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## Breaking the bundle of rights: conservation easements and the legal geographies of individuating nature

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# **Breaking the Bundle of Rights: Conservation Easements and the Legal Geographies of Individuating Natures**

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## **Abstract**

This paper bridges critical legal geography and geographical work on neoliberal natures to illustrate the vital role that US law has played in reimagining the values of nature as divisible from their supporting contexts and the spatial outcomes of this “individuation.” The development and widespread use of conservation easements by nonprofit land trust groups serves as a precedent-setting case study. I review the two major pieces of enabling legislation: the Uniform Conservation Easement Act, and the addition of Section 170(h) to the federal tax code, to argue that these legal changes mark a pivotal moment of reregulation that has been significant for regularizing the separation of conservation values from their socio-ecological contexts. Finally, I offer three examples of the spatial manifestations of the legal foundations of conservation easements: shifting geographies of conservation prompted by highest and best use valuation and tax deductibility, an altered public/private divide in protected areas, and the creation of new spaces of accumulation, through the use of easement law by entrepreneurial forest carbon firms.

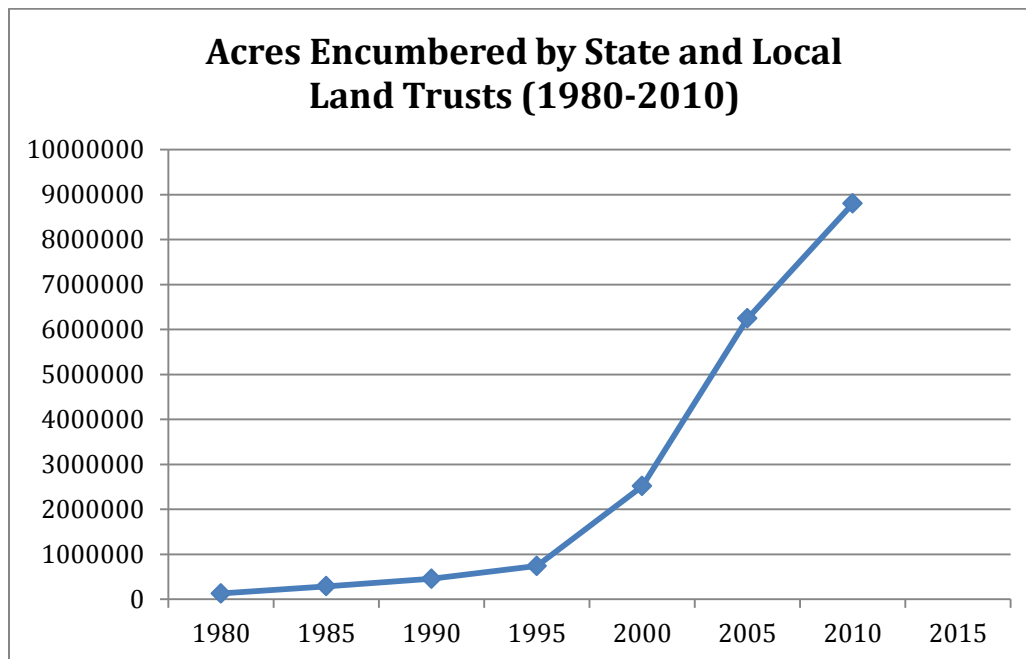
## **2.1 A Brief History of Conservation Easements**

Conservation easements are legally binding voluntary agreements between private landowners and organizations that are qualified to hold them, generally either a land trust or a government agency. Land trusts, broadly defined, are private nonprofit organizations

which, as all or part of their mission, work to conserve land through acquisition or easement (Land Trust Alliance, 2014a). In a conservation easement agreement, the landowner agrees to sell or donate one or more of their property rights for monetary payment or tax benefits while continuing to retain their private ownership of the land (Lindstrom, 2008). Most commonly, landowners will extinguish their rights to development, subdivision, or gas and mineral extraction; “in essence, the rights are forfeited and no longer exist” (The Nature Conservancy, 2013). The majority of conservation easements are perpetual, meaning that they “run with the land” indefinitely. If the property is sold or subdivided, the conditions of the easement remain in place. Conservation easements differ from other approaches to land protection because they are based so heavily on legal contract, and have, in recent years, become so intimately bound up with the federal income tax system.

While the statutes that have enabled and standardized the widespread use of easements are relatively new, the concept of acquiring partial rights in private land has a long history. The first private transaction for land protection in the US occurred in Boston, MA, in the 1630s, with the purchase of what is now the Boston Common (Levitt, 2005). Easements have a shorter history but have been used for half a century as a means of procuring rights of way for public utilities and government agencies. The term “conservation easement” originates from a 1959 publication by William H. Whyte, who suggests the use of easements as one possible approach for controlling urban sprawl (Gustanski and Squires, 2000). The oldest recognizable statutes that legislate conservation easements were adopted during the 1950s in Massachusetts (1956) and

California (1959) but, unlike today's laws, these statutes only authorized governments to hold conservation easements (Cheever, 1996). These early easements were primarily used for purposes like creating scenic parkways and protecting viewsheds near national parks (Fairfax et al., 2005), whereas today's easements are held by a broader range of actors and for a greater scope of purposes.



**Figure 3:** Growth in the total acres of land protected using conservation easement agreements, 1980-2010, adapted from McLaughlin (2013).

