

**INCORPORATING THE VALUE OF ECOSYSTEM
SERVICES IN LEGAL DECISION-MAKING**

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1. Introduction

(a) I aspire to a legal regime in which landowners are compensated for the ecosystem services produced by their land and water. This will occur by market payments, tax incentives (conservation easements), statutory reform for trespass and condemnation, and judge made tort law.

2. Conservation Easements

(a) A large market for protected lands

(i) There were 105,883 conservation easements covering 22,074,790 acres in the U.S. as of October 2014 according to National Conservation Easement Database <http://conservationeasement.us/> (last visited 3/8/15).

(b) The market compensation is tax incentives and cash

3. Existing case and statutory law on ecosystem services damages

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(a) Fee lands

(i) **Trespass statutes.** State trespass statutes generally do not recognize ecosystem services damages.

(ii) **Connecticut – C.G.S. Section 52-560a.** This statute allows damages for trespass on conservation easement lands, including attorney’s fees with a damage multiplier of up to five times the cost of restoration. *See Lyme Land Conservation Trust v. Platner*, Docket N. KNLCV 0960016075 Superior Court New London Connecticut (March 26, 2015).

(iii) **Tree Cutting Statutes.** Similar to ecosystems services damages, these statutes provide owners with restitution for damages beyond the lost economic value of their property.

(1) **Maine – Me. Rev. Stat. Tit. 17, § 2510.** “Any person who in fact cuts down or fells any tree without the consent of the owner of the property on which the tree stands commits a civil violation for which the forfeitures provided in this section may be adjudged. Proof of a culpable state of mind is not required...” Beyond civil penalties, the statute allows the court to “order restitution when appropriate on the basis of an adequate factual foundation.”

(2) **Massachusetts – Mass. Gen. Laws ch. 242, § 7.** “A person who without license willfully cuts down, carries away, girdles or otherwise destroys trees, timber, wood or underwood on the land of another shall be liable to the owner in tort for *three times the amount of the damages assessed therefor*; but if it is found that the defendant had good reason to believe that the land on which the trespass was committed was his own or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable for single damages only.”

(3) **Illinois – 740 Ill. Comp. Stat. § 185.** “Any party found to have intentionally cut or knowingly caused to be cut any timber or tree which he

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did not have the full legal right to cut or caused to be cut shall pay the owner of the timber or tree 3 times its stumpage value....

Within 30 days after the Department is ordered to establish value, it shall notify the court of its findings of value and expenses. The court shall then average the appraisals and award triple the average value and make final determination as to which party or parties shall pay expenses. The failure of any party to make full payment within the time limits set by the court or to cooperate with the Department shall be considered contempt of court.”

(iv) **Ecosystem services case law.** There are several cases in which ecosystem services damages in tort have been awarded on fee land.

(1) ***Pila’a 400, LLC v. Bd. Of Land & Natural Resources, 320 P.3d 912 (Haw. 2014)***. This case involved a company that did extensive grading on a piece of property that was located uphill from a State Conservation District (not a conservation easement, just fee ownership). When the area experienced heavy rains, the grading caused mud and other debris to wash into the Conservation District, damaging the land. The administrative agency assessed the LLC \$3,963,000 in damages, and stated that:

“The value of Pila’a beach, bay and reef includes use value, option value, commodity value, existence value, bequest value, cultural values, including value to indigenous people, and intrinsic value. Economic and use (market) values alone cannot and do not capture the full value of Pila’a. Economic valuation alone understates the true social loss from natural resource damage.”

Id. at 922. After a series of appellate courts agreed with the agency, the Hawaii Supreme Court also affirmed the administrative agency’s decision.

(2) ***Spaulding v. Howe, Docket No. 475-9-06 WRCV (Windsor Sup. Ct. Vt. Sept. 20, 2007)(unpublished)***. In this case, the defendant

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trespassed on the plaintiff's property and illegally cut timber, relying on an incorrectly drawn map. The court awarded \$30,000 in damages, of which \$4,675 was attributed to "loss of syruping/sugaring value." While this is technically an economic loss, it is somewhat less traditional than normal economic valuations.

(3) ***United States v. CB & I Constructors, Inc.*, 685 F.3d 827 (9th Cir. 2012)**. In this case, a construction company negligently set a forest fire that eventually burned 18,000 acres of National Forest in California. At trial, a jury awarded the United States \$7.6 million for fire suppression, emergency remediation, and resource protection costs, and awarded \$28.8 million (or \$1,600 per acre) in "intangible environmental damages." The government's witness described this intangible damage as "environmental harm to scenic views, recreational use, soil stability, water quality, plant life, wildlife habitat, the Red-Legged Frog population, and [a historical structure]." On appeal, the construction company argued that "intangible noneconomic damages are not compensable in tort suits alleging harm to property." Applying California law, the court concluded that "the government may recover intangible environmental damages because anything less would not compensate the public for all of the harm caused by the fire."

This case is a "must read" for ecosystem services damage to federal land. It contains citations to state court decisions. It is based in tort – a negligently set fire – and a California statute that establishes liability for property damages caused by willful, negligent or unlawful fire. Cal. Health & Safety Code §13007.

