Conservation Easement and Common Law Easement as a Nature Conservation Tool within the Context of Property Rights and the Economic Trade Off

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Abstract

In this paper, I discuss the concept of conservation easement and common law easement depending on property rights and economic trade off and their usages as conservation tool. Initially, I discuss property rights concept and the definition and derivation of conservation easement from common law easement, covenant, and equitable servitude. In the second chapter I give a comparison between conservation easement and common law easement and covenants. Then, I compare conservation easement to regulatory conservation policy tools from the point of both grantor and grantee view. In the end, I conclude that conservation easement can find a common ground for both private landlords and government.

I. Introduction

Conservation easement is a right on a real property owned by someone else. It derives from both common law easement and covenant concept. From property rights perspective, conservation easement is an interest on a real property and its basis is statute rather than common law itself. Since an owner may have several rights on his real estate such as right of use, alineation, rent, right of way etc., it is one of such rights that gives some rights to grantee

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like use someone else's land for protection purposes and put some obligations to grantor such as cultivate or not cultivate his real property. On the other hand, some trade off on each bundle of property rights is permitted. This means that an owner might not use all bundle of rights he owns on a real property and might want to convey some interest on the bundle for conservation purposes to conservation organisations or land trust agencies or public agencies at a particular level of cash payment. Thus this makes both landowner as a grantor and the said agencies as grantee better off. Such an aspect of conservation easement makes it more popular than other conservation tool such as purchasing or renting the land having conservation values.

II. The Concept of Conservation Easement and its relation to Ownership

Ownership is defined as a "collection of rights to use and enjoy property, including right to transmit it to others. The complete dominion, title, or proprietary right in a thing or claim. The right of one or more persons to possess and use a thing to the exclusion of others. The right by which a thing belongs to someone in particular, to the exclusion of all other persons. The exclusive right of possession, enjoyment, and disposal; involving as an essential attribute the right to control, handle, and dispose[1]".

Interest "means a right to have the advantage accruing from anything; any right in the nature of property, but less than title… The word "interest" is used in the Restatement of Property both generically to include varying aggregates of rights, privileges, powers, and immunities and distributively to mean any one of them[2].

An easement is described as "a right of use over the property of another. Traditionally, the permitted kinds of uses were limited, the most important being the right of way and rights concerning flowing waters. "Traditional easement is normally for the benefit of adjoining land regardless of who owns it, rather than for the benefit of a particular individual[3]." "An easement is a permanent interest in land in the possession of another which entitles the easement holder to limited use of the land subject to the easement. The land subject to the easement is called the "servient tenement. The easement holder's privilege of use may be protected against interference from the third persons and is not dependent upon the consent of the

1 Black, H. C. 1993. Black's Law Dictionary. St. Paul, Minnesota: West Publishing Co., pp. 765.
2 Black, H. C. 1993, pp. 560.
3 Black, H.C. 1993, pp. 352.

owner of the servient tenement"[4]. Another definition can be given as "an easement is a form of servitude. It is conventional and common law meaning is that it is a right or privilege which one parcel of land yields up to another parcel of land as an easement appurtenant... it is an incorporeal hereditament which issues from a corporeal estate for the benefit of another estate. It is a burden imposed on corporeal property and not upon the owner thereof"[5].

Besides that, "a covenant is a contractual promise, typically found in a deed or lease, to perform certain specified acts, or to refrain from performing certain specified acts, with regard to real property. The covenant is primarily a contractual obligation, not an interest in land. It is, however, a contract that has certain real characteristics, namely, the ability to "run with the land" of the parties to the covenant"[6]. In contrast, the courts classify covenant as "appurtenant" and "in gross". In many cases, courts do not allow the real covenants to run with land[7]. Covenant is also defined as "an agreement, convention, or promise of two or more parties, by deed in writing, signed, and delivered, by which either of the parties pledges himself to the other that something is either done, or shall be done, or shall not be done, or stipulates for the truth of certain facts"[8].

On the other hand, conservation easement is a general and broad term that consists of all types of easements and the main concept in all types of easements is the same. Generally a conservation easement is called by different names such as wetland conservation easement, historic preservation easement, agricultural preservation easement, forest land protection easement, and so on, according to the land area that is protected by such an easement[9, 10].