In 1980, only 128,000 acres of land across the US were protected using conservation easement agreements (McLaughlin, 2004). Over a relatively short period of time, the tool gained popularity within the land trust community and its use became much more widespread. The total amount of land protected through conservation easements by local and state land trusts grew from 2.5 million acres in 2000 to over 6.2 million acres in 2005; over the same period, only 480,000 additional acres of land were acquired through fee ownership (purchased in full) by the same organizations (Lindstrom, 2008: 4). Figure

1 illustrates the near-exponential growth in the use of conservation easement agreements by state and local land trusts between 1980 and 2010. The data included in Figure 1 *exclude* all easements held by public agencies, as well as the millions of acres under easements held by national land trust groups like The Nature Conservancy and the Trust for Public Land. How can we explain the explosive growth of conservation easements by private nonprofit land trusts, an approach which, prior to the 1980s, was virtually unheard of and, when used, was the strict domain of government? In order to understand this exceptional growth, two major factors must be considered: changes to the law and a changing political–economic climate.

## **2.2 The Enabling Legislation: Section 170(h)**

It is not until fairly recently that the acquisition of less-than-fee (partial) interest in land has been used as a tool for environmental protection. This is, in part, because of a variety of common law impediments to donation of partial interests in land, and partly because there was no incentive structure for protecting land using conservation easements (Dana and Ramsey, 1989). Prior to the late 1970s, nearly all land and historic resources that were protected by both private nonprofit groups and the state were purchased outright. A sea change was set in motion, however, when in 1980 the US tax code was revised to allow for the charitable donation of perpetual easements. This amendment was made to a relatively obscure tax provision from 1976, the Historic Structures Tax Act (Small, 2000), which codified the deductibility of conservation and historic preservation easement donations. With the Tax Treatment Extension Act of 1980, Congress made the conservation easement deduction provision permanent. The new regulation, Section

170(h), provided guidelines for the tax-deductible donation of partial interest in private lands for which ‘significant public benefit’ could be reaped. As Steve Small, an attorney who was pivotal in drafting the new regulations, puts it: ‘‘the tax code had created a tool for protecting private lands and gave land trusts a focus for their efforts, and the land trust movement was growing by leaps and bounds’’ (Small, 2000: 55). Similarly, Zachary Bray (2010: 129) writes

*the growth of private land trusts in the last four decades of the 20th century is best understood by reference to the growth of conservation easements...the growth rate was at its highest from 1985–1988—a period coincident with the early expansion of the federal tax deduction.*

Under Section 170(h) of the Internal Revenue Code (IRC) and related US Treasury regulations, there are four types of ‘‘conservation purposes’’ that easements can meet to qualify for federal tax deductions:

- (1) The preservation of land areas for outdoor recreation by, and for the education of, the general public.*
  - (2) The protection of relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.*
  - (3) The preservation of open space (including farmland or forest land) where such preservation is for the scenic enjoyment of the general public or pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield significant public benefit.*
  - (4) The preservation of a historically important land area or a certified historic structure.*
- (Public Law 96-541, 26 U.S.C. 170(h))

As a result of the vagueness of these conditions, the IRS has issued several memos providing further guidance for how terms like ‘‘significant public benefit,’’ ‘‘scenic enjoyment,’’ and ‘‘historically important’’ might be interpreted (IRS Notice 2004-41 (2004); IRS Notice 2007-50 (2007)). Furthermore, there exist a host of texts, both intended for legal audiences (e.g. *A Tax Guide to Conservation Easements*; *Conservation*

*Easements: Tax and Real Estate Planning for Landowners and Advisors*), as well as land trust personnel (e.g. *The Conservation Easement Handbook*), which detail case law, regulatory guidelines, and existing best practices in hopes of interpreting what counts as “good conservation” according to the Internal Revenue Service. The result of this has been that land trusts and other conservation nonprofits have reoriented their activities around these guidelines, in order to ensure that landowners who collaborate with them are eligible for tax relief. The focus of land trusts on adhering to the IRC has become heightened in recent years, primarily resulting from (1) a rash of IRS audits of conservation easement donations which were spurred on by a 2003 *Washington Post* expose of The Nature Conservancy (Silberstein, 2007), and (2) the development and evolution of “enhanced” incentives for landowners who donate easements, described below.

Since the changes to the IRC and Treasury Regulations in the early 1980s, there have been a host of new regulations to increase the federal tax incentives for conservation easement donations. In 2006, with the passage of the Pension Protection Act, the total amount deductible against income was increased from 30 to 50% of a taxpayer’s gross income (and raised to 100% for individuals classified as farmers and ranchers), and the number of consecutive years that an individual could apply their deduction for was increased from five to 15 years (Public Law 109-280 (2006)). These changes, collectively referred to as the enhanced conservation easement incentives, are not permanent. The provisions laid out in P.L. 109-280 have expired and been reextended several times over; and there was recent bipartisan support during the 2014 legislative session of the US

Congress for H.R. 2807, to make the enhanced conservation easement incentives permanent (Land Trust Alliance, 2014b). The Land Trust Alliance, which serves as the governing body for all US-based land trusts, has lobbied heavily to ensure the permanence of these incentives—most recently through their Ambassador’s initiative, which encourages land trust personnel to cultivate relationships with their local and state elected officials (Land Trust Alliance, 2014c). Furthermore, as of 2013, Congress provided permanent estate tax relief through Section 2031(c) of the IRC. This offers further incentive to place easements on land, providing landowners with up to a 40% reduction on estate tax payments for property encumbered by a conservation easement (Lindstrom, 2008). In combination, these incentives offer private landowners strong financial persuasion to place their land under conservation easement, and to do so through collaboration with a land trust.

