Conservation Easements in the U.S. and Abroad:
Reflections and Views toward the Future

Harvey M. Jacobs

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Abstract

Public policy for privately owned land in the United States was traditionally undertaken in one of three ways: through regulation, via manipulation of the property tax, or through targeted use of public capital investments. Thirty years ago a fourth approach began to gain prominence—private, non-profit land trusts and their use of the conservation easements.

In summer 2012 the Lincoln Institute sponsored a panel at an international conference on agriculture and forestry to expose U.S. practice with land trusts and conservation easements, and to ask questions about the transferability of the U.S. experience to other countries. This working paper provides an integrated summary of the presentations made at that conference and the papers subsequently prepared by the panel presenters.

Cutting edge practice is profiled in the Pacific Northwest and by a TIMO (private timberland investment organization). The use of conservation easements by land trusts will continue its growth in the U.S., there is both caution and hope for the transferability of the U.S. experience.

About the Author

Harvey M. Jacobs is Professor, Department of Urban and Regional Planning and Nelson Institute for Environmental Studies at the University of Wisconsin–Madison, and Visiting Professor, 2012–2015, Institute for Management Research, Department of Geography, Planning and Environmental Studies, Radboud University Nijmegen, Nijmegen, The Netherlands

Department of Urban and Regional Planning
925 Bascom Mall/Old Music Hall
University of Wisconsin–Madison
Madison, WI 53706
608-262-0552 (phone)
608-262-9307 (fax)
hmjacobs@wisc.edu

This working paper draws on presentations made and papers prepared by Armando Carbonell, Gene Duvernoy, Harvey M. Jacobs, and Peter Stein. The paper is the responsibility of Harvey M. Jacobs; it does not necessarily reflect consensus among Armando Carbonell, Gene Duvernoy or Peter Stein, though it often draws substantially from the analysis and the actual language of the background papers prepared by them

About the Panel Presenters and Background Paper Authors

Armando Carbonell is Chairman of the Department of Planning and Urban Form at the Lincoln Institute of Land Policy.

Lincoln Institute of Land Policy
113 Brattle Street
Cambridge, MA 02138-3400
617-661-3016 (phone)
617-661-7235 (fax)
acarbonell@lincolninst.edu

Gene Duvernoy is President of Forterra NW.

Forterra (Formerly Cascade Land Conservancy)
615 Second Avenue, Suite 600
Seattle, Washington 98104
206-905-6901 (phone)
206-292-4765 (fax)
gduvernoy@forterra.org

Peter Stein is Managing Director of The Lyme Timber Company, and also serves as the 2012–2013 Kingsbury Browne Fellow at the Lincoln Institute of Land Policy

The Lyme Timber Company LP
23 South Main Street, 3rd Floor
Hanover, NH 03755
603-643-3300, ext 112 (phone)
603-643-0331 (fax)
peterstein@lymetimber.com

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Introduction

In June 2012 the International Center for Research on Environmental Issues (http://www.icrei.org) sponsored their ninth international biennial conference in Aix-en-Provence, France (the initial conference was in 1996). As has been true with all prior conferences, the broad theme was "Property Rights, Economics and Environment." The specific sub-theme of the 2012 conference was Agriculture and Forestry. Following from prior collaborations and long-standing contact among the conference organizers and staff and affiliates of the Lincoln Institute it was arranged that Lincoln would sponsor a plenary session on "Property Rights, Government Regulation and Conservation Land Trusts" (as well as sponsor a screening and discussion of the Lincoln film *Portland: Quest for the Livable City*).

The plenary session had three goals. *Goal number one* was to frame the actions of conservation land trusts within a broader set of policy activities by state and local governments in the U.S. *Goal number two* was to bring cutting edge practitioners in conservation land trust activity in the U.S. for exposure to and discussion with an international audience. *Goal number three* was to reflect on the role of conservation easements and land trust activity is a broader theoretical and historical frame, and to speculate on the transferability of the U.S. experience, in particular to European countries which use civil law.

