

John T. Alexander
Biron L. Bedard ¹
Lisa L. Biklen
Ronald E. Cook ²
Nicole B. Jacobson ³
Frank E. Kenison
Garry R. Lane ⁴
Paul H. MacDonald ⁵
Michael J. Malaguti
Thomas N. Masland
Daniel J. Mullen
John C. Ransmeier
Lawrence S. Smith

**Ransmeier
& Spellman** P.C.
ATTORNEYS AT LAW

One Capitol Street
P.O. Box 600
Concord, New Hampshire 03302-0600

Telephone 603.228.0477
Fax 603.224.2780
Website www.ranspell.com

May 10, 2013

Joseph S. Ransmeier
1915-2010

Lawrence E. Spellman
1924-2001

Dom S. D'Ambruoso
Retired

¹ Also admitted
in Maine

² Also admitted
in Rhode Island

³ Also admitted in
Massachusetts and
Pennsylvania

⁴ Also admitted
in Maine and
Connecticut

⁵ Also admitted
in Vermont

Jane A. Difley, President/Forester
Society for the Protection of NH Forests
54 Portsmouth Street
Concord, NH 03301

Re: Connecticut Headwaters Conservation Easement and Northern Pass

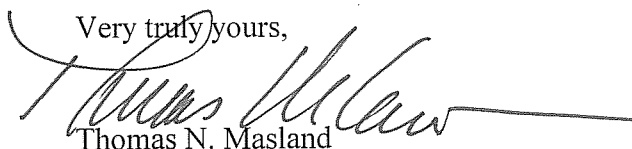
Dear Jane:

At your request we have analyzed the Connecticut Headwaters Conservation Easement Deed, granted to the State of New Hampshire in October, 2003, in light of the proposed development of a corridor for the construction of the Northern Pass transmission line, given the proximity of recent acquisitions to the property protected by the Easement. Our memorandum in response to your request is enclosed.

We conclude that the express terms of the Conservation Easement Deed prohibit the penetration of the Northern Pass project into, on, or under the land protected by the conservation easement and there is no easement provision which would allow the State to consent to utilizing any portion of the land subject to the easement with the Northern Pass project. Moreover, the State of New Hampshire, as the easement holder, has the duty and responsibility to defend and enforce the easement.

We would be pleased to discuss any questions or concerns you may have with you.

Very truly yours,



Thomas N. Masland

tom@ranspell.com

Direct Dial: (603) 410-6636

TNM/jmm/Enclosure

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MEMORANDUM

TO: Jane A. Difley, President/Forester
Forest Society Leadership Team

FROM: Thomas N. Masland, Esq. 
Paul H. MacDonald, Esq.

RE: The Connecticut Headwaters Conservation Easement and Northern Pass

The Northern Pass Transmission Project (the "Project") is a proposed 180-mile high-voltage, direct-current transmission line connecting Hydro-Quebec's power generation facilities in Canada to the New England electrical grid. The New Hampshire portion of the transmission line would be built and owned by a limited liability company referred to as "Northern Pass (NP)," with funding from an indirect, wholly-owned subsidiary of Hydro-Quebec. The members of Northern Pass are Northeast Utilities (the parent company of Public Service of New Hampshire) and NSTAR, a Boston-based electric distribution company. As currently proposed, the northern 40 miles of the route requires the Project developers to obtain a new right-of-way through Coos County. The construction of the transmission line would necessitate the clearing of the right-of-way through existing forest land, and the erection of towers at least 85 to 90 feet in height, and perhaps taller in some areas.

By Conservation Easement Deed recorded October 10, 2003 at Book 1054, Page 434 of the Coos County Registry of Deeds, the Trust for Public Land as the landowner – grantor conveyed and granted a perpetual conservation easement protecting 146,400 acres in Coos

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County to the State of New Hampshire, acting by and through the Department of Resources and Economic Development. (This Conservation Easement is sometimes referred to herein as the "Easement"). Northern Pass has yet to announce its intended route across Coos County, but recent land acquisition patterns indicate that a potential route approaches land that is subject to this easement. Therefore, the question presented is whether the Northern Pass Project, as proposed, would be an allowed use of the land under the terms of the Easement.