### **2.3 The Enabling Legislation: Uniform Conservation Easement Act (UCEA)**

A uniform act is a template for state law, drafted by a group of government and private lawyers, judges, and law professors from all 50 states, Washington DC, and Puerto Rico, called the Uniform Law Commission. Under a federalist system, like the United States, all powers not assigned to the federal government are left to the states (Uniform Law Commission, 2014). However, many issues that are legislated at a state level have national implications, thus, uniform acts provide model text for how laws which transcend state boundaries might be drafted and implemented uniformly across space. Enacted in 1981, the UCEA serves the function of “sweeping away certain common law impediments which might otherwise undermine the easement’s validity” (Uniform Law



Commission, 1981). The UCEA was drafted precisely to remove legal barriers that could be used to invalidate easement agreements at the state level (Burnett, 2013) and to create statutory precedent in favor of conservation easement arrangements. Essentially, “the Uniform Act specifically addresses questions raised by the common law, erasing doubt, ratifying visibility, or reversing rules so that conservation easements are a fully valid interest within the jurisdiction” (Korngold, 2010: 596). The UCEA has been incredibly effective: by 1984, 29 states had enabling statutes for perpetual conservation easements (Johnson, 2014), and today, all states but North Dakota allow for perpetual easements.

The UCEA text aims to establish that a conservation easement is valid in spite of a variety of legal obstacles, including the fact that:

- (1) it is not appurtenant to an interest in real property<sup>1</sup>;*
- (2) it can be or has been assigned to another holder;*
- (3) it is not of a character that has been recognized traditionally at common law;*
- (4) it imposes a negative burden;*
- (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;*
- (6) the benefit does not touch or concern real property<sup>2</sup>; or*
- (7) there is no privity of estate or of contract<sup>3</sup>* (Uniform Conservation Easement Act, 1981)

Conservation easements initially faced three major legal impediments to their widespread use, related to the seven points raised above. First, in common law, there are strong

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<sup>1</sup> The easement is not being granted to an adjacent property owner for the benefit of one or both owners.

<sup>2</sup> Real property, in contrast to personal property, refers to property in land. A conservation easement does not qualify as real property because easements are non-possessory rights of use or entry.

<sup>3</sup> In contract law, privity refers to a closed relationship between two parties. A lack of privity of estate or contract means that rights can be conferred to a third party, other than the two parties consenting to the agreement.

precedents that discourage the use of easements in gross. An easement in gross “runs with the land” after it has been sold, or the owner has passed on. Second, there are also strong precedents set against negative servitudes or covenants, especially if they are in gross; “negative easements were disfavored by a property law system designed to promote the marketability and alienability of property and to guard against restrictions which may work against these ends” (Dietrich and Dietrich, 2013: xix). Negative servitudes prohibit certain activities on a piece of land—an easement is generally regarded as a negative servitude because it extinguishes particular rights to property use. Finally, common law does not generally allow for easements to be held by individuals who are not adjacent property owners (nonappurtenant easements). Because the rights conveyed in an easement are usually transferred to a nonprofit land trust or government agency, it is necessary to alter the law to allow for the transfer of rights beyond the immediate vicinity of the property itself (Jacobs, 2014).

Overcoming the spatial barriers of the law is critical for enrolling private landowners into conservation programs en masse. While there are now a variety of state and municipal incentive programs for conservation easements, early on, the primary incentives stemmed from the federal government, via the IRS and Treasury, through Section 170(h). Because the laws that govern easements were regulated at the state level, the UCEA played a crucial role in aligning state and federal aims, ensuring that private property owners could reap federal tax incentives. At the same time as the UCEA sought to standardize easement law across space, it also contributed to the devolution of land management and governance by encouraging the increased role of private landowners in protecting and

maintaining so-called public goods. For example, the Uniform Law Commission reinforces the notion that conservation can and should take place in cooperation with private property owners, stating in the preamble of the act that the use of easements for land protection is aligned with the American notion of the “private ordering of property relations as sound public policy” (Uniform Law Commission, 1981). For its involvement in reconfiguring conservation practices around the acquisition of individual rights in private property, the UCEA can and should be seen as an important moment in legal harmonization for encouraging a host of social and political economic changes which have been collectively referred to as the neoliberalization of nature (Heynen et al., 2007).

#### **2.4 Neoliberal Environmental Governance in the United States**

The neoliberalization of nature refers to a suite of actually existing and spatially variegated processes and social interventions (Brenner and Theodore, 2002), distinctive of the “post- Fordist” mode of the regulation of capital (Aglietta, 1976; Jessop, 1990), which have reshaped the management and governance of the natural environment in recent decades. Characteristic processes include a focus on “properly” valuing land and resources, efforts to achieve ecologically preferable outcomes through the use of markets, the inclusion of private corporations and actors in governance, valorization of private property rights, and a preference for private, rather than public, ownership and stewardship of land and natural resources.

It is no coincidence that the laws which underpinned and expanded the use of easements were lobbied for and passed at the height of Reagan-era deregulation and reform. The same year that Section 170(h) was added to the US IRC, creating strong financial

incentives for conservation on private land by non-state actors, avowed “Sagebrush Rebel”<sup>4</sup> and Secretary of the Interior James Watt famously attempted to dismantle the Land and Water Conservation Fund (LWCF), the primary revenue source with which federal agencies purchase, improve, and maintain public lands (Vincent, 2006). Several accounts of the history of the land trust movement have recognized the direct relationship between the handicapping of federal land acquisition efforts and the growing popularity of approaches that leverage private property rights toward public goals (Johnson, 2014).

