

Could Coalbed Methane Be the Death of Conservation Easements?

By Nancy A. McLaughlin

Perpetual conservation easements have become the most popular private land protection tool in this country. The government at all levels, the nonprofit sector, and private landowners have embraced conservation easements as a way to achieve private land protection goals without the perceived unfairness associated with regulation. All fifty states and the District of Columbia have enacted easement enabling legislation, and since 1976 Congress has played a central role in encouraging private landowners to donate perpetual conservation easements by offering federal charitable income, gift, and estate tax deductions based on the value of the easements. Conservation easements now protect over 275,000 acres of privately-owned farm and ranchlands, open space, and wildlife habitat in Wyoming, and over 7.7 million acres (an area more than three times the size of Yellowstone National Park) nationwide.

On June 27, 2006, the Wyoming Supreme Court heard oral arguments in a dispute over Johnson County's termination of a perpetual conservation easement due to coalbed methane development on the encumbered land. A decision permitting the County to simply agree with the owner of the 1,043 acre ranch to terminate the easement would have significant adverse ramifications for conservation easements as a land protection tool, both in Wyoming and nationwide. This article explains that a charitable gift of a perpetual conservation easement should be treated like any other gift of property made for a specific charitable purpose—i.e., the holder of the easement should not be permitted to terminate the easement without court approval in a *cy pres* proceeding, where appropriate consideration would be accorded to both the intent of the donor and the public interest in the continued enforcement of the easement.¹

The Facts

In 1993, Mr. and Mrs. Lowham made a charitable gift of the conservation easement to the County for the purpose of “preserving and protecting in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch.” The easement prohibits subdivision and other inconsistent uses of the ranch, and was estimated to have reduced the ranch's value by \$1.2 million. The Lowhams claimed a federal charitable income tax deduction based on that amount.

In 1999, Mr. and Mrs. Dowd purchased the ranch from the Lowhams. The Dowds were aware that they were purchasing the ranch subject to the conservation easement, and the purchase price presumably reflected the perpetual restrictions on the ranch's development and use. The

Dowds also were aware that a third party not subject to the easement owned the subsurface mineral estate.

Two years later, an energy company informed the Dowds that it was going to commence coalbed methane drilling on the ranch. Aware that the energy company had the legal right to access the surface estate to extract minerals, but concerned that mineral development would reduce the property's value and might expose them and the County to potential liability under the easement, the Dowds requested that the County terminate the easement.

The County had expressly agreed in the deed of easement "...forever to honor the intentions of the Grantor...to preserve and protect in perpetuity the natural elements and ecological and aesthetic values of the Ranch..." Nonetheless, in August 2002, in response to the Dowd's request, the County adopted a resolution terminating the easement. The County received no compensation in exchange for the termination, and the development and use rights formerly restricted by the easement (estimated to be worth \$1.2 million in 1993, but likely worth considerably more now) passed to the Dowds. The Dowds then began to market the ranch as two subdivided lots.

In July 2003, Robert Hicks, a resident and landowner in Johnson County, filed suit in District Court objecting to the termination of the easement. Hicks argued, in part, that the County held the easement as a charitable trust for the benefit of the public, and thus did not have the legal right to terminate the easement without receiving court approval in a *cy pres* proceeding, where it would have to be shown that the charitable purpose of the easement has become "impossible or impractical." Hicks asserted that the limited mineral development that has occurred on the ranch (a few drilling structures impacting 0.1% of the land) has not rendered the purpose of the easement impossible or impractical.

In April 2004, the District Court denied summary judgment motions filed by the Dowds and the County, finding that: (i) the conservation easement was transferred to a charitable trust; (ii) Hicks, as a County resident and Wyoming citizen, was a beneficiary of the trust and had standing; and (iii) District Courts have exclusive jurisdiction concerning the administration of charitable trusts, and an appeal under the Wyoming Administrative Procedure Act (WAPA) is not required before requesting the court to adjudicate controversies concerning charitable trusts.

After being notified of the action by the District Court, the Wyoming Attorney General declined to intervene, stating:

"...at this time...[t]he issues are squarely before the Court and the interests of the public, as beneficiaries of the conservation easement at issue here, are being represented by arguments of counsel on all sides."

In October 2005, the District Court dismissed the case for lack of subject matter jurisdiction, concluding that: (i) the County's decision to terminate the easement was "agency action" under WAPA; (ii) Hicks failed to file a timely petition for review of that action within thirty days as required under the Wyoming Rules of Appellate Procedure (WRAP); and (iii) the

requirement of a timely filing cannot be avoided by seeking relief under the Uniform Declaratory Judgments Act. The court's order did not discuss the status of the conservation easement as a charitable trust, which is the fundamental issue in the case.

Hicks appealed to the Wyoming Supreme Court. On appeal, the County additionally argued that Hicks's suit should be barred under the Wyoming Governmental Claims Act (WGCA).