Conservation easement is defined as a kind of contract or agreement between a landowner and a private land trust organizations

4 Partigan, J. C. 1985. "New York's Conservation Easement Statute: The Property Interest and its Real Property and Federal Income Tax Consequences." *Albany Law Review.* 49, pp. 435.
5 Partigan, 1985, pp. 435.
6 Partigan, 1985, pp. 435.
7 Korngold, G. 1984. "Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements." *Texas Law Review.* 63:(387), pp. 433-495.
8 Black, 1991, pp. 251.
9 Bick, S. 1996. Donations and Sales of Conservation Easements on Forested Land in the Northern Forest of New York State. Ph.D. Diss., Virginia Polytechnic Institute and State University.
10 Stafan, N., & Thomas S, Barrett. 1996. Model Conservation Easement and Historic Preservation Easement. Washington, D.C.,: Land Trust Alliance Press.

or a government agencies to restrict the landowner's usage on his or her land in order to protect the land's conservation values[11]. Mississippi Conservation Easement Act defines conservation easement as "conservation easement shall mean a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purpose of which include retaining or protecting natural, scenic, historical or open space values of real property, assuming its availability for agricultural, forest, recreational, educational, or open space use, protecting natural features and resources, maintaining or enhancing air and water quality, or preserving the natural, historical, architectural, archaeological, or cultural aspects of real property[12].

III. Comparison Between Conservation Easement and Common Law Easement and Covenant

Although the main concept of conservation easement derives from the traditional easement and covenant concepts of English Common Law system, it differs from conventional easement and covenant concept in some ways[13]. The easement considered at conventional law partially resembles a conservation easement. "Conservation easement, if defined in relation to common law property interest, is a hybrid, falling somewhere between the common law easement and covenant, depending on the type of restrictions imposed"[14]. Since a covenant is a kind of agreement in which grantor promises to perform certain specified acts or abstain from performing particular activities on the land. Such a covenant is not an interest on land, but an obligation on the grantor's shoulder. Although it is not an interest on the land, a covenant has the ability to run with the land of the parties to the covenant"[15].

Although conservation easement has been used since 1890 around the Boston, the concept of conservation easement was first used by William H. Whyte in 1959 and it is very new concept in the law when comparing common law easement and covenant concept[16].

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11 Diehl, J., & T. S. Barrett. 1988. The Conservation Easement Handbook. Virginia: Book Crafters.
Food Security Act of 1985 and 1990 Amendment.

12 Article 1 of the Mississippi Conservation Esement Act of 1986.

13 Hoffman, S. M . 1989. "Open Space Procurement Under Colorado's Scenic Easement Law."*University of Colorado Law Review*. 60, pp. 383-416.

14 Partigan, 1985, pp. 431.

15 Partigan, 1985, pp. 431.

16 Haapoja, M. 1994. "Conservation Easements: Are They for You?" *American Forests* 100: 9-36.

Besides that, conservation easement conceptually derives from the concept of common law property interest and it's a statutory interest and does not depend on or unbounded by the conventional notions of easement and covenant. Although conservation easement is to be assigned as easement in gross, it may be enforced by its assignee against subsequent purchasers of the property. Also, in contrast to its being easement in gross, a conservation easement can serve another real estate. For example; when it is created in order to protect an open space adjacent to a historical building, monument, and so on, a conservation easement serves such protected property in reality[17, 18].

An easement conveys affirmative rights to grantee and does not burden any obligation to the grantor, which means that the easement holder is to be permitted to do something on the servient tenement such as right of way. In contrast, in the case of conservation easement, the easement grants negative restrictions to the grantor on his or her property and does not convey affirmative rights to grantee. If doing so, a grantor gives up using some of the bundle of property rights whose full fee ownership remains on the owner[19]. In practice, a conservation easement may grant some affirmative rights to grantee. For example; in the case of Wetland Reserve Program, in which a thirty year easement and perpetual easement are available, United States Department of Agriculture, as a grantee, has the rights to plant tress and grass, and restore the farmed wetlands[20].

