

FRAMING THE PAST, PRESENT AND FUTURE OF LAND CONSERVATION LAW

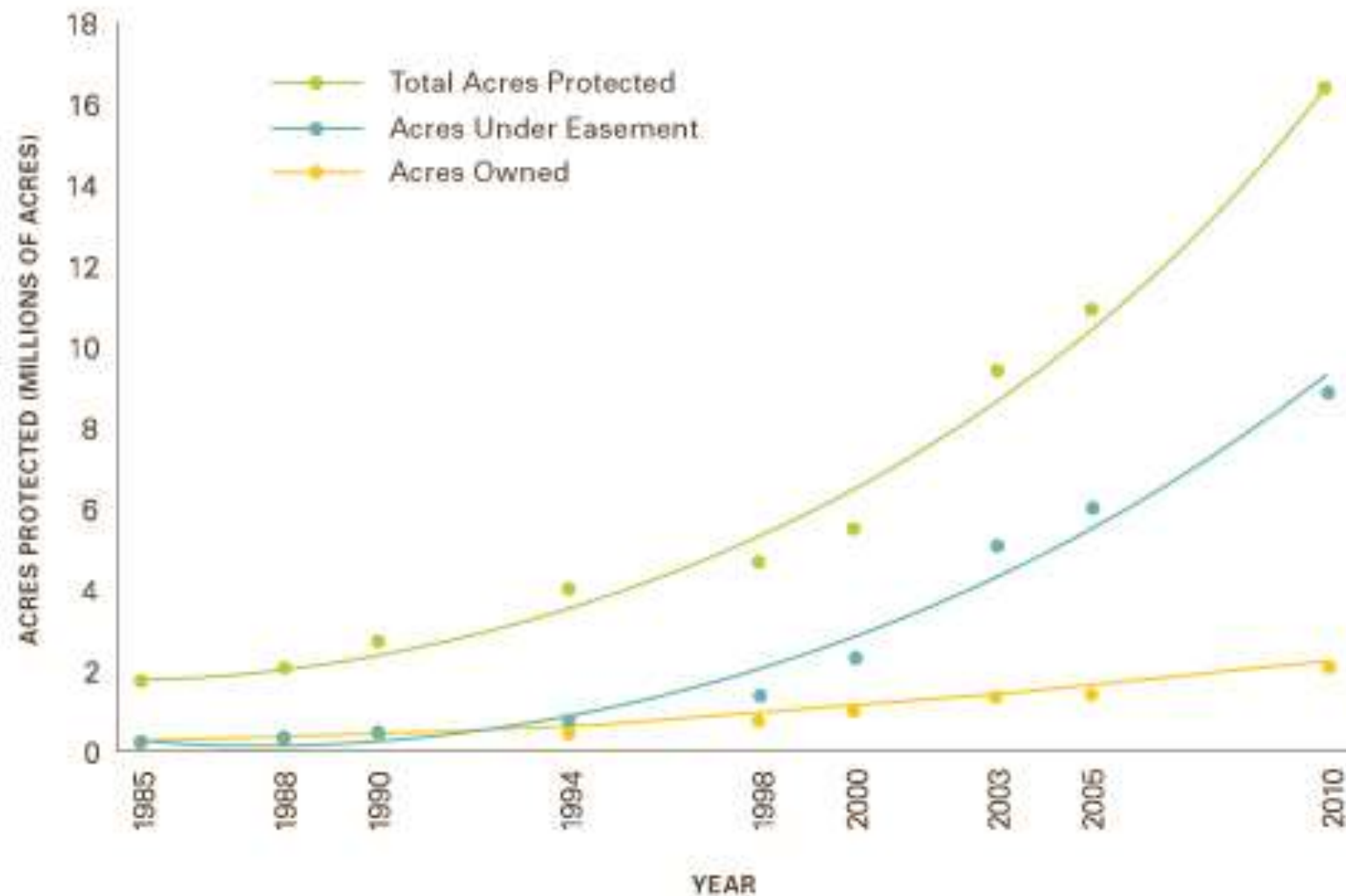
Professor Federico Cheever
University of Denver Sturm College of Law
March 13, 2014

Conservation Timeline – The Past – Punctuated Equilibrium

- 1891 – Trustees of Public Reservations
- 1891 – Forest Reserves Creation Act
- 1895 – Establishment of National Trust (U.K.)
- 1897 – Forest Service Organic Act
- 1903 – Pelican Island Refuge
- 1905 – Forest Service Use Book
- 1906 – Antiquities Act
- 1908 – National Conservation Conference
- 1909 – First National Conference of City Planning
- 1909-1912 – Denver Mountain Parks
- 1916 – New York Zoning Ordinance
- 1916 – Park Service Organic Act

THE PRESENT --
DRAMATIC GROWTH IN
“PRIVATE” LAND
CONSERVATION

Private Land Conservation by State and Local Land Trusts



Conservation Easement -- Simple Transaction

The Original Owner Seeks to Keep The Land in a Natural State. The Original Owner will receive market value, less than market value, a tax deduction or nothing

Land Trust
(Received Right to Prevent all/some Development)

