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CONFRONTING OUR SHARED LEGACY OF INCONGRUOUS LAND OWNERSHIP: NOTES FOR A RESEARCH AGENDA

FEDERICO CHEEVER†

> What we're saying today is that you're either part of the solution or you're part of the problem.[1]

INTRODUCTION

A. The Problem

Concepts of ownership in the American west have, quite literally, a checkered past.

In a broad band across southwestern Wyoming, northern Utah, central Nevada and the mountains of eastern California, 640-acre sections of federal government land are still arranged in a checkerboard pattern with alternating 640-acre sections of private land. This strange ownership pattern has nothing to do with the contours of the landscape and nothing to do with the traditions or aspirations of the human communities, native and non-native, who have bound themselves to that hard country. The Union Pacific/Central Pacific railroad "checkerboard" is a relic of a political deal designed to finance a transcontinental railroad, which was once the technological marvel of the world and now a curiosity of interest to no one but historians, railroad buffs, and the corporations who transport coal and other large-volume, low-priced goods.[2]

Although the largest, the Union Pacific/Central Pacific checkerboard is only one of the West's railroad checkerboards. During the nineteenth century, the federal government granted more than 94 million acres of land to railroads.[3]

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1. Robert Sheer, *Introduction* to ELDRIDGE CLEAVER: POST-PRISON WRITINGS AND SPEECHES xxxii (Robert Sheer ed. 1969) (quoting speech by Eldridge Cleaver to the San Francisco Barristers' Club).

2. STEPHEN E. AMBROSE, NOTHING LIKE IT IN THE WORLD: THE MEN WHO BUILT THE TRANSCONTINENTAL RAILROAD 1863-69, 77-81 (2000).

3. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 385 (1968).

Western New Mexico contains another kind of checkerboard, less regular and more complicated than the railroad checkerboard. The Navajo "checkerboard reservation" contains unequal chunks of Bureau of Land Management, state, private and Navajo tribal land.[4] Like the railroad checkerboard, the boxy section-by-section ownership configuration of the checkerboard reservation has little to do with the contours of the landscape or the aspirations of the residents.[5] The Navajo checkerboard is not the only checkerboard reservation. Most western states contain Indian reservations whittled down or hollowed out by the allotment acts of the late nineteenth century. As Justice Scalia recently put it:

> In the late 19th century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually. The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.[6]

Between 1887 and 1934, Indian title dwindled from 138 million acres (an area larger than California and New York combined) to 48 million acres (an area about the size of Oklahoma).[7] With the Indian Reorganization Act of 1934,[8] the federal government abandoned the policy, but the property rights remained. Indian tribes lost roughly 90 million acres of land between 1887 and 1934, roughly the same amount of land granted to railroads.[9]

The railroad checkerboards and the checkerboard reservations are not aberrations on the landscape of the American West. Rather, they are extreme but emblematic examples of our "history of ownership." In the "West,"[10] land ownership has regularly been employed as a tool of government policy. To further goals articulated in the halls of Congress, and to a much lesser degree in statehouses, our governments have been willing to buy land, sell land, sell land cheaply and give land away. At the same time, in furtherance of the same goals or related ones, our governments have been willing to deprive long time possessors and recognized

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4. *See* BLM Surface Management Responsibility Map, New Mexico (1994) 1:5000,000.

5. *See* Sarah Krakoff, *Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1185-88 (2004).

6. County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 253 (1992).

7. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.07[1][a], at 1009 (Nell J. Newton et al. eds., 2005).

8. Indian Reorganization Act (Wheeler-Howard Act), ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-479 (2000)).

9. U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS, Table 1-2 (2004), http://www.blm.gov/natacq/pls04/pls1-2_04.pdf (hereinafter PUBLIC LAND STATISTICS).

10. *See* Clyde A. Milner, *Introduction* to THE OXFORD HISTORY OF THE AMERICAN WEST 1-7 (Clyde A. Milner et al. eds. 1994).

legal owners of some or all of their rights to land with compensation, with limited compensation, or without any compensation at all.[11]

B. Ownership as a Tool of Policy

Property maps of the American West are littered with the detritus of policies once thought essential for the expansion, survival or honor of the nation, but are now largely forgotten.

Every western state contains thousands of acres once transferred into private ownership for nothing under the Homestead Act and Stock-Raising Homestead Act (287,500,000 acres)[12], and the Desert Lands Act (10,700,000 acres),[13] or for almost nothing under the Timber Culture Act (10,900,000 acres)[14] and Timber and Stone Act (13,900,000 acres).[15] From 1862, a heady mixture of state donation act tradition, an egalitarian National Land Reform Movement, and a desire to bind the West more closely to the Union during the Civil War prompted the federal government to give land away to claimants who had fulfilled residency requirements and submitted minimal paperwork.[16]

The homestead laws and the settlement they encouraged did many things, good and bad. Among these things was the settlement and tilling of millions of acres of land in the "Great Plow-Up."[17] In the long run, much of this land could not support the communities encouraged to claim them under generous federal laws.[18] The property rights remain.

