Conservation Easements as Charitable Trusts in Kansas: Striking the Appropriate Balance Among the Grantor's Intent, the Public's Interest, and the Need for Flexibility

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I. INTRODUCTION

Imagine that landowner *A* has lived much of his life on a large ranch in western Kansas. The land is a migratory path for a variety of wildlife on the western plains. The ranch serves as the primary living area for a rare species of prairie dog. Additionally, the large tract of undeveloped land provides the public the benefits of scenic vistas and a large open-space area. *A*, an avid naturalist and outdoorsman, feels a strong connection to the ranchland where he has spent most of his life and has a strong appreciation for the many species of wildlife found there. Concerned with increasing development further east, *A* would like some way to protect the natural value of the land and ensure the ranch will continue to serve as a migratory path for birds and other animals after he has passed on.

A does some research and finds that his county's board of commissioners will pay him a small amount of money if he agrees to burden his land with a conservation easement. The county plans to use funds acquired through property taxes to purchase the easement. The terms of the easement would prohibit *A* and any subsequent landowners from subdividing or developing the ranchland. Although selling the ranch to a developer would be much more profitable, *A* decides to grant the county the easement because the county assures him that his land will be protected from development long after he is gone.

Years later, *A* dies intestate, and his grandson, *B*, inherits the ranch. Not long after *B* inherits the ranch, an energy company approaches him, expressing interest in leasing and converting the ranchland into a wind farm. The company plans to construct numerous turbines on the land, covering most of the acreage. It has offered to pay *B* handsomely for the lease because the ranch is in an extremely desirable

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location for production of wind energy. *B*, who lives in a large city several hundred miles away, is excited about the possibility of leasing the land to the energy company.

However, the terms of the conservation easement expressly prohibit "any development" on the ranchland. The energy company refuses to enter into any lease for the land until the easement is terminated or modified to allow the wind farm development. *B* approaches the board of commissioners and asks it to terminate the conservation easement so that he can lease the land to the energy company. The county board happily agrees because the energy company has offered it a cash incentive for terminating the easement.

Several outraged residents of the county try to stop the land lease by bringing an action in court to enforce the terms of the easement. Although the citizens' tax money helped the county acquire the easement, the court holds that because the citizens are not parties to the easement, they lack standing to pursue such an action. The board of commissioners terminates the easement, *B* leases the land to the energy company, and the wind farm is developed.

The public no longer enjoys the scenic vistas or open space its tax money protected with the purchase of the conservation easement. The wind farm interferes with the migratory paths of a variety of land and airborne wildlife. Erosion from road construction and other negative environmental impacts from the wind farm development force the prairie dogs to relocate. Furthermore, the ranch is no longer protected in accordance with *A's* wishes, even though the county board assured him that the easement would bind his successors in interest.

Construing conservation easements as charitable trusts would protect *A's* wishes regarding his land and prevent the development. The public's interest in *A's* conservation easement would be protected because the Kansas Attorney General would have the right to enforce the easement under Kansas's charitable trust legislation. Finally, in the event the terms of the easement become impracticable, the doctrine of *cy pres* would provide a vehicle for modification or termination of an easement that has outlived its usefulness.

Conservation easements are negative "servitude[s] created for conservation or preservation purposes."[1] When a landowner grants a conservation easement, usually to some governmental body or non-profit organization, he or she promises to prohibit certain types of uses on the now-burdened land.[2] Conservation easements generally achieve one or

1. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6(1) (2000).

2. FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 10.03[1][c-1][iv][D] (2008). Generally, the prohibition will be against development of the land or some use not thought to be environmentally friendly. *Id.*

more goals. They protect the "natural, scenic, or open-space value of land," and they retain land for "agricultural, forest, recreational, or open-space use."[3] In addition, they protect natural resources as well as improve air and water quality and supply.[4]

Conservation easements can also be used for preservation purposes.[5] Preservation conservation easements protect "the historical, architectural, archaeological, or cultural aspects of real property."[6] Whether a conservation easement is designed to protect the natural value of real property or to preserve some historical aspect of it, the public enjoys the benefits such easements provide.

This Note presents a brief history of the evolution of the law surrounding conservation easements and identifies some of the problematic areas with the current law. After evaluating the state of the law, this Note proposes a solution that would maintain the efficiency of conservation easements, while ensuring the advancement of intended policy goals, and protecting the public's interest in those easements. Finally, this Note examines the practical mechanics of how Kansas's courts can apply charitable trust law to conservation easements.

II. BACKGROUND

This section briefly explains the common law origins of conservation easements and provides an overview of the modern conservation easement. This section also outlines charitable trust law and the *cy pres* doctrine before concluding with a summary of cases involving charitable trusts created with conservational intent.

A. Traditional Easements

Servitudes are legal devices "that create[] a right or an obligation that runs with the land or an interest in land."[7] Common law recognizes three varieties of servitudes: profits, easements, and covenants.[8] This Note is solely concerned with easements. An easement possesses six defining characteristics:

> (1) it is an interest in land in the possession of another, (2) it is an interest of a limited use or enjoyment, (3) it can be protected from interference by third parties, (4) it cannot be terminated at will by the possessor of the servient land, (5) it is not a normal incident of a possessory land interest,

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3. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6(1).
4. *Id.*
5. *Id.*; *see also* National Trust for Historic Preservation, What is a Preservation Easement?, http://www.preservationnation.org/resources/legal-resources/easements/easements-faq/what-is-an-easement.html (last visited Sept. 19, 2009).
6. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6(1).
7. *Id.* § 1.1.
8. *See* 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.01[1] n.1 (Michael Allan Wolf ed., Lexis Nexis Matthew Bender & Co., Inc. 2009).

and (6) it is capable of creation by conveyance.[9]

Traditional easements allow someone other than the landowner to use the land burdened by the easement, without creating an ownership interest in the land.[10]

A servient owner can only convey an easement to the extent his estate in the land will allow.[11] This means that traditional easements may be subject to durational restrictions.[12] Easements can also self-terminate when there is no longer any purpose for the their existence.[13] Thus, even when traditional easements are not expressly subject to durational restrictions, the possibility of termination exists.[14]

Easements are classified as appurtenant or in gross, depending on how the benefit is derived from the easement.[15] Appurtenant easements are "attached" to land.[16] In order to benefit from the rights provided by an appurtenant easement, a person must own or occupy the particular parcel of land associated with that easement.[17] By contrast, an easement in gross does not attach to any particular piece of real estate.[18] Conservation easements—which are held by an individual or an entity—are easements in gross. A person need not own a particular piece of land to enjoy the benefit of a conservation easement.[19]

Additionally, easements can be either affirmative or negative.[20] When the easement holder has authority to access the land and permission to engage in some type of action, an affirmative easement exists.[21]

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9. *Id.* § 34.02[1] (internal quotations omitted).

10. *Id.* § 34.01[1]. The "dominant" owner is the owner entitled to use the land under an easement, and the "servient" owner is the owner of the land burdened by the easement. *Id.*

11. *Id.* § 34.02[2][b]. The land subject to an easement is the "servient estate." *See id.* § 34.01[1]. The owner of the servient estate is the "servient owner." *See id.*

12. *Id.* § 34.02[2][b]. If the servient owner's estate in the land subject to the easement is not perpetual, the servient owner cannot convey a perpetual easement. *See id.*

13. *See id.* (stating "[i]t is often said also that easements cease upon cessation of a need for their continuance"). For instance, consider the following example. A servient owner's land is subject to an easement allowing a dominant owner access to cross the servient owner's land to reach a public highway. Construction of a new public road gives the dominant owner access, which was previously impossible, to the public highway without having to cross the servient owner's land. The termination of the easement can occur because it no longer serves a purpose.

14. *See id.*

15. *Id.* § 34.02[2][c]-[d].

16. *Id.* § 34.02[2][d].

17. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.5(1). Because the easement grants rights attached to the land, only the "owner or occupier" of that land is entitled to enjoy the benefits of the easement attached to that land. *Id.*

18. *Id.* § 1.5(2). In other words, the holder of an easement in gross need not own any real estate to benefit from the easement. *See id.* Easements in gross are held by individuals and can be either transferable or personal. *See id.* § 1.5. Personal easements in gross are not transferable. *See id.* § 1.5 cmt. b. In the past, the law did not recognize easements in gross. *Id.* However, the Restatement explains that old rules prohibiting servitudes in gross are outdated and interfere with the intent of the parties to the servitude, and, therefore, allows for servitudes in gross. *Id.* § 1.5 cmt. b-c.

19. James L. Olmsted, *Paradoxical Conservation and the Tragedy of Multiple Commons*, 22 TUL. ENVTL. L.J. 103, 118 (2008) (stating "conservation easements are easements in gross"). Conservation easements are in gross because there is generally no dominant-servient estate relationship involved. *See* POWELL, *supra* note 8, § 34.02[2][d].

20. POWELL, *supra* note 8, § 34.02[2][c].

21. *Id.*

A negative easement, on the other hand, does not grant the easement holder any affirmative rights, rather it prevents a servient landowner from engaging in certain actions on his land.[22] Conservation easements are negative easements because they limit a landowner's use of his land.[23]

B. Conservation Easements

Because they permit landowners to voluntarily limit uses of burdened land, conservation easements are unique and effective tools for environmental protection, allowing conservation to occur by private transaction, rather than by governmental regulation. Conservation easements evolved out of traditional negative easements even before jurisdictions began enacting legislation designed to overcome the common law's aversion to negative easements held in gross. While conservation easements provide numerous public benefits, the perpetual nature of many conservation easements has produced some criticism.

1. The Private Efficiency of Conservation Easements

Conservation easements have exploded in popularity in the last twenty years.[24] A number of reasons account for this popularity and encourage landowners to continue creating conservation easements. For example, landowners may use conservation easements to retain the natural beauty or character of their land or to preserve its historical value.[25] Additionally, the nature of conservation easements attracts many landowners, who prefer transactions between private individuals and entities, rather than what they view as more intrusive forms of gov-

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22. *Id.* Instead of allowing the easement holder to take affirmative action on the land (except for possibly enforcing the terms of the conservation easement), conservation easements are negative easements that prohibit certain types of uses on the burdened land. *See id.* Negative easements have been characterized as a "veto power." *Id.* This "veto power" is the holder's right to prevent uses that violate the terms of the conservation easement on the burdened land. These prohibited uses might include things like logging, mining, or subdividing the property for development. *See id.*

23. *See id.* § 34A.01.

24. Marc Campopiano, *The Land Trust Alliance's New Accreditation Program*, 33 ECOLOGY L.Q. 897, 897 (2006). Driven by the rise of private land trusts, conservation easements have helped protect millions of acres of land in the past twenty years. *Id.* In 1980, around 128,000 areas were burdened by conservation easements. Nancy A. McLaughlin, *Conservation Easements-A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL. L. 47, 50 (2005). By 2000, more than five million areas were subject to conservation easements. *Id.* Between 2001 and 2003, landowners granted conservation easements on more than 800,000 acres of land per year. *Id.* at 51.

25. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6. The Restatement identifies the following motivations that drive conservation easement creation:

> [R]etaining or protecting the natural, scenic, or open-space value of land, assuring the availability of land for agricultural, forest, recreational, or open-space use, protecting natural resources, including plant and wildlife habitats and ecosystems, and maintaining or enhancing air or water quality or supply. Preservation purposes include preserving the historical, architectural, archaeological, or cultural aspects of real property.

Id.

ernment conservation regulation.[26]

In addition to being viewed as less intrusive, private conservation easements can be a more efficient conservation tool than government regulation.[27] This is because the private nature of many conservation easements relieves some of the burden for conservation regulation traditionally placed on governmental entities.[28] When conservation efforts occur as transactions between individual landowners and private land trusts, the government can reallocate resources previously needed for environmental regulation. Whether the government decides to use the additional funds for other conservation measures or for an entirely different governmental function, this private assumption of conservation responsibility promotes governmental efficiency. The drafters of the Uniform Conservation Easement Act (UCEA) felt that giving private landowners the ability to permanently burden their land with conservation easements would be an effective and efficient means of supplementing the government's role in conservation.[29]

2. Common Law History

Modern conservation easements are "statutory creations" that do not fit "easily into any common law category for real property interests."[30] Although conservation easements are creatures of statute, they evolved from common law roots.[31] The common law disfavored conservation easements for multiple reasons.[32] Under traditional restrictive covenant doctrines, restrictive easements held in gross were not enforceable in equity.[33] Additionally, the common law disfavored negative easements because they limited potential uses or development of the

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26. *See, e.g.*, Dana Joel Gattuso, *Conservation Easements: The Good, the Bad, and the Ugly*, NAT'L POL'Y ANALYSIS, May 2008, http://www.nationalcenter.org/NPA569.html. Gattuso argues that over time private land trusts have increasingly become associated with governmental entities. *Id.* Gattuso is concerned that without reform conservation easements could become a means for government to gain control of private lands "under a pretense of private stewardship." *Id.*; *see also* Fred Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1090 (1996) (discussing how the perception of conservation easements as a "private transaction" encourages their creation).

27. *See* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 743 (2002) (explaining that conservation easements are an attractive "private ordering alternative to traditional command and control land use regulation").

28. *See* Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control over the Use of Real Property: Interpreting Conservation Easements as Real Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 101 (2002). Landowners convey many conservation easements to private land trusts, rather than governmental entities, which contributes to the perception of conservation easements as private transactions. *See id.* at 94. One 1998 study showed that private land trusts held more than 7,000 conservation easements and that this number was increasing. *Id.*

29. *See id.* at 100-01; *see also* UNIFORM CONSERVATION EASEMENT ACT Commissioner's Prefatory Note, 12 U.L.A. 166, 168 (1981).

30. Cheever, *supra* note 26, at 1080.

31. James L. Olmsted, *Representing Nonconcurrent Generations: The Problem of Now*, 23 J. ENVTL. L. & LITIG. 451, 458 (2008).

32. *Id.*

33. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. a.

burdened land.[34] Finally, conservation easements implicated issues concerning the rule against perpetuities and represented potential restraints against alienation.[35] Despite this historic aversion to negative easements in gross, the evolution of the modern conservation easement can be traced to the turn of the last century.

In 1891, the first conservation easement was created for the protection of a public park.[36] Such arrangements remained relatively rare until the 1930s and 1940s when conservation easement-like instruments were commonly used to protect scenic highways.[37] In fact, the eventual passage of the Federal Highway Beautification Act of 1965 motivated states without conservation easement-enabling legislation to pass such laws.[38]

States eventually began enacting legislation aimed at avoiding the common law problems with conservation easements. In the late 1950s, Massachusetts and California were the first states to enact such legislation.[39] Early state conservation easement-enabling legislation authorized only governmental easement holders.[40] In 1969, however, Massachusetts again broke new ground by passing a law allowing non-profit

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34. Olmstead, *supra* note 31, at 458-59.

35. *Id.* at 459. A potential violation of the rule against perpetuities could occur because the easement has no identifiable successor in which to vest within the required timeframe. *Id.* Construing conservation easements as creating charitable trusts offers solutions to these two problems. In many states, charitable trusts are immune to perpetuities statutes. Richard Raskin, *Constitutional Law-Equal Protection Discrimination: Sex-Charitable Trusts-Judicial Application of Trust Principles That Permit, but Do Not Encourage, Promote or Compel Private Discrimination on the Basis of Gender Does Not Constitute State Action Violative of the Fourteenth Amendment.* In re Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983), 53 U. CIN. L. REV. 297, 314 n.110 (1984). Conservation easements potentially restrain alienation because it may be more difficult to sell land burdened by a perpetual easement than to sell land subject to no such restriction. Olmstead, *supra* note 31, at 459; *see also* Cheever, *supra* note 26, at 1099.

36. Frederico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10224 (2004). In Massachusetts, the Trustees of Reservations held the first conservation easement, which protected the park against development. *Id.* It was not until the 1950s, however, that the term "conservation easement" became popular. Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1044 (2007). American sociologist William H. Whyte coined the term "conservation easement" because he felt it was effective in communicating the various conservational benefits conveyed by that type of instrument. John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 325 (1997).

