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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF INYO

In re the Matter of the
L. L. Nunn Trust for the benefit of Deep
Springs College under the Deed of Trust
dated November 5, 1923

Case No. SI CV PB 1253232

**PETITIONER'S PROPOSED STATEMENT
OF DECISION**

1 This case commenced with the filing of Petitioner David Hitz’s “Petition for Court Order
2 Construing Trust Provision, Or, If Necessary, Modifying the Trust Instrument,” on February 6, 2012.
3 The subject of the Petition is the L. L. Nunn Trust for the Benefit of Deep Springs College Under the
4 Deed of Trust dated November 5, 1923 (the “L. L. Nunn Trust” or the “Trust”). On May 9, 2012,
5 Objectors and Respondents Kinch Hoekstra and Edward Keonjian (“Respondents”) filed their
6 Objection and Response. On June 13, 2012, Petitioner filed his Reply.

7 The Trust governs the application and administration of some of the assets used to operate a
8 small college in Deep Springs Valley which has historically had an all male student body. The case
9 presents the question whether the Trust can be interpreted or modified to allow the admission of
10 female students, in addition to male students, at the college.

11 By stipulation, the Court bifurcated the issues presented by the Petition: (1) interpretation of
12 the Trust, and (2) modification of the Trust. On February 13, 2013, the Court issued its “Rulings and
13 Orders on Petition for Court Order Interpreting Endowment Gift Instrument,” determining that the L.
14 L. Nunn Trust could not be interpreted as affording the Trustees of the Trust discretion to institute
15 coeducation at Deep Springs College (“Deep Springs” or “the College”). That decision has been
16 appealed by Petitioner, which appeal is currently pending.

17 On March 22, 2013, Petitioner filed his “Supplement to Petition for Court Order Construing
18 Trust Provisions, Or, If Necessary, Modifying the Trust Instrument.” In the Supplement, Petitioner
19 advanced two additional grounds to modify the Trust.

20 The issue of modification of the L. L. Nunn Trust came on regularly for trial to the Court
21 commencing April 28, 2014. Trial continued April 29 through May 2, 2014, on May 13, 2014, and
22 on May 27, 2014.

23 Petitioner was represented at trial by Christopher L. Campbell and Dirk Paloutzian of Baker
24 Manock & Jensen, PC. Real Party in Interest Deep Springs College Corporation was represented at
25 trial by Jon Michaelson, then of K&L Gates LLP. Objectors were represented at trial by Eric M.
26 George and Ira Bibbero of Browne George Ross LLP, Joseph C. Liburt of Orrick, Herrington &
27 Sutcliffe LLP, and Heather Hoekstra.

1 **I. FACTUAL BACKGROUND**

2 The historical origins of this case are interesting, as well essentially undisputed among the
3 parties. These basic facts are set forth immediately below in summary fashion and supplemented in
4 the sections which follow to the extent necessary to fairly describe the Court's determinations as to
5 the ultimate facts and material issues in controversy. Code Civ. Proc. § 632; *Central Valley General*
6 *Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.

7 **A. L. L. Nunn**

8 Born in 1853, L.L. Nunn can be described as a serial entrepreneur. He was successful in most
9 enterprises he pursued, in large part because of his unbounded energy, intense focus, and
10 unwillingness to accept any accomplishment as sufficient.

11 L.L. Nunn can also be described as selfless. His ultimate aims were not personal, nor
12 measured by possessions or wealth. Rather, he sought to improve the world and to inspire and help
13 prepare others to do the same through a variety of commercial and educational initiatives.

14 L.L. Nunn's own formal education was spotty. He attended several universities in Europe for
15 brief periods and then Harvard's law school for a short time. In his late twenties, he headed to the
16 frontier west. There, between 1880 and roughly 1910, he started as a carpenter and restaurant owner
17 and rose to become a mine manager and owner, banker, newspaper owner, pioneer in the
18 development of hydroelectric power, and eventually an innovator in education.

19 L.L. Nunn's signature accomplishments in the power industry were born out of necessity. In
20 the 1880's, he owned several mines in and around Telluride, Colorado. Conditions became
21 increasingly difficult and more expensive for local operators when coal needed to be purchased and
22 shipped to mine sites because nearly all readily available timber had been cut and used to generate
23 heat to run steam driven equipment. To overcome this problem, in 1890 L.L. Nunn teamed with
24 George Westinghouse and Nikola Tesla to develop the very first commercial facility to generate and
25 transmit alternating current electricity. That first hydroelectric plant began operation just outside
26 Telluride in 1891. Following this initial success, L.L. Nunn built and operated hydroelectric power
27 plants throughout the Mountain West and into Mexico and Canada. Between 1903 and 1906, he was
28 primarily responsible for construction of the massive Ontario Power Works at Niagara Falls.

1 L.L. Nunn’s interest in developing educational programs arose from his nascent power
2 business. Generating and transmitting electricity in the 1890’s involved new technology. A skilled
3 and experienced work force did not exist; one had to be recruited and trained. L.L. Nunn focused on
4 hiring young men, recently graduated from high school, to work at his power plants. In return for
5 their commitment and labor, he offered and provided an education through small schools located at
6 various power plants. As most of these sites were in remote locations, L.L. Nunn also promoted a
7 degree of self-governance among his worker/students.

8 L.L. Nunn frequently moved worker/students from one installation (and small school) to
9 another, keeping track of them individually by placing pins on a map. Eventually, in 1904, he opened
10 a larger institute for his “pinhead” apprentices at the Olmsted Power Plant in Provo Canyon, Utah.
11 And when an Olmsted graduate wished to obtain further education, L.L. Nunn frequently underwrote
12 the cost of his obtaining an undergraduate and sometimes even an advanced degree from an
13 established college or university.

14 In 1911 and 1912, L.L. Nunn began to wind down his involvement in the power industry and
15 to direct his complete attention to educational pursuits. In 1911, he formed and endowed the
16 Telluride Association. Telluride Association built a scholarship house adjacent to Cornell University.
17 There, students could live (at no cost) after leaving Olmsted while pursuing a degree. Telluride was
18 soon a self-perpetuating, self-governing organization of 100 or so students and young intellectuals.¹

19 In 1912, after selling most of his power industry assets, L.L. Nunn turned to establishing what
20 he called his “primary branch” at the college level. The primary branch was intended to provide an
21 initial 2 or 3 years of post secondary education. The first attempt to open the primary branch took
22 place in 1916 at Claremont, Virginia. This, however, was a failure and L.L. Nunn shut it down in
23 short order. Then, in 1917, he founded Deep Springs College. Deep Springs College consumed most
24 of L.L. Nunn’s energy, attention, and wealth until he passed away in 1925.

25 Several other factors influenced L.L. Nunn throughout his life. First, L.L. Nunn was a theist.
26 He held a deep commitment to living in harmony with certain eternal truths and to leading society

27 _____
28 ¹ Today Telluride Association maintains scholarship houses at Cornell and at the University of
Michigan in Ann Arbor. It also finances and runs other educational programs, including summer
enrichment programs for disadvantaged high school students to encourage them to attend college.

1 away from materialistic concerns toward divinity through education, direct experience, and the study
2 of religion.

3 Second, when he established new educational institutions during his later years, L.L. Nunn
4 found inspiration in the ideas of Progressive Era luminaries such as John Dewey (who promoted
5 democratic educational methods to induce personal and social responsibility), in the manner in which
6 the British trained an elite few to lead their society (e.g., at Oxford and Cambridge and as expressed
7 at the time by Cecil Rhodes), and in the approach of America's preeminent colleges and universities
8 of the period such as Harvard, Yale, and Princeton. Consistent with the basic structure of each of
9 these models, with rare exception, the individuals whom L.L. Nunn educated prior to founding Deep
10 Springs College were all male.²

11 Finally, L.L. Nunn lived in a world that was all male in all things that mattered both generally
12 and to him personally. Again, the institutions of higher learning on which he pinned his hopes and
13 plans for Telluride Association and for Deep Springs were all male. In every one of his enterprises,
14 those with whom he interacted were men. There is no evidence that L.L. Nunn ever hired a woman
15 to work in one of his businesses. All his private secretaries, for example, were men. More generally,
16 according to 1920 Census data, it is highly unlikely that L.L. Nunn would have ever dealt with a
17 woman in conducting his commercial affairs: of roughly 82,000 bankers in the U.S., only 4,226 were
18 female; of more than 122,000 lawyers and judges, only 1,738 were women; of about 136,000
19 engineers, only 44 were women; and out of nearly 1.1 million workers engaged in the extraction of
20 minerals and other substances from the earth, there were only 2,864 females. Exh. 205; see also 496-
21 497, 560 (Newell).³

22 While it is likely, as Respondents argue, that L.L. Nunn was aware of the rare woman who at
23 the time participated at higher levels in education, business, or government, the exception proves the
24
25

26 ² The rare exceptions were a handful of family members and one individual who was the daughter of
27 one of L.L. Nunn's business competitors. All in all, not counting students who attended Deep
28 Springs, L.L. Nunn financed the college or post-graduate education of more than 450 men.

³ Page and page:line references are to the official transcript of trial proceedings. Exhibit ("Exh")
references are to exhibits introduced and admitted into evidence at trial.

1 rule. L.L. Nunn’s professional world was almost exclusively male, and there is no evidence that he
2 ever expressed any interest in changing that reality or anticipated that it would change.

3 **B. Deep Springs College**

4 Deep Springs College is located in remote Deep Springs Valley, which lies in Inyo County
5 between the Bristlecone Pine Forest and Nevada. The College operates a cattle ranch and also raises
6 much of the other food consumed on site.

7 The College is the smallest institution of higher learning in the United States, with 26 students
8 and a normal compliment of 6 faculty members. Students pay no tuition. They undertake a program
9 which lasts 2 years and is built around three “pillars”: (1) academic pursuits in and outside the
10 classroom; (2) a labor program which entails each student devoting at least four hours to ranch work
11 each day; and (3) a unique opportunity to exercise self-governance, including meaningful direct
12 participation in the management of College affairs. The students control their own Student Body and
13 have broad responsibility to regulate their own behavior. They participate directly in virtually all
14 aspects of College operations, including hiring and firing of administrators, faculty, and staff,
15 recruitment and selection of new students, communications with the “outside” world, curriculum
16 design, and even basic tasks such as cooking for the entire community, planting, maintaining, and
17 harvesting the garden, milking cows, irrigating fields, cutting and baling hay, herding and branding
18 cattle, assisting with the slaughter of livestock, washing dishes, cleaning toilets, and mopping floors.
19 Students serve as full voting trustees of the Trust and members of the Board of Directors of the Deep
20 Springs College Corporation.

21 The combination of these three pillars confronts and challenges Deep Springs students to
22 develop skills, judgment, and character in a manner different from and far beyond what the normal
23 college education entails and promotes. As President Neidorf put it, “Deep Springs is designed to
24 allow gifted students to take an extraordinary amount of responsibility for their own lives.” 165:15-
25 17. The intended result is to help these young people “develop greater strengths and rise to greater
26 heights of ability, endurance, emotional robustness and virtue . . . than they otherwise knew they were
27 capable of.” 163:6-8.

1 When L.L. Nunn started Deep Springs College and devoted significant attention to its early
2 structure and operations until his death in 1925, he regarded the institution as the culmination of his
3 life’s work. During its early years, the College included classroom activity in traditional academic
4 subjects, a relatively limited labor program, self-governance by the Student Body (often entailing
5 debate and negotiation between students and L.L. Nunn himself), and a focus on religious instruction.
6 The small number of students selected by L.L. Nunn to attend Deep Springs were men. Moreover,
7 with rare exception, L.L. Nunn chose young men from wealthier families even though, as is the
8 practice today, no one was charged tuition.

9 Over the decades, some elements of the experiment which L.L. Nunn inaugurated at Deep
10 Springs have remained constant while others have changed. The College has continued to be small
11 and isolated. Labor has remained a key feature of the College, but the scope and level of student
12 responsibility within this “pillar” have greatly expanded over the years. While a formal academic
13 program has always existed, the breadth of the curriculum and level of academic rigor have varied.
14 Student self-governance has always been a hallmark of the College – unique in the annals of higher
15 education in the U.S. in its potential and often actual reach into virtually all areas of decision making
16 for the institution. Yet, by contrast, one of the most important features of the College for L.L. Nunn
17 personally – religious emphasis and instruction – was dropped within 20 or 25 years following his
18 death. Even the practice of asking applicants to identify their religious affiliation ceased in the mid-
19 1960’s. And while all Deep Springs students to the present day have been young men, L.L. Nunn’s
20 preference for students from more established families disappeared, and prejudices common in higher
21 education during the first half of the twentieth century with respect to admission of individuals from
22 particular religious or racial backgrounds faded more or less in parallel with attitudinal changes in
23 society as a whole.