Conceptually, common law discourages negative restrictions on land as unduly encumbrances on free alienation. Negative easement is restricted in use only four types such as easement for light, for air, for support a building, and for flow of an artificial stream, while the main purpose of conservation easement is to burden negative restrictions on the grantor's land. Consequently, the grantor should burden some negative restrictions, which means that a conservation easement modifies traditional easement concept by eliminating

17 Dana, A., & M. Ramsey. 1989. "Conservation Easements and Common Law." *Stanford Environmental Law Journal.* 8:(2), pp. 2-45.

18 Winter, K. K. 1993. "The Endengered Species Act Under Attack: Could Conservation Easements Help Save The ESA?" *Northern Illinois University Law Review.* 13:(371), pp. 371-399.

19 Jordan, K., A. 1993. "Perpetual Conservation: Accomplishing the Goal through Preemptive Federal Easement Programs." *Case Western Reserve Law Review* 43: 401-410.

20 Secretary of the Interior. 1988. The Impact of Federal Programs on Wetlands: A Report to Congress. Washington, D. C.

the defense that a conservation easement imposes negative burden. With this respect, a conservation easement resembles to a covenant in which a covenant imposes negative duty to covenantor on his or her property[21, 22].

On the other hand, conventional easement can be both easement appurtenant and easement in gross. The former means that conveying easement provides benefit to a particular tract of land either adjoining or apart from, while the latter is an easement that does not benefit a particular tract of land. In addition, if an easement holder becomes an owner of the burdened land either in the case of appurtenant or in the case of gross easement, the easement extinct. In contrast, conservation easement can be easement in gross, in which there is no dominant tenement and it resembles to a mere personal interest in or right to use another's land. If a conservation easement holder becomes owner of the burdened property, for example, the conservation easement can not be extinguished in Mississippi. In this respect, a covenant has the same characteristics as conservation easement, which means that there is no need dominant tenement in the case of covenant[23]. On the other hand, some people argue that a conservation easement may be an easement appurtenant, because there is no statutory prohibition on that. In practice, if a tract of land is donated to protect another tract of land or real property, it is considered "conservation easement appurtenant." For example; if a tract of land adjoining an historical building is granted in order to protect the building's historical value, it may be considered a conservation easement appurtenant[24].

In the case of traditional easement and covenant, the parties (grantor and grantee) can be any kind of individual or legal entity, while in the case of conservation easement, the grantor can be any landowner, but the grantee must be a nonprofit private land trust organizations and government agencies or governmental body[25]. Other private actors cannot be the holder of a conservation easement. Such restricting may criticized that it restrained the alienability of an interest in real property. For example, in a conflict, A New Jersey court held that restrictions on the alienability of a

21 Jordan, K., A. 1993.
22 Uniform Conservation Easement Act, Article 4.
23 Mississippi Conservation Easement Act of 1986, Section 19.5.5.
24 Winter, K. K. 1993.
25 Article 2 of the Mississippi Conservation Easement Act of 1986.

conservation easement were valid, since restrictions outweighs any general rule on free alienability[26].

The way of creating a conservation easement is ambiguous in either Uniform Conservation Easement Act or Mississippi Conservation Easement Act. A traditional easement can be created by different ways such as express grant, express reservation, agreement, mortgages, necessity, condemnation, and so on. Similarly, a conservation easement can be created by the same manner as other easements[27, 28]. This provision of both statutes seems ambiguous and inconsistent with the main concept of the purchasing development rights and conservation easement. Because, at least literally, it is considered that a conservation easement can be crated by adverse possession, compensation, and, so on as common law easements, without consent of the grantor. Since a conservation easement is a voluntary agreement, not one way decision of any state agencies or governmental entity[29] the provision of Uniform Conservation Easement Act and Mississippi Conservation Easement Act are inconsistent with conservation easement provision of 1990 Farm Bill, which that main idea is purchasing development rights approach. In section 137, A of 1990 Farm Bill, it is stated that " the owner of such land shall provide a written statement of consent to such easement...", which means that consent of the owner is required to create a conservation easement.