The Stakes

Permitting the holder of a perpetual conservation easement to simply agree with the current owner of the encumbered land to terminate the easement would have devastating effects on the use of conservation easements as a land protection tool.

- Such a ruling would encourage owners of easement-encumbered land (and speculators) across the nation to try their hand at “breaking” conservation easements to unlock the millions of dollars inherent in the otherwise restricted development and use rights.
- Such a ruling would severely compromise the ability of municipalities and charities to solicit future easement donations. Landowners donate conservation easements in large part because they love their land and want to see that land and, in many cases, their rural communities and agricultural lifestyles, protected. They are unlikely to be willing to donate easements if the holder of an easement and a subsequent owner of the land could simply agree to terminate the easement and divide the spoils from development of the land. And it is not difficult to imagine that perennially cash-strapped municipalities and charities could be convinced to terminate some of the extraordinarily valuable conservation easements they hold without giving appropriate consideration to either the intent of the donors or the broader public interest in the continued enforcement of the easements.²
- Such a ruling could easily cause Congress to repeal the federal tax incentives offered to easement donors. Congress offers federal tax incentives only with respect to conservation easements that are: (i) conveyed as a charitable gift to a government entity or charity for a specific charitable purpose (i.e., the protection of the encumbered land for one or more of the conservation purposes enumerated in the Code in perpetuity);³ (ii) transferable only to another government entity or charity that agrees to continue to enforce the easement;⁴ and (iii) extinguishable only in what essentially is a *cy pres* proceeding.⁵ If state law is interpreted to permit perpetual conservation easements to be extinguished outside of a *cy pres* proceeding, the public's interest and investment in such easements will not be protected as Congress envisioned.⁶ Thus, an indirect consequence of a ruling to that effect could be the elimination of what has become an extraordinarily successful voluntary private land protection program.

Permitting the holder of a perpetual conservation easement to simply agree with the current owner of the encumbered land to terminate the easement also would be contrary to well-settled principles of charitable trust law.⁷

Conservation Easements as Charitable Trusts

A gift of fee title to land to a charitable organization and, in many cases, to a city, county, or other municipality to be used for a specific charitable purpose (such as the site of a hospital or a public park) creates a charitable trust. In such cases, the donor has transferred legal title to the land to the municipality or charity to be held for the specified purpose for the benefit of the public, which is the beneficiary of the gift. The conveyance creates a trust relationship, wherein the municipality or charity holds the land in trust for the benefit of the public, and owes fiduciary obligations to both the donor and the public to use the land for the specified charitable purpose.⁸

In such cases, the municipality or charity is not free to simply sell the land and use the proceeds to accomplish its public or charitable mission in some other manner. Rather, to deviate from the specified charitable purpose, the municipality or charity would have to obtain court approval in a *cy pres* proceeding, where: (i) it would have to be established that continued use of the land for the specified charitable purpose had become “impossible or impractical;” and (ii) if such a showing were made, the court would supervise the holder’s use of the land (or the proceeds from the sale thereof) for a similar charitable purpose.⁹

The gift of a perpetual conservation easement to a municipality or charity creates an *identical* trust relationship. The donor has transferred legal title to the easement to the municipality or charity to be used for a specific charitable purpose (i.e., the protection of the encumbered land for one or more conservation purposes in perpetuity), and the public is the beneficiary of the easement. The municipality or charity thus holds the easement in trust for the benefit of the public, and owes fiduciary obligations to both the donor and the public to use the easement for its stated purpose.

That the typical conservation easement does not contain the words “trust” or “trustee” is irrelevant. The creation of a trust does not require use of such words in the instrument of conveyance.¹⁰ In addition, the purpose of a conservation easement is clearly “beneficial to the community” and, therefore, “charitable” as those terms are defined under state law,¹¹ as evidenced by the enactment of easement enabling legislation in all 50 states and District of Columbia, and the provision of generous federal (and, in many cases, state) tax incentives to easement donors.¹²

Because a municipality or charity holds a perpetual conservation easement in trust for the benefit of the public, it is not free to simply agree with the current owner of the encumbered land to terminate the easement. Rather, to terminate the easement, the municipality or charity must obtain court approval in a *cy pres* proceeding, where: (i) it would have to be established that the charitable purpose of the easement has become “impossible or

impractical;” and (ii) if such a showing is made, the court would supervise the termination of the easement, the payment of a share of the proceeds from a subsequent sale or development of the land to the holder, and the holder’s use of such proceeds for a similar charitable purpose. And given that the easement is a charitable asset that belongs to the public, the holder should be entitled to proceeds equal to the full value of the development and use rights formerly restricted by the easement.¹³

Those who argue that perpetual conservation easements can be modified or terminated in the same manner as other easements—i.e., by agreement of the easement holder and the landowner—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 or a conservation easement, is donated to a municipality or charity for a specific charitable purpose, two sets of state law rules should apply: (i) state real property law rules, which prescribe the procedural mechanisms by which real property interests can be transferred and, in the case of easements, modified or terminated; *and* (ii) state charitable trust law rules, which govern a donee’s use and disposition of property conveyed to it for a specific charitable purpose.