24 Deep Springs has not sailed smoothly through its nearly 100 years of existence. Crises of
25 various types and intensity have arisen. Some involved leadership and direction of the College, as
26 when L.L. Nunn passed away and as when in the 1980’s turnover at the top and inappropriate
27 behavior among faculty, staff, and students created a tumultuous environment. On other occasions,
28 Deep Springs has faced serious financial straits. This happened during the Great Depression, in the

1 1960's, when a benefactor came to the rescue, and in the mid-1990's when College infrastructure
2 required complete overhaul but available resources were dwarfed by the accumulated deferred
3 maintenance that had to be addressed for the College to continue functioning. Indeed, by the mid-
4 1990's the College was at least \$6 million in the red, having long before exhausted the financial
5 corpus of L.L. Nunn's original gifts⁴ and having no endowment to help ensure its survival. And in at
6 least one instance, financial catastrophe converged with intense disputes over policy and caused deep
7 division among trustees, alumni and friends, students, faculty, and staff.

8 From as early as the 1950's, the question of coeducation came to the fore at Deep Springs. As
9 years passed, the issue became more inflammatory. In the 1960's, the Trustees first seriously
10 considered the matter but took no action. In the late 1970's, coeducation was the subject of extensive
11 formal study and debate by the Trustees and the community. Ultimately in 1980, the Trustees voted
12 unanimously to remain an all male institution, but agreed to revisit the matter in the future. That
13 reconsideration took place starting in 1992.

14 Renewed formal attention to coeducation in the mid-1990's coincided with the severe
15 financial crisis of that era. Discourse was heated, and the subject threatened to tear apart the Deep
16 Springs community. The Trustees deadlocked 4 to 4 when the one non-partisan member resigned in
17 frustration at, and in protest of, the tenor of the controversy. Prospects for raising new funds to
18 rebuild the College were nil – that is until leading proponents on each side of the issue agreed to table
19 the matter in order to devote their full attention to saving Deep Springs, and to consider coeducation
20 anew once that goal was accomplished.

21 Deep Springs was saved from infrastructure collapse and financial ruin. But the question
22 whether the admissions policy should be revised to include women in addition to men as students at
23 the College remained. A formal Student Body by-law requires that the issue be discussed – at the
24 very least among the students themselves – each and every year. From 2003 to 2005 a group of
25 Trustees again studied the subject, including input from students and others, and attempted to provide
26 an overall assessment of “pluses” and “minuses” of coeducation for Deep Springs. That effort ended
27

28 ⁴ Although the dollars he provided are long gone, the real property which L.L. Nunn contributed to
the Trust continues to be used by the College.

1 without resolution and with no agreed articulation of a rationale for maintaining an all male student
2 body. Alumni and friends as well as students continued to raise the issue and to discuss the impacts
3 of Deep Springs' all male status on its current performance and future prospects.

4 In 2009, the Trustees identified coeducation as a strategic issue important to the College and
5 decided to once more devote substantial time and attention to the topic. This most recent round of
6 consideration resulted in the votes of the Trustees and of the Deep Springs College Corporation
7 Board taken in September 2011 to implement coeducation and to the February 2012 filing of the
8 Petition in this matter.

9 Trustee debate and decision during 2011 on the issue of coeducation took place against the
10 backdrop of an institution that was (and remains today) in sound condition in many respects. The
11 College attracts good students, hires good faculty and staff, sends its graduates to complete their
12 undergraduate degrees at an impressive list of other colleges and universities, and has built its
13 endowment to the highest dollar level ever achieved.

14 At the same time, Deep Springs College rests outside the mainstream in U.S. higher education
15 in many ways. It is one of only four all male colleges which still exist in the country. It is tiny, and
16 has a correspondingly small alumni/donor base. Because of its all male policy, it is disadvantaged
17 relative to federal funding and private foundation support. The all male policy also appears to reduce
18 the quality of the applicant pool and of the resulting student body, to burden and complicate the tasks
19 of hiring and retaining the highest quality faculty and staff, to adversely impact the richness and
20 pedagogical value of peer interactions among students in the classroom, in the labor program, and in
21 self-governance, and to cause concern whether the College can sustain financial viability on a long
22 term basis.

23 In more general terms, Deep Springs is an unusual sort of college sometimes referred to as
24 "progressive" or "maverick." Continued existence of such an institution turns on its ability to
25 maintain a balance between adherence to founding principles and pressures for change which
26 emanate from society at large. The dance is difficult, and in this instance, Deep Springs has struggled
27 for four or five decades with the question of coeducation. As Professor Newell said succinctly, "that
28 is the balance that we're discussing in this court proceeding: whether Deep Springs can maintain

1 those things that are most essential to it . . . and at the same time being able to adapt fundamentally to
2 a very different society than L. L. Nunn designed the college to serve.” 527:10-15.

3 Notwithstanding its healthy current condition, the College has been described as “fragile” by
4 both sides of the coeducation debate which played out during trial. Though the protagonists no doubt
5 dispute the reasons and the appropriate response, the Court agrees that “fragile” is an apt
6 characterization in light of the tension which exists between the history and nature of Deep Springs
7 and the changes which have taken place in our society since the College was founded in 1917.

8 **C. The L.L. Nunn Trust**

9 Several portions of the instrument signed by L.L. Nunn in 1923 are relevant to this matter.

10 Paragraph number 1 of the Deed of Trust states that donated assets “shall” be used:

11 [T]o provide for and carry on educational work in the State of
12 California similar to and in development of the work already
13 inaugurated by Grantor at Deep Springs in Inyo County, California, but
14 in such manner and form and at such place or places within said State
15 as said trustees in good conscience and the exercise of their best
16 judgment may determine, for the education of promising young men,
17 selected by said trustees or as they may prescribe, in a manner
18 emphasizing the need and opportunity for unselfish service in uplifting
19 mankind from materialism to idealism, to a life in harmony with the
20 Creator, in the conduct of which educational work democratic self
21 government by the students themselves shall be a feature as is now the
22 case at said Deep Springs and which work shall be carried on not for
23 profit but solely for the advancement of the purpose hereinabove
24 mentioned.

25 In relevant part, paragraph number 2 of the instrument addresses in further
26 detail matters of Trustee power and authority as follows:

27 In order to enable them to accomplish the purpose of this trust in such
28 manner as they in the exercise of their best judgment may deem most
fitting and expedient, the said trustees are hereby authorized and
empowered to act in the matter and deal with any and all property now
or hereafter held by them hereunder.... as they in good conscience and
the exercise of their best judgment may deem proper and advisable; and
they are hereby given and granted full power and authority:

(a) To hold, sell, convey, lease, subdivide, pledge, mortgage, encumber,
invest, reinvest, loan, reloan and in any and all other respects handle,
manage, operate, and dispose of all or any portion of said trust estate in
such manner, for such consideration, and upon such terms and
conditions as said trustees may deem most advisable, and all without
the intervention of any court or any limitation or restriction on the
discretion of said trustees as to the kind or class of property in which
the proceeds of or income from said trust estate may be reinvested, ...;

1 (b) To transfer and turn over, without receiving pecuniary
2 consideration therefor, all of the trust estate held hereunder to an
3 educational corporation, unincorporated association, or other like
4 organization devoted to the cause of education, ..., whenever so to do
5 will in the judgment of said trustees best maintain and carry out the
6 purpose herein set forth, provided that under no circumstances shall any
7 of the trust estate be so transferred or turned over to any such
8 organization formed or operated for private gain, or for use otherwise
9 than in the accomplishment of the purpose of this trust;

10 ...

11 (f) To receive, hold, and use in pursuance of the terms hereof, any and
12 all other property that may be vested in them by deed or by will or
13 otherwise to be devoted to the primary object of this trust.

14 And with respect to the subject of student self-governance as mentioned in
15 paragraph 1, paragraph 5 of the Deed of Trust says this:

16 The students in attendance receiving the benefits of the educational
17 work being conducted hereunder are the sole beneficiaries of this trust,
18 constitute the Student Body, and are to be considered as the beneficial
19 owners of all the property at any time held by the said trustees under
20 the terms hereof, title and authority being vested hereunder in said
21 trustees only because of the probability that most of said students will
22 be and remain minors while they are such students, and to maintain and
23 perpetuate the work of this trust free from the changes that would
24 inevitably result from the ever changing membership of the Student
25 Body. Therefore, it shall be the duty of said trustees to accord the
26 Student Body the full right, power and authority of democratic self-
27 government in accordance with its traditions and the ideals and policies
28 of Deep Springs education institution set forth in correspondence and
documents of Grantor and of the institution, including the control of the
conduct of its members and of the buildings used as students'
dormitories and the power of majority vote to veto the dismissal of any
member during the school year but not the power to dismiss any
member. It shall also be the duty of said trustees to recognize the right
of the Student Body to maintain its organization and hold its meetings
under such rules and regulations as it may adopt and with no one
present but its own members except on its invitation; to ascertain,
consider, and comply with, so far as in good conscience they can so
comply with, the desires of said Student Body; and to accord it full
opportunity to make its wishes known to them. To this end, the
Student Body shall be entitled to appoint one of its members to act as
the Student Body Representative at all trustee's meetings, and it may
remove at will any person so appointed; such appointment or removal
to take effect upon the filing of a proper certificate with the secretary of
the trustees. Each person so appointed shall continue as the Student
Body Representative until removed or until the expiration of his term of
office as may be fixed by the Student Body even though he may after
his appointment cease to be a member of the Student Body. The
Student Body Representative, during his continuance in office, shall be
entitled to notice of, and to attend all trustee's meetings with full power
to speak therein and to present his views and those of said Student
Body on all matters connected with the carrying out of this trust the

1 same as if he was made one of said trustees' by virtue of this deed, and
2 to a vote, which shall be considered and counted as if he were one of
3 said trustees, on all matters acted upon at any trustees' meeting except
4 on matters involving the conveyance or transfer of any title to, or the
5 imposition of any lien upon, any of the property forming a part of the
6 trust estate, but not including a s a transfer of title within the meaning
7 of this exception the expenditure of money in the conduct of
8 educational work hereunder or in the protection or preservation of the
9 trust estate.

6 To the extent other portions of the Deed of Trust are also relevant, those are
7 referenced in the sections which follow.

8 **II. THE PARTIES' RESPECTIVE POSITIONS**

9 In brief, Petitioner asserts that L.L. Nunn's overarching aim in creating the Trust was to
10 provide funding to carry on Deep Springs as an institution to encourage and train students to become
11 unselfish leaders in uplifting mankind from materialism to idealism. Petitioner contends that this
12 goal cannot be achieved effectively today by excluding women from the Student Body. Petitioner
13 asserts further that the reference to "promising young men" in the Deed of Trust is not the primary
14 purpose, not a material purpose, and not even a restriction on the use of Trust assets. Even if it was a
15 purpose or restriction, Petitioner argues that the value of maintaining an all male student population is
16 outweighed by the need to achieve the more essential goal of training students capable of becoming
17 leaders who will benefit society in the manner envisioned by L.L. Nunn.

18 The position of Real Party in Interest, Deep Springs College Corporation, is that single sex
19 education is an anachronistic, substandard, and increasingly unacceptable approach from a purely
20 educational standpoint, that an all male admissions policy and an all male student body add nothing
21 of value to the ability of the College to meet its educational goals, and that the College risks ultimate
22 failure unless it is able to educate men and women together.

23 In general terms, the Respondents meet these contentions by saying that L.L. Nunn's
24 unambiguous intent was to found and maintain a college to educate promising young men for careers
25 of selfless service, that nothing in the extrinsic evidence – even if admissible – alters that essential
26 element of L.L. Nunn's purpose, and, by all relevant measures, Deep Springs is doing well and does
27 not need to change its admissions policy in order to continue to thrive as a single sex institution.
28

1 Respondents assert that Deep Springs must be failing irretrievably and close to if not at a point of
2 destruction before the Trust can be modified.

