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Hicks v. Dowd, CONSERVATION EASEMENTS, AND THE CHARITABLE TRUST DOCTRINE: SETTING THE RECORD STRAIGHT

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This is the fourth in an exchange of articles published by the *Wyoming Law Review* discussing the application of charitable trust principles to conservation easements conveyed as charitable gifts. In 2002, Johnson County, Wyoming, attempted to terminate a conservation easement that had been conveyed to the County as a tax-deductible charitable gift.[1] The County's actions were challenged,

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[1] See Quitclaim Deed between the Board of County Commissioners of Johnson County, Wyoming, Grantor, and Fred L. Dowd and Linda S. Dowd, Grantee (Aug. 6, 2002), in which the County attempted to transfer the conservation easement to the Dowds for the purpose of terminating the easement. The Dowds had earlier purchased the land subject to the easement from the easement donor. *See* Warranty Deed between the Lowham Limited Partnership, Grantor, and Fred L. Dowd and Linda S. Dowd, Grantees (Feb. 1, 1999).

first in a suit brought by a resident of the County, *Hicks v. Dowd*, and then in a suit brought by the Wyoming Attorney General, *Salzburg v. Dowd*.[2] The over six years of litigation associated with the easement's attempted termination has been the catalyst and background for the exchange of articles.

C. Timothy Lindstrom published the first article, entitled *Hicks v. Dowd: The End of Perpetuity* (*The End of Perpetuity*).[3] The authors of the present article published the second, entitled *In Defense of Conservation Easements: A Response to "The End of Perpetuity"* (*In Defense of Conservation Easements*).[4] Mr. Lindstrom then responded with a "surrebuttal" entitled *Conservation Easements, Common Sense and the Charitable Trust Doctrine* (the *Surrebuttal*).[5]

In his *Surrebuttal*, Mr. Lindstrom reiterates his assertion that land trusts are free to modify and terminate the conservation easements they acquire as charitable gifts, subject only to whatever constraints may be imposed by federal tax law and any internal policies and procedures the land trusts might voluntarily adopt from time to time.[6] In other words, he would eliminate the right of state attorneys

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[2] In *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007), a resident of Johnson County (Hicks) filed suit alleging, *inter alia*, that the conservation easement was held in trust for the benefit of the public and the County could not terminate the easement without receiving court approval in a cy pres proceeding. On May 9, 2007, the Wyoming Supreme Court dismissed the case on the ground that Hicks did not have standing to sue to enforce a charitable trust, but the Court invited the Wyoming Attorney General, as supervisor of charitable trusts in the state of Wyoming, "to reassess his position" with regard to the case. *Hicks*, 157 P.3d at 921. In July of 2008, the Wyoming Attorney General filed a complaint in District Court similarly arguing that the County had breached its fiduciary duties in attempting to terminate the easement and requesting that the deed transferring the easement to the Dowds be declared null and void. *See* Complaint for Declaratory Judgment Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties, Violation of Constitutional Provisions at 13, Salzburg v. Dowd, Civ. No. CV-2008-0079 (July 8, 2008). *Salzburg v. Dowd* was still pending at the time of the publication of this article.

[3] C. Timothy Lindstrom, Hicks v. Dowd*: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008) [hereinafter *The End of Perpetuity*]. The first article discussing the case was published two years earlier in the Wyoming bar journal. *See* Nancy A. McLaughlin, *Could Coalbed Methane be the Death of Conservation Easements?*, 29 WYO. LAW. 18 (2006).

[4] Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to* The End of Perpetuity, 9 WYO. L. REV. 1 (2009) [hereinafter *In Defense of Conservation Easements*].

[5] C. Timothy Lindstrom*, Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009) [hereinafter *Surrebuttal*].

[6] The *Surrebuttal* complains of the "dismissive manner" in which *In Defense of Conservation Easements* purportedly deals with the "constraints on land trusts imposed by existing law," which, according to *The End of Perpetuity*, are limited to the common law of real property and federal tax law. *See Surrebuttal*, *supra* note 5, at 399; *The End of Perpetuity*, *supra* note 3, at 67. However, as explained in *In Defense of Conservation Easements*, under the common law of real property, the owner of an easement can unilaterally release the easement, in whole or in part, or agree with the owner of the burdened land to modify or terminate the easement. Accordingly, such law does not appear to place any meaningful constraint on a holder's decision to modify or terminate a conservation easement. *See In Defense of Conservation Easements*, *supra* note 4, at 4 n.4. *In Defense of Conservation*

general and state courts to call land trusts (and, by extension, government entities) to account for breaches of their fiduciary duties to conservation easement donors and the public.

In advocating that the states should be deprived of their ability to call easement holders to account for breaches of their fiduciary duties, the *Surrebuttal* reiterates many of the same arguments originally made in *The End of Perpetuity*. Although those arguments were refuted in *In Defense of Conservation Easements*, the authors have nonetheless taken the time to respond to the *Surrebuttal* because of the danger that it may mislead landowners, land trusts, public officials, and others regarding the laws that govern the actions of government entities and land trusts that solicit and accept conservation easement and other charitable donations.[7]

Recognizing that readers may, by now, be a bit weary of this debate, the authors address below only the most problematic of the *Surrebuttal's* assertions. They also have done so in an abbreviated fashion, referring readers, where appropriate, to other sources for a more detailed exposition of the given points.

Technical "Trust" Characterization Not Required

The *Surrebuttal* argues that charitable trust principles should not apply to conservation easements because "Wyoming law permits inference of intent to create a trust, but the '. . . inference is not to come easily . . .' and '. . . clear, explicit, definite, unequivocal and unambiguous language or conduct establishing the intent to create a trust is required . . . .'"[8] That same argument was made by the Dowds (the landowners arguing in favor of the termination of the perpetual conservation easement) in *Salzburg v. Dowd*.[9] That argument

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Easements also explains in great detail why federal tax law does not ensure that government entities and charitable organizations comply with their fiduciary obligations to administer conservation easements in accordance with their stated terms and purposes, and that state attorneys general and state courts, rather than the Internal Revenue Service (IRS), are the proper enforcers of such state law fiduciary obligations. *See id.* at 74–82. *See also infra* notes 95, 96 and accompanying text.

[7] Although the *Surrebuttal* and *The End of Perpetuity* draw no distinction between conservation easements donated as charitable gifts and those acquired by purchase, exaction, or in other nondonative contexts, the analysis in this article (as in *In Defense of Conservation Easements*) focuses on conservation easements conveyed to land trusts or state or local government entities in whole or in part as charitable gifts—as was the case with the conservation easement at issue in *Salzburg v. Dowd* and *Hicks v. Dowd*. *See In Defense of Conservation Easements*, *supra* note 4, at 4 n.5 (explaining that the fact that some conservation easements are not conveyed as charitable gifts is not a justification for permitting government or land trust holders to avoid their fiduciary obligations with regard to those that are).

[8] *Surrebuttal*, *supra* note 5, at 402 (citation omitted).

[9] *See* Defendant Dowd's Response to Motion for Summary Judgment at 7, Salzburg v. Dowd, Civ. No. CV-2008-0079 (Sept. 4, 2009) [hereinafter Dowd's Response].

should be unavailing. The cases cited in the *Surrebuttal* and by the Dowds in support of that argument do not involve charitable gifts. More importantly, it should matter not whether the donation of a conservation easement creates a technical "trust" under state law. As the Wyoming Attorney General explained in his Memorandum in Support of his Motion for Summary Judgment in *Salzburg v. Dowd*, in many jurisdictions charitable gifts made to government entities and charitable organizations to be used for specific purposes are characterized as "charitable trusts" even in the absence of the use of the words "trust" or "trustee" in the instrument of conveyance.[10] However, even in jurisdictions where such gifts are not technically characterized as trusts, the substantive rules governing the administration of charitable trusts nonetheless apply.[11] All charitable gifts made for specific purposes, regardless of whether they are technically characterized as charitable trusts, are enforceable by the state attorney general (or other appropriate public official).[12] "The theory underlying the power of the attorney general to enforce gifts for a stated purpose is that a donor who attaches conditions to his gift has a right to have his intention enforced."[13] Wyoming law is in accord with these authorities.[14]

Obsessive focus on whether the conveyance of a conservation easement technically creates a charitable "trust" under state law obscures the fundamental point. Conservation easements are donated as charitable gifts to government entities or charitable organizations to be used for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the deed of conveyance.[15] Accordingly, donated conservation easements constitute restricted charitable gifts, and whether technically characterized as charitable trusts under state law or not, the

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[10] *See* Plaintiff's Memorandum in Support of Motion for Summary Judgment at 19–26, *Salzburg*, Civ. No. CV-2008-0079 (Aug. 12, 2009) [hereinafter AG's Motion for SJ]. *See also* 15 AM. JUR. 2D *Charities* § 8 (2009) ("A condition attached to a gift may be considered as tantamount to imposing a trust, and if the condition involves application for charitable purposes, a charitable trust will result.").

[11] *See* AG's Motion for SJ, *supra* note 10, at 19–26. *See also In Defense of Conservation Easements, supra* note 4, at 6–7.

[12] *See* AG's Motion for SJ, *supra* note 10, at 23–24.

[13] *Id.* at 25–26 (citing Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995, 998 (Conn. 1997)).

[14] *Id.* at 24–26.

[15] The conservation easement at issue in *Salzburg v. Dowd* is a case in point, having been donated to Johnson County, Wyoming, for the express purpose of "preserv[ing] and protect[ing] in perpetuity the natural, agricultural, ecological, wildlife habitat, open space and aesthetic features and values of [Meadowood] Ranch" for the benefit of the public. *See* Deed of Conservation Easement and Quitclaim Deed between the Lowham Limited Partnership, Grantor, and the Board of County Commissioners of Johnson County, Wyoming, Grantee 1, 2 (Dec. 29, 1993) [hereinafter Lowham Conservation Easement].

substantive rules governing the administration of charitable trusts should apply. This conclusion is supported by a variety of authoritative sources, including the Uniform Conservation Easement Act, the Uniform Trust Code, the Restatement (Third) of Property: Servitudes, and federal tax law.[16] There is no authoritative source of support for the contrary view.

Because the Wyoming Attorney General's cogent exposition of the relevant legal principles should be read by anyone interested in these issues, the portion of his Memorandum in Support of his Motion for Summary Judgment discussing the status of conservation easements as restricted charitable gifts or charitable trusts is included as APPENDIX A to this Article.

Amendments

The *Surrebuttal* asserts that the application of charitable trust principles to conservation easements means that

> (1) no amendments should be agreed upon between landowner and a holder of an easement without court approval under any circumstances and (2) even with court approval, no amendments should be approved unless compliance with easement terms would "defeat or substantially impair" the purpose of the easement, or unless the charitable purpose of the easement becomes "impossible or impracticable."[17]

Repetition of these alarming claims in the *Surrebuttal* does not make them any more accurate or less misleading than when they were first made in *The End of Perpetuity*.[18] The *Surrebuttal* does not respond to the detailed explanation of the application of charitable trust principles to conservation easement amendments in *In Defense of Conservation Easements.*[19] Accordingly, we are compelled to point out, again, that the law is much more reasonable and flexible than *The End*

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[16] *See* UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (2007), *available at* http://www.law.upenn.edu/bll/ulc/ucea/2007_final.htm (last visited Nov. 28, 2009) [hereinafter UCEA]; UNIF. TRUST CODE § 414 cmt. (2005), *available at* http://www.law.upenn.edu/bll/ulc/uta/2005final.htm (last visited Nov. 28, 2009) [hereinafter UTC]; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000); I.R.C. § 170(h) (2006); Treas. Reg. § 1.170A-14 (2009). See generally *In Defense of Conservation Easements*, *supra* note 4, for an extended discussion of these sources. For a more abbreviated discussion of these sources, see Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673 (2007) [hereinafter *Perpetuity and Beyond*]. Wyoming adopted the UTC in 2003. *See* WYO. STAT. ANN. §§ 4-10-101 to -1103 (2009) [hereinafter WYUTC]. Wyoming adopted the UCEA in 2005. *See* WYO. STAT. ANN. §§ 34-1-201 to -207 (2009) [hereinafter WYUCEA].