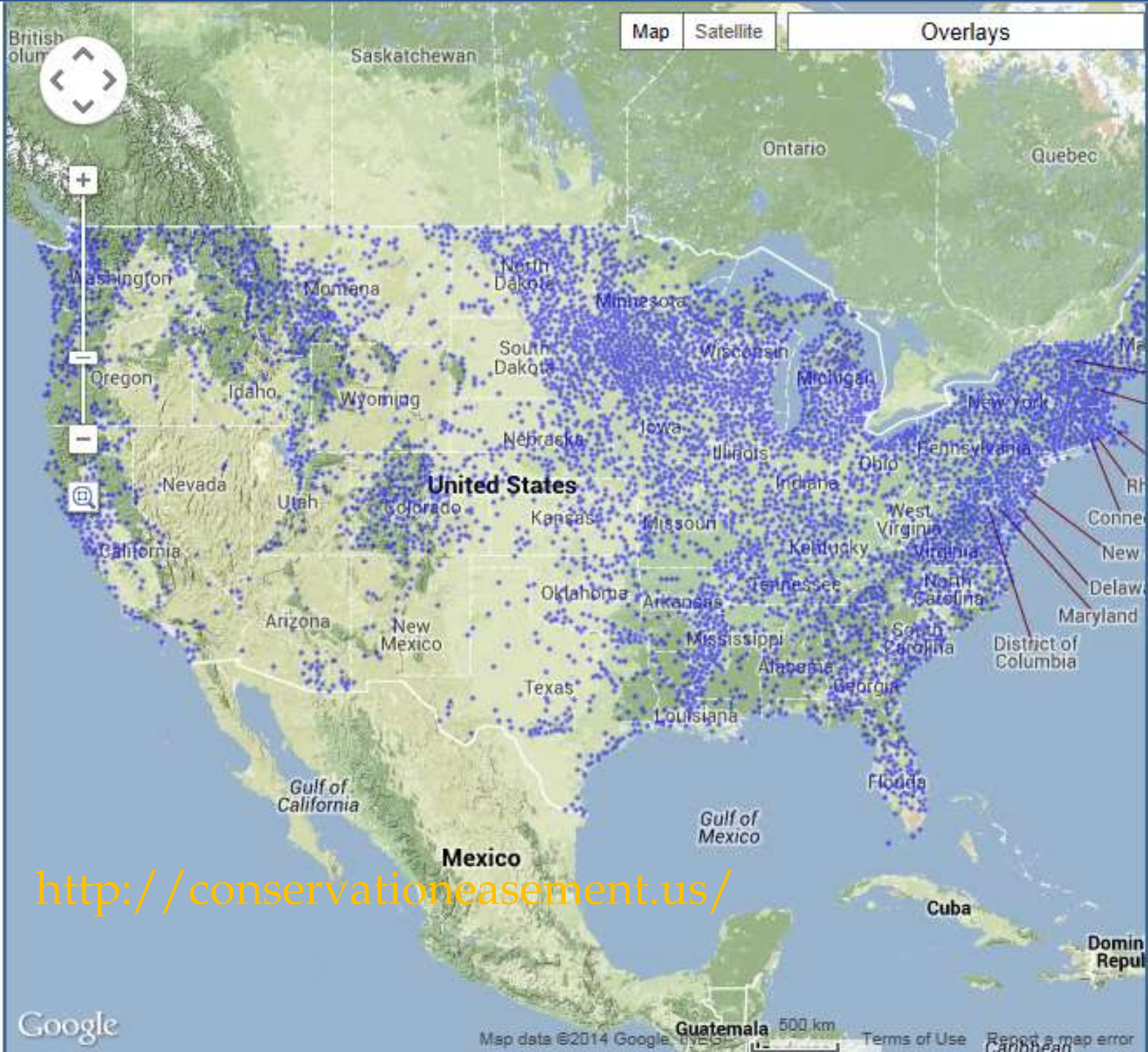
DEED OF
Conservation
Easement

The Land Trust Plans to Hold the Rights

Original Owner
(Retains Right of Access and Right to Exclude)

The Conservation Easement Spells out Exactly What Rights the Owner Retains and What Rights She Conveys





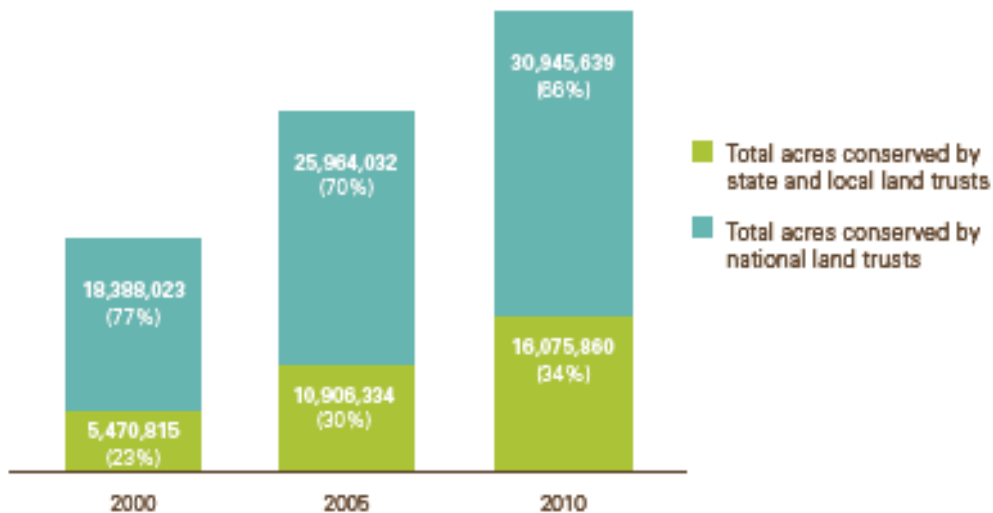
<http://conservationeasement.us/>

Colorado's Trends in Conservation: 2005–2010

- Land trusts in Colorado have protected 1,225,050 acres — this represents a 53% increase in acres conserved since 2005. Colorado ranks third in the nation in acres conserved, and first in the Southwest.
- There are now 38 land trusts operating in Colorado, including 29 staffed groups and 5 all-volunteer groups.
- Colorado increased their full- and part-time staff and contractors 60% in 5 years, for a total of 152 paid positions in 2010.
- Land trusts in Colorado drew upon the work of 1,529 active volunteers (an increase of 21% since 2005) and the contributions of 13,456 members and financial supporters.
- As a signal of the land trust community's commitment to excellence, there are now 13 accredited land trusts in Colorado. Together, these 13 groups have protected 948,323 acres as of 2010.

Private Conservation in the “Big League”

