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Using Trusts to Conserve Resources: A Book Review of Conservation Trusts

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**Using Trusts to Conserve Resources:
A Book Review of
CONSERVATION TRUSTS**

Robert W. Malsheimer*

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Americans' new assumptions about government and scientists' new knowledge of ecological processes are changing resource conservation. Traditionally, federal, state, and local agencies employed nonpartisan, technically competent civil servants to implement policies designed primarily by Congress to achieve the public interest on publically-owned lands. Governmental authority devolution and dispersion trends have created the opportunity for nontraditional, innovative organizations to conserve natural resources. Scientists' expanded understanding of ecological processes has also increased the need for new resource conservation organizations.

Sally K. Fairfax and Darla Guenzler's book, *Conservation Trusts*¹, is based on their assumption that "the next several decades will be characterized by [a] proliferation and diversification of resource management institutions."² The authors argue that some of these organizations can be built on trust principles – principles most attorneys learned in their Wills and Trusts classes – and that existing organizations based on these principles can provide important lessons about how new resource conservation organizations can be designed.

The book is a product of Sally Fairfax's supervision of her co-author's and other students' graduate work.³ The authors' goal is "to add trust elements to the set of options that analysts and practitioners draw on when thinking about institutional arrangements for managing and conserving resources. [They do this by] telling stories shaped to raise questions about institutional choices."⁴ Nine of the book's twelve chapters analyze existing conservation trusts – organizations that Fairfax and Guenzler define as "conservation organizations built on or close to trust principles."⁵

The authors accomplish their goal. *Conservation Trusts* provides a comprehensive, balanced analysis of these new organizations.

¹ SALLY K. FAIRFAX AND DARLA GUENZLER, *CONSERVATION TRUSTS* (2001).

² *Id.* at 3.

³ Fairfax is a Professor in the University of California at Berkeley's Division of Resource Institutions, Policy, and Management and the Henry J. Vaux Distinguished Professor of Forest Policy.

⁴ Fairfax and Guenzler, *supra* note 1, at 4.

⁵ *Id.* at 3.

Its insights on the next generation of resource management institutions will be valuable to anyone interested in resource conservation. The book's emphasis on trust principles makes it particularly readable by, and valuable for, attorneys interested or involved in this area.

Organization and Contents

In addition to the nine case study chapters, the book contains three general chapters. The authors organize these chapters into five parts in the book. Part One contains three chapters: an introduction to conservation trusts and the book, a discussion of how trust principles can function as a framework for institutions, and conservation trust analysis that illustrates that framework. Fairfax and Guenzler analyze three trusts established in and by government agencies in Part Two. Part Three examines mixed public-private trusts. The authors evaluate land trusts and private and family trusts in Part Four. The book concludes with a discussion of the role of trusts and trust principles in resource conservation.

While nine of the book's twelve chapters are in-depth case studies of various conservation trusts, this review focuses on the themes the authors glean from those trusts. However, potential readers should know that some of the most fascinating sections of the book are the authors' descriptions of why each trust was created, how it operates, and whether it has been proven effective.

Part One

The book's first chapter, "A New Era in Land and Resource Conservation," is divided into four main sections and sets the stage for the book. It begins with the authors' goals for the book and how they accomplish those goals. This section is important because it introduces one of the books' most important themes: trust accountability. Accountability is important because many of the organizations the authors examined were "established specifically to sidestep government

oversight mechanisms.”⁶ The authors argue that accountability involves three issues. First, how much institution building (e.g., staff, fundraising, project development) is appropriate? Second, how can conservation trust activities be monitored? Third, how can the combined efforts of diverse groups acting in the same general region to achieve the same goal be assessed?

In the second section in the chapter, the authors convincingly argue that the proliferation of non-traditional resource conservation organizations is based on Americans’ changing assumptions about government and land. They argue that repeated, heated fights over moves to “privatize” federal lands (i.e., the Sage Brush Rebellions) have concealed the extent to which government has distributed the management of conservation programs to private organizations. They trace this development to 1964, and the enactment of the Land and Water Conservation Fund (LWCF) and changes in Internal Revenue Service (IRS) charitable donation regulations.⁷ The authors argue that the LWCF’s matching funds requirement of the development of a state comprehensive outdoor recreation plan: 1) stimulated the development of local professional expertise; and 2) “gave rise to private groups specifically designed to procure LWCF funds to support their own acquisition priorities and to assist unimaginative federal real estate specialists in actually making the transactions.”⁸ The IRS’s 1964 amendments to the charitable donation regulations allowed a landowner to take an income tax deduction for a charitable donation of a conservation easement and spurred the development of private groups to accept these easements.

