with someone who is not an insider still involves the use of assets of the organization in a manner that confers a private, rather than a public, benefit, thereby violating the requirement that the organization be operated **exclusively** for public purposes. The requirement that assets be used exclusively for charitable purposes constitutes a prohibition on transactions that confer a “private benefit.”

The requirement that an exempt organization be operated exclusively for charitable purposes is viewed by the courts as imposing an additional requirement on charities that their activities confer no more than an “incidental” private benefit, regardless of whether or not the beneficiaries are “disqualified persons.”¹³⁰ The exempt organization engaging in the equivalent of an excess benefit transaction, but with a person who is not a disqualified person, runs the risk of losing its exempt status.

¹²⁸ 26 C.F.R. § 1.501(c) (2007).

¹²⁹ “Equivalent” but not “identical” because an excess benefit transaction, by definition, must involve a disqualified person.

¹³⁰ *American Campaign Academy*, *supra* at 1068, 1069:

Petitioner misconstrues the overlapping characteristics of the private benefit and private inurement prohibitions. We have consistently recognized that while the prohibitions against private inurement and private benefits share common and often overlapping elements, *Church of Ethereal Joy v. Commissioner*, 83 T.C. 20, 21 (1984), *Goldsboro Art League, Inc. v. Commissioner*, 75 T.C. 337, 345 n.10 (1980), the two are distinct requirements which must independently be satisfied. *Canada v. Commissioner*, 82 T.C. 973, 981 (1984); *Aid to Artisans, Inc. v. Commissioner*, 71 T.C. at 215.

The absence of private inurement of earnings to the benefit of a private shareholder or individual does not, however, establish that the organization is operated exclusively for exempt purposes. Therefore, while the private inurement prohibition may arguably be subsumed within the private benefit analysis of the operational test, the reverse is not true. Accordingly, when the Court concludes that no prohibited inurement of earnings exists, it cannot stop there but must inquire further and determine whether a prohibited private benefit is conferred. *See Aid to Artisans, Inc. v. Commissioner*, 71 T.C. at 215; *Retired Teachers Legal Fund v. Commissioner*, 78 T.C. 280, 287 (1982).

However, revocation of status is the **only** sanction available to the IRS in dealing with transactions that confer impermissible “private benefit” as opposed to “private inurement.”¹³¹ Excess benefit transactions are limited to “disqualified persons” as defined in the law. Because not all persons are “disqualified persons,” it is possible for someone who is not a disqualified person to engage in the equivalent of an excess benefit transaction with a public charity without incurring any penalty,¹³² but exposing the charity to loss of its exempt status.

The IRS has been reluctant in the past to invoke what is the ultimate punishment for a public charity: revocation of charity status. This is one reason why Congress created an intermediate punishment in the form of excise tax penalties for excess benefit transactions.¹³³ Furthermore, the rule that “no more than an insubstantial part” of an exempt organization’s activities be for other than its exempt purposes is a situational, and far less precise standard than the prohibition against excess benefit transactions, for which the law provides an exact measurement.¹³⁴ For example, an organization with \$100 million in assets could, presumably, engage in private benefit transactions valued in the millions and still consider those transactions to be an “insubstantial part” of its assets. On the other hand, for an organization whose assets are valued at \$100,000, very few private benefit transactions would be considered “insubstantial.”

For these reasons, the improper termination or modification of conservation easements involving persons other than disqualified persons is less likely to be deterred than such actions involving disqualified persons.

6. *Organizational Requirements for Public Charities*

In order to qualify as a public charity under Code § 501(c)(3) an entity must be “organized . . . exclusively for . . .” charitable purposes.¹³⁵ This requirement mandates that the organizing documentation¹³⁶ of such an entity strictly limit the activities of the entity to those that are consistent with the purposes which qualify the organization for public charity status, and that such documentation

¹³¹ “Private inurement” applies exclusively to the benefits generated to disqualified persons from excess benefit transactions.

¹³² The exception would be if the transaction constitutes recovery of an item with respect to which the person previously received a “tax benefit” as provided in 28 U.S.C.A. § 111 (2007).

¹³³ MERTENS LAW OF FEDERAL INCOME TAXATION, *supra* note 114.

¹³⁴ 26 C.F.R. § 53.4968-1(b) (2007) provides:

An excess benefit is the amount by which the value of the economic benefit provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person exceeds the value of the consideration (including the performance of services) received for providing such benefit.

¹³⁵ *Supra* note 107.

¹³⁶ For example articles of incorporation, articles of organization, etc. and by-laws.

does not permit activities that extend beyond such purposes.¹³⁷ Assuming that a land trust¹³⁸ has complied with this requirement (organizations seeking exempt status are required to submit copies of organizational documents to the IRS for purposes of determining compliance¹³⁹) any action to improperly terminate or modify a conservation easement would be *ultra vires* and potentially voidable or, arguably, illegal and void.¹⁴⁰ Arguably, transactions involving either private benefit or private inurement are a violation of federal law and are, therefore, “illegal.”

In Wyoming the Supreme Court has applied the doctrine of *ultra vires* to set aside a non-profit corporation’s transfer to an irrevocable trust of funds required by the corporation’s by-laws to be used for operational expenses, where the irrevocable trust did not so limit use of the funds.¹⁴¹ However, Wyoming law also provides that no act of a non-profit corporation will be declared *ultra vires*

¹³⁷ 26 C.F.R. § 1.501(c)(1)(b) (2007).

¹³⁸ Whether purely private, or a government-affiliated land trust.

¹³⁹ See IRS Form 1023 and the accompanying instructions.

¹⁴⁰ The following citation provides the general basis for these statements:

Generally, ‘*ultra vires* acts’ by a corporation are acts beyond the scope of express or implied powers conferred upon the corporation by the corporate charter or articles of incorporation and the laws in the state of incorporation. It has also been said that an act of a corporation is *ultra vires*, or beyond its power, when the act is outside the objects for which the corporation is created, as defined in the law of its organization.

19 C.J.S. *Corporations* § 673 (citations omitted).

It is generally recognized that a corporation cannot enter into, or bind itself by, a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature, within its constitutional power, has declared will not be performed.

18B AM. JUR. *Corporations* § 1734 (citation omitted).

However, the terms ‘*ultra vires*’ and ‘illegality’ represent distinct ideas. An illegal act of a corporation is one expressly prohibited by statute or against public policy and, thus, a corporate act may be *ultra vires* without being illegal.

As a general rule, corporate transactions and contracts which are illegal, as distinguished from merely *ultra vires*, are void and cannot support an action nor become enforceable by performance, ratification, or estoppel.

The doctrine of *ultra vires* has no application if a private corporation makes a contract which is prohibited by statute; for instance, even though an *ultra vires* contract may become enforceable once it is partially executed or through estoppel, no contract rights arise if the corporation engages in a prohibited act. Conversely, if there is no prohibitory statute, which invalidates the transaction at issue, the transaction is merely *ultra vires*, and statutes limiting the defense are applicable.

19 C.J.S. *Corporations* § 674.

¹⁴¹ Jewish Cmty. Ass’n of Casper v. Cmty. First Nat’l Bank, 6 P.3d 1264, 1267 (Wyo. 2000).

where a third party has acquired rights as a result of the act.¹⁴² Furthermore, it is generally the case that courts do not favor *ultra vires* as a means of challenging corporate actions, and that state statutes increasingly prevent the assertion of *ultra vires* in a manner that would disrupt the legitimate expectations of third parties.¹⁴³ However, there is a distinction between actions that are *ultra vires* and those that are illegal.¹⁴⁴ The latter are not “voidable” but “void.”

Arguably, the improper termination of a conservation easement is not only an *ultra vires* action by the land trust, and therefore voidable, but is also illegal under the terms of the Code and, therefore, void and unenforceable, and outside of the third party protection afforded by the Wyoming statute.

7. Requirements Imposed on “Qualified Organizations”

In addition to the foregoing constraints, all organizations “qualified” to hold deductible conservation easements are required to “have a commitment to protect the conservation purposes of the donation.”¹⁴⁵ This requirement would appear to prohibit a qualified easement holder from improperly terminating or modifying a conservation easement. To date, the IRS has not argued that improper easement termination or modification by a land trust disqualifies it as a holder of deductible easements. However, the provision appears to provide a legitimate basis for the IRS to do so.

C. Summary

The foregoing are some of the principal common law and statutory provisions that currently govern the creation, termination and modification of conservation easements. These rules constitute substantial remedies and disincentives to the improper termination or modification of conservation easements. The next section describes and discusses an alternative, or at least supplemental, approach to controlling the improper termination or modification of conservation easements: the charitable trust doctrine. The charitable trust doctrine, more commonly the doctrine of *cy pres*, has recently been advocated as a needed new control on improper easement termination and modification.

IV. CONSERVATION EASEMENTS AND THE DOCTRINE OF CY PRES

A. The Doctrine of Cy Pres Described

In recent years application of the doctrine of “*cy pres*” to conservation easements has been advocated. An argument has been prominently made that

¹⁴² WYO. STAT. ANN. § 17-19-304 (2007).

