

Property Rights & Environment

John Wargo

Professor, Yale University

Lecture 18

Environmental Politics and Law

April 1, 2010

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Perceived Legitimacy of Regulation...

Influential Factors?

Participation in Decision Making

Transparency of Process

Value Imposition

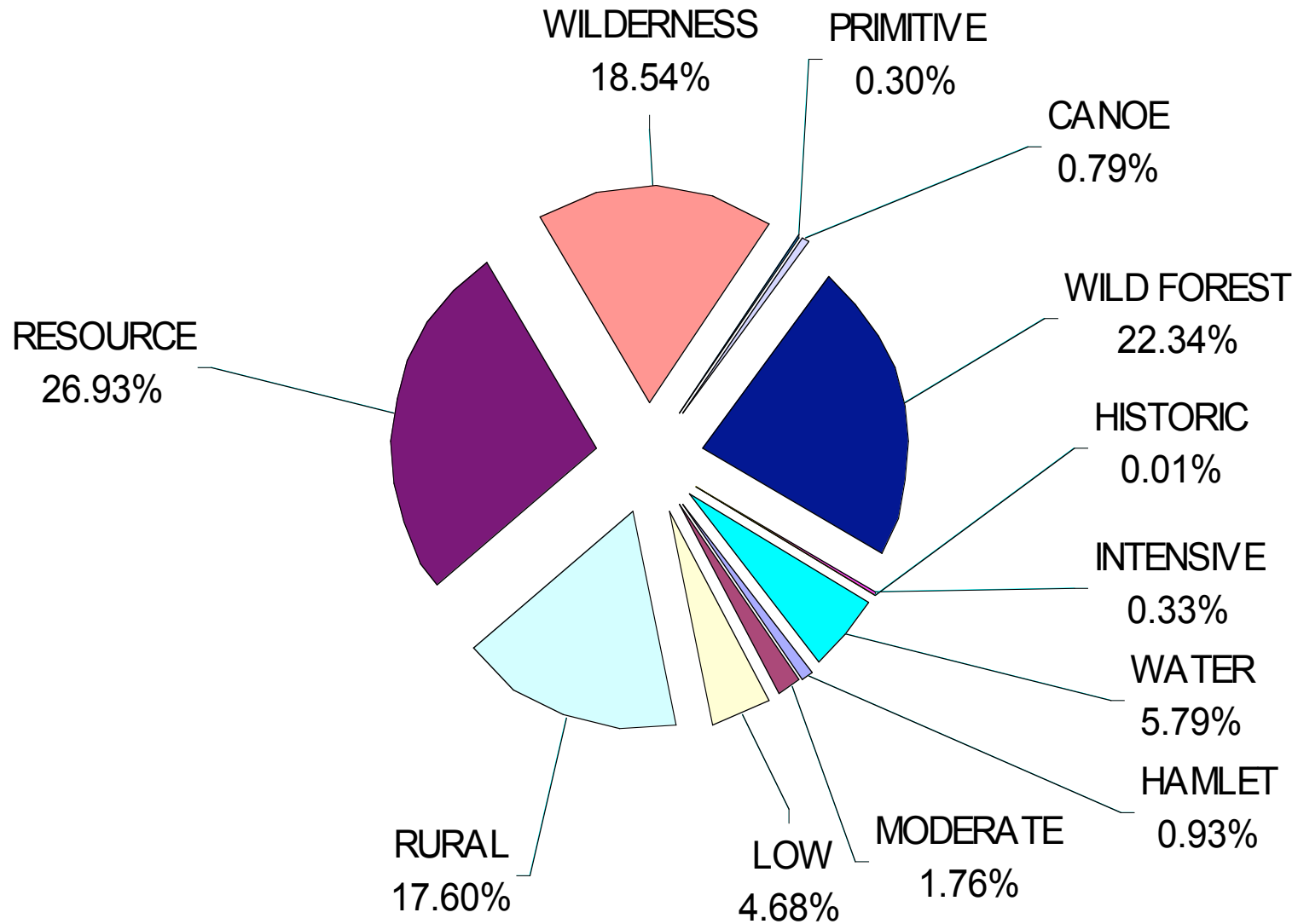
Strength of Science

Capacity to Challenge Science & Law

Compensation

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Pie: Public and Private

Definition of Wilderness: Wilderness Act 1964

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.

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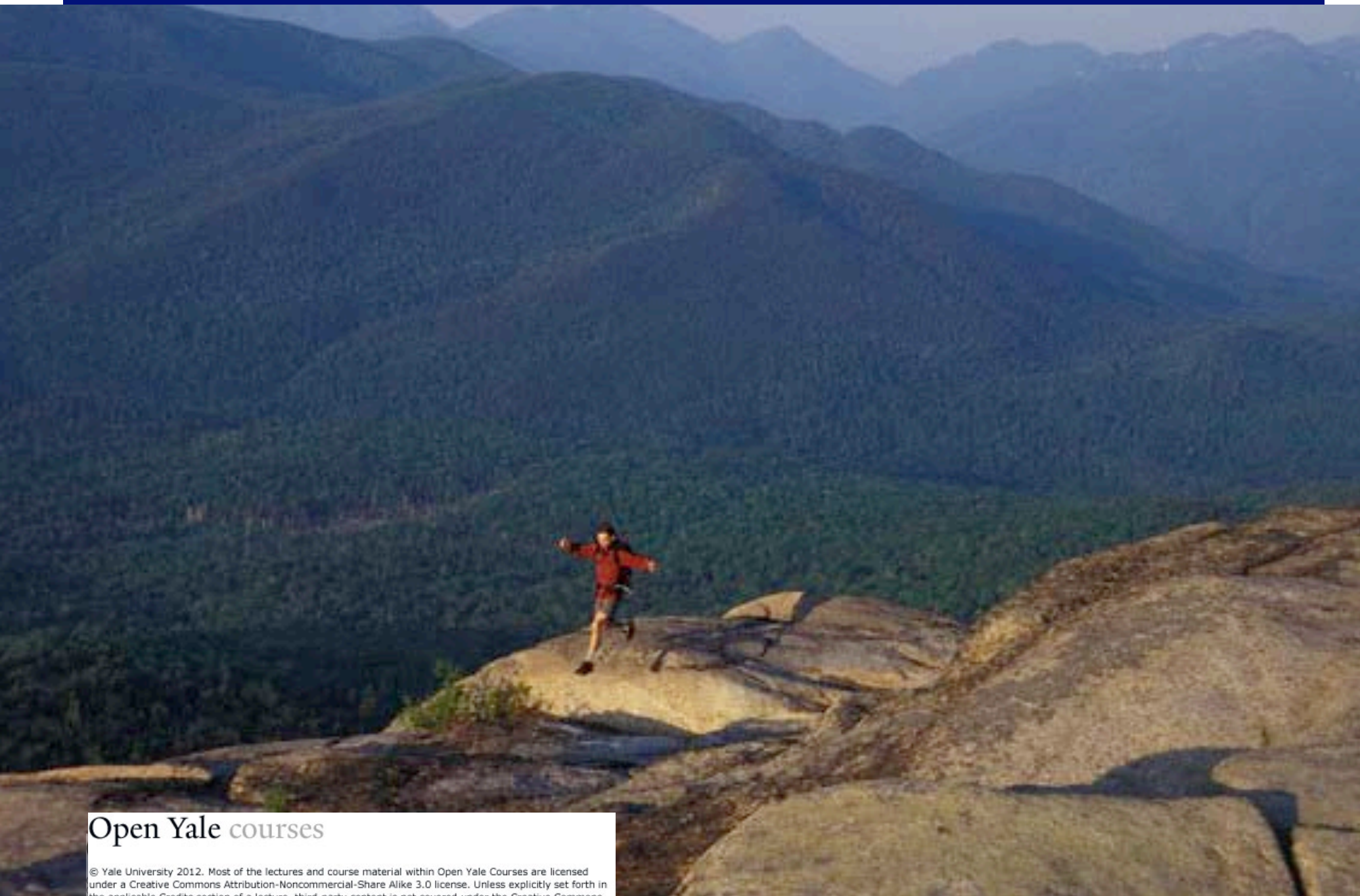
William Cronon:

The Trouble With Wilderness

“If we allow ourselves to believe that nature, to be true, must also be wild, then our very presence in nature represents its fall.”

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Adirondack Park Barnes Island

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PARADOX OF WILDERNESS....

- CULTURAL CONSTRUCTION
- PLAYGROUND FOR RISKY BEHAVIOR
- ASSOCIATION WITH LIBERTY
- REGULATED WILDERNESS?
- COMMODITY: GUIDES & PERMITS?
- TO KNOW IT IS TO LOSE IT?
- OPPORTUNITY TO SOCIALIZE

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Nepal Everest Regulations

1.) Single Climber: US \$ 25,000

2) 2 Person Team: US \$ 40,000.

3) 3 Person Team: US \$ 48,000

4) 4 Person Team: \$56,000.

5) 5 Person Team: \$60,000

6) 6 Person Team \$66,000.

7) 7 Person Team \$70,000

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Adirondack High Peaks Wilderness Area: Carrying Capacity?