37. Hollingshead, *supra* note 36, at 333. Hollingshead identifies the National Park Service's obtainment of conservation easements during this time to preserve scenic views along the Blue Ridge Parkway, as the "primary impetus for the widespread use of modern conservation easements." *Id.*; *see also* C. Timothy Lindstrom, Hicks v. Dowd*: The End of Perpetuity?*, 8 WYO. L. REV. 25, 35 (2008) (stating "[c]onservation easements were not used extensively until after the 1930s").

38. Hollingshead, *supra* note 36, at 334. It did so by providing states with additional federal highway funding for "highway landscaping and scenic enhancement." *Id.*; *see* Federal Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1032 (codified as amended at 23 U.S.C. § 319).

39. Cheever, *supra* note 26, at 1080. Massachusetts's first conservation easement statutes appeared in 1956 and California's appeared in 1959. Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 305 (2004); 1956 MASS. ACTS page no. 565; CAL. GOV'T CODE §§ 6950-54 (Deering 2004).

40. Lippmann, *supra* note 39, at 306.

organizations to acquire and hold conservation easements.[41] Although individual states began crafting their own legislation after Massachusetts and California started the trend in the late 1950s, state legislators had no model act to follow until 1981.[42]

3. The Uniform Conservation Easement Act

Today, conservation easements are created under the guidelines of enabling acts. The UCEA treats conservation easements like traditional easements and defines "conservation easement" as:

> a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological, or cultural aspects of real property.[43]

This definition is almost identical to the Restatement's definition of "conservation servitude" and is consistent with the pre-UCEA conception of conservation easement.[44] The Act explains that conservation easements "may be created, conveyed, recorded, assigned, released, modified, terminated . . . in the same manner as other easements."[45]

Eliminating the common law impediments to creating conservation easements is one of the express goals of the UCEA.[46] The Act validates conservation easements even when they are in gross, transferrable, negative in nature, created without "privity of estate or of contract," or otherwise not recognized under common law.[47] The UCEA allows "governmental bod[ies]" or "charitable" organizations to hold conservation easements.[48]

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41. *Id.*

42. *See* UNIFORM CONSERVATION EASEMENT ACT Commissioner's Prefatory Note, 12 U.L.A. 166, 168. The Uniform Conservation Easement Act's (UCEA) primary goal is to enable private parties to enter into agreements with governmental and charitable organizations. *Id.*

43. *See id.* The Act did not offer a dramatic new conceptual framework or definition of easements. *See id.* Rather, the drafters were primarily concerned with removing the common law impediments to conservation easements. *See id.* at 167 (stating "[t]he Act has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements' validity particularly those held in gross"). The National Conference of Commissioners of Uniform State Laws approved the UCEA in 1981. Olmstead, *supra* note 31, at 459. As of 2000, twenty-one states had adopted the UCEA. Mary Christina Wood & Matthew O'Brien, *Tribes as Trustees (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*, 27 STAN. ENVTL. L.J. 477, 486 (2008). Many of the remaining states have enacted legislation that closely mirrors the UCEA. *Id.* at 487; *see also* Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 301 (2009) (explaining that "more than forty states have passed legislation largely based on [the UCEA]").

44. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6.

45. UNIFORM CONSERVATION EASEMENT ACT § 2(a).

46. *Id.* at Prefatory Note, 12 U.L.A. at 167. When adopted in a jurisdiction, the UCEA removes common law barriers to the creation of conservation easements. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. a.

47. UNIFORM CONSERVATION EASEMENT ACT § 4(7); *see id.* § 4 cmt.

48. *Id.* § 1(2)(i), (ii).

The UCEA also provides guidelines for conservation easement enforcement.[49] The parties to the easement or "a person authorized by other law" have the power to bring a judicial action seeking enforcement of the easement.[50] A "person authorized by other law" could include a state's attorney general bringing an action to enforce a conservation easement as a charitable trust.[51] Interestingly, the UCEA allows for the creation of third-party conservation easement enforcement rights, but only in a governmental or qualified charitable organization.[52] The UCEA leaves the issue of whether conservation easements create charitable trusts to the adopting jurisdiction.[53]

4. Tax Credits

The UCEA is not the only legislation encouraging the creation of conservation easements. Many conservation easement donors are motivated, at least in part, by the tax benefits available for qualified donations. The Internal Revenue Code allows landowners who make "[q]ualified conservation contribution[s]" to receive income tax deductions.[54] Internal Revenue Code § 170(h) deals specifically with conservation contributions.[55] In order to qualify for the income tax deduction, the contribution must be of a "qualified real property interest . . . to a qualified organization . . . [and] exclusively for conservation purposes."[56] Qualified real property interests include perpetual restrictions on real property use.[57]

A conservation easement is such a restriction on real property use.[58] In order for a donor to qualify for federal tax deductions, the

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49. *See id.* § 3(a).

50. *Id.* § 3(a)(4). A third party with enforcement rights is defined as a qualified organization identified in the instrument as having such a power. *See id.* § 3 cmt.

51. *Id.* § 3(a)(4); § 3 cmt.

52. *Id.* § 1(3). Unlike the UCEA, the common law did not permit a third person the right of enforcement. *See id.* § 1 cmt. The comment to section 1 of the Act leaves the ultimate decision of whether to recognize a third-party enforcement right to the adopting state. *Id.* § 4 cmt.

53. *Id.* § 3 cmt. Commentators have said that the Act's drafters left the UCEA "in limbo" with regard to the issue of third party enforcement rights. Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 66 (2006). This discrepancy, or "gap," in the statutory scheme raises interesting questions for jurisdictions that fail to address this issue when adopting the UCEA. Kansas is one of these states, because the Kansas statutory conservation easement creation scheme is based on and is "substantially similar" to the UCEA. *See* KAN. STAT. ANN. §§ 58-3810 to 58-3817 (2005); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 statutory note. The matter of whether conservation easements create a charitable trust would be a matter of first impression in Kansas's courts.

54. I.R.C. § 170(a)(1), (h)(1) (2009). The Internal Revenue Code (I.R.C.) allows taxpayers making a qualified charitable contribution a deduction on their income tax for that year. *Id.* § 170(a)(1).

55. *Id.* § 170(h).

56. *Id.* § 170(h)(1).

57. *Id.* § 170(h)(2)(C).

58. POWELL, *supra* note 8, § 34A.01.

conservation easement donated *must* be perpetual.[59] The landowner must donate the easement to one of three types of qualified organizations to be eligible for an income tax deduction: (1) federal, state, or municipal governmental organization; (2) a charitable organization that receives "a substantial part of its support" from a governmental organization or "direct or indirect contributions from the general public;" or (3) an organization formed and operated exclusively for charitable purposes.[60]

In addition to fulfilling the above criteria, the landowner must donate the conservation easement exclusively for one of the following four conservation purposes:[61]

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public, (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, (iii) the preservation of open space (including farmland and forest land)[,] . . . [or] (iv) the preservation of an historically important land area or a certified historic structure.[62]

To supplement federal tax benefits, at least twelve states have enacted legislation that provides state tax benefits for qualified conservation easement donations.[63] No standard state model for the operation of conservation tax incentives exists, but at least one state, Colorado, has gone as far as making state tax credits from conservation easements transferable.[64] The various state programs granting donors tax incentives for easement donation will likely become more common.[65] These programs garner support from liberals and conservatives alike because they achieve conservational goals with minimal governmental intrusion or regulation.[66] In recognition of the fact that an easement decreases the value of the burdened land, some states lower the property taxes on

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59. *Id.* § 170(h)(2)(C). Unless the conservation easement instrument states otherwise, the UCEA presumes the conservation easement is perpetual. UNIFORM CONSERVATION EASEMENT ACT § 2(c). In Kansas, a conservation easement's life coincides with its grantor's life by default. KAN. STAT. ANN. § 58-3811(d) (2005).

60. I.R.C. § 170(b)(1)(A)(v), (vi). Any governmental organization or private land trust eligible for an I.R.C. section 501 exemption is a qualified organization under section 170. *See id.*

61. *Id.* § 170(h)(4)(A).