[17] *Surrebuttal*, *supra* note 5, at 407.

[18] *See The End of Perpetuity*, *supra* note 3, at 62, 68–69, 78–79, 81.

[19] *See In Defense of Conservation Easements*, *supra* note 4, at 41–56.

of Perpetuity or the *Surrebuttal* would have the reader believe. Rather than set forth a detailed exposition of the law in this article, the reader is encouraged to return to Part II. D. of *In Defense of Conservation Easements*, where the subject of amendments is discussed in detail. For purposes of this article, only the following short summary of how charitable trust principles should apply to conservation easement amendments is warranted.

1. If a land trust has negotiated for the inclusion of a standard amendment provision in a conservation easement (as is recommended by the Land Trust Alliance), the land trust has the express power to simply agree with the owner of the encumbered land to any and all amendments that are consistent with the conservation purpose of the easement.[20] Moreover, the land trust's exercise of this discretionary power will not be second-guessed by a court unless there has been a clear abuse.[21]

2. In the absence of an amendment provision, the land trust may have the implied power to agree to amendments that are consistent with the purpose of the easement, or the land trust could seek court approval of such "consistent" amendments in an administrative deviation proceeding, the legal standard for which is more generous than the *Surrebuttal* asserts.[22]

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[20] *See id.* at 42–47. Such "consistent" amendments are the only type of amendments sanctioned by the Land Trust Alliance and the Land Trust Accreditation Commission. For information on the Land Trust Alliance, see http://www.landtrustalliance.org. For information on the Land Trust Accreditation Commission, see http://www.landtrustaccreditation.org.

[21] *See In Defense of Conservation Easements*, *supra* note 4 at 42–43.

[22] *See id.* at 47–52. The *Surrebuttal* cites to an article published by Professor McLaughlin in the *Harvard Environmental Law Review* in 2005, which states the common law standard for the doctrine of administrative deviation (i.e., a court can authorize a deviation from the term of a trust if compliance with the term would defeat or substantially impair the accomplishment of the charitable purpose of the trust). Despite the seeming strictness of the common law standard, the modern tendency has been to permit a trustee to deviate from an administrative term if continued compliance with the term is deemed merely "undesirable," "inappropriate," or "inexpedient." *See, e.g.*, *In Defense of Conservation Easements*, *supra* note 4, at 50. *See also* GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 994 (3d ed. 2009) ("Where administrative provisions handicap the trustee, or the trustee lacks an essential power, the court frequently releases the trustee from the objectionable provision, or grants the needed authority, or otherwise changes the trust as to methods of operation, so as to enable the trustee to achieve the primary purposes of the settlor."). The UTC, which was approved by NCCUSL in 2000 and has since been adopted in 22 states, including Wyoming, relaxes the common law administrative deviation standard, basically codifying the fact that courts tend to liberally apply the doctrine to allow deviations from the terms of a trust where those deviations are consistent with or further the purpose of the trust. *See* UTC, *supra* note 16, § 412(b) ("The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."); WYO. STAT. ANN. § 4-10-413(b) (2009) (same).

3. It is only when a land trust is seeking to terminate a conservation easement, or "amend" it in a manner inconsistent with its conservation purpose (such as to permit the subdivision and development of the land, as was proposed in the Myrtle Grove controversy), that court approval in a *cy pres* proceeding would be necessary.[23] In such a proceeding, it would have to be shown that the charitable conservation purpose of the easement had become "impossible or impractical," and, if such a showing were made, the holder would be entitled to a share of the proceeds from a subsequent sale or development of the land, and the holder would be required to use such proceeds to accomplish similar charitable conservation purposes in some other manner or location.

These requirements under charitable trust law are consistent with the requirements under federal tax law for tax-deductible conservation easements. Federal tax law requires, among other things, that (1) the conservation purpose of a conservation easement must be "protected in perpetuity" (i.e., the easement must not be transferable or amendable in a manner inconsistent with its conservation purpose), and (2) the easement must be extinguishable (other than through condemnation) only in a judicial proceeding, upon a finding that the continued use of the land for conservation purposes has become "impossible or impractical," and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes (i.e., in a *cy pres* or similar equitable proceeding).[24]

Moreover, although no data exists on the prevalence of amendment provisions in conservation easement deeds, their use is likely not "infrequent" as asserted in

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[23] *See In Defense of Conservation Easements*, *supra* note 4, at 52–53. The Myrtle Grove controversy involved the attempted "amendment" of a conservation easement encumbering a 160-acre historic tobacco plantation on the Maryland Eastern Shore to permit a seven-lot upscale subdivision on the property, complete with a single-family residence and ancillary structures, such as a pool, pool house, and tennis courts, on each of the lots. The Maryland Attorney General filed suit, objecting to the amendment on charitable trust grounds. The case eventually settled, with the easement remaining intact and the parties agreeing, *inter alia*, that (i) subdivision of the property is prohibited; (ii) any action contrary to the express terms and stated purposes of the easement is prohibited; and (iii) amending, releasing (in whole or in part), or extinguishing the easement without the express written consent of the Maryland Attorney General is prohibited, except that prior written approval of the attorney general is not required for approvals carried out pursuant to the ordinary administration of the easement in accordance with its terms. *See id.* at 37–39.

[24] *See In Defense of Conservation Easements*, *supra* note 4, at 78–79 (describing the requirements under federal tax law for tax-deductible conservation easements). Federal tax law also requires, among other things, that (1) the interest in the land retained by the conservation easement donor must be subject to legally enforceable restrictions that will prevent any use of the land inconsistent with the easement's purpose, and (2) at the time of the donation, the possibility that the easement will be defeated (by, for example, amendment, release, or termination) must be so remote as to be negligible. *See id.*

the *Surrebuttal*, at least not now.[25] As explained in *In Defense of Conservation Easements*, (1) the Conservation Easement Handbook has discussed the wisdom of including an amendment provision in conservation easement deeds since its first publication in 1988, (2) the 2005 edition of the Handbook provides that "[m]any easement drafters . . . consider it prudent to set the rules governing amendments, both to provide the power to amend and to impose appropriate limitations on that power to prevent abuses," and "[a]mendment provisions are becoming more common to assure and limit the Holder's power to modify," and (3) in its recently published report on amendments, the Land Trust Alliance strongly recommends that land trusts negotiate with easement grantors for the desired level of amendment discretion and include an amendment provision in easement deeds expressly granting them such discretion.[26]

Finally, the fact that some, typically older, conservation easements do not contain amendment provisions is not a cause for specially exempting an entire class of charities (land trusts) and an entire class of charitable gifts (conservation easements) from oversight by state attorneys general and state courts.[27] Rather, to the extent they are not already doing so, land trusts should implement best practices as recommended by the Land Trust Alliance and negotiate for the amendment discretion they desire up front and in good faith at the time of the acquisition of easements, and memorialize that grant of discretion in the easement deeds. With regard to older conservation easements that do not contain amendment provisions, it may be desirable to seek judicial or legislative clarification of the extent of a holder's implied power to agree to amendments that are clearly consistent with or further the purpose of such easements.[28] And where the scope of a land trust's implied power to amend is unclear or an amendment would exceed its implied power, the land trust can seek judicial approval of the amendment in a typically non-adversarial and flexible administrative deviation proceeding.

Land trusts can also work with state attorneys general to develop guidelines regarding the proper procedures to be followed when amending conservation easements. Land trusts in New Hampshire are doing just that. The office of the New Hampshire Attorney General, in conjunction with land trusts in New Hampshire, is developing a comprehensive guide to amending conservation

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[25] *See Surrebuttal*, *supra* note 5, at 408 (asserting, without support, that amendment provisions are "infrequently included").

[26] *See In Defense of Conservation Easements*, *supra* note 4, at 44–45.

[27] If the *Surrebuttal's* position were adopted, the hundreds of government entities holding thousands of conservation easements across the nation would also be exempted from state oversight.

[28] *See In Defense of Conservation Easements*, *supra* note 4, at 48 n.178 (discussing the Uniform Management of Institutional Funds Act and the Uniform Prudent Management of Institutional Funds Act). *But see also id.* at 87–94 (discussing the constitutional and other limits on the power of state legislatures to alter the terms of existing or future charitable gifts).

easements within the framework of the charitable trust doctrine.[29] The Nature Conservancy, which operates in all fifty states, has similarly been working with state attorneys general to develop policies regarding conservation easement amendments.[30] Accordingly, contrary to the assertion in the *Surrebuttal*, state attorney general and court oversight of the activities of land trusts is not advocated by "just academicians."[31] Rather, it is recognized by state attorneys general and many in the land trust community as part of the common or statutory law of the states.[32]

The Uniform Conservation Easement Act (UCEA)

The *Surrebuttal*'s argument of choice, the foundation upon which it stands, is that conservation easements may be modified or terminated by simple agreement of the parties thereto because the Wyoming Uniform Conservation Easement Act (WYUCEA) states that conservation easements may be modified or terminated "in the same manner as other easements."[33] This is surely an argument no lawyer would fail to make if defending a client who improperly amended or terminated a conservation easement.[34] It might even appear to be reasonable to an audience not experienced in reading the law. But those who have tried to understand and apply statutory law know that it is far too easy to get it wrong if a line is taken from a statute and read separately from the lines around it, insulated from the common law that preceded and exists beside it, and bereft of the interpretive guidance provided by the people who wrote it.

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[29] E-mail from Terry Knowles, past President of the National Association of State Charity Officials and Assistant Director of the Charitable Trusts Unit of the New Hampshire Attorney General's Office, to Nancy A. McLaughlin (Dec. 21, 2009, 7:07am MST) (on file with authors).

[30] The Nature Conservancy also filed a Motion to Intervene in *Salzburg v. Dowd* in support of the Wyoming Attorney General's defense of the conservation easement at issue on charitable trust grounds. *See* Motion of The Nature Conservancy to Intervene or Alternatively, Motion to Appear as Amicus Curiae at 7, *Salzburg*, Civ. No. CV-2008-0079 (Aug. 7, 2009).

[31] *See Surrebuttal*, *supra* note 5, at 412.

[32] *See In Defense of Conservation Easements*, *supra* note 4, at 36–41 (explaining that the land trust community has contemplated the application of charitable trust principles to conservation easements for decades, and *The End of Perpetuity*'s (and, by extension, the *Surrebuttal*'s) characterization of the application of such principles to conservation easements as a new or unanticipated control or burden is not supportable).

[33] *See Surrebuttal*, *supra* note 5, at 401, 404–05. The actual provision of the WYUCEA reads as follows: "[e]xcept as otherwise provided in [the 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." WYO. STAT. ANN. § 34-1-202(a) (2009).

[34] In fact, the Dowds, who argue that Johnson County's termination of the conservation easement at issue in *Hicks v. Dowd* and *Salzburg v. Dowd* was proper, make this very argument in their pleadings and cite to the *Surrebuttal* for support. *See* Dowd's Response, *supra* note 9, at 6–7. Indeed, all those who seek to modify or terminate perpetual conservation easements for development purposes and personal gain will no doubt cite to *The End of Perpetuity* and the *Surrebuttal* in support of their position that conservation easements can be modified or terminated "in the same manner as other easements."

To properly understand the UCEA, the reader should not hearken to the *Surrebuttal*'s invitation to ignore the UCEA drafter's commentary or the state legislatures' intention in enacting the statute to achieve uniformity among the states. The reader also should not accept the *Surrebuttal*'s advice to ignore centuries of common law intended to encourage charitable donations by defending the intentions of charitable donors. And the reader should not disregard the clear implication of the UCEA itself, which expressly provides that "[the act] shall not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."[35]

The *Surrebuttal* attempts to dismiss the statutory language just noted, arguing that such language "cannot be assumed to incorporate into Wyoming conservation easements an entire body of law that directly contradicts the WYUCEA's explicit provision that conservation easements can be modified or terminated in the same manner as other easements."[36] But the *Surrebuttal*'s reasoning is fundamentally flawed. As the drafters of the UCEA explained in their original comments, the UCEA "leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts" and "independently of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts."[37] In other words, the UCEA does not, and was never intended to abrogate the well-settled principles that apply when property, such as a conservation easement, is conveyed as a charitable gift to be used for a specific charitable purpose.[38]

To address any possible lingering confusion on this point, in 2007 the National Conference of Commissioners on Uniform State Laws approved amendments to

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[35] UCEA, *supra* note 16, § 3(b); WYO. STAT. ANN. § 34-1-203(b).

