The Challenge of a Private Property Rights (NGO) Approach to Land Conservation[1]

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Introduction

Public and private action to protect agriculture and forest land is longstanding in the United States. Papers prepared for the plenary session "Property Rights, Government Regulation and Conservation Land Trusts" explored in more detail a) the landscape of public policy approaches used by the public sector (especially at the state and local levels) and b) two case examples of private sector (NGO) approaches in the USA. This paper supplements these presentations by examining some of the more broad and theoretical issues that underlay private approaches to land conservation in the U.S., and offering informed speculation as to whether an approach which has proved successful in the U.S. might prove equally successful in Europe.

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I. Conservation Easements for Land Conservation in the U.S.

As Stein makes clear so-called conservation easements are among the most common tools for land conservation in the U.S.[2] Their use 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 3.6 million hectares of U.S. land (in 2000 these organizations only held agreements that applied to under 1 million hectares 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 NGOs and by all levels of government as of 2012 one estimate was that this equaled over 95,000 easements and covered 7.3 million hectares of land (http://nced.conservationregistry.org/ , update as of 12 September 2012).

II. Underlying Principles for Conservation Easements

By any measure the amount and extent of conservation easement usage in the U.S. is impressive. What allows this to be so? I argue here that there are five main legal and social principles which have facilitated and thus contributed to the growth of this approach to land conservation. These include: a) property as a bundle of rights, b) the validity of in-gross property rights, c) the validity of perpetuity in property right relationships, d) national and state law regarding charitable contributions, e) Americans skepticism about government and its role in land management through regulation

- 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,

2. Peter R. Stein, "Combining Market and Non-market Mechanisms to Ensure Sustainable Management Practices on Forested Landscapes" in this volume.

etc. – and with a set of social relationships – about access, use (and abuse), sale, lease, gift (e.g. via inheritance, which is an intergenerational gift). 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.

In the United States, an early twentieth century expression of the nature of property was the acquisition of mineral rights by mining corporations in the southeast region of the country. 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 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" (for many it extends to about 1000 meters).

Conservation easements represent one of the rights in the bundle (Whyte 1959, Whyte 1968). It is 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 it is 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 – most commonly the owner chooses to donate (gift) this right but the right can also be purchased from the owner.

- 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 a 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.

- Perpetuity.

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).

- Charitable Donations.

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, like 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 web link 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 (though not all) that this aspect of U.S. tax law has been a key component of land conservation growth over the past decades.

- Skepticism About Government.

And then 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 can be more receptive to the idea that action for land conservation is being 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).

III. Conservation Easements Under Civil Law?

To summarize, 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 pause.

Korngold suggests that conservation easements are unlikely to work in Europe as they do in the U.S. for at least three sets of fundamental 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.

Conclusion: an Uncertain Future

While this paper is intended primarily to draw from the U.S. experience with conservation easements and inquire into their utility as a land management approach in Europe, I close with comments about their future in both in the U.S. and Europe.

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. In his paper in this volume, Stein includes a table showing the continued commitment by voters across economic and political groupings to provide support for land conservation, often as a direct cost to them 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. I believe such a change (which has been actively discussed in the last few years) would have a substantial impact.

Regarding Europe, I find myself largely agreeing with Korngold (2011). I am skeptical as to whether civil law countries can take an experience from a common law country, an experience with very particular elements, and successfully transplant it. I do not believe that the legal system in Europe easily accommodates this transference. And if there is interest in it – interest as an alternative to governmental action through regulation – then a way forward is going to be dependent on formal changes to the governing codes of each country.

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