Many, if not most, surveyed townships in western states still contain one, two or three sections of state land granted by the federal government for support of the common schools (77,630,000 acres),[19] universities, hospitals, prisons and more (21,700,000 acres).[20] In most states, these sections now provide only a tiny amount of the money needed to run modern schools, land-grant universities, and prisons. For example, in fiscal year 2006, revenues from state school-grant lands are projected to provide $31 million (1.1 percent) of Colorado's $2.8 billion school budget.[21]

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11. *See infra* text accompanying notes 12-37.
12. *See* PUBLIC LAND STATISTICS, *supra* note 9, at Table 1-2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *See* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 393-96 (1968). *See also* Wendy McElroy, *The Free-Soil Movement*, FREEDOM DAILY, May 2001, *available at* http://www.fff.org/freedom/0501e.asp.
17. DONALD WORSTER, UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST 98-99 (1992).
18. *See generally* JONATHAN RABAN, BAD LAND: AN AMERICAN ROMANCE (1996).
19. *Id.*
20. *Id.*
21. State of Colorado, Office of the State Auditor, State Board of Land Commissioners Performance Audit (Nov. 2005), http://www.state.co.us/auditor (follow "OSA Audit Reports" hyperlink; then follow "By Department/Entity" hyperlink; then follow "Natural Resources" hyperlink);

New Mexico, Arizona, California and southern Colorado contain a range of ownership configurations that memorialize our struggle with our national promise in the Treaty of Guadalupe-Hidalgo to respect property rights granted by Spain and Mexico before the United States' conquest of the Southwest. Millions of acres were confirmed through a bewildering variety of congressionally sanctioned processes; millions more were rejected, justly and unjustly.[22] Decisions of the California Land Commission made under the California Land Settlement Act of 1851[23] and the New Mexico Court of Private Land Claims authorized by Congress in 1891[24] confirmed title to huge tracts of land across present day California, Arizona, and New Mexico. Congress, through direct congressional confirmations of title, confirmed another nine million acres, including the million-acre Sangre de Cristo Grant in southern Colorado and northern New Mexico.[25] As important are the tens-of-millions of acres of land for which these confirmation processes rejected claims.[26] In many cases, Hispanic communities, particularly in northern New Mexico, have never accepted these deprivations.[27]

While these efforts were originally intended to protect the rights of actual former Mexican citizens, through the passage of time, title has passed to people and corporations who have no connection to the Southwest's Mexican past. In recent decades, the United States Supreme Court's most ringing endorsement of "special rights" for title descended

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see also Colorado State Land Board, http://www.trustlands.state.co.us/Documents/Questions/General.pdf (last visited Apr. 21, 2006) (total funding to Colorado schools generated from school trust lands in 2003-2004 was $57.9 million); PAUL TESKE, STEPPING UP OR BOTTOMING OUT? FUNDING COLORADO'S SCHOOLS 6 (2005), http://www.dkfoundation.org/PDFs/Teske_Full_Report.pdf (total funding for Colorado's K-12 schools in 2003 was $4.2 billion). *See also* Branson Sch. Dist. v. Romer, 161 F.3d 619, 626-27 (10th Cir. 1998) (upholding a Colorado voter initiative which changed management of land-grant lands for schools from "maximum amount" for public schools to "reasonable and consistent income.").

22. Malcolm Ebright, *Introduction* to SPANISH AND MEXICAN LAND GRANTS AND THE LAW 3, 3-11 (Malcolm Ebright ed. 1989); *See also* Federico Cheever, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hidalgo*, 33 UCLA L. REV. 1364, 1381-85 (1986).

23. California Land Settlement Act of 1851, ch. 41, 9 Stat. 631 (1851).9 Stat. 631 (1851).

24. Act of Mar. 3, 1851, ch. 539, 26 Stat. 854 (establishing a court of private land claims, and providing for settlement of private land claims in certain States and Territories).

25. Ryan Golten, Lobato v. Taylor: *How the Villages of the Rio Culebra, the Colorado Supreme Court, at the Restatement of Servitudes Bailed Out the Treaty of Guadulupe Hidalgo*, 45 NAT. RESOURCES J. 457 (2005); Gregory Hicks & Devon G. Peña, *Community Acequis in Colorado's Rio Culebra Watershed: A Customary Commons in the Domain of Prior Appropriation*, 74 U. COLO. L. R. 387 (2003).

26. Cheever, *supra* note 22, at 1381-89.

27. MALCOLM EBRIGHT, THE TIERRA AMARILLA GRANT: A HISTORY OF CHICANERY 28 (1980). For an extensive discussion, *see* U.S. GENERAL ACCOUNTING OFFICE, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO (June 2004), http://www.gao.gov/new.items/d0459.pdf.

from Mexican grants favored by Howard Hughes' Summa Corporation on land near Marina Del Rey in Los Angeles County.[28]

Millions of acres of the remaining public domain and quite a lot of private land are criss-crossed or perforated by patented mining claims under the General Mining Act of 1872, and rights-of-way under a long ago repealed law generally known as Revised Statute 2477.[29] As scholar Bret Birdsong put it in a recent article:

> For 110 years, from its enactment in 1866 until its repeal in 1976, this obscure statute known as R.S. 2477 granted the right-of-way across unreserved federal public lands for the construction of highways. For most of its lifetime, the terse and obscure grant caused little stir, except for the occasional claim that now private lands are subject to R.S. 2477 rights-of-way established during earlier public ownership. Since its repeal, however, R.S. 2477 has become a flashpoint in the ongoing battle for control over western public lands and the resources they harbor. Throughout the West, states, counties, and even individuals and groups pushing for unrestricted motorized access to remote public lands are using R.S. 2477 to try to frustrate environmentally protective measures imposed by federal land managers . . . .[30]