[36] *Surrebuttal*, *supra* note 5, at 404 (emphasis omitted).

[37] UCEA, *supra* note 16, § 3 cmt. (emphasis added).

[38] In fact, if the drafters of the UCEA had intended to deny to landowners donating conservation easements the protections afforded under state law to charitable donors of all other forms of property, they surely would have done so explicitly. A basic principle of statutory construction is that repeals by implication are strongly disfavored. *See, e.g.*, Lewis v. Marriot Int'l, 527 F. Supp. 2d 422, 429 (E.D. Pa. 2007) ("As a matter of statutory construction, 'statutes are not presumed to make changes in the rules and principles of common law or prior existing law beyond what is expressly declared in their provisions. . . .' '[A]n implication alone cannot be interpreted as abrogating existing law. The legislature must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded.'"); Brown v. Mem'l Nat'l Home Found., 329 P.2d 118, 132–33 (Cal. Ct. App. 1958) ("[I]t is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."); Boyd v. Commonwealth, 374 S.E.2d 301, 302 (Va. 1988) ("The common law will not be considered as altered or changed by statute unless the legislative intent is plainly manifested. . . . When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule."); *In re* Claim of Presad, 11 P.3d 344, 348

the comments to the UCEA to confirm its intention that conservation easements be enforced as charitable trusts in appropriate circumstances, explaining that

> while Section 2(a) [of the Act] 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.[39]

The decision of the UCEA drafters to "leave intact" the existing case and statutory law as it applies to charitable trusts, and to decline to address such law in the statute itself, was entirely sensible. As the drafters explained in their commentary: (1) the UCEA has the relatively narrow purpose of sweeping away certain impediments under the common law of real property that might otherwise undermine the validity of conservation easements held in gross, and, thus, the UCEA intentionally does not address a number of issues that were considered extraneous to that objective, (2) researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (3) the UCEA was intended to be placed in the real property law of adopting states, and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes.[40]

Moreover, the UCEA validates conservation easements created in a variety of contexts and containing a variety of terms. Thus, the UCEA validates

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n.1 (Wyo. 2000) ("'Knowledge of the settled principles of statutory interpretation must be imputed to the legislature.' . . . This Court presumes that the legislature enacts statutes 'with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and as part of a general and uniform system of jurisprudence . . . .'" (citations omitted)); McKinney v. McKinney, 135 P.2d 940, 942 (Wyo. 1943) ("[I]t is well settled that in construing statutes the rules of the common law are not to be changed by doubtful implication nor overturned except by clear and unambiguous language.").

[39] UCEA, *supra* note 16, § 3 cmt.

[40] *See* UCEA, *supra* note 16, § 3 cmt. The *Surrebuttal* argues that this last statement, which is included in the revised comments to the UCEA "itself acknowledges that the charitable trust doctrine does not apply to easements currently." *Surrebuttal*, *supra* note 5, at 401. That is a misreading of the comments. It could not be more clear from the comments that the drafters of the UCEA intended charitable trust principles, which were expressly left "intact," to apply to conservation easements in appropriate circumstances. Other issues the UCEA drafters expressly left to be addressed by an adopting state's "other applicable laws" are: (1) the formalities and effects of recordation, (2) the potential impact of a state's marketable title laws upon the duration of conservation easements, (3) the effect of a conservation easement on the value of the burdened land for local property tax purposes, and (4) the scope and the power of eminent domain and the entitlement of the holder of the easement and the owner of the encumbered land to compensation upon condemnation. *See* UCEA, *supra* note 16, Commissioners' Prefatory Note.

conservation easements that are donated in whole or in part as charitable gifts, purchased with funds received or solicited for such purchase, purchased with general funds, exacted as part of development approval processes, or acquired in mitigation or other regulatory contexts.[41] The UCEA also validates perpetual conservation easements, term easements, and easements that expressly provide that they are terminable in the discretion of the holder or upon the happening of some event other than a judicial proceeding.[42] Accordingly the laws governing the administration of charities and charitable gifts or trusts will apply with different force to different types of conservation easements, and attempting to address such permutations in the UCEA was considered by the drafters to be neither necessary nor wise.[43] But the fact that the UCEA was never intended to abrogate such laws could not be more clear.[44]

Finally, as with the comments to any Uniform Act, the comments to the UCEA and the Uniform Trust Code (also adopted in Wyoming) should be relied upon as a guide in interpreting those acts so as to achieve uniformity among the states that have enacted them.[45] As explained by the Connecticut Supreme Court:

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[41] The UCEA validates conservation easements that are (1) created for certain conservation purposes and (2) conveyed to qualified "holders," regardless of the context in which they are created. *See* UCEA, *supra* note 16, § 1(1), (2) cmt.

[42] The UCEA enables parties to create conservation easements of perpetual or lesser duration, subject to the power of a court to modify or terminate the easements in accordance with the principles of law and equity. *See id*. § 2(c), cmt.

[43] E-mail from K. King Burnett, member and past president of NCCUSL and member of the drafting committee for the UCEA, to Nancy A. McLaughlin (Nov. 13, 2009, 7:00pm MST) (on file with authors).

[44] As the discussion in this section makes clear, the *Surrebuttal*'s argument that application of charitable trust principles to conservation easements would require a "re-write" of existing law is incorrect. *See Surrebuttal*, *supra* note 5, at 402. Rather, existing law would have to be rewritten to specially exempt conservation easements conveyed as charitable gifts from the common and statutory laws that govern the administration of charitable gifts made for specific purposes, which laws the UCEA expressly left "intact."

[45] The comments to § 414 of the UTC provide:

> 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.

UTC, *supra* note 16, § 414 cmt. (2005).

> Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved. Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.[46]

In sum, contrary to the assertion made in the *Surrebuttal* and *The End of Perpetuity*, conservation easements are not mere creatures of property law, like right-of-way easements between neighbors. As Professor McLaughlin has explained:

> Those who argue that donated perpetual conservation easements can be modified or terminated in the same manner as other easements—i.e., by agreement of the holder of the easement and the owner of the encumbered land . . . —are viewing such easements solely through a real property law prism, and ignoring the fact that such easements are also charitable gifts made for a specific charitable purpose. Whenever any interest in real property, whether it be fee title to land or a conservation easement, is donated to a municipality or charity for a specific charitable purpose, both state real property law and state charitable trust law should apply. State real property law prescribes the procedural mechanisms by which real property interests can be transferred and, in the case of easements, modified or terminated. State charitable trust law governs a donee's use and disposition of property conveyed to it for a specific charitable purpose. In other words, although state real property law may provide that a conservation easement can be modified or terminated by agreement of the holder of the easement and the owner of the encumbered land . . . , the holder of a perpetual conservation easement, in its capacity as trustee, may not agree to modify or terminate the easement in contravention of its stated purpose without first obtaining court approval in a cy pres proceeding.[47]

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[46] Yale Univ. v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (citations omitted); *see also* WYO. STAT. ANN. § 4-10-1101 (2009) ("In applying and construing [the WYUTC], consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."); WYO. STAT. ANN. § 34-1-206 (2009) ("[The WYUCEA] shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it."); WYO. STAT. ANN. § 8-1-103(a)(vii) (2009) ("Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it.").

[47] *Perpetuity and Beyond*, *supra* note 16, at 683.

Bjork v. Draper

An Appellate Court of Illinois has already rejected the *Surrebuttal*'s argument that a perpetual conservation easement can be modified or terminated in accordance with only the provisions of the applicable state conservation easement enabling statute.[48] In *Bjork v. Draper*, the court invalidated amendments to a perpetual conservation easement that a land trust had approved at the request of new owners of the encumbered land. The land trust argued that the Illinois conservation easement enabling statute, which provides that a holder may release a conservation easement, gave the land trust the lesser right to agree to amendments, despite (1) the status of the easement as a tax-deductible perpetual charitable gift, (2) the easement's charitable purpose, which is to retain "forever" the scenic and open space condition of the grounds of a historic home, (3) provisions in the easement expressly prohibiting some of the activities authorized by the amendments, and (4) the provision in the easement requiring that the easement be extinguished, in whole or in part, only by judicial proceedings.[49] The court first determined that, because the easement expressly contemplated amendments, the easement could be amended.[50] The court then held, however, that while protecting the conservation purpose of an easement in perpetuity does not necessarily mean that the language of the easement can never be changed (the court explained that an easement could be amended to add land, which would most likely enhance the easement's purpose), "no amendment is permissible if it conflicts with other parts of the easement."[51]

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[48] Bjork v. Draper, 886 N.E.2d 563 (Ill. App. Ct. 2008), *appeal denied*, 897 N.E.2d 249 (Ill. 2008). Conservation easement enabling statutes are the state real property statutes, many of which are based on the UCEA, that sweep away the impediments under the common law of real property that might otherwise undermine the validity of conservation easements held in gross. For a somewhat dated survey of such statutes, see Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 26 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

[49] The Illinois easement enabling statute provides that conservation easements "may be released by the holder of such rights to the holder of the fee even though the holder of the fee may not be an agency of the State, a unit of local government or a not-for-profit corporation or trust." 765 ILL. COMP. STAT. 120/1(b) (2009).

[50] *Bjork*, 886 N.E.2d at 572.

[51] *Id.* at 574. The easement at issue in *Bjork* does not contain a standard amendment provision. It states only that: "No alteration or variation of this instrument shall be valid or binding unless contained in a written amendment first executed by Grantors and Grantee, or their successors, and recorded in the official records of Lake County, Illinois." *Id.* at 572. That provision does not expressly authorize the holder to agree to amendments or state the circumstances under which the holder can agree to amendments. Rather, it states only that, to be valid and binding, an amendment has to be written and recorded. In contrast, a standard amendment provision generally provides as follows:

> Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed

The court in *Bjork* was not presented with and, thus, did not address the argument that the conservation easement constitutes a restricted charitable gift or charitable trust. If the court had been presented with that argument, it could possibly have ratified some of the amendments as permissible deviations from the administrative terms of the easement, assuming any of the amendments were consistent with the easement's charitable conservation purpose.[52] The court properly held, however, that a perpetual conservation easement may not be substantially amended or released by its holder at will, regardless of the seemingly permissive language in the state easement enabling statute.

The land trust that agreed to the amendments in *Bjork* was aware of the argument that conservation easements conveyed as charitable gifts constitute restricted charitable gifts or charitable trusts.[53] However, rather than requesting

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> that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or Section 170(h) of the Internal Revenue Code, and any amendment shall be consistent with the purpose of this Easement and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of _____ County, [state].

THOMAS S. BARRETT & STEFAN NAGEL, MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT, 1996: REVISED EASEMENTS AND COMMENTARY FROM "THE CONSERVATION EASEMENT HANDBOOK" 22 (1996). Had the conservation easement at issue in *Bjork* contained a standard amendment provision, the court presumably would have determined that the land trust had the express power to agree to amendments that are consistent with the purpose of the easement and otherwise comply with the terms of the amendment provision.

[52] Whether any of the amendments were consistent with the purpose of the easement is questionable. One of the amendments approved landscaping changes that obscured the public's view of the property and, thus, was inconsistent with the purpose of the easement. *Bjork*, 886 N.E.2d at 571. Another of the amendments removed 809 square feet from the easement to allow the new landowners to construct a driveway turnaround in exchange for the addition to the easement of 809 square feet from an adjacent lot. *Id.* at 568, 574. The removal of land from the easement constituted a partial extinguishment rather than an amendment, and would have permitted a garage, carport, or other structure to be constructed on the protected grounds in contravention of the purpose of the easement. The amendment could have been drafted to permit the driveway turnaround in exchange for the protection of an additional 809 square feet of land without releasing the original 809 square feet from the easement. Had this been done, the amendment would not have resulted in the extinguishment of a portion of the easement or permitted construction of a structure on the originally protected grounds in contravention of the purpose of the easement. In such a case, the court may have been willing to ratify the amendment after the fact as a permissible administrative deviation. *See* BOGERT ET AL., *supra* note 22, § 561 ("Occasionally a trustee acts beyond his powers without court approval and later the validity of his act is presented for court determination on an accounting or otherwise. It seems probable that the court will approve or ratify the conduct of the trustee in exceeding his powers, after the ultra vires act has been done, in those cases where it would have approved the proposed change if the matter had been submitted to it in advance.").

