



Spring 2004

Comments on Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements

Bruce Yandle

Recommended Citation

Bruce Yandle, *Comments on Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 Nat. Resources J. 519 (2004).

Available at: <https://digitalrepository.unm.edu/nrj/vol44/iss2/9>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

BRUCE YANDLE*

Comments on Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements

I. INTRODUCTION

Nick Parker's examination of land trust decision making is of great interest to environmentalists, social scientists, and policy makers. His article is of particular interest to those who seek a better understanding of how private property rights affect and are affected by the growing land trust phenomenon. But rather than focus on their phenomenal growth and why there are land trusts, Parker seeks to get inside the box of the land trust, the not-for-profit firm itself, and explain the logic of choice that is applied when those organizations have the opportunity to receive ownership of particular land rights. Will the trust decide to hold conservation easements for the rights in question or will the trust seek the full bundle of land rights—fee simple? This is the motivating question for the article.

To answer it, Parker focuses on transaction costs faced by a land trust when managing land rights and how these costs differ between easements and fee simple ownership. The model considers positive and negative rights that may be associated with conservation and non-conservation activities. Parker's model envisions the land trust management weighing the relative gains from one form of right transfer versus another and opting for easements or fee simple transfers depending on how the mix of rights at the margin maximizes the value of land rights in its portfolio after all transaction costs are covered. The model focuses on the land trust as prime mover.¹ The land trust seeks to maximize land values, while land rights donors, presumably, seek to maximize the present value of their wealth.

Parker's focus on transaction costs enables him to derive a rich set of refutable hypotheses about the kinds of land rights or land activities that are more likely to be managed with an easement rather than fee-simple ownership. In a strong and very creative empirical section, Parker submits his hypotheses to a series of tests and finds meaningful support for the underlying forecast of the model.

* PERC Senior Associate.

1. The prime mover is the initiator of action in a two-party setting. It is possible for either the landowner or the land trust to take the initiative in contracting one with the other.

Parker has produced an interesting, well written, and carefully constructed paper. Of the various parts, I find the empirical section to be the strongest and most interesting. Indeed, I believe the empirical section can be used with an alternate model that may escape some of the complexities associated with the current one.

In the remaining parts of my comment, I discuss some of my concerns with the Parker model. I then describe an alternate view of land-rights allocation to land trusts and explain how the alternate model, which has weaknesses of its own, contains a bit more behavioral content and is consistent with the same set of refutable hypotheses provided by Parker's model.

II. AREAS OF CONCERN WITH THE PARKER MODEL

The Parker model is a transaction cost model that focuses on particular inputs. The focus on inputs raises a number of concerns. The first has to do with the inputs—negative and positive rights. It seems to me that since all private property rights are exclusive, what is positive to one party is by definition negative to another. The right to farm agricultural land is simultaneously the right to exclude hunting, the production of timber, homebuilding, changing oil in BMW automobiles, and an endless list of other activities. The holder of the rights determines the opportunities foregone. An easement that transfers development rights from agricultural land to a land trust is positive to the trust but negative to the land owner and to all others who may have designs on the property.

If we assume there are a finite number of identifiable sticks in a specific property rights bundle, let us say 100, then there are certain negative and positive rights associated with each stick. While the sticks can be counted, the number of negative rights cannot be, since they are part of an infinity of actions that can be excluded. In other words, when negative and positive rights are summed, it is possible to get more than 100. Indeed, I believe the number would form an infinity of rights.

A. Conservation and Non-conservation Activities

Parker's notion of conservation and non-conservation activities raises a second problem—what is conservation in one setting may be non-conservation in another. In raising this concern, I hasten to add that I can offer no immediate remedy for it.

For example, tomato farmers in Charleston County, South Carolina, today are viewed as producing an environmental value for those who drive by the moss-draped oaks that border the farmland and

view with misplaced nostalgia the happy tomato pickers who come at harvest time, most likely from Mexico. The county has issued bonds for the purpose of buying the development rights and placing them in a trust. In Charleston then, farming is a conservation activity. Meanwhile, the owners of farmland hold the cash value of the development rights that are transferred away and continue to engage in agricultural production.