Towards these goals a set of presentations and papers were commissioned. Armando Carbonell, Chairman of the Department of Planning and Urban Form at the Lincoln Institute focused his presentation on goal number one. His paper was titled "*Land Use and Private Property Rights in the United States*." Peter Stein, Managing Director of The Lyme Timber Company and the 2012–2013 Kingsbury Browne Fellow at the Lincoln Institute of Land Policy, was one of the two presentations focused on goal number two. He titled his paper "*Combining Market and Non-market Mechanisms to Ensure Sustainable Management Practices on Forested Landscapes in the US*." Gene Duvernoy, President of Forterra NW, was the second of the two presentations focused on goal number two. His paper was titled "*Conservation Easements: A Pacific Northwest Perspective on a Market-based Tool for Significant Landscape Conservation*." Harvey M. Jacobs, Professor of Urban and Regional Planning and Environmental Studies at the University of Wisconsin–Madison and Visiting Professor at Radboud University, Netherlands, served as the organizer and moderator of the plenary session and as the author of this working paper. His paper focused on goal number three and was titled "*The Challenge of a Private Property Rights (NGO) Approach to Land Conservation*."

This working paper draws upon the conference presentations and subsequent papers to make an integrated statement about the status and future of conservation easements in the U.S. and abroad. It represents an important snapshot among a leading set of practitioners and scholars about the state of easement-based conservation activity in the United States at the beginning of the 21st century. In so doing it seeks to raise a provocative set of issues for consideration by land

trust practitioners, city, regional and environmental planners, conservationists, public administrators, and citizen activists about the future of conservation easements, especially when land trusts focus upon agricultural, forested and conservation landscapes.

Understanding and Positioning the Conservation Easement

Property as a Bundle of Rights

In the United States (and under the common law) property is conceptualized as a bundle of rights (Demetz 1967, Jacobs 1998). Drawing from the Roman concept of ownership, aspiring attorneys are taught that "cuius est solum eius est usque ad coelum et usque ad inferos"—whoever owns [the] soil [it] is theirs all the way [up] to Heaven and [down] to Hell (more gently, whoever owns the soils owns all the way to heaven and all the way to the depths). In practice, this has come to mean that property is understood as comprising a set of rights that have to do with physical nature—soil, water, air, mineral, trees, etc.—and with a set of social relationships—about access, sale, lease, gift (e.g. via inheritance, which is an intergenerational gift) and use (and abuse). With regard to the latter right (use) this can be, in theory (and depending on the eco-system), for grazing, agriculture, or commercial forestry, or for residential, commercial or industrial activity. Combining these two sets of rights into a single bundle means that an owner may sell (or lease or gift) the land as a whole, but the owner may also sell, lease or gift individual rights. That is, when property is conceptualized as a bundle of rights, then rights may be separated from the bundle, rights may be separated from themselves, and rights may be added into and taken out of the bundle.

An early twentieth century expression of this nature of property was the acquisition of mineral rights by mining corporations in the southeast region of the U.S. Corporations approached owners and offered to separate (through purchase) the mineral right from an owner's bundle. The owner would continue to hold all the other rights in the bundle—soil, water, use, sale, etc. But by acquiring the mineral right, the mining corporation acquired the mineral (in this case coal) and the right to access that coal.

In the United States what is within and recognized as the bundle of rights has changed, often in response to changing technology and changing social values (Jacobs 1998, Jacobs 2004). So, for example, in the decade after the airplane was invented and became commercially viable, it was necessary to reassess the right of landowner to claim ownership "all the way [up] to Heaven." What happened is that the property rights bundle of individuals was modified; the air right was separated from itself and today individuals still own a right to the air space above their property, but it does not extend "all the way [up] to Heaven."

Conservation Easements as a Right in the Bundle

Conservation easements represent one of the rights in the bundle (Whyte 1959, Whyte 1968). They are most often understood as the right to change land use from a current, conservation-agriculture-forestry use to a more intensive use. In some instances these are referred to as the development right. Conservation easements remove the right to develop from the bundle of

rights, while leaving the owner with all (or most) of the remaining rights in the bundle. Once the right is removed the right to change land use to a more intensive use is severely restricted. The right can leave the bundle in a variety of ways—not un-commonly the owner chooses to donate (gift) this right but the right can also be purchased from the owner.