Total Acres Conserved by All Land Trusts:
State, Local and National

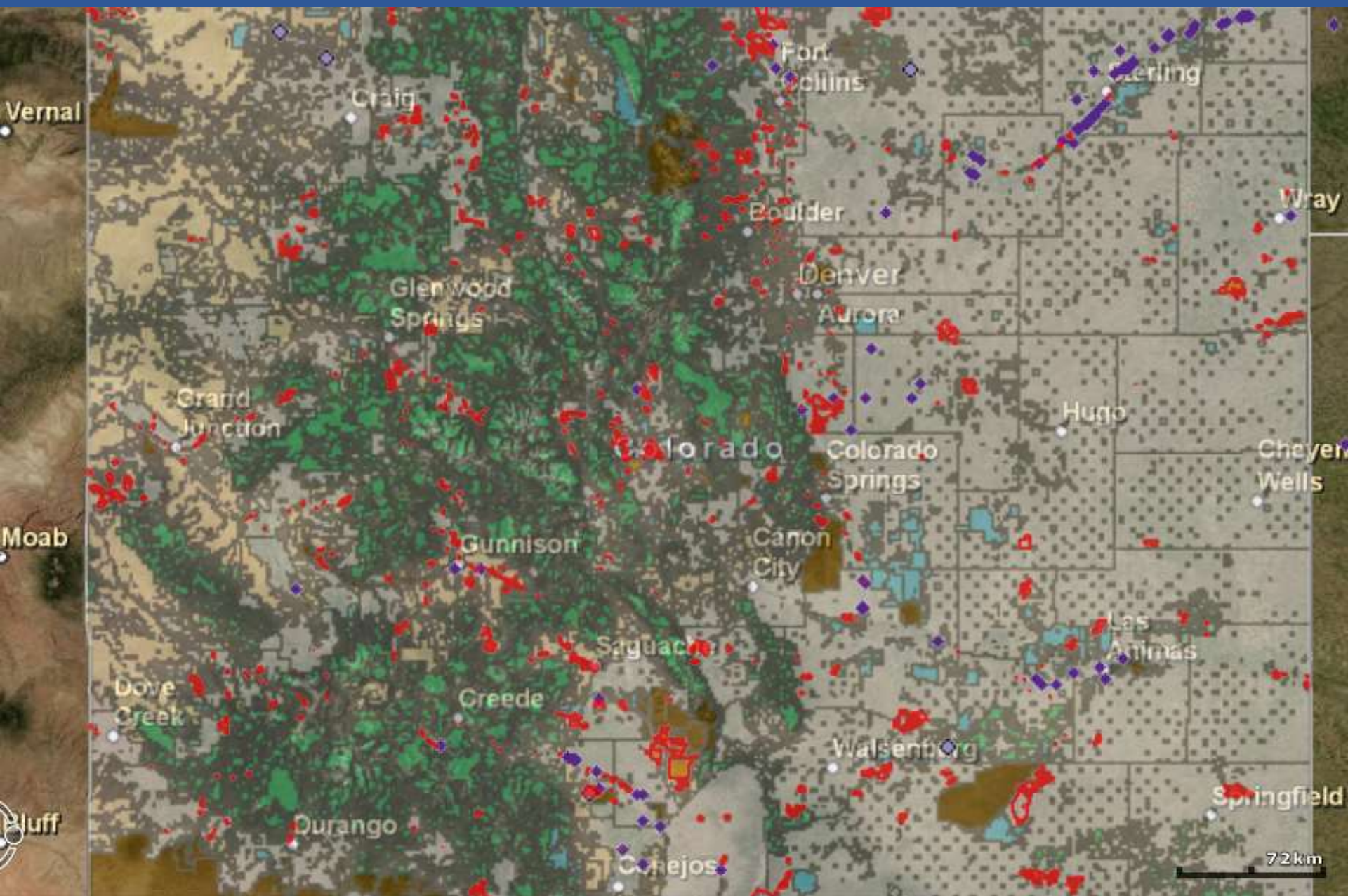


National land trusts conserved almost twice as much land as state and local land trusts, but the percentage of total land saved by state and local land trusts grew to more than a third of total acres protected in 2010, up from less than a quarter in 2000.

National Park System (Including Alaska) 1872-2013–
81 Million Acres

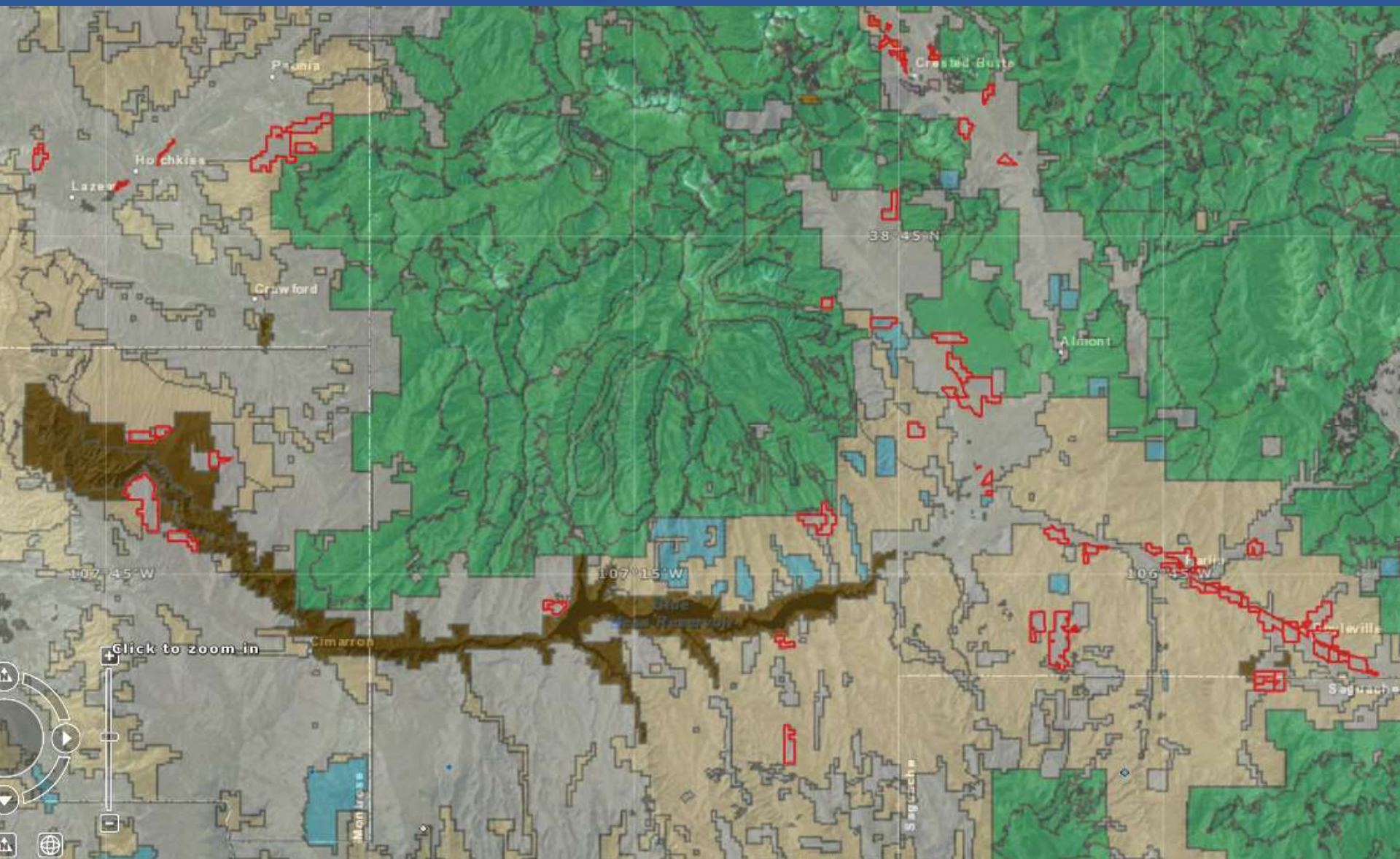
National Forest System (Including Alaska) 1891-2013
191 Million Acres