¹⁴³ 19 C.J.S. *Corporations* § 676.

¹⁴⁴ *Supra* note 140.

¹⁴⁵ 26 C.F.R. § 1.170A-14(c)(1) (2007).

a conservation easement donor makes a “*cy pres*” bargain with the public. The bargain is described as one in which the donor of a perpetual conservation easement is allowed to exercise “dead hand control” over his or her land through the imposition of the easement in exchange for which privilege the donor is deemed to have agreed that the easement may be modified or terminated to meet future unforeseen circumstances according to the rules of the doctrine of *cy pres*.¹⁴⁶ This argument has not gone without criticism.¹⁴⁷

A number of authorities have also recently given support to the application of the *cy pres* doctrine to conservation easements. The drafters of the Uniform Trust Code (“UTC”) state that “the creation and transfer of an easement for conservation or preservation purposes will frequently create a charitable trust.”¹⁴⁸ The Restatement (Third) of Property also recommends that a form of *cy pres* be applied to conservation easements.¹⁴⁹ As recently as February 2007 the Executive Committee of the NCCUSL amended the comments to the UCEA to advocate application of the charitable trust doctrine to conservation easement modification and termination.¹⁵⁰

¹⁴⁶ McLaughlin, *supra* note 7, at 459.

¹⁴⁷ For example, see Andrew C. Dana, *Conservation Easement Terminations, Property Rights, and the Public Interest*, draft prepared for “Advanced Legal Roundtable on Extinguishment of Conservation Easements” (2005), Land Trust Alliance National Rally, Madison Wisconsin, October 15, 2005 (cited with permission and copy in author’s files) [hereafter *Conservation Easement Terminations*]; see also Andrew C. Dana, *Conservation Easement Amendments: A View from the Field* (2006) available at www.learningcenter/lta.org (copy in author’s files).

¹⁴⁸ See comment to UTC § 4, paragraph 5. The complete paragraph states:

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value.

Note that the drafters provide no foundation for the statement that creation and transfer of conservation easements frequently create a charitable trust; the author found no basis for such a conclusive statement in the research undertaken in preparation for this article.

¹⁴⁹ RESTATEMENT (THIRD) OF PROPERTY § 7.11 (2000).

¹⁵⁰ UCEA § 3, comment, was amended by adding the following:

The Act does not directly address the application of charitable trust principles to conservation easements because: (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement’s validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was

The Regulations contemplate that a deductible conservation easement can be judicially extinguished in the event of an “unexpected change in circumstances” that “make impossible or impractical the continued use of the property for conservation purposes” and dictates the manner in which proceeds resulting from such an extinguishment must be used, unless state law provides differently.¹⁵¹

In the *Hicks* case, the Meadowood Easement not only incorporated¹⁵² the provisions required by the Regulations¹⁵³ it also required application of the doctrine of *cy pres* to locate a new holder in the event that the original easement holder ceased to exist.¹⁵⁴ Clearly, at least one party to the Easement had *cy pres* in mind in executing the conveyance. Relying on the Wyoming case of *Town of Cody v. Buffalo Bill Memorial Association*,¹⁵⁵ the district court in the *Hicks* case applied the charitable trust doctrine to the termination of the Meadowood Easement and, the application of the doctrine being challenged on appeal to the Supreme Court of Wyoming by neither party, that Court adopted the doctrine as the rule of the case.

beyond the scope of the drafting committee’s charge, and (ii) the Act is intended to be placed 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. However, because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and state law of adopting states as it relates to the enforcement of charitable trust should apply to conservation easements.

Thus, while Section 2(a) [of the UCEA] provides that a conservation easement may be modified or terminated ‘in the same manner as other easements,’ the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding. [Referencing McLaughlin, *supra* note 7 and *infra* note 194.].

¹⁵¹ 26 C.F.R. § 1.170A-14(g)(6)(i) (2007) provides:

If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee’s proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

26 C.F.R. § 1.170A-14(g)(6)(ii) (2007) sets forth a formula for reimbursing a land trust if a conservation easement is terminated, but specifically recognizes that State law may direct that proceeds be applied in a manner other than the formula contained in the Treasury Regulations.

¹⁵² The Deed and Easement § 9(b).

¹⁵³ 26 C.F.R. § 1.170A-14(c)(2) (2007).

¹⁵⁴ The Deed and Easement § 9(a).

¹⁵⁵ *Town of Cody v. Buffalo Bill Memorial Ass’n*, 196 P.2d 369 (Wyo. 1948).

The doctrine of *cy pres* has been described as follows:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.¹⁵⁶

The term '*cy pres*' is taken from the Norman French phrase '*cy pres comme possible*' meaning 'as near as possible,' or 'as near as may be.'

[*Cy pres* is applicable in situations where: (1) property is given in trust for a particular charitable purpose; (2) it is, or becomes, impossible, impracticable, or illegal to carry out such purpose; and (3) the settlor manifested a more general intention to devote the property to charitable purpose.

The doctrine of *cy pres* is a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor when that intent cannot be effectuated to the letter of the donor's directions or specifications.¹⁵⁷

However, the doctrine of *cy pres* applies to the law governing charitable trusts,¹⁵⁸ which makes the doctrine part of the law of trusts. Conservation easements are governed by the law pertaining to easements,¹⁵⁹ which is property law.

An additional hurdle to application of the *cy pres* doctrine to conservation easements is the requirement of trust law that a trust exist, i.e. that someone entrusts certain property to another, as trustee, to hold for the benefit of another;¹⁶⁰ **and** that the person creating the trust **intends** that the creation of the trust to be

¹⁵⁶ RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

¹⁵⁷ 88 AM. JUR. PROOF OF FACTS 3D 469 § 2 (2007). (citations omitted).

¹⁵⁸ *Id.* at § 5.

¹⁵⁹ UCEA § 2.

¹⁶⁰ See, e.g., *Scotti's Drive In Restaurants, Inc. v. Mile High Dart In Corp.*, 526 P.2d 1193, 1196 (Wyo. 1974).

for “general charitable purposes” as opposed to specific and limited charitable purposes.¹⁶¹ However, the courts generally favor a finding of general charitable purpose, and a specific and limited purpose will only be found when the evidence is “clear, definite, and unambiguous.”¹⁶² Furthermore, the *Restatement (Third) of Trusts* favors finding of a general charitable purpose.¹⁶³

Construing a conservation easement as containing a general charitable purpose is dealt with at length in “*Rethinking the Perpetual Nature of Conservation Easements*.”¹⁶⁴ Finally, the UTC, enacted in Wyoming, provides for application of the doctrine of *cy pres* in any case where the specific purpose of a charitable trust cannot be accomplished.¹⁶⁵ The comment to the UTC suggests that this provision supersedes the traditional requirement that a charitable trust express a general charitable purpose to be subject to *cy pres*:

Under Section 413(a), a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settlor’s charitable purposes to the extent they can be ascertained.¹⁶⁶

An even bigger hurdle to finding that the conveyance of a conservation easement creates a charitable trust is the requirement that for a trust to exist there must be a clear intention on the part of the putative settlor to create a trust. The UTC provides:

¹⁶¹ See, e.g., 88 AM. JUR. PROOF OF FACTS 3D 469 § 16 (2007):

The courts have repeatedly stated that *cy pres* can be applied only where the donor had a general charitable purpose and not where the gift was intended for a particular purpose only. The ultimate question is whether the donor would have preferred that his gift or bequest be applied to a like charitable purpose in the event that his original scheme did not work or would have instead desired that the funds be diverted to private use. (citation omitted).

¹⁶² *Id.*

¹⁶³ RESTATEMENT (THIRD) OF TRUSTS § 67, comment b states:

Contrary intention of settlor. Just as it is against the policy of the trust law to permit wasteful or seriously inefficient use of resources dedicated to charity, trust law also favors an interpretation that would sustain a charitable trust and avoid the return of the trust property to the settlor or successors in interest. See § 28, Comment a. Accordingly, when the particular purpose of a charitable trust fails, in whole or in part, the rule of this Section makes the *cy pres* power applicable (thus presuming the existence of what is often called a general charitable purpose) *unless the terms of the trust (defined in § 4) express a contrary intention* (emphasis added).

¹⁶⁴ McLaughlin, *supra* note 7, at 480.

¹⁶⁵ UTC § 413(a); WYO. STAT. ANN. § 4-10-414(a) (2007).

¹⁶⁶ UTC § 413(a), comment.

- (a) A trust is created **only if**:
- (2) the settlor indicates an intention to create the trust;¹⁶⁷

As noted, *supra* notes 146-47 (and accompanying text), some have argued that the grantor of a conservation easement makes a *cy pres* bargain with the public that allows the grantor to control the use of land in future generations through the terms of the easement.¹⁶⁸ However, it is likely that most conservation easement donors would be surprised to learn that they have made a bargain with anyone but the organization or agency to which they granted the easement.