The clear language of the Easement restricts commercial development of the protected Property that is not related to the Purposes of the Easement, and this land is not available to Northern Pass, as the uses and activities proposed by the Project are prohibited by the express terms of the Conservation Easement Deed.

The Conservation Easement Deed itself is a thorough, detailed and comprehensive conveyance to the State of New Hampshire of the right to restrict certain activities on the underlying Property. The land subject to the Easement is now owned by The Forestland Group, identified in the Easement as the "Fee Owner". As background, a Conservation Easement Deed is authorized by RSA 477:45 – 47, and constitutes an interest in real estate conveyed to the holder. The Connecticut Headwaters Easement was purchased with funds from both public and private sources. Public sources include federal funding through the Federal Forest Legacy Program and New Hampshire state funding through both the Land and Community Heritage Investment Program (LCHIP) and a direct expenditure authorized by the New Hampshire Legislature (Laws 2002, Chapter 148). Private funding included grants from private foundations and individual charitable donations solicited and received by tax-exempt charitable organizations, as funds dedicated to the Easement acquisition and stewardship.

The forty-two (42) page Easement Deed (not including signature pages and the property description) begins with a lengthy Preamble that places the grant of the Easement in context, and provides a detailed narrative description of the conservation, geological, cultural, historical and economic attributes of the Property that are protected by the Easement and the broad political and financial support for conserving this iconic forested land.

The Preamble is followed by a comprehensive statement of the "forest land protection and multiple use conservation purposes (the "Purposes")" of the easement grant. As will be discussed below, many provisions in the Easement refer back to these Purposes, to place in context considerations such as allowed uses and activities on the Property and as the Easement Holder fulfills its obligations to review proposed activities, assure that the uses of the Property are consistent with the Easement, and to enforce the Easement. The Purposes include:

“ i. To *conserve open spaces, natural resources and scenic values*, particularly the conservation of the 146,400 acres and the productive forest on the Property, *for the enjoyment, education, and benefit of the general public*; and

“ii. To *sustain traditional forest uses* including Forest Management Activities (as defined in Section 2.B) and Permitted Recreational Activities (as defined in Section 5.1); and

“iii. To conserve waterfront, streams, riparian areas and the quality of groundwater and surface water resources, and to conserve biological diversity, fish and wildlife habitats, rare plants and animals, rare and exemplary natural communities and cultural resources on the Property; and

“iv. To conserve the unusual natural habitat type known as the “high elevation mountain spruce-fir forest” that supports rare animals and pockets of mature forest stands located above 2,700 feet in elevation; and

“v. To guarantee the Easement Holder’s right to permit public access on the Property which will allow the general public to hike, hunt, fish, and trap, snowmobile on Designated Snowmobile Trails (as defined in Section 5.A.v), drive motorized vehicles on Designated Roads (as defined in Section 5.D), and participate in other natural resource-based outdoor recreational activities, natural resource-based outdoor conservation activities, or natural resource-based outdoor conservation education on the Property; and

“vi. To retain the Property as an economically viable and sustainable tract of land, conducive to ownership by a private timberland owner or timberland investor, for the protection of timber, pulpwood, and other forest products.”

(Emphasis added.)

The Purposes section also specifically makes reference to the public policy goals and objectives of the Federal Forest Legacy Program (16 USC Sec. 2103c), the New Hampshire Land and Community Heritage Investment Program (LCHIP) (RSA Ch. 227-M)¹ and the authorization established by the New Hampshire Legislature in Laws 2002, Chapter 148.

I. The express terms and conditions of the Conservation Easement do not allow the development of the Northern Pass Project

A. Section 2, “Use Limitations” prohibit the development of the Northern Pass Project

¹ These statutes will be more specifically discussed below.

Section 2 of the Conservation Easement Deed, "Use Limitations", sets forth specific restrictions on the use of, and activities which are prohibited, the Property which is protected by the Easement. The only commercial or industrial activities that may be conducted on the Property are those specifically allowed by the Easement. A number of the limitations and restrictions expressly prohibit aspects of the Northern Pass Project.

Initially, Section 2.A.i provides that "[t]he Property shall be maintained in perpetuity as open space ... ***without any residential, industrial or commercial activities being conducted thereon***, except Forest Management Activities..." and other rights specifically reserved or permitted in the Easement Deed (emphasis added). As the Northern Pass Project is a "commercial activity" that is not forest management, it is prohibited by this Use Limitation.