[53] In its petition for rehearing filed with the Appellate Court of Illinois, the land trust noted:

> Professor Nancy McLaughlin wrote an exhaustive article dealing with amendments to conservation easements. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005). Professor McLaughlin points out that as the number of acres subject to conservation easement [sic]

that the court ratify the amendments as permissible administrative deviations, the land trust argued (like the author of the *Surrebuttal*) that land trusts have the right to simply agree with subsequent owners of the burdened land to amend or release conservation easements, in whole or in part, regardless of the manner in which the easements were acquired or their express terms. That strategy backfired, and the land trust obtained a holding that constrains the ability to amend conservation easements in Illinois far more than would charitable trust principles.[54]

Donor Assumptions

The *Surrebuttal* asserts that conservation easement donors "reasonably assume that the easements they convey may be modified or terminated in the same manner as other easements, i.e., if both parties to the easement agree."[55] Such an assumption would be astonishing given the express terms of conservation easement deeds, as well as the representations made by land trusts to conservation easement donors and the public regarding the perpetual nature of conservation easements.

Most conservation easement deeds (like the easement deed at issue in *Salzburg v. Dowd*) contain detailed terms regarding the prohibited and permitted uses of the property, and further expressly provide that: (1) the purpose of the easement is to protect certain conservation attributes of the particular land encumbered by the easement in perpetuity, (2) the easement is transferable only to another government entity or charitable organization that agrees to continue to enforce the easement, and (3) the easement is extinguishable (other than through condemnation) only in a judicial proceeding. In addition, consistent with best practices as recommended

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> continues to increase, the need to make modifications and adjustment to account for changed conditions and societal needs may also increase. She does not suggest that the easement holder and property owner should have an unlimited right to amend, but urges that all amendments be in the framework of the charitable trust rules . . . because "such rules were developed and refined over the centuries to deal precisely with the issue presented by conservation easements . . ." McLaughlin, p. 429. *While the charitable trust doctrine has not been raised in this case, it may serve to provide guidelines for conservation easement amendments in the future*.

See Defendant/Appellee's Rule 367 Petition for Rehearing and Rule 316 Application for a Certificate of Importance at 9–10, Bjork v. Draper, 886 N.E.2d 563 (Ill. App. Ct. 2008) (No. 2-06-1145) (emphasis added). The land trust's petition for rehearing was denied, as was its petition for leave to appeal filed with the Supreme Court of Illinois.

[54] In support of its claim that conservation easements are modifiable and terminable by simple agreement of the parties thereto, the *Surrebuttal* asserts that "it is a fundamental principal [sic] of all agreements that they are amendable if the parties thereto agree to amend them, even if the agreements in question expressly prohibit amendment (because even a prohibition against amendment can be amended away by the parties to the agreement)." *Surrebuttal*, *supra* note 5, at 408. It is clear, however, that the Illinois Appellate Court would not agree with this claim as applied to conservation easements, nor would the American Law Institute, NCCUSL, Congress, or the Internal Revenue Service.

[55] *Surrebuttal*, *supra* note 5, at 404 (emphasis omitted).

by the Land Trust Alliance, many land trusts and government entities negotiate for the discretion to agree to amend conservation easements in certain limited circumstances and memorialize that grant of discretion in easement deeds in the form of an amendment provision.[56] It would be remarkable if a landowner signing a conservation easement deed containing such provisions assumed the holder was not bound by them and, instead, could simply agree with a subsequent owner of the land to modify, transfer, or terminate the easement "in the same manner as other easements."

Land trusts also routinely represent to landowners and the public that a conservation easement permanently protects the particular parcel of land it encumbers, and the specific restrictions on development and use of the land in the easement deed will run with land and bind all future owners. The Jackson Hole Land Trust—with which the author of the *Surrebuttal* is affiliated—is a case in point.[57] Under *Easement Basics* on its website, the Jackson Hole Land Trust explains:

> A conservation easement is a voluntary contract between a landowner and a land trust, government agency or another qualified organization in which the owner places *permanent restrictions* on the future uses of some or all of their property to protect scenic, wildlife, or agricultural resources (conservation values).
>
> . . . The easement is donated by the landowner to *the land trust*, which then *has the authority and obligation to enforce the terms of the easement in perpetuity*. The landowner still owns the property and can use it, sell it, or leave it to heirs, *but the restrictions of the easement stay with the land forever*.[58]

Similar representations can be found in the promotional materials of the Land Trust Alliance and virtually every land trust.[59] In light of these representations, it would again be remarkable if the donor of a conservation easement assumed that the holder could simply agree with a subsequent owner of the land to modify,

[56] *See supra* note 26 and accompanying text. For a sample standard amendment provision, see *supra* note 51. While the standard amendment provision grants the holder the right to agree with the owner of the land to amendments that are consistent with the purpose of the conservation easement, some donors do not wish to grant holders such broad amendment discretion and will customize the amendment provision to, for example, preclude the holder from agreeing to amendments that would increase the level of residential development permitted on the property. *See In Defense of Conservation Easements*, *supra* note 4, at 45–46.

[57] The Jackson Hole Land Trust has employed the author of the *Surrebuttal* as its Director of Protection and Staff Attorney since 2000. *See* Jackson Hole Land Trust, Our Board & Staff, http://jhlandtrust.org/about/ctimothylindstrom.htm (last visited Nov. 29, 2009).

[58] Jackson Hole Land Trust, *Easement Basics*, http://jhlandtrust.org/protection/easement.htm (last visited Nov. 20, 2009) (emphasis added).

[59] *See In Defense of Conservation Easements*, *supra* note 4, at 9–15.

transfer, or terminate the easement "in the same manner as other easements." When the donor of a conservation easement is told by a land trust that the carefully negotiated restrictions in the easement deed will "stay with the land forever" and that the land trust "has the obligation to enforce the terms of the easement in perpetuity," the donor is far more likely to assume that the holder means what it says, and that the holder will be legally bound to enforce the terms of the easement as written.

There also is an assumption implicit in the *Surrebutal* that must be spotlighted: that conservation easement grantors neither care nor should be heard to express concern over time about the precise terms of their conservation easement deeds or the long-term protection of the particular property encumbered by their easements. That assumption is unfounded. Surveys of easement donors indicate that many landowners feel more like the author of the *Surrebuttal* says he feels about his family farms: they are willing to donate conservation easements in large part because of a personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved.[60] Indeed, the land trust movement was built on promises made to individual landowners about the perpetual protection of *their* land according to the terms *they specify* in their conservation easement deeds.[61]

This does not mean that conservation easements are immutable, unchangeable documents. Rather, it means that land trusts should negotiate for the discretion to amend conservation easements in manners consistent with their stated purposes up front and in good faith with easement donors at the time of acquisition, and memorialize that grant of discretion in the easement deeds in the form of an amendment provision. Land trusts should not acquire expressly perpetual conservation easements with carefully negotiated terms, promise that the restrictions in the easements will "stay with the land forever," and then take the position that they are free to simply agree with subsequent owners of the land to substantially modify or terminate the easements. In addition to violating its fiduciary duties to the donor and the public, a land trust that takes such a position may find itself guilty of fraudulent solicitation.[62]

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[60] *Surrebuttal*, *supra* note 5, at 412 ("As an easement donor myself, the last thing I want to see is reversal of the conservation of two family farms to which I made an economic and emotional commitment, particularly as the ownership of these farms is no longer mine."); *see also In Defense of Conservation Easements*, *supra* note 4, at 15 (discussing surveys of easement donors).

[61] *See In Defense of Conservation Easements*, *supra* note 4, at 9–15 (detailing the representations land trusts make to conservation easement donors regarding perpetual protection of the donors' land, and explaining that donors do care about the specific restrictions in their conservation easement deeds).

[62] *Id.* at 15–16 (discussing fraudulent solicitation).

Chilling Conservation Easement Donations

The *Surrebuttal* asserts that "[t]he effect of imposing the kind of uncertainty and potential bureaucratic burden on the daily administration of conservation easements that could arise from a broad application of the charitable trust doctrine is sure to discourage many landowners from the use of conservation easements."[63] That logic is backwards.

The standard amendment provision in a conservation easement deed grants the holder the right to simply agree with the owner of the land to amendments that are consistent with the easement's stated charitable conservation purpose.[64] Moreover, it is black letter law that when a trustee is granted such a discretionary power, the trustee's exercise of that power is subject to oversight by the state attorney general and the courts only to prevent abuse.[65] In other words, neither the courts nor the attorney general would be permitted to second-guess a land trust's exercise of such a discretionary power unless there had been a clear abuse.[66]

Accordingly, a landowner who donates a conservation easement containing a standard amendment provision can expect attorney general or court involvement in the administration of the easement only if the holder attempts to terminate the easement, or amend it in a manner clearly inconsistent with its stated conservation purpose—as is contemplated by federal tax law in any event.[67] Charitable trust principles thus impose no additional "bureaucratic burden" on properly advised donors and holders, and, therefore, cannot be expected to discourage future donations. Indeed, if such principles are properly explained, prospective easement donors should welcome their application because they will operate to safeguard the purposes of their gifts, as in the Myrtle Grove controversy and, hopefully, *Salzburg v. Dowd*.

On the other hand, what "is sure to discourage many landowners from the use of conservation easements" is the prospect that land trust and government

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[63] *Surrebuttal*, *supra* note 5, at 412.

[64] *See In Defense of Conservation Easements*, *supra* note 4, at 42–43.

[65] *Id.*

[66] *See id.* at 43 (quoting RESTATEMENT (THIRD) OF TRUSTS § 87 cmt. b (2003) ("A court will not interfere with a trustee's exercise of a discretionary power . . . when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee's fiduciary duties . . . Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion."). On the other hand, in cases where there has been a clear abuse, as in the Myrtle Grove controversy or *Salzburg v. Dowd*, the attorney general is a proper party to bring an action to enforce the conservation easement on behalf of the donor and the public. *See supra* notes 2, 23, and accompanying text (discussing *Salzburg v. Dowd* and the Myrtle Grove controversy, respectively).

[67] *See In Defense of Conservation Easements*, *supra* note 4, at 75–79 (describing the requirements under federal tax law for tax-deductible conservation easements).

holders will take the position that, regardless of the express terms of easement deeds, holders are free to modify or terminate easements as they may see fit to, for example, accommodate the wishes of new owners of the land or raise cash to fund other ostensibly "better" projects or programs. In other words, what will surely chill future conservation easement donations is the prospect that land trusts and government holders will take the position espoused in *The End of Perpetuity* and the *Surrebuttal*: that perpetual conservation easements, regardless of their terms, are, at base, fungible or liquid assets, like "other easements."

The "Partnership" Red Herring

The *Surrebuttal* argues that the "partnership" created upon the donation of a conservation easement between the owner of the land and the holder of the easement distinguishes the gift of a conservation easement from other forms of charitable gifts.[68] The creation of this partnership, so the argument goes, supports exempting gifts of conservation easements from the laws that apply to all other charitable gifts made for specific purposes. There is, however, no basis in the law or policy for creating such an exemption.

As discussed above, the UCEA and other conservation easement enabling statutes were not intended to abrogate the well-settled principles that apply when property, such as a conservation easement, is conveyed as a charitable gift to be used for a specific charitable purpose. Rather, the laws governing charities and the charitable gifts they solicit and accept were left "intact."