Unless landowners manifest a clear and unambiguous intention to convey restricted rights (as opposed to limited rights) in land through their conservation easement donations, there is no legal or equitable basis to conclude that the donors struck a *cy pres* bargain with the public, triggering equitable review by the courts when easement terminations arise.¹⁶⁹

Negotiation of the terms of most conservation easements are the exclusive province of the landowner granting the easement and the prospective holder of the easement (with the IRS being an invisible third-party).¹⁷⁰ Many easement donors are quite particular about who holds their conservation easement, and insert provisions that restrict the manner in which an easement may be transferred in the future. The notion that the conservation easement that they have negotiated with a specific land trust constitutes a trust the beneficiaries of which are the general public would be startling to many easement donors.

¹⁶⁷ UTC § 402(a)(2); WYO. STAT. ANN. § 4-10-403(a)(2) (2007) (emphasis added). The comment to UTC § 402(a)(2) states:

[S]ubsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. See RESTATEMENT (THIRD) OF TRUSTS Section 13 (Tentative Draft No. 1, approved 1996); RESTATEMENT (SECOND) OF TRUSTS Section 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered.

¹⁶⁸ See McLaughlin, *supra* note 7, at 430.

¹⁶⁹ Dana, *supra* note 147, at 15.

¹⁷⁰ Where grant funds have been used in purchasing a conservation easement the grantor of the funds may also require that certain provisions be included in the grant to insure protection of its interest in the use of the funds. Of course in purchased easement situations, the application of the charitable trust doctrine becomes even more complicated because the easement was not created with exclusively charitable intentions so the existence of the “general charitable intent” necessary to create a charitable trust in a conservation easement is even more dubious.

Nevertheless, it seems clear that **if** a court chooses to apply the doctrine of *cy pres* to a conservation easement, there is likely to be sufficient legal basis for it to do so. On the other hand, given the actual fact easement donors are likely to deed their easement contribution to constitute a charitable trust for the public at large, courts may find it equally justifiable to find that charitable trust principles and the *cy pres* doctrine should not apply to the contribution of conservation easements. The important question therefore is whether application of the *cy pres* doctrine to conservation easements is needed, or prudent, in the long run.

To evaluate this question requires consideration of several issues. First, how serious is the problem of improper termination or modification of conservation easements? Second, is there a demonstrated lack of remedies for and disincentives to engaging in improper easement termination or modification? Third, is the doctrine of *cy pres* a suitable alternative, or addition to, existing remedies?

This article takes the position that there is scant evidence of a current serious problem of improper easement termination or modification in the United States today, and that the existing remedies and disincentives are adequate, or at least have not yet proven inadequate, to deal with the problem. The author relies on dearth of evidence to support a contrary position on these two points in making them. This leaves the question of whether the doctrine of *cy pres* is an appropriate alternative, or supplement on to the law governing conservation easements; which is a question that will be examined next.

B. Implications of the Application of Cy Pres to Conservation Easements

1. Elimination of Land Trust Authority to Modify or Terminate Conservation Easements

One of the most profound consequences of applying the doctrine of *cy pres* to conservation easements is that such application denies the holder of the easement the right to terminate or modify a conservation easement on their own. The Wyoming Supreme Court in the *Town of Cody* case¹⁷¹ quotes favorably from 2 *Bogert*,¹⁷² *Trusts and Trustees* § 435 as follows:

In the absence of special provisions in the trust instrument, the trustees have no power of their own motion to decide that it has become impossible or inexpedient to carry out the trust as originally planned and then to substitute another scheme. If the trustees feel

¹⁷¹ *Town of Cody*, 196 P.2d at 378.

¹⁷² Ronald Chester, George Gleason Bogert & George Taylor Bogert, *THE LAW OF TRUSTS AND TRUSTEES* (3d ed. 2005).

that an emergency of this type has arisen, they should bring the situation to the attention of the court and ask for instructions. (emphasis added).

King and Fairfax also note: “if the easement is in fact a charitable trust, neither the land trust nor the fee holder, but only the court can modify a CE purpose.”¹⁷³ Taking control over the modification, in particular, of conservation easements would represent an enormous change from current land trust practice and from the expectations of most easement grantors and holders.¹⁷⁴

2. *Expansion of Standing to Enforce Conservation Easements*

At common law the only person with standing to enforce an easement was the holder of the easement. The owner of the servient parcel would also have standing to prevent abuse of the easement, and to seek termination or modification under one or more of the rules described immediately following. Application of the *cy pres* doctrine could expand standing to enforce conservation easements considerably beyond the holder of the easement and owner of the parcel servient to the easement.¹⁷⁵ In considering this possible expansion of standing, it must be borne in mind that standing to enforce is, essentially, standing to “second guess”

¹⁷³ Mary Ann King and Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65,110 (2006).

¹⁷⁴ While voluntary termination of a conservation easement is a very rare event, modification of conservation easements occurs frequently enough that the Land Trust Alliance is developing a formal policy to guide the nation’s land trusts in the practice. Many land trusts around the country have themselves adopted formal internal policies governing the modification of conservation easements. The subject of easement modification is the subject of frequent lectures for landowners, attorneys and land trust professionals around the country.

Most conservation easement amendment policies that have been adopted by land trusts permit amendments under the following circumstances:

- To correct clerical or scribes’ errors in original drafting;
- To fulfill prior agreements specified in the conservation easement;
- To clarify an ambiguities [sic] in the conservation easement;
- To address condemnation proceedings by a public agency; and
- To add restrictions that strengthen the resource protection of the easement.

Dana, *supra* note 147, at 4.

¹⁷⁵ See *supra* note 155 for an example of the extent to which the Wyoming Supreme Court has permitted standing to enforce a public trust. However, standing to enforce charitable trusts traditionally has been quite restricted by the courts; see, e.g., Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Charitable Donors to Reserve the Right to Enforce a Gift Restriction?*, 42 REAL PROP. PROB. & TR. J. 245, 247 (2007): The general rule in charitable trust law, subject to a few notable exceptions, is that all parties except the state attorney general are prohibited from bringing suit to enforce the terms of a charitable gift. (citation omitted). However, Weisbord acknowledges that, in response to pressure from donors, courts are beginning to expand standing. *Id.*; see also McLaughlin, *infra* note 194, at 1080 (regarding limited standing).

the decisions of a land trust and landowner that result in the termination, or **any** modification, of a conservation easement.

Cases have found that standing under the *cy pres* doctrine is sufficiently broad to include the attorney general of the state in which the trust is established; designated or ascertained beneficiaries of the trust; and, **in some cases, donors to or founders of, the trust in question, but typically not mere taxpayers or members of the public who may enjoy the benefits of the trust.**¹⁷⁶

The UTC recognizes the attorney general as having “the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state by notifying the trustee by written notice.”¹⁷⁷ The UTC, and its Wyoming counterpart, also recognizes the settlor of a charitable trust as having standing to enforce the trust.¹⁷⁸ “Settlor” includes not only the creator of the trust, but anyone contributing to the trust.¹⁷⁹ Thus, as applied to a land trust, the founders of the land trust would have standing to invoke *cy pres* as well as anyone contributing to the trust, at least for purposes of enforcing the trust with respect to that contribution.

¹⁷⁶ *Supra* note 157, at § 8. Recall that the district court, in its initial ruling in *Hicks* (later abandoned), held that **anyone** who was a citizen of Wyoming had standing to seek to enforce the Scenic Preserve Trust in that case. *Supra* note 38. Such an expansion was rejected by the Wyoming Supreme Court in *Hicks*, 157 P.3d 914, 920 (Wyo. 2007) (citing Mitchellville Cmty. Ctr., Inc. v. Vos (*In re* Clement Trust), 679 N.W.2d 31, 37 (Iowa 2004)):

It is well established that persons are not entitled to sue [to enforce a charitable trust] if their only benefit from enforcement of the trust is that shared by other members of the public. The community’s interest in the enforcement of a charitable trust must be vindicated by the attorney general.

¹⁷⁷ UTC § 110(d); WYO. STAT. ANN. § 4-10-110(d) (2007). Note: notification of the trustee is only found in the Wyoming law.

¹⁷⁸ UTC § 405(c); WYO. STAT. ANN. § 4-10-406(c) (2007).

¹⁷⁹ UTC § 103; WYO. STAT. ANN. § 4-10-103 (2007). In reading the comments to the UTC it is not clear that the drafters were considering the consequences of applying *cy pres* to conservation easements:

The definition of ‘settlor’ (paragraph (15)) refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 401. Determining the identity of the ‘settlor’ is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the ‘settlor’ by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument.

