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WYO. DEPT. OF AGRICULTURE

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September 23, 2004

John Etchepare, Director
Wyoming Department of Agriculture
2219 Carey Avenue
Cheyenne, WY 82002

Re: Lake DeSmet Conservation District

Dear Director Etchepare:

We have received your inquiry regarding whether the Lake DeSmet Conservation District can hold and enforce a conservation easement on a parcel of public land.

Specifically, you have asked:

As a special district, can the Lake DeSmet Conservation District be the entity that maintains a conservation easement and do they have the authority to enforce the terms of the easement? Also, by entering a long-term agreement, is it legal for the current board to obligate future elected boards under the terms of the easement?

SPECIFIC FACTS

The City of Buffalo is planning to trade land in Crook County for United States Forest Service land located at, or actually under, the Tiehack Reservoir. One of the conditions of the trade, however, is a requirement by the Forest Service that a conservation easement be created upon the Tiehack Reservoir land for the purpose of preventing development of the land in the event the reservoir would dry up.

The City of Buffalo, as owner of the land to which the easement will attach, wants to transfer the right to hold and manage the easement to the Lake DeSmet

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Conservation District. The City will sell this right to the District for \$1.00. The land is within the boundaries of the District.

According to DIEHL AND BARRETT, THE CONSERVATION EASEMENT HANDBOOK (1988):

A conservation easement is a legal agreement a property owner makes to restrict the type and amount of development that may take place on his or her property. Each easement's restrictions are tailored to the particular property and to the interests of the individual owner.

According to BARRETT AND NAGEL, MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT, xiii (1996), "... conservation easement law is still relatively uncharted territory. . . . Enforcement experience is still sparse. What there is reinforces the conviction on which the models are based: drafting is crucial." Therefore, to aid in the enforcement of conservation easements, the Uniform Conservation Easement Act was drafted. However, this Model Act has not yet been adopted in Wyoming.

AUTHORITY OF THE DISTRICT

Only those powers expressly conferred by the Legislature are granted to an administrative agency. *Hupp v. Employment Sec. Com'n of Wyoming*, 715 P.2d 223 (Wyo. 1986). Statutes under which an agency purports to exercise a doubtful power must be strictly construed against the exercise of the power. *Jackson v. State ex. rel. Wyoming Worker's Compensation Div.*, 786 P.2d 784 (Wyo. 1990). Conservation districts are authorized by statute for the purpose of providing:

for the conservation of the soil, and soil and water resources of this state, and for the control and prevention of soil erosion and for flood prevention or the conservation, development, utilization, and disposal of water, and thereby to stabilize ranching and farming operations, to preserve natural resources, protect the tax base, control floods, prevent impairment of dams and reservoirs, preserve wildlife, protect public lands, and protect and promote the health, safety and general welfare of the people of this state.

WYO. STAT. § 11-16-103(b).

The District has certain powers enumerated by statute at WYO. STAT. § 11-16-122(b). They include:

(vii) Carry out preventive and control measures and works of improvement within the district, including engineering operations, range management, methods of cultivation, the growing of grass or other vegetation, changes in use of land or any measure which may be developed for the control of erosion and better use of soil, and works of improvement for flood prevention or the conservation, development, utilization and disposal of water on lands owned or controlled by this state or its agencies, with the cooperation of the agency administering and having jurisdiction thereof, or on other lands within the district with the consent of the owner or occupier of the lands;

(viii) Cooperate, or enter into agreements with and furnish financial or other aid to, any agency, governmental or otherwise, or any owner or occupier of lands within the district, in carrying on range management or erosion control and prevention operations and works of improvement for flood prevention or the conservation, development, utilization and disposal of water within the district, subject to such conditions as the supervisors deem necessary;

* * *

(xix) Manage, as agent of the United States or any of its agencies, and enter into agreements with the United States or any of its agencies, or this state or any of its agencies, to effect cooperation with the United States or any of its agencies under United States Public Law 566 approved August 4, 1954, or amendments thereto, in connection with the acquisition, construction, operation or administration of any land utilization, soil conservation, erosion control, erosion prevention, flood prevention projects, conservation of water, water utilization, disposal of water in watershed areas and other water projects within its boundaries;

* * *

(xxv) Make and execute contracts and other instruments necessary to the exercise of its powers.
(emphasis added)

Public Law 566, Title 16, Chapter 18 of the United States Code, authorizes the federal government to cooperate with states, political subdivisions and local conservation districts for the purpose of furthering conservation, development, utilization and disposal of water in order to protect and improve land, water resources and the quality of the environment. To accomplish these goals, the U.S. Secretary of Agriculture is authorized to work with local entities to carry out these works of internal improvement. In addition, the U.S. Secretary of the Interior may enter into cooperative agreements with local governments to enhance the protection of wildlife habitat on public and private land.

