

# Changing Rural Realities: Common Ownership of Resources and the Amplification of Development

S. Horne, A. Hiatt<sup>1</sup>

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## **Abstract:**

The commons, economic development and societal participation. In the United States, these three ideas are rarely linked together because of a historical connection to the often idealized system of private property rights and a distrust of common ownership of property. The thinking about these systems is evolving as a result of increasing instability of land ownership. Progressively, areas that were agricultural cornerstones and models of self-sufficiency are becoming inundated by suburban sprawl and environmentally unsustainable development. With growing poverty and wealth disparities, rural and agriculturally dependent areas of the US should play an even more important role in ensuring economic sustainability and food sovereignty. Instead, land ownership is becoming more consolidated and families with historical ties to the land are unable to retain their connections to culture and community.

This paper will examine how common ownership structures can improve community viability, market access for farmers, and environmental stewardship and sustainability. It will also address how unplanned ownership structures have been manipulated to damage the productive joint ownership of common resources. Finally, the paper will assess how common property ownership can contribute to increased political participation and empowerment.

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<sup>1</sup> Savi Horne is the Executive Director of the Land Loss Prevention Project, a public interest law firm based in Durham, North Carolina. LLPP was founded in 1982 by the North Carolina Association of Black Lawyers in an effort to respond to the unprecedented decline in landownership among low income and minority communities. Its mission is to use legal expertise, community education, and financial and community development tools to help rural communities retain the asset-base in land, agriculture, natural resources, and small businesses. To accomplish this mission, LLPP staff provides free legal assistance to individuals and community groups that are struggling to retain ownership of land. As development pressures increase, LLPP's work becomes more vital to ensuring that low-income landowners are able to preserve their land.

Annette Hiatt is a staff attorney for the National Hmong American Farmers, Inc., a non-profit community-based organization in Fresno, California that conducts state and federal policy analysis, supports Hmong farmers across the country with direct program and marketing technical support services, and also assists with capacity building activities with emerging nonprofit farm organizations.

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**Key words:**

*Agriculture, drought, water resources, agroforestry, farm policy, land use, property rights, family farms, common property, cooperatives, rural development, land tenure, free riders, natural resources, pollution, customary land law, capacity building*

**Changing Rural Realities: Common Ownership of Resources and the Amplification of Development**

Former US President John Adams said that power always follows property and that property widely distributed among the people holds the line against pernicious concentration of power.<sup>2</sup> In North Carolina, and across the United States, however, increasing numbers of people are being dispossessed of their land resources. The primary point of this paper is that as more people lose their land and homes, and ownership of assets becomes more concentrated, it becomes more important to be vigilant about the denial of basic civil and human rights. This paper will examine the ties of land ownership to social, economic and environmental rights through the lens of land loss caused by environmental injustices, foreclosures, heir property, and loss of farmland.<sup>3</sup>

Land ownership has long been linked to ideas of status and well-being. Although it is easier to see this importance during the days when families depended on the productivity of their farms for their food and clothing needs, land still holds ties to family and community history as well as the financial health of many in this nation. Land ownership is an important element that contributes to a sense of community—an intrinsic sense of belonging.

**Historical Overview of Political Participation**

Historically, land has been a requirement to the exercise of certain social rights in the United States—namely voting, which is one of the primary ways we as citizens have to prevent the concentration and abuse of power. Landowners are also more empowered to move for change, and history documents that Black landowners in the South were among the first to join and support the Civil Rights Movement.<sup>4</sup> Until 1856, only white, free, landowning men were permitted to vote.

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<sup>2</sup> Craig-Taylor, Phyllis (1998). To Be Free: Liberty, Citizenship, Property, and Race. 14 *Harvard BlackLetter Law Journal* 45.

<sup>3</sup> It is important to note, however, that the paper will just provide an overview of these issues, as they are very complex and entire articles can, and have been, written on a single one of these topics.

<sup>4</sup> Gilbert, Jess and Sharp, Gwen (2002) “The Loss and Persistence of Black-Owned Farms and Farmland: A Review of the Research Literature and Its Implications”, *Southern Rural Sociology*, Vol 18 (2). Ownership of land is also tied to increased pride and educational achievement. See also, <http://www.peterlevine.ws/mt/archives/2006/05/it-probably-won.html>

All white men were permitted to vote after that time,<sup>5</sup> and the Fifteenth Amendment extended universal male suffrage to all men, without regard to “... race, color, or previous condition of servitude” in 1868. Merely providing permission for action—the right to vote—however, is not a guarantee of this important social right. Similarly, land ownership is an important right as well as a sign of social progress (land ownership has not always been a given for all groups of people), but does not serve as a guarantee of authentic participation in the political or social system. For example, women were not allowed to control their own property and could not vote until 1920. Sharecropping farmers were at the mercy of the landowner and had no secure land tenure rights. Even after the Constitutional Amendment that extended the right to vote to African-American men, there was backlash in the states. Because voting rights are governed by state laws, many states enacted “Black Codes”, which were laws that violated civil rights, economic and physical freedoms as a response to the extension of voting rights to former slaves.<sup>6</sup> African American voters were denied voting rights through the use of gerrymandering (drawing political boundaries to diminish voting power), literacy tests, character evaluation, intimidation, poll taxes and the use of ‘grandfather clauses’ (which restricted the right to vote to those people whose grandfather voted, and in effect allowed illiterate white men to vote if their grandfather had voted).<sup>7</sup> The US Supreme Court ended the use of these clauses in 1915, finding that they violated the 15<sup>th</sup> Amendment.<sup>8,9</sup>

The road to true political access in the United States was a long one. It wasn’t until the enactment of the Voting Rights Act of 1965 that the use of literacy tests and other discriminatory devices were forbidden. The Voting Rights Act also gave individuals the right to sue anyone or the municipality that engages in discrimination related to voting rights. Obstacles, however, still remain. A more

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<sup>5</sup>The Library of Congress: Teacher Resources, -Feature- Elections the American Way: Voters <http://memory.loc.gov/learn/features/election/voters.html> (Last updated 7/12/2002)