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US: 1 Million Sold Each Year

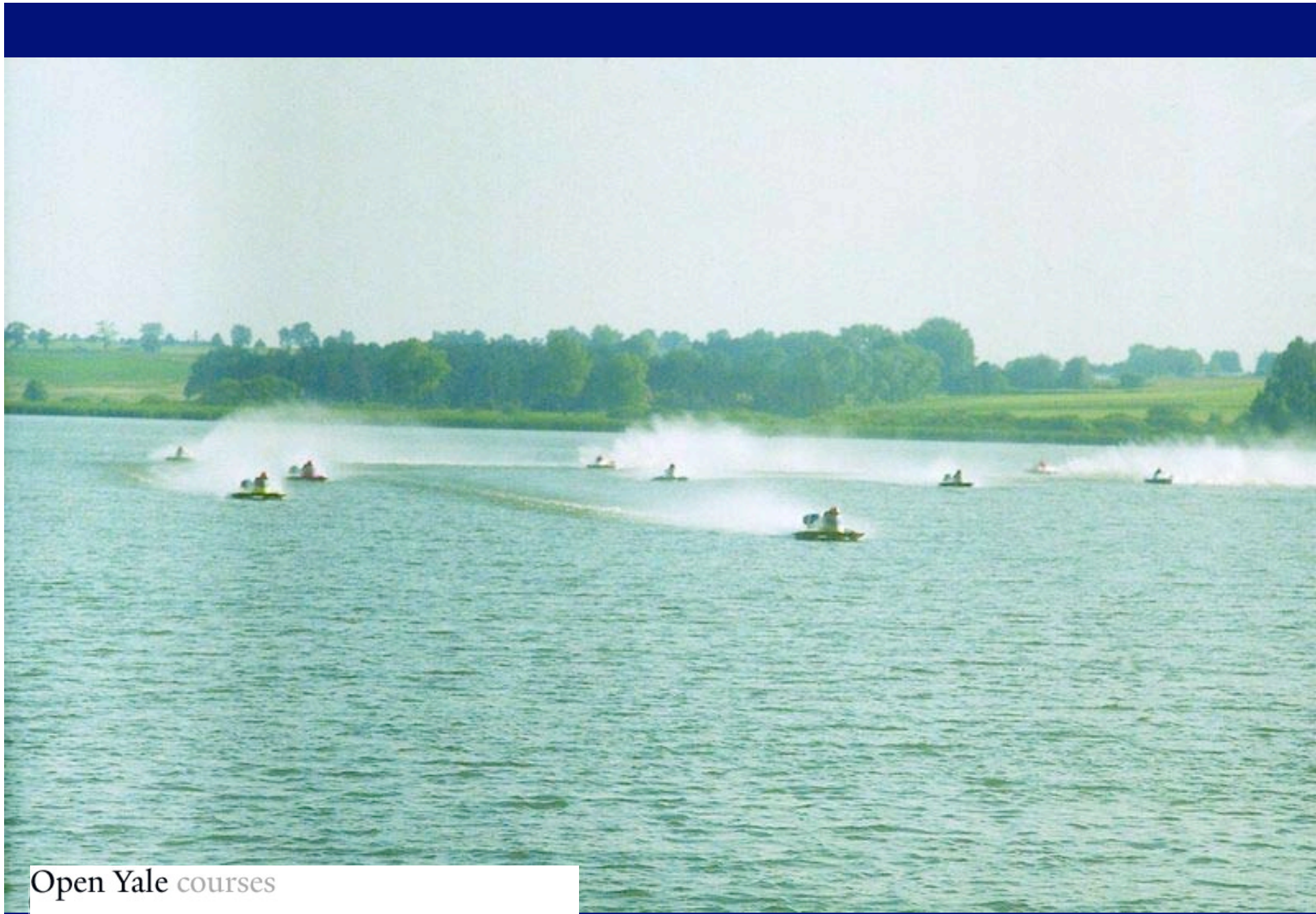
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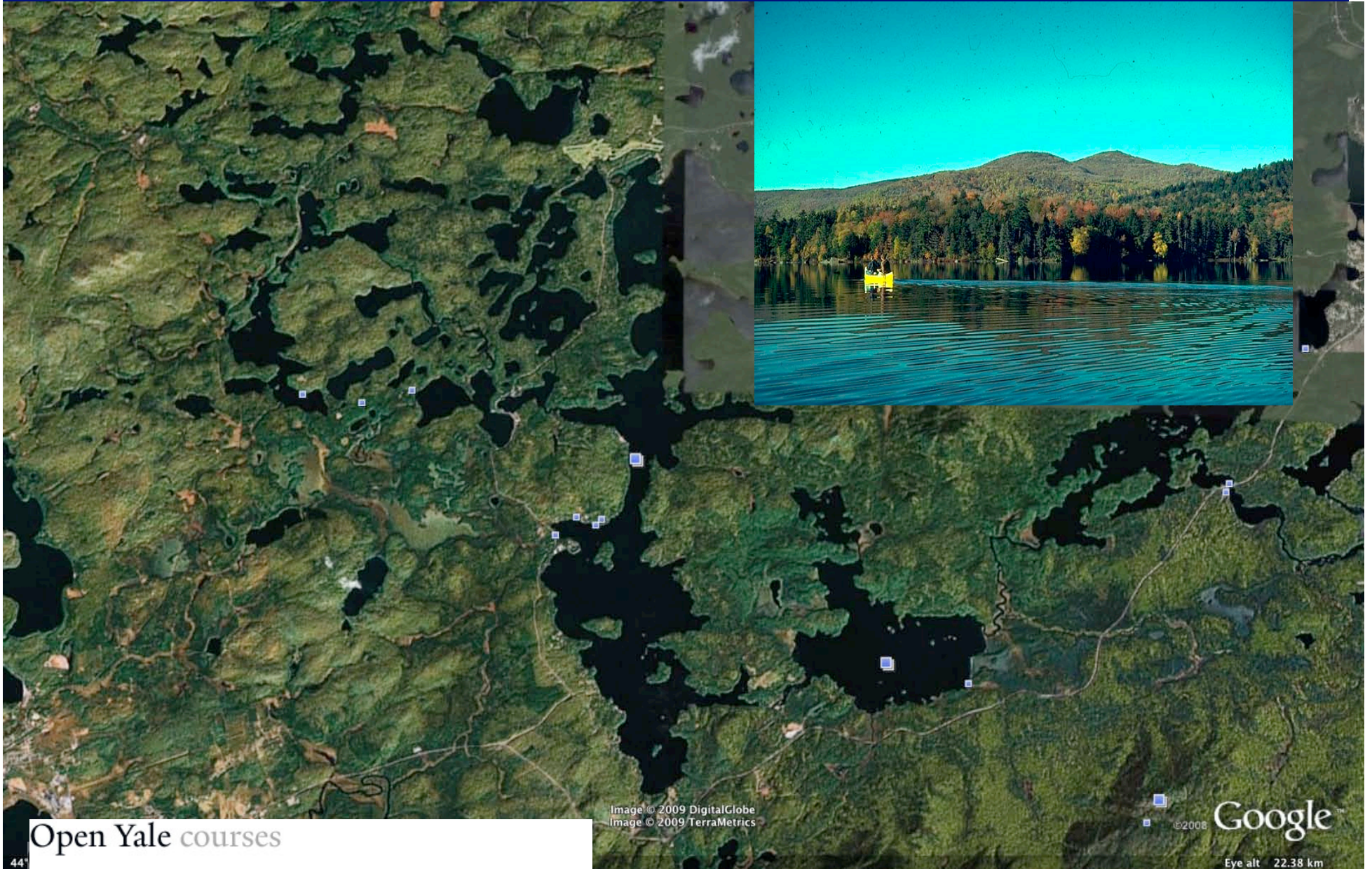


