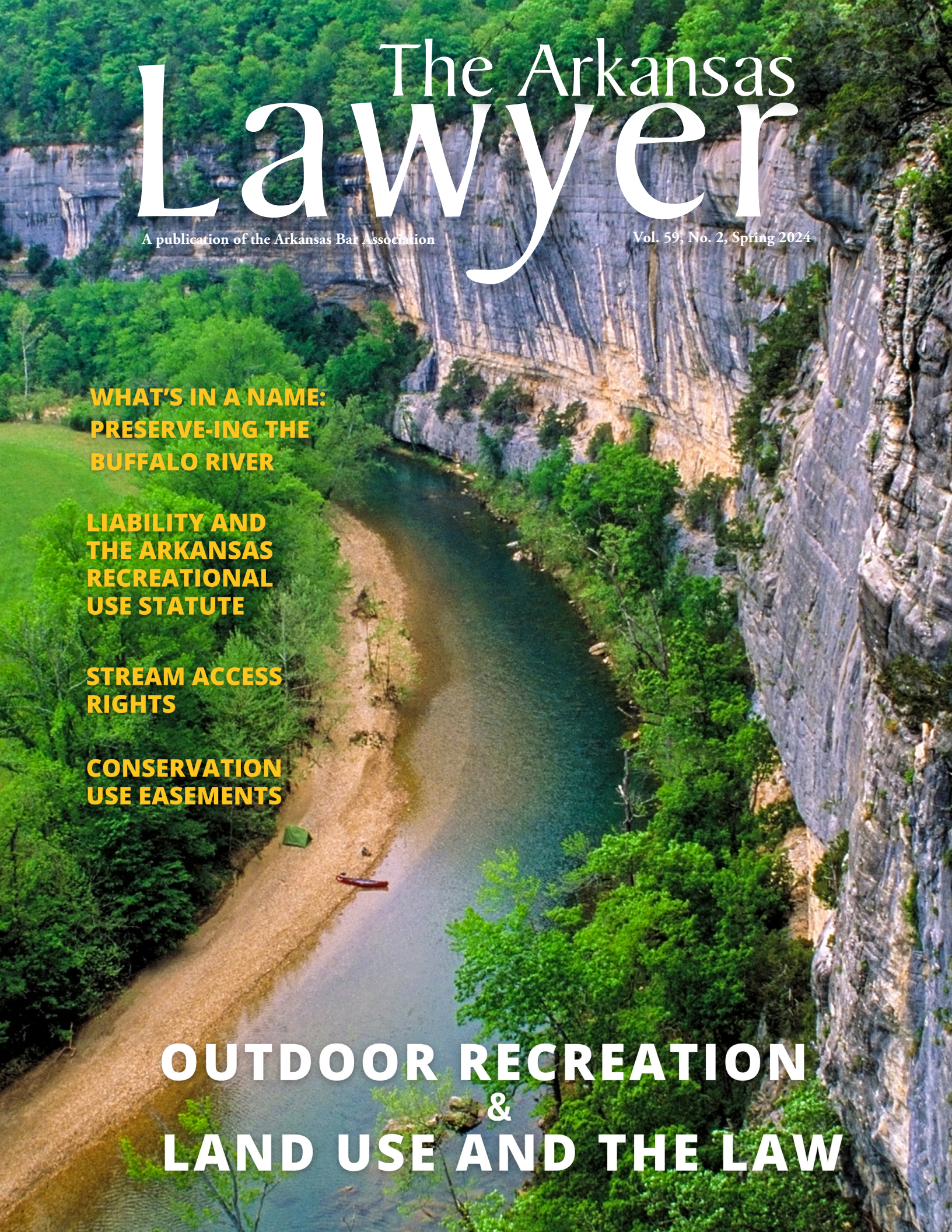


# The Arkansas Lawyer



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**WHAT'S IN A NAME:  
PRESERVE-ING THE  
BUFFALO RIVER**

**LIABILITY AND  
THE ARKANSAS  
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&  
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# Preserving Nature:

## A Guide to Arkansas's Conservation Use Easements

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**T**he Natural State has vast natural resources, including an array of state parks, wildlife management areas and refuges, and national parks. In addition to these public lands, private landowners play a crucial role in preserving natural habitats through conservation easements. Conservation easements achieve the twin goals of conserving nature and saving taxes.

### The Uniform Conservation Easement Act

Arkansas adopted the Uniform Conservation Easement Act ("the Act") in 1983, which is the same conservation easement act adopted in half of the states.<sup>1</sup> The primary purpose of the Act is to allow landowners to impose an easement on their property that restricts future uses that would harm the natural condition of the property. Governmental or charitable organizations can then enforce these easements to ensure the future protection of the property. Landowners form conservation easements by granting the easements to a qualified governmental agency or a charity. The landowner and easement holder negotiate the terms of the conservation easement for each property, which vary in their restrictiveness and permitted uses. Conservation easements can be for any length of time, though they are typically perpetual.

Landowners are willing to enter into these easements for two primary reasons, or a blend of both: (1) purely altruistic devotion to preserving the environment; or (2) significant tax advantages. A properly structured conservation easement qualifies as a charitable contribution for income tax purposes under 26 U.S.C. § 170. Additionally, the conservation easement permits a reduction in estate taxes, with heirs permitted to exclude 40% of the value of the land, up to \$500,000, protected by the conservation easement from estate taxes.<sup>2</sup> Unsurprisingly, there are extensive requirements to perfect the charitable contribution qualification, which are too extensive to cover in this article. Since Arkansas has the Uniform Conservation Easement Act, our act provides the essential framework to ensure that a conservation easement satisfies the IRS's requirements.