An interesting timeline of voting rights can be found at <http://www.crmvet.org/info/votehist.htm> , specific to NC: <http://www.king-raleigh.org/history/NCcivilRightsTimeLine.htm>

<sup>6</sup> Ronald Davies, From Terror To Triumph: Historical Overview, <http://www.jimcrowhistory.org/history/overview.htm>

<sup>7</sup> US Department of Justice, Before the Voting Rights Act, [http://www.usdoj.gov/crt/voting/intro/intro\\_a.htm](http://www.usdoj.gov/crt/voting/intro/intro_a.htm)

<sup>8</sup> *Guinn v. United States*, 238 U.S. 347 (1915). All white primaries were struck down in 1944 by the US Supreme Court by *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>9</sup> In 1920, women were permitted to vote through the 19<sup>th</sup> Amendment to the US Constitution. In North Carolina, as late as 1915, the state Supreme Court ruled that women were incapable of holding positions of trust (in the role of notary public) *Bickett v. Knight*, 1915, 169 N.C. 333. Includes discussion describing what notary was to do (approving documents) distinguishing the role of clerk and discretion required in role of notary. As a note related to gender issues, it is worth noting that gender equity has been correlated to increases in health care, education and poverty reduction. Gender inequality hinders economic development, productivity, and general well-being, damaging communities and families. (Isabelle Bleas, World Bank Institute, A World Bank Policy Research Report, *Engendering Development: Through Gender Equality in Rights, Resources, and Voice*. <http://siteresources.worldbank.org/INTECAREGTOPGENDER/Resources/Bleas.ppt#354,5>.)

modern restriction on voting rights tied to land ownership exists here in North Carolina.

This restriction on voting rights in some communities is the use of a city's extraterritorial jurisdiction (ETJ).<sup>10</sup> North Carolina law permits cities that are anticipating growth to extend their zoning authority beyond the current city boundaries—up to three miles out for cities with populations over 25,000.

Currently, there are several problems with the exercise of this authority. First, the city provides notification through first class mail to all the property owners in the area that is being considered as a part of the ETJ. This allows these owners to participate in the process of public hearings and planning. There is not, however, a requirement to notify all residents of that area, which automatically excludes those individuals who are renting homes or property. Second, if a community is included in the ETJ of the city, there is a direct impact on their voting rights. Although the residents of the community may still be living in the county, they are in an ETJ of the city, with no right to vote or participate in city elections until the city annexes the area, which may not be for several years. This political limbo means that even if they have some right to participate in the public meeting process around the ETJ, they have no entitlement to vote for the officials that actually make those decisions.

### Poverty in North Carolina

The counties in eastern North Carolina are among the state's poorest areas. The United States Census in 2000 showed twenty-three counties in North Carolina that had more than 18% of their population living in poverty. All of these counties are rural, and 19 of them are located in the Coastal Plain.<sup>11</sup> Of the rural poor, minorities had disproportionately higher rates of poverty compared to the 9.8% of whites living in poverty in North Carolina; with 27% of African Americans living in poverty, 22% of Native Americans, and 28% of Hispanics living in poverty.<sup>12</sup>

The rural population in North Carolina is relatively stable, in terms of growth, while the urban population continues to grow. The poverty rate in rural areas is higher, and the educational level is lower, with 14.5% of the rural population completing college in 2000, and 27.3 % not completing high school.<sup>13</sup>

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<sup>10</sup> North Carolina General Statutes, §§160A-362 *et seq.* For a North Carolina analysis of the effect of ETJs, see Cedar Grove Center for Resourceful Communities [http://www.ucdc.edu/faculty/Voting\\_Rights/Papers/14%20-%20Parnell%20&%20Marsh.pdf](http://www.ucdc.edu/faculty/Voting_Rights/Papers/14%20-%20Parnell%20&%20Marsh.pdf)

<sup>11</sup> *Poverty in North Carolina*, (last modified January 6, 2006), NC Rural Economic Development Center, [http://www.ncruralcenter.org/databank/trendpage\\_Poverty.asp](http://www.ncruralcenter.org/databank/trendpage_Poverty.asp).

<sup>12</sup> *Id.*

<sup>13</sup> USDA Economic Research Service, North Carolina State Fact Sheet, <http://www.ers.usda.gov/StateFacts/NC.htm> (last updated August 30, 2007).

Loss of property is a contributing factor to persistent poverty as it undermines a vital foundation for wealth-building, whether that be for individuals or communities. The most persistent and damaging causes of land loss in the state seem to be: heir property, the loss of farmland and farmers, and increasing foreclosures. A lack of income doesn't necessarily mean that people don't have assets, such as inherited land. However, it makes the retention of those assets all the more important, and for some, a small farmer who inherited land and the livelihood, for example, it could be everything, as the land is a key to life itself.

### Land as a form of wealth.

Land ownership is important as a form of wealth.<sup>14</sup> Historically, access to land has been limited. From the "founding" of our nation by the Europeans after colonization, there has always been a belief that equal access to property was a cornerstone of an individual's ability to be free and self-sufficient. Without property, it was believed that a person would become dependent and unable to fully exercise the rights and responsibilities provided by the US Constitution.<sup>15</sup> However, from the very inception with land distribution, there has been inequality. The Homestead Act of 1862, designed to encourage western migration, provided homesteads of 160 acres to citizens of the United States.<sup>16</sup> What becomes important, however, is to remember who was a citizen at that time, when most non-white individuals and women were not considered full people in the eyes of the law. Immigration law in 1887 restricted the ownership of land to US citizens and certain individuals seeking citizenship.<sup>17</sup> Mexicans living in the Southwest were made citizens of the US through the Treaty of Guadalupe Hidalgo in 1848<sup>18</sup>, but struggled for many years, until 1975, to obtain full citizenship<sup>19</sup>. African-American men became full citizens in 1868<sup>20</sup>, Native Americans were not

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<sup>14</sup> Gilbert, Jess and Sharp, Gwen (2002) "The Loss and Persistence of Black-Owned Farms and Farmland: A Review of the Research Literature and Its Implications", *Southern Rural Sociology*, Vol 18 (2).