Use Limitation 2.C. establishes a stewardship goal for the Property. It provides that activities on the Property "shall be balanced to protect the existing multiple uses of the Property in a manner which are consistent with the Purposes" of the Easement. Section xi specifically includes "Conservation of scenic qualities" as a stewardship goal.

Use Limitation 2.I. prohibits the construction, placement or introduction of any structures or improvements on the Property, specifically referencing "tower[s]".² Since the Northern Pass Project as designed would involve the construction or introduction of "structures" on the Property, including towers (anticipated to be 80-135 feet tall), it is prohibited by this Use Limitation.

Use Limitation 2.J. prohibits excavation on the Property, including "removal, filling, or other disturbances of soil surface, or any changes in topography, surface or subsurface water systems, unless necessary for Forest Management Activities. As the construction of the Northern Pass Project would necessarily involve on-site construction, and disturbances of the soil, the development of the Project is prohibited by this Use Limitation. In addition, this section would prohibit the burying of the transmission lines within the area protected by the Easement.

B. Section 3, "Reserved Rights" of the Landowner do not allow the development of the Northern Pass Project within the easement area.

Easement Section 3, Reserved Rights, sets forth express rights retained by the landowner that may be inconsistent with the Use Limitations, or that are specifically reserved to the landowner, for activities allowed on the Property. This section of the Easement includes twelve separate sections reserving to the landowner certain rights, including among other things, the right to enjoy outdoor conservation education and recreation opportunities on the land, to grant

² Except as provided in Sections 3 Reserved Rights and 5 Affirmative Rights and Responsibilities of the Easement Holder

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access to others and to construct trails, recreational improvements and licensed sites for those purposes, the right to engage in specific forest management activities and to process forest products; and the right to utilize water resources that may exist on the Property.

In this comprehensive Reserved Rights section, there is no specific reserved right, nor any generally stated reserved right, for the construction or development of any industrial or commercial activity that is not related to forestry and forest management, recreation or water resource management. There is no reserved right which would permit the landowner to allow the introduction of a utility corridor or the construction of a transmission line on the property protected by the Easement. The Section also establishes that the exercise of any reserved right on the Property must be consistent with the Stewardship Goals and the Purposes of the Easement.

C. Other Easement provisions confirm that Conservation Easement prohibits the development of the Northern Pass Project on the protected Property

Easement Section 5 is titled Affirmative Rights and Responsibilities of the Easement Holder. While the Easement provides for public access for recreational purposes on the Property, Section 5.H states “no member of the public shall have any independent right to use the Property under this Easement except pursuant to programs and policies established by the Easement Holder in accordance with this Easement.” In other words, all of the rights of the public to the Property are solely pursuant to the programs and policies of the Easement. Northern Pass has no independent right of access for its project, and as the commercial development of the Project is contrary to the explicit Purposes of the Easement, it cannot be agreed that there are “programs or policies” of the Easement Deed to allow for the development of the Project.

Easement Section 13, Additional Easement and Rights, provides for the possible introduction of additional easements or rights of way across the Property, and at first blush might seem to provide an opportunity for a limited departure from the Easement restrictions to allow for a utility right of way. However, on close reading the section indeed provides further restrictions to projects such as Northern Pass. This section reads in its entirety as follows:

“The Fee Owner ***shall not convey***, grant, exchange, or otherwise transfer use restrictions, licenses, ***rights-of-way, or other easements into, on, over, under, or across the Property without the prior written permission of the Easement Holder*** or except as may be otherwise specifically permitted by this Easement. Such written permission shall be recorded in the Coos County Registry of Deeds. ***No rights-of-way, easements of ingress or egress, driveways, roads, utility lines or other easements shall be constructed, developed, or maintained into, on, over, under, or across the Property without the prior written permission of the Easement Holder*** except as may be otherwise specifically permitted in this Easement. The Easement Holder shall grant permission if it determines,

in its sole discretion, that any such interest would be *consistent with the Purposes* of this Easement. *Any permitted use, restriction, or easement shall be consistent with the Purposes of this Easement, must be accepted and recorded by a governmental entity described in Section 14 or a qualified organization* within the meaning of Section 170(h)(3) of the U.S. Internal Revenue Code of 1986; as amended, and shall be recorded in the Coos County Registry of Deeds.” (Emphasis added.)