In the U.S. conservation easements are most usually structured as legal agreements between a willing landowner (grantor) and an eligible organization (grantee) in such as way so as to permanently restrict future activities on the land and protect the land's conservation values. Conservation easements allow landowners to continue to own and use their land subject to the agreement restrictions (that is, the landowner holds all the other property rights in the property bundle). And the landowner can also sell it or pass it on to heirs while the conservation easement remains in place. In this way the conservation easement is said to "run with the land."

Eligible grantees most often include local, state and federal natural resource agencies, land trusts (conservation non-profits) and other non-profit organizations. Typically, conservation easements protect open spaces, wildlife habitat, recreational land, and historically significant landscapes by extinguishing the right to develop the property; sometimes these easement also provide public access. Today, these "less-than-fee" interests have become the technique by which the most acreage in the US is conserved, as compared to outright acquisition by either land trusts or public agencies.

The use of conservation easements has grown rapidly and exponentially over the latter decades of the twentieth century. According to one sets of estimates, private sector land conservation organizations that work with conservation easements as a conservation approach currently hold between 20 and 30,000 of these agreements, and as of 2010 they represent agreements over 9 million acres of U.S. land (in 2000 these organizations only held agreements that applied to under 2.5 million acres of land) (http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/data-tables). If one includes the number and area of easements held by non-profits and by all levels of government as of 2012 one estimate was that this equaled over 95,000 easements and covered 18 million acres of land (http://nced.conservationregistry.org/, update as of 12 September 2012).

Conservation Easements as In-Gross Rights

Easements are a common and long-standing feature under English common law. However historically they had a key feature—they were designed as appurtenant relationships. That is, an easement was an mutual agreement between adjoining landowners where an encumbrance upon the land of one was of direct benefit to the other. And thus the easement could be severed at a future time when it no longer served the interests of the two parties. An appurtenant easement requires that properties share a boundary.

In their contemporary form conservation easements are what is known as an in-gross right (Whyte 1968). This is in contrast to an appurtenant right. In-gross easements do not require that the easement holder be in possession of a property that shares a boundary with the property from which the easement originates. Instead an in-gross right may transfer from a property to any legal organization that can hold property.

Historically English common law gave in-gross easements a much weaker position that appurtenant easements. Relationships over land, where there were contracting parties who could enforce the contract between them, were understood to be better for society.

What changed was a concerted movement in the 1970s to pass state-based legislation which recognized the legitimacy of in-gross easements so that they were on equal standing with appurtenant easements. A model state law was promulgated and states began adopting it (Katz 1986, King and Fairfax 2006). This allowed conservation organizations who did not own adjoining property to property they wanted to assist in protecting, to approach landowners with proposals for conservation activity.

The Forever Nature of Conservation Easements

A key component of a conservation easement is that it is constructed so that it will represent a property transfer "in perpetuity", that is, it is designed to exist forever (McLaughlin 2005). Once a landowner releases the conservation easement property right from her bundle of rights and the right is acquired by a land conservation organization that transfer is designed to be irrevocable.

But the idea of perpetuity for a property interest is in and of itself radical. English common law was very skeptical of this idea (the so-called "rule against perpetuities"). Property was something that was designed to serve social needs and thus was designed to change as society needed it to change. Thus the idea that one landowner could make a decision on land that would bind all future owners "forever" was anathema.

Given this orientation, perpetuity, like the relatively weak position of in-gross rights, required specific attention and revision. As with the in-gross rights this attention came about through specific changes to state-based law throughout the U.S. (often in tandem and as part of the changes that were part of the Uniform Conservation Easement Act).

The Charitable Legal Status of Conservation Easements

In the United States national (and often parallel state) tax law facilitates donations from individuals to appropriately recognized charitable organizations. Under these laws donations of cash or something with a cash-equivalent value (such as land or an in-gross, perpetual interest in land—i.e. a conservation easement) can become tax deductible to the donor. Most land conservation organizations in the U.S. are organized so as to be classified as charitable organizations (Wright 1992). When a donation is made to these organization (or even a less-than-fee sale occurs) it reduces the present (and perhaps future) income tax obligation for the donor.

