

ARTICLES

The New Public Lands: Competing Models for Protecting Public Conservation Values on Privately Owned Lands

by John H. Davidson

John H. Davidson is Professor of Law Emeritus, University of South Dakota School of Law; and President, Northern Prairies Land Trust.

Editors' Summary

The emergence of new hybrid categories of public interest lands represents an opportunity to advance the public interest. In recent decades, the U.S. government has acquired partial property interests over large acreages, meaning these properties must now be managed in accordance with governing statutes and regulations. Critics of this new model argue that the hybrid of public/private ownership is inefficient and too many resources are required to monitor and enforce applicable regulations. To address these concerns, land trusts and other private conservation organizations that hold the new public lands are implementing a private system capable of protecting these hybrid interests across time. Land trusts are now voluntarily accepting a regime of strict accreditation standards to guarantee that each easement held is backed by endowed funds sufficient to support enforcement, and that there is in place a fully informed and regulated monitoring process.

The most recent federal farm legislation¹ either continues or creates authority for a variety of significant conservation programs whereunder the United States acquires by purchase or creates incentives for the transfer of conservation easements in private land. The Wetlands Reserve Program (WRP)² authorizes the acquisition of perpetual and term conservation easements in wetlands. The Grasslands Reserve Program (GRP)³ authorizes the acquisition of easements in natural, productive grasslands. A farm and ranch protection program⁴ subsidizes the acquisition of easements by third parties. The Conservation Reserve Program (CRP) authorizes the acquisition of term interests in marginal farmlands if converted from cropping to vegetated cover such as grasses and forest.⁵ These programs combine to protect a significant and growing conservation resource. At the end of 2008, for example, the WRP had enrolled over two million acres⁶ and the Farm and Ranchlands Protection Program had enrolled at least 533,068 acres.⁷

The new farm legislation also contains a revision in the federal income tax code that provides stronger incentives for owners of farm and ranch lands to donate conservation easements.⁸

The Farm Bill conservation programs represent but one part of a complex of federal law authorizing federal agencies to acquire partial interests in conservation properties or encourage landowners, typically through the use of tax or regulatory incentives, to donate conservation easements to nonprofit conservation organizations, or to state and local governments. This Article addresses the importance of this significant public ownership interest, referring to it as the “new public lands,” and considers how ownership and management is and should be addressed.

I. Early Development of Hybrid Interests in Public Lands Law

During the 19th and 20th centuries, federal and state governments could address conservation, environmental, resource development, military, and recreation needs by diverting suitable resources from a rich reserve of publicly owned land. As a result, the phrase “federal public lands” became the accepted reference for an existing inventory of national parks, forests, wildlife refuges, range, monuments, rivers, and offshore resources. Similarly, the phrase “public lands law” came to

1. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234 (2008), U.S.C.A.N. (122 Stat. 923).
2. *Id.* §2201 (to be codified at 16 U.S.C. §§3837).
3. *Id.* §2403 (to be codified at 16 U.S.C. §3838n-q).
4. *Id.* §2401 (to be codified at 16 U.S.C. §3838h-i).
5. *Id.* §§2101-2111 (to be codified at 16 U.S.C. §§3821, 3831-32, 3834-35).
6. Wetlands Reserve Program, Natural Resources Conservation Service, <http://www.nrcs.usda.gov/programs/wrpl/>.
7. Natural Resources Conservation Service, <http://www.nrcs.usda.gov/>.
8. *See supra* note 1, §15302 (to be codified at 26 U.S.C. §170).

refer to the law and policy of managing these lands in the face of competing land use claims. Federal public lands are special indeed because the United States acquired them as sovereign, owns them outright, and as a result, retains the full complement of rights and interests. That the nation benefits immeasurably from this unique reserve is now widely agreed, allowing for the usual band of dissenters.

These public lands are customarily described and managed with reference to the purpose stated at the time of withdrawal or reservation. Although legal title is unified in the United States, competition for use and exploitation of the lands is intense, leading to conflicts among private users, public interest groups, and the assigned land managers. Today, this competition grows steadily along with growth in population, consumption, and disposable wealth, all combined with shortages of basic resources such as water, minerals, atmosphere, and energy. In other words, even where formal legal title is unified in the United States, there is a sharp policy struggle to achieve accommodation among private economic interests and the public interest.