3 **III. PRELIMINARY MATTERS**

4 Two issues permeate much of what the Court must determine in this proceeding: (1) whether
5 the Deed of Trust is ambiguous so as to justify the consideration of extrinsic evidence, and (2) the
6 determination of L. L. Nunn’s purpose or purposes in creating the Trust. Each of these matters is
7 addressed in this section to aid, and more fully explain, the Court’s resolution of the claims advanced
8 by Petitioner and opposed by the Respondents.

9 A. Extrinsic Evidence

10 Unlike most situations where grantor intent is at issue, L.L. Nunn left a large volume of
11 correspondence and other material regarding his desires for the educational undertakings he pursued,
12 including Deep Springs College. Moreover, enough is known about L.L. Nunn’s life,
13 accomplishments, interests, and general philosophy to put his writings in context. As a result, this is
14 the sort of case where extrinsic evidence – if properly allowable – can potentially be of the greatest
15 assistance to a court.

16 Probate Code sections 21101 *et seq.* govern interpretation of a trust. The overriding principle
17 of construction is that “[t]he intention of the transferor as expressed in the instrument controls.” *Id.* §
18 21102(a). Intent is determined by construing all parts of an instrument in relation to each other to
19 form a consistent whole, if possible. *Id.* § 21121. All provisions are assessed together in their
20 entirety, rather than the focus being on individual terms and conditions. See, e.g., *In re Bernatas’*
21 *Estate* (1958) 162 Cal.App.2d 693, 700. A provision which is “ambiguous or doubtful” may be
22 explained by any reference to or recital of the provision in another part of the instrument. Prob. Code
23 § 21121.

24 The first step in the process of interpretation is to determine whether there is any ambiguity in
25 the trust. In making this initial review, it is proper for the court to consider the circumstances under
26 which the document was made. See, e.g., *Estate of Russell* (1968) 69 Cal.2d 200, 208-210. Extrinsic
27 evidence in this limited respect is “admissible to interpret a trust, but not to give it meaning to which
28 it is not reasonably susceptible.” *Id.* at 211.

1 A written instrument such as a trust is deemed ambiguous when, in light of the circumstances
2 surrounding its execution, “the written language is fairly susceptible of two or more constructions.”
3 Estate of Russell, supra, 69 Cal.2d at 211. (citations omitted). When an ambiguity exists, the court
4 may properly consider a broader range of extrinsic evidence in order to resolve any uncertainty and to
5 give effect to the trustor’s intent. This broader range even includes expert testimony. See, e.g., *Ike v.*
6 *Doolittle* (1998) 61 Cal.App.4th 51, 77-78.

7 Applying this guidance, the Court concludes that the L. L. Nunn Trust is sufficiently
8 ambiguous to justify the admission and consideration of all available extrinsic evidence in order to
9 discern trustor intent. This finding is based upon this Court’s reading of the trust instrument as well
10 as an assessment of the circumstances under which it was created and signed. Several examples are
11 sufficient to support this result.

12 Paragraph number 1 of the Trust instrument is a lengthy sentence which enumerates things
13 L.L. Nunn had in mind concerning Deep Springs. One construction of this paragraph is that he
14 intended each and every one of these listed elements to be understood literally and to continue to be
15 included in the Deep Springs undertaking in equal measure and with equal emphasis in perpetuity.
16 In this interpretation, each element is clearly and fully delineated and the concluding phrase “solely
17 for the advancement of the purpose herein above mentioned” references the entire sentence.
18 Accordingly, the word “solely” applies to each individual element stated in that lengthy compound
19 sentence. L.L. Nunn’s purpose, then, would be construed as an integrated singularity, and not subject
20 to departure in meaning from an inseparable combination of all of the exact terms he employed.

21 Another construction of this paragraph is that the grantor’s objective was stated in the initial
22 phrase of the sentence: “The purpose for which the property hereby conveyed...is to provide for and
23 carry on educational work ... similar to and in development of the work...” he had “already
24 inaugurated” at Deep Springs. Under this interpretation, because L.L. Nunn used the word “shall” at
25 two particular points later in the text, but not elsewhere in the paragraph, the work must continue to
26 include “democratic self-government by the students” and must be conducted on a “not for profit”
27 basis. In this reading, the other individual items listed in paragraph 1 are not modified by the word
28 “solely” found in the final phrase and these other elements should be understood as providing

1 guidance to, but not strict limitations on, the Trustees relative to determinations made by them “in
2 good conscience and the exercise of their best judgment.” L.L. Nunn’s purpose, then, would be
3 construed as encompassing a number of mandatory objectives and several permissive but not
4 essential directives or means. The undertaking would also be understood as subject to some degree
5 of change and evolution over time as the Trustees continue the development of the educational work
6 so long as self-governance by the Student Body and non-profit status were preserved.

7 Without deciding (at least as part of this preliminary analysis) which of these interpretations is
8 “correct,” it is apparent that paragraph 1 of the Trust instrument is fairly susceptible of more than one
9 interpretation. The instrument is therefore “ambiguous” in the context of determining whether
10 extrinsic evidence should be considered.

11 At least two other portions of the document further support this finding. In paragraph 2(b),
12 L.L. Nunn authorizes the Trustees to transfer assets to any other educational entity “whenever to do
13 so will in the judgment of said Trustees best maintain and carry out the purpose herein set forth” –
14 but once more imposing an absolute condition that the transferee operate on a non-profit basis.
15 Neither paragraph 1 as a whole nor any other elements it contains is mentioned in provision 2(b) let
16 alone made a condition of transfer. This raises the question of how rigorously the grantor wished the
17 Trustees to preserve an institution which hewed strictly to each and every other element recited in
18 paragraph 1.

19 Moreover, in paragraph 2(f), L.L. Nunn authorized the Trustees to accept donations of other
20 property and stated that such additional assets should be “devoted to the primary object of this trust.”
21 “Primary object” may or may not mean the same thing as the word “purpose” found in paragraph 1
22 and elsewhere in the document. If the grantor had meant for “purpose” and “primary object” to
23 mean the same thing, he could have merely referenced paragraph 1 explicitly in paragraph 2(f).
24 “Primary object” also may or may not have been more important than “purpose” to the grantor. At
25 the very least, use of a different expression implies that L.L. Nunn intended more than one goal for
26 use of Trust assets and that he intended that one of these objectives – the “primary object” -- should
27 be treated as more important than others.
28

1 By the same token, other portions of the Deed of Trust present further challenges for proper
2 construction. As one example, the phrase “for the education of promising young men” can perhaps
3 be read (as Respondents assert) as meaning “for the education of promising young men, and only
4 promising young men.” On the other hand, this language is also reasonably susceptible to the
5 meaning (as Petitioner contends) “for the education of promising young men, but not to the exclusion
6 of women.” The possibility that gender of the Deep Springs Student Body did not enter L.L. Nunn’s
7 mind is consistent with the circumstances surrounding the execution of the Deed of Trust in that
8 women at the time played virtually no meaningful role in business, government, or higher education.
9 586-588 (Lehecka); Exh. 205. It is consistent as well with the fact that the institutions which he used
10 as models for the program he started at Deep Springs were all male. 491-503 (Newell).

11 As another example, the reference to “in a manner emphasizing the need and opportunity for
12 unselfish service in uplifting mankind from materialism to idealism” can be read (as Respondents
13 assert) to demonstrate L.L. Nunn’s intent to educate students to serve others. Or, just as reasonably,
14 it can be read (as Petitioner contends) as reflecting L.L. Nunn’s intent to train students in the skills
15 necessary to improve mankind (e.g., leadership). The latter view is consistent with the emphasis
16 which he placed in paragraphs 1 and 5 of the Trust with respect to assuring that students at the
17 College could and would continue to engage in meaningful self-governance.

18 Again, whether any one or another of these possible interpretations is “correct” is not the
19 basis for deciding whether extrinsic evidence should be considered. The question is whether
20 ambiguity exists within the four corners of the Deed of Trust according to the standard which the law
21 imposes. The answer is yes.⁵ Therefore, the Court finds that extrinsic evidence is admissible for the
22 purpose of interpreting L. L. Nunn’s intent and the related matters at issue in Petitioner’s request to
23 modify the Trust.

24
25
26 ⁵ The Court is also mindful of two more things on the subject of the meaning of the L.L. Nunn Deed
27 of Trust. First, thoughtful individuals on both sides of this controversy, acting in good faith, have
28 expressed divergent interpretations of the text of the instrument. When reasonable minds can differ,
the test for admission of extrinsic evidence has been satisfied. And second, cross-examination of
several of these individuals as to their respective readings of the document illustrates further that key
portions of L.L. Nunn’s expression are indeed susceptible to at least two meanings. See, e.g., 66-68,
71-72, 74 (Hitz); 868, 972-980 (Hoekstra).

1 Finally, the Deed of Trust contains at least two explicit references to extrinsic evidence. In
2 paragraph 1, L.L. Nunn mentions the “educational work ... already inaugurated ... at Deep Springs.”
3 In paragraph 5, he directs the Trustees “to accord the Student Body the full right, power and authority
4 of democratic self-government in accordance with its traditions and the ideals and policies of Deep
5 Springs educational institution set forth in the correspondence and documents of Grantor and of the
6 institution....” Even if the Court were to find that the document is not ambiguous, it would still be
7 appropriate to consider these particular categories of extrinsic evidence expressly identified in the
8 Deed of Trust in determining what L.L. Nunn intended.

9 **A. Purpose or Purposes of the Trust**

10 1. Purpose or Purposes in Light of the Text of the Trust Document.

11 Even where reference to extrinsic evidence may be helpful in determining grantor
12 intent, the analysis must still begin with the trust instrument read as a whole. *Wells Fargo*
13 *Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453.

14 In paragraph 1 of the Deed of Trust, a lengthy sentence quoted in substantial part
15 above, L. L. Nunn uses the word “shall” three times. First, he says, “the purpose for which
16 the [assets conveyed] shall be used ... is to provide for educational work in the State of
17 California similar to and in development of the work already inaugurated by Grantor....”
18 Second, L.L. Nunn states that “...in the conduct of which educational work democratic self-
19 government by the students themselves shall be a feature as is now the case at said Deep
20 Springs....” And third, he states “...which work shall be carried on not for profit but solely
21 for the advancement of the purpose hereinabove mentioned.”

22 In subsequent paragraphs of the document, L. L. Nunn reiterates and elaborates on
23 each of the three themes that are emphasized in paragraph 1 by use of the word “shall”:
24 educational work, student self-government, and non-profit operation. As previously quoted,
25 in Paragraph 2. (b) he authorizes transfer of assets to organizations “devoted to the cause of
26 education” as long as they are “non-profit.” In Paragraph 3, he directs that notices of the
27 appointment of new trustees be recorded “...wherein the principal part of the educational
28 work provided for hereunder is being carried on....” In Paragraph 4, not for profit status is

1 reinforced by the provision that "...Trustees shall receive no compensation...." Paragraph
2 5, quoted in full above, elaborates on both the educational work and the high importance of
3 student self-government to L.L. Nunn. It begins, "[t]he students in attendance receiving the
4 benefits of the educational work being conducted hereunder shall be the sole beneficiaries of
5 this trust.... Therefore, it shall be the duty of said Trustees to accord the Student Body the
6 full right, power and authority of democratic self -government in accordance with its
7 traditions and the ideals and policies of Deep Springs educational institution set forth in the
8 correspondence and documents of Grantor and of the institution...." And finally, paragraph
9 6 refers three times to "the educational work provided for hereunder" and once to the
10 "school work in progress."

11 The Court notes that while educational work, student self-government, and non-
12 profit operation are discussed throughout the Deed of Trust, other features mentioned in
13 paragraph 1 are not revisited. This factor must be given weight in the analysis.

14 In paragraph 1, L. L. Nunn also refers to other aspects of his vision for and the then
15 current character of Deep Springs. These phrases, both covered extensively during the trial,
16 are "for the education of promising young men" and "emphasizing the need and opportunity
17 for unselfish service in uplifting mankind from materialism to idealism, to a life in harmony
18 with the Creator...." Based upon a plain reading of the Deed of Trust as a whole, while it is
19 clear that L.L. Nunn intended both of these elements to be included by and/or at the College,
20 they were not as important to him as the objective of providing for a non-profit institution of
21 higher learning that utilized student responsibility and self-reliance as its core pedagogical
22 approach.