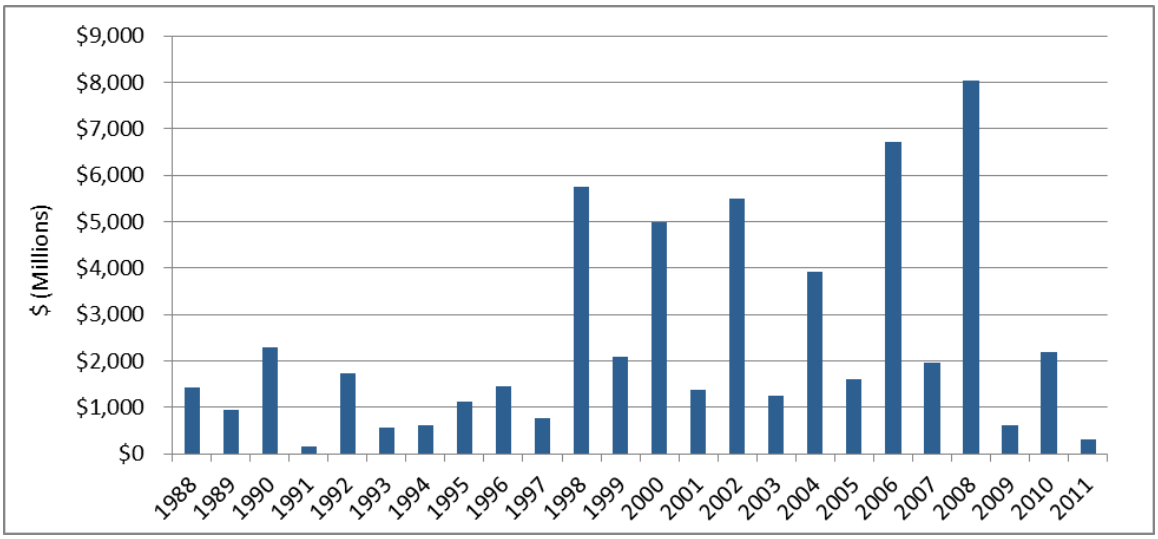
Almost all state and local land conservation organizations feature a weblink that highlights this aspect of their work (see for example this information on the website of Gathering Waters, the Wisconsin consortium for land trusts in the state: http://www.gatheringwaters.org/about-land-trusts/conservation-options-for-landowners/conservation-easements/; http://www.gatheringwaters.org/assets/documents/conservation-easements/

tax_benefits_jan_2011.pdf). Some suggest that this aspect of U.S. tax law has been a key component in exponential growth of conservation easements use over the recent decades.

Public Support for Conservation Easement Programs

Voters have also embraced large scale conservation initiatives, having repeatedly passed measures to finance conservation acquisitions, even in times of severe budget constraints, see Table 1 below.

Figure 2: Total Conservation Funding Approved by Voters by Year, 1998–2011[1]



In 2011, for example, Minnesota voters passed a constitutional amendment that created a 3/5ths of 1% increase in the State sales tax to support land conservation expenditures. This small tax increase has amounted to $220 million in conservation funding for the state annually. One of the earliest transactions supported by this new funding source was the acquisition of an 188,000 acre working forest conservation easement by the Minnesota Department of Natural Resources over the former Blandin Paper Company lands in northern Minnesota. This was the largest conservation transaction in Minnesota history. This project conserved over 60,000 acres of wetlands and over 280 miles of stream, lake and river frontage and stitched together over 4,000 square miles of public and private forest in the region. The conservation easement requires forest management under either Forest Stewardship Council or Sustainable Forestry Initiative third party certification guidelines. Public recreational access is one of the major benefits of this working forest conservation easement.