Fairfax et al., as one example, explain that:

*Land trusts sustained federal land acquisition efforts during a hostile administration. Under Reagan, it became politically impossible for federal agencies to seek acquisition funding from Congress. Private land trusts could, and did, and the transactions they supported became the surviving elements of the LWCF. Furthermore, in the ever more complex transactions that emerged in the 1980s, land trusts were better positioned than federal agencies to sculpt deals to the sellers’ advantage, fully exploiting federal and state incentive programs, lobbying for changes in tax laws, and adjusting to rapidly shifting real estate markets (2005, 178).*

This is echoed in a 1981 *New York Times* article about the growing land trust movement.

The article quotes Jean Hocker, who would go on to spend 14 years as the president of the Land Trust Alliance:

*With the Federal Government bowing out of land acquisition for parks and preserves for the time being, the burden of conserving remaining open spaces falls on the private sector. The pendulum may swing, but, for now, the Reagan Administration and Interior Secretary James G. Watt have decided that the nation cannot afford to spend money on land purchases, not even those authorized by Congress. Mr. Watt has called for a moratorium on such spending; he would use available funds to rehabilitate existing National Parks...Private land conservation efforts have been increasing in recent years, with local and regional land trusts and agricultural land trusts springing up around the country. “Reagan and Watt have given impetus to our efforts,” said Jean Hocker, a director of a land trust in Jackson Hole, Wyo. (Shabecoff, 1981).*

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<sup>4</sup> The Sagebrush Rebellion was a property rights movement during the 1970s and 1980s that sought devolved control, if not outright privatization, of public lands in the American West.

The relationship between the actions of land trusts and the federal government is a complicated one. During the 1980s, land trusts were acting in lieu of the Reagan administration, but doing so through the preferred channels of the neoliberal state, and with the support of federal tax law and state property law. Land trusts come to act as “flanking mechanisms,” filling the void created through deregulation (Castree, 2010), with laws like Section 170(h) and legal templates like the UCEA acting as crucial moments of reregulation which serve to bolster alternative, neoliberal spatialities of environmental conservation.

As the use of easements by private, nonprofit land trusts has extended well beyond the Reagan era, it is important to note the complexity of institutional arrangements and funding sources that support modern conservation. Thus, while the use of private property rights for land conservation has only expanded, neoliberalization has manifested in a variety of ways beyond privatization. For example, Raymond and Fairfax have argued that rather than seeing conservation easements as an outright shift from public to private, easements instead represent the “blurring of the ideas of property and policy” (2002: 602). Similarly, Amy Wilson Morris observes that most land trust transactions, while ostensibly “private,” employ public monies to ends which are intended to benefit the American public (2008). Hence, while the growth of land trusts does not necessarily point to the large-scale privatization of nature, it does, however, represent the large-scale privatization of decision-making around public goods (Morris, 2008). The widespread use of conservation easements also marks a devolved approach to regulating and managing space, since, “functionally, conservation easements resemble privatized and

individualized zoning and land use restrictions or, seen in another light, a form of privatized environmental regulation” (Olmsted, 2011: 51).

In the current political climate, there continues to be a strong ideological opposition to the federal ownership and management of public land, particularly in western states. This was highlighted most recently by the armed standoff between Nevada rancher Cliven Bundy and the Bureau of Land Management<sup>5</sup>. Given the hostility toward government ownership, easements have grown in popularity for their purported ability to protect conservation values without compromising private property rights (Anella and Wright, 2004). Thus, in addition to the various state and federally mandated tax deductions for private conservation, there are also a number of federal grant programs which distribute funds to nonprofits for conservation on private property. For example the Forest Legacy program of the US Forest Service, which provides grant funding for easement acquisition on private lands, has seen its budget increase from \$2.6 million in 1997 to over \$50 million in 2013 (USFS, 2013). Similarly, the US Fish and Wildlife Service, which administers a private landowner grant program as part of the North American Wetlands Conservation Act, has allocated over \$1 billion in grant funding for biodiversity conservation on private land since 1989 (Intermountain West Joint Venture, 2013).

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<sup>5</sup> Bundy refused to pay over \$1 million in unpaid grazing fees to the Bureau of Land Management because he was unwilling to recognize federal jurisdiction over public lands in Clark County, NV. After the situation continued to escalate, hundreds of protestors joined him in an armed standoff against the BLM in April 2014.

## **2.5 Making Law, Making Conservation Values Divisible**

Most fundamental to the process of standardizing conservation easements are the property law foundations that allow for the ownership, sale, or trade of partial interests in real property. Many theorists have conceptualized property as a metaphorical “bundle of sticks” or “bundle of rights” (Demsetz, 1967; Honore, 1961) which can be freely split, and traded or sold. This conception is often presented counter to so-called Blackstonian notions, which view property as individual, exclusive, and absolute (Rose, 1998). The legality of splitting the bundle of rights to generate conservation easements has been established as acceptable practice through several decades of US case law (Lindstrom, 2008). There are also long-standing precedents in common law in the United States that underpin the practice of “breaking the bundle,” most notably the severing of water or mineral rights from their surface estates. The ability to isolate singular rights in nature from the broader “bundle” and protect those specific rights is reflective of the ways that the institution of property has changed in recent history. Evolution in the interpretation of is what property is and what it can do is to be expected, as “the meaning of property is not constant...[and] changes are related to changes in the purposes which society or the dominant classes in society expect the institution of property to serve” (MacPherson, 1978: 1). The development of new technologies, transformation in social values (Jacobs, 1998), and, I would add, variation in approaches to the regulation of capitalism (Jessop, 1990), all serve to change what counts as part of the metaphorical “bundle of rights” and thus, what elements of real property can thus be framed as separable from their supporting context.