The prairies from Texas to Montana contain irregular jumbles of government land—the national grasslands—originally created to further farmers' relief and soil conservation. As mentioned above, the Homestead Act of 1862 and similar laws brought millions of settlers to the prairies. The land could not support them. After the First World War, sod, which should never have been broken, had been plowed up.[31] When the dry years came, the land yielded its topsoil to the incessant wind. The Dust Bowl came to Oklahoma, Texas, Wyoming, Nebraska, Kansas, Colorado and the Dakotas.[32]

> Ten-foot drifts of fine soil particles piled up like snow in a blizzard, burying fences and closing roads . . . Emergency measures were taken to save the farmers and settlers. The National Industrial Recovery Act of 1933 and the Emergency Relief Appropriations Act of 1935 allowed the federal government to purchase and restore damaged lands and to resettle destitute families. From these disastrous

28. Summa Corp. v. California, 466 U.S. 198, 209 (1984) (holding title descended from Mexican claims not subject to California's otherwise universal public trust easement).

29. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 20, 28-74 (1992); *see also* HIGHWAY ROBBERY: HOW A LOOPHOLE IN AN OUTDATED AND REPEALED ROAD STATUTE THREATENS OUR NATIONAL PARKS, MONUMENTS, AND OTHER SPECIAL PLACES – ONE MILE AT A TIME, http://www.highway-robbery.org/documents/Robbery.pdf.

30. Bret Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 524 (2005).

31. *See* DONALD WORSTER, UNDER WESTERN SKIES 93-105 (1992).

32. *See* TIMOTHY EGAN, THE WORST HARD TIME: THE UNTOLD STORY OF THOSE WHO SURVIVED THE GREAT AMERICAN DUST BOWL 145-330 (2005).

days, a hundred years after the Homestead Act on June 23, 1960, the National Grasslands were born.[33]

The often ignored national grasslands contain four million acres of land.[34]

Even some of the great national reservations, the National Forests and Bureau of Land Management holdings, were created to further policies that have long since dropped off any legislative agenda. The fear of "timber famine," so important in establishing the national forests,[35] now rarely comes to mind. The forage preserved by the Taylor Grazing Act[36] fattens an inconsequential three percent of the nation's beef.[37]

We do not regularly think of all these manipulations of ownership at the same time or in the same way. We, like the legislators who authorized those manipulations, tend to approach the western landscape thematically. We see only those things relevant to what we happen to be looking for: Hispanic rights, biodiversity, Native American rights, water supply, and minerals, among other things. But, of course, the western landscape is not arranged thematically.

The property ownership manipulations of the past two centuries seem breathtakingly arrogant. As anyone could have told the idealistic, sovereign agents of the past—whether Civil War Republican, early twentieth century Progressive, or New Deal Democrat—the property rights have outlasted the policies they were designed to support.

C. Life Among the Ruins

In the inland West, we live among a jumble of grants and claims, recognized and inchoate, created or suppressed to serve long-abandoned and half-forgotten policies. We live like medieval Romans,[38] building cooking fires in the ruined coliseum. The vast ruins around us are linked in our minds to our strong moral reaction for the reasons that brought them into being.

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33. U.S. Department of Agriculture, Forest Service, *National Grasslands*, http://www.fs.fed.us/grasslands/aboutus/index.shtml, (last visited Apr. 5, 2006); *see also* National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933); Emergency Relief Appropriations Act, ch. 48-49, 49 Stat. 115 (1935); 36 C.F.R. § 213.1 (2006) (regulations establishing the National Grasslands).

34. *See* U.S. Dept. of Agriculture, Forest Service, *supra* note 33.

35. *See* GIFFORD PINCHOT, THE FIGHT FOR CONSERVATION (Kessinger Publishing 2004) (1910), *available at* http://www.gutenberg.org/files/11238/11238-8.txt.

36. Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified at 43 U.S.C. § 315 (2000)).

37. National Public Lands Grazing Campaign, *Economic Facts of Public Lands Grazing* (2004), http://www.publiclandsranching.org/htmlres/PDF/FS_Grazing_Economics.PDF.

38. In the early Middle Ages Visigoths and Vandals invaded and sacked Rome. Paula J. Howarth, *Villa Aldobrandini on the Quirinal Hill in Rome* (Jun. 1996), http://www.paulahowarth.com/villa/e-04.htm. Political troubles, with Byzantines, the Lombards, the establishment of the Holy Roman Empire, and conflicts between the papacy further humbled the "eternal city." *Id.* The city was depopulated. *Id.* The remaining inhabitants dwelt mainly on the Campus Martius, the low-lying part of the city near the Tiber River. *Id.* They erected modest dwellings among the monumental buildings of Imperial Rome, by then in ruins. *Id.*

It barely requires proof that "life among the ruins" is less than perfect. Indian tribes work to regain land and sovereignty lost in the name of long discredited policies.[39] Hispanic communities try to piece together rights to coherent territories to support community life and tradition.[40] Wilderness advocates battle over rights of way—crumbling wagon ruts to long abandoned mines and reservoir sites.[41] Unused mining claims frustrate public land planning.[42] High plains farmers try to maintain dwindling communities on land grandly granted to them to settle the West.[43] Ranchers in Powder River country discover that Congress's failure to grant them mineral rights to their ranches under the Stock Raising Homestead Act of 1916[44] have opened their holdings and way of life to invasion in the age of coal-bed methane development.[45]