[1] The Trust for Public Land's Land Vote Database. www.landvote.org

Case Examples of Conservation Easements in Use[2]

Forest Conservation Easements

For lands that are suitable for agricultural activities, ranching, and in particular forestry, a particular form of conservation easement has evolved that provides for discreet economic utilization of the land as well as permanent conservation. For forestlands, working forest conservation easements protect not only the open space values of a property—such as wildlife habitat, ecological diversity, and recreational access—but also the economic and community benefits that arise from a forest's production of goods and services, including forest-based jobs. In a number of regions in the U.S., land trusts have developed sophisticated expertise in the design and application of working forest conservation easements as part of a land protection scheme that focuses on landscape scale conservation values.

A major component of working forest conservation easements that is absent from other types of conservation easements is the affirmative right of landowner to practice sustainable forestry. Today working forest conservation easements usually include a section that describes sustainable forestry practices requirements via either a grantee approved forest management plan or an approved third party certification program. Third party certification by the Forest Stewardship Council or the Sustainable Forestry Initiative, for example, is often the metric used to ensure compliance with the sustainable management goals that are contained in the conservation easement. In this way, the conservation easement guarantees that forestry practices will not negatively impact riparian corridors, wildlife habitat or fragile areas, such as high elevations and steep slopes.

Large-scale (greater than 50,000 acres) working forest conservation easements and working ranchland conservations easements have occurred numerous times since 2000 in California, New Hampshire, Maine, Vermont, New York, Washington, Minnesota, Wisconsin and Michigan. In the four Northern Forest region states alone (the Northern forest being the 26 million acre region that includes portions of New York, Vermont, New Hampshire and Maine), more than 3 million acres have been conserved through the utilization of this technique.

Forest Conservation Easement in Use—Example One

A prime example of a working forest conservation easement arrangement is the investment by Lyme Timber in the purchase of 72,800 acres in northwestern Wisconsin from the Wausau Paper Company in late 2011. At the time of its acquisition, Lyme granted The Conservation Fund (TCF), its conservation partner, an option to purchase a working forest conservation easement over the majority of the property within a specified period of time.

The former Wausau Paper Company lands were a conservation target for both Wisconsin's Department of Natural Resources and TCF because the lands adjoin over 950,000 acres of previously protected public lands, thereby buffering and connecting previous conservation

[2] These case examples draw directly from the background papers prepared by Stein and Duvernoy.

efforts, expanding wildlife migration corridors, and enhancing public recreational opportunities in the region. The property also contains the headwaters of two regionally significant rivers, globally rare pine-barrens habitat which supports many endangered and threatened species, and significant frontage on undeveloped lakes and streams. In addition, the forest on the property lends itself well to sustainable timber management, which benefits the local and regional economy and community by creating jobs in the woods and supplying twelve nearby pulp, sawtimber and telephone pole processing mills.

The property is located in four counties and encompasses many units of local (town) government. Existing land use regulations in each of these independent jurisdictions were unlikely to have forestalled the fragmentation and parcelization of this property nor ensured public recreational access or sustainable timber management protocols. For these reasons and also because of the property's significant conservation and community development attributes, Lyme and TCF worked with the Wisconsin Department of Natural Resources to design a working forest conservation easement to permanently protect this property. The first phase of this conservation easement was acquired by Wisconsin Department of Natural Resources in 2012 and the second phase is scheduled to occur in 2014. The first phase protects 44,679 acres and was funded by the Wisconsin state stewardship fund which was created in 1989 and re-authorized by the Wisconsin legislature in 2000. Under the terms of the conservation easement, Lyme is required to practice sustainable forestry, as laid out in an approved forest management plan. This conservation easement transaction will be the largest in Wisconsin history and will serve as a model public/private partnership success story.