<sup>15</sup> Craig-Taylor, Phyliss (1998). To Be Free: Liberty, Citizenship, Property, and Race. 14 *Harvard BlackLetter Law Journal* 45

<sup>16</sup> US Library of Congress <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=423>

<sup>17</sup> US Citizenship and Immigration Services, Legislation from 1790-1900 at <http://www.uscis.gov/files/nativedocuments/Legislation%20from%201790%20-%201900.pdf>

<sup>18</sup> US Library of Congress, <http://www.loc.gov/rr/hispanic/ghtreaty/>

<sup>19</sup> Latinos were not covered by the Voting Rights Act until 1975 when sections were added to cover voters of limited English proficiency and entire states of Alaska, Texas, and Arizona. The Lawyers' Committee for Civil Rights Under Law, February 2006 report: *Protecting Minority Voters: The Voting Rights Act At Work 1982-2005* A Report by the National Commission on the Voting Rights Act. <http://www.votingrightsact.org/report/finalreport.pdf>

<sup>20</sup> 14<sup>th</sup> and 15<sup>th</sup> Amendments of the US Constitution. See also, <http://www.king-raleigh.org/history/NCcivilRightsTimeLine.htm>

citizens until 1924<sup>21</sup>, and Asians struggled for citizenship until as late as the 1950s.<sup>22</sup>

### *Land Access in the Southeast*

In 1865, General Sherman issued a now infamous order that declared 485,000 acres of coastal land in South Carolina, Georgia and Florida to be abandoned, and some 40,000 freedmen were settled on 40-acre plots.<sup>23</sup> Also in 1865, Congress established the Bureau of Refugees, Freedman, and Abandoned Lands (the Freedman's Bureau) which promised "every male citizen, whether refugee or freeman, forty acres of land at rental for three years with an option to buy".<sup>24</sup> There was also a Southern Homestead Act in 1866 that opened forty-six million acres of public lands for homesteading.<sup>25</sup> There is an important distinction between this act and the 1862 Homestead Act for settlement of the west, however, in that the 1866 Act limited non-Confederate whites to homesteading only.<sup>26</sup> By mid-1866, more than half of the 850,000 acres that had been controlled by the Freedman's Bureau was returned to the former white owners.<sup>27</sup> These are illustrious, and somewhat telling, beginnings for the still-existing struggle by African-Americans and other minorities to access and retain land that continues in various forms to this date.

### *Income and Wealth Disparities*

There is a distinction between two terms, income and wealth, even though they are often used interchangeably. Wealth and income are two distinct realities and are defined differently. Income is usually defined in terms of money, and can be a gain or benefit derived from capital or labor.<sup>28</sup> Wealth is defined more as an asset that can be utilized to produce income, property with a money or exchangeable value, and abundance of valuable material possessions or resources.<sup>29</sup> Wealth in the United States comes in many forms: stocks, savings

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<sup>21</sup> US Library of Congress <http://memory.loc.gov/ammem/today/jun02.html> . Some Native Americans were permitted to renounce tribal membership and become US Citizens in 1887

<sup>22</sup> Reforms to the Immigration and Naturalization laws started in 1943, with the effective repeal of the Chinese Exclusion Act, and continued in 1946 and 1952. See the US Citizenship and Immigration Services at

<http://www.uscis.gov/files/nativedocuments/Legislation%20from%201941-1960.pdf>

<sup>23</sup> For an image of the order, see <http://www.history.umd.edu/Freedmen/sfo15.htm>

<sup>24</sup> Mitchell, Thomas (2001). From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common. *95 Northwestern University Law Review* 505, 525.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Mitchell, Thomas (2001). From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common. *95 Northwestern University Law Review* 505, at 526.

<sup>28</sup> Merriam-Webster Online Dictionary "Income" <http://www.merriam-webster.com/dictionary/income>

<sup>29</sup> Merriam-Webster Online Dictionary "Wealth" <http://www.merriam-webster.com/dictionary/wealth>

accounts, home equity, inheritances. If we look closely at the concentration of wealth, we find that the top 1% of the population in the US controls 39.7% of the financial wealth, while the bottom 20% of the population controls only 8.8% of financial wealth.<sup>30</sup>

In terms of types of financial wealth, the top one percent of households have 44.1% of all privately held stock, 58.0% of financial securities, and 57.3% of business equity. The top 10% have 85% to 90% of stock, bonds, trust funds, and business equity, and over 75% of non-home real estate. Since financial wealth is what counts as far as the control of income-producing assets, we can say that just 10% of the people own the United States of America.<sup>31</sup>

Because one has to have disposable income to acquire more wealth, retain one's existing assets, or to even think of passing an inheritance, the picture of who owes the majority of the debt is also important. Here, the polarization continues, as 90% of the population responsible for 74% of the debt. Additionally, there continue to be racial disparities in wealth generation<sup>32</sup>, despite gains in income and despite improvements in federal and state civil rights. A net worth analysis by the US Census Bureau (2000) shows that net worth is racially stratified, with white households having a median net worth of \$79,400, Hispanic

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<sup>30</sup> Domhoff, William. Who Rules America: Wealth, Income and Power. <http://sociology.ucsc.edu/whorulesamerica/power/wealth.html> (information updated December 2006). See also, Abraham, David (1996). Liberty Without Equality: The Property-Rights Connection in a Negative Citizenship Regime. 21 *Law and Social Inquiry* 1. The author provides the following:

If we take one indicator, percentage of the national wealth held by the top 1% of the population, an able but not exclusive stand-in for the actual issue, we find the following: from 1776 to the Homestead Act (1862), the percentage doubled (from 14.6 to 29) in a straight linear fashion. The Homestead Act and the seizure of some southern Rebel lands led to a decline to 27% in 1870. From 1870 to 1929 (stock market crash), concentration again rose in a fairly linear fashion from 27 to 42.6%, Progressivism notwithstanding. By 1933 the crash and crisis of capitalism drove the figure down to 32.1%, but by 1938 it was back to 35.1%. For good reasons did the rich hate the New Deal: welfarist programs reduced the figure to 26.1% by 1943. Taft Hartley and Cold War measures brought the figure back to 30% by the early 1950s. It hovered at around 30% until 1973 but then tumbled very quickly and briefly during the 1973-75 stock deflation to 17.6%. By 1982 it was back up to 31% and has risen steadily since to over 36.5%, the highest concentration of wealth since 1929. Claudia Goldin *et al.*, *New York Times*, 16 Aug. 1992, at E3. See Edward Wolff & Marcia Marley, "Long Term Trends in U.S. Wealth Inequality," in R. Lipsey & H. Tice, eds., *The Measurement of Saving, Investment and Wealth* 765 (Chicago, 1991).

<sup>31</sup> Domhoff, William (2006). Who Rules America: Wealth, Income and Power. <http://sociology.ucsc.edu/whorulesamerica/power/wealth.html>

<sup>32</sup> Shapiro, Thomas. (2005), *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality*. Oxford University Press, USA. See also Oliver, Melvin and Shapiro, Thomas (2006), *Black Wealth/White Wealth: Understanding Racial Inequality*. Taylor & Francis, Inc.

households holding a median net worth of \$9,750 and Black households having a median net worth of \$7,500.<sup>33</sup>

As analyzed in this paper, the ownership of land is tied intrinsically to wealth generation. Land can be utilized as an asset base—for the development of businesses, to support the acquisition of capital, and as a stable asset that steadily appreciates in value and can be transferred to successive generations. It also has ties to status—how much land you own, where the property is located, and its proximity to resources is still a key question in determining wealth and income. Intrinsic wealth can also be a step toward freedom and independence.<sup>34</sup> Land ownership is also tied to voting trends, political power, and economic development. This makes some level of sense, as a person that feels stable in his/her home (i.e., not in danger of losing it) will be more able to focus mental energy and other resources toward other activities like political, social, and familial participation. Shared or common property ownership, with the right management strategies, can also lead to greater financial, familial, and societal security.

### *A Loss of Wealth Through Increasing Foreclosures*

The US Census Bureau report cited above highlights that most Americans have low levels of net worth. If home equity is removed from the figure, the number plummets further.<sup>35</sup> That makes the loss of home ownership even more of a concern. High rates of foreclosures are receiving national attention, and foreclosures are a major cause of land loss in North Carolina. Protection of a supply of adequate housing ought to be a priority of local, state and federal governments, but the number of foreclosures continues to increase.<sup>36</sup> Foreclosures are a result of multiple factors, including low wages, job insecurity, and the use of sub-prime mortgages with interest rates higher than those of traditional mortgages for lower income borrowers. Throughout the entire state, from 1998 through 2005, the numbers of residential foreclosures have increased—a staggering 180%.<sup>37</sup> In 2006, across North Carolina, more than 45,000 foreclosure proceedings were initiated. One note of potential concern is a recent

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<sup>33</sup> US Census Bureau, *Net Worth and Asset Ownership of Households: 1998 and 2000 Household Economic Studies*. <http://www.census.gov/prod/2003pubs/p70-88.pdf>

<sup>34</sup> Craig-Taylor, Phyliss (2000). Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting. 78 *Washington University Law Quarterly* 737.

<sup>35</sup> US Census Bureau, *Net Worth and Asset Ownership of Households: 1998 and 2000 Household Economic Studies* (Figure 6). <http://www.census.gov/prod/2003pubs/p70-88.pdf>

<sup>36</sup> The International Covenant on Economic, Social, and Cultural Rights (1966) covers many areas at issue in this paper, and has been signed, but not ratified by the United States. [http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm) As one example, the Committee on Economic, Social and Cultural Rights discussed the Right to Adequate Housing (Article 11(1)) in 1991. See [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument)

<sup>37</sup> North Carolina Justice Center, NC Foreclosure Statistics, 2007 Fact Sheets, citing the North Carolina Administrative Office of the Courts. [http://www.ncjustice.org/assets/library/668\\_freclsrestatsncadminoffcts.pdf](http://www.ncjustice.org/assets/library/668_freclsrestatsncadminoffcts.pdf)

report indicated that the rental market is responding to these increases in foreclosures—by increasing rental rates too.<sup>38</sup>

*The Subprime Mortgage: Disproportionate Impacts on Minority Homeowners*

The rapidly increasing numbers of foreclosures in the recent years have brought to light the prevalence of the subprime mortgage. This form of lending targets individuals that do not qualify for traditional mortgages, specifically because of lower income levels or a bad credit history.<sup>39</sup> These mortgages often feature adjustable interest rates, prepayment penalties and limited access to escrow accounts for taxes and insurance.<sup>40</sup> The justification used by mortgage companies to explain the use of these terms is that they are there to compensate for perceived higher risk of repayment by these lower income or credit-damaged individuals.

HUD research from 2000 found that it is three times more likely to find subprime loans in low-income neighborhoods than higher income neighborhoods and five times more likely in African American neighborhoods as compared to Caucasian neighborhoods.<sup>41</sup>

More recent research conducted by the Center for Responsible Lending, an organization based in Durham, NC shows that the trend has continued and that African Americans and Latinos are 1/3 more likely to have a subprime mortgage. Even worse, this research shows that brokers benefit from kickbacks received when pushing people into high rate loans (through yield spread premiums).<sup>42</sup>

The subprime market is lucrative—generating approximately 2 trillion dollars between 1998 and 2006.<sup>43</sup> However, because of payment terms and adjustable interest rates, it is estimated that 15.6% of all subprime loans will end

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<sup>38</sup> Woolsey, Matt. Best Markets for Landlords on Forbes.com (September 2007) [http://www.forbes.com/realestate/2007/09/04/landlord-subprime-realestate-forbeslife-cx\\_mw\\_0905bestlandlordmarket.html](http://www.forbes.com/realestate/2007/09/04/landlord-subprime-realestate-forbeslife-cx_mw_0905bestlandlordmarket.html)