In addition, donors do not expect that their gifts of conservation easements will receive less protection under state law than all other forms of charitable gifts; indeed, it is likely they expect such gifts will receive *more* protection given the importance and visibility of land and land conservation.[69] Donors also do not expect that the carefully wrought restrictions in their easement deeds may be terminated or amended away by the holder at the request of future owners of the land.[70] And purchasers of conservation easement-encumbered land (such as the Dowds) cannot be heard to complain because they have at least constructive notice of the easement's perpetual restrictions and they generally pay a much-reduced price for the land as a result of those restrictions.

Moreover, as discussed in *In Defense of Conservation Easements*, any charitable organization could make the same complaints about the application of charitable

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[68] *See Surrebuttal*, *supra* note 5, at 406.

[69] *See, e.g.*, Affidavit of Paul Lowham at 4–5, Hicks v. Dowd, 157 P.3d 914 (Wyo 2007) (Civ. No. CV-2003-00057) ("It was the intention of the Lowham Family, that the conservation easement be held and operated by the Scenic Preserve Trust and they hired legal counsel to see that this was done. The conservation easement was a gift of immeasurable value to the people of Johnson County and the State of Wyoming from the Lowham Limited Partnership.").

[70] *See supra* notes 56–61 and accompanying text (discussing donor assumptions).

trust principles as are made on behalf of land trusts in *The End of Perpetuity* and the *Surrebuttal*—that complying with such principles can, at times, be inconvenient, costly, and time consuming.[71] Indeed, other charities have faced similar challenges, but none have made the novel argument that they be specially exempted from the state laws governing charities and the charitable gifts they solicit and accept.[72]

Most importantly, though, the "procrustean bed" in which the *Surrebuttal* argues that land trusts are forced to lie is self-made and can easily be avoided.[73] To repeat: a land trust that negotiates for the inclusion of a standard amendment provision in the conservation easement deeds it acquires has the right to simply agree with the owner of the land to amend the easement in any manner consistent with its stated charitable conservation purpose without attorney general or court approval. In such cases, court and attorney general involvement will be necessary only if the land trust seeks to terminate the easement, or "amend" it in a manner clearly contrary to its purpose—as is contemplated by federal tax law in any event. Accordingly, charitable trust principles impose no additional burdens on properly advised land trusts. Rather, they simply require that land trusts, like all other charities, administer the charitable gifts they solicit and accept in accordance with the donors' stated charitable purposes.[74]

It is, of course, true that some landowners are not willing to grant an easement holder broad discretion to amend a conservation easement in any manner consistent with its stated purpose.[75] Some landowners wish to customize the amendment provision to, for example, preclude the holder from agreeing to amendments that

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[71] *See In Defense of Conservation Easements*, *supra* note 4, at 29, 81.

[72] For example, the Robertsons' gift of funds to Princeton University that ended in a celebrated dispute involved an ongoing partnership between Princeton and the donors' heirs regarding the management and use of the gifted funds. *See generally* Iris J. Goodwin, *Ask Not What Your Charity Can Do For You:* Robertson v. Princeton *Provides Liberal-Democratic Insights Into The Dilemma of Cy Pres Reform*, 51 ARIZ. L. REV. 75 (2009) (discussing the gift and the dispute). Although Princeton and the donors' heirs disagreed regarding the interpretation of the donors' charitable purpose in making the gift, both understood that state law governing the use of restricted charitable gifts applied to the dispute. *Id.* at 99 ("No party to *Robertson v. Princeton* denied that the Robertsons' 1961 gift to the Robertson Foundation for the benefit of the Woodrow Wilson School is governed by the restrictive language found in [the] Robertson Foundation Certificate of Incorporation, and that the effect of this language was to restrict the purposes for which the funds contributed by Charles and Marie Robertson might be applied."). *See also In Defense of Conservation Easements*, *supra* note 4, at 49 n.178 (discussing the approach of museums and of charities holding institutional funds to the challenges posed by restricted charitable gifts; neither group has argued that they should be specially exempted from the state laws governing charities and the charitable gifts they solicit and accept).

[73] *See Surrebuttal*, *supra* note 5, at 410.

[74] *See also supra* notes 17–32 and accompanying text (explaining the manner in which charitable trust principles should apply to easement amendments in the absence of an amendment provision, and that the *Surrebuttal*'s claims with respect thereto are incorrect).

[75] *See supra* note 56 and accompanying text.

would increase the level of residential development permitted on the property. In that event, the land trust can simply refuse to accept the easement, or it can accept the easement knowing that its ability to amend absent attorney general and court involvement will be more circumscribed. In such cases—where a donor refuses to grant the holder broad amendment discretion—it would be even more absurd to argue that the holder nonetheless has that discretion.

In sum, while conservation easements do inevitably involve an ongoing partnership between the owner of the burdened land and the holder of the easement, that partnership is not a reason to ignore donor intent or exempt the government entities and land trusts holding such easements from oversight at the state level. Rather, it is a reason for government entities and land trusts acquiring conservation easements to consider *ex ante* the flexibility they may need to amend the easements consistent with their stated purposes, and negotiate for that discretion up front and in good faith when acquiring easements.

State Constitutions Do Not Provide Sufficient Safeguards

The *Surrebuttal* recommends that the termination of the conservation easement involved in *Salzburg v. Dowd* be voided, not because Johnson County violated its fiduciary duties to the donor and the public by agreeing to terminate the easement outside of a *cy pres* proceeding, but because the County's transfer of the easement to the Dowds was in violation of the Wyoming Constitution's prohibition on the transfer of public assets to private individuals without adequate consideration.[76] The *Surrebuttal* then implies that improper terminations of conservation easements by government entities can be similarly remedied in most states, thus obviating the need for the application of charitable trust principles to such easements.[77]

It is true that most state constitutions prohibit government entities from transferring their assets to private persons without adequate consideration.[78] Like the private benefit and private inurement prohibitions applicable to land trusts, however, these state constitutional prohibitions do not ensure that government entities will administer the conservation easements they hold in accordance with the easements' stated terms and purposes.[79] If all government holders were required to do is avoid running afoul of the state constitutional prohibitions, and if conservation easements were modifiable and terminable "in the same manner

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[76] *See Surrebuttal*, *supra* note 5, at 411.

[77] *See id.*

[78] *See In Defense of Conservation Easements*, *supra* note 4, at 76 n.294.

[79] *See infra* notes 95, 96 and accompanying text. For a detailed discussion of the private benefit and private inurement provisions and how they cannot be relied upon to ensure that land trusts administer conservation easements in accordance with the easements' stated terms and purposes, see *In Defense of Conservation Easements*, *supra* note 4, at 74–82.

as other easements" as the *Surrebuttal* argues, then government entities would be free to sell, trade, release, extinguish, or otherwise dispose of the perpetual conservation easements they hold, provided only that they receive appropriate compensation and use that compensation consistent with their broad public missions. In other words, government entities would be free to sell conservation easements to the highest bidder and use the proceeds to, for example, build roads or fund public schools. As with land trusts, the continued administration of conservation easements in accordance with their stated terms and purposes depends on a government holder's fiduciary obligations to the easement donor and the public under state charitable trust law or similar equitable principles.

The "Private" Misnomer

The *Surrebuttal* asserts that land trusts are "private" and conservation easements are "privately held" and "privately administered."[80] This is an odd claim, given that most land trusts qualified to hold conservation easements are publicly-supported charitable organizations, they receive substantial tax and other benefits because of the public purposes they serve, and, like all other charitable organizations, they are subject to oversight on behalf of the public by both state and federal regulators.[81]

Moreover, conservation easements themselves and their administration over the long term are also not "private." A private servitude is a private contract between private parties created for private benefit, such as a traditional right-of-way easement agreed to between neighbors. In contrast, conservation easements are validated under state law only if they are (1) created for certain conservation or historic preservation purposes intended to benefit the public and (2) conveyed to a government entity or charitable organization to be held and enforced for the benefit of the public.[82] The public heavily subsidizes the acquisition of conservation easements through appropriations to easement-purchase programs and the provision of tax benefits to landowners who donate conservation easements as charitable gifts.[83] And the importance of conservation easements to the public will only continue to increase as population growth exerts ever-greater pressures

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[80] *See Surrebuttal*, *supra* note 5, at 401, 409.

[81] *See generally* MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS (2004) (describing state and federal regulation of charities in the United States).

[82] *See, e.g.*, UCEA, *supra* note 16, § 1(1), (2). *See also supra* note 48 (referencing a survey of state conservation easement enabling statutes).

[83] *See* ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 9 (2d ed. 2005) (describing easement purchase programs); Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1 (2004) (describing the federal tax incentives); DEBRA PENTZ, THE CONSERVATION RESOURCE CENTER, STATE CONSERVATION TAX CREDITS: IMPACT AND ANALYSIS (2007) (describing the state tax incentives), *available at* http://conserveland.org/lpr/library?parent_id=18216 (last visited Nov. 29, 2009).

on undeveloped land, ecosystems, and wildlife.[84] Accordingly, the public, which heavily invests in and is the beneficiary of the conservation and historic benefits provided by conservation easements, has a significant stake in ensuring the proper enforcement of such easements over time.

This was recognized by the drafters of the Restatement (Third) of Property: Servitudes. Rather than providing that conservation easements are modifiable and terminable "in the same manner as other easements," as the *Surrebuttal* advocates, the Restatement provides just the opposite. Pursuant to the Restatement, the modification and termination of conservation easements held by government entities and charitable organizations are governed by a special set of rules based on charitable trust principles, and those rules apply regardless of how the easements were acquired. The drafters explained that "Because of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes."[85]

State Attorneys General

The *Surrebuttal* repeats the assertion made in *The End of Perpetuity* that state attorneys general may use the charitable trust doctrine as a "a sword" to "pierce" conservation easements.[86] This time, the author cites to a conversation with a former Wyoming Attorney General and a Wyoming state legislator in support of the assertion.[87] The assertion is, however, no more compelling or correct the second time around.

As explained in detail in *In Defense of Conservation Easements*, state attorneys general are charged with protecting the public interest in charitable assets.[88] They also take seriously their obligation to ensure the intent of charitable donors is honored because they recognize that disregarding donor intent would chill future charitable donations.[89] Moreover, even if a rogue attorney general were to file suit in an attempt to terminate a conservation easement in favor of development interests, the authority to apply the doctrine of *cy pres* is vested in the courts, not the attorney general.[90] And for the reasons noted in *In Defense of Conservation Easements*, it would be a profound departure from settled precedent for a court to authorize the termination of a conservation easement if the easement continued to provide significant benefits to the public.[91]

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[84] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmt. a (2000).

[85] *Id.*

[86] *See Surrebuttal*, *supra* note 5, at 409–10.

[87] *See id.*

[88] *See In Defense of Conservation Easements*, *supra* note 4, at 73.

[89] *See id*.

[90] *See id*. at 74.

[91] *See id.* at 70–74.

The *Surrebuttal*'s assertion that state attorneys general will attempt to use their position as supervisor of charitable gifts and trusts to terminate conservation easements in favor of development interests is even more remarkable in light of the evidence in the author's own state. The Wyoming Attorney General has spent considerable time and resources defending the intent of the donor and the interests of the public with regard to the conservation easement at issue in *Salzburg v. Dowd*, despite competing priorities and limited resources.[92] The Maryland Attorney General did the same in the context of the Myrtle Grove controversy.[93] *Salzburg v. Dowd* and the Myrtle Grove controversy provide concrete evidence that, contrary to the unsupported assertions made in the *Surrebuttal* and *The End of Perpetuity*, state attorneys general take seriously their obligation to protect the interests of donors and the public in charitable gifts, and they can be powerful allies to the land conservation community in cases involving the wrongful "amendment" or termination of conservation easements.[94]

Emasculating the States

The *Surrebuttal* recommends that Wyoming (and all other states) be deprived of their longstanding right to supervise the activities of the municipalities and charities that operate within their borders, and to call those entities to account for breaches of their fiduciary duties in one context: conservation easements. In a world structured according to the *Surrebuttal*, a state would have no power to require that conservation easement holders honor the terms of the easements protecting land within the state's borders. Rather, the only recourse available to a state and the citizens therein in the event a municipality or land trust improperly amended or terminated a conservation easement (as in *Salzburg v. Dowd* or the Myrtle Grove controversy) would be to look to the Internal Revenue Service (IRS), the enforcement powers of which are indirect, at best.[95] Even assuming the IRS had the resources and interest to involve itself in the enforcement of the thousands of conservation easements encumbering millions of acres across the fifty states, the IRS does not have the power to declare an improper conservation easement amendment or termination null and void, or remove and replace the

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[92] *See, e.g.*, AG's Motion for SJ, *supra* note 10.