(4) ***Phoenix Pinelands Corp. v. United States*, 2010 U.S. Dist. LEXIS 40638 (D. N.J. 2010)**. The landowner brought trespass claims against the United States under the Federal Tort Claims Act after fighter jets dropped flares on its property, causing several fires. In response to an interrogatory, the plaintiff claimed damages based upon the lost *services provided by the ecosystem* that existed on Plaintiff's property prior to the fire." The United States moved for summary judgment and dismissal for failure to state a claim, arguing that these "services

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provided by the ecosystem” were not a cognizable measure of damages. Under New Jersey law, a landowner can recover damages using two different calculations:

“The first measure, and the one most commonly mentioned in the opinions, is the diminution measure. Under this measure the plaintiff is entitled to recover the difference in the value of his property immediately before and immediately after the injury to it, that is, the amount his property has diminished in value as a result of the injury. The other measure awards the plaintiff the reasonable cost of restoring or repairing the damage.”

The court concluded that “[t]he phrase ‘services provided by the ecosystem’ is somewhat vague, but it can easily be construed to refer to qualities of the land which are relevant to calculation under either the diminution measure or the cost of repair measure.” Accordingly, the court denied the motion for summary judgment.

(b) **Condemnation statutes.** There do not appear to be any state condemnation statutes that grant a landowner increased compensation for damages to ecosystem services. Even in states that allow for ecosystem services damages in the context of conservation easements, the condemnation statutes have no provisions for these types of damages.

(c) **Conservation Easements**

(i) **Enabling acts.** Three states allow damages for conservation easement violations to be calculated using, in part, “the loss of scenic, aesthetic, or environmental value.” These three states are Colorado, California, and Hawai’i. *See* Colo. Rev. Stat. § 38-30.5-108; Cal. Civ. Code § 815.7; and Haw. Rev. Stat. § 198-5. *See* A Guided Tour of the Conservation Easement Enabling Statutes by Robert H. Levin originally published January 2010 and updated January 2014. Damages of any kind are not addressed in the Uniform Conservation Easement Act.

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4. **Creating a more favorable reception for ecosystem services damages**

(a) **With and without reference to the markets and credits**

(b) **How to implement in court**

(c) **Appraisers and other expert witnesses**

(d) **Condemnation**

(i) Legislative changes in the states?

5. **Conservation Easement Clauses**

(a) **Ecosystem Services – Environmental Attributes Clause**

(i) Grantor hereby reserves all Environmental Attributes associated with the Property. “Environmental Attributes” shall mean any and all tax or other credits, benefits, renewable energy certificates, emissions reductions, offsets, and allowances (including but not limited to water, riparian, wetlands, wildlife species, plant species, greenhouse gas, beneficial use, and renewable energy) generated from or attributable to the conservation, preservation and management of the Property in accordance with this Deed. Nothing in this Paragraph shall modify the restrictions imposed by this Deed or otherwise impair the preservation and protection of the Conservation Values.

(ii) Environmental or Ecological Attributes of Property. Grantors shall retain the right to undertake any action in connection with any permitted activity or enter into any transaction that is primarily intended to preserve, restore or enhance the environmental or ecological functions of the Property so long as such action is not otherwise prohibited in this Conservation Easement. Any such action which involves surface alteration of the Property shall be subject to Grantee’s prior approval. Grantors’ reserved rights under this paragraph include, without limitation, transactions involving the sale of mitigation commitments, ecological

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services, carbon sequestration credits, or any other Property-related transaction that is intended to generate economic value associated with enhancing the Property's ecological or environmental attributes. No action or transaction carried out under this paragraph may significantly impair or interfere with the Conservation Values.

(iii) Nothing in this paragraph shall prevent Grantor from developing ecosystem functions on the Protected Property including, but not limited to, carbon sinks, stream bank restoration, biodiversity mitigation, carbon sequestration and wetland and stream mitigation (other than creation of wetlands from historically upland property, such as hillsides or sites with no more than one of the following: current or historical evidence of hydric soils, hydrophytic vegetation, or wetland hydrology), provided that such developments are not in conflict or inconsistent with the conservation purpose of or the restrictions set forth in this Easement and that prior written approval for same shall have been obtained from Holder. Holder is not responsible for monitoring any such activities for compliance with permit(s) therefore, and Holder has no obligation to enforce said permits.

(iv) Rights of Holder. In connection with the rights and responsibilities conveyed and assumed in this Easement the following rights are conveyed to Holder: a 20% share in the value obtained by Owner should Owner sell or trade carbon sequestration or other ecosystem services credits or some similar asset the value of which is supported by the long term conservation of the Property (which is evidenced in whole or in part by and accomplished in whole or in part through this Easement).