<sup>39</sup> HUD, Fair Housing and Equal Opportunity, Subprime Lending Fact Sheet (last updated March 24, 2006) at <http://www.hud.gov/offices/fheo/lending/subprime.cfm>

<sup>40</sup> Center for Responsible Lending, *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners* (December 19, 2006) <http://www.responsiblelending.org/pdfs/foreclosure-paper-report-2-17.pdf>

<sup>41</sup> HUD, *Unequal Burden: Income and Racial Disparities in Subprime Lending in America* (2000). <http://www.huduser.org/publications/fairhsg/unequal.html> (last updated March 31, 2005)

<sup>42</sup> Center for Responsible Lending, *Minority Families Pay More: HMDA Stats Show Disturbing Disparities*. <http://www.responsiblelending.org/issues/mortgage/briefs/page.jsp?itemID=28012796>

<sup>43</sup> Center for Responsible Lending, *Subprime Lending: A Net Drain on Homeownership*, CRL Issue Paper No. 14, March 27, 2007 <http://www.responsiblelending.org/pdfs/Net-Drain-in-Home-Ownership.pdf>

in a foreclosure.<sup>44</sup> In addition to the loss of homes, there will be a loss of \$164 billion of wealth.

### *Losing Rights to Land: The Manipulation of Heir Property Ownership Structures*

Land loss related to heir property is a complicated issue, but is a common contributing cause to the loss of land in general as well as the loss of farmland in particular.<sup>45</sup> A 1978 research report showed that more than one third of all black owned property in the rural south was held as heir property.<sup>46</sup> It is important to note that fractionation is also a significant problem for lands held by Native American Tribes because of the mixed status of trust lands, heir transfers and jurisdictional issues but will not be covered in detail here.<sup>47</sup>

Heir property is a particular form of joint property ownership that occurs when an owner of property dies without writing a will.<sup>48</sup> State law then determines which heirs own what share of the land, and those heirs receive an undivided interest in the land, owning it together as co-tenants.<sup>49</sup> Heir property can be difficult to manage, in part because heirs may not live on or near the property, and in fact, could be several generations removed from the original purchaser of the land.

The fractionation of title as a result of heir property ownership of land is not an isolated problem. There is a barrier to economic development by heir owners that would like to make use of the property or are in need of financial assistance, as many lenders will not give a mortgage if the entire parcel of land cannot be encumbered. Also, like many families, various heirs can be spread out across the state and the country. The odds of the heirs being far from the land are increased if there have been several generations that have passed land without using wills.<sup>50</sup> When heirs are scattered or in financial need, they become more vulnerable to development pressures and may sell their interest to an outside purchaser.

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<sup>44</sup>Center for Responsible Lending, *Subprime Lending: A Net Drain on Homeownership*, CRL Issue Paper No. 14, March 27, 2007 <http://www.responsiblelending.org/pdfs/Net-Drain-in-Home-Ownership.pdf> See also, *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners* <http://www.responsiblelending.org/pdfs/FC-paper-12-19-new-cover-1.pdf>

<sup>45</sup> See generally Todd Lewan and Dolores Barclay, *Torn From the Land: Today, Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, in *THE AUTHENTIC VOICE: THE BEST REPORTING ON RACE AND ETHNICITY* (Columbia University Press, 2006), also found at [http://www.theauthenticvoice.org/Torn\\_From\\_The\\_Land\\_Intro.html](http://www.theauthenticvoice.org/Torn_From_The_Land_Intro.html).

<sup>46</sup> Graber, C. Scott (1978). Heirs Property: The Problems and Potential Solutions, 12 *Clearinghouse Rev.* 273, 273-276.

<sup>47</sup> For additional information, see the Indian Land Tenure Foundation. <http://www.indianlandtenure.org/ILTFallotment/introduction/fractionation.htm>

<sup>48</sup> See N.C. Gen. Stat. Chapter 29 (2006).

<sup>49</sup> *Id.*

<sup>50</sup> Mitchell, Thomas (2001). From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common. 95 *Northwestern University Law Review* 505.

In this form of property ownership, call a co-tenancy, one owner can only convey by a legal document that portion (the share of ownership interest) that he or she actually owns. This owner cannot legally bind the other owners without their express permission.<sup>51</sup> If one co-tenant conveys a share of the land (called an undivided interest), the subsequent purchaser becomes a co-tenant and can bring a partition action.<sup>52</sup> This puts the new purchaser in the same standing as any other family member, even if the new purchaser only owns a miniscule proportionate share. At that point, the court will either physically divide the property or sell the property and divide the proceeds amongst the co-owners. There is generally a presumption against forcing a sale of the land,<sup>53</sup> but many parties seeking partitions request a sale over the physical division of the property. The partition sale mechanism allows outsiders, speculators, and/or developers to purchase a relatively small ownership interest and then have equal standing with family owners in court. Heir owners are particularly vulnerable in areas of increasing development, and may not be able to bid competitively in the public auction process.<sup>54</sup>

An additional economic problem for families holding title to land as a group of heirs is the payment of property taxes. All the heirs have equal responsibility for the payment of taxes, but it is common that this burden is not equally distributed, and one person, or a small group of persons, takes on this responsibility. For low income, or fixed income elderly heir owners, the payment of property taxes is a yearly struggle. If the land is in an area with rapidly increasing property values, the issue becomes even more difficult, as the property taxes will also increase. If the property taxes are not paid, the county has the authority to bring a foreclosure against for the entire parcel,<sup>55</sup> and widely dispersed heirs may not even be aware of this danger.