Typically, a land trust is organized by incorporators, who may, or may not, have any functional interest in the land trust (e.g., an incorporator may be an attorney hired to form the corporation that becomes the land trust). More likely, the initial officers and directors would be a closer equivalent of a typical trust settlor, but it is not clear that these people actually “created” the land trust. Furthermore, it is at least arguable that a significant contributor early in the history of a land trust has standing to invoke *cy pres*, not only with respect to the original contribution, but also with respect to assets that may have resulted from the contribution. Application of the doctrine of *cy pres* to a land trust, according to the provisions of the UTC, would significantly expand standing to invoke *cy pres* to enforce a conservation easement.

The Wyoming Supreme Court in *Hicks* comprehensively explored the question of who has standing to enforce a charitable trust. The Court reviewed a number of authorities, including *The Law of Trusts and Trustees*,¹⁸⁰ which the Court cited favorably for the following proposition with respect to standing to enforce a charitable trust:

Recently, the common law standing rule has expanded. ‘[A]s public attention to laxity in the enforcement by the Attorney General increases, courts have begun to expand standing to enforce charitable trusts’ to others. Chester, et al., *The Law of Trusts and Trustees*, § 411, at 2. Generally, that power has been extended to individuals with a fiduciary interest (trustees, former and subsequent trustees, or subtrustees); to specially interested beneficiaries; and to the settlors and their successors. *Id.*, at § 412–415; *see also* *Forest Guardians v. Powell*, 24 P3d 803, 808 (N.M.App. 2001).¹⁸¹

Following this line of reasoning, possible persons with standing to invoke *cy pres* to enforce a conservation easement would include (i) the attorney general, (ii) the settlors of the land trust; (iii) the successors of the settlors (including the original officers and board members and their successors in a land trust); (iv) trustees past, (v) present and (vi) future (virtually, all board members of land trusts); and (vii) “specially interested” beneficiaries (a new class).

The Wyoming Court concluded that a “qualified beneficiary” “means a beneficiary who is currently entitled to distributions of income or principal from the trust or has a vested remainder interest in the residuary of the trust which is not subject to divestment.”¹⁸² The Court also concluded that the term

¹⁸⁰ Chester, Bogert & Bogert, *supra* note 172.

¹⁸¹ *Hicks*, 157 P.3d at 920.

¹⁸² *Id.* at 921 (citing WYO. STAT. ANN. § 4-10-110(d)(xv) (2007)).

“qualified beneficiary” was analogous to the common-law concept of “specially interested.”¹⁸³ In both cases, the concept limits the standing of beneficiaries of a charitable trust to beneficiaries who have been singled out by the trust, either as individuals, or as a class of persons, to receive a benefit different from that available to the public at large.¹⁸⁴ The typical conservation easement does not single out individuals, or classes of individuals, as beneficiaries. While neighbors may derive a special benefit from the protection of adjoining land, it would be hard to consider them as having been intentionally granted a special benefit from a conservation easement.

A typical charitable trust does not impose a burden on real property, other than by outright ownership when full fee title has been passed to the trustee, or perhaps by holding a traditional easement over real property as an appurtenance to real property that it owns outright. Therefore, it is not clear whether the owner of a parcel of land servient to a conservation easement has any standing under the doctrine of *cy pres*. Such a person would certainly seem to have a “special interest” in the charitable trust to which his or her land is subject. However, the sense of “qualified” or “special” as described above speaks only to **benefits** derived from a charitable trust. The owner of a parcel servient to a conservation easement typically does not derive a “benefit” from the conservation easement; the restrictions imposed on his or her use of the land sound much more like a **detriment**.

Under the common law applicable to easements the owner of the servient parcel clearly has standing in matters pertaining to the easement to which his property is subject. Presuming that the *cy pres* doctrine, if applied, would not replace, but only supplements, the common law governing conservation easements, application of the doctrine should leave intact the servient parcel owner’s standing under common law property principles with respect to the conservation easement to which his or her parcel is subject. Where neighbors contemporaneously convey conservation easements on their adjoining properties each might be considered a “qualified beneficiary” by reason of having a “special interest” in the easement on the others’ property.¹⁸⁵

In any event, it is clear that applying the doctrine of *cy pres* expands significantly the number of persons with standing to enforce a conservation easement. This, in turn, will complicate the enforcement of conservation easements because enforcement may involve multiple parties and the attendant increase in the time and cost of litigation. The foregoing discussion suggests that applying the *cy pres* doctrine to conservation easements may open standing to challenge decisions

¹⁸³ *Hicks*, 157 P.3d at 921.

¹⁸⁴ RESTATEMENT (THIRD) OF TRUSTS § 28, comment c.

¹⁸⁵ Note that if these easements were conveyed pursuant to an agreement between the neighbors the tax deductibility of the conveyances would be suspect.

to modify or terminate a conservation easement to (i) the attorney general, (ii) the grantor of the easement, (iii) the grantor's successors, (iv) the founders of the holder of the easement (including officers and board members) and their successors, (v) anyone who can demonstrate a "special interest" in enforcement of the easement and, (vi) under the original common law applicable to easements, the owner of the parcel servient to the conservation easement.

3. *Changing the Criteria for Modification and Termination of Conservation Easements*

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.

The UTC does not spell out the criteria for application of the doctrine of *cy pres* other than to state: "the court may apply *cy pres* to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes."¹⁸⁶ *The Restatement (Third) of Trusts* describes the circumstances which trigger application of the doctrine as those in which carrying out the purpose of the trust becomes (1) unlawful; (2) impossible; (3) impractical; (4) or wasteful.¹⁸⁷ A more expansive view of circumstances justifying application of *cy pres* is provided by *Am. Jur. Proof of Facts*:

The *cy pres* doctrine cannot be invoked until it is clearly established that the directions of the donor cannot, or cannot beneficially, be carried into effect. (citation omitted) . . . A purpose becomes impracticable when the application of property to such purpose would not accomplish the general charitable intention of the settlor.¹⁸⁸

As easements, conservation easements have been seen primarily as two-party contracts¹⁸⁹ in which modifications could cover a broad range of issues. Such issues include the correction of technical errors in the easement document; clarification

¹⁸⁶ UTC § 414(a)(iii); WYO. STAT. ANN. § 4-10-415(a)(iii) (2007).

¹⁸⁷ RESTATEMENT (THIRD) OF TRUSTS § 67.

¹⁸⁸ 88 AM. JUR. PROOF OF FACTS 3D 469 § 10 (2007) (citations omitted).

¹⁸⁹ Mary Ann King and Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 85 (2006).

of ambiguities; tightening of restrictions; expansion of the area covered by the easement¹⁹⁰; relocation or modification of reserved development rights; increase in reserved rights in exchange for increased conservation on the easement parcel or another parcel; and modifications to reflect changes in the law, or to improve enforcement and management of the easement.

The doctrines of *cy pres* and *administrative deviation* or *equitable deviation*¹⁹¹ would preclude most of these amendments because these doctrines only permit revisions in the substantive or administrative terms of a charitable trust in the event of **an unforeseen change in circumstances** that make **unlawful, impossible, or impractical**¹⁹² achieving the purpose of the trust.¹⁹³ Few typical conservation easement amendments could meet any of these criteria, although a leading advocate of application of the *cy pres* doctrine suggests that it would be appropriate to imply a reserved right in all conservation easements to amend the easement for most of the purposes listed in the preceding paragraph.¹⁹⁴ How this

¹⁹⁰ In the author's opinion, placing additional acreage under conservation easement should be done by conveyance of a new conservation easement rather than amendment of an existing one because expanding an easement requires conveyance of an interest in the previously unburdened property, and typical amendment provisions lack the necessary terminology to constitute a conveyance. Nevertheless, many organizations expand existing conservation easement by amendment of an existing easement.

¹⁹¹ A doctrine parallel to *cy pres* in which a court may permit deviation from the **administrative terms** of a charitable trust if, due to unforeseen circumstances, adherence to such terms would frustrate the accomplishment of the purpose of the trust. See McLaughlin, *supra* note 7, at 433; see also 88 AM. JUR. PROOF OF FACTS 3D 469 § 7 (2007).

¹⁹² 88 AM. JUR. PROOF OF FACTS 3D 469 § 7 (2007).

¹⁹³ McLaughlin, *supra* note 7, at 435-36, describes the effect of the application of the doctrine of *cy pres* as follows:

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.

In other words, if the easement grantor is well-enough represented to provide an amendment clause in his or her conservation easement, the easement will be exempt from the doctrine of *cy pres*; otherwise not. One has to wonder; if application of the doctrine is so crucial to the proper management of conservation easements having a clever lawyer should exempt a grantor from its application.

¹⁹⁴ Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: The Myrtle Grove Controversy*, 40 UNIVERSITY OF RICHMOND LAW REVIEW 1031, 1075 (2006).

implied reserved right to amend conservation easements would be reconciled in actual practice with the *cy pres* doctrines, is hard to predict, or even understand, being as it is the modification of what is so far legal theory with yet another theory.