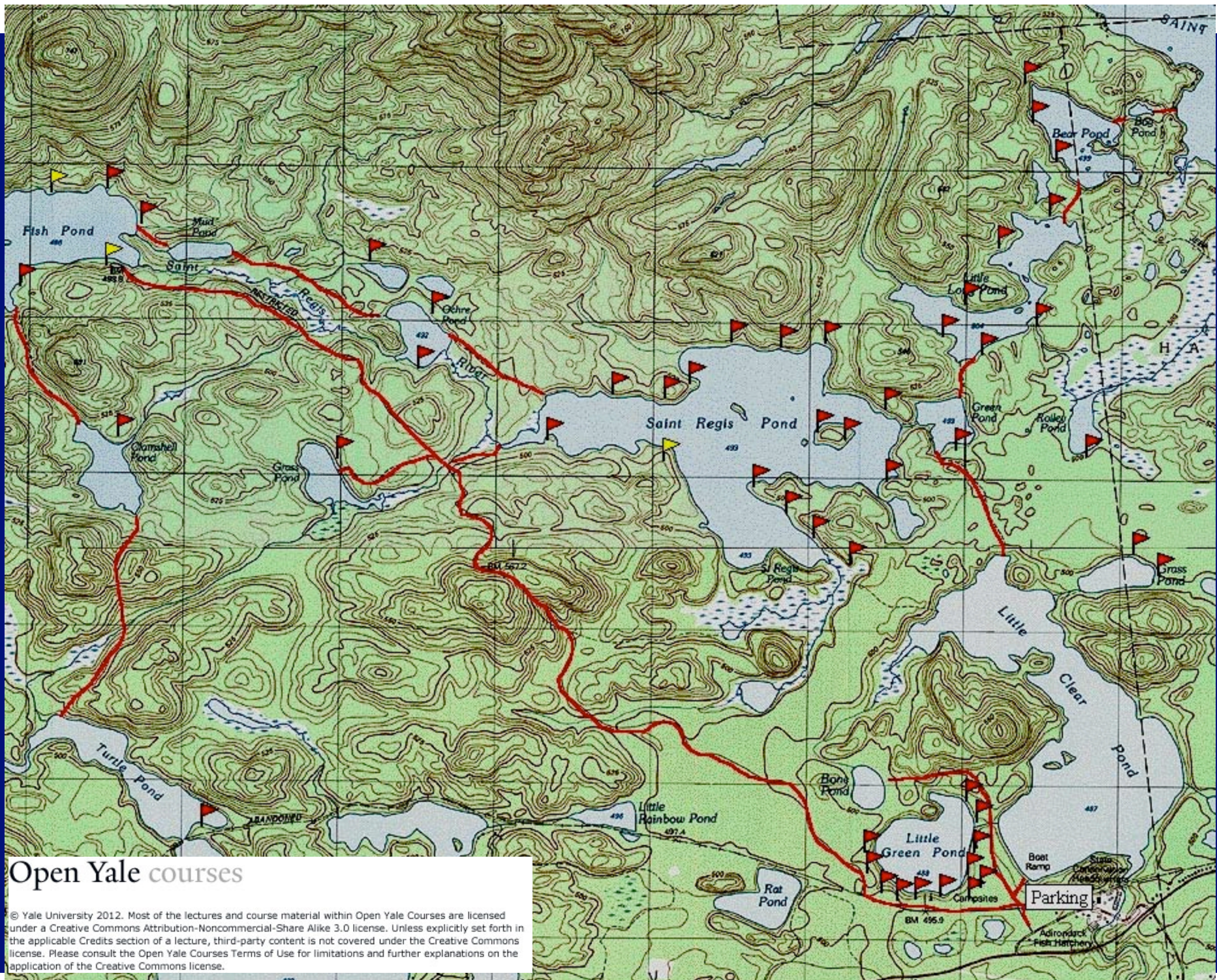
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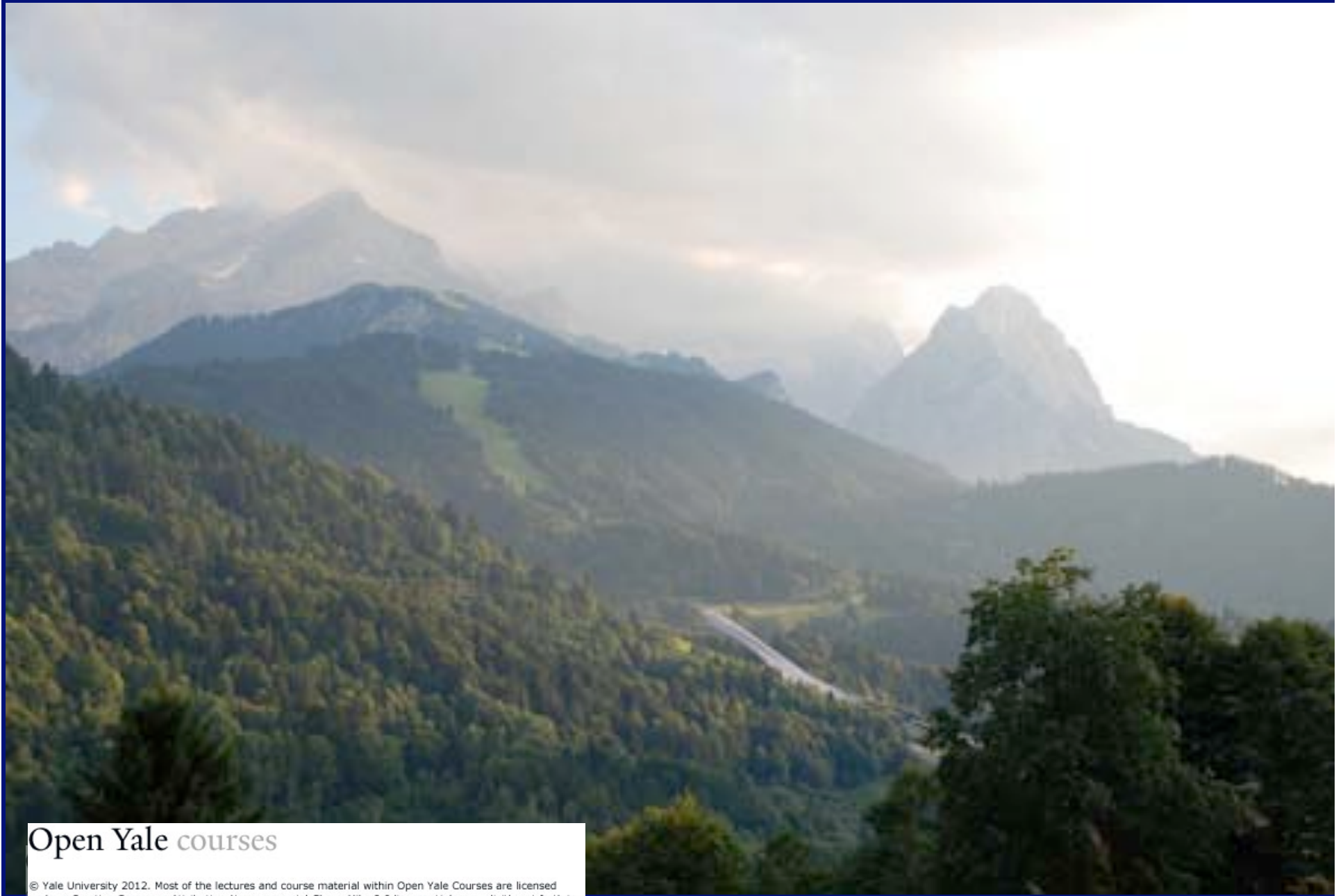
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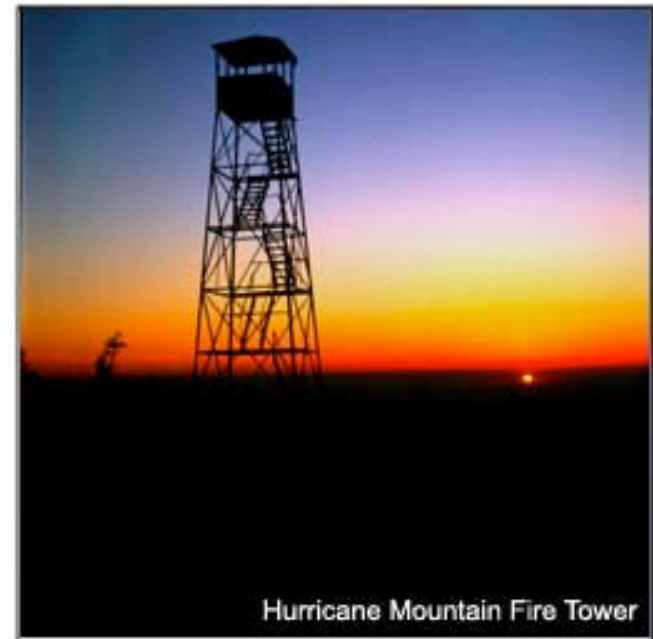
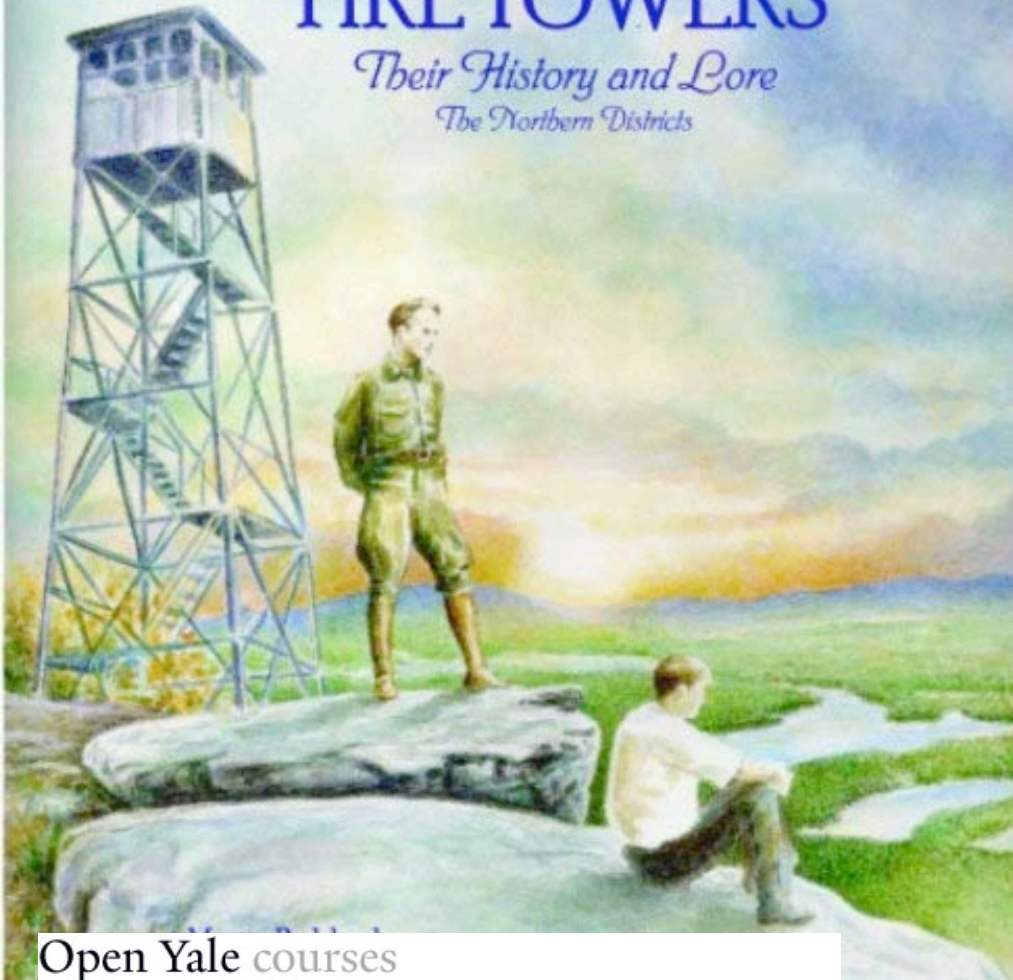