THE PRESENT --
LANDSCAPE RELEVANCE OF
PRIVATE LAND
CONSERVATION IN THE
WEST - PATTERNS FROM
VOLUNTARY
TRANSACTIONS

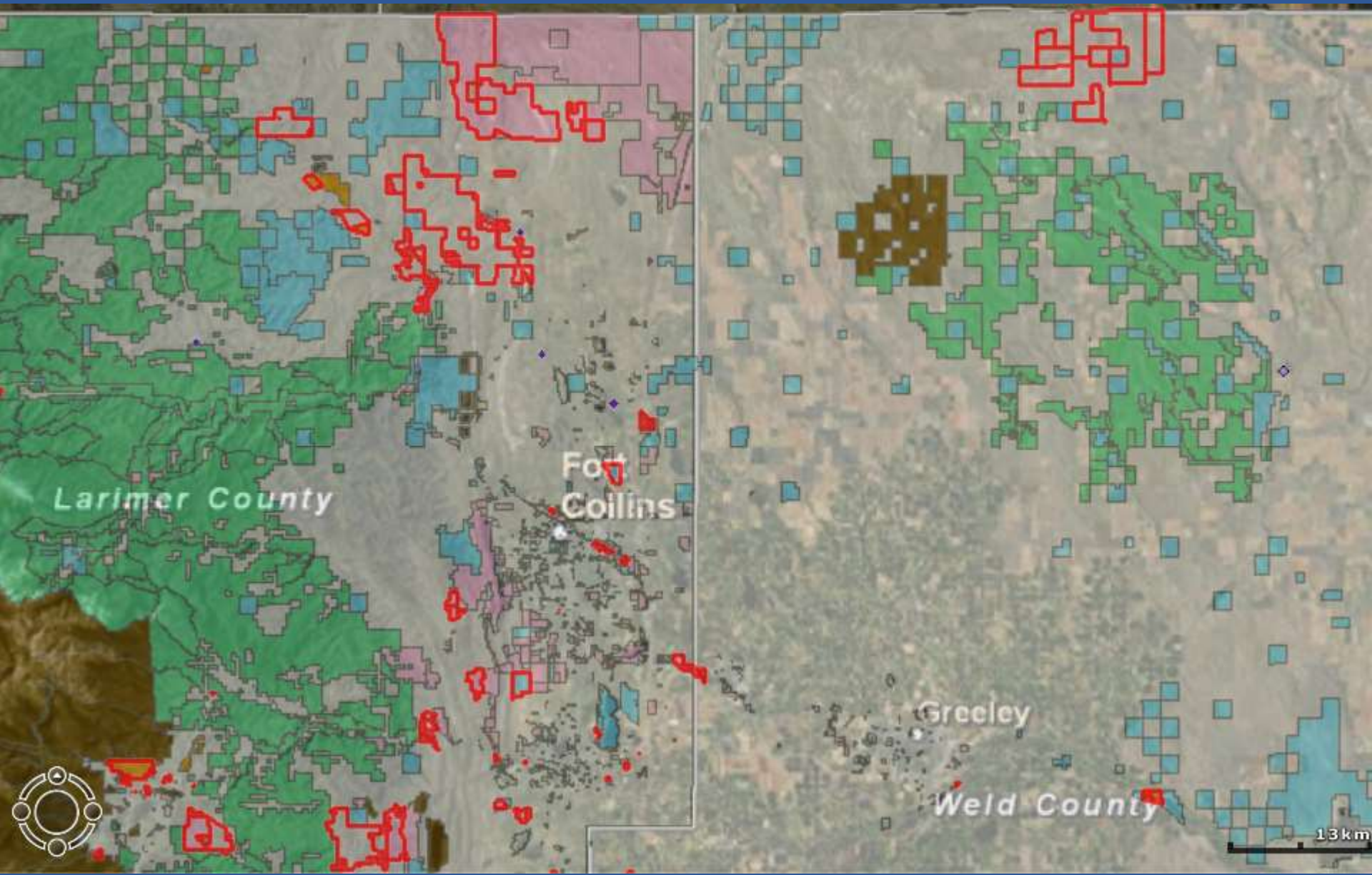


<http://www.nrel.colostate.edu/projects/comap/>

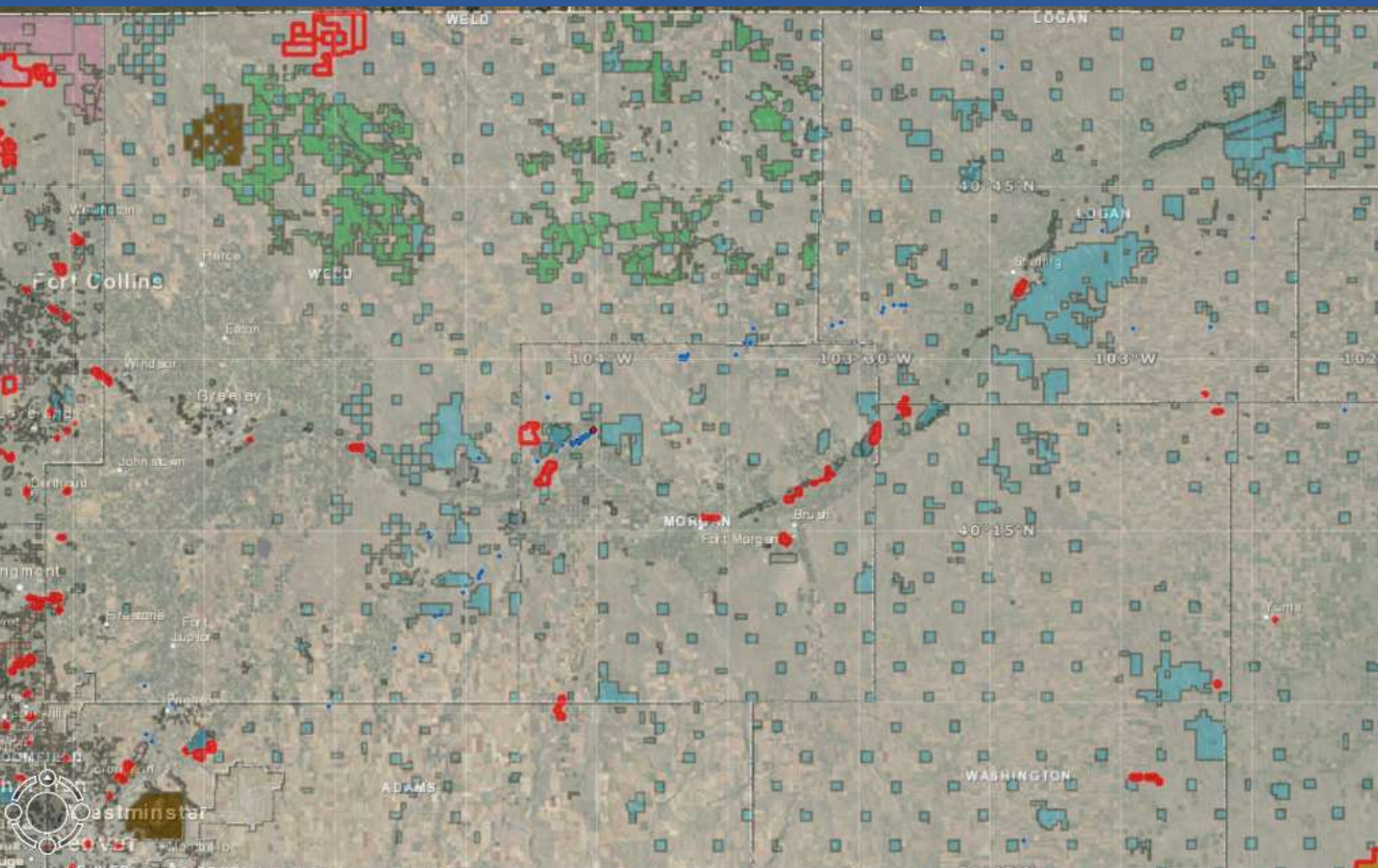
Patching Public Lands



City Buffers and Climate Bridges



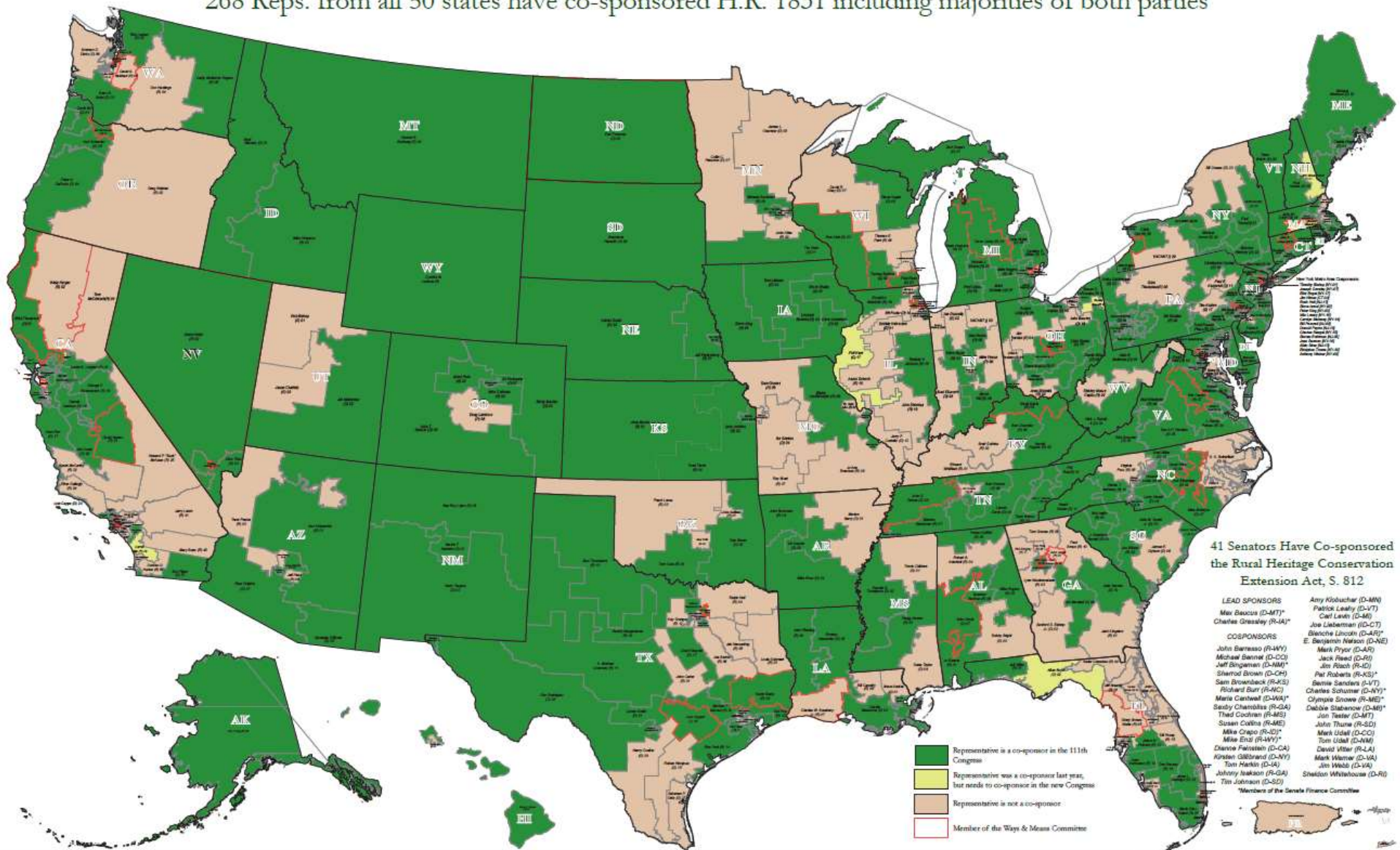
Buffering Riparian Areas



THE PRESENT --
POLITICAL SUPPORT
TRENDS

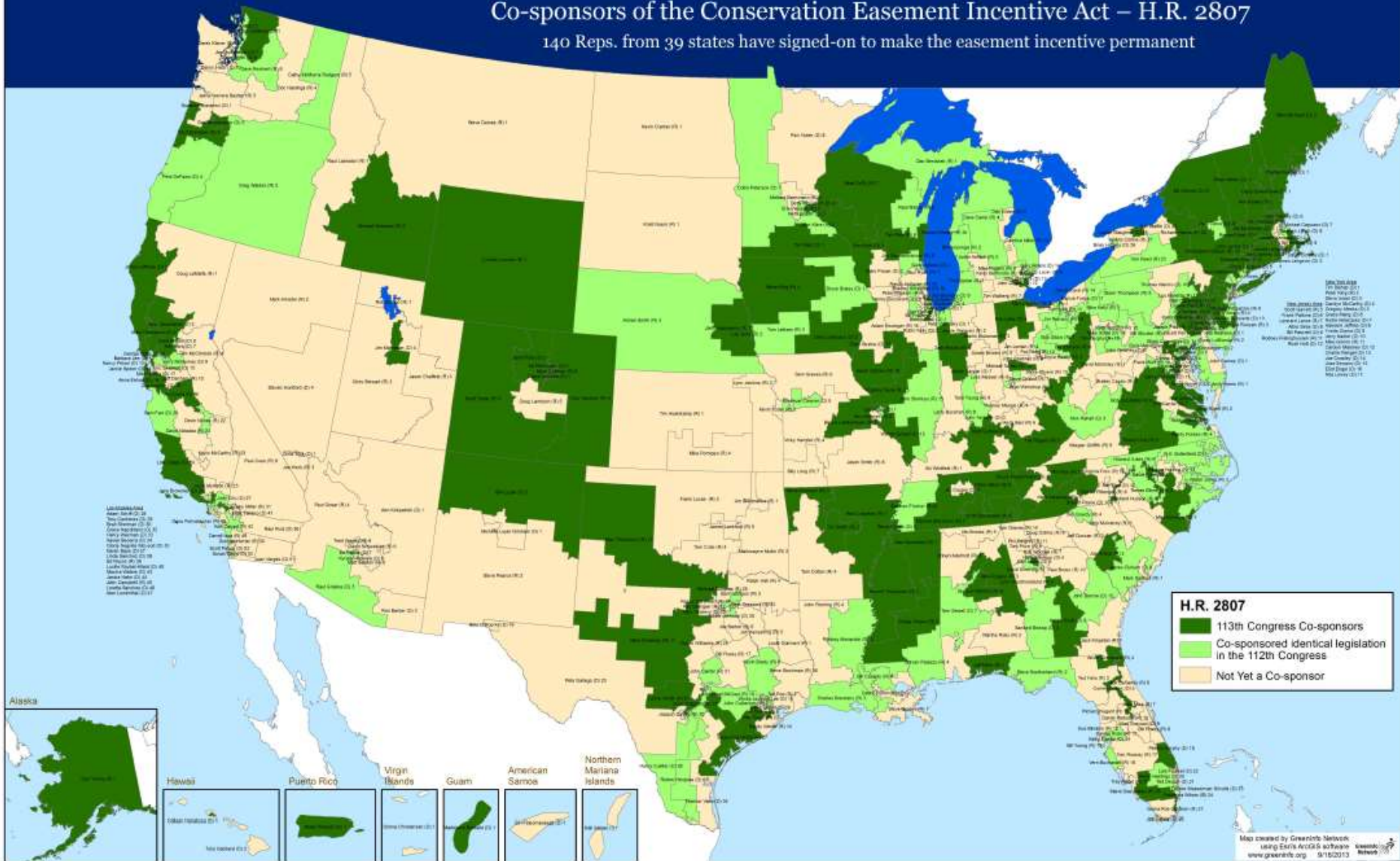
Co-sponsors of the Conservation Easement Incentive Act

268 Reps. from all 50 states have co-sponsored H.R. 1831 including majorities of both parties



Co-sponsors of the Conservation Easement Incentive Act – H.R. 2807

140 Reps. from 39 states have signed-on to make the easement incentive permanent





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America's Great Outdoors: A Promise to Future Americans

President Obama launched the America's Great Outdoors (AGO) Initiative to develop a 21st Century conservation and recreation agenda. AGO takes as its premise that lasting conservation solutions should rise from the American people – that the protection of our natural heritage is a non-partisan objective shared by all Americans.

AGO recognizes that many of the best ideas come from outside of Washington. Instead of dictating policies, this initiative turns to communities for local, grassroots conservation initiatives. Instead of growing bureaucracy, it calls for reworking inefficient policies and making the Federal Government a better partner with states, tribes, and local communities. The report below is the result of this work.