4. *Increased Costs*

Finally, applying the doctrine of *cy pres* to easement terminations and modifications will significantly increase the time, money, and effort involved in such actions over that involved under current common law practices.¹⁹⁵

5. *Summary*¹⁹⁶

To summarize: application of the doctrine of *cy pres* to conservation easements can reasonably be expected to have the following consequences:

1. It will eliminate the authority of easement holders to modify or terminate conservation easements.
2. It may significantly expand the number of persons with standing to invoke *cy pres* in decisions to modify or terminate conservation easements (standing to **prevent** modification or termination and, presumably, standing to **initiate** modification or termination).
3. It will impose a new and restrictive set of criteria on the justifications for easement modification or termination precluding most of the easement amendments that are typical today.
4. It will dramatically increase the time, money and costs of easement termination and modification.

¹⁹⁵ Dana, *supra* note 147, at 16, provides several elaborate examples and concludes: “[t]he transactions costs that are associated with any administrative deviation or *cy pres* proceedings, whether simple or complex, are likely to be significant.” In at least one suit with which the author is familiar seeking to enforce a conservation easement in Wyoming (settled out of court), the attorney’s fees for the land trust involved exceeded \$260,000 for pre-trial expenses alone. That case involved three years of pre-trial work and never went to trial. It is not known how much was expended in legal fees and court costs in the *Hicks* case. It is known that the suit was filed in 2003, not decided by the district court until 2005, and not decided by the Supreme Court until 2007.

¹⁹⁶ For an extensive analysis of the potential problems associated with the application of the doctrine of *cy pres* to conservation easements. See Dana, *supra* note 147.

V. *HICKS* V. *DOWD* REVISITED

The termination of the Meadowood Easement may appear to some as a “poster child” example of the need for application of the doctrine of *cy pres* to conservation easements. As of the time of this writing, whether the Wyoming Attorney General will respond to the Supreme Court’s invitation to enforce the Meadowood Easement is purely a matter of speculation, and seems increasingly unlikely as time passes. However, it may be instructive to consider the *Hicks* case in the context of the common law and then in the context of the *cy pres* doctrine.

A. *Application of Existing Remedies*

As discussed, *supra*, the common law of easements is, by statute in Wyoming, applicable to easement modifications or terminations.¹⁹⁷ Applying common law principles to the *Hicks* case suggests that Johnson County and the Dowds may have been within their rights to terminate the Meadowood Easement, because the common law clearly allows the holder of an easement (Johnson County, in this case) to “release” the easement back to the owner of the servient parcel (the Dowds).¹⁹⁸ The parties, arguably, also had a right to terminate the Meadowood Easement under the common law principles applicable to the termination of easements due to “cessation of purpose”¹⁹⁹ because of the unforeseen development of coalbed methane on the Ranch, and its alleged effect upon the purpose of the Meadowood Easement.²⁰⁰

One caveat to the argument that the parties to the Meadowood Easement could, between them, release that Easement is that, at common law, a release is only effective as to those with an ownership interest in the dominant estate who agree to the release.²⁰¹ However, unless the courts found that the Meadowood Easement had been granted to, or expressly for, the benefit of others in addition to Johnson County, the release should be within the rights of the County and

¹⁹⁷ WYO. STAT. ANN. § 34-1-202(a) (2007); *See also* text accompanying *supra* note 95.

¹⁹⁸ *See* the discussion of “release,” *supra* note 77 and text accompanying note 77. Note that neither of the parties to the *Hicks* suit, (and neither of the courts considering the suit) appeared to consider this line of reasoning which clearly suggests that, in this case of first impression, no one was thinking of the conservation easement in the common law terms that seem dictated by the nature of the Easement and the terms of the Act.

¹⁹⁹ *See* the discussion of “cessation of purpose,” *supra* note 76 and text accompanying note 76.

²⁰⁰ *See* Resolution 247, *supra* note 32:

WHEREAS, the coalbed methane development, which is not subject to the Conservation Easement, is and will be in the future inconsistent with the purposes of the Conservation Easement, makes enforcement of the Conservation Easement impossible as to the coalbed methane development and exposes the Board to liability under the terms of the Conservation Easement.

²⁰¹ *Supra* note 78.

the Dowds.²⁰² An argument to the contrary would be that the release of the Meadowood Easement by the Trust was *ultra vires* and/or against public policy (see the discussion of *ultra vires*, *supra* notes 140-44 and accompanying text), keeping in mind that the Trust was a corporation governed by its own organizational documents and technically separate from Johnson County.

Had the release of the Meadowood Easement been to “disqualified persons” the transaction would be an “excess benefit transaction” within the meaning of the Internal Revenue Code. If the transaction were an excess benefit transaction the Dowds could reasonably expect to be required to “correct” the transaction by conveying to the Trust a conservation easement comparable to the Meadowood Easement, and re-conveying the One-Acre Tract to the Trust. In addition, the Dowds would be facing an excise tax in an amount equal to 25% of the value of the Meadowood Easement and the One-Acre Tract.²⁰³ In addition, the trustees of the Trust might expect to pay up to \$20,000 each in excise taxes. This assumes that it is determined that the value of the Dowd’s agreement “to indemnify and hold harmless the Board and the County from all liability, claims and causes of action, including reasonable costs and attorneys fees, that arise out of or by virtue of transfer of the One Acre Tract and Conservation Easement to them”²⁰⁴ was less valuable than the financial benefit conferred on the Dowds by release of the Meadowood Easement and conveyance of the One-Acre Tract.²⁰⁵

²⁰² Of course, this was the finding implicit in the district court’s ruling that the Scenic Preserve Trust was a charitable trust and the action was one to enforce that Trust. This position does not take into account constitutional, legal, or moral constraints on the County as a result of its governmental status.

²⁰³ In certain cases where an excess benefit transaction is “corrected” the excise tax may be abated. 26 C.F.R. § 53.4958-1(c)(2)(iii) (2007).

²⁰⁴ *Supra* note 32.

²⁰⁵ Releasing restrictions on the future development and subdivision of the 1,043-acre Meadowood Ranch conferred an unequivocal and substantial benefit to the Dowds. In this case we do not know that value was. We do know that the Lowham Limited Partnership obtained an independent valuation of the Meadowood Easement at the time of the conveyance to the County, indicating that the value of the easement was \$1,266,000; and we know that the Partnership claimed a federal tax deduction for the easement. Presumably, six years later the value of the Meadowood Easement would be the same as or greater than it was when contributed. It is true that by terminating the Meadowood Easement the County averted liability, whatever that may have been, from holding an interest in land on which coalbed methane operations were likely to occur. Regardless of how likely it is that merely holding a conservation easement exposes the holder to liability for activity on the servient parcel, whatever the value of this benefit to the County might have been, it clearly was not consideration provided by the Dowds for the benefit the Dowds received, and therefore does not enter into the excess benefit evaluation. What the value of being indemnified and held harmless from challenges to the release of the Meadowood Easement itself might be is hard to measure, although the Dowd’s agreement in this regard does constitute for the termination of the easement. It is not known whether the Dowds covered the County’s legal fees and expenses in defending the *Hicks* suit pursuant to the indemnification agreement.

However, the Dowds do not appear to be “disqualified persons.” They did not make the contribution of the Meadowood Easement to the County or the Trust; the Lowham Partnership did that. Even if the deductible value of the Meadowood Easement were considered as the contribution value for purposes of determining whether the grantor was a substantial contributor, and therefore a disqualified person, the contribution would not be attributable to the Dowds. Assuming that the Dowds were not disqualified persons for some other reason (and given the government-affiliated nature of the Trust, it is doubtful that the Dowds were substantial contributors, board members, officers, etc.) being owner of land servient to a Trust-held conservation easement does not by itself make them disqualified persons. Furthermore, as the Dowds were not the contributors of the Meadowood Easement and did not, therefore, claim a tax deduction with respect to the contribution, they will not be subject to the tax benefit rule.²⁰⁶

The only potential penalty under existing common or statutory law would appear to be the potential for revocation of the Trust’s exempt status. However, as the Trust is a government-affiliated organization, even if this extraordinary remedy were to be used by the IRS, it is unlikely to be of significant consequence to Johnson County which can always create and fund an equivalent organization. Furthermore, the requirement for disclosure of easement terminations and modifications on Form 990 did not apply to the year in which the Trust terminated the Easement and, because the Trust is exempt from filing Form 990 as a government-affiliated organization, even if the requirement did apply in the year of the termination, it would not apply to the Trust. Therefore, except for the notoriety of the *Hicks* case itself, there is no reason why the IRS would learn of the termination of the Meadowood Easement.

For the foregoing reasons it does not appear that, under the existing common law or statutory rules applicable to conservation easements, there is likely to be **any** consequence seriously adverse to either the County or the landowner as a result of the termination of the Meadowood Easement. Assuming that the termination of the Meadowood Easement was improper, there is no penalty for the action, no deterrence to similar actions by the Trust or the County in the future, and no disincentive to others. Such results lend considerable weight to the argument that there is a need for the application of the doctrine of *cy pres*, or some other mechanism of public oversight, for a discussion of some legislative and administrative alternatives to *cy pres*), for conservation easement terminations.