Likewise, the purpose of a conservation easement differs from the purpose of traditional easement. The intention of parties in a traditional easement varies from providing right of ways, pipeline, water flowage, to constructing a public roads or buildings (easement by prescription), while the purpose of conservation easement is to preserve open spaces, natural habitats, historical buildings, and so on. Although the grantee can be a private land trust organization, there is always a public benefit from a donated conservation easement, while traditional easement is to provide benefit, if grantee is a private entity. Also, the instrument that creates a conservation easement must be written. Oral agreement cannot be enforced against grantor, while the instrument that creates a common law easement may be oral. Written contract is not required. Even in some cases, without a contract or oral agreement, an easement can be created such as by implied reservation or implied grant[30].

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26 Hoffman, S. M . 1989.
27 Article 2 of the Uniform Conservation Easement Act.
28 Mississippi Conservation Easement Act of 1986, Section 5.1.
29 1990 Farm Bill, Sec,1239, 2.
30 Nagel, S., & Thomas S, Barrett. 1996. Model Conservation Easement and His-

Conveying a common law easement gives the rights only to grantee as such easement, but in the case of conservation easement, the public may have the rights to access to the restricted land depending on the contract of such an easement. Particularly, in the case of scenic easement, the conservation easement created on Blue Ridge, and Natchez-Trace Parkway[31], the public has rights to access such natural beauties depending on the contents of the agreement[32].

In contrast to its being a negative easement, the grantee of a conservation easement, in many cases, may acquire affirmative rights on such a property. For example; in the case of scenic easement on Natchez - Traces Parkway, the public or grantee may enjoy affirmatively through the parkway[33].

The conservation easement is different from common law covenant concept also. Since covenant is a kind of promises, it does not create an interest on real property[34].

The recordation of conservation easement is also different than common law easement. An unrecorded conservation easement is void for all purposes and would be ineffective to the purchaser of property subject to unrecorded conservation easement. In Mississippi, each conservation easement must be recorded by the clerk of court and a certified copy is to be sent to Attorney General of Mississsippi and the Mississippi Department of Wildlife Conservation along with notice as to date and place of recordation. In contrast, the conveyances of unrecorded common law easement is effective against the purchaser of the servient tenement with actual or inquiry notice of the conventional easement[35, 36].

The duration of conservation easement is not clearly defined in either Uniform Conservation Easement Act or Mississippi Conservation Easement Act. In section 2 .A, the Uniform Conservation Easement Act has stated that "a conservation easement may be terminated in the same manner as other easements." In contrast,

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toric Preservation Easement. Washington, D.C.,: Land Trust Alliance Press.

31 This is an historical road connecting Eastern USA to Mississippi River Basin in Natchez in Southern USA.

32 Partigan, 1985, pp. 431.

33 Daniels, T. L. 1992. "The Purchase of Development Rights." *Journal of American Planning Association.* 57:(4), pp. 421-432.

34 Dana, A., & M. Ramsey. 1989.

35 Partigan, 1985.

36 Katz, E. E. 1986. "Conserving the Nation's Heritage Using The Uniform Conservation Easement Act." *Washington and Lee Law Review.* 43:(337), pp. 369-397.

section 2.C, stated that " a conservation easement is unlimited in duration unless the instrument created it otherwise provides." It seems that section 2.C, is inconsistent with section 2.A. Although there is not any conflict if the instrument provides otherwise, if there is not any provision in instrument, will the duration be unlimited or will the duration be determined by the same manner as other easements? Since other easements are not statutory provisions, the agreement between grantor and grantee will determine the duration. Consequently, the unlimitedness of a conservation easement is void in this sense. On the other hand, unlike Uniform Conservation Easement Act, the Mississippi Conservation Easement Act is straightforward in the duration of a conservation easement. This statute did not let the manner as other easements determine the duration, but in section 5.3, the statute stated that " a conservation easement is unlimited in its duration unless the instrument creating it otherwise provides." Consequently, the duration of a conservation easement is determined by the instrument created it. If there is not such a statement about duration, it is unlimited in Mississippi[37]. On the other hand, the courts apply a doctrine which is called "changed conditions" doctrine to such cases and "if conditions have so changed since the making of the premise as to make it impossible to secure in a substantial degree the benefits of intended to be secured by the promise"[38,39].

In contrast to such differences, there are some similarities between conservation easement and common law easement and covenant. Grantee or easement holder enforces both conservation easement and common law easement. Grantor does not have any obligation to maintain the easement. Then, both conservation easement and traditional easement are interest on the other's land. Also, both are restricts the usage of servient tenement to some extend[40].