Property serves as a central concept in both the literatures from political ecology on “neoliberal environmental governance” and “neoliberal natures” (Castree, 2010; Heynen et al., 2007; Mansfield, 2008) and in critical legal geography (Blomley, 2005a, 2005b; Graham, 2010; Von Benda-Beckmann et al., 2009), and thus offers a useful starting point for placing these literatures into greater conversation. The evolution of laws surrounding property are some of the best windows into our preferred modes of governance and economic regulation, because “through the course of American history, the legal system evolved constantly in accordance with major changes in American political economy” (Thompson, 1997: 3). It has been suggested that legal geography needs to better attend to the complex political economic relationships under which laws are written and law regulates space (Andrews and McCarthy, 2014; Jepson, 2012). However, it has also been suggested that studies of neoliberalization need to take heed of the importance of the law (Barkan, 2011; Delaney, 2014). The intersection of these fields is logical, as “neoliberalism is, in part, a language of property—a return to central axioms of eighteenth century liberalism, which locates private property as the foundation for individual self interest and optimal social good” (Blomley, 2004: 614). Furthermore, processes of privatization, enclosure, and regulatory roll-out and roll-back—central tenets of neoliberal policy-making—are centrally driven by legal frameworks and relations (Delaney, 2014a). In order to conceptualize the ways that property shapes nature/society relations, as many scholars of neoliberal natures aim to do (Castree, 2010; Mansfield, 2008), we must also understand the ways that law is implicated in the framing and reconfiguring of what counts as property.



One way that law reconfigures property, and in turn, nature, is through the drawing of boundaries. Questions around the bounding of space are familiar terrain for legal geographers and critical socio-legal scholars. Many legal geographers draw on the Greek concept of *nomos* (law), which recognizes law as a form of territorialization and boundary making. Law as *nomos* highlights the fact that law is not simply the set of legal codes which preside over a pre-given territorial jurisdiction, suggesting instead the co-constitution of law and space (Barkan, 2011; Delaney, 2010). As Nicholas Blomley has demonstrated with great force (2004, 2005a, 2005b, 2008), property relationships play a critical role in boundary making, particularly in terms of delineating what is public and what is private. In many of his accounts, boundaries are circumscribed through the exchanges between socionatures—ranging from river high marks to garden hedges—and land laws. Through the interplay between nature and law, the spatialities of neoliberalism are produced and bounded.

Conservation easements present an example of the ways that law has facilitated the redrawing of boundaries in ways that allow for the bundle of rights to be more easily and readily separable; “like the layers of a peeling onion, our notions of property rights have been increasingly severed into distinct layers of resource citizenship” (Perramond and Lane, 2014: 143). Nicole Graham (2010) describes this form of bounding as the disembedding of environmental values from their supporting place-based contexts, a process which she refers to as the “dephysicalization” of property (2010). The rise of dephysicalized property relations emerged, she argues, in the 17th century as part of the ownership and land-use changes required to bring about early forms of capitalism. The

concept has endured, she argues because it “supports and facilitates the trade of everything capable of being traded” and thus the concept serves as a crucial “cornerstone of the contemporary and global economy” (Graham, 2011: 153–154).

The literature on neoliberal natures is rife with cases which describe the bounding of the material world through the creation of abstractions that alter and “dephysicalize” property relations to create new markets in nature. Representative examples of this phenomena include carbon emissions trading (Bumpus and Liverman, 2008), payment for ecosystem service programs (MacDonald and Corson, 2012; Sullivan, 2009), and entrepreneurial wetland mitigation banking (Robertson, 2012). What all of these examples have in common is the fact that they represent the circumscription of specific attributes of the biophysical world (i.e. the ability to store carbon, the ability to filter water, a scenic view) and the disembedding of those values from their ecological contexts, a process which Castree (2003) has referred to as “individuation”. Similar to dephysicalization, individuation refers to the “representational and physical act of separating a specific thing or entity from its supporting context” (Castree, 2003: 280). He argues that this process is often tightly bound up with the parallel act of abstraction, in which a range of qualitatively distinct entities are assimilated as a single, broader type or process (Castree, 2003: 281). In the specific case of conservation easements, both abstraction and individuation play crucial roles. The legal document draws the boundary around the particular property rights which are included in the easement agreement, and the value of those rights is then determined through real estate appraisal. The easement contract serves to individuate the rights from their environmental contexts, while the

appraisal and subsequent valuation translate the bounded rights into a value-bearing abstraction (Robertson, 2012).

