

LAW REVIEW AUGUST 1994

LAND & WATER CONSERVATION FUND ACT  
BLOCKS CONVERSION OF SCENIC EASEMENT TO GOLF COURSE

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The Land and Water Conservation Act of 1964 (LWCF), Public Law 88-578 (16 U.S.C. §§ 460L-4-460L-11) was signed into law on September 3, 1964. Therefore, as we observe the thirtieth anniversary of the LWCF, it seemed appropriate to review a landmark decision which underscored the significance of this federal statute in preventing the diversion of public recreation resources to other uses. In the absence of LWCF protection (or a private dedication of land expressly restricted to public park purposes) governments are generally free to divert public recreation lands to other purposes. As a result, limited public park and open space resources oftentimes offer a convenient and low cost solution to satisfy increased demand for state and local public works projects, such as roads, schools, public housing, etc.

In the *Friends* decision described herein, the LWCF provided private citizens with a means to block, at least temporarily, a proposed golf course on a scenic state park resource acquired by the state through an LWCF grant. Accordingly, when a public park or recreation resource is threatened with diversion, it would behoove public or private opponents to such government action to determine if the imperiled resource was acquired or developed with LWCF funds during the past thirty years.

With a Little Help from My Friends

In the case of *Friends of the Shawangunks, INC. v. Clark*, 754 F.2d 446 (Cir.2d 1985), a group of private citizens dedicated to the preservation of a particular natural resource sued the Secretary of the Interior for the alleged failure of the National Park Service to comply with requirements of the Land and Water Conservation Fund Act. The facts of the case were as follows:

The Shawangunk Range, located in Ulster County, New York, is noted for spectacular rock formations, sheer cliffs, windswept ledges with pine barrens, fast-flowing mountain streams and scenic waterfalls, as well as a series of five mountain lakes, the "Sky Lakes." Of these, Lake Minnewaska is one, with extremely steep banks and many magnificent cliffs rising as high as 150 feet along its northern and eastern shores...

In 1971, the State of New York purchased about 7,000 acres of land bordering Lake Minnewaska to the south and west for the formation of Minnewaska State Park. The park is under the jurisdiction and management of the Palisades Interstate Park Commission (PIPC), an interstate park commission formed by compact between the State of New York and the State of New Jersey.

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In 1977, the PIPC added 1,609 acres of land to the park and purchased an approximately 239-acre conservation easement over Lake Minnewaska itself and certain land adjacent to it, all with the help of 50% federal matching funds from the Land and Water Conservation Fund.

According to its terms, the easement was "for the purpose of, but not solely limited to, the conservation and preservation of unique and scenic areas; for the environmental and ecological protection of Lake Minnewaska and its watershed; and to prevent development and use in a manner inconsistent with the present use and operation of lands now owned and to be conveyed [to the PIPC] and to be part of Minnewaska State Park."

Let's Make a Deal!

In 1980, the Marriott Corporation, a national hotel and resort developer, acquired an option in 1980 to purchase approximately 590 acres, including the water and lands encumbered by the 239-acre easement. Marriott proposed to develop a resort facility, including an expanded, professional grade golf course. Eight holes and related facilities were to be constructed on property subject to the easement. Beginning in early 1981, the PIPC and the Mid-Atlantic Region of the National Park Service debated accommodating Marriott by amending the conservation easement.

Friends of the Shawangunks, Inc., a New York not-for-profit corporation with approximately 600 members devoted to insuring the "preservation and prudent development of the Shawangunk Mountains in Ulster County, New York, as a natural resource for all to enjoy," and certain individual members or "Friends" of the Shawangunks opposed the contemplated amendment. Specifically, the Friends argued that "the amendment would constitute a conversion under section 6(f)(3) requiring the approval of the Secretary of the Interior. Further, the Friends maintained that "the conversion did not meet that section's criteria for approval."

Despite the Friends' arguments, the PIPC resolved on July 20, 1981, "to amend the conservation easement to allow the Marriott Corporation to expand the golf course as proposed, drill wells within the easement area, increase the use of water from Lake Minnewaska, and utilize acreage encumbered by the easement for purposes of computing total average density of residential development."

In consideration, Marriott agreed to extend the area covered by the easement, permit public access to footpaths through the easement area and adjacent lands owned by Marriott, maintain the lake level above an elevation of 1,646 feet, limit development on its other adjoining property, and open the golf course to the public twenty-five percent of the time.

On October 20, 1981, the National Park Service notified PIPC that "the contemplated amendment of the conservation easement did not constitute a section 6(f)(3) conversion and therefore did not require

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any federal authorization." This determination prompted the Friends to bring their lawsuit against the Secretary of the Interior and the National Park Service. The federal district court granted summary judgment to the federal government. In the opinion of the district court, the challenged amendment to the conservation easement "did not constitute a conversion" under section 6(f)(3) of the LWCF. Specifically, the district court reasoned that "because the public had no access to the lands encumbered by the easement these lands "presently are not intended for outdoor, public, recreational use" within the meaning of the Land and Water Conservation Fund Act of 1964".