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Adirondack FIRE TOWERS

Their History and Lore
The Northern Districts

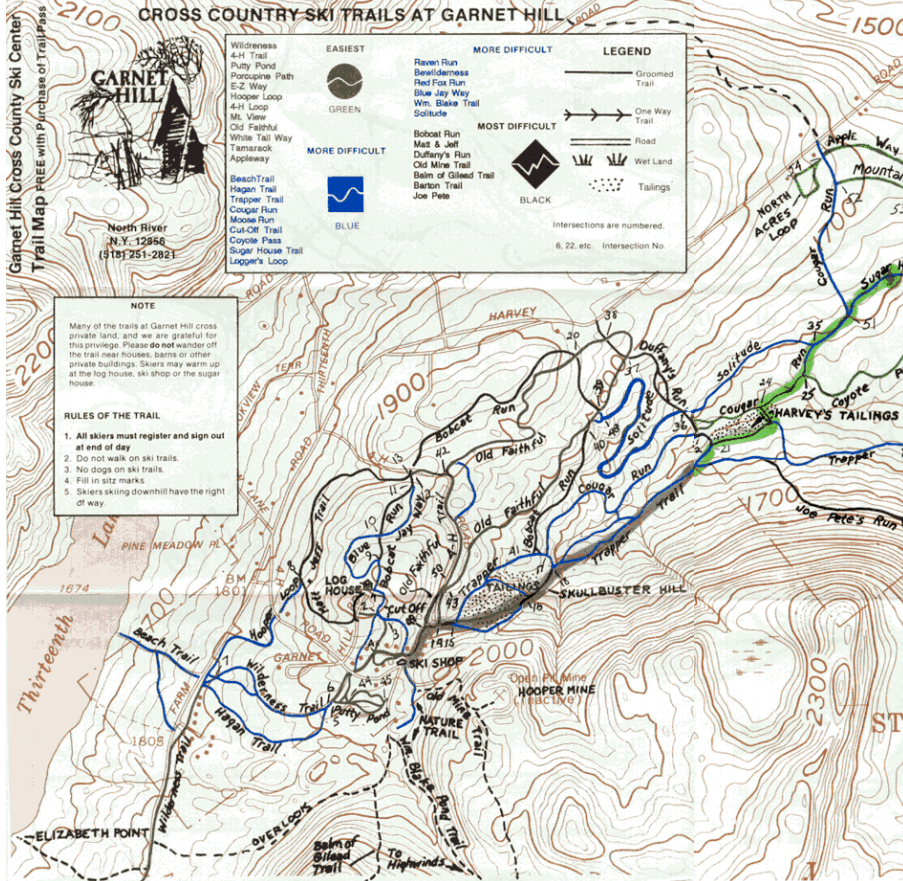


Hurricane Mountain Fire Tower

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Property and Environment

- Property and Freedom
- Property and Privacy
- Property: Rights and Obligations
- Property and Knowledge
- Property and Science
- Public vs. Private & Mixtures

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Origin of Property?

- God
- Labor: John Locke
- Inheritance: Rousseau and Inequality
- Scarcity: Caruso vs. Lost
- Opportunity
- Custom and Tradition: First Possession
- Regulation?

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Types of Property

- Commons
- Private
- Public
- Hybrids

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5th Amendment of the US Constitution

“Nor shall private property be taken for public use without just compensation”

- 1. What is private property?*
- 2. What is a justifiable public use?*
- 3. What government appropriation becomes a “taking”?*
- 4. When has land been rendered valueless?*
- 5. Should government’s regulation of private property be limited?*

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SALT CREEK BEACH PARK



THUNDERB



COMMUNITY GARDENS PARK



STONEHILL SELVA P



LA PLAZA PARK



Dana Point



CRYSTAL COVE PARK



SEA V



KEN SAMPSON OVERLOOK PARK



HERITAGE PARK



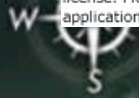
LANTERN BAY C



DANA COVE PARK

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ate value on 10 acres of water....





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Weed Eliminator

Concentrate

HERBICIDE Kills Lawn Weeds
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Active Ingredients:

Mecoprop, dimethylamine salt	10.60%
2, 4-D, dimethylamine salt	3.05%
Dicamba, dimethylamine salt	1.30%

Inert Ingredients: 85.05%

TOTAL 100.00%

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CAUTION

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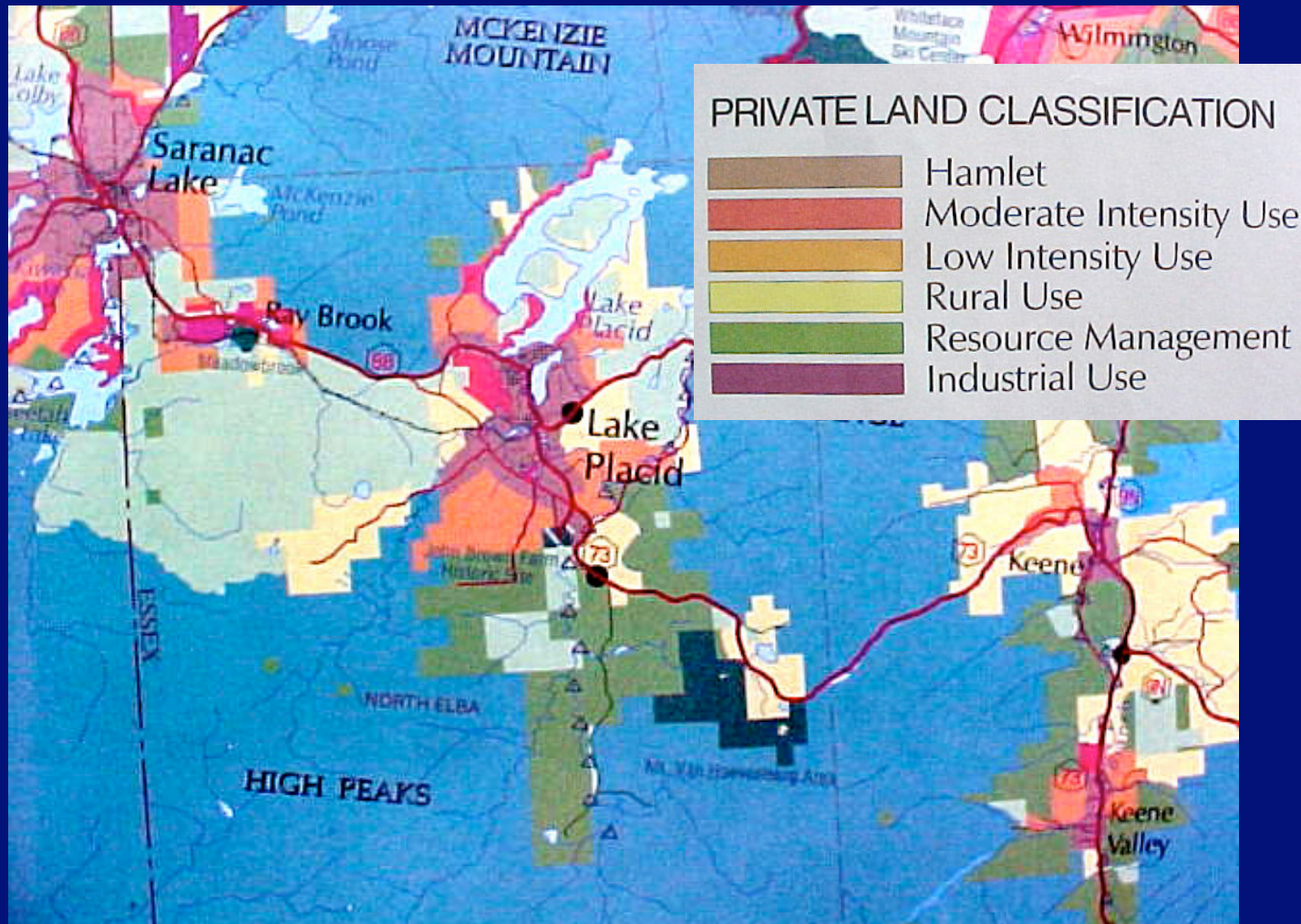
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New York Supreme Court: Upheld Density Guidelines