In their precedent-setting public lands law casebook, George Coggins and Charles Wilkinson wrote in 1981 that “[f]ew people are aware of the full extent to which the United States government owns and controls land.”⁹ They went on to report that at the time they were writing—1981—the United States owned in fee about 740 million acres, or one-third of the nation’s land.¹⁰ This is all familiar today, but when Coggins and Wilkinson led the way, the idea of making a particular study of the law, policy, and management of federal lands seemed novel; that it was important cannot be questioned. In that same Preface, they wrote:

Lord Macauley long ago noted that the true test of American institutions would come when the free public domain was exhausted and an increased population competed for ownership of the land and its depleted resources. That time has arrived and the competition is intense.¹¹

The resulting competition over the public lands was, as it developed, epic, and continues at the time of this writing. That competition, however, is thought of almost entirely as one involving lands owned outright by the United States.

This Article addresses an evolving chapter in the history of public lands. It begins by recognizing that in this intensely crowded new century, the option of meeting public needs by simply withdrawing lands from those already owned by federal and state governments is seldom available, although the evolving public interest in conservation, and agricultural and environmental land and water uses, may be more compelling

9. GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LANDS AND RESOURCES LAW* xix (1st ed. 1981).

10. *Id.*

11. *Id.*

than it has ever been.¹² The issue is particularly noticeable in the middle tier of states, including Kansas, Nebraska, North Dakota, and South Dakota, where few reserves of public land exist and more than 95% of the land is in private ownership, including vital remnants of native prairie, wetlands, headwater streams, open space, history, archaeology, and paleontology. The issue exists throughout the nation, however, wherever there is competition among perceived public values and the more specific goals and constraints of private ownership. Where the public values of concern are on private land, one response to the resolution of the private-public tension is leading to an additional category of “new public lands.”

Generally, new public lands is a hybrid category comprised of lands where the United States, states, or some quasi-public entity own that portion of the fee title that represents an important public value, with the remainder of the title in private hands, and usually continuing in productive economic uses.¹³ The sources of law that underlie and give life to this hybrid public ownership vary considerably, and may even differ according to geographic region.

Roots of the hybrid ownership pattern in the new public lands can be found in traditional public lands law. A familiar example is the General Mining Act of 1872,¹⁴ which recognized that while fee ownership might continue in the United States, a private prospector could acquire the right to mine and profit from valuable minerals. In the Stock Grower’s Homestead Act of 1928,¹⁵ the U.S. Congress perceived that although the surface could be transferred into private ownership for agricultural uses, the underlying mineral estates were so bound up with a larger public interest that they should be reserved in the United States.¹⁶ Nearly one century later, these minerals, usually in the form of coal, coal-bed methane, and natural gas, are fueling the nation’s energy industry. The consistent feature is that government identifies a strong public value and either retains or acquires and holds only that portion of the fee perceived to be necessary in order to protect or preserve the public interest; the remainder is owned and utilized in the private economy pursuant to state property law, but servient to the publicly owned portion.

As a further example, in 1936, Congress created the Blue Ridge Parkway as a scenic and recreational link between the Shenandoah and Great Smoky Mountain National Parks, but chose not to acquire scenic viewsheds in fee, instead authorizing the managing agency to acquire scenic easements, thus creating a hybrid ownership form that served private interests

12. See generally Joseph L. Sax, *Reflections on Western Water Law*, 34 *ECOLOGY L.Q.* 299 (2007).

13. See Edward Thompson Jr., *Reconciling Property Rights and Land Conservation: The Hybrid Paradigm*, 26 *J. LAND RESOURCES & ENVTL. L.* 57 (2005).

14. General Mining Act of 1872, ch. 152, 17 Stat. 91 (codified in numerous sections from 30 U.S.C. §§22-47).

15. 43 U.S.C. §§291-301 (repealed 1976).

16. Marvin D. Truhe, *Surface Owner vs. Mineral Owner or “They Can’t Do That, Can They?”*, 27 *S.D. L. REV.* 376 (1982).

while also protecting a perceived public interest, a practice followed in the creation of a long list of national parks and monuments.¹⁷ Similarly, in designating segments of rivers in the Wild, Scenic, and Recreational Rivers Act, Congress typically limits the managing agencies to acquisition of hybrid land interests, most often, scenic and open space easements.¹⁸