In 1999, the United States Supreme Court decided the case of *Amoco Production Company v. Southern Ute Indian Tribe*[46] and illustrated the nature of "life among the ruins." The Southern Ute Tribe had sued Amoco and a variety of other private parties extracting coal-bed methane gas out of lands in which the tribe owned the rights to "coal."[47] The case was heralded as a struggle between oil and gas companies and an impoverished Indian tribe.[48] Law professors love the case because its holding turns on the meaning of the word "coal."[49] More significantly for us, the entire dispute—expensive, frustrating and hurtful—arose out of property-rights allocations made to further long-abandoned federal policies.[50]

During the late nineteenth century, the federal government, expending its energy to sell or give away western lands, made half-hearted efforts to reserve valuable mineral lands. The 1864 Coal Lands Act[51] and the 1873 Coal Lands Act[52] set a maximum limit of 160 acres for individual entry on coal lands and minimum purchase prices of ten dollars to

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39. *See* CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS xii, 241, 248-49 (2005).

40. *See* Lobato v. Taylor, 70 P.3d 1152, 1155 (Colo. 2003).

41. *See, e.g.*, sources cited, *supra* note 29.

42. *See* Wilkinson, *supra* note 29, at 28-74.

43. *See generally* RABAN, *supra* note 18; EGAN, *supra* note 32, at 237-41.

44. Enlarged Homestead Acts (Stock-Raising Homestead Act), ch. 9, 39 Stat. 862 (1916) (codified in 43 U.S.C. §§ 299, 301 (2000)).

45. *See* Ray Ring, *Backlash: Local Governments Tackle an In-Your-Face Rush on Coalbed Methane*, HIGH COUNTRY NEWS, Sept. 2, 2002, http://www.hcn.org/servlets/hcn.Article?article_id=11371. *See generally* M. Kristeen Hand & Kyle R. Smith, Comment, *The Deluge: Potential Solutions to Emerging Conflicts Regarding On-Lease Surface Damage Caused by Coal Bed Methane Production*, 1 WYO. L. REV. 661, 667-68 (2001).

46. 526 U.S. 865 (1999).

47. *Amoco*, 526 U.S. at 865-66.

48. *See id.* at 865.

49. *See id.* at 865-66.

50. *See id.* at 868, 879-80.

51. Coal Lands Act of 1864, ch. 205, §§ 2-4, 13 Stat. 343, 343-44.

52. Coal Lands Act of 1873, ch. 279, §§ 1-6, 17 Stat. 607.

twenty dollars an acre.[53] With the dawn of the twentieth century came claims of "widespread fraud" in the disposition of coal lands and dire threats of a "coal famine."[54]

In 1906, by executive order, President Theodore Roosevelt responded to these concerns of fraud and resource famine by withdrawing 64 million acres of potential coal lands from the operation of the federal disposal laws.[55] Homesteaders, who had entered the land and worked it in good faith, were to be deprived of any chance of ever receiving title to the lands they occupied.[56]

In 1909 and 1910, Congress enacted a legislative compromise reserving the "coal" under the lands in question for the federal government and allowing all other rights to pass to the apparently deserving homesteaders.[57]

After the passage of the Indian Reorganization Act in 1934,[58] some of the federal "coal" rights created by the 1909 and 1910 laws were transferred back to the Southern Ute Tribe from which the land (and coal) had originally been taken.[59]

In the 1990s, using technology Theodore Roosevelt would have admired, but could not have imagined, the successors in title to the homesteaders began leasing their land for the extraction of methane gas from the now Indian-owned coal.[60]

In 1999, at the dawn of the twenty-first century, the United States Supreme Court held that "coal," as conceived by the authors of the Coal Lands Acts of 1909 and 1910 at the beginning of the twentieth century, did not include coal bed methane.[61] They explained how the Southern

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53. *Amoco*, 526 U.S. at 868.

54. *Id.* at 868-69.

55. 41 CONG. REC. 2615 (1907).

56. *Amoco*, 526 U.S. at 869.

57. *Id.* at 870. While the 1909 Act allowed the federal government to grant land patents to those people who had already endeavored to make good-faith entries onto the land, it also reserved for the United States the right to mine and remove the coal. *Id.* The 1910 Act similarly reserved the coal rights for the United States in the remaining coal lands that the government had opened up for new entry under the provisions of the homestead laws. *Id.*

58. Indian Reorganization Act (Wheeler-Howard Act) of 1934, ch. 576, 48 Stat. 984 (codified in 25 U.S.C. §§ 461-79 (2000)).

59. *Amoco*, 526 U.S. at 870. The Court said:

> Among the lands patented to settlers under the 1909 and 1910 Acts were former reservation lands of the Southern Ute Indian Tribe, which the Tribe had ceded to the United States in 1880 in return for certain allotted lands provided for their settlement. (citation omitted) In 1938, the United States restored to the Tribe, in trust, title to the ceded reservation lands still owned by the United States, including the reserved coal in lands patented under the 1909 and 1910 Acts. As a result, the Tribe now has equitable title to the coal in lands within its reservation settled by homesteaders under the 1909 and 1910 Acts.

Id.

60. *See id.* at 870-71.