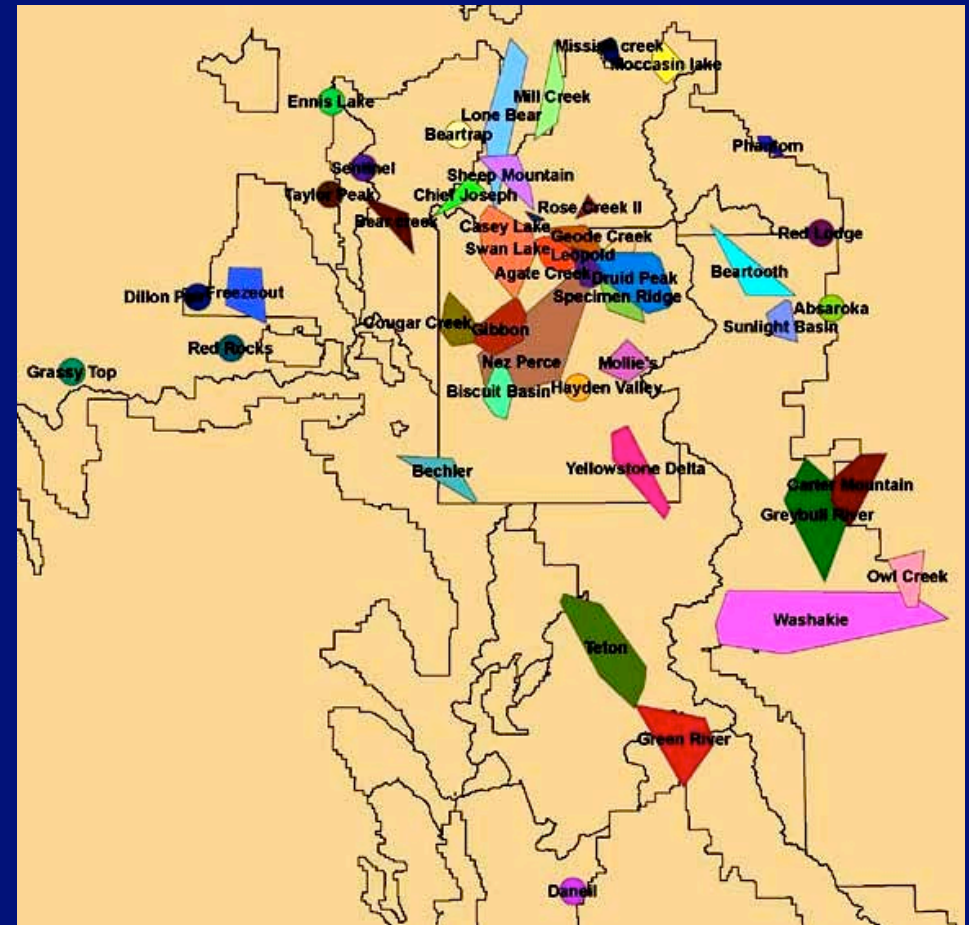
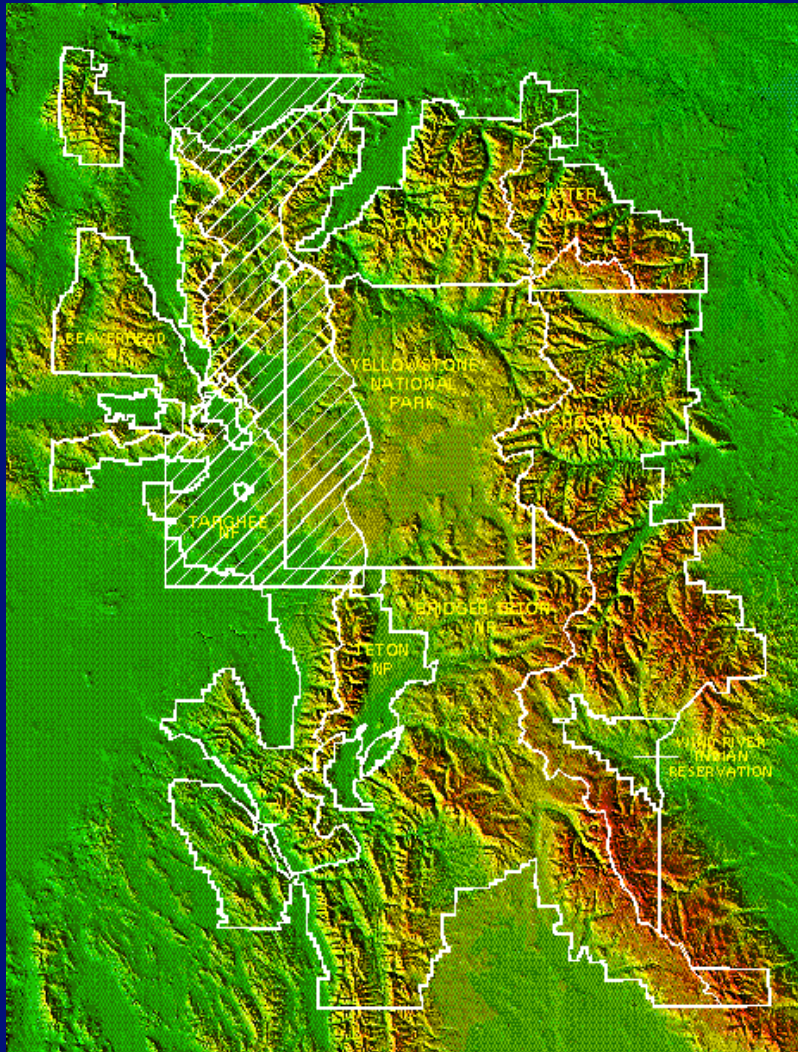
Despite Absence of Quantitative Estimates of Damage

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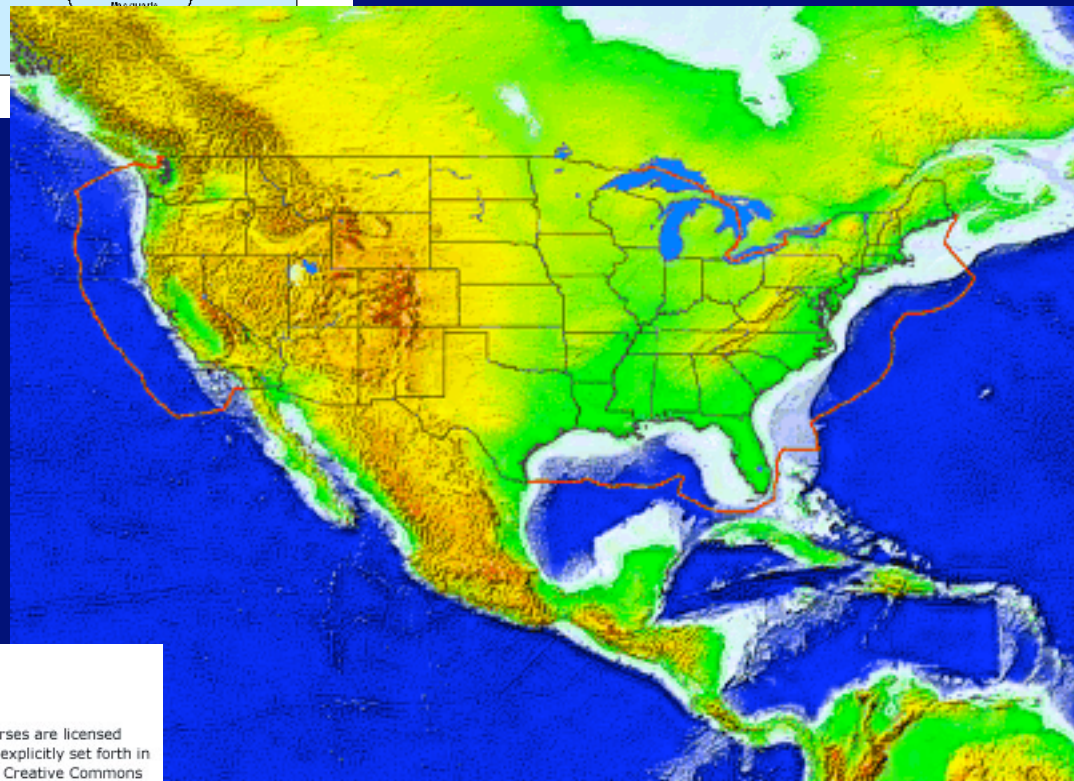
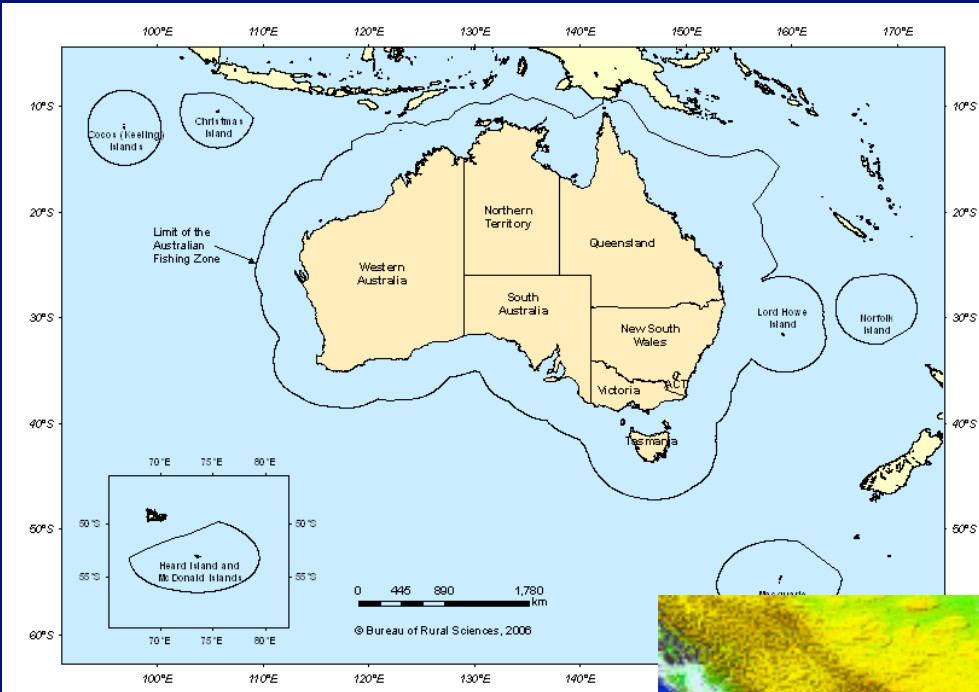
GREATER YELLOWSTONE ECOSYSTEM