Hence, whatever limited public access is contemplated by the terms of the proposed amendment to that easement, therefore, must be viewed as nothing less than a bonus to the public, and not as a diminution in, or conversion of, the availability of public, outdoor, recreation facilities.

### Scenic Easement Golf?

The Friends appealed this judgment to the U.S. Court of Appeals, Second Circuit. As characterized by the federal appeals court, "[t]his case presents the novel question whether amendment of a conservation easement acquired in part with federal funds under the Land and Water Conservation Fund ACT of 1965 as amended, 16 U.S.C. §§ 4601-4 to 4601-11 (1982), so as to permit expansion of a golf course with limited access constitutes a conversion 'to other than public outdoor recreation uses' under section 6(f)(3) of the [LWCF] Act, 16 U.S.C. § 4601 -8(f)(3)." In pertinent part, Section 6(f)(3) of the LWCF provided as follows:

No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

"When faced with a problem of statutory construction," the federal appeals court acknowledged that "a court should show considerable deference to any reasonable interpretation given the statute by the officers or agency charged with its administration, especially where specialized agency understanding is involved." However, under the circumstances of this case, the appeals court agreed with the Friends that "the district court wrongly decided that the easement lands presently are 'not intended for outdoor, public, or recreational use'." On the contrary, "in light of the policies of the Department of the Interior and the purposes of the statute," the appeals court found the proper definition of "public outdoor recreation uses" in section 6(f)(3) should be interpreted "broadly, to encompass uses not involving the public's actual physical presence on the property."

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After all, Webster's Third New International Dictionary (1971) defines "recreation" as "refreshment of the strength and spirits after toil,"; surely by exposing scenic vistas and serving as a buffer zone between Minnewaska State Park and developed areas, the easement area provides such refreshment...

Here the Department of the Interior apparently agrees with the Friends that the term "public outdoor recreation uses" should be construed to include conservation easements such as the one at issue. Thus, the Department's Bureau of Outdoor Recreation Manual (Dec. 14, 1973) (hereinafter cited as Manual) indicates the Department's own broad construction of the Act, pointing out that acquisitions eligible for federal assistance as "lands and waters for public outdoor recreation," id. s 640.2.1., include "[n]atural areas and preserves and outstanding scenic areas where the objective is to preserve the scenic or natural values, including areas of physical or biological importance and wildlife areas," id. Outdoor recreation activities are defined to include "sightseeing" and "nature study." Id. § 640.2.2...

### Conservation Recreation?

While noting that "a mere surface view of the Act itself seems to show that Congress intended primarily to increase opportunities for active physical recreation," the appeals court found that "both the legislative history and the Act itself reveal Congress's broader concerns."

The statement of purposes, for example, envisions "individual active participation in [outdoor] recreation." 16 U.S.C. § 4601 -4. Concededly, much of the Act deals with admission and special recreation use fees, see id. §§ 4601-5a, -6a, -6b, again contemplating actual physical entry...

The Senate Report prominently mentions the need to improve "the physical and spiritual health and vitality of the American people." S.Rep. No. 1364, 88th Cong., 2d Sess. 4 (1964). Similarly, when President Kennedy first transmitted to Congress the draft legislation on which the Act is based, his accompanying letter referred specifically to the preservation of "irreplaceable lands of natural beauty and unique recreation value" and to "the enhancement of spiritual, cultural, and physical values resulting from the preservation of these resources."

Accordingly, the appeals court acknowledged that "Conservation may include, though it is by no means necessarily limited to, the protection of a present resource in its natural state."

It is after all a "conservation" fund Act... Indeed, the Act's stated purposes include "preserving" the "quality" of outdoor recreation resources. 16 U.S.C. § 4601-4. The focus on preservation reappears in section 4601 -9(a)(1), which authorizes allocation of

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funds for federal acquisitions both to protect endangered and threatened species and also, by reference to section 460k-1, to protect "natural resources."

### Conservation Conversion?

As a result, the appeals court, contrary to the district court's holding, concluded that "the easement area presently is used for 'public outdoor recreation uses,' as that term of art was conceived by Congress and has been interpreted by the Interior Department." In light of this determination, the appeals court then had to consider "whether the amendment at issue here constitutes a 'conversion' of that easement to other than outdoor, public, recreation uses within the meaning of section 6(f)(3)." While observing that "the nature of a conservation easement makes the application of the concept of conversion somewhat elusive," the appeals court concluded that "the proposed amendment does constitute such a conversion" under the facts of this particular case.