This section establishes the following:

- The right of the Fee Owner to grant rights-of-way or other easements on the Property is prohibited without the prior written permission of the Easement Holder or except as otherwise specifically permitted by the Easement Deed. Thus, because Northern Pass Project is not specifically permitted, the Easement Holder must expressly approve this use.
- However, the Easement Holder shall grant such permission only if it determines, in its sole discretion, that any such interest would be consistent the purposes of the Easement. In other words, the State has absolute discretion to determine the consistency of the proposed right-of-way with the Purposes of the Easement. The “sole discretion” of the State means that the State is not required, nor does it need, to solicit public input or hold hearings before making its decision.
- Further, this section establishes an absolute prohibition against the “construction of utility lines” without the prior written permission of the Easement Holder, which shall be granted only if the proposed construction is consistent with Purposes of the Easement. A review of the Purposes of the Easement, quoted above, establish that the Northern Pass Project is inconsistent with the Purposes of the Easement.
- Interestingly, this section, which consists of four sentences only, uses the terms “specifically permitted by this Easement” twice and “consistent with the Purposes of this Easement” twice. Each sentence of the section contains one or the other of these phrases, without exception. In other words, any discretion to grant a right-of-way or easement must be either specifically permitted by the Easement or consistent with the Purposes of the Easement. As stated above, the development of a private utility transmission corridor meets neither of these tests; and to the contrary such a use is clearly prohibited by the terms of the Easement.
- Finally, the final sentence of this section establishes that any restriction or easement that may be granted or imposed must be “accepted and recorded by a governmental entity described in Section 14 or a qualified organization within the

meaning of Section 170(h)(3) of the Internal Revenue Code”. These are “qualified” Easement holders under the terms of the Code, and do not include private, independent or commercial entities. In other words, the final sentence of this section establishes clearly that any additional easement is to benefit or be consistent with the purposes of a not-for-profit or governmental entity only, and not a private commercial enterprise.

- The Northern Pass Project meets none of these tests. Because any additional easement must be accepted by a government agency or qualified conservation organization, it is clear that a no right-of-way, easement use, or restriction could be granted to a utility or other commercial enterprise.

Section 13 of the Easement Deed does not allow Northern Pass to obtain an easement or right of way to develop the Project on, under or across the Property or any portion thereof.

II. **The Conservation Easement Deed cannot be amended to allow the construction of a Project that is contrary to the Purposes of the Conservation Easement.**

The prospect of amending the Conservation Easement to allow for a limited intrusion by the Northern Pass Project may be raised, as the Easement Deed does include a provision that anticipates the possibility of amending the Easement.

Easement Section 16 provides for the amendment of the Conservation Easement, but only in very limited terms and circumstances. This section is entitled “Limitation on Amendment”, and reads in its entirety as follows:

“If circumstances arise under which an amendment to or modification of this Easement would be appropriate, the Fee Owner and the Easement Holder may, by mutual written agreement, jointly amend this Easement provided that no amendment shall be made that will adversely affect the qualifications of this Easement or the status of the Easement Holder under any applicable laws including the Forest Legacy Program (16 USC Section 2103c), the Land and Community Heritage Investment Program (RSA 227-M), and RSA 477:45-47. Any amendment shall be *consistent with the Purposes and Stewardship Goals* of this Easement and shall not affect its perpetual duration. Any amendment shall be recorded in the Coos County Registry of Deeds after all approvals required by law have been obtained. *Nothing in this Section shall require the Fee Owner or the Easement Holder to agree to any amendment or to consult or negotiate regarding any amendment.*”

With respect to a possible amendment, the initial question is whether an amendment “would be appropriate”. This threshold question means that an amendment needs to be consistent with the goals and specific purposes of the Easement, absent any further instruction to that effect. The amendment of this Easement to introduce a project clearly contrary to the Purposes of the Easement and expressly prohibited by the terms of the Easement Deed itself is “not appropriate”. The development of such a Project is contrary to all aspects of the Easement. Thus, the thought of amending the Conservation Easement to allow commercial industrial development of this type is clearly inappropriate and fails the threshold test.