²⁰⁶ *Nash v. U.S.*, 398 U.S. 1, 3 (1970). Because the Lowham Partnership did not enjoy the benefit of the easement release, it is not subject to this rule either.

B. Application of the Doctrine of Cy Pres

Now let us consider how the doctrine of *cy pres* would affect the termination of the Meadowood Easement. There are two important threshold issues before actual application of *cy pres* can occur: the court must determine that a charitable trust exists, which depends upon the intention of the putative settlor; second, someone with standing must bring an action to enforce the charitable trust.

Considering the standing issue first; granted that the doctrine of *cy pres* may expand standing rather significantly over that existing with respect to enforcement of a traditional easement, it is still problematic, as discovered by Mr. Hicks, the plaintiff in the *Hicks* case. In principle, the issue of whether or not a charitable trust was created seems more of a challenge with respect to conservation easements. A court must find a clear intention on the part of the grantor of a conservation easement (the “settlor” of the charitable trust, if there is any) to create a trust. A charitable trust depends upon the existence of a contribution from the settlor to another person who agrees to hold that contribution for the benefit of one or more other persons. If, instead of contributing a conservation easement, the settlor had given land outright to a land trust, with restrictions on the future use of that land, the first condition to finding creation of a charitable trust would exist: a restricted gift. However, the donor of a conservation easement merely grants a land trust the right to enforce restrictions on the future use of land, not a fee interest subject to restrictions. The restrictions themselves are the gift.

For a charitable trust to arise with respect to donated property, including conservation easements, the gift of property must be ‘restricted.’ [Citation omitted.] *Therefore, if a gift of a conservation easement does not constitute a restricted gift of a partial interest in real property, a charitable trust does not arise, either explicitly or as a matter of law.* In such circumstances, there is no legal justification for grafting charitable trust common law principles on to conservation easements created pursuant to statute.²⁰⁷

A large part of the problem of determining whether the contribution of a conservation easement constitutes the creation of a charitable trust goes back to the elusive nature of a conservation easement itself. It is not property that can, in any normal sense of the word, be “used.” Therefore, the notion of restricting the use of a conservation easement, i.e. restricting the use of a restriction, seems perverse. However, a conservation easement certainly represents a right held by a land trust. Clearly, the grantor of that right, or set of rights, intends that the rights

²⁰⁷ Andrew Dana, *Conservation Easements: A View from the Field*, p. 7, published by the Land Trust Alliance on LTA Net.org (http://www.ltanet.org/objects/view.acs?object_id=18640) (2006) (emphasis in original).

be used in a certain way (i.e. according to the typically elaborate provisions of the easement document) and for the benefit of the public (if any intent to gain tax benefits is part of the donor's motivation). Following this line of thinking, a court could find that a conservation easement is granted subject to the "restriction" that the terms of the easement be enforced in perpetuity for the benefit of the public. This would seem to be the essence of the requirements of the Code for deductible easements and consistent with the terms of most easements. Such intent also constitutes the essence of what it takes to create a charitable trust. Of course, these "restrictions" are not imposed on the donation unilaterally by the donor. They are required by federal tax law. Accordingly, one can argue about whether the donor really made a classic restricted charitable gift, imposing the donor's own preferences and restrictions on the land trust, or whether the donor simply sought to follow the requirements of the tax code to be eligible to claim a charitable donation.

If these threshold issues can be successfully addressed, application of the doctrine of *cy pres* itself involves three steps.²⁰⁸ The first step involves a judicial determination that the conservation purposes of the conservation easement are unlawful, impractical, or impossible due to unforeseen changed conditions.²⁰⁹

In *Hicks*, the unforeseen circumstance was coalbed methane development. Arguably, based upon the geological report prepared for the Lowham Partnership indicating that "the probability of mining on the property was so remote as to be negligible"²¹⁰ coalbed methane development was unforeseeable despite the fact that minerals were owned separately from the surface at the time that the Meadowood Easement was conveyed.

Whether coalbed methane development rendered the conservation purposes "unlawful, impractical, impossible, or wasteful" is less clear. The "Purpose" defined in the Meadowood Easement was to: "preserve and protect in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch."²¹¹ Coalbed methane development certainly doesn't render the conservation purposes of the Easement unlawful. It also would not appear that such development makes the conservation purposes wasteful.²¹² Whether coalbed methane made achieving the purpose of the Meadowood Easement impractical or

²⁰⁸ McLaughlin, *supra* note 7, at 464. The three-stop process described above is an adaptation of McLaughlin's.

²⁰⁹ See *supra* note 193 and accompanying text.

²¹⁰ Brief of Appellees Dowd at 7, *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007).

²¹¹ Meadowood Easement, ¶ 1, p. 2.

²¹² This raises an interesting question. If the Meadowood Easement were able to prevent coalbed methane development on the Ranch, and that development was determined to be highly valuable economically, could a court, applying the doctrine of *cy pres*, determine that the purpose of the Meadowood Easement to keep the land open was "wasteful" and therefore a ground upon which the easement could be terminated, or at least modified to allow the development? These kinds of questions are the kinds that make application of *cy pres* both intriguing and unsettling.

impossible would require a substantial and complicated factual inquiry into the nature, extent, duration and likelihood of such development. Arguably, many of the conservation purposes, e.g. protection of the agricultural and habitat uses of the Ranch, could still be achieved in spite of coalbed methane development. A good argument could be made that termination of the Meadowood Easement so early in the development process was premature as it would be impossible, with just over one acre of land disturbed by such development,²¹³ to ascertain the true extent or permanence of damage to the values which it is the purpose of the Easement to protect.²¹⁴

The question of impossibility or impracticality will be determined as a function of how a court weighs the conflicting variables involved. The district court had several alternatives under *cy pres*. It could have determined that coalbed methane did not make impossible or impractical the conservation purposes of the Meadowood Easement and set aside the termination. The district court could have determined that coalbed methane development made impossible enforcement of the Meadowood Easement's prohibition against mining and mineral extraction²¹⁵ and simply directed modification of the Easement to remove that specific prohibition.²¹⁶ Or, the district court could have determined that the conservation purposes of the Meadowood Easement could no longer be achieved and uphold the termination. The Meadowood Easement also contained the standard "severance" clause (paragraph 12(b)) allowing valid portions of the Easement to stand while others could be invalidated. This provision also provided the parties and the court an alternative to the termination of the entire interest. If the district court determined that the conservation purposes of the Meadowood Easement had become impossible or impractical due to coalbed methane development its next step under the doctrine would be to determine whether or not the contributor of the Meadowood Easement, the Lowham Partnership, had a "general charitable intent" in conveying the Easement, or a limited or specific intent.²¹⁷

As noted *supra* courts are reluctant to find a lack of general charitable intent in determining whether or not to apply *cy pres*. The UTC, applicable in Wyoming, provides that unless expressly stated to the contrary, a general charitable intent will

²¹³ Affidavit of Kenneth M. Quinn, *supra* note 31, at page 4. The affidavit also states that the area disturbed was 0.79 acres.

²¹⁴ As noted *id.*, at the time of the release of the Meadowood Easement around one acre of the Ranch had been disturbed by coalbed methane development.

²¹⁵ Meadowood Easement, ¶ 5(d), p. 6.

²¹⁶ Such an action would be so narrow in scope as to belie the argument that coalbed methane development made impossible or impractical achieving the conservation purposes, in which case *cy pres* would appear to have no application. However, the parallel doctrine of administrative deviation, *supra* note 191, could apply for the narrow purpose of eliminating a prohibition that could no longer be administered (although, the mineral rights having been severed prior to conveyance the Meadowood Easement, that provision could never have been administered).

²¹⁷ *Supra* note 161, and accompanying text.

be implied in the creation of any charitable trust.²¹⁸ Finally, when a landowner contributes a conservation easement pursuant to the requirements of the Code, he or she must include a provision in the easement that insures that, in the event that the easement is terminated for any reason in the future, the holder of the easement is entitled to a percentage of the sales proceeds of the underlying property equal to the value of the easement.²¹⁹ Unless state law provides otherwise (which it does not in Wyoming), these proceeds are required to be used in a manner “consistent with the conservation purposes” of the easement.²²⁰ This provides a fairly solid basis for finding that the contribution of a conservation easement evidences a “general charitable intent” on the part of the donor. Here again, however, it may be argued that the donor only intended to comply with federal tax law in order to obtain a charitable deduction, rather than having the broader charitable intent necessary to create a trust.