In addition, WYO. STAT. § 11-16-132 permits a conservation district to lease lands from a county or other political subdivision of the state:

Agencies of the state, county or any political subdivision of the state which have jurisdiction over or are charged with the administration of any state, county or other publicly owned lands lying within the boundaries of any district organized hereunder, shall cooperate to the fullest extent with the supervisors of the district to effect the programs and operations undertaken by the supervisors under this act and may lease such lands to a district. The supervisors of the districts shall be given free access to enter and perform work upon the publicly owned lands. The provisions of conservation ordinances have the force and effect of law over all publicly owned lands, and shall be in all respects observed by the agencies administering the lands. (emphasis added)

DISCUSSION

The statutes allow a conservation district to enter into agreements in order to carry out or engage in conservation efforts. While the statutes do not specifically address whether a conservation district can “own” property, management of real property, including leasing, does appear to be among the duties allowed to districts. “[T]he intention and meaning of the legislature must be determined from the language of the statute itself and not from conjecture aliunde.” *Mahoney v. L.L. Sheep Company*, 333 P.2d 712, 715 (Wyo. 1958). However, “[i]ntent must be found

in the language of the statute itself." *Weyerhaeuser Co. v. Walters*, 707 P.2d 733, 738 (Wyo. 1985); *see also, Lo Sasso v. Braun*, 386 P.2d 630, 631 (Wyo. 1963). "[I]t is a well-established principle that in construing a legislative enactment we must, if possible, ascertain the intent of the legislature from the wording of the statute. * * * Also, words utilized in the statute are to be given their plain and ordinary meaning unless otherwise indicated." *Wyoming State Department of Education v. Barber*, 649 P.2d 681, 684 (Wyo. 1982). "It is our duty to ascertain the intention of the legislature as completely as possible from the language used in the statute itself." *Elmore v. Van Horn*, 844 P.2d 1078, 1082 (Wyo. 1992), *quoting State, Department of Revenue and Taxation, Motor Vehicle Division v. Andrews*, 671 P.2d 1239, 1246 (Wyo. 1983). Reading the statutes *in pari materia*, there appears to be no public policy that would prevent a conservation district from managing an easement. In addition, since conservation districts can lease land, *see WYO. STAT. § 11-16-132*, it is logical that a conservation district can hold a real property interest such as an easement. All in all, it is our opinion that a court would recognize that a conservation district has been granted the authority by the Legislature to hold easements on real property.

While there are conservation easements in place in Wyoming, there do not appear to be any cases interpreting conservation easements. There is a body of law on easements, which may be used in interpreting conservation easements. Likewise, there are Wyoming cases on contract interpretation and restrictive covenants if the court views conservation easements as being more like contracts or restrictive covenants.

If the court were to view a conservation easement under easement law, it would have to determine whether such easement is "appurtenant" or "in gross." An "appurtenant," easement "runs with the land," and involves a dominant and a subservient estate. In *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 586 (Wyo. 1999), the Wyoming Supreme Court "identified certain 'badges' of appurtenant easements: whether the language indicates it was created to benefit a specific parcel of land; whether the easement creates a perpetual grant for ingress and egress; and whether the easement benefits the landowner in its use of the land and is not limited to a specific landowner." *Baker v. Pike*, 2002 WY 34, ¶ 13, 41 P.3d 537, ¶ 13 (Wyo. 2002), *citing to R.C.R.*, 978 P.2d at 586. An "easement in gross," on the other hand, is given to a nonowner of property for purposes of using the easement in a particular way. Examples of "easements in gross" include utility, electric, pipelines and similar easements. Conservation easements tend to have attributes of both easements in gross and appurtenant, and Wyoming courts have not yet determined whether a conservation easement should be viewed as "appurtenant" or "in gross."

On the other hand, if the court views conservation easements as being more like contracts or restrictive covenants, then a court could interpret a conservation easement under that body of laws. In *Streets v. J M Land & Developing Co.*, 898 P.2d 377, 379 (Wyo. 1995), the Wyoming Supreme Court looked at the issue of restrictive covenants in a case involving the equitable title holder placing restrictive covenants on land being purchased under a contract for deed. The buyers of the property believed that only the legal title holder, not the equitable owner, could place restrictive covenants upon the land, thus arguing that the restrictions did not "run with the land." The Court disagreed:

The general view is that a restrictive covenant is not strictly an easement and does not run with the land in the true sense of that term. Such agreements are, however, enforceable in equity against all those who take the estate with notice of them, although they may not be, strictly speaking, real covenants so as to run with the land or of a nature to create a technical qualification of the title conveyed by the deed. The question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. It has been noted that the enforcement of restrictive covenants or equitable servitudes is based on the equitable principle of notice; that is, a person taking title to land with notice of a restriction upon it will not, in equity and good conscience, be permitted to violate such restriction. (Footnotes omitted, emphasis added.)

In order for a restrictive covenant to "run with the land" the following elements must be established:

- a. The original covenant must be enforceable;
- b. The parties to the original covenant must intend that the covenant run with the land;
- c. The covenant must touch and concern the land;
and

d. There must be privity of estate between the parties.

20 AM. JUR. 2D *Covenants, Conditions and Restrictions* § 30 pages 600-601.

Regardless of which body of law may be applied, it would appear that the easement in question is designed to run with the land, the real property that is subject to the easement. Thus, as long as the easement does not violate the rule against perpetuities, the easement, which as we understand prevents development if the Tiehack Reservoir at some future date dries up, does not remove discretion from or bind future elected boards. The conservation easement, in all likelihood, will be found to run with the land to which the easement is attached.

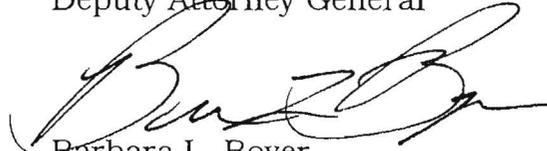
Sincerely,



Patrick J. Crank
Attorney General



Michael L. Hubbard
Deputy Attorney General



Barbara L. Boyer
Senior Assistant Attorney General