The new public lands include a multitude of situations, but a representative hypothetical example of this hybrid ownership might be a productive farm or ranch located within a rich wetland resource. The wetlands serve important public interests such as groundwater supply and recharge, flood control, surface headwater stream protection, migratory wildlife nesting and feeding, as well as hunting and bird watching. The farm or ranch serves important functions in the form of grain and meat production, business opportunity, open space, and community. Typically, however, the private market signals to the farmer or rancher that elimination of the wetland by drainage will result in greater agricultural production. In the face of this conflict between public and private interests, the United States or other entity may choose to acquire a conservation easement either by donation, purchase, or some combination of the two. In this way, accommodation can be achieved, and the result is a hybrid form of public land ownership.¹⁹

Because such new public lands take on numerous shapes and forms, and vary according to region, culture, and need, this Article relies on one more detailed example from the central part of the region of the nation known as the “prairie pothole.”²⁰ With that example in mind, the Article concludes with analysis and observations concerning this new model of public land ownership. This Article may be viewed as a variation on an interesting theme that is gradually coming into focus in the legal and policy literature. The goal is to advance that discussion.²¹

II.A Working Example: The Prairie Pothole Region of North America

Were it possible to revisit public land history in the United States, the strongest case would be made that, in addition to

17. 16 U.S.C.A. §460a-2.

18. See, e.g., National Parks and Recreation Act of 1978, Pub. L. No. 95-625, §707, 92 Stat. 3467, ___ (codified as amended at 16 U.S.C. §1274(a)(22) (2000)). For another example, see Columbia River Gorge National Scenic Area, 16 U.S.C.A. §§544-544p (2000).

19. Thompson, *supra* note 13.

20. For a good description of the prairie pothole, see Scott Stephens, Ph.D., *Plowing the Prairie*, DUCKS UNLIMITED, July/August 2006, at 70.

21. See Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. REV. 301 (2008); Federico Cheever, *Confronting Our Shared Legacy of Incongruous Land Ownership: Notes for a Research Agenda*, 83 DENV. U. L. REV. 1039 (2006); Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325 (2002); John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1 (2005); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77 (1995); James R. Rasband, *Buying Back the West*, 24 J. LAND RESOURCES & ENVTL. L. 179 (2004); Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541 (2006); Barton H. Thompson Jr., *Conservation Options: Toward a Greater Private Role*, 21 VA. ENVTL. L.J. 245 (2002); and Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L.J. 273 (2007).

Yellowstone, Great Smoky Mountain, Glacier, and Yosemite, there should also have been established a “Great Prairie Grasslands Pothole National Park.” That there was not leads to a situation of tension between the public interest and the resulting private land ownership regime.

The Prairie Pothole region of the Northern Great Plains is one of the most extensive and valuable freshwater resources in the world,²² surpassed in the United States perhaps only by the Great Lakes and the original Everglades. Unlike the latter two, however, the importance of the Prairie Pothole is not broadly appreciated, possibly because the resource is subtle and the region’s human population is relatively small. Whereas the Everglades cover 13,000 square miles,²³ the Prairie Pothole region encompasses 300,000 square miles in the United States and Canada.²⁴

Wetlands in this region function as habitat for wildlife, produce more than two-thirds of all North American ducks, and are the critical nesting habitat of a vast list of birds, insects, and other wildlife.²⁵ The wetlands retain runoff waters,²⁶ sediments, and pollutants.²⁷ They interact with groundwater and thereby play a role in protecting the quality and quantity of water used in homes, farms, ranches, and industry in the region and in the great river basins into which they drain. Although these wetlands are visibly small and dispersed on the land surface, and typically hold surface water for only a few months after spring runoff and for short periods of time after heavy precipitation events,²⁸ they are usually connected hydrologically and are part of a larger watershed.

The Prairie Pothole begins somewhere north of the Missouri River where that stream separates Nebraska from South Dakota.²⁹ The region to the north through South Dakota and Minnesota contains perhaps 17,000 miles of gently flowing headwater wetlands that create, and are tributary to, prairie streams and rivers. These wetlands have a soft gradient that results in slight surface and sub-surface flows, which gradually cumulate until they are the surface flows of tributary streams. Northward through the “Coteau” region shared by Minnesota, North Dakota, and South Dakota, the land gradually becomes more level, and the prevalent headwater wetlands change to a system of depressional potholes.

Sloped headwater wetlands are at greater risk of destruction partly because depressional wetlands were the paradigm for the region when wetlands definitions were first formulated. Moreover, they do not enjoy the well-publicized, more apparent importance of depressional wetlands in wildfowl migrations.

Sloped headwater wetlands typically lie between two hills, or any gradient, where the hills slope downward toward one another and then level out. While both depressional and

22. WILLIAM J. MITSCH & JAMES F. GOSSELINK, *WETLANDS* 57-59 (2d ed. 1993).

23. *Id.* at 53.