Court cases involving the forced division of heir property through partition are often complicated and take detailed work to resolve, because it requires thorough records to determine who actually owns the land. Often, by the time a partition action is filed in the court, it is difficult to preserve the land for the owners that wish to keep it. Historically, this has contributed to large amounts of lost land, especially amongst African Americans living in the Southeast.<sup>56</sup> However, if heirs were permitted or encouraged to communicate proactively and

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<sup>51</sup> *Hinson v. Shugart*, 224 N.C. 207, 29 S.E.2d 694 (1944); *Bailey v. Howell*, 209 N.C. 712, 184 S.E. 476 (1936).

<sup>52</sup> See N.C. Gen. Stat. Chapter 46.

<sup>53</sup> N.C. Gen. Stat. 46-22 (2006); *Seawell v. Seawell*, 233 N.C. 735, 65 S.E.2d 369 (1951).

<sup>54</sup> Rivers, Faith (2006). *The Public Trust Debate: Implications for Heirs' Property Along the Gullah Coast*. 15 *Southeastern Environmental Law Journal* 147.

<sup>55</sup> NC General Statutes § 105-374 (2007) gives the county authority to foreclose on land for nonpayment of property taxes.

<sup>56</sup> The Federation of Southern Cooperatives <http://www.federationsoutherncoop.com/landloss.htm> citing the report of The Emergency Land Fund, *The Impact of heir property on black rural land tenure in the southeastern region of the United States*.

see the land as a shared resource that could benefit the entire family, some of the discord could be avoided.

### *Our Rural Landscape: Are We Losing Agriculture?*

North Carolina is steadily losing its small farmers and land base. This is an especially significant problem because agriculture has both an economic role in the state as well as cultural and environmental importance.

Many small and minority farmers, both nationally and in North Carolina, are fighting to retain their land in the face of diminishing agricultural profitability and development pressures. The struggles of African American farmers are especially relevant. In 1920, at the height of Black farm ownership, there were 926,000 African American farmers that owned over 16 million acres of land.<sup>57</sup> By 1980, Black farmers owned about 2 million acres.<sup>58</sup> The 2002 Census of Agriculture found approximately 29,000 African American principal operators, nationally, and 1,686 of these farmers were in North Carolina.<sup>59</sup> The precipitous decline of African-American farmers is due in part to persistent discrimination in lending programs from the United States Department of Agriculture—the government agency that was designed to be the “lender of last resort”<sup>60</sup> and was the subject of federal litigation resulting in the largest civil rights settlement against the USDA (total relief to date for Track A claimants: \$962,392,330).<sup>61</sup> <sup>62</sup>

Agriculture has historically been a primary economic contributor to North Carolina’s economy.<sup>63</sup> North Carolina agriculture, which includes food, fiber and

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<sup>57</sup> Gilbert, Jess and Sharp, Gwen (2002) “The Loss and Persistence of Black-Owned Farms and Farmland: A Review of the Research Literature and Its Implications”, *Southern Rural Sociology*, Vol 18 (2). See Also, Wood, Spencer and Gilbert, Jess (Spring 2000) :Returning African American Farmers to the Land: Recent Trends and a Policy Rationale.” *The Review of Black Political Economy* 27 (4).

<sup>58</sup> *Id.*

<sup>59</sup> United States Census of Agriculture, 2002.

[http://www.agcensus.usda.gov/Publications/2002/FINAL\\_Counting\\_Diversity\\_in\\_American\\_Ag.pdf](http://www.agcensus.usda.gov/Publications/2002/FINAL_Counting_Diversity_in_American_Ag.pdf)

<sup>60</sup> Gilbert, Jess and Sharp, Gwen (2002) “The Loss and Persistence of Black-Owned Farms and Farmland: A Review of the Research Literature and Its Implications”, *Southern Rural Sociology*, Vol 18 (2).

The Federation of Southern Cooperatives, Significant Dates on Black Land Loss & Acquisition: found at <http://www.federationsoutherncoop.com/landloss.htm>

<sup>61</sup> *Pigford v. Johanns* (1997), <http://www.pigfordmonitor.org/stats/>, For a strong history, see also the Court opinion <http://www.pigfordmonitor.org/orders/19990414op.pdf> and Consent Decree <http://www.pigfordmonitor.org/orders/19990414consent.pdf>

<sup>62</sup> There have been other lawsuits against the USDA filed since *Pigford* related to race or gender-based discrimination in lending. *Keepseagle, et al. v. Johanns* (Native American farmers); *Garcia v. Johanns* (Hispanic farmers and ranchers); *Love v. Johanns* (women farmers).

<sup>63</sup> In 2005, North Carolina was the nation’s top producer of tobacco, the “annual pig crop”, and sweet potatoes. It ranks second in: Christmas tree cash receipts, turkeys raised, hogs and pigs, and cucumbers for pickles. The state is third, nationally, in the production of trout, and has the third highest net farm income of \$3,616,000 (following California and Texas). North Carolina

forestry, contributes \$68.3 billion annually to the economy, accounting for 20.3% of the State's income, and employs over 17% of the work force.<sup>64</sup>

The number of farms and amount of land in farms has declined across the United States, and North Carolina is no exception. Despite the fact that agriculture has been a powerful engine of the state's economy, North Carolina has steadily lost farms and land in farms. Between 2002 and 2007, 6,200 farms and 300,000 acres of farmland have been lost.<sup>65</sup> Between 2002 and 2006, the national trend is similar, with a loss of 45,000 farms and 7,870,000 acres of farmland.<sup>66</sup>

Despite the large number of farms lost, the average size of farms is increasing, which suggests either a consolidation of farmland or a loss of predominantly small farmers. Of the total number of farmers, a very small percentage (3.6%) owns 36% of the land in farms and these farms are over 1000 acres.<sup>67</sup> This is especially striking when coupled with the fact that the average farm size for NC is relatively small—183 acres.<sup>68</sup>

Another state statistic of concern for those working with small and family farmers is that the number of producers on the upper end of the income scale (those netting \$100,000 or more annually) has actually increased since last year. This figure initially dropped from 2002-2003, but then steadily increased, whereas the numbers of farmers in the mid and lower income ranges showed a continual decrease. This is especially relevant when juxtaposed with the fact that for non-white farmers in North Carolina, the average gross income and the average total acres operated was less than half that of white farmers.<sup>69</sup>

An additional problem for low-income individuals that are seeking to buy land or begin farm enterprises is that farm values have almost doubled since

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Department of Agriculture and Consumer Services, Agricultural Statistics Division, NC Rank in US Agriculture, <http://www.agr.state.nc.us/stats/ncrank.htm> (last updated July 26, 2007).