[93] *See generally* Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006) (detailing the Maryland Attorney General's defense of the conservation easement at issue in the Myrtle Grove controversy).

[94] *See also* FREMONT-SMITH, *supra* note 81, at 447–48 (explaining that, while state attorneys general regulate charities, they also function as supporters of and advocates for charities).

[95] The IRS could, for example, impose financial sanctions on an insider who receives an economic benefit from a land trust as a result of an easement amendment or termination, or revoke the tax-exempt status of a land trust that confers private benefit on a landowner in such circumstances. *See In Defense of Conservation Easements*, *supra* note 4, at 74–82. However, neither sanction would restore a conservation easement that had been improperly amended or terminated, or prevent amendments or terminations agreed to in exchange for an appropriate amount of cash or other compensation. Moreover, government entities are not subject to even these indirect sanctions.

holder of an easement, or enjoin the holder from future wrongdoing; those key remedies are the province of state courts.[96]

The *Surrebuttal* attempts to reassure the reader that depriving the states of the ability to call easement holders to account for breaches of their fiduciary duties should be of no concern because conservation easements are "privately administered" and, with intensified training from the Land Trust Alliance and the Alliance's recent accreditation program, land trusts can be relied upon to always do the right thing.[97] But that is cold comfort given the long history of abuses in the charitable context and the inevitable financial, political, and other pressures that will be brought to bear on holders to substantially modify, release, or terminate conservation easements.[98] As explained in *In Defense of Conservation Easements*, negligence, malfeasance, and the use of assets for purposes other than those specified by the donor are not unknown in the charitable context, and there is no reason to believe that land trusts holding conservation easements will be the first class of entities in history to be immune to such abuses.[99] Moreover, many other segments of the charitable sector, such as universities, museums, and religious organizations, have much more mature self-regulatory accreditation programs, and they are not thereby exempted from the state laws governing charities and the charitable gifts they solicit and accept.[100] The *Surrebuttal* also fails to explain how its plan to emasculate the states would affect the thousands of conservation

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[96] *See In Defense of Conservation Easements*, *supra* note 4, at 81 ("[I]t is state courts, rather than the Tax Court or the IRS, that possess the broad range of equitable powers necessary to protect assets dedicated to charitable purposes.").

[97] *See Surrebuttal*, *supra* note 5, at 412.

[98] These pressures may be brought to bear on the executive director and board members of a land trust 25, 50, or 75 years hence—when the current executive director and current board members and all their best intentions and loyalties to existing donors are long gone. Moreover, such pressures are likely to be particularly intense in the conservation easement context because development pressures can be expected to rise as undeveloped land becomes increasingly scarce, and there is enormous economic value inherent in the development and use rights restricted by conservation easements. *See In Defense of Conservation Easements*, *supra* note 4, at 61–62.

[99] *See id*. at 61.

[100] *See, e.g.*, PANEL ON THE NONPROFIT SECTOR, PRINCIPLES FOR GOOD GOVERNANCE AND ETHICAL PRACTICE: A GUIDE FOR CHARITIES AND FOUNDATIONS 78–81 (reference ed. Oct. 2007) *available at* http://www.nonprofitpanel.org/Report/index.html (last visited Nov. 29, 2009) (listing numerous self-regulatory accreditation programs for nonprofit organizations). This report also discusses the legal obligations of nonprofit organizations, explaining, for example:

> If a donor provides a clear, written directive about how funds are to be used at the time a charitable gift is made, the board of the recipient organization has a fiduciary obligation to comply with the donor's directive and state attorneys general may enforce compliance. . . . An organization's communications while it is soliciting contributions may also create a legally binding restriction that can be enforced under state and federal fraudulent solicitation prohibitions.

Id. at 43.

easements held by the hundreds of government entities across the nation, which entities are subject to even less oversight by the IRS than are land trusts.[101]

Salzburg v. Dowd, *Bjork v. Draper*, and the Myrtle Grove controversy, as well as a controversy involving a Wal-Mart,[102] starkly illustrate why there must be a means by which holders of conservation easements can be held accountable for breaches of their fiduciary duties to both easement donors and the public.[103] Emasculating the states when it comes to calling easement holders to account for such breaches would not only be contrary to existing law, it would be bad policy. This was recognized by the National Conference of Commissioners on Uniform State Laws in its adoption of the UCEA and the Uniform Trust Code, as well as by the American Law Institute in its promulgation of the Restatement (Third) of Property: Servitudes.[104] This was also recognized by Congress and the Treasury Department in enacting and issuing, respectively, § 170(h) of the Internal Revenue Code and the accompanying Treasury Regulations, which effectively require that the donation of a tax-deductible conservation easement be in the form of a restricted charitable gift or charitable trust.[105]

Pyrrhic Victory

To some land trusts, the position espoused in the *Surrebuttal*—that conservation easements should be modifiable, transferrable, and terminable

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[101] *See In Defense of Conservation Easements*, *supra* note 4, at 77. *The End of Perpetuity* proposes two unrealistic and unsatisfactory "solutions" to the problem of lack of oversight of government holders in the event states are denied enforcement powers. *See In Defense of Conservation Easements*, *supra* note 4, at 77 n.297.

[102] The Wal-Mart controversy involved a four-lane road providing access to a Wal-Mart Supercenter that was constructed across land protected by a perpetual conservation easement. Two nonprofit organizations and a private citizen sued the owner of the encumbered land (the development corporation that had sold the adjacent land to Wal-Mart) and the holder of the easement (the city of Chattanooga) objecting to the road. The case settled, and the development corporation agreed to convey a replacement parcel of land and $500,000 to the plaintiffs to be used for similar conservation purposes and to pay the plaintiffs' not insubstantial legal fees. In approving the settlement, the court concluded that the charitable purpose of the easement had become, in part, "impossible or impractical," and the property and cash transferred to the plaintiffs constituted a reasonable and adequate substitute for any portion of the property that may have been affected or taken as a result of the road construction. *See Perpetuity and Beyond*, *supra* note 16, at 678, 695–700.

[103] Contrary to the assertion made in the *Surrebuttal*, the "problems" in the Myrtle Grove and Wal-Mart controversies were not "voluntarily corrected." *See Surrebuttal*, *supra* note 5, at 412. Rather, they were corrected through settlement only after suit was brought in state court. *See Perpetuity and Beyond*, *supra* note 16, at 690–93, 695–700. Moreover, the IRS did not involve itself, directly or indirectly, in either the Wal-Mart or Myrtle Grove controversies, or in *Hicks v. Dowd*, *Salzburg v. Dowd*, or *Bjork v. Draper*.

[104] *See supra* note 16 and accompanying text.

[105] *See In Defense of Conservation Easements*, *supra* note 4, at 78–91 (explaining that the real check that federal tax law places on the conservation easement amendment and termination activities of land trusts and government entities depends on state charitable trust law).

by mere agreement of the owner of the land and the holder of the easement, and that states should have no oversight authority with regard to conservation easements—may have superficial appeal. If courts in a state were to accept that position, however, the consequences to the land trust community could be grave.

A landowner donating a conservation easement is eligible for a federal charitable income tax deduction pursuant to § 170(h) of the Internal Revenue Code only if the conservation easement is "granted in perpetuity" and its conservation purpose is "protected in perpetuity." In explaining these perpetuity requirements, the Treasury Regulations provide that, among other things, a conservation easement must be (1) expressly transferable only to another government entity or charitable organization that agrees to continue to enforce the easement, and (2) extinguishable by its holder only in a judicial proceeding, upon a finding that the continued use of the encumbered land for conservation purposes has become impossible or impractical, and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes.[106]

The donor of the conservation easement at issue in *Salzburg v. Dowd* attempted to comply with these requirements. The donor expressly provided in the conservation easement deed that the purpose of the easement is to preserve and protect certain conservation attributes of the land burdened by the easement in perpetuity.[107] The donor also expressly provided that the easement can be transferred or extinguished only in the circumstances set forth in the Treasury Regulations.[108] If Wyoming courts were to adopt the *Surrebuttal*'s position—that a conservation easement may be modified, transferred, or terminated by mere agreement of the owner of the land and the holder of the easement, regardless of the status of the easement as a restricted charitable gift or its express terms—the IRS could readily conclude that there simply is no way conservation easements donated in Wyoming could meet the federal tax law requirements for deductibility. Congress might also deem it imprudent to continue subsidizing the acquisition of conservation easements nationwide and repeal the federal tax incentives for easement donations altogether. Accordingly, even if courts in a state could be convinced to deny themselves their historic and inherent jurisdiction with respect to matters relating to charitable gifts in the conservation easement context (i.e., if they could be convinced to accept the position espoused in the *Surrebuttal*), it would likely prove to be a Pyrrhic victory for *Surrebuttal* enthusiasts.[109]

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[106] *See* Treas. Reg. § 1.170A-14(c)(2), -14(g)(6) (2009).

[107] *See* Lowham Conservation Easement, *supra* note 15, at 2.

[108] *See id.* at 8–9.

[109] A "Pyrrhic victory" is a victory offset by staggering losses. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1476 (3d ed. 1992). The phrase is named after Macedonian King Pyrrhus of Epirus, whose army, although defeating the Roman army in a 280 B.C. battle at Heraclea, suffered such severe and irreplaceable casualties that the phrase "Pyrrhic victory" became the proverbial expression for an over-expensive gain. *See* PETER CONNOLLY, GREECE AND ROME AT WAR 90 (Prentice-Hall 1981).

Logical Incoherence

Finally, the *Surrebuttal* opines that, if it were possible to contain the application of the charitable trust doctrine to cases such as *Salzburg v. Dowd*—those involving an "outright, unmitigated easement termination"—then "the implications of the doctrine for conservation easement administration might be of less concern."[110] The *Surrebuttal* further notes that "[i]t is in the application of the doctrine to modifications that negative implications for efficient and reasonable easement administration arise."[111] The *Surrebuttal* then acknowledges, however, that "[o]f course, the problem is that one can effectively terminate an easement by amendment nearly as effectively as by outright termination."[112]

The *Surrebuttal* offers no answer to this conundrum: that applying charitable trust principles to the termination, but not modification, of conservation easements leaves the door open to the effective termination of easements through cleverly designed "modifications." One can only assume that, if asked to respond to this conundrum (and in the absence of the enactment of the unspecified new "remedy" he calls for),[113] the author of the *Surrebuttal* would return to the position that underlies all of his arguments: land trusts and, by extension, government entities should simply be trusted to do the right thing. For all the reasons previously discussed, that response simply cannot satisfy the needs of easement donors and the public. Far better for land trusts and government holders to negotiate for the discretion they need "for efficient and reasonable administration" up front and in good faith at the time of their easement acquisitions. And far better for the states to retain their longstanding right to oversee the activities of the government entities and nonprofits soliciting and accepting all manner of charitable gifts within their borders, including conservation easements.

In conclusion, conservation easement donors, like all other charitable donors, should have assurance that the charitable purposes to which they dedicate their property will be honored. The law should not leave them to find that, instead of having sacrificed a more comfortable life and a legacy for their heirs so as to conserve a beloved farm or ranch, they have, instead, merely made a fungible gift of resources to an entity unwilling to make a durable commitment to the protection of that land. If a government entity or land trust wishes to be able to modify or terminate the conservation easements it acquires as it may see fit in accomplishing its public or charitable mission over time, it should negotiate for that discretion up front and in good faith at the time of acquisition. Donors would then have the choice to give under those conditions, or not.

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[110] *See Surrebuttal*, *supra* note 5, at 411.