24. *Id.* at 54.

25. *Id.* at 59.

26. See, e.g., Thomas M. Power & Ernie Niemi, *An Economic Evaluation of Flood Control Alternatives in the Vermillion River Basin, South Dakota*, 3 GREAT PLAINS NAT. RESOURCES J. 3 (1998).

27. MITSCH & GOSSELINK, *supra* note 22.

28. *Id.* at 54.

29. *Id.* at 57-59.

sloped headwater wetlands are important for water quality, sediment control, denitrification, nutrient uptake, groundwater recharge, wildlife habitat, water conservation, and flood control, sloped headwater wetlands serve as the source headwaters for prairie rivers.³⁰ These wetlands also function as important wildlife travel corridors, particularly for amphibians, reptiles, and insects. Many birds nest in them and others use them for cover in all seasons. They augment low flows to downstream aquatic life and release water gradually, well into the dry season. In the Prairie Pothole, as elsewhere, the sloped headwater wetlands contribute materially to the survival of federal and state listed endangered and threatened species. It is the combination of sloped and depressional wetlands that constitute the Prairie Pothole region.

Whether the wetland is sloped or depressional, the landowner may propose a drainage measure to eliminate these wetlands. A typical response is to bury a continuous line of perforated pipe, or tile, parallel to each side of the sloped headwater, gathering and carrying off the water that would otherwise support the wetland. The landowner can then contour the area to allow cultivation of the surrounding field. The tile will assure that the headwater is dry every year to allow for cultivation and "farming through." Regardless of the incentives involved, drainage is often the last step in the destruction of the wetland.

The destructive effect of this practice does not end at the landowner's property line. Sloped headwater wetlands, being linear, run down a slope across many fields and farms. When one landowner drains a wetland, the velocity of the flowing water increases, assuring that a process of degradation will begin on the next field down the slope. The cumulative effect of this process of headwater wetland destruction is enormous and is the pivotal first step in degradation of the larger watershed.

Summarizing, across the middle of the United States, there is a sharp tension between a productive, private agriculture operating in the midst of a water resource that itself provides economic and noneconomic benefits to the public comparable to any such benefits generated by the private agricultural economy.

III. Practical Difficulties Inherent in Protecting a Wetland Resource on Private Lands

It is helpful to review some of the factors that make it difficult to protect and sustain wetland resources on private land because these distinguish the problem from many others where regulatory and systems management approaches have met with some success. For wetland regulation, the benefits to the public, or costs avoided by the landowner, are not related in any immediate way to human health. Nor are the benefits of wetland protection easily perceived. Even when the loss of many wetlands leads to some clearly observable public prob-

lem, such as floods or droughts, the public rarely appreciates the connection to wetland loss. In other words, though all members of the public broadly share the benefits of wetland protection, most will not understand that the protection makes a meaningful contribution to their well-being.³¹

Both the benefits and costs of wetland protection occur in small, almost undetectable increments. Incrementalism, whether it occurs in the form of direct acts of pollution or in the form of misuse of a natural resource, poses one of the most difficult problems in the administration of natural resources law and policy. It is one thing to regulate a large pollution source, such as an electric power-generating facility for example, and quite another to police numerous small fires in rural areas. It is one thing to regulate wetland conversion by a large-scale residential and commercial land developer operating near an urban area or large river, and quite another to attempt to control uncountable acts of small wetland elimination occurring across a vast rural landscape. The net result for the environment is the same.

To an extent not sufficiently appreciated, incrementalism, particularly the type that field agriculture produces, is at the heart of the nonpoint source water pollution issue. Sediments and associated pollutants enter streams and rivers from a vast number and variety of agricultural sources. Few notice or consider important the majority of these sources because they are not sufficiently large. The sum of these pollutants, however, creates one of this nation's most significant water pollution problems. In fact, the acts of wetland drainage are very often the same acts that create a nonpoint source of pollution, as sediments and other pollutants that a wetland would naturally retain enter the receiving waterway.

The nature of the incremental polluter also presents a challenge to the polluter-pays principle. Unless there is a control at the point of manufacture or distribution, as with small appliances, it is very difficult to place the true cost on the polluter. Typically, societies allow the costs of incremental acts to cumulate until there is a concentrated and visible crisis and then intervene with public funds. This is the case with wetland drainage. The normal course is to tolerate many acts of individual drainage until a flood occurs or a watershed is degraded, at which stage the government intervenes with large water resource development projects paid for by society at large.