Beyond the issue of appropriateness, a proposal to amend the Conservation Easement Deed to allow the development of a utility transmission corridor across the protected Property would fail each of the tests or provisions of these sections.

- An amendment cannot adversely affect the qualification of the Property for the Forest Legacy Program, or LCHIP. As will be discussed in the section that follows, the development of the Northern Pass Project on the Property is expressly prohibited by both programs.
- Any amendment must be consistent with the Purposes and Stewardship Goals of the Easement. An amendment to allow the private commercial development of an electricity transmission line is inconsistent with these sections of the Easement.
- As will be discussed in more detail below, RSA 227-M prohibits the release or disposal of any resource protected with LCHIP funding from the public trust, or put to a use which is inconsistent with the purposes for which it was acquired.

An amendment to allow the development and construction of the Northern Pass Project meets none of these tests. As Section 18 expressly does not require the Easement Holder to “consult or negotiate” regarding an amendment, the Easement Holder can not, and simply should not, entertain any request for an amendment to allow any such development on the Property.

As a matter of affirmative policy, any amendment of a conservation easement in New Hampshire is required to meet the guidelines set forth in the publication “Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements”³ (the “Guidelines”). This was published in response to the announcement by the Attorney General that conservation easements, regardless how acquired, are subject to charitable trust principals.

³ The Guidelines are available on the New Hampshire Department of Justice website: <http://www.doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf>

The Guidelines set forth criteria and procedures for amending a conservation easement, and anticipate review and participation of the Charitable Trusts Division of the New Hampshire Attorney General's Office, and possibly the Probate Court.

In considering any proposed amendment, the Easement Holder must first ensure that the amendment complies with all of seven stated guiding principals. In this case, a request to allow a project such as Northern Pass would clearly fail to meet at least six⁴ of the seven:

1. It does not clearly serve the public interest nor serve the Easement Holder's mission;
2. As will be further discussed in the next section, an amendment may not comply with federal and state law;
4. It would create impermissible private benefit to a private commercial developer;
5. It is inconsistent with the conservation purposes and intent of the Easement;
6. It is inconsistent with the intent of the easement Grantor and the direct funding sources (both public and private); and
7. It would have a negative affect on the conservation values and attributes protected by the Easement.

This would be a "High Risk" amendment as defined in the Guidelines, which would require Attorney General review and possible Court approval.

If, however, it is argued that an amendment should be considered, the next question is whether the amendment would affect the qualification of the Easement or the status of the Easement Holder under the Forest Legacy Program or the Community Heritage Investment Program.

III. LCHIP and Forest Legacy funding provides additional statutory restrictions on the use of the Property that prohibit the development of Northern Pass.

A. RSA Chapter 227-M, Land and Community Heritage Investment Program

The Conservation Easement was purchased in part with funds from the New Hampshire Land and Community Heritage Investment Program. The Easement makes specific reference to

⁴ The numbers below relate to those principals in the Guidelines.

the LCHIP enabling statute, and particularly to RSA 227-M:14 which requires that specific statutory language must be recited in each deed acquired with LCHIP funds. This statute states that

“notwithstanding any other provision in the easement ... ***no deviation in the uses of any resource acquired under this Easement to uses or purposes that are inconsistent with the Purposes of this Easement shall be permitted.*** The sale, transfer, conveyance or release of any resource asset from the public trust is prohibited except as specifically permitted in this Easement.”

Once again, applicable language (this time statutory) is clear that no use of the Property can be made that is inconsistent with the Easement Purposes.

This statutory prohibition is specifically included in the Easement Deed as well. Section 17 prohibits both deviations in the use of the Property protected from the Easement Purposes and sale or release of any resource from the Public Trust.

“Notwithstanding any other provision in this Easement or of law relating to the disposal of publicly-owned real estate, and in accordance with RSA 227-M:14 under which this Easement is acquired, no deviation in the uses of any resource acquired under this Easement to uses or purposes that are inconsistent with the Purposes of this Easement shall be permitted. The sale, transfer, conveyance or release of any resource asset from the public trust is prohibited except as specifically permitted in this Easement.”