[111] *Id.*

[112] *Id.*

[113] *See id.* at 412 (calling for the creation of some new "remedy for improper easement administration"). As discussed at length in *In Defense of Conservation Easements*, there are potentially significant constitutional and other problems with attempting to apply new state law "remedies" to existing or future conservation easements, and the creation of such new remedies is unnecessary. *See In Defense of Conservation Easements*, *supra* note 4, at 87–94.

APPENDIX A

EXCERPT FROM WYOMING ATTORNEY GENERAL'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN SALZBURG V. DOWD[***]

C. Lowham's Charitable Donation of the Conservation Easement either created a Charitable Trust or constituted a Restricted Charitable Gift, and the Board Breached its Fiduciary Duties by Failing to Obtain Judicial Approval for the Transfer and Termination of the Easement in a Cy Pres Proceeding

1. Lowham's Charitable Donation of the Conservation Easement either created a Charitable Trust or constituted a Restricted Charitable Gift

Lowham's charitable donation of the conservation easement to the Board [of County Commissioners of Johnson County, Wyoming] for the express purpose of preserving and protecting in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic, and aesthetic features and values of the Ranch for the benefit of the people of and visitors to Wyoming either created a charitable trust, or constituted a restricted charitable gift, the administration of which is also governed by charitable trust principles.

a. Legal Principles

Charitable gifts made to government entities and charitable organizations can be either restricted or unrestricted. *See* Nancy A. McLaughlin, *In Defense of Conservation Easements: A Response to the End of Perpetuity,* 9 Wyo. L. Rev. 1, 2 (2009). An unrestricted charitable gift is a contribution of money or property that the donor makes without attaching any conditions on its use by the recipient entity or organization. *Id.* An entity or organization in receipt of an unrestricted charitable gift is free to use that gift as it sees fit in accomplishing its general public or charitable mission. *Id.* A restricted charitable gift, on the other hand, is a contribution of money or property that the donor makes to a government entity or charitable organization to be used for a specific charitable purpose and often according to carefully negotiated terms. *Id.* at 2–3.

In many cases, restricted charitable gifts are characterized as "charitable trusts" even in the absence of the use of the word "trust" or "trustee" in the instrument of conveyance. *See, e.g.*, *In re Estate of Heil v. Nevada*, 210 Cal. App. 3d 1503, 1511

[***] Plaintiff's Memorandum in Support of Motion for Summary Judgment at 19–41, Salzburg v. Dowd, Civ. No. CV-2008-0079 (Aug. 12, 2009) (on file with the *Wyoming Law Review*).

*Editor's Note: Plaintiff's Memorandum appears here with its original footnotes. All nonconforming citations and any omissions, corrections, and substitutions in this excerpt using standard punctuation appeared in the original with the exception of the first bracketed substitution identifying the Board of County Commissioners of Johnson County, Wyoming. Omissions by the author are indicated by * * * *. Emphasis appearing in the original and superscripts have been changed to comply with our journal's style requirements.*

(Cal. Ct. App. 1989) (bequest to State of Nevada for the purpose of preservation of wild horses in Nevada created a charitable trust); *Chattowah Open Land Trust, Inc. v. Jones*, 636 S.E.2d 523, 524–26 (Ga. 2006) (devise of decedent's home and surrounding acreage to a charitable organization for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of Internal Revenue Code § 170(h) "unambiguously created a charitable trust," and decedent's failure to use the terms "trust" and "trustee" did not alter the outcome because the strict use of those terms is not required to establish a trust); *In re Village of Mount Prospect*, 522 N.E.2d 122, 125–26 (Ill. App. 1988) (land dedicated to Village "for public purposes" was held to create an express charitable trust and could not be sold without court approval in a cy pres proceeding); *City of Salem v. Attorney Gen.*, 183 N.E.2d 859, 862 (Mass. 1962) (devise of land to city to be used "forever as public grounds" established a trust); *State v. Rand*, 366 A.2d. 183, 186, 196 (Me. 1976) (gift of land to city to be "forever held and maintained . . . as a public park" created a charitable trust); *Bankers Trust Co. v. New York Women's League for Animals*, 23 N.J. Super. 170, 182 (1952) (bequest to charitable organization to be used to purchase a rural farm for the care of animals created a trust); *Abel v. Girard Trust Co.*, 73 A.2d 682, 684 (Pa. 1950) ("A charitable trust is created by deed where there appears in the deed an intention that the transferee shall hold the land subject to the equitable duty to use the land for a charitable purpose.").

> It is well-settled that no magical incantation, such as use of the word 'trust' or 'trustee,' is required to create a trust. Indeed, the settlor need not even understand precisely what a trust is. All that is required to create a trust is an intention to create a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.

McLaughlin, 9 Wyo. L. Rev. 1, 20–21.

The Restatement (Third) of Trusts (2003) treats restricted charitable gifts as charitable trusts, providing in cmt. a of § 28:

> An outright devisee [sic] or donation to a . . . charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust . . . A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee. . . .

Moreover, even in those cases in which a restricted charitable gift is not characterized as a technical "trust," the substantive rules governing the

administration of charitable trusts, including the doctrine of *cy pres*, nonetheless apply. *See, e.g.*, *Estate of Vallery v. St. Luke's Cmty. Found. Inc.*, 883 P.2d 24, 28 (Colo. Ct. App. 1994) (bequest for a specified charitable purpose constituted a "restricted gift" as opposed to a trust, but doctrine of *cy pres* applied); *Blumenthal v. White*, 683 A.2d 410, 412–13 (Conn. App. Ct. 1996) (gift of land to a city with instructions that land be used as a public park and not transferred did not create a trust "in strict sense," but "it may be so regarded," and city held land as a "quasi-trustee"); *Lancaster v. City of Columbus*, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) ("It is settled state law that lands taken and held by a municipality as a gift for a specific purpose are subject to the law of trusts, and any use inconsistent with that intended by the dedicator constitutes a breach of trust."); *School Dist. No. 70, Red Willow County v. Wood*, 13 N.W.2d 153, 156 (Neb. 1944) ("a gift to a charitable corporation [for a particular purpose] is equivalent to a bequest upon a charitable trust and will ordinarily be governed by the same rules"); *St. Joseph's Hosp. v. Bennett*, 22 N.E.2d 305, 308 (N.Y. 1939) (while no trust arises "in a technical sense," a charitable corporation "may not . . . receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands").

The Restatement (Second) of Trusts § 348, cmt f. (1959) explains:

> Property may be devoted to charitable purposes not only by transferring it to individual trustees to hold it for such purposes, but also by transferring it to a charitable corporation. . . .
>
> Where property is given to a charitable corporation, particularly where restrictions are imposed by the donor, it is sometimes said by the courts that a charitable trust is created and that the corporation is a trustee. It is sometimes said, however, that a charitable trust is not created. This is a mere matter of terminology. . . .
>
> Ordinarily the principles and rules applicable to charitable trusts are applicable to charitable corporations. . . .
>
> The doctrine of cy pres (see § 399) is applicable to gifts to charitable corporations as well as to gifts to individual trustees for charitable purposes.

Regardless of whether they are characterized as charitable trusts, restricted charitable gifts are enforceable by the state attorney general. *See, e.g.*, *Lefkowitz v. Lebensfeld*, 417 N.Y.S.2d 715 (N.Y. App. Div. 1979) (noting "the never disturbed equitable doctrine that although gifts to a charitable organization do not create a trust in the technical sense, where a purpose is stated a trust will be implied, and the disposition enforced by the attorney general, pursuant to his duty to effectuate

the donor's wishes"); Restatement (Second) of Trusts § 348, Reporter's Note. cmt f. ("Where restricted gifts are made to charitable corporations, the restrictions are enforceable at the suit of the Attorney General"); McLaughlin, 9 Wyo. L. Rev. 1, 6–7, n. 12 (*quoting* Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 348.1 (4th Ed. 1989) ("Certainly many of the principles applicable to charitable trusts are applicable to charitable corporations. In both cases the Attorney General can maintain a suit to prevent a diversion of the property to purposes other than those for which it was given; and in both cases the doctrine of cy pres is applicable.")).

Wyoming law is in accord with these authorities. In *Buffalo Bill Memorial Ass'n*, the Supreme Court of Wyoming held that fee title to land that had been donated to a charitable association to be used for a specific charitable purpose – to perpetuate the memory of Buffalo Bill – could not be transferred by the association without authorization of a court of equity. *Buffalo Bill Memorial Ass'n*, 196 P.2d 369, 382 (Wyo. 1948). The court explained:

> *Grants made to a charitable corporation may, of course, be of various kinds. They may be absolute or, on the other hand, proper terms, conditions and directions may be annexed thereto. In the latter case, the terms, conditions and directions annexed must be carried out*. . . .
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> . . . .
>
> [W]ithout particularly characterizing the grants involved in this case at this place, *we are here dealing with a charitable trust, or the ordinary rules relating thereto should be applied*. . . .
>
> . . . .
>
> [C]*ounsel completely failed to recognize that the rules of a charitable trust are applicable herein*.

Buffalo Bill Memorial Ass'n, 196 P.2d at 377, 383 (emphasis added).

Charitable trust principles also apply to charitable gifts to municipal corporations. *See Rayor v. City of Cheyenne*, 178 P.2d 115, 117 (Wyo. 1947) ("If a dedication of property for public use is by a private party, not even the legislature can authorize property thus dedicated to be used for any other purpose, since that would violate the contract between the dedicator and the public"); McQuillin, The Law of Municipal Corporations § 47:17 ("A gift to a municipal corporation for a charitable purpose cannot, after the municipality accepts it, be renounced or conveyed away so as to defeat the charity"); *Id.* § 28:25 ("when the trust is accepted, the municipal corporation assumes the same burdens and is subject

to the same regulations that pertain to other trustees. The duty to administer the donation or charitable fund agreeably to the expressed wish of the donor or testator will be enforced in equity, and, where circumstances warrant such action, the municipal corporation may be removed or replaced as trustee.").

"The theory underlying the power of the attorney general to enforce gifts for a stated purpose is that a donor who attaches conditions to his gift has a right to have his intention enforced." *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 998 (Conn. 1997). *See also St. Joseph's Hosp.* 22 N.E.2d at 307 ("Nothing in authority, statute or public policy has been brought to our attention which prevents a testator from leaving his money to a charitable corporation and having his clearly expressed intention enforced."); *Holt v. Coll. of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 935 (Cal. 1964) ("In addition to the general public interest…there is the interest of donors who have directed that their contributions be used for certain charitable purposes. Although the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust.").

The Wyoming Supreme Court has similarly recognized the rights of charitable donors. *See First Nat'l Bank & Trust Co. of Wyo. v. Brimmer*, 504 P.2d 1367, 1371 (Wyo. 1973) ("The clearly expressed intention of the settlor should be zealously guarded by the courts, particularly when the [charitable] trust instrument reveals a careful and painstaking expression of the use and purposes to which the settlor's financial accumulations shall be devoted."); *Bentley v. Whitney Benefits,* 281 P. 188, 190 (Wyo. 1929) ("The provisions of instruments creating charitable trusts are favorably regarded by the courts, and are generally construed with the utmost liberality in order to carry out the laudable purpose of the donor.").

b. Application of Above Legal Principles to Lowham's Charitable Donation of the Conservation Easement to the Board

* * * *

Lowham clearly did not donate the conservation easement to the Board to be used for the Board's general purposes. Rather, Lowham donated the conservation easement as a charitable gift to the Board to be used for a very specific charitable purpose—the preservation and protection in perpetuity of the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch for the benefit of the people of and visitors to Wyoming. Accordingly the conservation easement constitutes a restricted charitable gift and, pursuant to *Buffalo Bill Memorial Ass'n* and the other authorities referenced above "*we are here dealing with a charitable trust, or the ordinary rules relating thereto should be applied*. . . ." (emphasis added). *Buffalo Bill Memorial Ass'n,* 196 P.2d at 377.