IV. The Concept of Property Rights and Its Connection to Easement

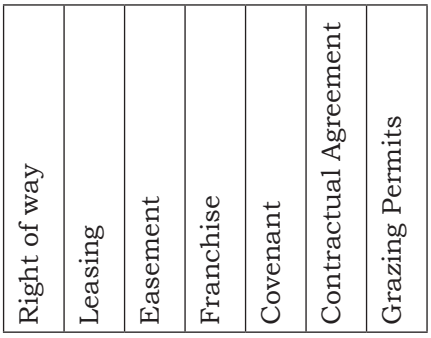
Several definitions may be articulated within the context of property rights. Property is an aggregate of rights which are guaranteed and protected by the government[41]. The term is said to be extend to every species of valuable right and interest. More specific-

37 Mississippi Conservation Easement Act, Section 19.5.
38 Owers vs. Camfield, 614, SW 2 nd. 698, Arkansas, Ct. Court, App, 981.
39 Korngold, 1984, pp. 484.
40 Korngold, 1984.
41 Black, 1993, pp. 845.

ally, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to posses it, to use it, and to exclude every one else from interfering with it. That dominion or indefinite right to use or disposition which one may lawfully exercise over particular things or objects[42]

When we look at the ownership or property rights, it entitles landlord to use, enjoy, sell, lease, convey, exclude it to others etc. Since property rights are not a sole right, but a combination of many kinds of stick, so to speak, that construct a bundle, any one stick of from that bundle can be a subject of trade off separately from the bundle as a whole. This characteristics of property rights can lead landlords trade off on that single right alone. The logic behind this kind of trade off is that a landlord may not need to use all bundle of rights on his/her own real property. In other words, when a landlord uses his/her own property for any purpose, he can also lease or sell another stick of the bundle to someone else, as long as these two rights are not compete to each other. For instance, as a landowner, someone may not use all rights and while he is farming on it, he can sell a right of way to someone else and these two usage cannot block each other. Hence, both individuals can be better off than previous condition that such a transaction did not occur. This is also the core and purpose of liberal economic system that welfare of individuals is to be improved without letting anybody be in poorer condition. Thus, making each individual in a society makes an enhancement in general increment in the country.

Figure 1: The Scheme of Property Rights on Real Property



Each column represents a single right from whole bundle, such as[43]; Right of way, Leasing, Easement, Franchise, Covenant, Contractual Agreement, Grazing Permits.

42 Black, 1993, pp. 845-846.

43 These rights may be extended depending upon legal provisions applied in the

All bundle represents a property right that is a sum of each stick. Any of them can be a sole subject of any kind of economic transaction, in which landlord can convey one or some of them in any single trade off to another person. And both grantor and grantee can be better off. The more stick in the bundle defined by law the more economic value of the property itself and the more public welfare in the country.

V. The Growing Popularity of Conservation Easement as a Nature Conservation Tool and How both Grantor and Grantee Can Be Better off With Conservation Easement?

Conservation easement has become an effective environmental protection policy tool in the USA since 1980s. The reasons behind this development are that it is cheaper than purchasing full fee title and government regulatory protection policy. Then it balances between eminent domain and private property rights, gives psychological satisfaction to grantors, and provide financial benefits to property owners[44].

Since conservation easement, as a purchasing development rights program, requires only purchase some bundle of property rights instead of full fee title, selling price is always cheaper than that of purchasing full fee ownership[45].

Up to 1980s, regulatory policy was considered cheaper and effective way to protect environment. Particularly "zoning" regulation was recognized much cheaper in a broad areas such as Western States, without any payment, because zoning was legitimate without just compensation as a government policy power under the Tenth Amendment of the US Constitution. Besides that, zoning did not fall in the Fifth Amendment of the US Constitution provisions against taking the property without just compensation. This policy was supported by the Courts in Oregon. Courts have decided that "zoning" was legitimate without just compensation, as long as some economic values of lands were removed[46, 47].

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country. The more bundle legally defined the more value of the land assessed.

44 Korngold,1984.

45 Daniels, T. L. 1997. "The Purchase of Development Rights." *Journal of American Planning Association.* 57:(4), pp. 421-432.