<sup>64</sup> North Carolina Department of Agriculture and Consumer Services, Agricultural Statistics Division, Report on 2005 Cash Receipts (last modified on November 11, 2006 at <http://www.ncagr.com/stats/cashrcpt/commrank.htm>).

<sup>65</sup> Between 2002 and 2006, the number of farms went from 54,200 to 48,000; Land in farms from 9,100,000 to 8,800,000 acres. North Carolina Department of Agriculture and Consumer Services, Agricultural Statistics Division, North Carolina 2002-2006 (last modified February 13, 2007) at [http://www.agr.state.nc.us/stats/num\\_land/numfmyr.htm](http://www.agr.state.nc.us/stats/num_land/numfmyr.htm).

<sup>66</sup> North Carolina Department of Agriculture and Consumer Services, Agricultural Statistics Division, Number of Farms and Land in Farms (last updated August 9, 2007) <http://www.agr.state.nc.us/stats/economic/landandfarms.htm>

<sup>67</sup> North Carolina Department of Agriculture and Consumer Services, Agricultural Statistics Division, NC Summary Page, at <http://www.agr.state.nc.us/stats/release/NC%20Highlights.pdf> (date)

<sup>68</sup> North Carolina Department of Agriculture and Consumer Services, Agricultural Statistics Division, Number of Farms and Land in Farms (last updated August 9, 2007) <http://www.agr.state.nc.us/stats/economic/landandfarms.htm>

<sup>69</sup> Schulman, M.D. (1989) "White and Non-White North Carolina Farm Operators: A Comparison" *Journal of Social and Behavioral Sciences* 35(1):9-22.

2002. The 2006 price per acre is now averaging \$4,600 (as compared to \$2,900/acre) with pasture land averaging higher than cropland.<sup>70</sup>

The state and many counties are so concerned about the loss of land that they are creating conservation districts and encouraging other forms of land conservation—including placing limits on development. There are at least 24 land trusts operating across the state, and this is one viable option of preserving undeveloped land.<sup>71</sup> Some forms of easements allow for continued operation of the farm business but this will depend on the scope of the restrictions placed on the land. However, conservation alone will not answer all the equity-related questions—which lands are preserved, who those lands belong to (related to tax discounts), and where those lands are located.

### *Impacts of Regulatory Decision-Making on Landowners: A Case Study of Environmental Injustices*

Environmental rights are related to all the areas previously discussed in this paper: access to land, full use of the land, and the ability to develop or retain land are all implicated in environmental justice issues. Whether an area is urban or rural, regulatory decisions related to the permitting of facilities (whether the siting, monitoring of releases, or the enforcement of penalties against violators) impact the ownership and use of land. In this way, environmental justice serves as a fulcrum for all the issues: economic development, land retention, and political participation. Wrapped up in one issue, one can see the barriers that affect a community or individuals ability to make use of property, what that property is worth, and how to mobilize to request, or demand, change. There are also direct individual rights of health, and ability to use land without interference. Access to land that is not contaminated with toxins, or in close proximity to a polluter is intertwined with an individual or community's ability to sustain itself. As an economic consequence, environmental degradation devalues land, making it difficult to market, and preventing homeowners from realizing the value of their initial investment or even from moving out, as they cannot afford even replacement housing. Once contaminated, land is also more likely to be used for increased development, possibly as site for more industrial facilities.

Minority landowners have borne the burden of many years of racism, in social, political, and economic forms as well as direct physical forms. The basic human rights to life and health are violated by the perpetually polluting industries that operate with seeming impunity in communities made up of residents that are people of color or have low income levels. Environmental racism often forces

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<sup>70</sup>North Carolina Department of Agriculture and Consumer Services, Agricultural Statistics Division, <http://www.agr.state.nc.us/stats/economic/realestate.htm> (last updated August 6, 2007)

<sup>71</sup>See the Conservation Trust for North Carolina, for a list of land trusts across the state <http://www.ctnc.org/about.htm> and the Black Family Land Trust <http://www.bflt.org/>

people off the land (if they have money to move), and it often freezes local economic development. Although environmental degradation often impacts community connectedness, it does not necessarily limit political participation, as there are active movements to improve living conditions in areas where there has been significant contamination.

The term “environmental justice” is being used with increasing frequency.<sup>72</sup> Environmental law as we know it is not, however, synonymous with environmental justice. Environmental justice is a broad concept and is often associated with the push toward equity in environmental protection. As such, environmental justice work involves federal and state environmental laws as well as federal civil rights statutes. This effort encompasses a civil rights and/or social justice focus and is the collective work of both activists and lawyers. The prolonged efforts of activists and other concerned citizens to raise the awareness about the ongoing threats to the environmental health of minority and low-income communities and the physical well being of their residents have blossomed into a movement which is recognized in both law and politics.

#### *North Carolina Roots of Environmental Justice*

The movement for environmental equity has prominent early roots in North Carolina, beginning with the siting of a hazardous waste landfill in Warren County. In 1978, it was discovered that a company in the Research Triangle Park area was dumping oil containing PCBs (Polychlorinated Byphenyls<sup>73</sup>) along long stretches of roadway in eastern North Carolina. After the extent of the contamination was discovered and over 240 miles of road were dug up, the waste had to be taken somewhere, and the state selected a location in Warren County, North Carolina. The Afton Community in the Shocco Township is a predominantly minority community, with estimates ranging from “sixty-nine (69%) percent non-white”<sup>74</sup> to eighty-four (84%)<sup>75</sup> percent African-American in 1982, with twenty (20%) percent of the residents having incomes below the federal poverty level. This rural community was chosen by the state to house the one

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<sup>72</sup> Parts of the following sections have been taken from a manuscript prepared by the Land Loss Prevention Project for a free continuing legal education (CLE) program, Environmental Advocacy for Individuals and Communities, offered in April of 2005 in Durham, North Carolina.