Forest Conservation Easement in Use—Example Two

The Snoqualmie Preservation Initiative of Forterra focuses on Snoqualmie Falls. Snoqualmie Falls is one of the major natural features in the Pacific Northwest's Puget Sound region—it is among the most visited sites by tourists who come to the state. Across from the falls, on a hill where Native Americans once met and traded, about 145 acres was scheduled to be commercially developed. The development would have permanently diminished the experience of visitors to the falls. At the same time, there were nearby efforts to conserve land and working forests along the Raging River, a river tributary to the Snoqualmie River. And also nearby, a major development company wanted to accelerate the construction of an additional 3,000 homes to meet market demands within an already existing Master Planned Development (MPD) at a pace faster than permitting agencies were initially comfortable. Each of these issues independently would have been hard to resolve, but were addressable simultaneously with a conservation easement as the major organizing mechanism.

Today, a conservation easement is in place on the 145 acres across from the falls that allows broad public access, but no development or timber harvesting. The forest land along the Raging River also has also been conserved permanently with a conservation easement. This site continues to be used for timber production in accordance with Washington State's timber laws while also allowing trail access, but precluding any residential or commercial development. Finally, the development company was authorized to build 3,000 homes in the MPD, with the infrastructure in place to minimize the impact. The Snoqualmie Forest Initiative and its

conservation easements enabled conservation and community development to proceed hand-in-hand.

Farmland Conservation Easement

The Triple Creek Ranch has been a working farm in Kittitas County, Washington on the eastern slope of the Cascade Mountains, since late the 1800s. Over the years it has been a cattle ranch and grown crops such as alfalfa, hay and grain. Recently, however, the property was zoned for thirteen 20-acre residential parcels. In April 2012, Forterra and the Kittitas County government permanently conserved Triple Creek Ranch with the purchase of a 260-acre working-farmland conservation easement, the largest completed to date in this county. With the easement in place, the longtime family-owned farm outside of Ellensburg, Washington can continue its agricultural operations in perpetuity without succumbing to rural residential development pressures. Conservation easements particularly lend themselves to agriculture conservation in the United States where it is understood that farmland is best stewarded by farmers who continue to own the underlying property. A conservation easement that facilitates continued ownership while the farmer is also compensated for development value is an often described as a win-win solution.

Wetland Conservation Easement—Development for Conservation

Patterson Creek is an area in Washington State of about 250 acres that includes a major wetlands habitat. The problem Forterra confronted was the fact that the property was slated for development of 300 homes—the zoning on the property was actually grandfathered-in before more stringent state and regional land-use policies were enacted.

Forterra borrowed the money and purchased the property as the first stage in crafting a lasting solution to preserve the wetlands, address the community expectations, and satisfy the financial requirements of the developer/land owner. Forterra then reconfigured a modest portion of the site for the construction of 30 homes with an overlying conservation easement that restricted any such development to what is known as limited impact development. Forterra then sold the remaining development potential to the King County government. The profit from this transaction paid back the initial loan to buy the property and two-thirds of the property (more than 200 acres) was conserved outright with sufficient funds remaining to perpetually care for its important conservation values. It is now known as the Patterson Creek Preserve.

Landscape Conservation Easement

The Snoqualmie Tree Farm project in Washington State, another effort by Forterra, ultimately conserved about 100,000 acres of working forest that provides recreation, water quality, habitat and also continued timber harvest for the land's owners. It was a complicated project with several starts and stops but it demonstrates both the need to persevere in complicated transactions and the important role conservation easements can play in working landscape conservation. Initially, Forterra pioneered an elaborate tax-exempt bond financing mechanism to conserve the property that required authority by the U.S. Congress. This bond would have supported the conservation of 80 percent of the property with a conservation easement and the outright preservation of 20 percent of the site composed of high habitat value riparian corridors.

However, Congress did not act in time and the transaction was not completed within the sale deadline.

Nonetheless, this initial structure demonstrates how sophisticated financial instruments have the potential to support a conservation easement acquisition. This setback was overcome by the King County government and Forterra partnering to purchase a conservation easement for the property for $22 million and this crown jewel of regional open space was conserved.

One final point to make about the Snoqualmie Tree Farm has to do with the underlying land owner. The Hancock Timber Resources Group ownership of this working landscape illustrates that enlightened management and business perspective can be crucial to these kinds of projects. HTRG was a willing and helpful seller of the conservation easement, demonstrating the old proverb of doing well while doing good.