Support for this position can be found in a variety of sources:

- In *In re Preservation Alliance for Greater Philadelphia*, O.C. No. 759 (Ct. Com. Pl. of Philadelphia June 28, 1999), the court assumed without discussion that a perpetual conservation easement encumbering an historic structure constituted a “charitable interest” and applied the doctrine of *cy pres*.¹⁴
- The drafters of the Uniform Conservation Easement Act (UCEA), adopted by Wyoming in 2005, explained in their commentary that “the Act 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 “independent of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts...”¹⁵
- Section 7.11 of the Restatement (Third) Property: Servitudes recommends that the modification and termination of conservation easements held by governmental bodies or charitable organizations be governed by a special set of rules modeled on the charitable trust doctrine of *cy pres*.¹⁶ The Restatement also recommends that the governmental body or charity be entitled to appropriate damages and restitution upon termination.¹⁷
- The Uniform Trust Code (UTC), adopted by Wyoming in 2003, provides that §414, which allows for the modification or termination of certain “uneconomic” trusts, “does not apply to an easement for conservation or preservation”—thereby implying that other UTC sections do apply to such easements in appropriate circumstances. The UTC drafters explained that:

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.¹⁸

- Congress is free to condition the receipt of federal tax incentives upon the conveyance of a particular form of charitable gift.¹⁹ As noted above, in the conservation easement context, the gift must be made to a government entity or charity for a specific charitable purpose, and the easement must be extinguishable only in what essentially is a *cy pres* proceeding.

Protecting the Public Interest

If perpetual conservation easements are recognized as charitable trusts, the public interest and investment in such easements will be protected in the following manner:

- Courts have plenary jurisdiction over the administration of charitable trusts, and there generally is no statute of limitations or similar constraint on the ability of a party with standing to sue to enforce a charitable trust.²⁰ Accordingly, time limits such as those found in WRAP will not preclude suits to enforce perpetual conservation easements.
- It is not uncommon for a member of a community benefited by a charitable trust to be granted standing to sue to enforce the trust, particularly when the attorney general declines to participate or otherwise fails to adequately represent the public interest.²¹ If the attorney general declines to participate in a suit to enforce a charitable trust because another party is already representing the public interest, but that party subsequently is denied standing, the attorney general should be afforded another opportunity to intervene so the public interest is represented.
- A fundamental maxim of trust law is that *a trust will not fail for want of a trustee*.²² Thus, if it turns out that the holder of a conservation easement did not have the legal authority to assume fiduciary responsibilities as trustee, or becomes defunct or bankrupt or otherwise unable to continue to serve as trustee, or wishes for liability or other reasons to no longer serve as trustee, the appropriate action is not to terminate the easement and allow the value inherent therein (which is an asset that belongs to the public) to pass as a windfall to the landowner, but to petition the court for the appointment of a substitute trustee.²³
- The requirements of the doctrine of *cy pres*—including the “impossibility or impracticality” standard, the representation of the public interest by the attorney general or some other party, and the vesting of ultimate decision making authority in a court—all help to ensure that perpetual conservation easements will not be terminated

without appropriate consideration of both donor intent and the public interest. Just as importantly, if an easement is terminated under the *cy pres* doctrine, the court will supervise the holder's receipt and use of a share of the proceeds from a subsequent sale or development of the land, thus ensuring that the value attributable to the easement (which is an asset that belongs to the public) will continue to be used for similar charitable purposes.

- The purpose of governmental immunity is to protect the public fisc. The goal of a party suing to enforce a conservation easement *is* to protect the public fisc by either: (i) securing the continued enforcement of the easement for the benefit of the public; or (ii) if the court authorizes termination of the easement in a *cy pres* proceeding, ensuring that the holder of the easement receives an appropriate share of proceeds and uses such proceeds for a similar charitable purpose. Accordingly, a suit to enforce a conservation easement should not be barred on governmental immunity grounds (such as under WGCA).

Conclusion

The Wyoming Supreme Court has the opportunity to set a clear precedent establishing that a charitable gift of a perpetual conservation easement creates a charitable trust. Such a precedent would significantly advance the protection of both donor intent and the public interest in perpetual conservation easements across the country. Given Wyoming's many acres of farm and ranchlands, abundant wildlife, beautiful wide open spaces, and respect for the right of private landowners to control the use and disposition of their property, it would be fitting for the Wyoming Supreme Court to lead the nation by ruling foursquare in support of this uniquely American form of conservation philanthropy.