62. *Id.* § 170(h)(4)(A). The donee is required to hold the conservation easement for one of these conservation purposes, rather than exchanging the easement for money, property, or services. *See* H.R. REP. NO. 95-263, at 30 (1977) (Conf. Rep.).

63. Christen Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, 117 YALE L.J. 218, 219 (Supp. 2008). California, Colorado, Connecticut, Delaware, Georgia, Maryland, Mississippi, New Mexico, New York, North Carolina, South Carolina, and Virginia have all enacted legislation entitling landowners that make qualifying conservation easement donations to receive some form of state tax credits. *Id.* Young explains that the private and voluntary nature of the transactions bolsters the movement toward state legislation that offers incentives for conservation easement creation. *Id.* at 218.

64. *Id.* at 223. Transferable tax credits allow donors in Colorado to sell the tax benefits they gain from donating conservation easements to other Colorado taxpayers. *Id.* Allowing taxpayers to sell state tax credits is an additional incentive for landowners to donate conservation easements.

65. *Id.* at 220. Estimates show that state tax incentives have managed to protect more than 5.5 million acres of land in the twelve states that provide tax credits. *Id.* at 224.

66. *Id.* at 219-20.

the burdened land in proportion to the decrease in value.[67] In short, the public subsidizes the tax benefits that qualified donors enjoy, whether through the Internal Revenue Code, state tax benefits, or a reduced ad valorem tax base. This public funding aspect of conservation easement policy creates a significant public interest in the donated conservation easements.[68]

5. Conservation Easement Concerns

The increasing popularity of conservation easements has led to some criticism regarding their operation.[69] For example, concern exists that landowners fraudulently inflate their property values in order to receive higher tax benefits for burdening their land with conservation easements.[70] Commentators have also expressed numerous concerns stemming from the perpetual nature of many conservation easements.[71] One such concern is that permanent restrictions create an undesirable restraint on alienation.[72] Another concern is that perpetual easements pose problems for necessary development in the future.[73] A historic aversion to "dead-hand" control is the basis for this criticism.[74] The question the dead-hand argument raises is whether, given the uncertainty of future land use needs, it is sound policy to allow a landowner to place perpetual restrictions on the use of his real property. In order for conservation easements to be effective private conservation tools, it is vital for courts to strike the appropriate balance between a conservation easement grantor's intent, the public's interest in that easement, and the necessary flexibility required for easement modification.

C. Trusts

Another body of law in which courts must balance public interests and private intent is charitable trusts, which allow settlors to create perpetual trusts for which the public is the beneficiary. The doctrine of *cy pres* allows courts to modify charitable trusts that have become imprac-

67. Mahoney, *supra* note 27, at 751-52. At least seventeen states allow landowners of conservation easement burdened land to pay proportionally lower property taxes. *See* DEFENDERS OF WILDLIFE, CONSERVATION IN AMERICA: STATE GOVERNMENT INCENTIVES FOR HABITAT CONSERVATION 10 (2002), *available at* http://www.defenders.org/resources/publications/programs_and_policy/biodiversity_partners/conservation_in_america.pdf?ht=.

68. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. b.

69. *See, e.g.*, McLaughlin, *supra* note 24, at 52-54.

70. *See generally* Jennie Lay, *Conservation Easement Conundrums*, HIGH COUNTRY NEWS, Mar. 21, 2008, at 4-5, *available at* http://www.hcn.org/issues/367/17604. *See also* McLaughlin, *supra* note 24, at 53. Massachusetts's law attempts to address the problem that landowners may inflate the value of their land by requiring state officials to approve all conservation easements before they are recorded. *See* King & Fairfax, *supra* note 53, at 72.

71. POWELL, *supra* note 8, § 34A.07.

72. *Id.*

73. *Id.*

74. *See, e.g.*, Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 901 (2008).

ticable, while still protecting the public's interest in those trusts. Case law demonstrates how courts might apply the charitable trust analysis to conveyances of non-possessory interests in real property that benefit the public.

1. Charitable Trusts

Some commentators have advocated for construing donated conservation easements as charitable trusts.[75] A charitable trust exists when "property is held for the benefit of the community or a significant portion of it," or when a trust limits property to some public use. [76] Charitable trusts generally perform some function that alleviates a burden normally placed on the state, and this function usually benefits the public in some way.[77] Whereas traditional trusts are subject to durational restrictions, states allow charitable trusts to be perpetual because they benefit the public.[78]

The trust instrument need not contain classic trust language in order to create a charitable trust; the donor's intent and donative purpose determine whether a charitable trust exists.[79] The identity of the beneficiary is the major distinguishing factor between charitable and private trusts.[80] Whereas private trusts benefit an individual or a defined, ascertainable group, charitable trusts benefit a larger portion of the public.[81] In addition to benefitting the public at large, charitable trusts must be created for a charitable purpose.[82] Charitable trusts create fiduciary and

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75. *See generally* Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to* The End of Perpetuity, 9 WYO. L. REV. 1 (2009). McLaughlin and Weeks make convincing arguments for applying the charitable trust doctrine to donated conservation easements. *Contra* C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009). On the other hand, Lindstrom argues that applying charitable trust doctrine to conservation easements would be burdensome on landowners and, therefore, would discourage them from granting conservation easements. *Id.* at 412. The drafters of the UCEA decided not to address the application of trust law to conservation easements and preferred instead to leave the decision to the adopting states. Arpad, *supra* note 28, at 93. This Note advocates applying charitable trust law to all conservation easements, whether donated or conveyed in exchange for consideration.

76. *See* POWELL, *supra* note 8, § 576.

77. *See id.* § 581.

78. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 351 (1992). Courts took into account this public benefit and decided to allow dead-hand control of trust property that would not be allowed in traditional trusts. *Id.*

79. *Id.* § 245 (stating "neither the beneficiaries nor the purposes of a charitable trust need be described in the same detail required to sustain a private trust"). While it is important that some charitable intent exist, the donor's intent need not be solely for some altruistic purpose. *See id.* § 366. Intent can be a mixture of selfish and charitable motives. *Id.*

80. *Id.* § 363.

81. *Id.* Gifts of buildings with historical significance may create charitable trusts. *See, e.g.*, Valley Forge Historical Soc'y v. Washington Mem'l Chapel, 479 A.2d 1011 (Pa. Super. Ct. 1984).

82. BOGERT, *supra* note 78, § 361. In the context of gifts donated to charitable corporations, however, the charitable purpose may not need to be specifically defined. *Id.* In these cases, charitable intent is presumed. *See id.* § 362 n.17. One could argue that land trusts operate similarly enough to charitable corporations that this same reasoning should apply. There could be a presumption that when a donor grants a conservation easement to a land trust, the donor intended a charitable purpose. Bolstering the argument is the fact that many land trusts advertise to potential donors that

equitable duties in the trustee, and courts have traditionally taken an active role in enforcing them.[83]

Although members of the public are typically the beneficiaries of charitable trusts, they do not have standing to bring a lawsuit seeking to enforce the trusts.[84] Rather, a state's attorney general normally shoulders the responsibility of representing the public's interest in a charitable trust enforcement action.[85] Many states have statutes delegating this responsibility, but in the absence of such statutes, the attorney general's charitable trust enforcement power is generally considered an implied duty of the office.[86] Some courts have even held that this duty is mandatory.[87] Because of the special rules surrounding charitable trusts and the public's interest in them, courts subject charitable trusts to their own unique set of rules concerning amendment, termination, or other modification.