Learn about America's Great Outdoors

- [50-State Report](#)
- [The Report](#)
- [Presidential Memo: A 21st Century Strategy for America's Great Outdoors](#)
- [Watch the America's Great Outdoors video](#)
- [President Obama's 2011 speech on the America's Great Outdoors Initiative](#)

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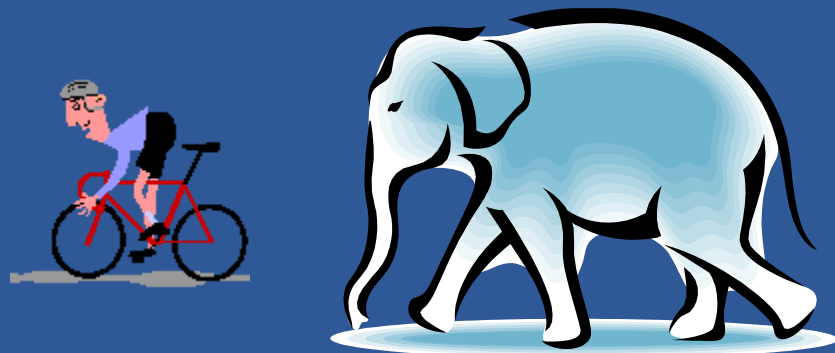
Get Involved

[Register here to receive updates](#)

Instead of dictating policies, this initiative turns to communities for local, grassroots conservation initiatives. Instead of growing bureaucracy, it calls for reworking inefficient policies and making the federal government a better partner with states, tribes, and local communities.

<http://americasgreatoutdoors.gov/>

AGO listening sessions revealed a growing awareness that protecting the nation's natural and cultural heritage requires working across land ownership . . . At listening sessions, Americans also emphasized the importance of incentive-based approaches to conservation. They noted that conservation must make economic sense to landowners. . . . One of the most frequent recommendations was to maintain the enhanced tax deduction for conservation easements.



But ...

Land Trust Scams on the Rise

By Elizabeth MacDonald / Emac's Bottom Line / Published January 21, 2013 / *FOXBusiness*



Elizabeth MacDonald

The Great Recession has triggered a rising tide of real estate and tax abuse centered around land trusts that is going ignored, the Internal Revenue Service, Congress' Joint Committee on Taxation and the Government Accountability Office have all warned.

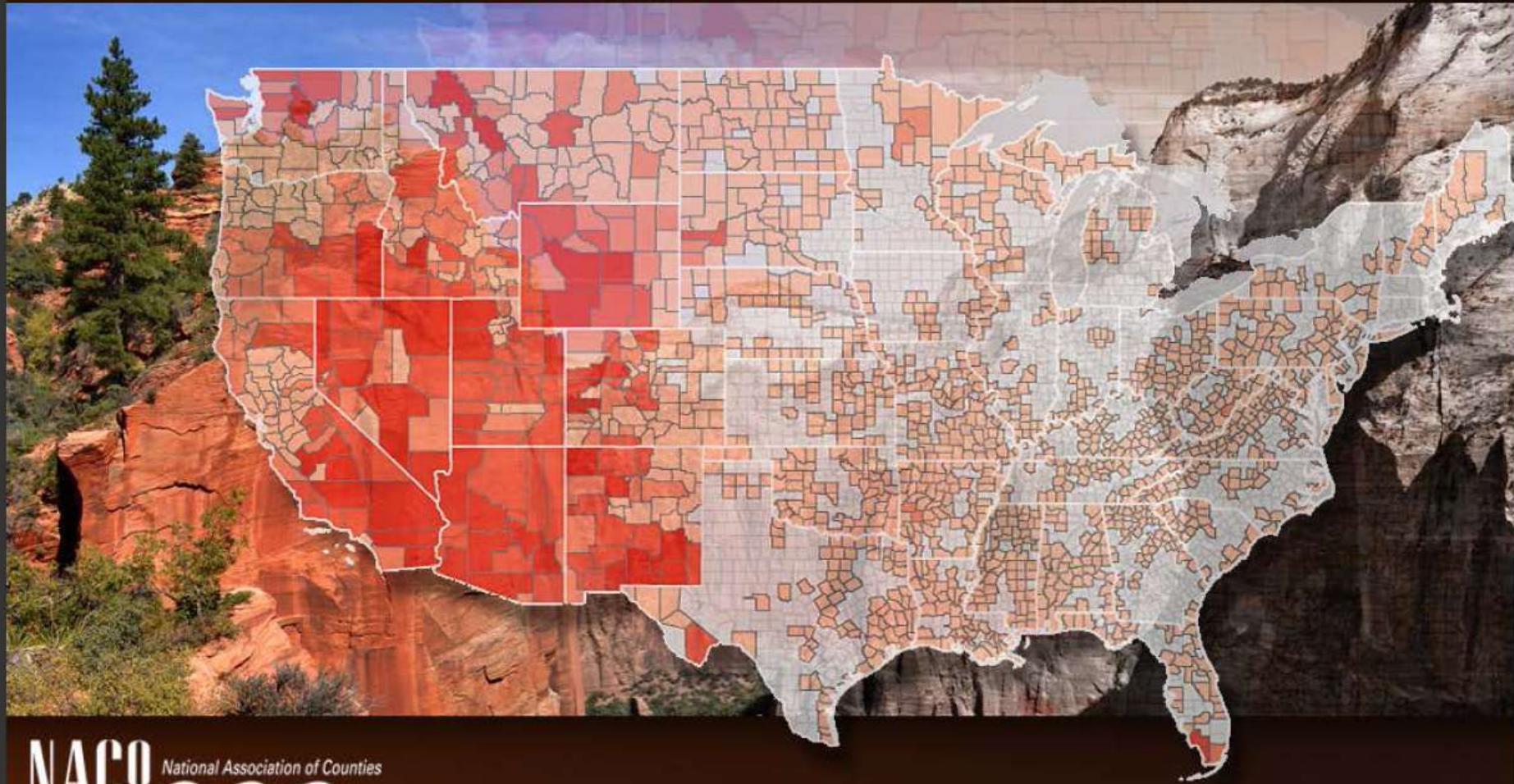
Land trusts, in which landowners donate land to trusts in an effort to obtain billions of dollars in federal tax deductions, have allowed some property owners to wipe out all of their federal tax bill.

The Government and “Private” Land Conservation

- ▣ Federal Tax Deductions
- ▣ Direct Federal Funding (LWCF/ AGO)
- ▣ State Tax Deductions and Credits
- ▣ Direct State Funding (GOCO)
- ▣ State Statutory Authorization (CE Statutes)
- ▣ “Making” the Open Space Market
- ▣ **Local Tax Exemptions**
- ▣ Direct Local Government Funding

THE FUTURE- POLITICAL
SUPPORT
LOCAL GOVERNMENT
REBELLION

The Payment in Lieu of Taxes (PILT) Program



The History of PILT

PILT's Authorization and Appropriation Levels

1976-1994

Historically, PILT payments were limited to an amount appropriated by Congress. Initially authorized at \$100 million, that amount was appropriated annually during the first decade of the Act. During the 1980s, there were attempts to zero out the amount in budgets, but Congress made the minimum amount available each year.