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Wolf Pack Territories



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Tsongas National Forest



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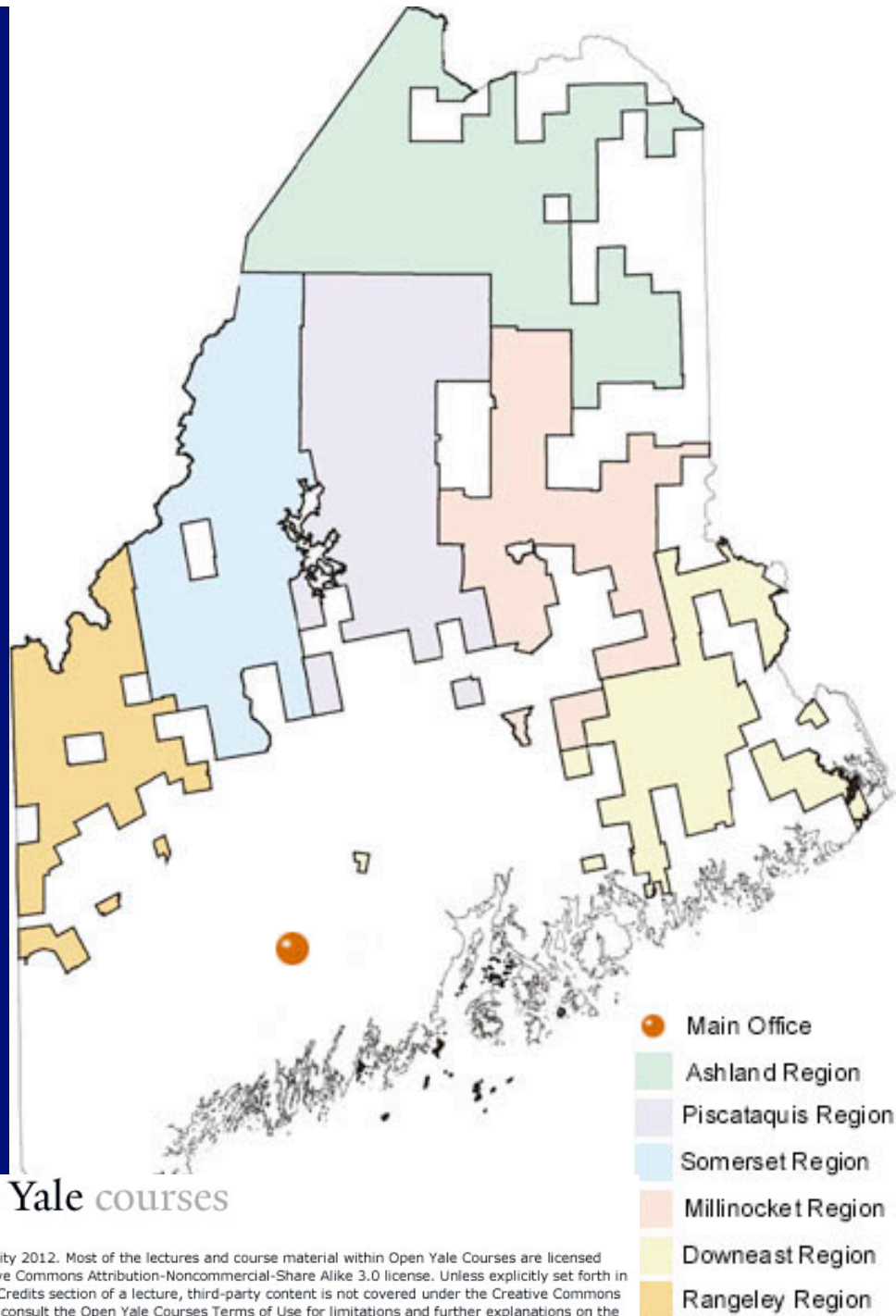


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Maine Land Use Regulation Commission

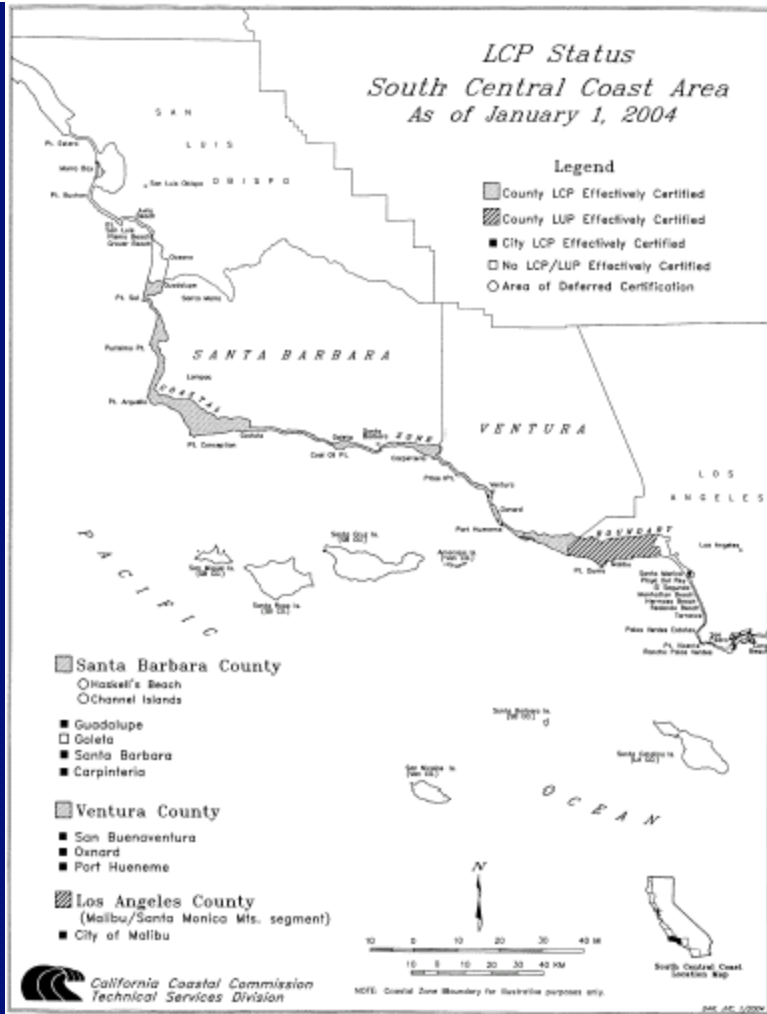
Authority to control
development in
“unorganized and de-
organized areas of the
State”



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California Coastal Commission California Coastal Act of 1976.