The conservation easement deed reveals a particularly careful and painstaking expression of the use and purposes to which Lowham intended the gift would be devoted, and "[t]he clearly expressed intention of the [donor] should be zealously guarded by the courts. . . ." *First Nat'l Bank & Trust Co. v. Brimmer*, 504 P.2d at 1371. As explained in one of the leading cases in this area:

> [E]quity will afford protection to a donor to a charitable corporation in that the Attorney-General may maintain a suit to compel the property to be held for the charitable purpose for which it was given. . . .
>
> . . . .
>
> No authority has been brought to our attention that a gift to a charitable corporation with the express direction that it be applied to a specific corporate purpose in a specific manner may be accepted by the corporation, and then used for a different corporate purpose in a different manner. . . . [*A*] *charitable corporation . . . may not . . . receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands*.

St. Joseph's Hosp. 22 N.E.2d at 306–07, 308 (emphasis added). In addition, as explained above, these same charitable trust rules also apply to charitable gifts made to municipal corporations. *See Rayor*, 178 P.2d at 117; McQuillin, The Law of Municipal Corporations §§ 28:25; 47:17.

c. The Uniform Trust Code, the Uniform Conservation Easement Act, the Restatement (Third) of Property, and Federal Tax Law Further Support the Application of Charitable Trust Rules to the Conservation Easement

Wyoming adopted the Uniform Trust Code (UTC) effective July 1, 2003. *See* WYO. STAT. ANN. §§ 4-10-101 through 4-10-1103. The drafters of the UTC specifically addressed conservation easements in their comments to § 414, which provides a special set of rules for the modification and termination of "uneconomic trusts," but also provides that the section does not apply to conservation easements:

> 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 [§ 414], 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*.

Uniform Trust Code § 414 cmt. (2005) (emphasis added); WYO. STAT. ANN. § 4-10-415(c). The comments by the drafters of a uniform law adopted by Wyoming are particularly persuasive authority in light of the Legislature's explicitly declared goal of promoting uniformity with other jurisdictions that have also adopted the uniform law. *See* WYO. STAT. ANN. §§ 4-10-1101 ("In applying and construing this act [the UTC], consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it."); 8-1-103(a)(vii) ("Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it[.]").

Wyoming has also adopted the Uniform Conservation Easement Act (UCEA), effective July 1, 2005[2]. See WYO. STAT. ANN. §§ 34-1-201 through 34-1-207. That Act states that:

> Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements.

WYO. STAT. ANN. § 34-1-202(a). It also provides, however, that the Wyoming UCEA "shall not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity." WYO. STAT. ANN. § 34-1-203(b). In the original comments to the UCEA, the drafters explained that "the Act leaves intact the existing case and statue law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts," and "independently of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts." Uniform Conservation Easement Act § 3 cmt. (1982) (Emphasis added).

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[2] Like the UTC, the Wyoming UCEA promotes uniformity of application and construction: "This article [the UCEA] shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the article among the states enacting it." WYO. STAT. ANN. § 34-1-206.

In 2007, the drafters amended the comments to the UCEA to include further discussion of conservation easements as enforceable under charitable trust principles:

> The [UCEA] does not directly address the application of charitable trust principles to conservation easements because: (i) the [UCEA] 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 beyond the scope of the drafting committee's charge, and (ii) the [UCEA] is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes. 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 statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements*. This was recognized by the drafters of the Uniform Trust Code, approved by the National Conference of Commissioners on Uniform State Laws in 2000.
>
> . . . .
>
> *The* [*UCEA*] *leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts*. Thus, while Section 2(a) 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*.

Uniform Conservation Easement Act § 3 cmt. (amended 2007) (emphasis added).

In 2000, the American Law Institute published the Restatement (Third) Property: Servitudes, which recommends that, in lieu of the traditional real property law doctrine of changed conditions, the modification and termination of conservation easements held by governmental bodies or charitable organizations

should be governed by a special set of rules based on the charitable trust doctrine of *cy pres*. In their commentary, the drafters of the Restatement explained:

> Because of the public interests involved, these servitudes [conservation easements] are afforded more stringent protection than privately held conservation servitudes. . . .
>
> There is a strong public interest in conservation and preservation servitudes. . . .
>
> The rules stated in this section are designed to safeguard the public interest and investment in conservation servitudes to the extent possible, while assuring that the land may be released from the burden of the servitude if it becomes impossible for it to serve a conservation or preservation purpose. . . .
>
> . . . .
>
> If the particular purpose for which the servitude was created can no longer be accomplished, but the servitude is adaptable for other conservation or preservation purposes, the servitude should be continued for those other purposes unless the document that created the servitude provides otherwise.

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11 cmts. a and b (2000).

Finally, federal tax law also contemplates that charitable trust principles will apply to tax-deductible conservation easements. 26 U.S.C. § 170(h) sets forth the criteria governing tax benefits for those who donate conservation easements. *See also* C.F.R. § 1.170A-14 (interpreting IRC § 170(h)). To be eligible for a federal charitable income tax deduction, a landowner donating a conservation easement must satisfy the following requirements (among others):

> (i) The conservation easement must be conveyed as a charitable gift to a government entity or charitable organization to be used for a specific charitable purpose—the protection of the particular land encumbered by the easement for one or more of the conservation purposes enumerated in the Internal Revenue Code "in perpetuity." *See generally* 26 U.S.C. § 170(h); Treas. Reg. § 1.170A-14.
>
> (ii) The conservation easement must be expressly transferable only to another government entity or charitable organization that agrees to continue to enforce the easement. *See* Treas. Reg. § 1.170A-14(c)(2).

> (iii) The conservation easement must be extinguishable by its holder only in a judicial proceeding, upon a finding that the continued use of the encumbered land for conservation purposes has become "impossible or impractical," and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes. *See* Treas. Reg. § 1.170A-14(g)(6).

These requirements ensure that every tax-deductible conservation easement will be conveyed in the form of a restricted charitable gift, thereby triggering the application of charitable trust principles under state law, including the requirement that the easement be terminated only in the context of a judicial proceeding.

The conservation easement Lowham donated as a charitable gift to the Board was drafted to comply with federal tax law requirements. It was donated as a charitable gift to a government entity for the specific purpose of protecting certain conservation features and values of the Ranch in perpetuity for the benefit of the people of and visitors to Wyoming (i.e, it was donated as a restricted charitable gift). [Appendix A, Deed, p. 1, ¶ 2; p. 2, ¶ 1] It required that any transfer of the easement had to be to a "qualified organization" that agreed to enforce the easement. [Appendix A, Deed, p. 8, ¶ 9(a)]. It also specifically required that the easement could be terminated only in a judicial proceeding, upon a finding that continuation of the easement had become impossible, and with a payment of a share of the proceeds to the holder as mandated by the Treasury Regulations. [Appendix A, Deed, p. 8, ¶ 9(b)].

In sum, pursuant to well-settled state law governing charitable gifts made to government entities and charitable organizations for specified charitable purposes, and consistent with the recommendation of the American Law Institute in the Restatement (Third) of Property: Servitudes, the intent of the drafters of the Uniform Trust Code and the Uniform Conservation Easement Act (both adopted in Wyoming), and federal tax law requirements, Lowham's donation of the conservation easement to the Board either created a charitable trust, or constituted a restricted charitable gift, the administration of which is also governed by charitable trust principles.

2. The Board Breached its Fiduciary Duties by Failing to Obtain Judicial Approval in a Cy Pres Proceeding for the Transfer and Termination of the Conservation Easement

As explained above, Lowham's charitable gift of the conservation easement to the Board either created a charitable trust, or constituted a restricted charitable gift, the administration of which is also governed by charitable trust principles. By accepting the charitable gift of the conservation easement, the Board assumed the

fiduciary obligations of a trustee. *See Buffalo Bill Memorial Ass'n* 196 P.2d at 377 ("we are here dealing with a charitable trust, or the ordinary rules relating thereto should be applied. . . ."); McQuillin, The Law of Municipal Corporations § 28:25 ("when the trust is accepted, the municipal corporation assumes the same burdens and is subject to the same regulations that pertain to other trustees. The duty to administer the donation or charitable fund agreeably to the expressed wish of the donor or testator will be enforced in equity. . . .").

Pursuant to the common law, termination of a restricted charitable gift or charitable trust or modification of its purpose requires judicial approval pursuant to the doctrine of *cy pres*. See *Jackson v. Phillips*, 96 Mass. 539 (1867) (Applying *cy pres* to a charitable trust created to promote abolition of slavery; in light of Thirteenth Amendment, court amended trust to provide aid to former slaves); *St. Joseph's Hosp.* 22 N.E.2d at 306–07, 308 ("[a] charitable corporation . . . may not . . . receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands"); Restatement (Second) of Trusts § 348, cmt f. (1959) ("The doctrine of cy pres . . . is applicable to gifts to charitable corporations as well as to gifts to individual trustees for charitable purposes"). The Wyoming Supreme Court has described this rule thusly:

> In 2 Bogert, Trusts and Trustees, § 435, the author states:
>
> > '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 that an emergency of this type has arisen, they should bring the situation to the attention of the court and ask for instructions.'
>
> That is said in connection with the doctrine of cy pres. . . . That terms means 'as nearly as possible.' 'Roughly speaking,' says Bogert, supra, § 431, 'it is the principle that equity will make specific a general charitable intent of a settlor, and will, when an original specific intent becomes impossible or impracticable of fulfillment, substitute another plan of administration which is believed to approach the original scheme as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies.' . . . It is sometimes referred to as the doctrine of Approximation.

Buffalo Bill Memorial Ass'n, 196 P.2d at 378 (citations omitted); see also McLaughlin, *In Defense of Conservation Easements*, 9 Wyo. L. Rev. at 52–53.

The conservation easement deed incorporates the doctrine of *cy pres* as the procedure required to terminate the easement:

> *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 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 the Grantee shall be entitled to such proceeds from the transfer as provided for in Treasury regulation section 1.170A-14(g)(6)(ii)*[3] . . . [.] (Emphasis added).

[Appendix A, Deed, p. 9, ¶ 9(b)]

* * * *

The conservation easement deed also permits the Board to voluntarily transfer the easement only to another "qualified organization" that agrees to continue to enforce the easement.

> *Grantee shall have the right to transfer or assign any and all rights and responsibilities accruing unto it by this Easement, provided* that the assignee is an entity acceptable to Grantor, and that, at the time of such transfer of [sic] assignment *the transferee is a "qualified organization,"* within the meaning of § 170(h) of the Code, *and* provided that *such transfer or assignment shall be conditioned on the transferee or assignee complying with or enforcing the conservation purposes which this Easement intends to accomplish*.

[Appendix A, Deed, p. 8, ¶ 9(a)]

By accepting the charitable gift of the conservation easement, the Board became bound by the easement's terms. *See Am. Nat. Bank of Cheyenne, Wyo. v. Miller*, 899 P.2d 1337, 1339 (Wyo. 1995) ("A fundamental duty of a trustee is to carry out the terms of the trust"); *Buffalo Bill Memorial Ass'n,* 196 P.2d at 377 (the

[3] The Treasury Regulations require that the holder receive a certain percentage of the proceeds upon extinguishment and use such proceeds "in a manner consistent with the conservation purposes of the original contribution." See Treas. Reg. § 1.170A-14(g)(6).

terms, conditions and directions annexed to a charitable gift must be carried out); Wyo. Stat. Ann. § 4-10-801 ("Upon acceptance of a trusteeship, the trustee shall administer the trust . . . in accordance with its terms and purposes . . .").

The Board thus had "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." *Buffalo Bill Memorial Ass'n*, 196 P.2d at 378 (quoting 2 Bogert, Trusts and Trustees § 435). Rather, in order to transfer the conservation easement to private parties – the Dowds – and thereby terminate the easement, the Board was obligated to seek judicial approval in a *cy pres* proceeding pursuant to both state law governing the administration of charitable gifts made for specific purposes *and* the express terms of the conservation easement deed. The Board completely ignored the legal duties and obligations it assumed upon accepting the charitable gift of the conservation easement and its conveyance of the one-acre parcel and the conservation easement to the Dowds was therefore void. See *Buffalo Bill Memorial Ass'n*, 196 P.2d at 378–82 (Transfer of trust property in contravention of trust terms and purpose and without authorization of a court of equity is void.).

* * * *