61. *Id.* at 880.

Utes ended up with certain rights in the "bundle of rights" to the lands at issue.[62] However, resolving a modern dispute within the frame of reference created by an ancient compromise (two compromises, if you count the Indian Reorganization Act) bothered them not at all.

I. THE PROBLEM AND THE SOLUTION

We all—Indian nations, environmentalists, public land managers, city planners, ranchers, developers and farmers—live with bits of the collective property ownership problem. This realization, in itself, has some value. At least we can commiserate. But does this realization provide a path to a collective solution of some kind?

An obvious candidate for "agent of positive change"—a necessary but insufficient condition for a solution—is the land trust community.

I define that community broadly to include private land trusts (international, national, regional and local) and government entities (federal, state, tribal and local) committed to preserving and promoting various public values by buying-up property rights related to land and water. These are people who transfer property rights in the interest of preserving environmental, historical, and cultural value.

By law, land trusts must be government or non-profit entities committed to the public good.[63] State conservation easement statutes generally allow these two types of entities to hold development rights for someone else's land for purposes of preservation.[64] Generally, conservation easements can only be created and enforced for specific beneficial purposes. For example, the Uniform Conservation Easement Act only authorizes conservation easements:

> [T]the purposes or powers of which include retaining or protecting natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property."[65]

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62. *See id.* at 879-80.

63. Jane Prohaska, *Outline: Conservation Easement Drafting*, SL053 A.L.I.-A.B.A. 219, 221 (2005).

64. *See* UNIF. CONSERVATION EASEMENT ACT, § 1(2) (1982). The model statute provides further clarification on two types of entities:

> 'Holder' [of a Conservation Easement] means: (i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or (ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property . . . .

Id.

65. *Id.* §1(1).

Land trusts have a broad range of tools for conveying property interests to meet their goals and, in recent decades, an impressive record of making transactions happen.[66] According to the National Land Trust Census, as of 2003, local and regional land trusts now protect more than 9.4 million acres of open space, in addition to the millions of acres national land trusts protect;[67] this is a 100% increase over the 4.7 millions acres protected in 1998.[68] As of 2003, more than five million of these acres were protected by conservation easements, almost 266% more than in 1998.[69]

Who better than the land trust community to reorder the jumble of property rights around us into something that reflects our current values and priorities? It is only by the voluntary transfer of property rights that the problems created by the current property configuration can be made better.

But wait a second! Rather than being "part of the solution" isn't the land trust community actually "part of the problem"?[70] Their activities, authorized and shaped by state and federal statute and subsidized by state and federal tax law or tax revenue, can be seen as another example of transitory government priorities manipulating perpetual property rights.[71]

A number of scholars have pointed out the "problem of perpetuity"[72] in the work of the land trust community. Generally, the restrictions imposed through land conservation transactions are perpetual. Whether the land trust community protects land by accepting a conservation easement that restricts future development of land or by accepting fee title to land, history strongly suggests that the effects of the property transactions will outlast the desires of the grantor of those property rights and probably outlast the vision that inspired the land trust to which the

66. *See* Land Trust Alliance, About LTA: Our History, http://www.lta.org/aboutlta/history.htm (last visited Apr. 7, 2006); Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVIT. LAW. 441, 451 (2000).

67. Land Trust Alliance, National Land Trust Census, http://www.lta.org/aboutlta/census.shtml (last visited Apr. 7, 2006).

68. *Id.*

69. *Id.*

70. *See supra* note 1 and accompanying text.

71. *See* Duncan M. Greene, Comment, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 U. SEATTLE L. REV. 883, 901-05 (2005).

72. *See, e.g., id;* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 756 (2002); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984); *Cf.* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11, cmt. a (2000). This section states:

> It is inevitable that, over time, changes will take place that will make it impracticable or impossible for some conservation servitudes to accomplish the purpose they were designed to serve. If no conservation or preservation purpose can be served by continuance of the servitude, the public interest requires that courts have the power to terminate the servitude so that some other productive use may be made of the land.

Id.

rights are granted.[73] Arguably, the well-meant activities of the land trust community will consign our grandchildren to "life among the ruins" in the same way that the allotment acts, railroad grants and mining claims of the nineteenth century force us to live among the ruins. Are we making the same mistake again?

The answer to this question is complicated. The complete answer requires transaction-by-transaction empirical research work that, to my knowledge, has not yet been undertaken.[74] But, I have to say that I think the answer is "no."

While generalizations are dangerous, particularly in the absence of much data, there is one common characteristic of almost all of the agents of the land trust community that suggests they may do more good than harm in the effort to create a property landscape that conforms to the needs and aspirations of the people who live on the land. That characteristic is (for want of a better phrase) "local-ness": the concern of the interests of the people in relatively small geographic areas and the landscapes in those areas.

The property ownership configurations we contend with today are the result of sweeping national determinations about who should own what, where and how. Congress (and occasionally state legislatures), through mining legislation, land legislation, private land title confirmation legislation, Indian legislation, transportation legislation, water development legislation, and economic relief legislation, built property rights "creating and destroying machines." Once those machines were released on the landscape, creating and destroying property rights by adjudication or by rule, Congress had little power to control them and, generally, little interest in controlling them.