2. Doctrine of *Cy Pres*

The Restatement (Third) of Property states that conservation easements may be modified or terminated through the doctrine of *cy pres* when the easement's purpose becomes impracticable.[88] *Cy pres* is uniquely applicable to charitable trusts.[89] The doctrine applies when three conditions are present: "(1) property is given in trust for a particular charitable purpose; (2) it is, or becomes, impossible, impracticable, or illegal to carry out such purpose; and (3) the settlor manifested a more general intention to devote the property to [a] charitable purpose."[90]

Trustees or attorneys general initiate *cy pres* proceedings when it is impossible to carry out the settlor's purpose.[91] The court determines

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their conservation easements will run with the donor's land in perpetuity. *See, e.g.*, Land Trust Alliance, FAQ: Conservation Easement, http://www.landtrustalliance.org/conserve/faqs/faq-conservation-easement (last visited Sept. 20, 2009). Donors may believe that the land trust will take steps to protect the donated easement in accord with the donor's charitable intent. The Land Trust Alliance website's discussion of conservation easements states: "Future owners also will be bound by the easement's terms. The land trust is responsible for making sure the easement's terms are followed on a long-term basis." *Id.*

83. *See* BOGERT, *supra* note 78, § 368. The trustee is required to ensure that the use of the donated property is for the donor's charitable purpose. *Id.* § 394.

84. *Id.* § 411.

85. *Id.*

86. *See id.*

87. *See, e.g.*, *In re* Veterans' Indus., Inc., 88 Cal. Rptr. 303, 313 (Cal. Ct. App. 1970) (holding "[i]t is the Attorney General's duty to protect interests of the beneficiaries of a charitable trust"). Another approach is to allow a party, who has a significant interest in a charitable trust, standing to bring an enforcement suit in the event the attorney general decides not to pursue the suit. *See, e.g.*, MINN. STAT. § 501B.16 (2002).

88. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11.

89. RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. a (1959).

90. Lindstrom, *supra* note 37, at 59.

91. *See* BOGERT, *supra* note 78, § 438.

whether modification is proper in light of the settlor's intent.[92] The court will utilize the *cy pres* doctrine to modify a charitable trust if it is impracticable or impossible to carry out a donor's general charitable intent.[93] The term means "as near as possible," and courts using the doctrine attempt to adhere as closely as possible to the donor's intended purpose for the gift.[94] Rather than allowing the trust to fail, a court will "direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor."[95] Although no court has used *cy pres* to modify or terminate a conservation easement, cases exist that open the possibility of applying charitable trust law and *cy pres* to conservation easements.

3. Charitable Trusts Created for Conservation Purposes

Because case law dealing with conservation easements is sparse, and even fewer cases specifically address whether such easements create charitable trusts, it is helpful to examine case law addressing charitable trusts that were created with conservational purposes.[96]

In *Cohen v. City of Lynn*,[97] the Massachusetts's Court of Appeals considered whether two deeds stating that land "be used 'forever for park purposes'" created a charitable trust, even though the grantors had received consideration for the easement.[98] The trial court found that language from the 1893 conveyances of a parcel of land created a charitable trust.[99] The trial court also held that the charitable trust trumped legislation authorizing the city to convey the parcel to the developer.[100]

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92. *Id.*

93. RESTATEMENT (SECOND) OF TRUSTS § 399.

94. *See* BOGERT, *supra* note 78, § 431.

95. *See* Lindstrom, *supra* note 37, at 59; *see also* RESTATEMENT (SECOND) OF TRUSTS § 399. If the court determines that the settlor had only a specific intent with regard to the trust and manifested no broader general intent, the trust will fail. *See* BOGERT, *supra* note 78, § 436.

96. *See* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 12:2 (2001) (stating "there has been little litigation in the area").

97. 598 N.E.2d 682 (Mass. App. Ct. 1992).

98. *Id.* at 683. After the City of Lynn acquired a strip of coastal land in 1893 by deeds with that exact language, it leased the parcel to the Metropolitan Park Commission for a period of ninety-nine years. *Id.* at 683 n.4. During those ninety-nine years, the public enjoyed open access to the land—which provided a "buffer zone between private use and the ocean"—to use primarily for "exercise and recreation." *Id.* at 686. When the lease expired, the City of Lynn sold a portion of the parcel to a developer. *Id.* at 683 n.4. The mayor and city council each approved the sale of the land to the developer. *Id.* at 683. Two separate grantors had conveyed the land to the city in 1893. *Id.* at 683 n.4. The court found that the two deeds constituted "a single declaration of trust" because each of the conveying instruments contained a clause declaring that the land be used for park purposes. *Id.* at 684.

99. *Id.* at 683.

100. *Id.* at 684. Based on these holdings, the trial court ordered the restoration of the land to its original condition before the city conveyed it to the developer. *Id.* When the developer began to construct a parking lot on the land, a group of taxpayers filed a complaint. *Id.* at 683. The taxpayers alleged that the land was subject to a charitable trust created by the conveyances of the land to the city in 1893. *Id.* Although taxpayer status is generally not enough to create standing to enforce a trust, the taxpayers in this case had standing under a Massachusetts law granting taxpayers of a city standing to enforce the terms of a trust arising from a conveyance or gift granted to that city. *Id.* at

The appellate court held that the language in the 1893 deeds, "'forever for park purposes,'" was sufficient to establish the grantors' intention to create a charitable trust.[101] The appellate court rejected the city's and developer's argument that because the grantors received consideration for the land, the transaction did not create a charitable trust.[102] The court noted, "[w]e have found no authority . . . to the effect that the receipt of substantial consideration prevents a grantor from conveying property to a municipality in such a manner as to establish a public charitable trust."[103] The determinative factor for the court was the grantors' express intention that the land be used for a public park in perpetuity.[104] The court explained that because the 1893 conveyances created a charitable trust, the city's acceptance of the deeds created an enforceable contract with the grantors.[105]

The court in *Three Bills, Inc. v. City of Parma*[106] also considered whether a conservational conveyance created a charitable trust, but it came to a different result than the *Cohen* court. In *Three Bills*, a city ordinance required a development company (Three Bills) to convey five percent of the land it was developing to the city "'in the interests of public safety, health and welfare, to provide proper open spaces for circulation of light and air and to avoid future congestion of population detrimental to the public safety, health and welfare . . . .'"[107] The owners of

683 n.3. The taxpayers argued that the charitable trust required the city to manage the land perpetually as public parkland. *Id.* at 683. Additionally, the taxpayers sought a court order that would force the developer to return the land to its original condition before construction of the parking lot began. *Id.*

101. *Id.* The court carefully noted that the deeds contained "no precatory language; no mere statement of a use only; no condition or limitation on the use; nor any right of reversion." *Id.* at 685. The court explained that this was evidence of the grantors' intent to divest themselves of all future interest in the land through the creation of a public charitable trust. *Id.* at 684.

102. *Id.* The City and developer appealed the trial court's ruling, arguing that the court incorrectly interpreted the 1893 conveyances of the land to the city as creating a charitable trust. *Id.* They argued that because the grantors received "substantial payment" for conveying the land to the city, the transactions did not create a charitable trust. *Id.* at 685. They further argued that even if a charitable trust was created, its purpose had become impracticable, warranting application of *cy pres*. *Id.* at 684. The city and developer asserted that the conveyance to the developer and the developer's proposed use of the land conformed to the general intent of the charitable trust. *Id.*

103. *Id.* at 685.

104. *Id.* The court held that a charitable trust was created even though the grantors received consideration for the conveyance. *Id.*

105. *Id.* Having determined that the 1893 conveyances created a charitable trust, the court addressed the city and developer's argument that the court should apply *cy pres* to uphold the city's conveyance to the developer. *Id.* at 686-87. The City and developer argued that the primary purpose for the city's acquisition of the parcel was to allow public access to the beach and the construction of the public road on the land achieved this goal. *Id.* at 686. Additionally, they argued that the parcel conveyed to the developer was too small to be used for park purposes and was merely "'ornamental.'" *Id.* The court examined evidence outside the terms of the 1893 deeds and found that the parcel of land conveyed to the developer could still fulfill the original purposes of the conveyances. *Id.* at 686-87 (explaining that the parcel would "promote public enjoyment of the 'views' and 'sea breezes'"). Therefore, the court held that the purposes of the charitable trust created by the 1893 conveyances had not become impossible or impracticable, and, thus, *cy pres* did not apply. *Id.* at 687.

106. 676 N.E.2d 1273 (Ohio Ct. App. 1996).