1995-2007

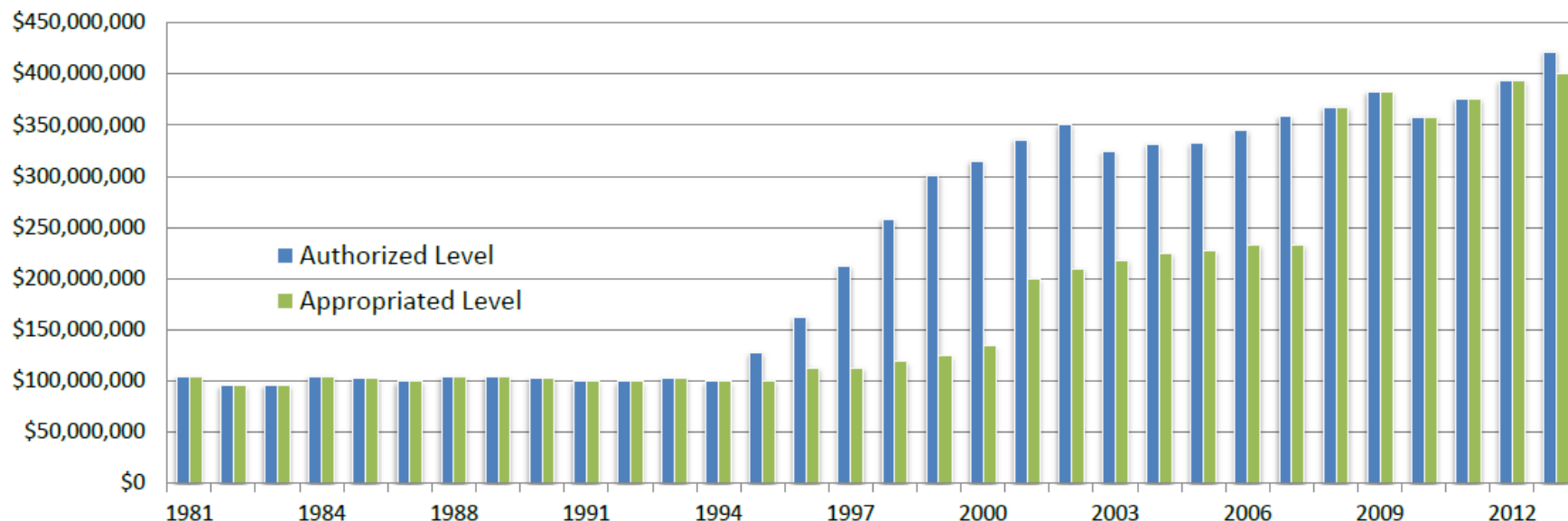
After the 1994 PILT reform, which tied authorization levels to the consumer price index (CPI), authorized and appropriated levels began to diverge. PILT is one of the few federal funding programs that has a "floating authorization" amount.

2008-2012

Despite increasing authorized levels after 1994, PILT was not fully funded until 2008, when it was changed from a discretionary to a mandatory program. As a result, PILT was fully funded between 2008 and 2012.

2013

The Moving Ahead for Progress in the 21st Century Act (MAP-21), enacted in July 2012, included mandatory PILT funding for 2013.



Long Standing Tension

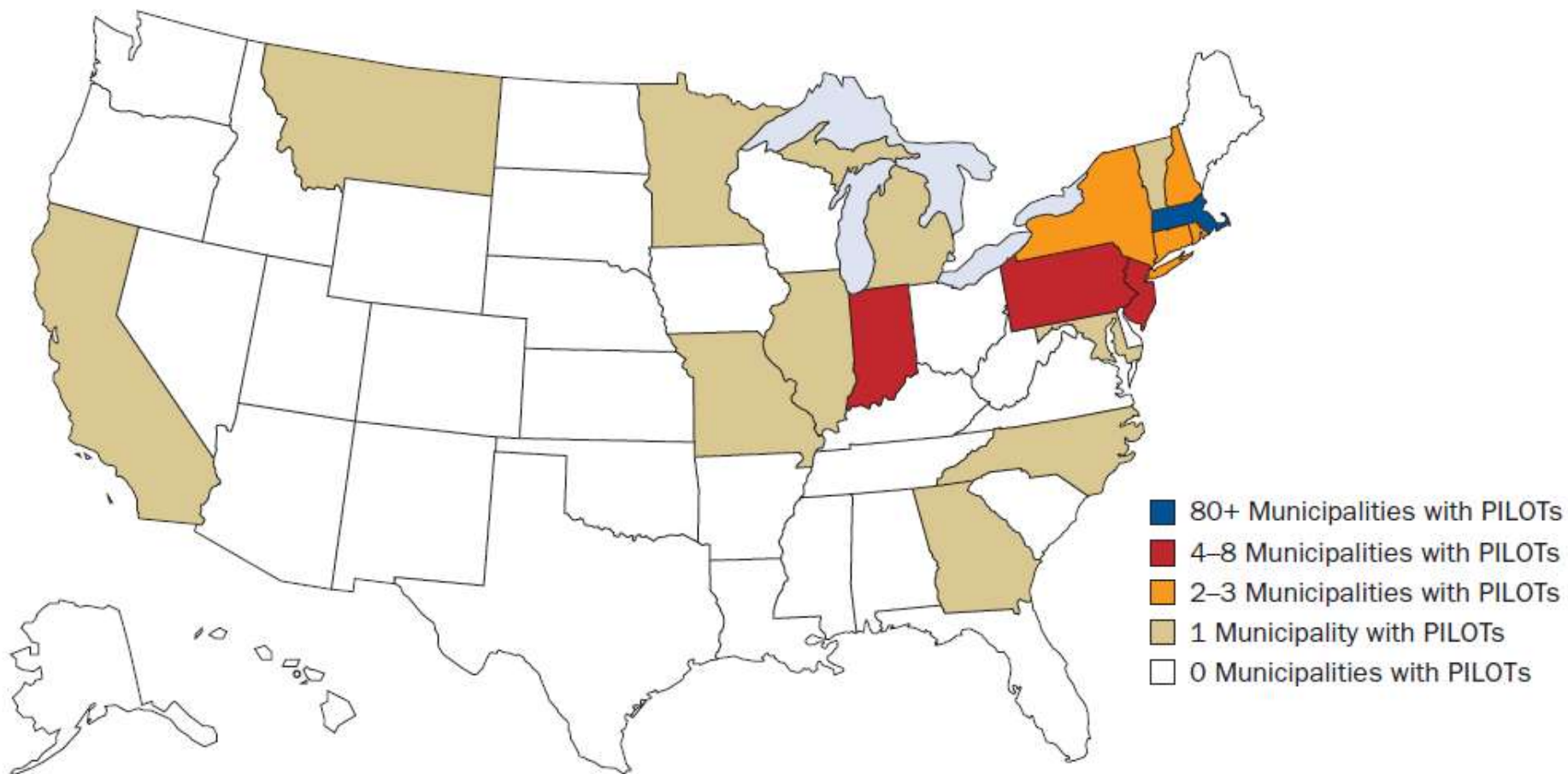
Policy Focus Report • Lincoln Institute of Land Policy

Payments in Lieu of Taxes

Balancing Municipal and Nonprofit Interests



FIGURE 2
States with Municipalities Collecting PILOTs (2000–2010)



Source: Authors' research (see chapter 3).