23 Respondents' argument as to the meaning of the Deed of Trust on its face is that paragraph 1
24 is the full and complete statement of L. L. Nunn's purpose. They assert that each and every element
25 which L.L. Nunn expressly included in paragraph 1 must be viewed as an inseparable part of an
26 integrated and immutable single purpose. They contend that the final phrase "...solely for the
27 advancement of the purpose hereinabove mentioned" indicates that there is a single purpose, that it
28 must include a fusion of all elements mentioned in the sentence, and that anything else is excluded by

1 use of the word “solely.”

2 For example, Dr. Hoekstra’s testimony concerning his interpretation of purpose is that L.L.
3 Nunn enumerated each and every indispensable element in paragraph 1, that the singular objective is
4 the conjunction or intersection of those things, and that it cannot be determined whether any one or
5 more of these components are either elevated or subservient to others. , 945-948. In this view, each
6 element is integral to the purpose and Deep Springs ceases to exist (as the grantor envisioned it) if
7 any element (e.g. “promising young men”) is altered. Id.

8 Respondents also emphasize in this regard that L.L. Nunn was a lawyer and careful
9 draftsman who employed another attorney in creating the document. As a result, they say,
10 any departure from the exact manner in which any word or phrase appears in the text is not
11 what L.L. Nunn would have wanted.

12 The Court does not accept Respondents’ view of a singular immutable purpose. It is
13 apparent from the text of paragraph 1, and from the Deed of Trust read as a whole, that L.L.
14 Nunn was interested in a number of things for Deep Springs. The document in and of itself,
15 moreover, indicates that these elements were neither rigidly tied to each other nor of equal
16 importance.

17 Two other phrases included in paragraph 1 further substantiate this conclusion. The
18 first is the reference by L.L. Nunn to “similar to and in development of” the efforts he had
19 commenced in Deep Springs Valley. The second is the expression “but in such manner and
20 form as said Trustees in good conscience and the exercise of their best judgment may
21 determine....” While the scope and limits of the Trustees’ discretion have been at issue in
22 this case, these two additional references plainly indicate that the grantor anticipated that
23 things would change at the College over time. Having stated that his Trustees could and
24 should make at least some adjustments and work to further develop Deep Springs as they
25 saw fit, if L.L. Nunn had wished to mandate that an all male student population, religious
26 instruction, an absolute ban on incidental activity across the state boundary in Nevada,
27 and/or any other facet of the undertaking could not be altered by the Trustees, he could have
28 and would have expressed that intent by using the term “shall” or its equivalent in

1 connection with one or more of those elements.⁶ Therefore, the Court does not and cannot
2 read the document, as written, to bind the College in the legal version of a straightjacket.

3 Accordingly, based solely on the language employed throughout the instrument and
4 the circumstances surrounding its execution, the Court believes that the primary purpose of
5 the Trust is to fund the continuing operation of Deep Springs College as a non-profit
6 institution of higher education which utilizes meaningful student self-government as a key
7 pedagogical method. This assessment may, of course, change upon consideration of
8 additional extrinsic evidence—the task to which the Court now turns.

9 2. L. L. Nunn’s Purpose or Purposes for Deep Springs in Light of the Extrinsic Evidence.

10 The analysis of L.L. Nunn’s purpose or purposes based on a reading of the Trust document in
11 and of itself is further informed by the extrinsic evidence. First, as to whether the instrument (1)
12 reflects grantor intent to establish a single purpose which would not be subject to change
13 (Respondents’ assertion), or (2) reflects several objectives of varying levels of importance
14 (Petitioner’s perspective), the additional references and other information available to the Court
15 support the latter conclusion.

16 As one significant example, the writings of L.L. Nunn (as referenced in paragraph 5 of the
17 Trust instrument) urge the Deep Springs students of his time to not stray from the Valley. Exh. 201
18 pp. 7-8 (March 26, 1920); pp. 25-27 (February 17, 1923). This emphasis on isolation – which all
19 parties acknowledge was and has remained an essential feature of the College program – is not
20 referenced explicitly in the Trust. Yet it was important to L.L. Nunn and to the vision he had for the
21 College:

22 The desert has a deep personality; it has a voice; and God speaks
23 through its personality and voice. Great leaders in all ages from Moses
24 to Roosevelt, have sought the desert and heard its voice. You can hear
25 it if you listen, but you cannot hear it while in the midst of uproar and
26 strife for material things. Gentlemen, “For what came ye into the
27 wilderness?” Not conventional scholastic training; not for ranch life;
not to become proficient in commercial or professional pursuits for
personal gain. You came to prepare for a life of service, with the
understanding that superior ability and generous purpose would be

28 ⁶ By “equivalent” the Court means using a word such as “only” or “solely”, as for example making an
insertion in another part of paragraph 1 to read “at such place or places *only* within said State....”

1 expected of you, and this expectation must be justified. Even in
2 scholastic work, average results obtained in ordinary school will not be
3 satisfactory. The desert speaks. Exh. 201 pp 26 (February 17, 1923.)

4 In other writings, L.L. Nunn describes the program and his desires for the College in a manner
5 which is not the same as what is set forth in terms of particular elements in paragraph 1. Exhs. 201,
6 359. For instance, L. L. Nunn often refers in his letters to “the four hours of physical labor required
7 as an important feature of the education....” Exh. 26, p. 14 (April 4, 1921). Today that is referred to
8 as the labor program—one of the three pillars of the Deep Springs program — but it was not
9 mentioned in the Deed of Trust. Once more, the extrinsic evidence suggests that what L.L. Nunn
10 expressed in paragraph 1 was not a complete and unalterable description of what he wanted for his
11 College.

12 Relative further to this subject, Respondents point to L.L. Nunn’s undated 1924 letter to the
13 Trustees (Exh. 32), which states:

14 It is certainly true that Deep Springs has worked very imperfectly. I
15 have never been satisfied with it. And I hope that the Trustees never
16 will be. But the fundamental principles practised [sic] at the institution
17 are what I wish to perpetuate. I shall keep driving home to you
18 gentlemen, even if it takes my dying breath, that the purpose of Deep
19 Springs is the education of promising young men in a manner
20 emphasizing the need and opportunity for unselfish service and
21 uplifting mankind from materialism to idealism, to a life in harmony
22 with the Creator.

23 According to Respondents, even though L.L. Nunn may have expected and wanted change (as in fact
24 he says directly) there remained in his mind one unalterable core purpose.

25 While this contention carries some weight based on part of what appears in this excerpt, it is
26 not a complete answer. Indeed, another portion of the same text begs the question: what are the
27 “fundamental principles practised at the institution” to which the author refers? Student self-
28 governance and non-profit operation have to be included, but those are not mentioned in the letter.
Isolation, religious instruction, and the labor program were major elements of the Deep Springs
program at the time, but those are not mentioned either. Are they or are they not among the
“fundamental principles practised at the institution” which L.L. Nunn wanted to “perpetuate?”
Absent guidance from other sources which might provide an answer, the undated 1924 letter is

1 insufficient to alter the Court’s determination that L.L. Nunn did not posit a single, immutable
2 purpose for the College.

3 Going beyond the writings, the proposition that L.L. Nunn intended his experiment in
4 education at Deep Springs to continue operating into the indefinite future within narrowly defined
5 boundaries is contradicted by his experiences prior to founding the College as well as by his very
6 character. L.L. Nunn always pushed to improve whatever enterprise he focused on at a given time.
7 In the educational arena, starting with small programs at various hydroelectric plants, coalescing
8 those efforts with formation of an institute at Olmsted, founding Telluride Association, and making
9 an initial attempt to start his “primary branch” in Virginia, he was constantly trying new approaches,
10 adjusting the overall undertaking, and discarding what did not seem to be productive. Even in the
11 years between 1917, when he started Deep Springs, and his death in 1925, changes occurred under
12 his direct leadership. 505-506 (Newell). And, indeed, with respect to the future of his educational
13 undertakings, he even exhorted those responsible for the Telluride Association during this same
14 period to do what they thought best for that institution and beyond: “I say again, cut me out. Do not
15 use my name. Refer no one to me for any cause. Establish the work on broader lines than individual
16 plan or purpose, always having in mind that the benefits must ultimately go to the world and not to a
17 class.” 1105-1106 (Newell). Any suggestion that L.L. Nunn wished to define or limit forever how
18 the College pursued its ultimate mission to educate and encourage its graduates to change the society
19 for the better fails in light of what the evidence shows he did and what he wanted others to do in his
20 absence.

21 The next relevant aspect of the Deed of Trust subject to possible further interpretation is L.L.
22 Nunn’s emphasis on the elements of education, student self-government, and non-profit operation.
23 Nothing in the extrinsic evidence suggests that any of these considerations was unimportant to the
24 grantor. To the contrary, various writings and other pertinent facts reinforce the conclusion that they
25 were very significant objectives in his mind for the Deep Springs effort. Education was the exclusive
26 focus of L.L. Nunn’s entire life after 1911 or 1912. He drove to establish a school which would
27 eventually rival Harvard, Yale, and Princeton. He devoted not just attention and energy to the
28 undertaking, but also his wealth. That was done by him to the ultimate end of “uplifting mankind,”

1 not in order to generate a profit. Indeed, it is impossible to imagine that someone who founded an
2 institution to help channel mankind “from materialism to idealism” would want it to be anything but
3 a not-for-profit enterprise. And the pivotal significance of self-reliance and self-governance by the
4 students at Deep Springs is demonstrated even more thoroughly than in the Deed of Trust (where it
5 already received the highest level of attention) by the grantor’s many direct interactions with them in
6 the Valley and in correspondence with them and others about their role.⁷ Indeed, there is no element
7 to which L.L. Nunn directs greater emphasis, both within and beyond the Deed of Trust, than student
8 self-governance.

9 The question then arises whether the extrinsic evidence points to any other component
10 identified in the Trust instrument being accorded by the grantor the same level of importance as
11 education, self-governance, or non-profit operation. The “candidates” pertinent to this proceeding are
12 references to “... unselfish service in uplifting mankind....”and “...for the education of promising
13 young men.” Again, there is no doubt that these objectives had significance for the grantor. But how
14 much significance?

15 The notion of “uplifting mankind” to achieve “harmony with the Creator” appears to have
16 been a guiding principle during most of L.L. Nunn’s life. Professor Newell described how, in his late
17 twenties, L.L. Nunn wrote in a paper called “The Moral Sense” about his Christian theist position
18 relative to the world being flooded with information, technology, and scientific knowledge. L.L.
19 Nunn embraced these developments, but also felt there were certain God-given moral truths
20 embedded in the universe and that it was essential to bring one’s life into conformity with these
21 truths. L.L. Nunn presented this paper and kept it close at hand throughout his life. 487-489
22 (Newell). Consistent with this background and commitment, when L.L. Nunn founded Deep Springs,
23 religious instruction was a significant feature of the curriculum. Thus, the extrinsic evidence might
24

25 ⁷ For example, “[y]ou are right, the development of a desire within to do right is one, probably the
26 most important of the principal functions of the student body”; “[t]he student body must acquire
27 authority by wise conduct. . . . Nobody will or can object to that and from such care will emanate
28 control first and then authority. Were I to issue an absolute order giving authority it would do the
student body no good and simply place me in the position of being an arbitrary dictator instead of a
guiding influence”; and “[The Student Body] has authority over the conduct of its members and right
to increase that authority to an absolutely unlimited extent under the law of the eternal fitness of
things.”. Exh. 201, letters of February 22, 1919, January 24, 1921, and April 5, 1921.

1 support attributing to this element as much importance as is more explicitly assigned in the text of the
2 Trust to education, student self-government, and not for profit status.