107. *Id.* at 1274. Three Bills conveyed to Parma a thirty-two acre tract adjacent to the land it was developing. *Id.* The City compensated the owners of the development company $32,000 for the conveyance. *Id.* The Hoislbauers owned all the shares of the Three Bills development company and

Three Bills, the Hoislbauers, conveyed the land "'for parks and green area purposes.'"[108]

Twenty-one years after the Hoislbauers conveyed the land to the City of Parma, the City leased the land to a broadcasting company.[109] The City allowed the broadcasting company to build "a communications tower, service road, and maintenance building on the property."[110]

Three Bills and the Hoislbauers filed a complaint seeking to enjoin commercial use of the land and to restore it to its previous condition.[111] The trial court granted the broadcasting company's motion for summary judgment.[112] Upon Three Bills's appeal, the appellate court first considered whether Three Bills had standing.[113] Three Bills and the Hoislbauers argued that the conveyance created a charitable trust and, therefore, they had standing as a beneficiary of the trust.[114] The court rejected this theory, explaining that a charitable trust's settlor lacks standing to bring an enforcement action.[115] Although the court did not go as far as holding that the conveyance had created a charitable trust, the court implied that the conveyance may have done so.[116]

A recent Wyoming case dealt specifically with a conservation easement.[117] In *Hicks v. Dowd*,[118] a Wyoming taxpayer sued to enforce the terms of a conservation easement.[119] Although the Wyoming Supreme Court ultimately held that the taxpayer lacked standing to pursue the suit, the case offers meaningful insight into the issue of whether conservation easements create charitable trusts.[120]

Fred and Linda Dowd owned the conservation easement-burdened Meadowood Ranch (Ranch).[121] The conveying deed stated the conser-

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conveyed the land to the city. *Id.*

108. *Id.*

109. *Id.* The City placed the funds generated by the lease into an account used only for parks and recreation. *Id.*

110. *Id.*

111. *Id.* at 1275.

112. *Id.*

113. *Id.* at 1275-76.

114. *Id.* In addition to its charitable trust argument, Three Bills advanced two other theories for its standing. *Id.* at 1275. First, Three Bills argued wrongful conversion after its dedication of the land to the city. *Id.* The court rejected this argument, holding that there was no dedication because Three Bills received consideration for the conveyance. *Id.* Three Bills also claimed it had standing as an adjacent property owner with a special interest in a restrictive covenant. *Id.* The court rejected this argument because Three Bills failed to produce evidence demonstrating that it owned any property adjacent to the land at issue. *Id.*

115. *Id.* at 1276. In this case, Three Bills and the Hoislbauer family were the settlors of the claimed charitable trust. *Id.* at 1276.

116. *Id.* ("[a]ssuming without deciding that a trust was created in this case").

117. *See* Hicks v. Dowd, 157 P.3d 914 (Wyo. 2007).

118. 157 P.3d 914 (Wyo. 2007). The case has already spurred much debate about whether a donated conservation easement creates a charitable trust. *See, e.g.*, Lindstrom, *supra* note 37; Lindstrom, *supra* note 75; McLaughlin & Weeks, *supra* note 75.

119. *Hicks*, 157 P.3d at 915.

120. *Id.* at 919.

121. *Id.* at 915. Meadowood Ranch (Ranch) is a 1,043-acre tract of land. *Id.* The Lowhan Limited Partnership, the Dowds' predecessor in interest, conveyed a conservation easement to the John-

vation easement was to "'preserve and protect in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch.'"[122] Additionally, the deed provided that the conservation easement be perpetual unless "'unforeseeable circumstances'" made the easement's existence impossible to continue in perpetuity.[123]

The Dowds asked the Johnson County Board of Commissioners (Board), the easement holder, to terminate the conservation easement in order to allow a company owning the underlying mineral rights to access coal bed methane under the Ranch.[124] The Board agreed to extinguish the easement, and ten months later, a Wyoming taxpayer filed suit alleging that the Board could not terminate the conservation easement without a judicial determination that "unforeseeable circumstances made the continuation of the easement impossible."[125]

The district court held that the conservation easement created a charitable trust and that Hicks had standing as a Wyoming citizen and beneficiary of that trust.[126] The district court also noted that the Wyoming Legislature gave the Attorney General standing to enforce charitable trusts, and the court ordered the parties to give the Attorney General notice of the suit.[127] The parties notified the Attorney General, who declined to participate in the litigation.[128]

Upon review, the Wyoming Supreme Court held that Hicks lacked standing and dismissed his claim.[129] The court first agreed with the district court's determination that the easement created a charitable trust under the Wyoming Uniform Trust Code.[130] Second, ruling that only the Attorney General, co-trustee, or someone with a "special interest" has standing to enforce the charitable trust, the Wyoming Supreme Court held that Hicks did not have the requisite "special interest" for standing.[131] The court then invited the Attorney General to "reassess

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son County Board of Commissioners by quitclaim deed on December 29, 1993. *Id.* at 916. The Dowds purchased the ranch, subject to the conservation easement in 1999. *Id.* at 916-17. In addition to creating the conservation easement burdening the entire ranch, Lowhan Limited Partnership conveyed one acre of the Ranch to the Board. *Id.* at 916.

122. *Id.* The deed expressly prohibited the "'removal of minerals, hydrocarbons, and other materials on or below the surface of the land.'" *Id.*

123. *Id.*

124. *Id.* at 917. The Dowds reasoned, "coal bed methane development was unpreventable, unanticipated, and inconsistent with the terms of the conservation easement." *Id.*

125. *Id.* The Board adopted Resolution No. 257 on August 6, 2002, which simultaneously conveyed the tract and terminated the easement. *Id.*

126. *Id.* at 917-18.

127. *Id.* (citing WYO. STAT. ANN. § 4-10-110 (2005)).

128. *Id.* at 918. In declining to participate in the litigation, the Attorney General explained that all sides were adequately represented by counsel. *Id.*

129. *Id.*

130. *Id.* at 919. Hicks did not challenge the district court's holding that the conservation easement created a charitable trust. *Id.*

131. *Id.*

his position" with regard to his decision to abstain from the litigation.[132]

Out of the three cases discussed above, only *Hicks* dealt specifically with a conservation easement; however, the courts' rationales and charitable trust analyses illustrate how charitable trust law should govern conservation easements.

III. DISCUSSION

Because of their private nature, conservation easements are attractive vehicles for landowners wishing to preserve their land.[133] Both purchased and donated conservation easements possess all the elements of charitable trusts and, therefore, should be construed as charitable trusts. Construing conservation easements as charitable trusts ensures that both the trust settlor's intentions are honored and that the public's interest in the conservation easement is protected. Placing conservation easements within the framework of charitable trust law also allows courts to use *cy pres* to modify or terminate conservation easements that have become impracticable. Applying the doctrine of *cy pres* to conservation easements is a feasible solution to complaints that perpetual conservation easements are impractical, while court oversight protects the public's interest in conservation easements.

Kansas, a UCEA state, has not yet clarified, through legislation or case law, whether conservation easements create charitable trusts. Kansas's trust and conservation easement statutes, however, provide a solid framework for construing conservation easements as charitable trusts. Kansas's courts should construe conservation easements as charitable trusts, regardless of whether the easements were donated or conveyed for consideration. Doing so strikes the appropriate balance among the grantor's intent in conveying the easement, the public's interest in the easement, and the need for some degree of flexibility for modifying or terminating conservation easements.

A. Conservation Easements Create Charitable Trusts

Although no Kansas court has expressly held that conservation easements create charitable trusts, conservation easements have all the characteristics of charitable trusts. The Restatement (Second) of Trusts defines a trust as:

> [A] fiduciary relationship with respect to property, subjecting the person

132. *Id.* at 921. On July 8, 2008, the Wyoming Attorney General filed a complaint alleging the Board breached its fiduciary duties as trustee of a charitable trust by terminating the conservation easement. Complaint at 10-11, Salzburg v. Dowd, No. CV-2008-0079 (4th Dist. Ct. Wyo. July 8, 2008), *available at* http://www.landtrustalliance.org/about-us/programs/conservation-defense/documents/dowd-complaint.pdf.

133. *See supra* notes 24-29 and accompanying text.