In contrast to the benefits of wetland protection, the short-run costs are concentrated on the private landowners, who are likely to form a distinct and vocal group. This class does not see the costs as small or merely incremental, and it is not easily persuaded that individual decisions to drain small wetlands are harmful to the public. Indeed, the class is more likely to be convinced that its actions contribute to the public good by enhancing economic productivity. To put it another way, the true costs are spread across the long term and are not easily perceived at the time of decision.

To complicate matters further, the conduct that wetland protection efforts inevitably condemn as harmful was recently

30. The classic work on this subject is H.S. PERSON, *LITTLE WATERS: A STUDY OF HEADWATER STREAMS AND OTHER LITTLE WATERS, THEIR USE AND RELATIONS TO THE LAND* (Soil Conservation Service 1935), reprinted in 2 *GREAT PLAINS NAT. RESOURCES* J. 78 (1997).

31. See WILLIAM H. RODGERS JR., 2 *ENVIRONMENTAL LAW: AIR AND WATER* 183 (1986).

seen as praiseworthy land “reclamation.”³² It was promoted by every level of government, from the local 4-H farm youth organizations and land grant agricultural colleges to the U.S. Department of Agriculture (USDA).³³ Moreover, the political and other institutions that have supported the elimination of wetlands are difficult to reform, and they resist evidence that tends to show that wetland protection delivers valuable services to the community and region.

Landowners tend to see wetland conversion as an entitlement, similar in some respects to the right of a senior water right holder under a western state’s prior appropriation system.³⁴ As with water rights, a key ingredient of the right for the holder of the property or entitlement is use of the land without regard to adverse environmental impacts. This sense of entitlement is powerful, particularly when voiced at the local level. The argument is even more forceful when it is tied to strong societal values such as the need to allow small farms and businesses to survive, to encourage entrepreneurship and capital investment. Although it is attractive to believe that this attitude is on the wane, it is gaining strength, because as agricultural landholdings and production entities concentrate, field agriculture increasingly adopts factory-type approaches and the land is viewed, more than ever, as a mere commodity. Of course, land has always been a commodity in the sense that it is a subject of investment. Property rules recognize a right to develop and improve land. In traditional American agriculture, however, that sense of entitlement was muted by a culture that viewed the land of small farms as having unique status. That view is now in the clear minority. In the hands of large landholders, who are frequently heavily leveraged and organized as business corporations, the commodity character of land is foremost.

A considerable industry has developed around wetland drainage, and its continuing prosperity is dependent upon a ready supply of new projects. In farm country such as the Prairie Pothole, where undrained wetlands remain, contractors are ubiquitous and seek business aggressively, often door-to-door. The contractors are also influential with both state and national legislators and skilled in the ways of administrative agencies.

This extended discussion of the intersection of the public interest, private property, and entrepreneurship based on intensive land use poses the problem of whether and how best to protect the public interest in a healthy natural system of hydrology in the Prairie Pothole region. The argument in favor of protecting the wetland resource is broadly accepted and has been integrated into national and state policies, but the means of protection chosen are diverse.

32. ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., MISC. PUB. NO. 1455, FARM DRAINAGE IN THE UNITED STATES: HISTORY, STATUS AND PROSPECTS 2 (George A. Pavelis ed., 1987), available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1d/93/13.pdf.

33. See generally A. Dan Tarlock, *Putting Rivers Back in the Landscape: The Revival of Watershed Management in the United States*, 6 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 167, 167 (2000) (“For most of this century, . . . natural resources policies and laws have promoted watershed degradation.”).

34. The comparison is explored in SARAH F. BATES ET AL., SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY 3-13 (1993).

Of the various methods available to protect the wetland resource on private lands, the most apparent is a direct legal prohibition of actions that reduce, destroy, or waste the resource. Such a prohibition would resemble the laws under which states regulate the use of private water use rights: while private ownership is recognized and encouraged, the use is limited to avoid waste, destruction, or uses that are inconsistent with the public interest. Through §404 of the Clean Water Act (CAA)³⁵ and §7 of the Endangered Species Act (ESA),³⁶ the nation has moved cautiously in that direction, although it has encountered relentless opposition.

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) share responsibility under CWA §404 for regulating activities that may adversely impact wetlands. The “discharge of dredged or fill material into . . . navigable waters . . .”³⁷ is the basis of a regulatory scheme that has developed layers of complexity, especially as the agencies struggle to define the boundaries of their jurisdiction in the face of a recalcitrant and determined regulated community. Once it is determined that there is regulatory authority, the substantive criteria for permitting provide a layer of uncertainty, a result of the Corps’ vague and manipulable public interest review standard.

