

CONSERVATION EASEMENTS IN THE ROCKY MOUNTAIN WEST: “PERPETUITY” IS RELATIVE

BY: JESSICA RUTZICK, ATTORNEY AT LAW

Conservation easements are becoming a popular and frequently used land protection tool. In Wyoming alone, over 275,000 acres of privately owned farm and ranchlands, open space and wildlife habitat are protected by conservation easements. Although the donors of a conservation easement intend that the land be protected from development in perpetuity, termination of the easement has become a real possibility -- with significant ramifications.

A recent case decided by the Wyoming Supreme Court calls into question the legal bases on which conservation easements rest and highlights their numerous legal pitfalls. *Hicks v. Dowd* has changed the terms and methods for enforcing conservation easements throughout the state and their durability will remain in question for years to come throughout the Rocky Mountain West.

Hicks v. Dowd concerns a 1,000 acre ranch northeast of Buffalo, Wyoming. The easement was created by the Lowhams in 1993 and deeded to the Board of County Commissioners of Johnson County. The stated purpose of the conservation easement was: “preserving and protecting in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch.” The gift was estimated to have reduced the ranch’s value by \$1.2 million and the Lowhams claimed a federal charitable income tax deduction based on that amount.

Subsequently, the Board of County Commissioners created the Johnson County Scenic Preserve Trust and quitclaimed the one-acre property and the appurtenant conservation easement to the Trust. The County Commissioners were the trustees and settlers of the Trust.

In 1999 the Dowds purchased the ranch from the Lowhams. Two years later, a mineral developer, Northwest Energy, obtained twenty two permits for coalbed methane development on the ranch, pursuant to its lease of the subsurface mineral estate. Recognizing that mineral development would likely reduce the property's value and defeat the purpose of the conservation easement, the Dowds asked the County Commissioners to terminate the easement. In a public meeting, the County Commissioners complied and granted the request by way of Resolution. The Dowds then subdivided their land and listed it for sale for \$1.5 million more than they paid for it.

Approximately one year later, (July 2003) Robert Hicks filed suit against Johnson County, challenging the termination of the conservation easement. Hicks argued 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 court approval. The Dowds argued that the conservation easement must be treated from a legal standpoint like any other contractual easement, which is terminable at the will of the parties to the contract.

The district court never reached the merits of the case, dismissing it on the ground that Hicks needed to appeal the County's decision under the Wyoming Administrative Procedure Act. Hicks appealed the dismissal to the Wyoming Supreme Court, which heard oral arguments in June 2006. The *Hicks v. Dowd* decision leaves us with more questions than answers. Two of the more intriguing issues are addressed in this article.

HOW LONG IS FOREVER?

In order to qualify for an income tax deduction for a charitable donation, the conservation easement must be held in perpetuity by a donee organization. Accordingly, land trust

organizations must have the means to enforce the conditions of the easement in perpetuity.¹ This requirement begs the question: how long is forever? More specifically, under what circumstances will the purposes of the conservation easement be defeated, thereby justifying termination?

Under Wyoming common law, an appurtenant easement is a contractual relationship between the servient and dominant estate holders.² The contract could be voluntarily amended or even terminated by the parties to the agreement at any time. If conservation easements are classified as appurtenant, the common law doctrines of contracts and easements dictate amendment and/or termination.

In this framework, the easement holder (land trust) and the land owner could agree to amend or terminate the easement in their discretion. That is exactly what happened in the *Hicks v. Dowd* case. In this legal context, unless a third party beneficiary of the conservation easement is specifically named in the agreement, it is unlikely that the terms of a conservation easement could be enforced by anyone other than the owners of the dominant and servient estates.³ Thus, the life of a conservation easement is only as enduring as the mission, finances, and wherewithal of the organization entrusted with it. In the *Hicks v. Dowd* case, the easement was sustained for less than ten years.

With rising commercial, residential and mineral development in the Rocky Mountain West, pressure to terminate conservation easements will increase exponentially. Land trusts will

¹ I.R.C. § 170; C.F.R. §§ 1.170A-14(e)-(g) (2004).