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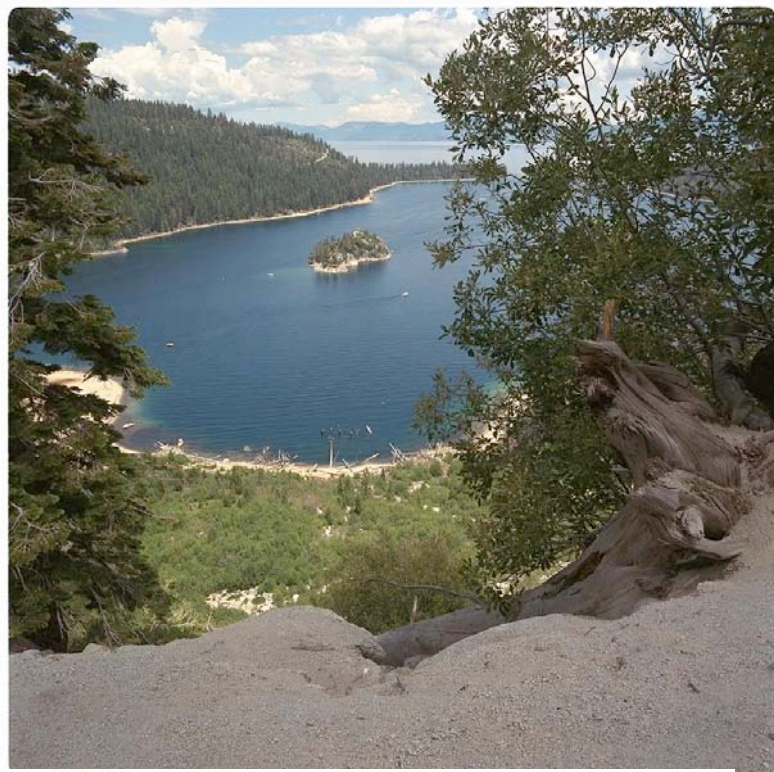
Point Reyes National Seashore



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Lake Tahoe Commission



1968 California, Nevada & USFS
Created the Tahoe Regional
Planning Compact to Protect the
Quality and Clarity of Lake
Tahoe

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Horse Whisperer's Complaints Coal Bed Methane Extraction



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Nuisance: Mugler v. Kansas 1887

- If a land use is considered a **nuisance**, it may be regulated without compensation.
- In Mugler, the sale of alcoholic beverages on property was considered to be a public nuisance, and prevented by regulation.
- Not all rights to use the land were removed, as the land could still be used for other purposes.

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Euclid v Ambler 1926 Supreme Court (6-3)

- Questioned Constitutionality of Zoning Ordinance
- Segregated Residential and Commercial Districts
- Restricting Development in Each Zone
- State Police Power May be Used to Classify and Regulate Land Use to Prevent Nuisances

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Penn Central Transportation Co. V. City of New York: 1978

Is the designation of a railroad terminal as an historic landmark—thereby prohibiting development above the terminal—a taking of property (air rights) without compensation?

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- “The Supreme Court affirms that the restrictions imposed under New York City's Landmarks Preservation Law on Penn Central's right to construct an office building above Grand Central terminal do not constitute a taking of private property.”

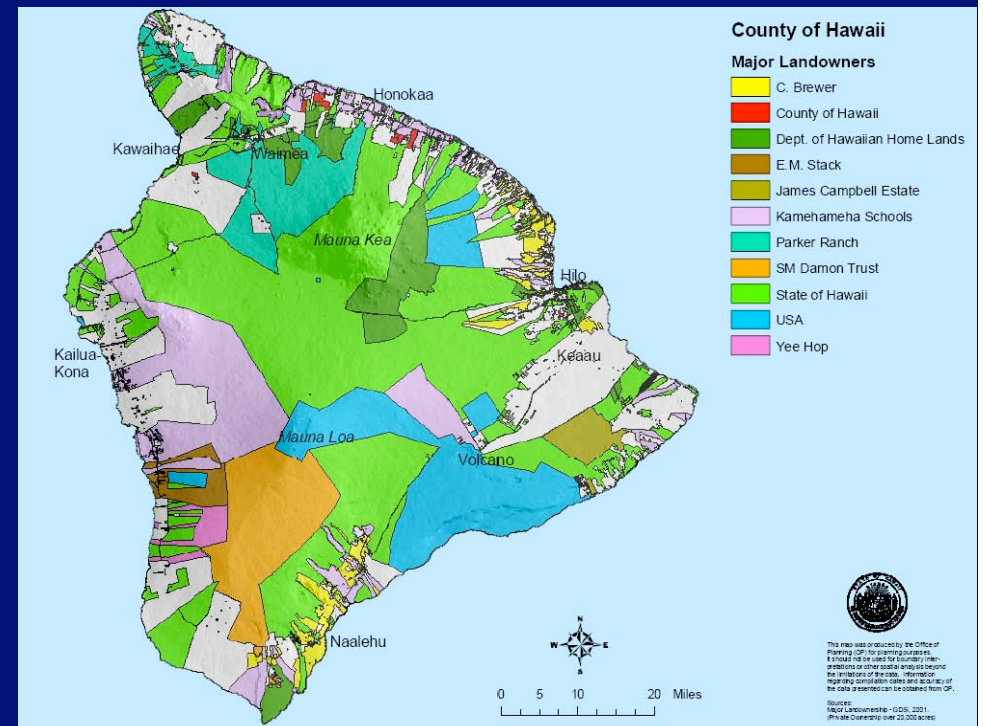
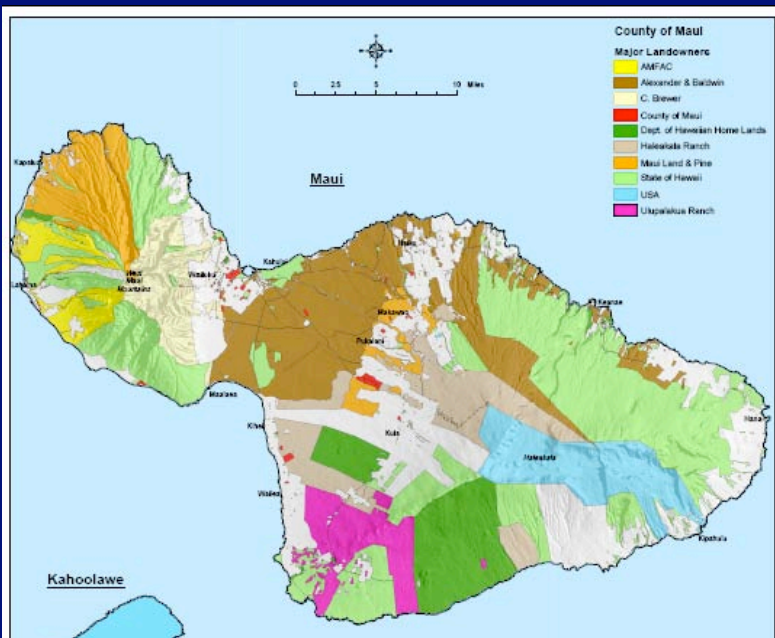


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Hawaii Housing Authority v. Midkiff: 1984

- 96% of the state was owned by 72 landowners, or state or federal government
- 1967 Hawaii legislature approved use of eminent domain to condemn residential lots and sell land to existing tenants, even if the landowner objected.



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Midkiff Ruling

- Supreme Ct.: Use of Eminent Domain is not a taking.
- The single most important criterion to justify the use of eminent domain is the nature of the public use.
- A public use is created, even when immediately turned over to private hands.
- In this case the public use or interest lay in the breakup of a land oligopoly.

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Kelo v. City of New London 2005

- US Sup Ct upheld the Supreme Court of Connecticut, which found that the use of eminent domain for economic development did not violate the public use clauses of the state and federal constitutions.
- The court found that if an economic project creates new jobs, increases tax and other city revenues, and revitalizes a depressed (even if not blighted) urban area, it qualifies as a public use.

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♪ THIS LAND'S NOT YOUR LAND ♪

STAHLER
JIM DUNN
2005



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What Renders Property “Valueless”?

Pennsylvania Coal Co. V. Mahon 1922

A statute that prohibits the mining of coal underground in a manner that causes subsidence of homes on the surface went “too far” and constituted a “taking”.

Why? Underlying mineral rights become worthless...

Oliver Wendell Holmes:

“While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking...”

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Nollan v. California Coastal Commission

1. Nollan leased property in Ventura California with an option to buy, conditioned on replacement of a 500 sf bungalow.
2. Construction of a larger home required a permit from the California Coastal Commission (CCC).
3. CCC found that the new house would block the ocean view, contributing to the development of "a `wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to



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1. The new house would also increase private use of the shorefront. And would cumulatively "burden the public's ability to traverse to and along the shorefront."
2. CCC granted the permit conditioned upon grant of a public access easement.
3. Finding blocked visual access, it required physical access.
4. Nolan argued: access condition = taking

Supreme Court. Response....

“It is quite impossible to understand how the access requirement lowers any "psychological barrier" to using the public beaches.”

“...if California wants an easement across the Nollans' property, it must pay for it.”

“A taking without compensation occurred.”

Nexus Requirement: The Court demanded a tighter connection between the harm (loss of visibility) and the remedy (access).

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ibility to allow 1 type of harm (loss of
quiring a different type of benefit?