46 Braswell, M. K., & S. L. Poe. 1995. "Private Property vs. Federal Wetland Regulation: Should Private Landowners Bear The Cost of Wetland Protection?" *American Busines Law Journal.* 33:(2), pp. 179-217.

47 Thompson, E. Jr. 1989. "Purchase of Development Rights: Ultimate Tool For Farmland Preservation?" *Zoning and Planning Law Report.* 12:(9), pp.

Since 1986, the Court has changed its opinion about regulatory policy as stating that if regulation reduces land's value to a greater extent, it is considered "taking" and government has to pay "just compensation"[48].

Recently, in Lucas vs. South Carolina Coastal Council case, the U.S. Supreme Court held how much a government regulation can go further according to the case of Pennsylvania Coal Co. vs. Mahan 1n 1922 in which Justice Holmes stated that "while property may be regulated to a certain extent; if regulation goes too far it would be recognized as a taking"[49]. In the referred case[50] above, David Lucas purchased two residential beach front lots on the Palms, South Carolina, in 1986. In 1988, Beach Front Management Act prohibited Lucas to construct houses on the lots. Lucas claimed that such a regulation required "just compensation" according to the Fifth Amendment of the US Constitution, because that kind of regulation reduced the viable value of land. The District Court decided for Lucas, but the Supreme Court of South Carolina reversed. Then, the Supreme Court of the United States reversed and remanded the resolution. The U.S. Supreme Court added a new dimension to the "taking" concept, such as physical invasion of property and denying all economical beneficial use of the land. Also, determining land value for compensation is wholly "arbitrary and capricious"[51].

In the case of Dolan vs. city of Tigard, Supreme Court held that there should have to be a reasonable connection between a government regulation and value of the land. If the value of the land is reduced to much lower, it is considered "taking" and requires "just compensation"[52].

Since the Court decided that government regulations on private land may be considered "taking" and required just compensation according to the Fifth Amendment of the U.S. Constitution, and to determine whether reduction on land value requires just compensation or not is wholly arbitrary, the federal regulatory policy on the lands became very expensive. Consequently, the new policy has shifted from regulatory policy to purchasing development rights or

153-160.

48 Braswell, and Poe, 1995.

49 Braswell and Poe, 1995, p.4.

50 Lucas vs. South Carolina Coastal Council Case.

51 Wright, J., B. 1994. "Designing and applying conservation easements." *Journal of American Planning Association,* 60: pp. 380-389.

52 Jordan,1993.

"conservation easement" on a particular pieces of a land which has a special nature conservation value[53].

Because purchasing development rights policy allows both use the land and save its scenic value and protect the habitat on it to some extent, it is considered the policy that balances private land use interest and public benefits on private lands. So, conservation easement led policy makers and private voluntary organizations develop a new balancing policy between conservation and economic development[54].

Theoretically a landowner does not need to use all bundle of rights on his property. Suppose that a landowner has a particular acre of farmland and in his bundle, he has the right of farm, right of way, right of scenic enjoyment, right of recreation etc., since he does not need all bundle of rights, he can make trade off any rights on the bundle, while he exploit other rights rest on the bundle. If he does not trade off on the rights, some of them would be waste use of property. If he trade off on some of the rights in the bundle, he will be better off, because he can raise revenue from trading off on the rights. When we look at the figure above, we see the theoretical explanation clearly.

VI. Conclusion

To sum up, conservation easement is a more reasonable, cheaper, and flexible land protection tool than regulatory policy. It allows the owner to make trade off on one or more of the sticks of the bundle. In here, without conveying title deed of the whole property the owner may both sell some interest on his property by keeping the rest of the rights in his hand and an environmental protection function is to be performed on the rest of the property. Thus, conservation easement, as a restrictive rights on a real property, can contribute protection and its application and scope can be more extended within the next future. Beyond that, the value of a piece of land having more bundle than that of having less bundle may be dependent upon the statutory provisions applied in the country. Creating more bundle by law makes the value of the land more and contributes an increment in the public welfare of the country.

53 Braswell & Poe, 1995.

54 Wiebe, K., A. Tegene, B. Kuhn. 1997. "Managing Public and Private Land Through Partial Interest." *Contemporary Economic Policy*. 15:(2), pp. 35-44.

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