What the land trust community does works in a very different way. Transactions are undertaken one at a time. Whether the parties to the transactions are public or private, whether funding comes from the government, private parties or tax incentives, the land trust community remakes ownership patterns on the landscape by one parcel and by one decision at a time.[75]

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73. *See* Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

74. *But see* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 426-27 (2005). The "problem of perpetuity" is neither new nor unique to land trusts and their activities. The legal doctrine of cy pres has been developed and refined over the centuries to deal precisely with the issue presented by acquisitions of land and conservation easements by land trusts – how to adjust when the charitable purpose to which property has been "perpetually" devoted becomes obsolete due to changed conditions. *Id.*

75. *See generally* BILL BIRCHARD, NATURE'S KEEPERS (2005) (describing the origins of The Nature Conservancy).

I think this characteristic is a cause for hope. The land legislation of the past was enacted largely by people of good will intended to solve perceived problems. The wrong they did arose largely from their use of durable tools (property rights) on landscapes they barely knew and their addiction to the glory of solving problems and making choices on a national scale. The "local-ness" which is a hallmark for the land trust community was largely, if not entirely, absent from the property rights generating and destroying machines that created the problems we see around us. Those particular titans among the "lords of yesterday"[76] almost universally suppressed local concerns in favor of national ones. If we turn that bias around, maybe we can get somewhere.

II. LOCAL-NESS

Here and there across the West, the land trust community has taken up the challenge of reshaping the ownership regimes of the past into something corresponding to modern values and priorities. When they have done so, they have done so on a local level, concerned primarily with communities of human users and the health of the land itself.

In the first years of the twenty-first century, the Trust for Public Lands (TPL), in cooperation with local land trusts and the United States Forest Service conceived the "Sierra Checkerboard Initiative."[77] A swath of the West was "checker-boarded" to finance the Transcontinental Railroad.[78] The checkerboard land ownership pattern is still dominant in a section of the most valued and most used mountain landscape in the continental United States, California's Sierra Nevada. Between the south fork of the American River and the North Yuba River, east of the burgeoning "gold country" cities of Auburn, Grass Valley, Nevada City and Yuba City, TPL and its partners hope to fill in the checkerboard to sustain a permanently protected landscape.[79]

The Science Assessment for the Sierra Checkerboard Initiative, released by The Conservation Biology Institute in the summer of 2005, estimates that between 400,000 and 70,000 acres of private land (held by successors to the Central Pacific Railroad) will need to be protected in one form or another to protect the biological assets of the northern Sierra.[80]

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76. *See* WILKINSON, *supra* note 29, at 3-27.

77. Angela Ballard, *Closing the Checkerboard*, LAND & PEOPLE, Spring 2005, http://www.tpl.org (follow "publications" hyperlink; then follow "Land & People magazine" hyperlink; then follow "Land & People Spring 2005" hyperlink).

78. *See supra* Part I.A.

79. *See* Ballard, *supra* note 77.

80. *See* The Trust for Public Land, Science Assessment for the Sierra Checkerboard Initiative, http://www.consbio.org/cbi/applied_research/sierra_assessment/sierra_assessment.htm (last visited Mar. 16, 2006).

Writings about the Sierra Checkerboard Initiative, whether scientific[81] or popular,[82] are about "the place" itself, not about Forest Service policy, railroads, California's population or any other larger "national" issue.

The Navajo Nation established a Land Acquisition fund in 1984.[83] "The fund was intended to consolidate the Navajo land base by purchasing allotted lands, expand the land base for more grazing and home-site areas, create economic development opportunities and to relieve crowded areas to make land available for the growing Navajo population."[84] The fund currently contains $37 million.[85] According to Navajo President Joe Shirley, Jr., within ten years that amount is expected to grow, giving the Navajo Nation huge buying power and enabling it to spend at least $10 million per year on land purchases.[86] The President's recent statement expressed interest in purchasing nine specific parcels amounting to more than 22,000 acres.[87] Almost all of those parcels are in the checkerboard reservation.[88]

In two major projects in Colorado, the Trust for Public Land is trying to organize coalitions to put back together what the General Mining Act of 1872 tore to pieces. To provide prospectors with incentives to locate valuable mineral deposits on the public land, the 1872 law granted them the power purchase lands on which they had found such deposits at bargain basement prices ($2.50 to 5.00 per acre).[89] In the "high elk corridor" near Marble, Colorado and in the Mosquito Range behind Fairplay, Colorado, TPL is "doing deals" to place hundreds of long abandoned mining claims back into public ownership.[90] This, they hope, will eventually provide an ownership regime that supports the current uses of these lands, recreation and preservation.

In southeastern Colorado, in the much neglected short-grass prairie country, lies the Comanche National Grassland. According to the federal government, the Comanche National Grassland includes over 440,000

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81. *See, e.g., id.*
82. *See, e.g.*, Ballard, *supra* note 77.
83. Press Release, The Navajo Nation, Navajo Nation President Joe Shirley, Jr. Defends Land Acquisition Trust Fund Before Navajo National Council, (Sep. 2, 2005), http://www.phoenixdine.com/news_landtrust.html.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See* WILKINSON, *supra* note 33, at 48.
90. Trust for Public Land, Mosquito Range Heritage Initiative, http://www.tpl.org (enter "Colorado" in "Select by State" box; click on "Mosquito Range Heritage Initiative" hyperlink) (last visited Apr. 7, 2006); Trust for Public Land, High Elk Corridor campaign, http://www.tpl.org (enter "Colorado" in "Select by State" box; click on "High Elk Corridor Campaign" hyperlink) (last visited Apr. 7, 2006).

acres.[91] Those acres are spread almost helter-skelter across Otero, Las Animas and Baca counties.