In an effort to make regulation more flexible, the Corps has recognized that when a development will destroy wetland values and there is no real alternative, the developer may acquire a drainage permit after agreeing to invest in the restoration of wetlands elsewhere in the area. Known as mitigation banking, this is a process that has become institutionalized within the regulatory community.³⁸

A modified version of direct regulation was introduced in the 1985 farm legislation and states that “[a]ny person who in any crop year produces an agricultural commodity on converted wetland shall be ineligible for . . .”³⁹ price support payments, farm storage loans, crop insurance, disaster payments, or insured or guaranteed loans. Financial payments to farm producers are lavish, and the threat of so-called cross-compliance is serious; the resulting political and legal resistance has therefore been unrelenting. Nonetheless, this “swampbuster” provision retains vitality as an alternative to direct regulation.⁴⁰

Wetland regulation encounters resistance for many reasons, but chiefly because it is viewed as a type of land use regulation, a governmental activity that customarily resides at the local level. Since wetland regulation may be implemented by agencies that are strangers to local government, such as the USDA, the Corps, or in some cases, state water resource allocation agencies, the agencies are often regarded as outsiders in local processes. If the justifications offered by a regulating agency are based on goals that transcend municipal boundaries, there is further reason for resistance. This condition highlights the

35. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

36. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

37. 33 U.S.C. §1344.

38. See generally Holly V. Campbell, *New Directions for Wetland Mitigation and Implications for the Nation’s Waters*, 37 ELR 10114 (Feb. 2007).

39. 16 U.S.C. §3822.

40. See Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act’s “Swampbuster” Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 HARV. ENVTL. L. REV. 201 (1997).

fact that the wetland drainage problem only becomes visible at the watershed level. However, local government is not typically organized by watershed, and as a result, there is not an accepted political voice from that level. Most watersheds are broken up into numerous political institutions, such as counties, towns, and special districts, which are inclined to side with their constituents, namely, the complaining private landowners. There is no voice for the watershed. The history of attempts to create regional or watershed political institutions with political viability is replete with failure.

IV. Acquisition by Purchase

In sharp contrast to direct and indirect regulation, the United States has quietly undertaken a process of protecting the public interest through the acquisition of partial fee interests such as conservation easements. This process began as a small experiment but has now blossomed into a large and diverse category of public ownership covering millions of acres. What follows is a mere selection of the programs of particular applicability to the wetland and grassland resource, but these and other programs are found across the nation.

The North American Wetlands Conservation Act (NAWCA) of 1989⁴¹ was enacted in order to implement the North American Waterfowl Management Plan, an international agreement that seeks the long-term protection of wetlands and associated upland habitat essential to waterfowl and other migratory birds in North America. In 2002, NAWCA was reauthorized and expanded in scope to include the conservation of all habitats and birds associated with wetland ecosystems.⁴²

NAWCA is a grants program administered by the U.S. Fish & Wildlife Service (FWS). Private organizations apply for grants, and are required to match federal funds on a one-to-one basis. Nonprofit organizations such as Ducks Unlimited raise funds nationwide in order to provide the required matching funds.⁴³ The Act states that a “wetlands conservation project” includes acquiring real property interests in lands or waters, including water rights, but only on terms “that will ensure that the real property will be administered for the long-term conservation of such lands and waters”⁴⁴

The Act has resulted in active protection of one sort or another on more than 24 million acres, and as of 2002, at least 1.7 million acres have been protected through conservation easements, fee purchases, and leases,⁴⁵ which are held by the FWS.

A vastly more expansive program of wetland acquisition is the Wetland Reserve Program (WRP), which was first implemented in the 1990 farm legislation and which authorizes the USDA’s Natural Resources Conservation Service (NRCS)

to “purchase conservation easements from or enter into restoration cost-share agreements with eligible landowners who voluntarily cooperate in the restoration and protection of wetlands and associated lands.”⁴⁶ The program has been strengthened and reauthorized by each subsequent farm bill, and today the total of enrolled lands exceeds three million acres and continues to grow.