The property acquired by PIPC through its purchase of the easement was the right to prevent further development of the land underlying the easement. By the proposed amendment, Marriott, the holder of the fee, would be permitted to engage in precisely such development, changing both the character of the land and the population having access to it. By the amendment, in effect, PIPC would convey away its right to prevent any change in the character of the land subject to the easement. The view that such a change constitutes a "conversion" is supported by the Department of the Interior's own practice.

In a May 15, 1978, Memorandum from the Director of the Department's Heritage Conservation and Recreation Service to all Regional Directors, delegating to them the conversion-approving function, the Director defined "conversion" to include instances in which "[p]roperty interests are conveyed for non-public outdoor recreation uses." It is plain that there is a conversion from public enjoyment of an unspoiled area to private golfing.

### LWCF "To Do" List

Having found that the proposed amendment to the LWCF conservation easement would constitute a "conversion," the appeals court found that section 6(f)(3) would require the following:

The Secretary [of Interior], in the words of section 6(f)(3), must determine that the conversion is "in accord with the then existing comprehensive statewide outdoor recreation plan" and grant his approval "only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location." These findings may seem simple, but they nevertheless must be made.

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Acting Regional Director [of the NPS] Castleberry's letter stating that there was no conversion may not be treated as making them; though his letter did look to these very criteria, we cannot assume that he gave them the attention outlined in the above-mentioned Memorandum of May 15, 1978, which instructs regional directors to determine, for example, that "[a]ll practical alternatives to the conversion have been evaluated and rejected on sound bases," and that the fair market values of the property to be converted and of the property to be substituted have been established and compared.

Thus, though Acting Regional Director Castleberry reviewed the New York State Department of Environmental Conservation's Draft Environmental Impact Statement on Marriott's project, which presumably considered the project's impact on the state's outdoor recreation plan, and though he implicitly found that the amended easement was "reasonably equivalent" to the original easement when he concluded "that none of the stated purposes for which the easement was acquired are defeated and that public recreation opportunities have been increased," we cannot assume, for example, that he made sure that all practical alternatives were considered and rejected (e.g., whether the new golf holes could be built elsewhere on Marriott land), or that he established and compared the fair market values of the original and amended easements. We assume, rather, that Acting Regional Director Castleberry would engage in more careful scrutiny before approving a conversion than before determining, as he did here, that his approval was unnecessary.

The federal appeals court, therefore, held that "the amended easement constitutes a conversion to 'other than public outdoor recreation uses,' requiring the Secretary's approval."

[W]e would require approval by the Secretary in this case even if the Marriott Corporation planned to build a completely public outdoor recreation facility, because such a plan would be inconsistent with the original easement's prohibition of new facilities... The Act requires the Secretary to approve all "planning, acquisition, or development projects" before allocating federal funds. It envisions that these "projects" will affect the future of the area acquired, preserving outdoor recreation opportunities for "present and future generations."

Consistent with Congress's concern for lasting recreation opportunities, the Secretary approved federal funding for the Minnewaska easement in part because of the plans for the easement area's future--specific constraints on development and guarantees of environmental protection. Consequently, any future change that contravenes these plans retroactively calls into question the basis for the original federal funding. Such a change necessarily requires the Secretary's approval, whether or not the change falls within the

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Act's definition of a "conversion." Otherwise, the Secretary's initial approval of a "project" extending into the future would be meaningless. Once again, it would not be enough for the Secretary to find that federal approval is unnecessary; while the statutory criteria for approval would not apply to a change from one public use to another, positive approval is still required.

### You Win Some, You Lose Some

In making its determination, the appeals court recognized Marriott's efforts in a "rather cumbersome process involving a considerable amount of time and effort that undertaking this development has entailed."

Marriott tells us that the project has been reviewed not just by the PIPC and the Department of the Interior, but also by the New York State Department of Environmental Conservation, the County of Ulster, the Town of Rochester, and the New Paltz Central School District, and several law suits have been filed.

Unfortunately, or fortunately perhaps, the courts do not control the process, let alone establish it. When one undertakes to develop for private purposes a project involving the use of lands encumbered by a government interest, one's expectations are, or should be, that a certain amount of process and expense will be involved; presumably the anticipated rewards offset the cost and hassle, though surely the ultimate consumer will pay the cost of the benefit the process achieves, or there will be a hole in the developer's pocket. A court is left with the thought that one challenge of the years ahead is to cut down the process, thus lowering the cost, even while preserving the benefit. Meanwhile, the court's duty remains to follow the law as written and intended.

As a result, the federal appeals court reversed the summary judgment of the lower court in favor of the federal defendants and remanded (sent back) this case to the federal district court. On remand, the appeals court directed the district court to "enter judgment prohibiting amendment of the easement without an appropriate determination by the Secretary as to the effect of conversion."