Similarly, the state of Wisconsin pays farmers to maintain their barns, which are seen as an important part of the state's scenic beauty. Vegetable farms in Charleston and dairy farms in Wisconsin, which some would see from a distance as non-conservation activity, are seen on closer inspection as conservation, at least by the voters in those communities. Elsewhere, of course, agricultural activity is seen as destructive to certain features of nature. In those cases, easements or agriculture production rights are transferred to a land trust for the purpose of reducing production agriculture and therefore enhancing the environment. While we can most likely resolve this definitional problem about what is conservation and non-conservation when a particular parcel of land is being considered, I do not think we can resolve it globally when data are aggregated across the United States. In other words, what seems otherwise to be a sound behavioral model may break down when applied to an aggregated data set.

B. Who Is the Residual Claimant?

An occasional appeal to incentives associated with residuals and who gets them raises another set of issues for the land trust side of Parker's model. If we focus solely on private landowner decisions, then appeal to the residual claimant makes sense. Private owners of land and their heirs are the residual claimants; we predict a tendency to conserve because of this.

Trustees of land trusts, if other than the landowners, are another matter. They and their heirs have no individual claims to the residuals of land trust operations. It is to be granted that by self-selection the ultimate trustees may be people who receive utility² from an expanding trust operation and may receive particular joy from being able to manage excess revenues that arise from cost-effective management. But unlike landowners who may be negotiating with the trustees, the trustees have no claim on the assets that can be converted to cash or other real benefits when they vacate their trusteeship.

2. Utility and happiness or satisfaction are synonyms.

The problem here is the assumption that underlies the term "residual claimant." It is not a problem with respect to economizing behavior that may be exhibited by trustees of not-for-profit organizations. If the use of the term is crucial, then I suggest that the focus should be on landowners and that the land trust should play a passive role in the decision-making process. Instead of doing this, however, I recommend a change in vocabulary. Let the trustees be output maximizers, cost minimizers, or better yet utility maximizers. These terms more accurately describe the trustee's role.

C. Differentiating Trusts from Farms

Parker helpfully differentiates land trusts from farms by suggesting that farm operators have a comparative cost advantage in farming, relative to trusts, and that land trusts have a comparative cost advantage in managing land rights. It follows that land trusts would not be able to compete as farm operators.

While this *ex post* analysis in fact may be true, it is more likely a result of legal constraints than the failure of markets to allocate specialized resources to firms, irrespective of their names. As not-for-profit firms, land trusts have specialized charters that allow them to engage in specified land management activities. They are not legally able to engage in production agriculture as for-profit firms. In that sense, they cannot be competitive farmers. Land trusts have a legal duty to engage in specialized land rights management—farmers do not.

With all this said, there is no *economic* reason that a farm operator could not organize a land trust and participate as its executive director or trustee. On the other hand, all private parties who assemble land for conservation purposes are in fact acting like land trusts. But as a land trust trustee, a farm proprietor could channel resources in the direction of land trust activities. It is also true that the executive director and trustees of a land trust could, if they wished, organize a for-profit farm and operate it as a separate and distinct economic activity. It must be the case that many trust managers do in fact engage in farming and ranching activities. But it is the prior constraint of law that yields the specialization found in the black box called land trust, not economic specialization.

D. The Strength of the Parker Model

Despite the concerns raised here, the Parker model does what models are supposed to do; it provides a useful way to think about the ultimate land trust rights allocation. Will it be fee-simple transfer or a

transfer of limited easement rights? As it turns out, most of the business about positive rights, negative rights, and residual claimants has little bearing on the final logic of the model. Making common sense arguments, which are always the most powerful, Parker describes what land trusts can do at lower cost than landowners, and what landowners might do at lower cost than land trust personnel. Refutable hypotheses derived from his common sense arguments are tested, and the results are indeed supportive of the model's implications.