3 By contrast, there is no extrinsic evidence which points to L.L. Nunn having regarded the
4 education of “promising young men” -- in and of itself -- to be a goal for the College. He did not
5 include in any document a specification of his reasons for starting Deep Springs as a men’s college.
6 In his extensive study of L. L. Nunn, his writings, and what others wrote about him, Professor Newell
7 found no “reference to Nunn dreaming about founding a men’s college.” 501: 23-24. Respondents
8 have cited no such evidence. Nor did L. L. Nunn include in any writing a statement indicating that he
9 wished to exclude women as students either during the time he led the institution or thereafter. And
10 while the evidence is also uncontradicted that L.L. Nunn selected only men to attend Deep Springs,
11 that was consistent with all social realities of the era. Elite colleges and universities educated only
12 men. Women led more protected lives and when they sought higher education that took place close
13 to home and not in an undeveloped, isolated, and rugged environment such as Deep Springs Valley.
14 Moreover, overwhelmingly women were educated only in limited fields such as teaching and nursing
15 in which it was socially acceptable for them to work. The professions in which L.L. Nunn had been
16 engaged during his lifetime, along with those other arenas where he expected Deep Springs and
17 Telluride participants to flourish after graduation, were almost exclusively men’s clubs. Even if
18 women were to attend the College, chances that they would be interested in pursuing let alone be
19 accepted in the domains of interest to L.L. Nunn were exceedingly small. Accordingly, none of the
20 extrinsic evidence indicates that he gave conscious thought – let alone made a knowing decision –
21 that the education of promising young men was as important as education in a more general sense,
22 student self-government, or non-profit operation.

23 There is another, related matter of construction arising from terms found in paragraph 1 but
24 not elsewhere in the Trust. The Petitioner reads the language “emphasizing the need and opportunity
25 for unselfish service in lifting mankind from materialism to idealism” to encompass the concept of
26 training leaders for society. On the other hand, Respondents emphasize that the words employed by
27 the grantor control, and that he never mentions “leadership” in the document. The omission is critical,
28

1 and in the Court’s view bears significant though not conclusive weight. The extrinsic evidence
2 therefore assists in sorting out this issue further.

3 There is no question that L.L. Nunn wished to encourage Deep Springs’ students to live lives
4 of service.⁸ Some of his writings add the notion of leadership or equate the two concepts. For
5 example, in “Children of this World” (Exhibit 359), he describes time spent by the students in the
6 desert as not being a commitment “...to a fanatic life of asceticism but to a short season of
7 preparation for the work of the few, the great work – the heavy toil of leadership.” And in other
8 places, he talks about Deep Springs preparing “the few” or “Trustees of the Nation.” Exh. 201
9 (letters of April 5, 1921 and February 17, 1921 along with essay “The Purpose”)

10 Yet the written record is not consistent. Other writings touch on the subject only generally or
11 metaphorically. E.g. 201 (“The Man Required for Deep Springs”). While it may be that the grantor
12 considered leadership training to be an important part of what he wanted to provide at the College,
13 the parameters of this component and its relative significance to him are not established definitively
14 in the writings.

15 Other evidence in this regard is more consistent. L.L. Nunn himself was a leader in several
16 fields during his lifetime, and he appears to have valued others who were leaders in society (such as
17 George Westinghouse and Nicola Tesla, not to speak of historical figures such as Moses,
18 Washington, and Lincoln to whom he referred regularly in his letters). He picked as models for his
19 educational undertakings institutions in this country and in the England where the articulated purpose
20 was to train leaders. And the entire program he pursued starting with his power plant schools,
21 evolving with the institute at Olmsted, and culminating with funding higher education for the
22 “pinheads” and founding Telluride Association, was designed to generate a cadre of leaders who
23 could return to further develop the nascent power industry. 487-493 (Newell). It is therefore not
24

25 _____
26 ⁸ In addition to expression being used in the Trust, some of the grantor’s writings expand on the
27 point: for example, “[t]he general conduct has been that of ordinary students and not such as should
28 be expected of a score of students especially selected from the hundred million people of this country
as the best material out of which to make public servants and trustees of the country's welfare”;
“[t]he Deep Springs Student] should know what to expect on entering service of his country in
diplomatic fields abroad or in commissions or other fields at home, and to be ready to meet and reject
any alluring opportunities.” Exh. 201, letters of April 5, 1921 and June 1, 1922.

1 possible to exclude training in leadership as an objective which L.L. Nunn wished the College to
2 pursue.

3 Although it appears on balance in light of the extrinsic evidence that training in leadership
4 was important and well within the ambit of L.L. Nunn’s contemplation for Deep Springs, the Court
5 cannot conclude that this was his single primary or dominant purpose. L.L. Nunn could not
6 reasonably have expected that all Deep Springs students would become leaders. Nor is there any
7 indication in the intrinsic or extrinsic evidence that he believed the College would fail in achieving its
8 objectives as a result.

9 Understanding the meaning and relative importance of the phrase “for the education of
10 promising young men” in the Deed of Trust is also challenging. L.L. Nunn used the same phrase in
11 the undated 1924 letter quoted above. Further, as Respondents also point out, L.L. Nunn utilized the
12 word “men” in many of his writings.

13 By contrast, however, in “Children of This World,” L. L. Nunn wrote “[t]his environment [at
14 Deep Springs] consists: (1) in the intimate association with a small group of young men who have
15 declared themselves ready to accept the purpose of Deep Springs.” Exh. 359. It is illogical to say that
16 young men ready to accept the purpose could at the same time also be the purpose.⁹ Furthermore,
17 also as noted above, there is no indication that either the selection of only men – to the exclusion of
18 women -- from the Deep Springs student cohort was intentional or important to L. L. Nunn. Colleges
19 and universities at the time which sought to educate the elite of society limited admission to men, and
20 the entire frame of reference for L.L. Nunn in his professional life was exclusively male. Indeed, the
21 evidence is uncontradicted that he had no contact with any woman as an employee – let alone as a
22 person with high level responsibility or as an equal – in any of his enterprises.

23 As related by Professor Newell, if L.L. Nunn directed any conscious thought to the question
24 of the gender of the student population at Deep Springs – and, again, there is no evidence he did --
25 that was probably influenced by notions of efficiency. L.L. Nunn was founding a small college. To
26 have the greatest impact, he needed to select as students individuals who had the greatest prospects
27 for having an ultimate impact on society. 493-494 (Newell). That explains, for example, the

28 _____
⁹ For example, see the letters of April 15, 1921, and February 15, 1923. Exh. 26 (pp. 13,27).

1 recruitment and selection of the vast majority of students in L.L. Nunn’s day from families of
2 financial means. 498-499 (Newell). The same logic could be true of selecting men, and thus would
3 be a matter of efficacy rather proof of purpose.

4 Respondents also make the argument that L.L. Nunn was not “opposed” to women receiving
5 an education (based on the facts that his sisters were well schooled and that he encouraged his nieces
6 to attend college) and that he did not subscribe to many common prejudices of his day (such as
7 discrimination against Catholics and Jews). While these assertions are supported by the evidence,
8 they do not logically lead to any particular conclusion as to grantor intent. Recognizing that higher
9 education could be beneficial to some or even a large number of women is not the same thing as
10 believing in the early decades of the twentieth century that it would be appropriate or desirable for
11 women to attend Harvard, Yale, Princeton, or Deep Springs. And being ahead of one’s time in some
12 aspects of social equality does not necessarily translate into “enlightenment” across the board. There
13 is no evidence, for example, as to whether L.L. Nunn did or did not harbor prejudices common to his
14 era with respect to African-Americans, Mexican-Americans, or immigrants from particular foreign
15 lands. Nor is there evidence as to whether he did or did not believe the common presumptions and
16 stereotypes of his era relative to women as a group.

17 What is apparent from the extrinsic evidence on this topic is that the phrase “for the education
18 of promising young men” cannot be pushed very far in either direction – if at all – from how it should
19 properly be understood as part of the Deed of Trust. It remains in the Court’s view something that
20 was important to L.L. Nunn at the time, but both the language of the Trust and the extrinsic evidence
21 indicate it is less essential than his three primary objectives for Deep Springs. Moreover, there is no
22 definitive indication from any evidence that the original all male Student Body resulted from a
23 conscious decision to exclude women or that it is a characteristic which he intended would continue
24 in perpetuity. The Court therefore concludes that it should not be construed as a permanent
25 restriction on the College.¹⁰

26
27 ¹⁰ In reaching this determination, the Court also observes that there is an interesting comparison
28 involving the phrase “for the education of promising young men” and the reference by L.L. Nunn in
the trust to “the Creator.” Use of the word “Creator” in paragraph 1 of the document, coupled with
the reference to “work already inaugurated,” reflects the grantor’s interest in and emphasis on
religious instruction as a part of the program at Deep Springs. Religious instruction, however,
disappeared from the curriculum in or about the 1950’s when it became undesirable in the view of the

1 As a result, the Court continues to believe – now in light of the extrinsic evidence as well –
2 that the primary purpose of the Trust is to fund the continuing operation of Deep Springs College as a
3 non-profit institution of higher education which utilizes meaningful student self-government as a key
4 pedagogical method. Ultimately, L.L. Nunn had a compelling desire for graduates of this program to
5 make a positive difference in society. Additionally, the Court recognizes that service to mankind (in
6 multiple forms), instruction in religion, and the education of promising young men (though not
7 necessarily to the exclusion of women) were important considerations for L.L. Nunn in founding and
8 funding Deep Springs. The Court believes that L. L. Nunn intended that those attributes be preserved
9 to the extent reasonably possible, but did not wish them to be strict restrictions on the College or its
10 Trustees.

11 **IV. PETITIONER’S THEORIES FOR MODIFICATION**

12 Petitioner advanced four legal theories for modification, and evidence regarding each of these
13 assertions was presented at trial.

14 **A. MODIFICATION OF TRUST BASED ON CONSENT OF BENEFICIARIES** 15 **(PROBATE CODE SECTION 15403)**

16 Section 15403 reads in relevant part as follows:

17 (a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable
18 trust consent, they may compel modification or termination of the trust upon petition to
19 the court.

20 (b) If the continuance of the trust is necessary to carry out a material purpose of
21 the trust, the trust cannot be modified or terminated unless the court, in its discretion,
22 determines that the reason for doing so under the circumstances outweighs the interest in
23 accomplishing a material purpose of the trust.

24 **1. Right to Petition**

25 students attending the institution. No furor apparently arose and no application was made at the time
26 to interpret or modify the trust to eliminate something which was clearly quite important to L.L.
27 Nunn. By contrast, there is little if any evidence that maintaining an all male Student Body was as
28 important to him. Yet, the subject has been debated hotly for many decades and ultimately has come
before this Court. Gender equality seemingly was and apparently remains a far more sensitive topic
than required instruction in religion – even though L.L. Nunn’s intent or commitment to the Creator
and to religious instruction was arguably a higher priority for him than the gender of the Student
Body.

1 Respondents point to the text of section 15403 to argue that relief is not available under the
2 statute because no beneficiary has petitioned the Court directly in this matter. The Court disagrees,
3 and holds that a trustee of a trust may also institute and maintain a petition to modify or terminate a
4 trust under this provision.

5 The authority of a trustee in this regard is established by Probate Code section 17200 as
6 follows:

- 7 (a) ...a trustee . . . of a trust may petition the court...concerning the
internal affairs of the trust....
8 (b) Proceedings concerning the internal affairs of a trust include, but
are not limited, to proceedings for any of the following purposes:
9 . . .
10 (13) Approving or directing the modification or termination of the
trust.

11 In other words, a trustee can proceed under section 17200 to seek modification of an
12 instrument on any available grounds, including those set forth in section 15403.

13 Any doubt as to trustee empowerment and the ability of a court to act most broadly in
14 response to a petition advanced in accordance with section 17200 is put to rest by the decision in *Ike*
15 *v. Doolittle*, supra, 61 Cal.App.4th 51. That case involved several petitions to modify a trust brought
16 pursuant to section 17200. The party who opposed modification argued that a trial court’s statutory
17 power to modify a trust was “strictly limited by the provisions of section 15400 et seq.” Id. at 83.
18 Both the trial court and Court of Appeal rejected this contention. They did so not merely based on
19 the language of section 17200 recited above, but also because none of the statutory provisions dealing
20 specifically with trust modification contains express language which limited grounds for modification
21 to the bases set forth in those particular sections, and because the scope of trustee authority described
22 in section 17200 is non-exclusive. Id. at 82-83.