Under WRP, as it has evolved, NRCS can purchase conservation easements for 10- and 30-year terms or in perpetuity. Applications are ranked, with priority placed on the enrollment of those lands that will maximize wildlife values (especially related to “enhancing habitat for migratory birds and other wildlife”).⁴⁷ The terms stipulate that “the easement area be maintained in accordance with WRP goals and objectives.”⁴⁸

V. Acquisition by Donation

In addition to programs of direct purchase of conservation easements by government, there is in place a well-established program of federal tax incentives that encourages landowners to donate conservation easements to either private nonprofit conservation organizations or to government at any level. In 2005, there were more than 1,600 land trusts and other qualified private conservation organizations holding conservation easements on more than 37 million acres, an area 16.5 times the size of Yellowstone National Park.⁴⁹ In addition, an untabulated number of easements are held by state and local governments, including special districts of all sorts.

The financial incentives for donated easements are in the form of income tax provisions, which allow the appraised value of donated conservation easements to qualify as charitable contributions.

VI. Protecting and Administering the New Public Lands

Ultimately, the success of this program of federal investment in new public lands is dependent upon the method of monitoring and enforcement that is established. Unlike a national park or public grazing lands, these new public lands are dispersed across the landscape, intermingled with the full range of private economic and social human activities. Owners of the servient estates will be subject to the normal inclinations to invade the public values for which the easements were acquired, and as properties are transferred from one owner to another and across generations, landowners may have diminishing allegiance to the conservation goals of the easement and be tempted to take invasive actions. Unless easements are

41. 16 U.S.C. §§4401-14.

42. *Id.* §4402.

43. *Id.* §4407.

44. *Id.* §4402(9)(a).

45. RESPONSIVE MGMT., A PROGRAMMATIC EVALUATION OF THE NORTH AMERICAN WETLANDS CONSERVATION ACT (NAWCA) IN THE UNITED STATES AND CANADA: FINAL REPORT 7 (2002), available at <http://www.fws.gov/birdhabitat/grants/nawca/files/programmaticevaluation.pdf>.

46. 7 C.F.R. §1467.4(a) (2009).

47. 7 C.F.R. §1467.6(b)(2) (2009).

48. *Id.* §1467.11(a)(1). WRP was first enacted in the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, and extended and revised in 1990, 1996, 2002, and 2008. The most recent legislation is the Food, Conservation, and Energy Act of 2008, *supra* note 1.

49. See LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT (2006), available at <http://www.landtrustalliance.org/about-us/land-trust-census/2005-report.pdf>.

monitored frequently and conditions enforced diligently, the value of the easements to the public can easily be lost.⁵⁰

Easements owned and administered by the FWS, such as those acquired pursuant to NAWCA, are administered by the Agency according to the terms of the Refuge Improvement Act, which establishes an overriding mission for the FWS “to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.”⁵¹ The Act provides 14 explicit standards to guide management of the lands.⁵² The statute was written with contiguous national wildlife refuges in mind rather than easements dispersed across the countryside, but the Agency has assumed that the Act applies to all property interests, easements included, assigned to the agency’s jurisdiction.

WRP easements are by regulation assigned to the Agency’s state conservationists for enforcement. The powers available for that purpose include the right to enter the easement area, and to employ “any and all legal and equitable remedies as may be available to the United States under applicable law.”⁵³ In addition, the regulations provide for recovery of “any and all administrative and legal costs, including attorney’s fees or expenses, associated with any enforcement or remedial action.”⁵⁴

In the case of the easements held by private conservation organizations or state and local government entities, there is, of course, no uniform system or requirement of monitoring and enforcement, each easement being dependent upon the skill, capacity, and determination of the easement holder. Thus, in general, despite the size of the federal investment in these easements, in the form of tax benefits granted, monitoring and enforcement is ungoverned, discretionary, and unrecorded.

This situation is beginning to change gradually in the case of private land trusts. A private and voluntary program of accreditation of land trusts is just getting under way, the central focus of which is on the capacity of land trusts to monitor and enforce across the future.⁵⁵ Applying this volunteer program to all land trusts will take years, but it is a first step in recognizing that easements donated to private organizations are no better than the enforcement mechanisms in place.

In the case of easements held by state and local government entities, the situation remains fully ungoverned, this despite the fact that it is these entities that are most likely to be exposed to pressures to alter easement terms with the passage of time and the change in circumstance.