III. AN ALTERNATE MODEL

I want to suggest and partly develop an alternate model that may comfortably amend the model Parker has employed. In my model, the landowner is the prime mover, not the land trust. The landowner is a utility maximizer. He gains happiness from two activities. One is the production of noncommercial environmental services enjoyed by the landowner, members of his family, and others in his community. In the absence of any contract-based encouragements, the landowner produces some positive amount of environmental services. We might say that he holds to some stewardship ethic. In more prosaic terms, we can say the landowner loves flowers and particular vistas that he maintains on his land. So do some of his neighbors, whose well-spoken opinions the landowner values.

Importantly, the environmental services that the landowner produces have a peculiar trait that is referred to as publicness.³ A unit of environmental beauty produced by and for Farmer Jones becomes a partial unit available for others in the community. Put differently, a well-maintained vista made available to one carload of passers-by is a vista for busloads of passers-by. Unlike private goods, which provide consumption benefits to one party and disappear when consumed, a unit of a public good, one with the publicness trait, when made available for one person is simultaneously a unit for many. As some might say, the good is nondepletable and nonexcludable. In a community of landowners who value the sight of well-maintained land and vistas, each landowner produces happiness for his neighbors when making himself happy.

3. JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* 65 (1968).

A. Meeting the Publicness Challenge

Because of the publicness of environmental services, the landowner's effort to produce environmental services may include participation in a local conservation organization, such as a land trust. The trust, one of many available to the landowner, encourages conservation activities and accepts donations of easements and fee simple land rights. However, in the absence of any other benefits, these activities are not the crucial ones for landowners who seek to maintain an optimal level of conservation activities.

Coordination of land conservation activities across multiple landowners is required to achieve a collective optimal outcome. One might argue that the degree of participation is conditioned by population density of landowners who seek to produce environmental services. If average land holdings are large, making landowners few and far between, then the publicness of their environmental production and the related need to coordinate will disappear. However, if people far removed from the site of the amenities are willing to pay for additional production, then there is evidence that publicness can travel great distances. The land trust serves as a beneficial cartel for coordinating production of a valuable public good. With coordination in place, the conservation organization can also accept fee simple transfers of land rights and easements that memorialize aspects of the coordination effort.

B. After-Tax Income: The Other Driver

Net after-tax income, or all other goods, is the other argument in the landowner's utility function.⁴ Landowner income is derived from commercial use of land. The landowner's utility is constrained by the amount of land rights he owns or controls. There is a transformation function that describes how land that produces noncommercial environmental services can be converted by the landowner to commercial production. The division of land as between conservation and non-conservation activities is determined by the utility obtained from income relative to the utility gained from conservation activities. The transformation function includes real management and other transaction costs associated with the two utility-generating activities as well as any special tax treatment accorded expansion of one or the other land use activities.

4. Economy theory explains human action on the basis of a collection of goods and experiences that generate utility or happiness for the individual. This unique collection of goods and experiences can be expressed as a mathematical function or utility function.

C. Regulatory Disturbances and Incentives

Assume that this representative landowner obtains equilibrium with respect to his two utility-generating activities. He is as happy as he can be given the constraints he faces. There is a positive amount of land committed to producing environmental services. The balance of the land produces commercial products and income.

Now, a new constraint arises—the government defines a portion of the commercial land as wetlands (or other sensitive habitat), impairing the output of commercial products as well as income to the landowner. In essence, the government requires the landowner to produce more environmental services than he would choose to produce voluntarily. The landowner is now in a disequilibrium position. A new regulatory equilibrium will obtain if penalties and other sanctions are introduced that affect the landowner's transformation function. However, happily, the regulatory regime that affects landowner activities is accompanied by special tax incentives that make the regulation more palatable. If land rights to sensitive land are donated to an approved conservation organization, the landowner can deduct the market value of the donation from his tax liability. With such benefits in the offing, interested landowners make haste to enlarge the activities of their favored land trust.