23 By close analogy, Petitioner here was well within his rights to initiate a request to modify the
24 Nunn Trust on any available basis – including that set forth in section 15403. And this Court’s
25 authority to adjudicate that petition pursuant to section 15403 is not constrained by any language
26 found therein or in any other part of the Probate Code.¹¹

27 _____
28 ¹¹ The Court observes further that Respondents’ argument with respect to who is entitled to petition
under section 15403 rests on a foundation which is materially different from that underpinning
assertions which they made at trial concerning participation of the Attorney General in these
proceedings. Government Code section 12591 states “that no court shall have jurisdiction to modify

1 Petitioner’s decision to invoke section 15403 in this case also makes practical sense given the
2 two year character of the Deep Springs program. All those who were current students at the time the
3 petition was filed have graduated and ceased to be beneficiaries. When that happened, they lost their
4 ability (standing) to continue the litigation. Each July newly admitted students would have to be
5 substituted as current beneficiary petitioners in their place, and that process continued for however
6 long the proceeding lasted. This would elevate form over substance and illustrates further that
7 nothing of value would be accomplished if the Court were to accept Respondents’ view as to proper
8 procedure under section 15403. For this reason as well, the Court concludes that the Trustees had
9 and have the authority to file and maintain a request to modify the L.L. Nunn Trust pursuant to
10 Probate Code section 15403.

11 1. Required Consents

12 As set forth previously in the Court’s “Ruling and Order on Respondents’ Motion for
13 Judgment on the Pleadings, or, in the Alternative, Motion in Limine,” filed November 13, 2013, the
14 issue of whether all beneficiaries have consented to modification within the meaning of section
15 15403, subdivision (a), is a matter of statutory interpretation and has been described as a pure
16 question of law. *Boys & Girls Club of Petaluma v. Walsh* (2008) 169 Cal.App.4th 1049, 1057.

17 Probate Code section 24, subdivision (d), defines a beneficiary as “a person to whom a
18 donative transfer of property is made or that person’s successor in interest . . . ,” including “a person
19 who has any present or future interest, vested or contingent.” In the context of a charitable trust,
20 section 24 defines a beneficiary as “any person entitled to enforce the trust.” See *Boys & Girls Club*,
21 *supra*, at 1058.

22 No California case has decided whether the Attorney General is a beneficiary for the
23 purposes of consent under Probate Code section 15403, although such is implied in cases like *Boys &*
24 *Girls Club*. In many circumstances the Attorney General would be the only “beneficiary” of a

25
26 ... any trust of property for charitable purposes unless the Attorney General is a party to the
27 proceedings.” No such directive appears in section 15403, and although the words of 15403(a) might
28 be read as saying that trust beneficiaries should be the ones who make the request, there is no express
requirement that they do so and no express prohibition on a trustee taking the initiative instead.

1 charitable trust under Probate Code section 24, subsection (d), as in situations where the beneficiaries
2 are indefinite and thus unable to consent on their own behalf. The Attorney General has an
3 obligation (rather than mere discretion) to institute suit when there has been a breach of a charitable
4 trust. Should another person institute the proceedings, the Attorney General must be made a party.
5 “No doubt this latter requirement is to permit him to exercise his duty as the primary guardian of the
6 general public’s interest in charitable trusts.” *In re Veterans’ Industries, Inc.* (1970) 8 Cal.App. 3d
7 902, 919-920. The Attorney General actively participates in developing plans to carry out *cy prè*s
8 requirements in connection with reorganization of charities. The Attorney General may consent to the
9 distribution to the nominee suggested by a petitioner or recommend others for the consideration of
10 the Court. *Id.* at 919-920. The Attorney General also has power to recommend or appoint another
11 distributee. *Estate of Buck* (1994) 29 Cal.App.4th 1846, 1859. Therefore, it would strain logic to
12 conclude that the Attorney General was not intended as one of the beneficiaries required to sign the
13 consent in cases involving charitable trusts under Probate Code section 15403.

14 Moreover, with specific reference to the case now at hand, it is apparent from language found
15 in the Trust instrument (specifically in paragraph 5) that L.L. Nunn expected unnamed and
16 unidentifiable students to become beneficiaries in the future. The Court finds that the Attorney
17 General is entitled to and should consent (or decide to withhold consent) on behalf of these future
18 students. In light of the efforts which they made to join the Attorney General as a party to this action,
19 Respondents appear to agree. Petitioner agrees as well, if nothing else by virtue of the fact that he
20 sought and obtained the consent of the Attorney General to modification of the L.L. Nunn Trust to
21 allow for the education of women in addition to men at Deep Springs College.

22 A consent of the Attorney General to the modification requested by Petitioner was filed with
23 the Court on May 5, 2014. Exh. 237. The Court concludes that this consent by the Attorney General
24 satisfies the requirements of Probate Code section 15403(a) at least in part.

25 As to others who may be deemed beneficiaries of the Trust for purposes of Probate
26 Code section 15403, the Court discussed this question as well in its November 13, 2013 Ruling and
27 Order. There, the Court noted that persons with a “special interest” are sometimes granted standing
28

1 to act as beneficiaries of a trust. *Hardman v. Feinstein* (1987) 195 Cal.App.3d 157,161-162;
2 Restatement Third of Trusts, section 94.

3 The Court also identified the factors to be considered in such an analysis: (1) Whether the
4 interest is current or only potential (*Robert Schalkenbach Foundation v. Lincoln Foundation, Inc.*
5 (2004) 208 Ariz. 176, 91 P.3d 1019, 1025, 2017); (2) Whether the person seeking standing is likely to
6 be injured or has something personal to gain by the action (*Price v. Akaka* (1990) 915 F.2d 469, 472;
7 *Y.M.C.A of City of Washington v. Covington* (1984) 484 A.2d 589, 591); (3) Whether the class of
8 potential beneficiaries is sharply defined and limited in number as opposed to interest that is no
9 greater than the interest of all the other members of a large class of potential beneficiaries of a
10 charitable trust (*In re Rosenthal*, 99 A.D.3d 573; *Mt. Jezreel Christians v. Bd. of Trustees* (1990) 582
11 A.2d 237, 239); *Rhone v. Adams* (Ala. 2007) 986 So. 2d 374, 377; (4) Public policy concerns and
12 objectives (Restatement Third of Trusts, section 94); (5) The nature of the challenge (theory not
13 favored in cases of an ordinary exercise of discretion on a matter expressly committed to the trustees
14 which may give rise to recurring litigation) (*Kania v. Chatham* (1979) 297 N.C. 290, 254 S.E.2d 528;
15 *Hooker v. Edes Home* (D.C. 1990) 579 A.2d 608, 615); (6) Whether the suit is by a representative
16 aimed to vindicate the interests of the entire class or to interests of a given individual (*Hooker v.*
17 *Edes Home*, supra, 579 A.2d at 615); (7) The ability of the Attorney General to represent any interest
18 (*Warren v. Board of Regents of University System of Georgia* (2001) 247 Ga.App. 758, 759-762, 544
19 S.E.2d 190, 192-194); (8) A class's direct input on trust affairs in terms of decision-making power or
20 administration over the trust (*In re Milton Hershey School* (2006) 590 Pa. 35, 43, 911 A.2d 1258,
21 1260, 1262; *In re Francis Edward McGillick Fund* (1991) 406 Pa.Super. 249, 594 A.2d 322, 328,
22 *affirmed in part, reversed in part* (1994) 537 Pa. 194, 642 A.2d 467); and (9) The intent of the settlor
23 regarding the class's beneficiary status (*In re Milton Hershey Sch.* (2006) 590 Pa. 35, 44.).

24 The Court observed further in this regard that the Restatement Third proposes that a small
25 group of students may represent a class:

26 If a charitable trust is created to benefit the members of a described group
27 of persons that is reasonably limited (though "indefinite" ...), one or more
28 members of that group may be allowed to maintain a suit, on behalf of its
members generally, against the trustee for enforcement of the trust. ... So,
too, if a college is trustee of a trust the terms of which direct that its

1 income be used to provide graduate-study scholarships each year to
2 selected students graduating from the college, based on prescribed
3 procedures and criteria, the trust purpose may be enforced by one or more
4 of the current students who might reasonably expect to meet the criteria.
(Rest.3d Trusts, § 94.)

5 While this is again a situation where there is no California decision directly on point,¹² the Court
6 concludes based on the above authorities that the students attending Deep Springs College at the time
7 of trial should be afforded the status of special interest beneficiaries of the L. L. Nunn Trust.

8 The number of the students involved is small and defined. These students have taken a
9 personal interest in the outcome of the litigation. See, e.g., 378-379, 385-396, 401-404 (Robinson);
10 776-779, 789-792 (W.J.Jones); Exhs, 216, 228, 229, 232. The nature of this case is unique and does
11 not involve routine administrative operations of the Trust or the College. There is no evidence that
12 any student enrolled at Deep Springs has anything to gain as an individual from this proceeding. The
13 students in attendance at the time of trial are intimately familiar with and well versed in the nature of
14 Deep Springs College and the possible impact of any decision in this case on the institution and its
15 future students. See, e.g., 389-394, 408 (Robinson), 787 (W.J.Jones); 1052-1055 (Neidorf). Students
16 at Deep Springs participate (at the very least through their selected representatives) directly and
17 materially in substantive decisions made by the Trustees as well as in a wide variety of important
18 affairs of the College. See, e.g., 123-126 (Myers); 162-166 (Neidorf); 364-369 (Robinson); 509
19 (Newell); 780 (W.J.Jones); 1052-1055 (Neidorf); Exh. 203. And perhaps most importantly, L. L.
20 Nunn himself identified those in attendance at the College as “the beneficial owners of all the
21 property at any time held by” the Trustees. Deed of Trust, para. 5.

22 By contrast, the Court determines that individuals who have not yet applied for admission as
23 well as those who have applied successfully to attend the College, but who were not yet in attendance
24 as of the time this matter went to trial, are not special interest beneficiaries whose consent is required

25 _____
26 ¹² The lone California case that discusses the ability of beneficiaries to consent to modification of a
27 charitable trust under the current statute is not instructive. *Boys & Girls Club of Petaluma v. Walsh*,
28 supra, 169 Cal.App.4th 1049, involved named beneficiaries. Without analysis, the court determined
that those named beneficiaries were the class of “all beneficiaries” entitled to enforce the trust. The
unusual facts of the case drove this result as acknowledged in the opinion itself; the court was
interested in having the corpus distributed to charity without further delay, even if some terms of trust
were ignored. *Id.*, at 1061.

1 to satisfy Probate Code section 15403(a). Unlike those who were members of the Deep Springs
2 Student Body at the time of trial, the size of this group is potentially large (especially considering that
3 it could include applicants many years or decades in the future), it is impossible to identify all group
4 members, and as compared to current students, these individuals will not be as familiar with the
5 College and will not have participated in the governance of the institution. Moreover, the Deed of
6 Trust refers to students in attendance – and not to those who might someday attend – as
7 beneficiaries.¹³

8 The students in attendance at Deep Springs at the time of trial, all of whom were then 18 years
9 of age or older, consented unanimously to the modification requested by Petitioner. See 1055
10 (Neidorf); Exhs. 216, 228, 229, 232. Combined with the consent provided by the Attorney General,
11 Petitioner satisfied the requirement set forth in subdivision (a) of Probate Code section 15403.

12 2. Reasons for Proposed Modification in Light of the Purposes of the L. L. Nunn
13 Trust

14 As set forth in Probate Code section 15403(b), even where all beneficiaries consent, the Court
15 must still make an assessment of the proposed modification: would it impair achievement of a
16 material purpose of the trust and, if so, does the reason for the change outweigh the interest in
17 achieving that material purpose? The Court has already decided that limiting the student population
18 at Deep Springs to men and only men was not among L.L. Nunn’s primary reasons for devoting Trust
19 assets to support of the institution. But that does not answer completely the question at hand. One of
20 a grantor’s purposes can be “material” even if it is not within the ambit of his primary or
21 “overarching” objective for a charitable gift.
22

23
24 ¹³ A more difficult issue might be presented in the event the Court had to decide whether individuals
25 who had been invited to become students at Deep Springs starting in early July 2014 should be
26 considered beneficiaries for purposes of section 15403(a). This group of roughly 14 (future) students
27 is small and identifiable – notwithstanding President Neidorf’s tongue in cheek reference to them as
28 “incoming missiles.” See 1087-1088. They also will have matriculated by the time this matter is
formally submitted for decision. They thus come closer to fitting into the concept of having a
“special interest” in the proceeding. Nonetheless, in recognition of practical reality and in a desire to
obtain finality of decision in this part of their litigation, the parties stipulated that Petitioner need not
demonstrate that he has the consent of this subset of newly admitted students in order to satisfy
section 15403(a). See 1134-1136.