> by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.[134]

Charitable trusts benefit the public and aid the government in some traditional roles. Because no express language is required to create a charitable trust, courts examine whether the donor possessed charitable intent when donating the property in question.[135] In determining the donor's intent, courts look at the instrument creating the trust, as well as outside evidence demonstrating the settlor's intent.[136]

The requirement that the trust benefit the public is fulfilled if the trust instrument is aimed at some general public good and if the trust does not name a particular group of specific beneficiaries.[137] Because the public benefits from conservation easements, the public would be the intended beneficiary of a charitable trust conveyed as a conservation easement to a governmental organization or private land trust.[138]

Some conservation easements already contain language illustrating the grantor's general charitable intent. For example, the language in one sample easement provides, "'Grantee agrees by accepting this grant to honor the intentions of Grantors stated herein and to preserve and protect in perpetuity the conservation values of the Property for the benefit of this generation and generations to come[.]'"[139] The language "generation and generations to come" illustrates the grantor's intention to benefit the public generally, rather than a specific group of beneficiaries.[140] However, even in cases without such clear language demonstrating the grantor's charitable intent, courts are likely to find general intent.[141] Both the Restatement (Second) of Trusts and the Uniform Trust Code favor a finding of charitable intent.[142]

The fact that tax benefits may have motivated a landowner to burden his land with a conservation easement does not preclude the creation of a charitable trust.[143] The donor's intent does not need to be solely charitable.[144] For example, a landowner's motivation to take advantage of tax benefits is not fatal to the existence of a charitable trust,

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134. RESTATEMENT (SECOND) OF TRUSTS § 2.
135. *See* BOGERT, *supra* note 78, § 368.
136. *See* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 478 (2005). The instruments creating conservation easements (generally deeds) are not required to contain express trust language in order to create charitable trusts. *See supra* note 79 and accompanying text.
137. BOGERT, *supra* note 78, § 365.
138. *See supra* Part II.B.1.
139. Arpad, *supra* note 28, at 133.
140. *Id.*
141. BOGERT, *supra* note 78, § 368 (stating "[courts] wish to find a charitable intent and to carry it out, if at all possible").
142. McLaughlin, *supra* note 136, at 480.
143. *See supra* note 79.
144. *See id.*

as long as the donor had *some* charitable intent.[145]

Both donated conservation easements and conservation easements conveyed for consideration can create charitable trusts.[146] As *Cohen* and *Three Bills* indicate, property interests conveyed for consideration may create charitable trusts when the grantor's motivation is a general charitable intent.[147] Although those cases dealt with the conveyance of possessory interests, non-possessory interests created by conservation easements should trigger the same analysis.[148] When a deed conveying a conservation easement expressly identifies the donor's charitable intent (e.g. forever for park purposes) and the grantor conveys the interest in perpetuity, a charitable trust is created.[149] The grantor's receipt of consideration in the transaction should not alter the charitable trust analysis.[150]

Thus, even in cases similar to the Introduction's hypothetical in which the grantor received consideration in exchange for the easement, courts should find that the conservation easement created a charitable trust. Applying charitable trust law to conservation easements protects the public's interest, which exists regardless of whether the easement was donated or purchased.[151]

The public's interest in the easement is further protected by the fiduciary duties of the county board that acts as the trustee of a charitable trust and holds the easement for the public's benefit.[152] The situation in *Hicks* and the Introduction's hypothetical is unlikely to occur when the easement holder is bound by a fiduciary duty to the public because that duty would force the holder to honor the terms of the easement. Fiduciary duties effectively ensure that easement holders cannot unilaterally terminate easements to the public's detriment.

A criticism of construing conservation easements as charitable

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145. *See id.*

146. *See* McLaughlin, *supra* note 136, at 430-31. McLaughlin focuses her analysis on construing donated conservation easements as charitable trusts, but points out that the public benefits involved also support the argument for construing conservation easements purchased by non-profits and governmental entities as charitable trusts. *Id.*

147. Cohen v. City of Lynn, 598 N.E.2d 682, 685 (Mass. App. Ct. 1992); Three Bills, Inc. v. City of Parma, 676 N.E.2d 1273, 1276 (Ohio Ct. App. 1996). In *Three Bills*, the court did not enforce the terms of the easement because it held that the settlor did not have standing to enforce a charitable trust, not because receipt of consideration precluded creation of a charitable trust. 676 N.E.2d at 1275. The court did not expressly reject the idea that an interest conveyed for consideration precluded creation of a charitable trust. *Id.*

148. *See* Arpad, *supra* note 28, at 129 (explaining that a less than fee simple interest in property can be an acceptable trust res).

149. *See Cohen*, 598 N.E.2d at 683. This was the language in *Cohen*. *Id.* Although a possessory interest was conveyed in that case, conveying a non-possessory interest (for example, a conservation easement) should not change the analysis.

150. *See id.* at 685.

151. In the Introduction's hypothetical, the public had an interest in the easement because the public enjoyed the many benefits of the easement that its tax dollars allowed the city to acquire.

152. *See* RESTATEMENT (SECOND) OF TRUSTS § 348 cmt. a (explaining that the creation of a charitable trust instills fiduciary duties in the trustee).

trusts is that doing so burdens their administration.[153] However, such a construction is unlikely to create any unreasonable burdens. The parties to the easement would not need judicial approval to modify conservation easements in line with the conservation purposes for which the easement was created.[154] Additionally, some administrative burden may be necessary and justifiable to protect the strong public interest in conservation easements. The burden the public may endure is acceptable in exchange for the assurance that conservation easement holders are required to enforce the easement in a manner consistent with the public interest.

The Wyoming Supreme Court's decision in *Hicks* offers a glimpse of how charitable trust law should apply to conservation easements in Kansas. Like Wyoming, Kansas has adopted both the Uniform Trust Code and the UCEA.[155] Although the ultimate ground for dismissal in *Hicks* was standing, the Wyoming Supreme Court suggested that the conservation easement at issue created a charitable trust.[156] Kansas trust and conservation easement law closely mirrors the Wyoming law that framed the controversy in *Hicks*.[157] The analysis in *Hicks* relied on statutory provisions almost identical to their relevant Kansas counterparts.[158]

In Kansas, a charitable trust may be created for "the promotion of health, governmental or municipal purposes, or other purposes the achievement of which [are] beneficial to the community."[159] The public benefits derived from conservation easements, including the protection of scenic vistas, open space, and recreational areas, clearly fulfill the purpose requirement identified in the Kansas provision.

Kansas statutes also allow the court to select beneficiaries when the trust instrument fails to do so.[160] Therefore, even in cases involving an instrument that conveys a conservation easement without language of an express intent to benefit the public, the court can use its judgment to make this finding.[161] Construing conservation easements as charitable trusts addresses many of the difficulties associated with conservation

153. Lindstrom, *supra* note 75, at 412. Lindstrom argues that subjecting conservation easements to charitable trust doctrine could make the process more political and, therefore, detract from the private nature of conservation easements. *Id.* Lindstrom is concerned that this politicizing could discourage landowners and chill conservation easement creation. *Id.*

154. McLaughlin, *supra* note 136, at 445.

155. *See* KAN. STAT. ANN. §§ 58a-101 to 58a-1107 (2005 & Supp. 2008); KAN. STAT. ANN. §§ 58-3810 to 58-3819 (2005 & Supp. 2008).

156. Hicks v. Dowd, 157 P.3d 914, 919 (Wyo. 2007).

157. *Compare id. with* KAN. STAT. ANN. §§ 58a-101 to 58a-1107; KAN. STAT. ANN. §§ 58-3810 to 58-3819.

158. *See Hicks*, 157 P.3d at 919-21; *see also* KAN. STAT. ANN. §§ 58a-101 to 58a-1107; KAN. STAT. ANN. §§ 58-3810 to 58-3819.

159. KAN. STAT. ANN. § 58a-405.

160. *Id.* § 58a-405(b) (stating that if the terms of the charitable trust do not indicate who the beneficiary is, the court has the power to name one).

161. *See id.*

easement enforcement, and Kansas's conservation easement and trust legislation facilitates such an interpretation.