D. Land Trusts Enter the Picture

Let us now recall the land trusts that may passively accept planned donations of land rights from landowners. It is to be remembered that the land trusts operate in a competitive market, which tends to minimize the cost of providing land trust services. The combination of regulatory and tax incentives generates new interest in land trust activities on the part of landowners. As trustees of the land trust, the community of landowners must determine how land rights can be transferred to the trust in ways consistent with the landowner utility maximizing goals.

Recall that each landowner faces a land-based constraint that describes how land can be converted from commercial to noncommercial production. Management costs, other transaction costs, and special tax benefits are included in the transformation function. If a commercial landowner transfers easements instead of fee simple ownership to the trust, it is business as usual for the farmer; the farmer's management activity is not increased. If, however, fee simple ownership is transferred to the trust, a new transaction cost enters the story. Unless the trust received a guarantee that the farmer will continue his land management

activities, the trust will have to pay someone to assume those activities. Total land management costs must increase with each fee simple transfer. The landowner is still managing land and now the land trust must manage related land rights. Even if there are economies of scale in monitoring and managing, there will be a new element of cost that did not exist before. Therefore, representative landowner/trustees will only transfer fee simple when the land in question is to be converted to specialized activities that require specialized monitoring and management. With due consideration given to costs and benefits, land rights are transferred to land trusts in ways that maximize landowner utility.

At this point, all of Parker's propositions seem to emerge from the model. Indeed, his story is in ways the mirror image of mine. His resulting empirical work illuminates the working of the model. There is, then, more than one way of getting to the strong empirical part of the Parker article.

IV. FINAL THOUGHTS

The Parker model and the alternative sketched here focus on decisions regarding what form property rights will take when landowners transfer rights to land trusts. There are elements in both models that address the question of why land trust activity has enjoyed such burgeoning growth in the last few decades. Parker describes the growth of state and federal tax benefits accorded landowners who transfer rights to trusts. He also identifies the emergence of model state legislation that reflects legislative accommodation of land trusts. Given this governmental encouragement, it is not surprising that land trusts would become a growing industry.

The publicness of land conservation activities when coupled with the income sensitivity of demand for environmental quality augments the encouragement supplied by tax and legislative incentives. We know that the demand for conservation activities increases systematically with rising per capita income.⁵ Then, if my argument about regulatory constraints and government efforts to ease their bite is valid, yet another land trust demand shifter enters the picture. When each of these drivers is examined closely, special tax treatment seems to be the crucial element. Any modification of tax treatment, increasing or

5. See generally BRUCE YANDLE ET AL., ENVIRONMENTAL KUZNETS CURVES: A PRIMER (Prop. & Env'tl. Res. Ctr., Pub. No. RS02-01, 2002) (discussing the relationship between income changes and environmental quality).

decreasing taxpayer benefits, will directly affect the fortunes and growth of the land trust movement.

In conclusion, there are two observations to make with regard to the growth and financial success of land trusts, especially as related to the larger national trusts. First, there is evidence that suggests that the larger land trusts serve as land agents for government.⁶ When a federal agency seeks to acquire private land rights, land trusts offer the advantage of being able to move faster and with less public notice and, therefore, less controversy, in doing the government's bidding. The land trust can acquire fee simple ownership and in turn sell the property rights to the federal government, for a profit. This provides yet one more reason one might observe fee simple land rights in a land trust's portfolio, albeit on a temporary basis.

But sometimes, government agencies also compete with land trusts. For example, the federal government's wetland reserve program provides the means for farmers to sell fee-simple rights and easements as perpetuities to the federal government, in which case the government pays 100 percent of fair market value. Alternately, the seller can write a 30-year contract with the government and receive 75 percent of market value. However, this competition is hampered by all the competitive disadvantages inherent to a government-operated enterprise.

6. Roger E. Meiners & Bruce Yandle, *Land Trusts: A Return to Feudalism*, in *AGRICULTURE AND THE ENVIRONMENT: SEARCHING FOR GREENER PASTURES* 25-45 (Terry L. Anderson & Bruce Yandle eds., 2001).