Assuming that the district court found a general charitable intent, coupled with its determination that coalbed methane development made impossible or impractical achieving the purposes of the Meadowood Easement, the district court could apply *cy pres* to either modify the Meadowood Easement so that it continued to serve a conservation purpose, or the district court could authorize sale of the Ranch and direct that the portion of the proceeds attributable to the Meadowood Easement, calculated as required in the Easement, be turned over to the Trust for use consistent with the purposes of the Easement, as provided for therein.²²¹

The number of variables involved in the *Hicks* case (the multiple and comprehensive conservation purposes of the Meadowood Easement; the extent and character of the Ranch itself; the relatively speculative impact of coal bed methane development on the Ranch and conservation values protected by the Meadowood Easement), and the extensive discretion of the district court in the application of *cy pres* to those variables, makes the results of the application of *cy pres* to the *Hicks* case unpredictable. However, it is clear that *cy pres* provides remedies that do not exist under existing common and statutory law, given the particular facts of the case that preclude application of these common and statutory law remedies.

²¹⁸ UTC § 405(b), WYO. STAT. ANN. § 4-10-406(b) (2007).

²¹⁹ 26 C.F.R. § 1.170A-14(g)(6)(ii) (2007).

²²⁰ 26 C.F.R. § 1.170A-14(g)(6)(i) (2007).

²²¹ Presumably, the district court would be guided, if not bound, by the contractual agreement of the parties to the Meadowood Easement with respect to the use of proceeds in the event the Meadowood Easement is terminated and the Ranch sold, as required by the Code. This raises the question of what happens if the owner of the land servient to the easement does not choose to sell that land. Could a court enforce a partition of the land between the servient parcel and the easement by requiring a sale and division of the proceeds, or would it impose a constructive trust on the land as requested in the *Hicks* case?

VI. THE NEED FOR NEW REMEDIES

The central question raised by the *Hicks* case, and the prospect of future improper easement terminations and modifications, is whether an additional tool, such as the doctrine of *cy pres*, is needed. *Hicks* is a case where the application of *cy pres* could have made a difference. Given the outstanding invitation by the Wyoming Supreme Court to the Attorney General, it still may play a role, however unpredictable a role it may be.

However, certain facts of the *Hicks* case make it less than an ideal example for testing the efficacy of existing common law and statutory remedies in discouraging improper easement termination or modification. First, the *Hicks* case involved an easement held by a government-affiliated land trust. That close affiliation is underscored by the County Board's occasional failure to recognize the Trust as an independent entity.²²² Second, the Dowds were not the original grantors of the Meadowood Easement. Third, the Dowds do not appear to be "disqualified persons," so that the conveyance of the One-Acre Tract and termination of the Meadowood Easement do not invoke the prohibition against "excess benefit transactions." For these reasons, the significant disincentives to improper easement termination or modification under existing common and statutory law were largely irrelevant.

Had the holder of the Meadowood Easement been a private land trust dependent upon direct public support, managed by people whose primary purpose was land conservation, and whose existence depended upon its continued exempt status, as is typically the case of private land trusts; had the Dowds been "disqualified persons" making the transaction an "excess benefit transaction" in which the beneficiary of the transaction was potentially liable for the "correction" of the transaction and payment of a 25% excise tax on the excess benefit as well as the possibility of, in effect, returning the tax benefits received as a result of the easement deduction, the outcome of the termination would likely be quite different.

Thus, in a case where improper easement termination or modification constitutes an "excess benefit transaction" it is likely that the existing tax penalties are both adequate and compelling remedies and disincentives to improper actions. Furthermore, where the easement holder is a private land trust required to report easement termination and modifications annually to the IRS on Form 990, and

²²² There seemed to be confusion as to who exactly held the Meadowood Easement. The Easement was granted directly to the Board in 1993. In 1997 the Board conveyed the Easement to the Trust. In 2002 the Board, in Resolution 245, acknowledged receipt of the Easement and One-Acre Tract but failed to note the conveyance to the Trust. The Resolution authorized the Board, not the Trust (although it technically held the Easement), to convey the One-Acre Tract and release the Easement to the Dowds, in exchange for the Dowds agreement to indemnify and hold-harmless the Board and County from liability for these actions.

heavily dependent upon its exempt status and the goodwill of its contributors for its continued existence, improper easement termination or modification raises risks that should deter all but the most clueless land trusts from such activity.

Assuming knowledge²²³ of these very real consequences on the part of land trusts and owners of land servient to conservation easements; given the heightened scrutiny of easement transactions by the IRS;²²⁴ and given the dearth of evidence of improper easement termination or modification to date, there is every reason to believe that the existing penalties for improper easement termination or modification will prove sufficient deterrents to improper actions in the kinds of cases to which they apply: private land trusts dealing with disqualified persons. This covers a vast number of conservation easements in the United States.

Given the intensive educational efforts directed at private land trusts; the dearth of evidence of improper easement terminations or modifications; the new reporting requirements imposed on private land trusts by Form 990; and the dramatically increased scrutiny of the IRS, it would seem premature, at best, to encourage across-the-board application of the doctrine of *cy pres* to conservation easements. This is not to say that *cy pres* might not be an appropriate remedy in certain cases, including *Hicks*; provided that it can be applied without opening up the entire field of conservation easement administration to *cy pres*. However, before introducing the *cy pres* doctrine the field of property law that is the foundation of conservation easements, careful consideration of some of the short-comings of *cy pres* in the context of conservation easements should be considered.²²⁵

As discussed, *supra* at notes 171–90 (and accompanying text), application of the doctrine of *cy pres* to conservation easements is likely to have the following consequences: (1) It will eliminate the discretion of land trusts to terminate or modify easements; (2) it may significantly expand the number and types of persons who may intervene in decisions to modify or terminate easements; (3) it will

²²³ Knowledge of consequences is the key to compliance. Education of land trusts and landowners is, therefore, a crucial element in preventing improper easement termination and modification. The national effort being mounted by the Land Trust Alliance, and others, to insure that private land trusts are aware of the consequences of improper easement termination and modification, and to establish a national certification program for land trusts, will play an important role in making the consequences of improper easement termination or modification effective.

²²⁴ The IRS reports having over 500 conservation easements under audit, or pre-audit, and most of the land trusts in Colorado are themselves being audited due to the Colorado tax credit.

²²⁵ These shortcomings have been addressed by one of the chief proponents of application of the doctrine of *cy pres* who has devoted considerable thought to mitigating these shortcomings; McLaughlin, *supra* note 7. However, the kinds of analysis, balancing of factors, and insight required by McLaughlin's suggested mitigations assumes a judiciary far more knowledgeable, patient, and sympathetic to nuance, and with substantial time to devote to application of the doctrine, than is likely to be the case. As an academic matter it is certainly possible to think one's way around the logical pitfalls of application of the doctrine. However, the reality is that these pitfalls are far more likely to be fallen into than avoided in the actual application of the doctrine.

significantly constrain the circumstances in which easements may be terminated or modified, and dramatically reduce the types of modifications that can be considered; and (4) it will significantly increase the time, resources, and money that must be invested in undertaking easement terminations or modifications by land trusts, landowners, and courts.

Addressing these consequences in order:

(1) Application of *cy pres* to conservation easements does not simply create a new remedy for correcting improper easement terminations or modifications; it imposes an entire new process on the administration of conservation easements, whether that administration is improper or not. **Every** modification and termination will be subject to the process because no termination or modification that has not been judicially sanctioned will be valid.

It has been suggested that the right to undertake proper easement modifications (and presumably terminations) should be considered to be “implied” in the easement itself.²²⁶ However, if *cy pres* is applied to conservation easements, it requires a significant leap of faith to assume that the application will be so discriminating as to imply authority for certain types of amendments, but not others. Furthermore, whether or not authority is “implied” for certain modifications, for example, is unlikely to be so crystal clear that either landowners or land trusts can simply assume that such authority is implied, particularly given the cast of characters granted standing by the doctrine to second-guess their assumptions. Once the application of *cy pres* to conservation easements becomes accepted, it would be reasonable to assume that mere “due diligence” would strongly suggest judicial review of every significant easement modification of whatever nature, and every termination.

It is overly sanguine to assume that imposition of this new burden on easement modifications, at least, will not discourage landowners from contributing conservation easements in the future. While it is unlikely that most easement donors make the contribution assuming that some day they will need to terminate the easement, it is unrealistic to assume that they believe they have created the perfect document that will not require revision with experience.

Most conservation easement donors understand that they must give up the unilateral right to revise a conservation easement in order for the contribution of the easement to qualify for a tax deduction. However, it has been reasonable for landowners to assume that reasonable requests for easement modification will be favorably considered by land trusts, and that land trusts have the authority to make such modifications. The assumption is given foundation by the LTA’s own *Standards and Practices* manual which provides guidance to the nation’s land trusts

²²⁶ McLaughlin, *supra* note 195, at 1075.

with respect to easement amendments, and the Tax Court case of *Strasburg v. C.I.R.* (T.C. Memo. 2000-94 (2000)) in which that Court recognized an easement amendment which added land to an existing easement.

It is unreasonable to assume that landowners will take the same comfort from application of a doctrine that says that only if the purpose of their conservation easement has become impractical or impossible to accomplish can a modification be considered and then only through a judicial process that may involve participation by the attorney general, former land trust board members and the original easement donor, for example.