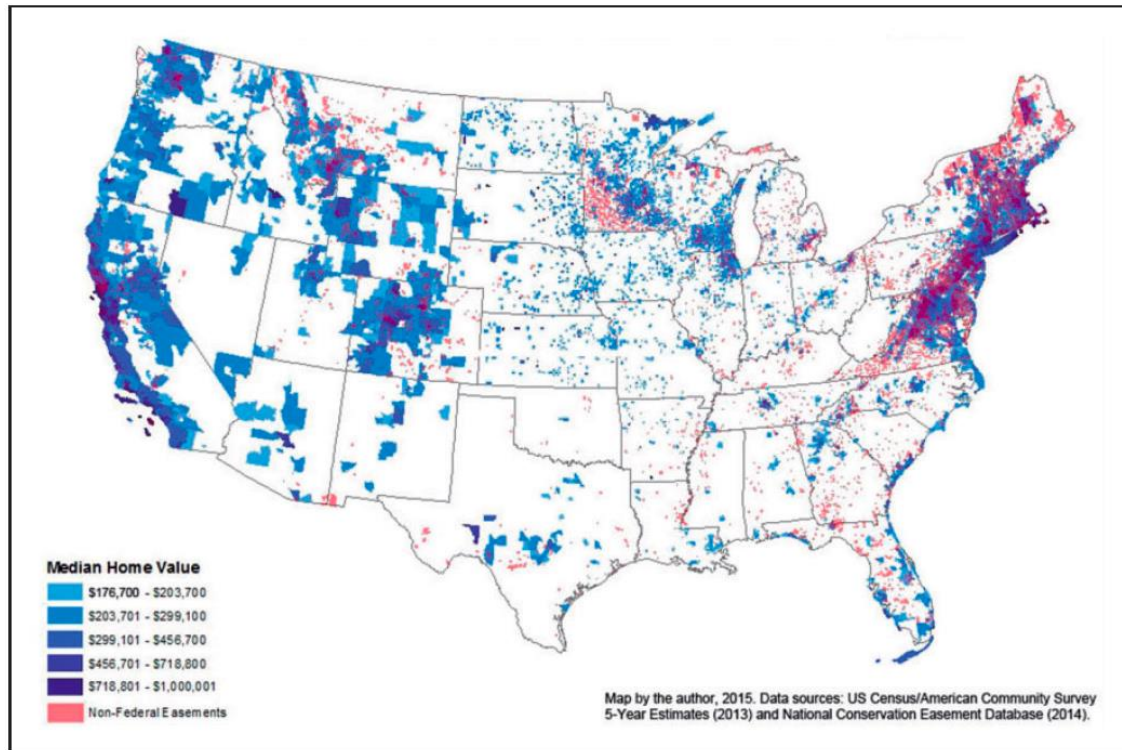
## **2.6 Discussion: Spatialities of Section 170(h) and the UCEA**

In this section, I offer three brief descriptions of the spatialities which have manifested through the interactions between easement law, existing property relations, political economy, and the biophysical world. The use of individuated rights in nature as the primary means of protecting conservation values has resulted in distinctive social and spatial outcomes. These outcomes are the unique result of the political economic context in which the enabling legislation was crafted (namely the preference for non-state property ownership and management), the incentive structures built into Section 170(h), and the fact that individuation allows for rights to more easily circulate as commodities.

## **2.7 Tax Law and the Geographies of Highest and Best Use (HBU)**

The use of the IRC as the primary enabling legislation for conservation easements has produced a unique geography of conservation lands, as illustrated in Figure 2. The map displays the location and extent of all easements not held or owned by the federal government, and the census block groups which have median home values above the 2013 national average of \$176,700. The locations of easements held by nonprofit groups are, on the whole, generally coincident with or proximate to high-value real property. The unique geography of easements, much like the geography of US public lands, has resulted from a combination of the legal frameworks which supported their creation, and historically specific understandings of capitalism, property, and nature.

Federal ownership is heavily condensed in the West—nearly half of the land in the 11 coterminous western states is federally owned (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), while Alaska is over 60% federally owned (Gorte et al., 2012).



**Figure 4:** Non-federally held conservation easements in the US, displayed with above-average median home value (>\$176,700). Map by the author (2015).

This geography resulted from Progressive Era shifts in regulation surrounding the sale of public lands, the conservation of resources, and the redefinition of public property and its boundaries (Hays, 1959). Similarly, the geography of conservation easements is a reflection of political economy and law. It has emerged from the interplay between the rise of neoliberal environmental governance, which favored private management of public resources, and the economic benefits established by Section 170(h) and updated

through various iterations of the enhanced conservation easement incentives—including increased amounts deductible from income and reduced estate tax payments on encumbered lands. Explaining the geographies of easements requires both an understanding of how land is valued, and close engagement the particularities of the laws which undergird their expansion.

Section 170(h) of the IRC dictates that the value of a conservation easement is determined through a real estate appraisal, by a qualified appraiser, using the before-and-after method of valuation (IRS Notice 2006-46 (2006); Lindstrom, 2008). First, the entire property is appraised based on its HBU, generally its value for development or resource extraction. Then, a second appraisal is conducted to determine the value of the land minus its potential for development or extraction, or whatever other values are being extinguished by the easement agreement. The second appraised value is subtracted from the first, and the difference between the two appraisals is the value of the easement, and thus, the amount which can be considered as a charitable donation for state and federal tax purposes. The individuated rights are gifted to a land trust or the state, and the landowner is compensated with a tax deduction for the appraised monetary value of the rights.

It is notable that tax benefits derived from easements are offered as deductions, rather than credits. Tax deductions are typically only claimed by itemizers, who on the whole tend to be wealthier (Colinvaux, 2012). Furthermore, charitable donations are only deductible on itemized tax returns, thus, donating an easement only makes sense if a

property's development rights are worth more than the standard deduction. This inequitable benefit is exacerbated by the fact that tax deductions also have greater value as marginal tax rates increase, meaning that, proportionally, the wealthier that a donor is, the more s/he will gain from the tax deduction that accompanies the donation of a conservation easement (Colinvaux, 2012).

Roger Colinvaux, counsel to the Joint Committee on Taxation in the U.S. Congress for the development of the enhanced conservation easement incentives, is very critical of the use of lost development potential as a metric for conservation benefit (2012, 2013). He has argued against the use of HBU valuation as a metric for measuring social benefit, as it is inefficient and wasteful for taxpayers. Further, he writes

*use of lost economic development value as the measure of the deduction has driven up the costs of the program. In terms of revenue loss, many of the taxpayers most likely to donate conservation easements are unlikely to develop the property in any event and would be willing to part with the easement for much less than the current tax benefit (Colinvaux, 2012: 34).*

The specific metrics that are used to measure conservation benefit matter. While easements are often presented as private real estate transactions, the acquisition of conservation easements is widely supported and funded by the state, under the auspices of protecting land for the public good (Morris, 2008). In 2007 alone, there was \$2.18 billion in claimed deductions for conservation easement donations (Colinvaux, 2012: 3). This number, however, is deceptive. It excludes losses in federal estate tax collection, state and local tax subsidies, and permanently lowered property values for the purposes of ongoing property taxation by local government authorities. This metric is striking in

contrast to appropriations to the LWCF during the same year. In 2007, a total of \$298 million was allocated for all federal and state land acquisition projects. This is just 13.6% of the public expenditure on easements, and unlike the \$2.18 billion in claimed tax deductions during that same year, the \$298 million from the LWCF came from taxing the private use of public resources (LWCF funding comes from taxing offshore gas and oil drilling), rather than from direct public expenditure.