² The principles of contract construction apply to construction of an easement. *Lozier v. Blattland Investments, LLC*, 2004 WY 132, 100 P.3d 380 (Wyo. 2004).

³ A third party beneficiary may enforce his rights under a conservation easement only if specific terms exist. An outsider claiming the right to sue must show that the easement was intended for his direct benefit. A third party may sue to enforce his rights under a conservation easement only if: the easement recognizes a right to performance in the beneficiary and the circumstances indicate that the grantee (land trust) intends to give that beneficiary the benefit of the conservation easement. *Bear v. Volunteers of America, Wyoming, Inc.*, 964 P.2d 1245, 1252 (Wyo. 1998).

require increasing flexibility in their management and oversight. Application of the common law of contracts and easements will best serve that need by eliminating the possibility of interference or uninformed input from indiscriminate members of the public. On the other hand, the grantor's intentions may not necessarily be honored by the trust, whose stewardship decisions are influenced by changing development pressures. For example, the ability to sell or trade development rights from one parcel of land to another may benefit the trust's mission, but could fly in the face of the grantor's wishes to preserve one specific parcel of land. As in the *Hicks* example, the land trust simply concluded that proposed mineral development defeated the purpose of the conservation easement and agreed to terminate it. The grantors of the easement certainly did not anticipate its termination within nine years, nor did the Internal Revenue Service, which requires the easement to be "perpetual" for the tax benefits to take effect.

"Forever" in the common law context is only as long as the land trust is willing and able to retain its interest in the conservation easement. As *Hicks v. Dowd* suggests, that could be anywhere from nine years to centuries.

EFFECT OF SPLIT ESTATES

As *Hicks v. Dowd* illustrates, even the *potential* for mineral development may justify termination of a conservation easement. The Dowds purchased their ranch with the understanding that mineral development was highly unlikely. Within eight years, however, Northwest Energy commenced mineral development on the ranch.

After viewing the extensive surface damage caused by well sites, roads, pipelines, and water disposal facilities on nearby lands, the Dowds were alarmed by what they saw. They concluded that this activity would cause significant environmental damage and was inconsistent with the terms of the conservation easement. The Johnson County Commissioners agreed, and

terminated the conservation easement accordingly. Had the district court reached the merits of the *Hicks* case, it would have had to consider an equitable remedy addressing the changed circumstances on the ranch.⁴

Very little, if any, case law is available to lend guidance on whether or when changed circumstances justify amendment or termination of a conservation easement. In any event, the determination must be fact and case specific, based on the provisions of the particular easement at issue, the intent of the grantor, and the particular circumstances prompting amendment or termination.

This analysis invokes a high degree of subjectivity. For example, in *Southbury Land Trust, Inc. v. Andricovich*, 757 A.2d 1263 (Conn.App. 2000), a land trust easement holder challenged the construction by the servient land owner of a farm house intended for use by the grantor's family. The trial court permitted the construction and the court of appeals affirmed, finding that the construction was consistent with the intent of the easement. The court of appeals interjected a subjective analysis, however, opining, that if a large contemporary mansion was built in middle of the pastoral view of the farm, then the spirit of the easement *would* be undermined. In that case, the court concluded that the easement holder could enjoin construction of a mansion on the ground that it would undermine entire purpose of the easement. Thus, the court's subjective views of good taste, appropriate location and the grantor's intent played a significant role in the outcome.

To some, disturbance to the surface estate by mineral development is short-term and any harm to the surface may be readily reclaimed. To others, like the Dowds and the Johnson County Commissioners, mineral development can so impact the surface estate that any attempt at

⁴ Wyo. Stat. § 34-1-203 (b). The UCEA "shall not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."

conservation is futile. Thus, the intent of the grantors and the easement language will dictate whether or not mineral development will justify termination. Any conservation easement on a split estate should anticipate mineral development and identify those circumstances in which amendment or termination of the easement should occur.

The *Hicks v. Dowd* case has called into question the status and sustainability of conservation easements, especially those placed on split estates. The intended perpetuity of these easements will be subject to challenge and remain under scrutiny for years to come.