VII. Conclusion

In 1981, it could be stated that few people were aware of the full extent to which the United States government owned and controlled land, a statement that can now be extended to the partial property interests which have been acquired in recent decades, although ownership is now divided among the United States, private conservation organizations, and state and local governments. The land moving into this hybrid category now represents a substantial investment, large acreages, and an evolving methodology for protecting the public interest. As with traditional public lands such as national parks, national forests, and wildlife refuges, these hybrid forms of property must be managed by professional agency or nonprofit corporation personnel, in accordance with governing statutes and regulations, or some other equally reliable system. As with traditional lands, pressures develop over time to compromise the original purpose of the interest, and vigilance on behalf of the public interest is essential if the acquisition program is to be successful across the long term.

Just as the acquisition and use of the original public lands represented an opportunity to advance the public interest, so too does the emergence of new hybrid categories of public interest lands. That these lands are not owned outright by the public is a difference, but a difference in degree only, a difference that highlights the fact that as population and consumption increase, and as understanding of the public interest changes, ever more condensed forms of land use and land protection will emerge. It may be that we are in the midst of what one commentator describes as a “period of reacquisition,” in which the acquisition of conservation easements from volunteer landowners is the most lasting part.⁵⁶

In one respect, this development is far from novel. Accommodating public and private interests in unique lands is the constant theme of property law, including water law, since the onset of the industrial revolution. The new public lands category represents a new stage in this progression, however. If the phrase “public interest easements” is substituted for the phrase “conservation easements,” the issue may be clarified. Rather than protecting the public interest by direct regulation, the public interest is protected by voluntary transactions that allow for private activity to continue, subject to limitations in favor of the public interest, all laid out in detail in documents that are part of the chain of legal title. Thus, at least theoretically, police power regulation is then left for the outer boundaries of private action. If done well, this combination has the potential to protect the public interest across the long term.

The argument against this approach has many facets. It is slow, expensive, and results in fragments of protected land across the landscape. There are limits as to how much the public can afford. It can be argued that this approach creates an entitlement mentality, a fact most evident in farm country, where landowners are accustomed to the lavish support of federal farm programs. Most important is that monitoring and enforcement is management intensive. Where the easements are held by federal agencies, such as the NRCS or the FWS,

56. Rasband, *supra* note 21, at 179.

50. See generally RESTATEMENT (THIRD) OF PROP.: SERVITUDES §7.10, .11 (2000).

51. 16 U.S.C. §668dd(a)(2).

52. *Id.* §669dd(a)(4); see also JAN G. LAITOS ET AL., NATURAL RESOURCES LAW 475-77 (2008).

53. 7 C.F.R. §1467.15(a)(3) (2009).

54. *Id.* §1467.15(a)(4).

55. See Land Trust Accreditation Commission, <http://www.landtrustaccreditation.org/> (last visited Mar. 3, 2009).

the ability to monitor is dependent upon the availability of current appropriations and trained personnel, and the ability to enforce must rely on the availability of assistance from the U.S. Department of Justice. Parallel issues are present when easements are held by state or local agencies. In all cases of public ownership, the very real threat of the nearly inevitable desire of elected officials to compromise easements in order to satisfy short-term economic or political objectives is a threat. Absent some right of citizens to bring some form of independent enforcement actions in such situations, there is little protection for publicly held easements across the long term.

Improbably, the land trusts and other private conservation organizations that hold so much of the new public lands, and which might be thought of as being too weak to monitor and enforce on a sustained basis, are in fact adopting a private system capable of protecting these interests across time. In a process now well under way, land trusts are voluntarily accepting a regime of strict accreditation standards, the core purpose of which is to guarantee that each easement held is backed by endowed funds sufficient to support enforcement, and that there is in place a fully informed and regulated monitoring process. Taking the longer view, these organizations are innovating a system of "litigation insurance," not unlike title insurance, which will assure the availability of experienced enforcement counsel.

In sum, there is an extraordinary experiment underway. It is the result of numerous factors, not the least of which is a strong land ethic among many private landowners, which leads them to draw upon the flexibility of the rules of the private property system to assure protection of conservation values into the future. Clearly, the availability of public funds and incentives is a large factor, no doubt stimulated in part by politicians who are reluctant to regulate directly. Another factor is the desire of communities across the land to protect what is unique about their surroundings and their history. But emerging as a lasting factor is the growing awareness of the complex and subtle ways in which lands, no matter how owned, deliver ecological services too valuable to be lost by inaction. These services may be essential to the well-being of society, but cannot be protected without altering land use activity. If outright acquisition of the fee is deemed unnecessary and inefficient, and direct regulation politically unpalatable, acquisition of a partial interest may be the best means of serving the public interest, provided that a rational and meaningful system of administration through regular monitoring and enforcement can be mounted.