There are a wide range of socially acceptable approaches to valuation, including hedonic methods and stated preference. While HBU valuation has resulted in a particular geography, changing the legally preferred approach to valuation of easements would likely have major impacts on both their geographies and their costs. It may be worthwhile to consider alternative approaches to valuation and compensation, as the current approaches, dictated by 170(h), are incentivized using regressive forms of social redistribution and are thus likely to have uneven geographical impacts into the future. The correlation between median home values and the locations of easements highlights the possible environmental justice issues that stem from tax deductions based on HBU valuation. Furthermore, the fiscal chaos which has ensued from California's decision to cap property taxes (Proposition 13) offers but one illustration of the possible future consequences of utilizing the large scale devaluation of real property as a means of protecting conservation values (Schrag, 1999).

## **2.8 Conservation Easements and the Public-Private Divide**

Within the US conservation community, the public-private divide is widely understood to be a false, or at least unhelpful, dichotomy (Geisler and Daneker, 2000; Raymond and

Fairfax, 2002), namely because of the substantial expansion of public–private partnerships in recent decades (Endicott, 1993). This bridging of public agencies with NGOs, private landowners, and private capital has made it difficult to characterize conservation efforts in black and white terms. While the composition of actors and sources of funding may have blurred the lines between public and private in US conservation, this blurring together of public and private interest has not carried through into conservation property relations. Most notably, the growing use of private property rights for conservation has indisputably been matched by a marked reduction in public access to protected areas. The National Conservation Easement Database, for example, reports that nationally 2,224 properties under easement explicitly allow for public access, while over 54,000 properties are explicitly closed to the public (NCED, 2014). Despite the expenditure of public funds for the protection of scenic and natural resources, the spaces created through easements are often inhospitable and inaccessible to the publics who have supported and financed their creation.

By utilizing approaches to conservation, namely the individuation of public conservation values, which produce overlapping spheres of public nature and private property on the same parcels of land, the private users, who retain the majority of the bundle of rights, are able to dictate the terms on which the public may access and use the properties, if at all. Protecting public environmental values through a restriction on a private property deed thus means that the public interest is bounded in such a way as to be deferential to the rights of the private owner. This raises a crucial issue with the spatialities of conservation easements. While Section 170(h) and the UCEA provide a legal foundation for



individuating individual conservation values for the purposes of valuation or quantification, these rights are still ultimately tied to land, and this land is still ultimately owned by a private citizen who has the ultimate authority over managing the public interest in his or her land. While the public may hold an extensive interest in private land, property rights are functionally useless without access and use rights (Ribot and Peluso, 2003).

Furthermore, in the US, like most Western societies, property rights are generally understood to be relative, not absolute (Graham, 2011). For properties under easement, negotiating the trade-offs between the overlapping spaces of public and private ownership, has been, and will likely continue to be, a difficult and ongoing process. This deeply political process, which largely takes place within courtrooms, is about placing that tenuous boundary between public property and private; it “in other words, is about social ordering: who gets what, who gets excluded, and how” (Correia, 2013: 7).

Largely, these court cases have fallen on the side of private property owners. The landmark Supreme Court case *Lucas v. South Carolina Coastal Commission*<sup>6</sup> for example, ruled that the maintenance of the value of private property trumps the protection of public environmental goods. This does not bode well for expanding public access to easements. In another recent court case, *New England Forestry Foundation, Inc. v. Board of Assessors of Hawley*, which looked specifically at conservation land ownership, the ruling was not in favor of the public interest. In this case, a small town challenged a land

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<sup>6</sup> For a detailed exploration of this case and its implications, see Logan and Wekerle (2008) and Sax (1993).

trust's claim to tax-exempt status, arguing that simply owning conservation land did not provide the public any benefit, especially given that the parcel in question was functionally inaccessible. The land trust won the case and was allowed to retain its tax-exempt status, despite the town's concern that they were paying for the protection of public goods which they could not access.

The statistics and case examples given above illustrate the neoliberal logics under which conservation easements were conceptualized and legitimated. The private property interest is the foundational one, and any conservation benefits which can be derived beyond those interests are seen as a bonus, to be compensated for with state and federal tax benefits. When competing interests arise, the rights of the private owner are upheld, even if they conflict with the public interest, and private landowners who have easements on their land for the sake of protecting public environmental values are not expected to allow the public access to those values. This deference to the private interest may present a challenge to the viability of conservation easements in the future, particularly as land with conservation easement restrictions is sold to new owners (Merenlender et al., 2004). Thus, in many ways, the reimagining of property rights that enabled easements could ultimately prove to be their downfall.

## **2.9 Conservation and Accumulation: Forests of Carbon**

Finally, in addition to legitimating and incentivizing certain approaches to conservation, the legal foundations which have established the validity of conservation easements have also played an important role in stabilizing new markets in nature. One notable example

is the emergent relationship between land trusts, conservation easements, and forest carbon projects. There are many similarities between payments for ecosystem service (PES) programs and conservation easements. Both function through the use of legal contracts which bring together private property owners, conservationists, and compensatory agencies (in the case of both easements and PES programs, this is most often a public agency), in order to extinguish particular property rights for some form of compensation. Furthermore, both aim to create environmentally beneficial outcomes through the individuation of specific rights from an underlying property.