RSA 227-M:14 also establishes that assets acquired through LCHIP funding are held in public trust.⁵ The statute states the resource assets so purchased

“shall be held in public trust and used and applied for the purposes of this chapter. Notwithstanding any other provision of law relating to the disposal of publicly-owned real estate, no deviation in the uses of any resource asset so acquired to uses or purposes not consistent with the purposes of this chapter shall be permitted. The sale, transfer,

⁵ The “public trust doctrine” is an ancient legal doctrine rooted in English common law, and refers “to the duty of sovereign states to hold and preserve certain resources...for the benefit of its citizens. Described simply, the doctrine provides that natural resources belong to the whole public....” Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 Duke Envtl. L. & Pol'y F. 57, 61 (2005). The New Hampshire Supreme Court has long recognized the doctrine in this state, and recently stated “[t]he public trust doctrine provides that the government holds public lands, waters and other natural resources in trust for the benefit of its citizens. ... As trustee, the government ‘must act as a fiduciary in its management of the resources which constitute the corpus of the trust’ ”; State of NH v. Hess Corporation 161 NH 426, 20 A. 3rd 212, 216 (2011).

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conveyance, or release of any resource asset from public trust is prohibited, except as provided in RSA 227-M:13.”

As noted, the only release from public trust allowed under the statute is that provided in RSA 227-M:13, I, which allows and provides for specific purposes of road expansion only. The statute concludes by stating: “Projects determined by the authority to be outside of the scope permitted by this chapter shall require approval from the *general court*.” (Emphasis added.)

The effect of this provision is that should the LCHIP Authority be asked to approve the release of the Easement from the public trust, and if the Authority concludes, as it must, that the Northern Pass Project is not a project authorized by RSA 227-M:13, I, that it must refer the Project to the New Hampshire Legislature for consideration and approval.

B. 16 USC 2103c: Forest Legacy Program

Section 18 recites that the Easement was acquired with federal funds provided through the Forest Legacy Program (16 U.S.C §2103c). The federal statute recites the purposes of the program to fund the acquisition of interests in real estate, and imposes additional restrictions on the conversion of property so acquired to other uses. 16 U.S.C § 2103c (a) states the program is

“for the purpose of ascertaining and ***protecting environmentally important forest areas that are threatened by conversion to nonforest uses*** and, through the use of conservation easements and other mechanisms, for promoting forest land protection and other conservation opportunities. Such purposes shall also include the protection of important scenic, cultural, fish, wildlife, and recreational resources, riparian areas, and other ecological values.” (emphasis added)

16 U.S.C § 2103c (i) requires that under the terms of a conservation easement acquired under the program “the landowner shall be required to manage property in the manner that is consistent with the purposes for which the land was entered in the Forest Legacy Program, and shall not convert such property to other uses.” Thus, the conversion to other uses of the Property protected by the Easement is prohibited by federal law.

The “Program Narrative” and Grant Award of the Forest Legacy Program to the State of New Hampshire confirmed these purposes, and goes on to state:

“This tract is found in a Forest Legacy Area that the State identified and subsequently was authorized by the Secretary of Agriculture as having significant public values, values of both national and state significance. Specifically, the public values being protected for this area are: terrestrial and aquatic wildlife habitats, including vernal pools and seasonal wetlands, boreal peat bogs, early successional forests, high and low elevation conifer

forests; recreational access for hiking, hunting, fishing, ski touring, snowmobiling, and wildlife observation, a number of rare ecological communities, and working forest landscape.”

Both state and federal law provide further obstacles to the development of the Northern Pass Project across the property protected by the Easement.

IV. The State of New Hampshire, as Easement Holder, has accepted the responsibility to enforce and is obligated to defend the Easement.

Section 22 of the Easement Deed is entitled “Binding Effect” and reads in full as follows:

“The Easement Holder, by accepting and recording this Easement, agrees to be bound by, observe, and enforce its provisions and assumes the rights and responsibilities granted to and incumbent upon the Easement Holder, all in furtherance of the Purposes for which this Easement is delivered.”

By accepting the Easement and assuming the responsibilities of Easement Holder, the State of New Hampshire has a legal obligation to uphold and defend the terms and conditions of the Easement, and to take the steps necessary, including legal actions, to assure that the purposes of the Easement are not violated.