B. Cy Pres *Protects the Public Interest in Conservation Easements*

An additional benefit of the charitable trust construction is that *cy pres* provides an answer to balancing the sometimes-competing interests of the conservation easement grantor, the current landowner, the easement holder, and the public. What should happen to a conservation easement when conservation needs or the needs of the surrounding community change? What should be the procedure for modifying, amending, or terminating conservation easements? How much deference should be given to the parties' intentions (i.e. the burdened land's owner and the easement holder)? Is it possible to protect the public's interest in conservation easements while maintaining some flexibility with regard to modification, amendment, and termination? Because few parties have litigated these questions, the discussion surrounding them is ongoing.[162]

Balancing the public's interest, the grantor's intent, and the need for flexibility and practicality with regard to conservation easements presents a challenge for ensuring that conservation easements are effectively utilized. Construing conservation easements as charitable trusts alleviates this challenge. Imposing fiduciary duties on conservation easement holders protects the public's interest, while honoring the grantor's underlying intentions. The *cy pres* doctrine provides a suitable vehicle for modifying impracticable conservation easements.[163]

In order to qualify for federal tax benefits for conservation easement donation, the donor must place a perpetual burden on the land.[164] Landowners that receive consideration for conveying conservation easements may also desire to make the easement perpetual.[165] Landowners, like *A* in the Introduction's hypothetical, will gain peace of mind knowing their land will be protected in perpetuity. This perpetual aspect of conservation easements has made them susceptible to criticism because they can become impractical.[166] Construing conservation easements as charitable trusts answers this criticism by allowing courts to apply *cy pres* to modify the terms of, or terminate, an easement that has become truly impracticable.[167]

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162. *See, e.g.*, Lindstrom, *supra* note 37; Lindstrom, *supra* note 75; McLaughlin & Weeks, *supra* note 75.

163. McLaughlin has said the trustee of a charitable trust serves two masters: the public and the donor. McLaughlin, *supra* note 136, at 433-34.

164. *See* I.R.C. § 170(h)(2)(C) (2009).

165. *See supra* Part I.

166. *See, e.g.*, Gattuso, *supra* note 26 (stating "[p]erpetuity requirements run counter to flexibility and necessary change").

167. *See* BOGERT, *supra* note 78, § 438.

A common criticism is that perpetual conservation easements allow undesirable dead-hand control and that their permanent nature is inflexible and impractical. The *cy pres* doctrine was created to address the same problem conservation easements present: how to strike the appropriate balance between a charitable donor's dead-hand control over his property and the public's (sometimes conflicting) interest.[168] Because the public benefits from charitable trusts, settlors creating them are allowed to exercise a greater extent of dead-hand control over the trust *res* than settlors establishing private trusts.[169] This presents a problem, however, when it becomes impracticable to accomplish the purposes of the charitable trust. Court oversight of the process through *cy pres* ensures the protection of the public interest in both purchased and donated conservation easements.[170]

In the Introduction's hypothetical, *A's* successor to the ranch would gain a substantial sum of money by terminating the easement. The county board also stood to profit from the easement's termination. If the two parties terminated the easement on their own, the public would suffer because its interest in the natural value of the land is ignored. Requiring judicial approval of conservation easement termination is a means of protecting the public interest because courts would have the power to keep the easement terms in place. The public interest is not sacrificed merely because the owner of the burdened land and the easement holder agree to terminate the easement.

In the hypothetical, a court would likely deny *B's* and the board's request to terminate the easement because *A* created the easement expressly to protect wildlife and prevent development of the land. Under these facts, a court would honor *B's* intent to protect the land and the public's interest in the easement because nothing suggests it has become impracticable or impossible to carry out the terms of the easement. The mere fact that the current landowner and easement holder have a monetary interest in terminating the easement could not justify its termination.

In order to illustrate a situation in which a court might apply *cy pres* to modify the conservation easement, consider the following variation of the Introduction's hypothetical. Imagine that rather than living in a city hundreds of miles away, *B* lives on the ranch. *B* becomes interested in placing one or two wind turbines on the ranch to provide the power necessary to operate the ranch. *B* has hired an expert who determines that there will be minimal negative impact on the ranch, the

168. *See generally* McLaughlin, *supra* note 136, at 429.
169. *Id.* at 460.
170. *See* Nancy A. McLaughlin, *Could Coalbed Methane Be the Death of Conservation Easements?*, 29 WYO. LAW. 1, 6 (2006).

migratory paths of the surrounding wildlife, or the prairie dogs. Additionally, the small-scale operation will not significantly affect the scenic vistas or open space the public enjoys because of the easement's restrictions.

However, *B* again encounters a problem because the terms of the easement prohibit placing turbines on the ranch. A court in this situation would likely modify the easement to allow *B* to place the turbines on the land. If the board of commissioners or attorney general felt that the impact on the ranch was more significant, either could bring an enforcement action, and the court could then rule on whether to enforce the terms of the easement or make a *cy pres* modification.

One of the great benefits of applying charitable trust law to conservation easements is that courts perform the *cy pres* analysis on a case-by-case basis. This flexibility in balancing the competing interests involved with conservation easements is necessary to ensure their continued effectiveness as a conservation tool.

Kansas's statutes recognize the doctrine of *cy pres*.[171] Kansas's courts have the authority to modify a charitable trust when it becomes impracticable to carry out the purpose of the trust.[172] The Kansas Attorney General has standing to initiate actions to modify a charitable trust.[173] Giving the Attorney General standing to enforce conservation easements effectively protects the public's interest in the easements because the Attorney General can file suit on behalf of the public to enforce the easement's terms.

On the other hand, when it becomes impracticable to carry out the terms of the easement, the Attorney General or a party to the easement can petition the court to change the terms of, or terminate, the easement to advance the grantor's charitable intention. The public benefits because it does not have to submit to unreasonable dead-hand control when courts modify conservation easements. The doctrine of *cy pres* effectively balances the competing interests involved with conservation easements, thereby strengthening the argument for applying charitable trust law to conservation easements in Kansas.

IV. CONCLUSION

The UCEA suggests that charitable trust law may be a helpful structural framework for dealing with conservation easements. But it leaves the ultimate decision of whether to apply charitable trust law to conservation easements to the adopting jurisdiction. Case law addressing the question of whether conservation easements create charitable

171. KAN. STAT. ANN. § 58a-413.
172. *See* KAN. STAT. ANN. §§ 58a-412 to 58a-413.
173. *Id.*

trusts is sparse. In addition to a lack of case law, Kansas lacks legislative direction on the issue.

However, Kansas trust statutes and conservation easement statutes provide a workable framework for construing conservation easements as charitable trusts, which protects the public's interest. Trustees, land trusts, or governmental organizations holding conservation easements owe fiduciary duties to the grantor/settlor and the public/beneficiaries of the conservation easements. The adopting jurisdiction's attorney general has standing to bring trust enforcement actions on behalf of the public.[174] This provides an end-run around taxpayer standing issues.[175] Furthermore, Kansas trust law grants the settlor of a charitable trust standing to pursue an enforcement action.[176] This eliminates the standing difficulty that Three Bills experienced while attempting to enforce the terms of the deed it conveyed to Parma and, thus, further protects the public's interest.

Cy pres allows courts to strike an appropriate balance between the grantor's intent in creating the easement and the public's interest in modifying or terminating an impracticable conservation easement. Applying *cy pres* to conservation easements that have become impracticable is another compelling reason for construing conservation easements as charitable trusts.

Conservation easements fulfill all the elements of charitable trusts, and construing the easements as charitable trusts protects the public's interest. Applying the doctrine of *cy pres* to modify impracticable charitable trusts provides a framework for addressing the issues of dead-hand control and evolving community needs.

174. *See* BOGERT, *supra* note 78, § 411.

175. However, in Kansas, the settlor of a charitable trust has standing to bring an enforcement action. *See* KAN. STAT. ANN. § 58a-405(c). Because of this, the outcome of *Three Bills* would likely have been different in Kansas. *See* Three Bills, Inc. v. City of Parma, 676 N.E.2d 1273, 1276 (Ohio Ct. App. 1996). Allowing settlors to seek judicial enforcement of conservation easements adds another level of security, which protects the benefits the public reaps from such easements.

176. *Id.*