A conservation easement is especially useful for agricultural and recreational land. Unlike a traditional donation of land, the donor of a conservation easement retains title to the land and can continue to use the land for purposes not inconsistent with the conservation easement.<sup>3</sup> For instance, the landowner may continue to use the land for farming, timber, hunting, fishing, and low-density housing. This makes conservation easements perfect for farmers and hunters who anticipate never using their land for some other purpose.

A conservation easement can also be used to preserve "historical, architectural, archaeological, or cultural aspects of real property."<sup>4</sup> This makes conservation easements attractive to owners of historic properties who do not wish to change the nature of the property in the future. Arkansas has a unique addition to the Act in Ark. Code Ann. § 15-20-410, which is a special provision permitting the Old State House Commission to hold conservation easements.<sup>5</sup> Conservation easements for historical properties can also be granted through the Arkansas Historic Preservation Program, sometimes in exchange for tax credits and historic preservation grants.<sup>6</sup>

While there are advantages to granting conservation easements, landowners should be mindful of two major disadvantages. First, by their design, conservation easements are difficult to terminate or modify, even if conditions change or the desires of the landowner (or heirs) no longer align with the conservation purpose. Second, by their nature, conservation easements result in a reduction in privacy because the conservation easement holder has an interest in regularly inspecting the property to ensure compliance with the easement.

To elaborate on the first disadvantage, the Act expressly states that it “does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.”<sup>7</sup> Arkansas has no reported cases interpreting this portion of the Act, and Arkansas’s statute still incorporates the original 1981 official commentary from the Uniform Law Commission, which guides courts in interpreting the meaning of the Act. The 1981 commentary focuses on the doctrines of changed conditions and the *cy pres* doctrine. As stated in the commentary:

[I]f the purposes of a charitable trust cannot [be] carried out because circumstances have changed after the trust came into being or, for any other reason, the settlor’s charitable intentions cannot be effectuated, courts under their equitable powers may prescribe terms and conditions that may best enable the general charitable objective to be achieved while altering specific provisions of the trust. ... The Act leaves intact existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts.<sup>8</sup>

In 2007, the Uniform Law Commission officially adopted a new version of the commentary to this section of the Act, which discusses in greater detail the considerations for modifying or terminating a conservation easement.<sup>9</sup> The 2007 commentary does not fundamentally change the approach to termination or modification, but the 2007 commentary

is more than twice as long and provides significantly more direction for applying the *cy pres* doctrine to preserve a conservation easement. The new commentary refers to the approach of the 2000 Restatement (Third) Property: Servitudes, which provides that “in lieu of the traditional real property law doctrine of changed conditions, the modification and termination of conservation easements held by governmental bodies or charitable organizations be governed by a special set of rules modeled on the charitable trust doctrine of *cy pres*.”<sup>10</sup>

The 2007 commentary also ties back to the Uniform Trust Code, which Arkansas adopted in 2005. The Uniform Trust Code’s section on the modification or termination of uneconomic trusts specifically excludes conservation easements.<sup>11</sup> The commentary to this portion of the Uniform Trust Code clarifies that, unlike traditional trusts, “[m]ost creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value.”<sup>12</sup>

To the author’s knowledge, there have been no efforts in Arkansas to adopt the 2007 version of the Act’s commentary. Courts, however, could reasonably take judicial notice of the existence of the newer commentary in crafting decisions. After all, one of the greatest advantages of uniform laws is the ability to draw upon national scholarship and persuasive decisions from other states interpreting the same law.

## Conclusion

The Act is a state-of-the-art framework that allows landowners to impose an easement on their property that restricts future uses that would harm the natural condition of the property. Appropriate governmental or charitable organizations can enforce these easements to ensure the future protection of the property. Landowners may enter into these easements for altruistic reasons or to take advantage of significant tax benefits. Conservation easements are especially useful for agricultural and recreational land, as well as for preserving historical, architectural, archaeological, or cultural aspects of real property. However, landowners should be



mindful of the potential disadvantages, including the difficulty of terminating or modifying the easement and the reduction in privacy. The Act provides a valuable tool for landowners to preserve the natural beauty of their property while also potentially benefiting from tax advantages.

## Endnotes:

1. ARK. CODE ANN. §§ 15-20-401 to -410. As a note of historical interest, the Uniform Conservation Easement Act was developed by the Uniform Law Commission during the presidency of Jack Deacon of Jonesboro.
2. 26 U.S.C. § 2031.
3. ARK. CODE ANN. § 15-20-402.
4. ARK. CODE ANN. § 15-20-402(1).
5. In full disclosure, the author is both a Uniform Law Commissioner and an Old State House Commissioner.
6. <https://www.arkansasheritage.com/arkansas-preservation/programs/services/easements> (accessed 2/4/24).
7. ARK. CODE ANN. § 15-20-409(b).
8. ARK. CODE ANN. § 15-20-409(b).
9. <https://www.uniformlaws.org/viewdocument/final-act-40?CommunityKey=4297dc67-1a90-4e43-b704-7b277c4a11bd&tab=librarydocuments> (accessed 2/4/24).
10. <https://www.uniformlaws.org/viewdocument/final-act-40?CommunityKey=4297dc67-1a90-4e43-b704-7b277c4a11bd&tab=librarydocuments> (accessed 2/4/24).
11. ARK. CODE ANN. § 28-73-414.
12. ARK. CODE ANN. § 28-73-414. ■