1 As with several other issues presented in this case, there is scant guidance in the law as to
2 what is or is not “material” within the meaning of this statute. The Court has found no cases on
3 point, and neither side in the controversy has identified any such authority. Secondary sources are
4 also silent on the subject. The Court therefore looks to the plain and ordinary meaning of the term for
5 assistance. Dictionary references to the word “material” as used in the context of section 15403(b)
6 include “having real importance” or “of great consequence” (Merriam-Webster, Online Dictionary
7 (2014)) and “significant” or “essential.” Black’s Law Dictionary, Eighth Edition (2004) p. 998.
8

9 In light of these definitions, it is difficult to characterize the reference to “promising young
10 men” in paragraph 1 of the Deed of Trust as being a material purpose. Having a male student body
11 was something which the grantor believed was important at the time he inaugurated Deep Springs
12 and at the time he executed the Deed of Trust. But as discussed above, this was a reflection of the era
13 in which L.L. Nunn lived, including the roles which society considered to be acceptable for women to
14 fill and the gender prejudices of the time. It reflects as well the models on which L.L. Nunn based
15 the Deep Springs program, and his desire to educate students to become meaningful, unselfish
16 contributors in their professions and in society. There is nothing in the text of the trust instrument or
17 in the extrinsic evidence to indicate that he directed specific thought to the subject or that he believed
18 the restriction was so essential that it should be made permanent at the College into the indefinite
19 future. As a result, the Court can justify approving Petitioner’s request for modification under section
20 15403(b) because the all male restriction is not a material purpose of the Trust.
21
22

23 But even if the expression “promising young men” were to be deemed to reflect a material
24 purpose, the Court finds in light of the evidence adduced at trial that maintaining an all male Deep
25 Springs is outweighed by the reasons which have prompted Petitioner to commence this proceeding.
26 Again as noted earlier in this decision, limiting the Student Body to men has negative consequences
27 for the College. This is especially true with respect to attracting the best applicants to apply to attend
28 Deep Springs. 187-190 (Neidorf); 370-373, 443-444 (Robinson); 556 (Newell). It is also particularly

1 telling with respect to attracting and retaining the best faculty and staff. 190-191, 198-199, 245-46
2 (Neidorf); 809 (Wilczek). The financial status of the College is not as viable as it could be either as a
3 result of the all male restriction. 92 (Hitz); 180-185 (Neidorf); 315-318 (Welle).

4 And most importantly from the Court's point of view, the overwhelming if not virtually
5 uncontradicted testimony at trial demonstrates that the quality of education provided at the College,
6 both in the classroom and beyond with respect to the labor and self-government pillars, is not at the
7 level it could and should be because of the absence of female students. 187-188, 247-251 (Neidorf);
8 640-643 (Lehecka); 713-715 (Riggio). This diminution of quality is highly significant and most
9 troubling whether the overall aim of Deep Springs is to train leaders or to provide any other sort of
10 education. The Court has no doubt that L.L. Nunn would be extremely dissatisfied if anyone could
11 reasonably describe the quality of education offered by the institution he founded as "inferior" or
12 "subpar." 260-261 (Neidorf); 562-563 (Newell); 583 (Lehecka); 713-723 (Riggio).

13
14
15 For these reasons, the Court agrees with Petitioner that the Deed of Trust can and should be
16 modified pursuant to Probate Code section 15403.

17
18 **B. STATUTORY EQUITABLE DEVIATION (PROBATE CODE SECTION 15409)**

19 Section 15409 reads in relevant part as follows:

20
21 (a) On petition by a trustee or beneficiary, the court may modify the
22 administrative or dispositive provisions of the trust or terminate the trust if, owing to
23 circumstances not known to the settlor and not anticipated by the settlor, the continuation
24 of the trust under its terms would defeat or substantially impair the accomplishment of
25 the purposes of the trust. In this case, if necessary to carry out the purposes of the trust,
26 the court may order the trustee to do acts that are not authorized or are forbidden by the
27 trust instrument.

28 Under this statute, a court may order the trustee to do acts that are not authorized or that are
forbidden by the trust if to do so would carry out the purpose of the trust. The Respondents have
argued that Probate Code section 15409 may not be applied to alter a charitable trust's purpose and
that, at most, it may be used to cure a scrivener's error. The Court disagrees; this section is not so
limited. Some cases have gone so far as to find that if the primary purpose(s) would be defeated by

1 slavish adherence to a secondary purpose, the secondary purpose should fail. *Samarkand of Santa*
2 *Barbara, Inc. v. County of Santa Barbara* (1963) 216 Cal.App. 2d 341 357 [“Clearly, educational,
3 scientific and literary purposes are to be pursued only so far and in such manner as the board of
4 trustees may deem them in furtherance of the primary purpose ‘To furnish food, lodging and medical
5 care to elderly persons and to otherwise fulfill their wants and needs and provide for their life
6 care.’”]; *Estate of Flannery* (1969) 269 Cal.App.2d 890, 897-898 [“Were the court so to construe her
7 intent, a secondary trust purpose ... would be accomplished and here primary purpose ... would be
8 frustrated and the tail would wag the dog.”]

9 Statutory equitable deviation is a thoroughly equitable creation. Equity looks at substance
10 rather than form. Civ. Code § 3528; *Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586.
11 Searching for technical definitions of words such as “primary purpose” and “material purpose” or
12 insistence upon narrow application of those terms is inappropriate. In this context, equity demands
13 not a search for technical definitions but an answer to the question “What was most important to the
14 settlor?” Many trusts do have a single purpose such as, “to fund a hospital” or, “to provide for the
15 poor of the country.” But often, trusts have more than one purpose, such as to provide for a life
16 tenant with the remainder to charity. When a conflict arises, the Court must decide which term or
17 purpose must be preserved and which may be sacrificed in order to continue the trust according to the
18 main intent of the settlor.

19 As already indicated, the Court has determined that certain objectives for the continuation of
20 his experiment at Deep Springs were more significant to L.L. Nunn than others. Those which he
21 intended to have highest priority were the maintenance of a non-profit organization which provided a
22 rigorous and highly challenging educational program at the college level in which student self-
23 governance was a central feature. Other elements of the Deep Springs undertaking were important
24 but secondary in his view. This includes the reference in paragraph 1 of the Deed of Trust to
25 “promising young men.” The question then becomes whether adherence to the less essential idea of
26 educating “promising young men” should be modified by adding women in order to achieve the more
27 important goal of preserving aims which were of greater importance to the grantor.
28

1 Based on the evidence adduced at trial, the Court concludes that the all male admissions
2 policy at Deep Springs substantially impairs the accomplishment of the more fundamental purposes
3 of the Trust. As a result, modification is justified on grounds of equitable deviation pursuant to
4 Probate Code section 15409.

5 According to witness testimony and other evidence, material impacts of the all male student
6 population at Deep Springs are felt on several planes. For example, the College is not able to recruit
7 the most promising students. 187-190 (Neidorf); 369-374, 443-444 (Robinson); 556 (Newell).
8 Some qualified male students do not apply for admission because the College is not coeducational.
9 185-186 (Neidorf). And in many instances the most qualified applicants are females, who are not
10 even permitted to apply. 369-374 (Robinson). Further, the single-sex environment increasingly
11 attracts less mature students. 187-190 (Neidorf). If the quality of applicants and the resulting
12 Student Body does not improve or in fact declines, the ability of the school to maintain a rigorous and
13 highly challenging program is seriously jeopardized. 194-195, (Neidorf); 513-518, 523-529
14 (Newell).

15 Of equal importance, the testimony of both percipient and expert witnesses demonstrates that
16 education in a single sex environment – especially in the classroom – is inferior. 247-251 (Neidorf);
17 409 (Robinson); 640-643 (Lehecka). This appears to be true whether the goal is to train future
18 leaders or more simply to furnish a top caliber educational experience. 251-252 (Neidorf); 510-511,
19 513-529 (Newell); 713-715, 721-727 (Riggio). Similarly, Petitioner adduced testimony at trial –
20 most if not all of which was uncontradicted – that the essential labor and self-governance “pillars” of
21 the Deep Springs program were less robust than they could and should be without the participation of
22 female students. *Id.*

23 To the extent it is also important to recognize and preserve L.L. Nunn’s interest in educating
24 “promising young men,” the record indicates further that male students attending the College are not
25 well served by continued maintenance of a single gender program. The experts agree, and no
26 substantial evidence was advanced to the contrary, that an all male educational environment is
27 “subpar” and not something which anyone wishing to design and implement a college or university
28 today would consider. 187-188, 247-251, 260-261 (Neidorf); 640-643 (Lehecka); 713-715 (Riggio).

1 Finally, given that L. L. Nunn strongly desired that Deep Springs graduates make a positive
2 difference in society, modification will enable the College to better meet that objective. As already
3 noted, men educated in a single sex environment are less well prepared to participate in a society
4 which currently is far closer to gender equality than it was nearly a century ago when the program
5 was inaugurated. That means that current male graduates from Deep Springs are less likely to make a
6 difference. Moreover, women today are involved – and involved with increasing effectiveness -- in
7 all aspects of society of interest and concern to L.L. Nunn. Continuing to exclude women as students
8 at Deep Springs is an additional barrier to the ability of the College to serve the mission which its
9 founder articulated of encouraging “unselfish service in uplifting mankind from materialism to
10 idealism.”

11 The Court has considered the views expressed by Respondents concerning the benefits of the
12 all male experience at Deep Springs. According to Respondents, those include reduction of
13 distractions (flowing from the presence of students of the opposite sex), promotion of higher levels of
14 intensity and focus, minimization of a potential “profusion of sexual relationships,” and the
15 availability of “male bonding” experiences. 848, 850-853 (Hoekstra). The record, however,
16 demonstrates that these alleged advantages are not attributable to having an all male Student Body,
17 are not grounded in actual recent circumstances at the College, or both. 168-175, 1064-1071
18 (Neidorf). Moreover, to the extent certain elements highlighted by the Respondents in this regard are
19 important and should be preserved, the testimony has the Court convinced that the College can
20 continue those elements in the context of a coeducational program at Deep Springs. Id.

21 While the quality of applicants and students and the quality of the education which they are
22 offered are for obvious reasons the most essential considerations in this analysis under Probate Code
23 section 15409, the all male character of the Deep Springs student population has other material
24 negative consequences. The single sex admissions policy constitutes a “tax” with respect to
25 recruitment of faculty and staff which the institution can ill afford to continue to pay. That is, the
26 single sex student body both limits the number of faculty and staff applicants and requires a more
27 extensive recruiting effort to find a select faculty and staff of the quality sought by Deep Springs.
28 190-191, 198-199, 245-46 (Neidorf); 809 (Wilczek). The policy also hinders fundraising. 92 (Hitz);

1 180-185 (Neidorf). In light of the inherent challenges which the College already faces in these
2 respects (301-305, 307-308 (Welle); 557 (Newell)), elimination of this obstacle will enable the
3 Trustees to more effectively guide the school to better realize its more essential objectives. For these
4 reasons as well, the Court grants Petitioner's request for modification under the doctrine of statutory
5 equitable deviation.

6 **C. COMMON LAW EQUITABLE DEVIATION**

7 Common law equitable deviation has been explained as making specific administrative terms
8 of an instrument subservient to dispositive provisions in the event of a conflict. *Estate of Traung*
9 (1962) 207 Cal.App.2d 818, 830, citing 2 Scott on Trusts (2d ed. 1956) section 167 at pages 1176-
10 1177. Where the primary purpose of the trust would not be accomplished by strict adherence to the
11 terms of the declaration of trust and when it is made to appear that the benefits and advantages which
12 the trustor desired to confer upon the beneficiaries would not accrue to them by a slavish adherence
13 to the terms of the trust, the Court may modify those terms to accomplish the real intent and purpose
14 of the trustor. *Adams v. Cook* (1940) 15 Cal.2d 352, 361. The theory allows terms of the trust to be
15 altered in order to permit the trustee to do not what the testator intended them to do at the time the
16 trust was created, but rather what the court thinks the testator would have intended if he had
17 anticipated the circumstances that ultimately arose. *Stanton v. Wells Fargo Bank etc. Co.* (1957) 50
18 Cal.App.2d 763, 770 [summarizing authorities.] As with statutory equitable deviation, the theory is
19 not limited to deviation of administrative terms. *Estate of Traung*, supra, 207 Cal.App.2d at 831.