(2) Assuming that opening up standing to “enforce” a conservation easement to the attorney general, as well as others, is a positive change fails to recognize that such persons may argue **for** the termination or modification of a conservation easement, not just **against** such termination or modification. What is to prevent a development-minded attorney general from filing suit seeking to apply *cy pres* to terminate an easement in a case where a developer seeks to construct, say, a new shopping center on easement land that the developer argues will strengthen the tax base and reduce unemployment?²²⁷ What is to prevent a judge, whose background is in commercial real estate law, from agreeing with the attorney general (and likely the owner of the land servient to the easement) that continuing to enforce the easement constitutes a “waste” that justifies termination of the easement under *cy pres*; or that the increased value of the easement property for the shopping center represents a “changed circumstance” making accomplishment of the purposes of the easement “impractical?” What is to keep the judge from agreeing that the value of the easement, in such a case, is based upon the agricultural value of the land, instead of its development value, therefore allowing only a pittance of compensation to go to the land trust?²²⁸ In such cases application of *cy pres* could actually undermine the integrity of conservation easements.

²²⁷ See Dana, *supra* note 147, at 20 (Many state attorney general offices have far higher priorities than overseeing conservation easements, and many do not have staff sufficient to represent the interest of the public in such proceedings. One state attorney general asked the author why it was safe to assume that an attorney general would necessarily be favorably inclined to land protection and not actively opposed in a *cy pres* proceeding and why, therefore, the precedent should be set in the first place.).

²²⁸ See Dana, *supra* note 147, at 18, 20:

The broad equitable powers of judges to amend conservation easements for widely divergent reasons in similar circumstances will not lead to predictability and stability in conservation easement amendment law. Instead, the result is more likely to be a patchwork of decisions based on each judges' predilections and preferences, or the parties' practical settlement of controversies before a judicial decision is reached. (Footnote omitted). The lack of predictability and reliability that is inherent to charitable trust proceedings may result in profound social demoralization costs, as the public, conservation easement donors, and easement holders find that conservation easement enforcement decisions turn on individual judges' idiosyncrasies, not on a set of clearly defined criteria that are designed to protect the interest of all parties.

While it has rightly been said that opening up standing to every citizen to bring a *cy pres* action would expose charities to “unnecessary litigation”²²⁹ limiting standing to trust settlors, the attorney general, or qualified beneficiaries,²³⁰ does not preclude “unnecessary litigation” and puts land trusts in the potential position of having to look over their shoulders for challenges from past board members, officers, easement contributors, and the attorney general, all of whom may have agendas disruptive to the proper administration of conservation easements.

(3) While it may be appropriate to limit easement terminations to cases in which the purposes of a conservation easement, due to unforeseen circumstances, have become impractical or impossible to accomplish,²³¹ such a limitation imposed upon easement modifications, unless the existence of “implied powers,” *supra*, is assumed, could preclude many salutary and reasonable easement modifications, **even after a judicial review**, simply because the preconditions for the application of *cy pres* are absent.²³² Of course, under the guise of *cy pres* a court may assume authority to do a number of things, whether or not they are consistent with the theory of *cy pres*. Whether the flexibility thus derived from an equitable proceeding should be more a source of comfort than concern will be more dependent upon the judge assigned to the case than the theory of the doctrine itself.

(4) As anyone who has engaged in litigation of any complexity can testify, it is costly and time consuming. Imposing these costs on land trusts in the interest of preventing improper easement termination or modification, particularly given the dearth of evidence of such improper actions, is difficult to justify. Land trusts today are struggling to put together sufficient funds to enforce the conservation easements that they hold in case of violation. To impose substantial additional costs on the administration of easements will divert assets that may be needed for enforcement and normal protection and stewardship functions, again weakening, rather than strengthening, the integrity of conservation easements.

By necessity, judges are generalists; they are not experts, for example, at understanding the diffuse benefits provided by ecosystem services, or wildlife habitat, or open-space land protection. Understanding foregone short-term economic opportunities (lost revenues, lost jobs, etc.) is much easier—and provides a more expeditious basis on which to make decisions—than understanding the value to society of protecting habitat for butterflies. Complicated, time-consuming arguments, based on extensive scientific testimony, that the purposes of a conservation easement *have not* become impossible or impracticable are unlikely to be well received by many judges, with crowded criminal and civil dockets.

²²⁹ Chester, Bogert & Bogert, *supra* note 172.

²³⁰ Hicks v. Dowd, 157 P.3d 914, 921-22 (Wyo. 2007). See also discussion at § B-2, *supra*.

²³¹ Which still leaves open the question of whether and when it is appropriate to terminate a conservation easement because its purpose has become “wasteful.”

²³² One of the arguments for applying the doctrine of *cy pres* is to justify the “dead hand control” allegedly imposed on land use decisions by conservation easements. See McLaughlin, *supra* note 7, at 459. Ironically, application of *cy pres* to conservation easements, rather than making easements more flexible, may make them more rigid. See, Dana, *supra* note 147, at 23.

A land trust cannot avoid litigation costs simply by refusing to consider any easement terminations or modifications. With sufficient incentive any number of persons with standing under the doctrine could institute a *cy pres* proceeding to pursue a termination or modification. In such a case, the land trust could save money by simply declining to participate actively; although this would not be consistent with its obligation to enforce its easements or necessarily with the interests of conservation.

In considering litigation costs, it would be well to recognize that the doctrine of *cy pres* may represent a sword in the hands of landowners and developers, not just a shield for conservation interests. As the value of development potential tied up by conservation easements increases in the future, the incentive for landowners (and contract purchasers from landowners, who would also presumably stand in the shoes of the landowner for purposes of standing) to institute *cy pres* actions to modify or terminate conservation easements, will increase. In the hands of a well-financed legal team the doctrine of *cy pres* could be stood on its head and used equally well to obtain desired modifications or terminations as to prevent them. The mere cost of defending such suits may compel settlements that are not in the best interests of conservation.

For all of these reasons appropriating the doctrine of *cy pres* to conservation easements appears a risky proposition. Furthermore, the doctrine cannot reach (assuming its application remains limited to charitable contributions of easements) a great many conservation easements that are sold for fair value, are exacted as part of development approvals by localities, or conveyed as mitigation under state or federal laws. Such easements represent an increasing body of land conservation and the issues relating to the termination or modification of these easements are not significantly different from those relating to contributed easements.

VII. RECOMMENDATION

It is suggested here that, rather than grafting a body of law developed with respect to an entirely different type of transaction, the creation of a charitable trust, certain modifications be made to the existing law applicable to improper easement modification or termination more effective. Two such changes would go far to avoid the results seen in the *Hicks* case, and would extend current remedies to most conservation easement modifications and terminations, whether or not the easements were charitably contributed.

First, the definition of “disqualified persons” that currently restricts application of the prohibition against “excess benefit transactions” to “insiders” should be eliminated and the prohibition should be extended to anyone engaging in transactions resulting in either private inurement or private benefit. Given the current congressional focus on conservation easements, this revision of the law could be limited to transactions involving conservation easements.

Second, governmental agencies and government-affiliated agencies, at least with respect to conservation easements held by them, should be considered the same as any other “qualified organization” within the meaning of section 170(h)(3) of the Code for purposes of applying the excess benefit transaction prohibition, and penalties, or such agencies and affiliated organizations should no longer be considered “qualified organizations” for purposes holding conservation easements.

Making these changes will effectively provide remedies for the improper modification or termination of virtually all conservation easements, whether they were granted with charitable intent or not. This is because the excess benefit prohibitions would apply whether or not an easement was granted out of charitable motives.

The additional virtue of the two preceding suggestions is that these changes, once enacted, would automatically apply uniformly throughout the United States, whereas the doctrine of *cy pres* is a common law concept that must be developed and applied state-by-state with the possibility of little consistency or predictability. It will take many years for application of the doctrine of *cy pres* to make its way into the laws of most states, whereas revising application of the excess benefit prohibition can be done by an act of Congress (not guaranteed to be quicker, it is conceded).

VIII. CONCLUSION

It is conceded that current common and statutory law applicable to conservation easements does not provide a comprehensive response to improper easement terminations or modifications. However, it is the conclusion of this article that incorporating the doctrine of *cy pres* is an inappropriate response to what thus far has been so minor a problem as to be nearly theoretical. Under current circumstances, it makes sense to allow recent changes in reporting requirements for private land trusts and landowners to have time to take effect, and for the current vigorous efforts of the IRS to investigate easement transactions to have a chance to educate both the land trust community and the IRS. Furthermore, serious consideration should be given to expanding the reach of the prohibition against excess benefit transactions instead of extending the doctrine of *cy pres* to conservation easements. The penalties for violating that prohibition are compelling and directly address what will be the principal motivation for improper easement termination or modification in the future: financial gain. Finally, expanding an existing and effective penalty on improper transactions will be far less disruptive of the important and constructive relationship between land trusts and landowners, far less intrusive into proper easement administration, and far less likely to discourage future easement contributions, than injecting an entirely new and additional process into existing easement administration.