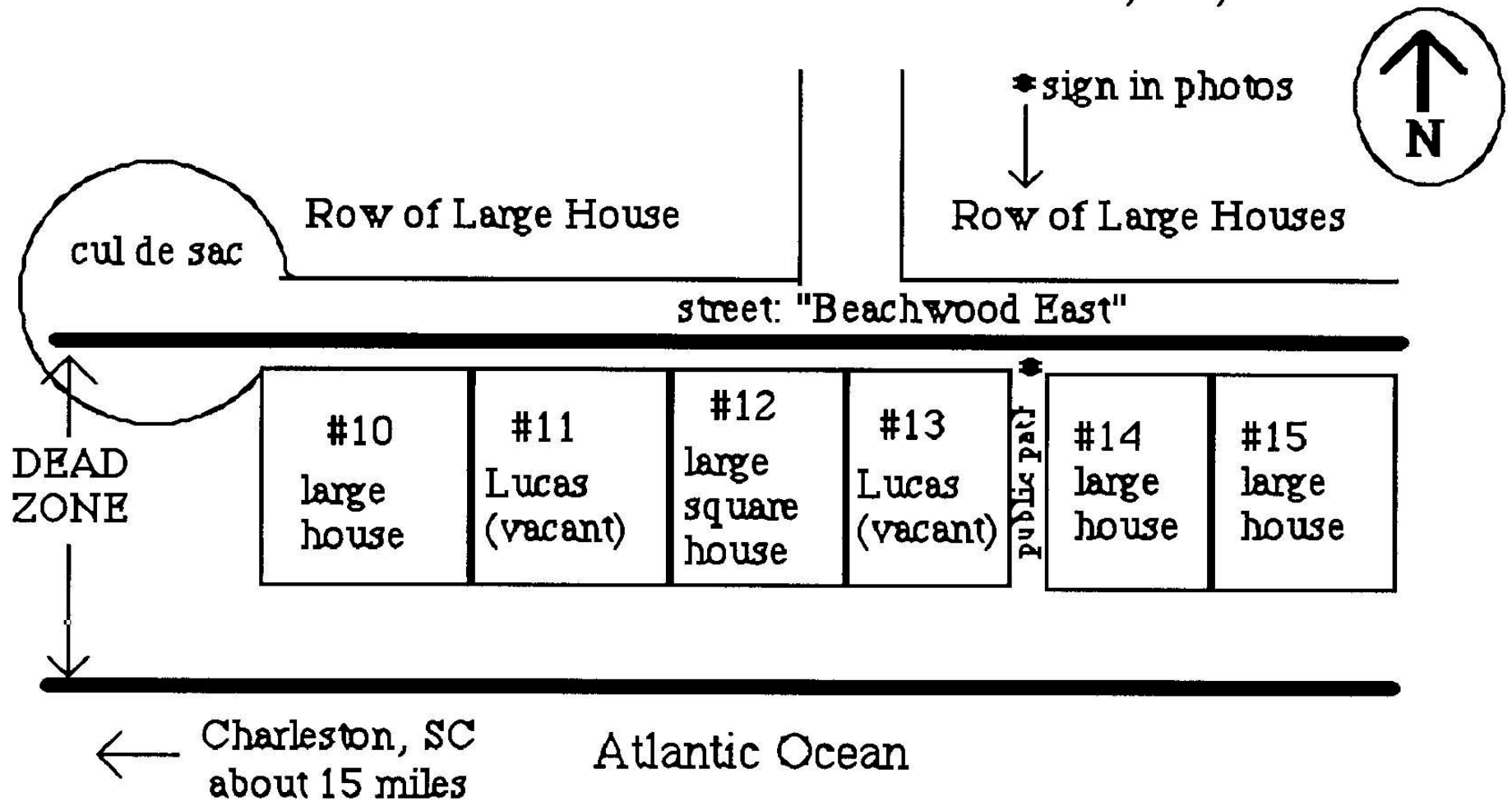
Lucas v. South Carolina Coastal Commission 1992:

1. 1986...Lucas bought 2 residential lots on a South Carolina barrier island--Isle of Palms--for \$975,000.
2. 1988...South Carolina adopted Beachfront Management Act, prohibiting Lucas from building on the lots. (Established a critical erosion zone including all of Lucas' lots.)
3. Lucas claimed the law deprived him of all “economically viable use” of his property.
4. State trial court agreed and awarded \$1.2 million.
5. Supreme Ct. of So. Carolina reversed... no compensation is needed when a regulation is designed to prevent serious public harm or injury to public health, safety, or the environment. (Mugler v. City of South Beach, 1890)

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Part of "Wild Dunes" resort on Isles of Palms, SC, 11/94



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Lucas continued....

Harmful or Noxious Use:

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public.

[S]ince no individual has a right to use his property so as to create a nuisance or harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity."

Does an individual have a constitutionally protected right to place others at risk?

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The Result?

1. The case was remanded back to state courts to consider the magnitude of the nuisance (harm).
2. How is the public interest served by restricting development, and has all economic value been removed by the restriction?
3. South Carolina Supreme Ct reversed its earlier decision (membership changed)

Damages must be assessed and paid to Lucas.



Former Lucas Lots

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1. SCCC granted Lucas permission to build.
2. Lucas was compensated: Sold lots to the State for \$1.575 million.
3. Instead of protecting dunes, the State sold lots to a

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Dolan v City of Tigard Oregon:

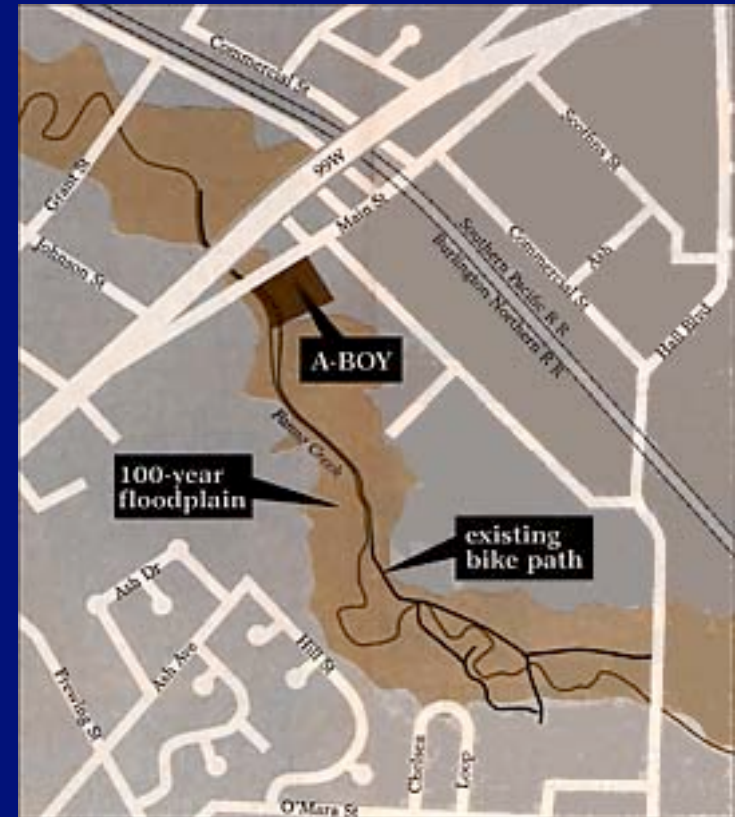
1994 US Supreme Court

Dolan applied to the city to significantly expand hardware store in a floodplain.

The City approved, but required:

- Dedication of floodplain area to improve city drainage system
- 15 foot easement for a pedestrian/bicycle pathway adjacent to floodplain

Sup. Ct. cited the need for a “Principle of Rough Proportionality” in relation between the potential public harm and the



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Pesticide Bans:

- Government Required to Purchase Existing Stocks of Newly Banned Products
- Presumption of Safety Implied by Earlier Government Licensing
- Compensation is not required to recover R/D costs for chemicals not allowed to reach the marketplace.



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Pesticide Tolerances

- 10,000 tolerances for pesticides on foods.
- Does the act of regulation creates a private property right? Normally yes— a right to pollute that often creates or protects property value.
- Cancellation of tolerances, or pesticide bans, remove those rights.
- Normally bans have been considered attempts to prevent harm.
- By contrast, courts have normally demanded compensation when government regulates to create a benefit.

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Tahoe Regional Planning Compact

7 Land Use Capability Districts

Each District assigned a maximum percentage of land coverage

By impervious surfaces—*asphalt, roofing, etc.*

Most sensitive zone: 1%

Least sensitive zone: 30%

Exceptions led CA to withdraw from compact & set tougher rules.

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1980: 94 Stat 3235-3238

TRPC was restructured, and allowed development moratoria.

“Regional environmental threshold carrying capacities” required.

Considering: Standards for air quality, water quality, soil conservation, vegetation preservation and noise.

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Eagle Protection Act and the Migratory Bird Treaty Act

"Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed, or transported without a Federal permit, but may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter. . . ."

Effect: Separation of the right to possess eagles from the right to import, export, sell, purchase or trade.

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Andrus v. Allard: Sup Ct 78-740.

Does prohibiting trade constitute a taking?

No. Considerable value remains simply from possession. The inability to trade does not remove all value. Compensation is not required.

“..where an owner possesses [444 U.S. 51, 66] a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.”

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Principles of Takings Law

1. Acquisition for Public Use Requires Compensation. (Vieques).
2. Eminent Domain for Private Development Is Legitimate (Kelo)
3. Regulation of Private Use is More Complex. (Adirondacks)
4. Ad Hoc Factual Inquiry: Weigh Each Case Independently
5. Nolan: Means-Ends: Objective and Form of Regulation Should be Closely Tied (Nexus argument).
6. “Harmful or noxious uses” of property may be proscribed by government regulation without the requirement of compensation.”
Legitimate State Interest to Protect: Env, Econ, Health, Welfare
7. Dolan: Rough Proportionality: Regulation Should be Proportional to Adverse Effects of Private Action
8. Lucas: Compensation Required in the Relatively Rare Case where All Economic Value is Denied

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atorium is not a taking. Permanent vs.
Potential Economic Use.