(v) Natural Resource Benefits. The right to enter into agreements whereby (1) Grantor agrees to manage the natural resources associated with the Property in a specific manner consistent with this Easement or (2) permits a third party to manage such natural resources in a specific manner consistent with this Easement. In addition, Grantor reserves the right to sell, trade, or exchange quantifiable natural resource benefits associated with the Property, provided that

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such sales, trades, or exchanges are exercised in a manner that is consistent with this Easement. Such agreements, and any management of such natural resources in accordance with such agreements, or to accomplish such sales, trades, or exchanges, shall be subject to the terms and conditions of this Easement, and Grantor shall at all times remain responsible for compliance with the terms of this Easement. One example of such agreement, sale, trade or exchange, is Grantor receiving compensation, including transferable credits, for participating in a greenhouse gas emission offset program. Another example would be agreeing to restore, enhance or manage a wetland as part of a wetland banking or credit program, providing that Grantor may not benefit from any compensation or credits available through such programs or agreement in the event that such restoration is required as a result of Grantor's violation of this Agreement. The Parties acknowledge that because the Conservation Values protected by the Easement shall not be adversely affected by such agreement, exchanges or trades, and the only interest affected shall be Grantor's interest, any compensation received by Grantor for such agreements, exchanges or trades shall be payable in its entirety to Grantor. The Parties acknowledge and agree that this reserved right does not include the right to exchange, trade, license, lease, transfer, or sell topsoil, sand, gravel, or water located on the Property.

(b) Violations - Damages

(i) Grantee's remedies described in this Section shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity, including the right to recover any damages for loss of Conservation Values as described in C.R.S. §38-30.5-108.

(c) Condemnation - Damages

(i) Grantee's remedies described in this Section shall be cumulative and shall be in addition to any and all remedies now or hereafter existing

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at law or in equity, including the right to recover any damages for loss of Conservation Values as described in C.R.S. §38-30.5-108.

6. **Who should be compensated for Ecosystem Services?**

(a) **Exxon Valdez and Deepwater Horizon examples**

(i) In the Exxon Valdez case, the company settled its civil case with the federal and state governments for just under \$1 billion, which was deposited into a fund that serves educational and environmental remediation goals. A separate lawsuit involving private plaintiffs garnered \$287 million in actual damages and (eventually) approximately \$500 million in punitive damages. These funds were also deposited into a fund and used to help aggrieved parties remediate their land and businesses.

(1) As of this writing, the United States and the State of Alaska are still seeking an additional \$90 million from Exxon under an obscure “reopener” clause in the settlement agreement that allows the governments to demand payment for harms that were not quantifiable at the time of the original agreement. Exxon is fighting this claim.

(ii) The Deepwater Horizon oil spill has been the subject of numerous lawsuits between the federal government, states, private citizens, British Petroleum, Transocean, and Halliburton.

(1) Initially, BP set up a private fund without a cap to compensate landowners and private citizens for their damages, including “natural resource damages.” BP has paid over \$13 billion in claims to businesses, individuals and the government.

(2) The civil penalties under the Clean Water Act will be decided in the near future in pending federal court litigation.

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(3) First BP reached a settlement of its criminal case in November, 2012. BP agreed to pay \$4.5 billion in fines and other payments. The settlement includes payments of \$2.394 billion to the National Fish and Wildlife Foundation, \$1.15 billion to the Oil Spill Liability Trust Fund, \$350 million to the National Academy of Sciences for oil spill prevention and response research, \$100 million to the North America Wetland Conservation Fund, \$6 million to General Treasury and \$525 million to the Securities and Exchange Commission. BP still faces fines under the Natural Resources Damage Assessment and payouts to impacted states. The settlement has also not resolved what may be the largest penalty related to the spill, the fines under the Clean Water Act. The potential fine for the spill under the act is \$1,100 to \$4,300 a barrel spilled, meaning the fine could be as much as \$21 billion.

7. **Is there a tension between selling or donating a conservation easement, and later selling ecosystem services from the same land?**

(a) **Excerpt from Treasury Regulation §1-70A-14(h)(3).** If, as a result of the donation of a perpetual conservation restriction, the donor or a related person receives, or can reasonably expect to receive, financial or economic benefits that are greater than those that will inure to the general public from the transfer, no deduction is allowable under this section. However, if the donor or a related person receives, or can reasonably expect to receive, a financial or economic benefit that is substantial, but it is clearly shown that the benefit is less than the amount of the transfer, then a deduction under this section is allowable for the excess of the amount transferred over the amount of the financial or economic benefit received or reasonably expected to be received by the donor or the related person.

Appendix Materials

Pila'a 400, LLC v. Bd. Of Land & Natural Resources, 320 P.3d 912 (Haw. 2014).

United States v. CB & I Constructors, Inc., 685 F.3d 827 (9th Cir. 2012).

Phoenix Pinelands Corp. v. United States, 2010 U.S. Dist. LEXIS 40638 (D. N.J. 2010).

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Appendix Materials Continued

Lyme Land Conservation Trust v. Platner, Docket No. KNLCV 0960016075 Superior Court
New London Connecticut (March 26, 2015).

Cal. Civ. Code § 815.7. Enforceability; Remedies.

Colo. Rev. Stat. 38-30.5-108. Enforcement – remedies.

Haw. Rev. Stat. § 198-5. Enforcement of easement.

Conn. Gen. Stat. § 52-560a. Damages for encroachment on state, municipal or nonprofit
land conservation easement open space.