20 The evidence presented to the Court of relevant changed circumstances since 1923 is
21 overwhelming. Women today have vastly more opportunities and play vastly different roles --
22 including especially leadership roles in all aspects of society, whether that be in education, business,
23 politics, government, or elsewhere -- as compared to what L.L. Nunn experienced during his lifetime.
24 558-560 (Newell); 607-611 (Lehecka); Exhs. 204-209. None of these changes was or could have
25 been anticipated by L.L. Nunn – or anyone else for that matter – when the Deed of Trust was signed.
26 498 (Newell).

27 The nature of higher education itself is materially different today than it was nearly a century
28 ago. Whereas there were numerous all male institutions in the United States in the 1920s, including

1 especially nearly all of the most elite colleges and universities, that is not the case now. Deep
2 Springs is one of only four men’s colleges remaining in the country. 640-641 (Newell).¹⁴ Diversity
3 in all dimensions is now the norm in the college and university arena. 615-616 (Lehecka). The
4 educational benefits of coeducation are established and widely accepted. Id. And, again, there is no
5 evidence that any of these developments was or could have been anticipated by the grantor.

6 The program at Deep Springs has also changed since L.L. Nunn’s era. The labor component
7 is more extensive and directed predominantly by students. Student self-government is now firmly
8 established (in contrast to being a novelty and matter of considerable concern to L.L. Nunn in his
9 day), and student participation is fully engrained in virtually all aspects of the College. 508-509
10 (Newell). Various elements of the program which L.L. Nunn regarded as very important – in
11 particular his personal commitment to and emphasis on religious instruction –disappeared as the
12 values held by students and other members of the Deep Springs community changed. 507-508
13 (Newell). Isolation remains a key characteristic, but with necessary adjustments made in light of the
14 realities of the Internet Age. Yet again, L.L. Nunn did not and could not have foreseen these
15 changes.

16 In light of such evidence, the charge to the Court under the doctrine of common law equitable
17 deviation is to determine what L.L. Nunn would have wanted if he had known of the relevant changes
18 which took place in the more than 90 years since he executed his Deed of Trust. The Court
19 concludes in this regard that L.L. Nunn would have affirmatively wanted females to participate
20 equally with males as students at Deep Springs.

21 The most powerful evidence underlying this determination is that emphasized mainly by the
22 Respondents to the effect that L.L. Nunn was not a prejudiced individual. 270-271(Neidorf); 495-
23 497, 546-547 (Newell). On several occasions, he took steps to include in his enterprises persons
24 against whom most others in society at the time discriminated. This included Catholics and Jews. Id.
25 In addition, Respondents provided evidence that L. L. Nunn was not opposed to the concept of
26 educating women in the contexts considered appropriate in his time. As attitudes in U.S. society as a
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28 ¹⁴ And while there are still a larger number of women’s colleges operating today, that group of
institutions continues to shrink. 1035 (B. Jones).

1 whole have changed – as they have done quite radically since the 1960’s, first in terms of racial
2 equality and then in terms of gender equality (509-510 [Newell]; 619-620 [Lehecka]) – the Court
3 believes that L.L. Nunn’s attitudes would have evolved in tandem.¹⁵

4 Other evidence indicates that L.L. Nunn wanted his experiment in education at Deep Springs
5 to be successful and to continue to be viable into the indefinite future. 488, 499-500 (Newell). Given
6 the trajectory of his adult life – where he moved from enterprise to enterprise, all the while adapting
7 to new conditions and new challenges – it is safe to say that he would have understood, accepted, and
8 indeed expected that change would be necessary in order for this desires for Deep Springs to be
9 realized. He was certainly sufficiently astute to know when and how best to respond to new
10 information. Had L. L. Nunn been in attendance during trial—given what Professors Newell and
11 Riggio, along with Dean Lehecka, had to say about the need for coeducation in order to maintain a
12 viable institution of higher learning today, given what President Neidorf, Professor Wilczek, and
13 others had to say about negative impacts of an all male program in and outside the classroom, and
14 given what Professor Wilczek and Ms. Marcus personify in terms of the capabilities and interests of
15 women in this century – there should be no doubt that he would regard the admission of female
16 students at Deep Springs to be appropriate if not highly desirable.

17 And finally on this point, the evidence is equally plain and uncontradicted that L.L. Nunn was
18 not afraid of change. He was a pioneer in many things he did, including with respect to establishing a
19 unique educational institution in Inyo County. Stating less graphically a point which Professor
20 Newell made (507-508, 562) the Court agrees that L.L. Nunn would not have wanted his
21 experimental undertaking at Deep Springs to remain the same. Even if the program was not broken,
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23 ¹⁵ Respondents, on the other hand, argue that L.L. Nunn’s refusals to discriminate against some
24 minority individuals “prove” that his exclusion of women from Deep Springs was purposeful and
25 must therefore continue to be honored. This contention, however, ignores the reality that a person
26 who is forward thinking in one respect is not necessarily forward thinking in others. So far as L.L.
27 Nunn is concerned, it is apparent from the evidence that he was a man of his times insofar as attitudes
28 toward and treatment of women are concerned. 495-498 (Newell). And in the 1920’s, it was an
extreme rarity for a woman to aspire to leadership in business, elite institutions of higher education,
or government. Id. And it was inconceivable that a women would want or even be permitted to
attend such a small, isolated, and primitive institution as Deep Springs – not to speak of one which
did not provide training in what were regarded in that era as appropriate pursuits for females (e.g.,
teaching and nursing). Id. L.L. Nunn’s failure to include women as students at Deep Springs during
his lifetime most likely reflects the fact that the idea never occurred to him – and nothing more.

1 he would have pressed his Trustees to continually work as hard as possible to make the College even
2 better. If that meant admitting women in addition to men, the Court believes that L.L. Nunn would
3 not have been reluctant to do so.

4 The Court determines that modification of the L.L. Nunn Trust is also appropriate under the
5 common law as a permitted equitable deviation from what the Respondents have argued was the
6 grantor's original intent.

7 **D. THE CY PRÈS DOCTRINE**

8 Petitioner's final claim is that principles of *cy prè*s also allow for modification of the Trust to
9 allow coeducation at Deep Springs College. The legal theory can be summarized as follows:

10 Unless the terms of the trust provide otherwise, where property is
11 placed in trust to be applied to a designated charitable purpose and it is
12 or becomes unlawful, impossible, or impracticable to carry out that
13 purpose, or to the extent it is or becomes wasteful to apply all of the
14 property to the designated purpose, the charitable trust will not fail but
the court will direct application of the property or
appropriate portion thereof to a charitable purpose that reasonably
approximates the designated purpose. (Rest.3d Trusts, § 67.)

15 As explained in the comments to section 67, if a settlor provides for a trust to support a school, but
16 mandates conduct at the institution which seriously undermines the usefulness of the entity, the court
17 may modify trust terms to allow a similar but more general charitable purpose to be accomplished.
18 (Rest.3d Trusts, § 67, at com. c.)

19 The question presented, then, is whether the all male admissions policy at Deep Springs
20 makes it "unlawful, impossible or impractical" to continue to carry out L.L. Nunn's charitable
21 purpose. Petitioner makes no argument based on illegality or impossibility. The matter thus narrows
22 to impracticality.

23 "Impracticability" is not the same as "impossibility." In *Dunbar v. Board of Trustees of*
24 *George W. Clayton College* (1969) 170 Colo. 327, the court held that in view of changing conditions,
25 the charitable intent of testator whose 1899 will provided for establishment of a college for the care
26 and training of poor, white male orphans between the ages of 6 and 10 years could best be served by
27 extending admission to children regardless of color and between ages of 6 and 18 years who had been
28 deprived of parental care and/or support:

1 We would be less than candid if we did not state that many jurisdictions
2 still equate the word ‘impracticable’ with the word ‘impossible’ when
3 dealing with the *cy prè*s doctrine. We think this is an unenlightened
4 view. *Id.* at 334.

5 More specifically, a purpose becomes “impracticable” under the *cy prè*s doctrine when it appears that
6 under the circumstances the application of trust property to that designated aim would fail to
7 accomplish the general charitable intention of the testator. *Matter of Estate of Vallery* (Colo. Ct.
8 App. 1993) 883 P.2d 24, 28. The difficulty need be only a reasonable one and not such as to make
9 the donor’s plan a physical impossibility. *Id.*

10 Beyond such general statements, however, the law offers scant guidance for application of the
11 theory. As the California Supreme Court put it, “[t]he *cy prè*s doctrine has meant many things to
12 many courts and its limits have rarely been defined.” *Estate of Loring* (1946) 29 Cal. 2d 423, 436.

13 This Court believes nonetheless that certain standards can be identified and should be applied
14 generally. One, the impairment involved needs to be significant such that it has and will continue to
15 have a material adverse impact on the charitable activity. Minor or transitory problems should not be
16 the target of *cy prè*s requests. Two, the degree of materiality involved should be quite high. There is
17 no exact formula to be applied, but something relatively close to complete failure of purpose should
18 be involved. And three, an appropriate measure of immediacy is essential. Trustees of a charitable
19 trust should not be required to wait until the undertaking reaches the edge of a precipice before they
20 seek to act under the *cy prè*s rubric, but at the same time a request for modification under the doctrine
21 which is made too long before a point of failure would improperly ignore the possibility that a less
22 drastic solution might arise.

23 Pursuant to these guidelines, the Court determines that the request to modify the L.L. Nunn
24 Trust pursuant to the *cy prè*s doctrine should be granted. The impracticality which Petitioner pled
25 and then substantiated at trial is not minor or transitory. While restricting the gender of Deep Springs
26 students had little or no impact on the institution when it was founded and for decades thereafter –
27 and in fact could have made a positive contribution to the program in its earlier days – that is not the
28 situation today. As already discussed, limiting admissions to men adversely impacts the quality and
diversity of the student applicant pool and the resulting Student Body, diminishes the quality of

1 education provided (both generally and with respect to the goal of training selfless leaders for
2 society), weakens non-academic elements of the program, makes more difficult the recruitment and
3 retention of the highest quality faculty and staff, and inhibits fundraising. It even makes the program
4 less beneficial to its current male Student Body. Absent the admission of women – in addition to
5 men – at Deep Springs, these negative consequences cannot be avoided or effectively mitigated. To
6 the contrary, as the push for gender equality in all aspects of U.S. society continues, the level of
7 acceptance of and tolerance for an all male institution may well diminish further.

8 Second, the matter is very serious. Declines in the quality of applicants and students, in the
9 quality of the educational experience, and in the ability to recruit and maintain top quality faculty and
10 staff threaten the core of L.L. Nunn’s purpose in establishing his experiment at Deep Springs. The
11 operation might continue, but the critical essence of what the grantor wished to accomplish has been
12 dissipating and is likely to continue on a downward path.

13 Third, even though the College is not on the verge of failure in any traditional sense, it has
14 been and remains in a fragile state. This is due in part to small size and the unique character of the
15 Deep Springs program. The increased level of vulnerability which this imparts means that the
16 situation can change quickly. In Respondents’ view, which the Court understands and appreciates,
17 the institution is far from collapse and can afford to carry on as a men’s college for years or decades
18 into the future. Petitioner, on the other hand, notes the significant risk of more rapid decline is real
19 and cannot be ignored. He emphasizes that Deep Springs lacks and will never have the reservoir of
20 potential applicants, faculty, staff, alumni, friends, strong name recognition and reputation, and
21 financial resources which the typical major college or university can tap in the event things go badly
22 for a year or two or three. As a “maverick” or “progressive” institution, Deep Springs must always
23 keep the unique elements of its offering in balance with societal values so as to not lapse into
24 irrelevance. Although a close call, the Court believes that Petitioner demonstrated a sufficient degree
25 of impracticality in this respect, as well as in the others which appear relevant, to justify modification
26 of the Trust under a theory of *cy prè*s.

27 **V. CONCLUSION**

1 Petitioner’s request is granted, and the Court hereby decrees that the L.L. Nunn Trust should
2 be modified by adding the words “and women” following the phrase “for the education of promising
3 young men” in paragraph 1 of the instrument. Counsel for Petitioner shall prepare the Order.
4

5 Dated: _____

Dean T. Stout
Judge of the Superior Court

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