The chapter’s next section describes alternative conservation organizational forms: government agencies; government corporations; nonprofit corporations; foundations; and consensus, watershed, and “Friends of” groups. This discussion is designed to allow readers to make comparisons between these organization forms and conservation trusts.

⁶ *Id.* at 5.

⁷ 16 U.S.C. §§ 4601-4 – 4601-11 (1964).

⁸ Fairfax and Guenzler, *supra* note 1, at 10.

Since the word “trust” is used in other contexts in resource conservation, the authors also discuss trusts that they did not consider for analysis. They distinguish conservation trusts from the public trust, the sacred trust, the Indian trust, a few pretend trusts, and the institutional category known as land trusts.

The second chapter, “The Trust as a Framework for Institutional Design,” reviews trust concepts that will be familiar to most attorneys. These concepts include trust principles of clarity, accountability, perpetuity, enforceability, prudence, and trust amendment. While attorneys familiar with trusts may be tempted to skim this section, this would be a mistake. These principles provide Fairfax and Guenzler’s framework for the next nine chapters’ analysis. More important, the authors explain how these principles relate to resource conservation and translate into conservation trust ideas. For example, they explain how traditional trust and land ownership principles preventing trust perpetuity do not apply to charitable trusts and how many perpetual conservation trusts’ framers limit trustees’ financial investment opportunities. The authors also evaluate the administrative problems inherent in perpetual land protection mechanisms.

The second chapter concludes with an overview of the diversity of the conservation trusts analyzed by the authors. The description of trust foundation, purpose, obligation, and organizational diversity prepares the readers for the next nine chapters’ analysis. This is important because Fairfax and Guenzler do not use subtitles to explicitly highlight how each of their six trust principles apply to the conservation trusts they analyze. While this mechanism allows the authors to concentrate on the trust principles that are most appropriate to their analysis of a particular conservation trust, this is one of the book’s defects. The lack of trust principle subtitles forces the reader to wonder how, and if, the trust principles Fairfax and Guenzler do not emphasize apply, or fail to apply, to each conservation trust.

The final chapter of Part One contains a detailed analysis of the Platte River Whooping Crane Maintenance Trust (PRT) – a

government-private trust located in Nebraska.⁹ The authors discuss the PRT in this section, rather than in Part Three, because “the PRT most closely reflects [the] trust principles” described in the previous chapter.¹⁰ In fact, they attribute the PRT’s success to “the clear presence of trust principles in [the PRT’s] . . . culture and decision making.”¹¹

Part Two

The next three chapters examine three government conservation trusts: the Dade County Wetlands Trust, the Exxon Valdez Oil Spill Trustee Council, and the Hawaiian Home Lands Trust. Fairfax and Guenzler’s government conservation trusts share two common elements. First, government resources fund each of these trusts. Second, they are all managed by what the authors call government trustees – trustees who are appointed by an elected official or trustees who serve *ex officio* as a function of their employment by a government agency.

The authors speculate that these conservation trusts share the least in common with traditional legal trusts because of their proximity to government bureaucracies. While trust principles are not evident in their operation, the authors argue that all three government conservation trusts’ framers utilized trust principles to establish the organizations. Trust principles differentiate these trusts from other governmental organizations in three ways. First, each trust has a corpus so the trust is not wholly dependent on legislative appropriations for their programs. Second, each trust addresses resource management issues that fall under the authority of multiple agencies. Third, trust principles allow the trusts to transcend legislative and agency assumptions, standard operating procedures, and unexamined policies.

Fairfax and Guenzler argue that these differences are important because government conservation trusts that are not permitted to operate outside the standard political setting achieve little. They conclude that “[when] government agencies, even those with a limited history of cooperation, are forced to manage common resources jointly, the trust

⁹ See *infra* Part Three (discussion of government-private trusts) and note 13.

¹⁰ *Id.* at 53.

¹¹ *Id.*

is a convenient and effective template for describing, in a sympathetic and credible way, the basis for joint action.”¹²

Part Three

The third part of the book examines government-private trusts – trusts that involve both governmental and private trustees. While Part Three includes only two trusts, the North Dakota Wetlands Trust and the Great Lakes Fishery Trust, the authors actually examine three government-private trusts because the PRT is also such a trust.

Fairfax and Guenzler’s analysis reveals that while each of these trusts have problems, none of them arise from the public-private sharing of power. Instead, they demonstrate that trust framers need to design boards of trustees to fit the purposes of the organization. The authors’ analysis also raises questions about government-private conservation trusts accountability and activities, and when these organizations are an appropriate way to spend public funds.