PILOT Requests for FY 2013

Educational Institutions	FY11 PILOT	Total Exempt Value	If Taxable	FY13 PILOT (Year 2)	Less Community Benefits Credit	Cash PILOT	1st Half PILOT Notice	1st Half PILOT - Actual
Berklee College	\$151,331	\$149,334,523	\$4,635,344	\$548,145	(\$274,072)	\$274,072	\$137,036	\$91,218
✓ Boston Architectural College	-	\$19,056,500	\$591,514	\$12,591	(\$6,296)	\$6,296	\$3,148	\$3,148
Boston College	\$297,571	\$526,217,533	\$16,333,792	\$1,735,615	(\$867,807)	\$867,807	\$433,904	\$315,332
Boston College High School	-	\$27,176,500	\$843,559	\$37,796	(\$18,898)	\$18,898	\$9,449	\$5,000
✓ Boston Conservatory	-	\$23,099,000	\$716,993	\$25,139	(\$12,570)	\$12,570	\$6,285	\$6,285
✓ Boston University	\$5,082,079	\$1,857,208,214	\$57,647,743	\$11,159,196	(\$5,579,598)	\$5,579,598	\$2,789,799	\$2,789,799
Catholic Memorial	-	\$16,753,071	\$520,015	\$5,442	(\$2,721)	\$2,721	\$1,360	\$0
Emerson College	\$141,591	\$240,541,000	\$7,466,393	\$869,988	(\$434,994)	\$434,994	\$217,497	\$70,795
Emmanuel College	-	\$153,126,000	\$4,753,031	\$428,743	(\$214,372)	\$214,372	\$107,186	\$0
Fisher College	-	\$42,819,500	\$1,329,117	\$86,352	(\$43,176)	\$43,176	\$21,588	\$0
Harvard University	\$2,109,293	\$1,522,337,601	\$47,253,359	\$7,203,714	(\$3,601,857)	\$3,601,857	\$1,800,929	\$1,080,145
✓ Mass College of Pharmacy	\$242,252	\$109,297,000	\$3,392,579	\$583,400	(\$291,700)	\$291,700	\$145,850	\$145,850
✓ NE College of Optometry	-	\$25,065,500	\$778,033	\$31,243	(\$15,622)	\$15,622	\$7,811	\$7,811
New England Conservatory	-	\$31,627,000	\$981,702	\$51,610	(\$25,805)	\$25,805	\$12,903	\$0
Northeastern University	\$30,571	\$1,285,478,281	\$39,901,246	\$3,329,741	(\$1,664,870)	\$1,664,870	\$832,435	\$443,000
Roxbury Latin School	-	\$52,829,300	\$1,639,821	\$117,422	(\$58,711)	\$58,711	\$29,356	\$0
✓ Showa Institute	\$123,084	\$42,694,600	\$1,325,240	\$233,665	(\$116,832)	\$116,832	\$58,416	\$58,416
✓ Simmons College	\$15,000	\$139,730,000	\$4,337,219	\$405,162	(\$202,581)	\$202,581	\$101,290	\$108,790
✓ Suffolk University	\$378,979	\$228,659,417	\$7,097,588	\$1,117,974	(\$558,987)	\$558,987	\$279,493	\$280,000
✓ Tufts University	\$232,975	\$158,300,662	\$4,913,653	\$724,376	(\$362,188)	\$362,188	\$181,094	\$187,500
✓ Wentworth Institute of Tech.	\$31,504	\$196,470,568	\$6,098,446	\$601,090	(\$300,545)	\$300,545	\$150,273	\$150,273
Wheelock College	-	\$54,656,000	\$1,696,522	\$123,092	(\$61,546)	\$61,546	\$30,773	\$0
Winsor School	-	\$41,283,900	\$1,281,452	\$81,585	(\$40,793)	\$40,793	\$20,396	\$0
TOTAL	\$8,836,231	\$6,943,761,670	\$215,534,362	\$29,513,081	(\$14,756,541)	\$14,756,541	\$7,378,270	\$5,743,362

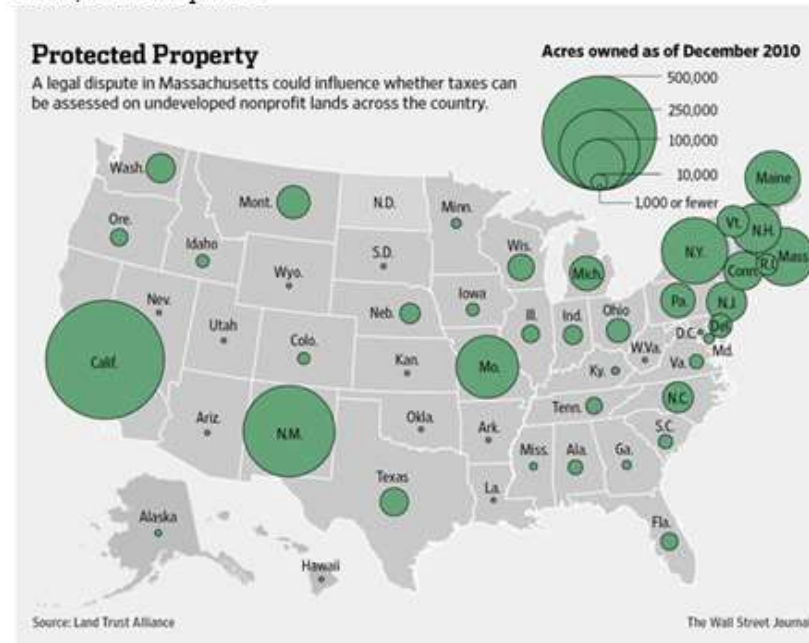
A New Game

Wall Street Journal

For Land Trusts, a Landmark Case

Dispute Over \$172.87 Tax Bill May Guide How Municipalities Handle Property Held in Public Interest

By
Cameron McWhirter
Feb. 4, 2014 6:35 p.m. ET



Virginia Gabert, a part-time administrative assistant for the tiny town of Hawley, Mass., recalls being taken aback five years ago when she received a letter from a nonprofit declining to pay its annual tax bill of \$172.87.

"We were very surprised from the beginning," said Ms. Gabert, noting that the nonprofit had paid taxes on the 120 forested acres for a decade. "It's like they said, 'Hey, let's pick on a small town.'"

The nonprofit, the New England Forestry Foundation, believes it is the one being picked on. It decided to seek full tax exemption on the Hawley property as a test case on the issue after it started

Specifically, § 5, Clause Third, exempts from taxation all “personal property of a charitable organization, . . . and real estate owned by . . . and occupied by it or its officers for the purposes for which it is organized” G.L. c. 59, § 5, Clause Third.

New England Forestry Foundation v.
Board of Assessors of the Town of Hawley
(Tax Appellate Board January 28, 2013).

“A charity in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either *by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.*”

New Habitat, Inc., 451 Mass. at 732 (quoting *Jackson v. Phillips*, 96 Mass. 539, 14 Allen 539, 556 (1867))

Quoted in New England Forestry Foundation v. Board of Assessors of the Town of Hawley (January 28, 2013).

{T]he subject property nonetheless did not appear to be open to the general public. The subject property lacked sufficient signage alerting the public to its availability for public usage. Information was not disseminated to the public on any wide scale; its inclusion on a very narrowly distributed Community Forest booklet and a broken link on a website did not constitute sufficient dissemination to the public of the subject property's availability.

Moreover, the subject property was not easily accessible. It was situated at the end of a dirt road that passed between a private house and barn, and thus its entry had the appearance of being a driveway within a private property.

New England Forestry Foundation v. Board of Assessors of the Town of Hawley (January 28, 2013).