From the 1880s, the Homestead Act and its relatives encouraged settlement on to the short grass prairie lands of eastern Colorado.[92] Towns were established and quickly boomed. Successive episodes of blizzard, drought and commodity price collapse, and the Dust Bowl of the 1930s, drove many of those settlers or their children off the land. To stabilize soil conditions and provide some financial relief, the federal government bought some of the land back.[93] It was another twenty years before the federal government conceded that these acquisitions were not temporary and began managing the patchwork prairie holdings as national grasslands.[94] The random nature of government acquisition makes the grasslands extremely hard to manage.[95]

The mission of the Southern Plains Land Trust (SPLT), headquartered in Pritchett, Colorado, just north of the Comanche Grassland holdings, "is to create a shortgrass prairie reserve network that enables native plant and animal communities to once again thrive, with minimal human intervention."[96] As SPLT makes clear: "Though our National Grasslands hold the greatest promise for large scale prairie preservation, the U.S. Forest Service remains the greatest obstacle to that goal."[97] SPLT's first acquisition is "approximately 14 miles west of the town of Springfield in southeastern Colorado. The 1,280 acres known as Fresh Tracks is three miles north of the Comanche National Grasslands."[98]

III. MAJOR CONCERNS

A. State Laws

Western environmentalists and western Indian nations share many characteristics, among these are an abiding presumption that the federal government, despite all its flaws, is an ally and the reciprocal presumption that states and local actors are, by and large, adversaries. History bares this out, and history is not to be discounted.

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91. USDA Forest Service, Comanche National Grassland-Area Information, http://www.fs.fed.us/r2/psicc/coma/main/areainformation.shtml (last visited Apr. 7, 2006).

92. *See supra* Part I.

93. *See* U.S. Dept. of Agriculture, *supra* note 33.

94. *See id.*

95. *See* Elizabeth Howard, *Management of the National Grasslands*, 78 N.D. L. REV. 409, 425-27 (2002) (describing the confusing and conflicting management attempts that the Forest Service has attempted to implement, and the lack of a clear roadmap for future management of the national grasslands).

96. Southern Plains Land Trust, About SPLT, http://www.southernplains.org/aboutsplt.org (last visited Apr. 7, 2006).

97. Southern Plains Land Trust, SPLT's Mission, http://www.southernplains.org/aboutsplt.org (last visited Apr. 7, 2006).

98. Southern Plains Land Trust, Fresh Tracks, http://www.southernplains.org/freshtracks.html (last visited Apr. 7, 2006).

Relying on land conservation transactions to remake the landscape of western ownership means relying, to some degree, on state law. State law is not without its biases. Conservation easement statutes are no exception. While every western state conservation easement statute authorizes private non-profits (including environmental groups) to hold conservation easements for purposes of environmental and historical preservation, only a few statutes specifically recognize the right of the native people to use conservation easements to preserve their heritage or recognize the right of tribal entities to hold conservation easements.[99]

Arizona's conservation easement statute defines a conservation easement as an easement created to serve a variety of public purposes "[p]ursuant to a clearly delineated federal, state or local governmental conservation policy" but makes no reference to tribal government conservation policies.[100] Arizona defines the holder of a conservation easement to include "[a] governmental body empowered to hold an interest in real property under the laws of this state or the United States."[101] Again, the language omits tribes.

Colorado and Utah allow a conservation easement to be held "by a governmental entity" without further detail.[102]

Alaska, Idaho, South Dakota, and Texas, in various forms of the Uniform Conservation Easement Act, define a holder of a conservation easement to include "[a] governmental body empowered to hold an interest in real property under the laws of this state or the United States."[103] Again, tribes are omitted.

Nevada defines a holder to include "[a] governmental body empowered to hold an interest in real property,"[104] neither including nor excluding tribal entities.

California and Oregon specifically recognize tribal holders of conservation easements. California defines the holders of conservation easements to include "[a] federally recognized California Native American tribe or a non-federally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place . . . ."[105] Oregon

99. For a discussion of conservation easement statutes as a protector of Native American sacred sites, *see* Lawrence Kueter & Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources*, 83 DENV. U. L. REV. 1057 (2006).

100. ARIZ. REV. STAT. ANN. § 33-271-2(c)(ii) (20006).

101. *Id.* § 33-271-3(a) (2006).

102. COLO. REV. STAT. ANN. § 38-30.5-104(2) (West 2006); UTAH CODE ANN. § 57-18-3 (West 2005).

103. ALASKA STAT. § 34.17.060 (2005); IDAHO CODE § 55-2101 (2005); S.D. CODIFIED LAWS § 1-19B-56 (2005); TEX. NAT. RES. CODE ANN. § 183.001 (2005).

104. NEV. REV. STAT.111.410 (2005).

105. CAL. CIV. CODE § 815.39(c) (West 2005).

defines the holder of a conservation easement to include "[a]n Indian tribe as defined [by Oregon statute]."[106]

Hawaii authorizes "[a]ny public body" to hold a conservation easement.[107] And, Hawaii, alone, specifically authorizes conservation easements to "[p]reserve and protect the structural integrity and physical appearance of cultural landscapes, resources, and sites which perpetuate indigenous native Hawaiian culture."[108]

If California, Hawaii and Oregon can do it, why can't any other western state?[109] Does the fact that conservation easement statutes in California, Oregon and Hawaii specifically reference indigenous values or tribal easement holders, mean that statutes in other states' statutes must be construed as omitting them?