California's carbon market is the only functioning domestic market in the US and is structured in a way that provides a privileged role to land trusts. The legislation that established and regulates the state's carbon market, the California Global Warming Solutions Act of 2006 (AB-32), has required that all "avoided conversion" carbon projects include a perpetual conservation easement on the property. Avoided conversion projects pay landowners to sequester carbon rather than extract timber or build on the property—much the same as a conservation easement compensates a landowner to extinguish development rights. While carbon markets are relatively new, easements have a long intellectual and statutory history. By using a conservation easement to delineate the boundaries of an offset project, 30 years of legal precedent are put to work to essentially serve as a form of insurance for an otherwise novel market. AB-32 is set to expire in 2020, but the land-use restrictions on property delineated as forest carbon offsets and placed under easement will endure irrespective of the life span of the carbon market. Thus, approaches to and durations of ownership that are associated with

conservation through easements are an important part of ensuring the legitimacy of new markets in nature. As illustrated by the avoided conversion guidelines in AB-32:

*For Avoided Conversion Projects on private land, the Forest Owner must record a Qualified Conservation Easement against the offset project's property in order for the Forest Project to be eligible. Any Forest Project that records a Qualified Conservation Easement may reduce its risk rating and required contribution to the Forest Buffer Account in Appendix D.*

*To be “qualified” for purposes of ARB’s compliance offset program, the conservation easement must:*

- a. Be granted by the owner of the fee to a qualified holder of a conservation easement in accordance with the conservation easement enabling statute of the state in which the project is located;*
- b. Be perpetual in duration;*
- c. Expressly acknowledge that ARB is a third party beneficiary of the conservation easement with the right to enforce all obligations under the easement and all other rights and remedies conveyed to the holder of the easement. These rights include standing as an interested party in any proceeding affecting the easement.*

*(California Air Resources Board, 2011: 16–17)*

Through its reliance on conservation easements and the law that regulates them, AB-32 embeds particular logics of conservation into the carbon market. It makes reference to both perpetuity (a requirement which emerged and has endured as a result of its centrality to Section 170(h)), and to the state’s conservation easement enabling statute, as derived from the UCEA. Even the use of the term “qualified” echoes the requirements that easements be held by a “qualified” organization, also a requirement which has been passed down from Section 170(h) of the IRC. In this we can see that the legal frameworks, which have served to make easements feasible, secure, and evenly legislated, are now an important element in structuring and governing emerging domestic markets in forest carbon offsets.

The point of contact between land trusts and forest carbon brokers signals the moment at which individuated, or unbundled, rights to property can be valued and circulated as commodities. In practice, this has meant that many forest carbon firms are actively seeking out land trusts, which have the ability to hold conservation easements, have working relationships with landowners, and are familiar with particular modes of valuation and appraisal. For example, Finite Carbon, one of the leading firms in the development of compliance carbon offsets in the United States, has focused much of its work on collaboration with land trusts. Their website states “land trusts are able to serve as conduits to introduce local landowners to the benefits of carbon markets,” and as a result of this, Finite Carbon is willing to cover all costs to help bring land trust groups and the landowners with whom they collaborate into the folds of the carbon market (Finite Carbon, 2014). This compatibility is becoming widely recognized. In recent years, there has been a marked increase in attendance from carbon registries and similar groups at the Land Trust Alliance annual conference, and between the 2013 and 2014 conferences the number of seminars about forest carbon funding for land conservation tripled (Land Trust Alliance, 2013, 2014d).

All of this becomes increasingly important with the growing global interest in market based incentives and tools for environmental protection, emissions reduction, and climate change mitigation. The construction of California’s carbon market was a massive regulatory feat, involving negotiations between countless lawmakers and policymakers in venues and debates that span back to the late 1990s (Bigger, 2015). This makes California’s the most developed and comprehensive climate legislation in the United

States. California has long served as a regulatory testing ground for the rest of the United States (Schrag, 1999)—many laws passed in California become templates for national regulation. With the United States under increasing pressure to make strides toward greenhouse gas reductions, it is not unlikely that national cap-and-trade legislation would be modeled after AB-32. While new markets come into being through processes of individuating rights, many of the specific geographies and political and economic relations which have emerged from the widespread use of conservation easements would likely also become embedded into the laws and spatialities of future carbon offset markets.

## **2.10 Conclusions**

This chapter has looked at the role that two legal changes, Section 170(h) of the IRC and the UCEA, have played in facilitating the individuation of conservation values from their larger socio-ecological contexts, as part of the reregulation of nature–society relations that has characterized neoliberal environmental governance. Through the geographies of easements, property access regimes, and the creation of new markets in forest carbon, this paper explores the spatial outcomes of these legal and political economic changes. In particular, I have made an argument for employing property as a foundational concept for understanding the co-constitution of law and political economy. This serves to bridge work on neoliberal natures, which is concerned with the state but often overlooks the law, with work in legal geography that is concerned with law but often overlooks political economy.

Conservation easements are but one of many examples of the ways that law, space, nature, property, and political economy are intimately co-productive. Just as the rapid spread of easements can only be understood within the larger context of neoliberal environmental governance and property rights movements, other facets of modern-day conservation and natural resource management are the result of ongoing forms of legal and political economic reregulation, and these foundations demand greater elaboration. The ongoing and evolving interest of financial actors in the mediation of environmental management, as one example, offers a fruitful example of reregulation of property and nature that is ripe for study.

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