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¹ See also Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006) [*Myrtle Grove*]; Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005) [*Rethinking*].

² The controversy discussed in this article is a case in point. See also *Myrtle Grove*, *supra* note 1 (illustrating that even a well-funded and well-intentioned easement holder can make inappropriate modification and termination decisions without the attorney general and court oversight that attends the administration of all other charitable gifts made for specific purposes).

³ IRC §170(h). The conservation purposes enumerated in the Code are protection of open space, including farmland and forestland; protection of wildlife habitat; historic preservation; and protection of land for public recreation or education. *Id.* §170(h)(4).

⁴ Treas. Reg. §1.170A-14(c)(2).

⁵ Treas. Reg. §1.170A-14(g)(6)(i). See also *Myrtle Grove*, *supra* note 1, n. 154 and accompanying text.

⁶ In most states (including Wyoming), landowners are free to convey, and government entities and charities are free to acquire, conservation easements that grant the holder the discretion to agree to modify or terminate the easement as the holder sees fit in the accomplishment of its public or charitable mission. However, donations of such *nonperpetual* conservation easements would not be eligible for federal tax incentives (and even in the purchase context, easement grantors thus far have not opted to grant holders such discretion).

⁷ See generally Marion R. Fremont-Smith, *Governing Nonprofit Organizations* (2004) (describing the history of charitable trust law, and the need, evident from almost the first emergence of charities as legal entities, for the supervision of those entrusted with charitable assets to help prevent negligence, maladministration, and diversion of such assets to purposes contrary to those specified by the donors).

⁸ See, e.g., *Town of Cody v. Buffalo Bill Memorial Ass'n*, 196 P.2d 369 (Wyo. 1948) and cases cited in *Myrtle Grove*, *supra* note 1, n. 15.

⁹ For a more detailed discussion of the doctrine of *cy pres*, see *Myrtle Grove*, *supra* note 1, at 1040-41.

¹⁰ See *id.*, *supra* note 1, n. 117 and accompanying text.

¹¹ See Restatement (Third) Trusts §28(f) (2003).

¹² See also *id.* cmt. 1. (“...a trust is charitable if its purpose is to promote...environmental quality” and “A trust to promote the contentment or well being of members of the community is charitable. Thus, a trust to beautify a city or to preserve the beauties of nature, or otherwise to add to the aesthetic enjoyment of the community, is charitable”).

¹³ See *Hartford National Bank v. City of Bristol*, 321 A.2d 469 (1973); *Rethinking*, *supra* note 1, at 490-98.

¹⁴ See *Rethinking*, *supra* note 1, at 450-51 (discussing the case in more detail).

¹⁵ Uniform Conservation Easement Act §3, cmt. (1981) (emphasis added). See also *Myrtle Grove*, *supra* note 1, n. 147 (noting that the application of charitable trust law to conservation easements was not directly addressed in the UCEA because the UCEA was intended to be placed in the real property law of adopting states, and most states would not permit charitable trust law to be addressed in the real property law provisions of their state code).

¹⁶ See Restatement (Third) Property: Servitudes §7.11, cmts. b, c (2000). The drafters of the Restatement were keenly aware of the “strong public interest” in such conservation easements, and clearly did not intend that the holders of such easements could simply agree with the owners of the encumbered land to terminate the easements. See *id.* §7.11, cmt. a. However, similar to the drafters of the UCEA, the drafters of the Restatement were constrained from addressing trust law issues in a Restatement dealing with property law.

¹⁷ See *id.* §7.11, cmts. c, d. The author disagrees with the Restatement’s recommendation regarding the amount of damages and restitution to be paid to the holder upon termination of an easement to the extent that implementing such recommendation would result in a windfall to the owner of the encumbered land. See *supra* note 13 and accompanying text.

¹⁸ Uniform Trust Code §414(d), cmt. (last revised or amended in 2005).

¹⁹ See *Gillespie v. Comm’r*, 75 TC 374, 378-79 (1980).

²⁰ See Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §392, at 380 (4th ed. 1989); Ronald Chester et. al., *The Law of Trusts and Trustees* §411, at 34-36 (3rd ed. 2005).

²¹ See, e.g., *Fremont-Smith*, *supra* note 7, at 333; *City of Paterson v. Paterson General Hospital*, 97 N.J. Super. 514, 527-28 (1967); *Kapiolani Park Pres. Soc’y v. City of Honolulu*, 751 P.2d 1022, 1025 (Haw. 1988). See

also Chester, supra note 20, §411, at 2 (“...as public attention to laxity in the enforcement by the Attorney General increases, courts have begun to expand standing to enforce charitable trusts...”).

²² Dukeminier et. al., *Wills, Trusts, and Estates* 490 (7th ed. 2005).

²³ *See* Restatement (Third) Trusts §31 (2003); *id.* §33, cmts. d, e.