Why would tribal governments want to hold conservation easements under state law? Efforts to protect tribal culture and values extend beyond the recognized boundaries of tribal jurisdiction. As the United States Supreme Court made clear in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,[110] the holes in Indian ownership caused by the allotment laws can tear holes in Indian jurisdiction.[111] Conservation easements have become important land use regulation tools in communities, like Boulder, Colorado, with comprehensive zoning codes.[112] Conservation easements could become important land use regulation tools to allow tribal control of non-Indian land within and around Indian reservations, but only if it is clear that tribal governments can hold them and hold them for Indian purposes.

B. Should We Purchase Property Rights to Protect What We Should be Able to Protect Without Buying Anything?

One of the perennial arguments in the non-Indian land trust community is to what degree government entities should be willing to pay (by purchasing conservation easements and other property rights) to protect public values, when they have the power to protect those public values through regulation without compensating the land owner who might injure them. As John Echeverria puts it:

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106. OR. REV. STAT. § 271.715 (2005).

107. HAW. REV. STAT. § 198-3 (2005).

108. *Id.* § 198-1 (2005). *See also* Jocelyn B. Garovoy, *'Ua Koe Ke Kuleana O Na Kanaka' (Reserving the Rights of Native Tenants): Integrating Kuleana Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523 (2005) (describing kuleana lands in the context of conservation land trusts).

109. A Westlaw search carried out in March 2006 identified only California, Hawaii, and Oregon as states whose conservation easement statutes reference Native American, Indian, or indigenous peoples.

110. 492 U.S. 408 (1989).

111. *See Brendale*, 492 U.S. at 422.

112. *See generally*, Boulder County Colorado, Land Use Department, http://www.co.boulder.co.us/lu (last visited Apr. 8, 2006) (describing Boulder's land use planning).

> [R]egulation and payment cannot simply be viewed as alternative means for advancing a single overarching goal. Rather, how and when one tool is used will affect how and when the other tool can be used, both as a matter of social policy and ultimately, too, as matter of law. In particular, use of public and private resources to pursue various conservation goals threatens to weaken society's capacity to pursue the same or similar goals through regulation. At worst, widespread use of the payment approach has the ironic potential to undermine the cause of environmental protection itself by undermining a time-tested and effective tool for protecting land.[113]

This concern about payment and regulation applies in the Indian context and in the non-Indian one. Will paying non-Indian landowners to get back land originally unjustly taken from Indian tribes both convince other similarly situated land owners that they too are entitled to payment and undercut moral claims regarding Indian ownership of the land?

I believe this is a false dichotomy. Most successful regulatory efforts, no matter how worthy in their own right, have been facilitated with significant subsidies. If the government wants everyone to paint their house purple, it is wise to provide purple paint at low cost. Direct subsidies, for example, for water treatment plants,[114] brown-fields redevelopment[115] and mine land clean-up,[116] or indirect subsidies like federal funding for light rail or reorganization bankruptcy protection for liable parties under CERCLA (the superfund law),[117] make it easier to get people to do what regulations require.

In the American West, where the federal government had a hand in creating most of our land use messes, the line between government subsidies to facilitate regulation and government payments for past responsibilities becomes blurry in the extreme. In all of our checkerboards (real and metaphorical), the government is not only the sovereign, but it is also

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113. John D. Echeverria, *Regulating Versus Paying To Achieve Conservation Purposes*, SJ053 A.L.I.-A.B.A. 1141, 1145-46 (2004).

114. The Clean Water State Revolving Fund (CWSRF), "provides $4 billion annual in recent years to fund water quality protection projects for wastewater treatment, nonpoint source pollution, and watershed and estuary management." U.S. Environmental Protection Agency, Clean Water State Revolving Fund: America's Largest Water Quality Financing Source, http://www.epa.gov/owm/cwfinance/cwsrf/index.htm (last visited Apr. 8, 2006).

115. Three EPA financing programs—EPA's flagship effort—have been used extensively to spur brownfield redevelopment. The Brownfield Revitalization Act authorizes up to $200 million annually for EPA's site assessment, cleanup, and revolving loan fund capitalization programs (although Congress to date has not provided more than $123 million for these programs and related operations and support). U.S. ENVIRONMENTAL PROTECTION AGENCY, BROWNFIELDS FEDERAL PROGRAMS GUIDE (Sept. 2004), http://www.epa.gov/swerosps/bf/partners/federal_programs_guide.pdf.

116. U.S. Environmental Protection Agency, AML Site Information, http://www.epa.gov/superfund/programs/aml/amlsite/index.htm (last visited Apr. 8, 2006) (describing abandoned mine land cleanup priority sites throughout the United States).

117. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (Superfund Act), Pub. L. 96-510, 94 Stat. 2767.

a property owner. It hardly seems wrong to force the federal government to subsidize solutions to problems it created.

CONCLUSION

This caution aside, however, the prospects look good. The land trust community seems unlike the property rights manipulators of the past. It seems better suited to solving problems by addressing local problems on the landscapes on which it operates. We should all make time to gather some information and give it some thought.