The obligation of the State to defend the easement was recognized by the New Hampshire Legislature in authorizing the funding to purchase the Easement. Both the Easement Preamble and Purpose Section 1.C. cite 2002 New Hampshire Law Chapter 148. and quote the Legislative Finding declaring “that it is in the public interest to acquire fee ownership and conservation easement interest in these lands to *ensure* that they remain in a largely undeveloped productive working forest which also provides public access for recreation and conserves ecologically sensitive areas.” (Emphasis added.)

Similarly, RSA Ch. 227-M, which created and authorizes LCHIP recognizes that ensuring the perpetual protection of conservation resources is integral to the State’s interests in the Property. RSA 227-M: 1 provides, in part, that

“The intent of the program is to conserve and preserve this state's most important natural, cultural, and historical resources through the acquisition of lands, and cultural and historical resources, or interests therein, of local, regional, and statewide significance, in partnership with the state's municipalities and the private sector, for the primary purposes of *protecting and ensuring* the perpetual contribution of these resources to the state's economy, environment, and overall quality of life.”

Further, easement holders who accept LCHIP funding assume stewardship responsibilities to enforce the easement. RSA 227-M:2 defines the stewardship obligations of Easement Holders, as follows:

“VIII. "Stewardship" means planning for and *taking the necessary actions* over the long term to successfully preserve and protect the natural, cultural, or historical value of a resource asset. Such actions include, as applicable, managing the resource asset in accordance with *all legal obligations* entered into under this chapter, performing regular maintenance and upkeep, providing for necessary monitoring, educating or informing those that might negatively impact upon the resource asset about the need and/or *legal obligation to protect and preserve it*, paying tax or in-lieu-of tax obligations, obtaining liability insurance, and securing sufficient levels of financial resources to carry out all such necessary actions.” (Emphasis added)

As noted above, natural resources acquired and protected with LCHIP funding are held in the public trust. The New Hampshire Supreme Court has recognized that the State holds such resources in a fiduciary capacity to benefit the citizens of the state.⁶

In addition to the public trust doctrine, the State may also be subject to charitable trust concepts. The Easement was purchased, in part, with dedicated funds donated by private individuals and foundations, and solicited by non-profit, tax exempt charitable organizations for this initiative. In New Hampshire gifts made to charitable organizations or a government agency for a specific purpose create a charitable trust.⁷ The New Hampshire Attorney General has taken the unequivocal position that conservation easements donated in whole or in part to a government entity constitutes a charitable trust, and that purchased easements may be subject to similar equitable and charitable principals. These concepts and the role of the New Hampshire Attorney General in defending perpetual conservation easements and the environmental values and attributes protected thereby, are discussed in the Amendment Guidelines referenced in Section II above and cited in footnote 3. The promulgation of the Guidelines, and the role the Attorney General has assumed in reviewing and approving conservation easement amendments, establishes the role of that office in assuring the enforcement of perpetual conservation easements.

The Connecticut Headwaters Conservation Easement is the largest tract of land in New Hampshire protected by a conservation easement and thus is the highest profile easement in the state. Landowners, New Hampshire Land Trusts and other easement holders, other states and the larger land trust community nationwide will be watching the State of New Hampshire with interest to be sure it upholds its obligations as the Easement Holder under the terms of the Easement, the public trust doctrine and the charitable trust doctrine. A failure to adequately

⁶ State v. Hess, id.

⁷ See, e.g., the discussion and citations in Guidelines footnote 1

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defend this Easement will put into question the willingness and ability of the state to defend any and all of the conservation easements in which it has an interest. This is a matter of no small importance, given the significance of the enormous financial investment the State of New Hampshire has made to land conservation through the Land Conservation Investment Program (LCIP), LCHIP, Agricultural Lands Protection Program, NH Fish and Game Habitat Protection programs, Great Bay Resource Protection Partnership, and the Land and Water Conservation Fund Program.

V. CONCLUSION

By its express terms, the Connecticut Headwaters Conservation Easement prohibits any commercial or industrial activity on the protected Property that is not related to forestry, forest products and forest management, recreation or water resource management. The development of any other commercial or industrial activity, and specifically the development of a transmission corridor such as the Northern Pass Project, is contrary to the express Purposes of the Conservation Easement, and is contrary to the State and Federal law that authorizes significant funding sources for the purchase of the easement. The State of New Hampshire, as the Easement Holder, is obligated assure that the easement is not breached or violated, and to enforce the protection of the Purposes and natural resource assets protected thereby.

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