Part Four

The authors examine family, charitable, and land trusts in the last multi-chapter part of the book. These are conservation trusts supported with private funds and run by private boards of trustees. The authors analyze five organizations: the Phillips Memorial Trust, the Society for the Protection of New Hampshire Forests (SPNHF), the Bois De Brodeur Family Trust, the Highland Farm Family Trust and the Napa County Land Trust. Unlike other chapters that analyze only one conservation trust, the SPNHF chapter includes the analysis of three conservation trusts, the SPNHF, and the two family trusts.

Since private conservation organizations are “enjoying a period of almost uncritical public adulation,” the authors focus their analysis on four topics.¹³ First, how trust principles foster public accountability for private organizations indirectly supported by government tax policy. Second, how these trusts patch together privately-owned parcels with

¹² *Id.* at 59.

¹³ *Id.* at 152.

public lands to conserve not only individual parcels, but landscapes. Third, when private landowners should be allowed to perpetuate their conservation preferences. Fourth, how private conservation trusts' acceptance of traditional natural resource agency responsibilities may affect these trusts in the future.

Part Five

Fairfax and Guenzler's conclusion is one of the most interesting parts of the book. The chapter applies the knowledge gained from the in-depth examination of the conservation trusts in the preceding nine chapters to the authors' discussions of trust principles in the first and second chapters.

The chapter is divided into three sections. The first section addresses how conservation trusts demonstrate the continued devolution and dispersion of governmental authority. While most of the authors' analysis collaborates the government devolution and dispersion theories, their conclusion is enlightening. They argue that "it is inadequate to think only in terms of private organizations edging" into natural resource agencies' areas of expertise.¹⁴ "The opposite is . . . true – governmental agencies are increasingly inclined to pursue their missions under the cover of or on the terrain of private ones."¹⁵ The authors believe this is why it is "increasingly difficult to locate clear boundaries between governmental and non-governmental [conservation] organizations."¹⁶

The second section discusses how the six trust principles discussed in chapter two "address problems of democratic governance inherent" in the blending of public and private institutions.¹⁷ While this section provides an excellent summary of how these principles pertain to the trusts discussed in the previous nine chapters, it is also one of the book's most frustrating sections. The inclusion of a table that cross-referenced these principles with the eleven trusts described in the book

¹⁴ *Id.* at 202.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 199.

would make the section, and more importantly, the book's contribution to resource conservation much easier to understand. Without such a table, the reader is forced to make such an analysis on her own.

The authors use the final section of the chapter to "draw together some of the more useful lessons" they learned from studying conservation trusts.¹⁸ These include advice, such as:

1. trust "[f]ramers must begin by identifying means to ensure that those required to put up money for the corpus will do so,"¹⁹
2. "those entering into partnerships with the federal government should proceed with caution,"²⁰
3. trustees need to be educated about their basic obligations "and the peculiar strengths and requirements of trust principles,"²¹ and
4. conservationists, and particularly the environmental community, need "to think beyond familiar modes of 'direct' conservation."²²

These lessons also include the authors' impressions, such as "we are quite impressed by the notion of overlapping easements[, and] . . . we reiterate our concern about setting public resources outside of standard routines of accountability and then effectively shutting off the trust's judicial enforcement mechanisms."²³

Conclusion

The authors' concluding lessons illustrate one of *Conservation Trusts'* greatest assets. While Fairfax and Guenzler believe some conservation organizations can use trust principles, they do not advocate the wholesale use of conservation trusts. Instead, they critically analyze

¹⁸ *Id.* at 210.

¹⁹ *Id.* at 211.

²⁰ *Id.*

²¹ *Id.* at 212.

²² *Id.*

²³ *Id.* at 211.

the advantages and disadvantages of conservation trusts and highlight the potential pitfalls for resource conservationists and their advisors to avoid.

Although the book is an important addition to the resource conservation literature, it does suffer some minor problems. As mentioned, the lack of a summary table and the authors' selective examination of trust principles in their trust analysis present difficulties for readers.

However, these problems do not diminish the value of Fairfax and Guenzler's work. Attorneys involved in natural resource litigation will find the book useful in their settlement deliberations because conservation trusts are often the result of litigation settlements. Attorneys who counsel wealthy clients interested in resource conservation will learn important lessons about drafting charitable resource conservation trusts. Attorneys on conservation trust boards, or who advise such boards of trustees, will better understand how trust principles affect their trustees' responsibilities and obligations and may discover new models for their boards.

These examples illustrate why conservation trusts are so attractive to attorneys. Attorneys already understand trust principles. They only need to understand how these principles apply to resource conservation organizations. This is exactly what Fairfax and Guenzler do in *Conservation Trusts*. Resource conservation attorneys can either read this book or risk repeating the mistakes made by existing conservation trusts.