Challenges for the Future of Conservation Easements

As noted by Gene Duvernoy in his background paper "conservation easements are not a panacea." Why, given that Forterra makes such robust use of them, does he make this assertion? He provides three primary reasons.

1. An easement is a static document in a changing world. Unless a conservation easement is carefully crafted, it is difficult to manage a property and adapt to changing infrastructure or environmental conditions or to advances in farming and timber practices.

2. An easement is a long-term relationship with the landowner. As with any agreement, a conservation easement must be respected by all its parties. Landowner compliance with easement agreement have to be continually monitored. In addition, relationships must be developed with successive owners to any property covered by a conservation easement. This requires a significant of time by those holding the conservation easements (such as land trusts).

3. It can be complicated to draft easements at landscape scale. For example working forest or farm easements can have many "moving parts"—stewardship and land management plans, forest and farm soil productivity issues, timber and commodity price to value matters, application of state-by-state forestry, agricultural, and environmental rules. This can require a level of skill and expertise not commonly available to non-profit organizations.

In addition to the conservation easement related reasons for some skepticism, there is the very broad issue of the skepticism that the American people hold towards government and especially governmental action via regulation over land and natural resources (Jacobs 1998, Jacobs 2010). While zoning and related public means of managing privately owned land are nearly a century old (New York City invented the first American zoning regulation in 1916) and have been long affirmed as fully legal and constitutional actions by local and state governments (zoning was

affirmed by the U.S. Supreme Court in 1926, and many other of the common land regulation actions by local governments were reaffirmed by the Court in 2002), still Americans have heated public policy discussions about the reasonable extent of public action (Jacobs 1998, 2010). In this context, Americans would seem to be more receptive to the idea of action by land conservation undertaken by private, charitable organizations (Wright and Czerniak 2000).

But curiously, conservation easements and state and local land conservation organizations do not receive a uniformly warm reception from those most skeptical about government regulation. Rather than embracing this private charitable alternative, a group of scholars and activists on the political right have argued against both conservation easements and state and local land conservation organizations for one of several reasons (Meiners and Yandle 2001, Gattuso 2008). These reasons include that these organizations are in general anti-development and anti land use change in orientation, that these organizations represent an attempt to exercise a form (sometimes a very direct form) of public control in the guise of private, charitable control, or that these organizations and their principle vehicle (conservation easements) can be very damaging to local public finance because a) they remove property from being subject to local taxation, and b) they distribute economic benefit (through income tax deductions and property tax reductions) to those who often do not need such a benefit (Merenlender et al. 2004).

The Transferability of the U.S. Experience— Internationalizing Conservation Easements?

One way to view conservation easements and the work of private, charitable land conservation organizations is to argue that they succeed in the U.S. because of: a) the way property is conceptualized as a bundle of rights, b) the legal validity of in-gross property rights, c) the parallel validity of perpetuity in property right relationships, d) specific national and state law regarding the income tax benefits of charitable contributions and the fact that most land conservation organizations are chartered as charitable organizations, and e) the broad-based skepticism among Americans about governmental action towards land and natural resources.

A recent article examines the functionality of the conservation easement as an approach to environmental protection outside the U.S. (Korngold 2011). Korngold's focus is global, examining many regions of the world. He does, however, specifically address the challenges to the conservation easement (and private, charitable land conservation organizations) in civil law countries, including parts of Europe. His conclusions offer caution.

Korngold suggests that conservation easements will have more difficulty working in Europe and other civil law countries as they do in the U.S. for at least three reasons. First, is the general prohibition against in-gross property relationships and perpetuity relationships. He argues that under the civil law the property relationship that is favored is an appurtenant one. Second, he argues that the civil law rejects the imposition of affirmative obligations upon a landowner. And thirdly, he notes the principle of *numerous clausus* whereby the legal system does not recognize property relationships not articulated in a governing code; specifically the civil code rejects enduring property relationships created between parties or created by courts.

At the same time, Korngold is among a set of observers who note the growth of of conservation easements and non-profit land trusts globally. So for example, from Korngold (2011: 629–630).

> There is currently a legislative proposal in Chile to create a new right under the Chilean civil code called *a derecho real de conservacion* (i.e., a real right of conservation). The proposal expressly denotes the interest as a real estate right, permits it to be held by nonprofit organizations as well as government, and allows for perpetual duration. There is no requirement that the right be appurtenant to a benefited property, thus in gross rights should be permitted. The right is for "environmental conservation" goals, defined as protection of biodiversity, species, habitat, and ecosystems as well as the prevention of environmental deterioration. The legislation also allows the interest holder a right of access to inspect the burdened property to determine compliance. As of this writing, the proposal is still pending in the legislature.
>
> There are several salutary aspects to the Chilean approach. . . . the proposed legislation does not attempt to impose the common law conservation easement on civil law, but rather offers a new interest—the derecho real de conservacion—that would be embraced by the civil code.

The use of conservation easements is expanding, in terms of acres protected in both selected civil code nations (the panel members are aware of activities in Spain and Germany), as well as in common law nations like the United States, Australia and the provinces of Canada in which English legal tradition is the basis of the legal system.

For example in Canada, as of the end of 2011 there were 150 local and regional land trust organizations. The use of less-than-fee interests in land such as easements as a conservation protection device are becoming more and more common place. In Canada, they are generically referred to as "conservation agreements." In practice, these mechanisms are specifically referred to as easements or covenants in provinces, conservation agreements in British Columbia and servitudes in Quebec due to the structure of the civil code. Not unlike the experience in the U.S., the initial application of the less-than-fee techniques have been for forever wild purposes e.g. land preservation as well as for farmland protection. Much more recently, there have been working forest conservation agreements in British Columbia and the very first working forest conservation servitudes are now occurring in Quebec. Lyme Timber (the focus of forest conservation easement in use—example one discussed above) is the advisor to the family trust that owns the 15,000 acres that will be encumbered by a prototype working forest conservation servitude with the grantee being the Nature Conservancy of Canada. Less-than-fee interests have been used by both land trusts and public agencies since the late 1980s in Canada and their utilization seems to be growing rapidly.

The larger point is that selected civil code and common law nations around the world are now in the process of adapting successful U.S. experiences with conservation easements to conservation-related law, policy and practice in their own local, provincial and national circumstances. They are using appurtenant easements when necessary, and adopting arrangements similar to easements in gross when possible.

This paper is intended to reflect on the U.S. experience with conservation easements and inquire into their future as a land management approach both in the U.S. and globally.

Regarding the U.S., private land conservation organizations experienced a remarkable and exponential period of growth from the 1960s until the 2000s. For many reasons—some good and some bad—that growth has halted. Many of the organizations that were formed in the growth period were small, and largely utilized volunteers to realize their mission. As private land conservation activities have gotten more complicated and more sophisticated it has become increasingly difficult for these organizations to function, no less survive. So one reason growth has halted has been a tendency towards larger, more sophisticated and more professional private land conservation organizations. And some of these are actually consolidations of preexisting smaller organizations.

However, the decline in the number of private land organizations is in no way an indicator of a decline in public interest and commitment to the activities of these organizations. As noted in Table 1 there is a continued commitment by voters across economic and political groupings to provide support for land conservation, often as a direct cost to themselves through a levy on their property taxes.

One question is the continued viability of private, charitable land conservation organizations using the conservation easement as their principal vehicle if national or state (but most especially national) rules on charitable donations should change.

Regarding Europe (the focus of the panel from which the background papers for this working paper originate) and other civil law countries there is reason for both caution and hope. Caution draws from whether civil law countries can take an experience from a common law country, an experience with very particular elements, and successfully transplant it. As Korngold (2011) notes the civil law system does not easily accommodate this transference. Hope draws from the fact that multiple civil law countries are actively experimenting with conservation easements and working to bring them into existence. As there is interest in it—and there is interest!—then a way forward is going to be partially dependent on formal changes to the governing codes of each country, as in occurring in Chile, and partially dependent on the creative actions of conservation focused actors.

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