<sup>73</sup> PCBs are a group of manufactured organic chemicals that were often used in transformers and other electrical equipment before their production was stopped in the U.S. in 1977. PCBs are usually range from colorless to light yellow, are not water soluble, and have no known odor or taste. There have been studies linking PCB exposure to several negative health effects, including cancer. Studies Link PCBs to Human Cancer, January 2, 2001 *Wall Street Journal* (Carpenter, David)

<sup>74</sup> Warren County PCB Landfill Fact Sheet, Division of Waste Management, North Carolina Department of Environment and Natural Resources. Note: It is not clear from what year this was taken, or from what level of census analysis (county or census block).  
[http://www.wastenotnc.org/WarrenCo\\_Fact\\_Sheet.htm](http://www.wastenotnc.org/WarrenCo_Fact_Sheet.htm)

<sup>75</sup> Robert Bullard, Environmental Racism PCB Landfill Finally Remedied But No Reparations for Residents, Environmental Justice Resource Center, Clark Atlanta University, January 11, 2004.  
<http://www.ejrc.cau.edu/warren%20county%20rdb.htm>

hundred and forty two (142) acre landfill<sup>76</sup>, even though none of the contaminated soil was removed from Warren County. Despite numerous challenges to the selection process by residents and activists, construction for the landfill began in 1982. Community members and activists continued their protests and drew national attention to the problem. As the first truckloads of contaminated soil came in, demonstrators laid down in the road and organized other forms of peaceful protest. There were over 500 arrests.<sup>77</sup>

Because of the level of attention that this project engendered, Governor Jim Hunt promised that the landfill would be detoxified if the necessary technology became available.<sup>78</sup> Twenty years after the landfill opened, and after many years of concern that the landfill was leaking, the detoxification began, and was completed in October 2003.<sup>79</sup> Approximately eighty two thousand tons (82,000) of contaminated soil were treated.

### *National Linkages and Studies*

Additionally, the events in Warren County prompted a national inquiry into issues of environmental equity. In 1983, as a result of urging by the Congressional Black Caucus, The United States General Accounting Office (GAO) released a report entitled “Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities,” finding that African American communities were disproportionately burdened in the placement of landfills in EPA’s Region IV (which is comprised of eight southern states). In fact, a 1987 report found that the *most* significant factor in the siting of hazardous waste landfills was race.<sup>80</sup> As a follow-up to the 1987 report, the United Church of Christ commissioned a second analysis, which was released in March of 2007.<sup>81</sup> The situation has not improved, and the study found that more than 9 million people live within three kilometers of one of the nation’s 413 commercial hazardous waste facilities. More than 5.1 million people of color live in a neighborhood that has a commercial hazardous waste facility.<sup>82</sup>

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<sup>76</sup> Warren County PCB Landfill Fact Sheet, Division of Waste Management, North Carolina Department of Environment and Natural Resources.

[http://www.wastenotnc.org/WarrenCo\\_Fact\\_Sheet.htm](http://www.wastenotnc.org/WarrenCo_Fact_Sheet.htm)

<sup>77</sup> NC WARN fact sheet, A Long Road to Win Environmental Justice, December 2003.

<sup>78</sup> Warren County PCB Landfill Fact Sheet, Division of Waste Management, North Carolina Department of Environment and Natural Resources. *See also*, NC WARN fact sheet, A Long Road to Win Environmental Justice, December 2003.

<sup>79</sup> Robert Bullard, Environmental Racism PCB Landfill Finally Remedied But No Reparations for Residents, Environmental Justice Resource Center, Clark Atlanta University, January 11, 2004.

<sup>80</sup> “Toxic Wastes and Race in the US—A National Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites”, United Church of Christ Commission on Racial Justice. (1987) *Generally*, *See also* Harvey White, Race, Class and Environmental Hazards at

<http://www.calepa.ca.gov/EnvJustice/Documents/2003/Appendices/AppendixB.pdf>

<sup>81</sup> Toxic Wastes and Race at Twenty, <http://www.ucc.org/justice/pdfs/toxic20.pdf>

<sup>82</sup> *Id.* 2.5 million Hispanics or Latinos, 1.8 million African Americans, 616,000 Asians/Pacific

The environmental justice movement addresses, in part, what has come to be known as environmental racism. Reverend Benjamin Chavis, Jr. is credited with coining the term in 1987 and defines it as follows:

Environmental racism is racial discrimination in environmental policymaking. It is racial discrimination in the enforcement of regulations and laws. It is racial discrimination in the deliberate targeting of communities of color for toxic waste disposal and the siting of polluting industries. It is racial discrimination in the official sanctioning of the life-threatening presence of poisons and pollutants in communities of color. And, it is racial discrimination in the history of excluding people of color from the mainstream environmental groups, decision-making boards, commissions, and regulatory bodies.<sup>83</sup>

The movement's focus on racial discrimination does not, however, suggest that the movement has as its goal the redistribution of disadvantage. Rather, Deohn Ferris describes it as seeking a healthier environment for all people – “[t]he keystone of this quest for justice is equal protection, *not* equal pollution.”<sup>84</sup>

#### *A Movement for Equity*

Leaders in the movement for environmental justice gathered in Washington, DC in October of 1991 at the First People of Color Environmental Leadership Summit. As a result, the group developed a set of principles designed to define and describe environmental justice.<sup>85</sup> Highlighting the rights of workers, children, Tribes, and communities that are overburdened with toxic facilities, this document is a foundation for work that continues today. As the movement as progressed, these leaders are seeking holistic improvements that combine areas of work not traditionally united: community development becomes a part of work for environmental justice, preservation of land becomes key to work against climate change, and all of the above are becoming a single movement. Intertwined with all of these is a focus on racial, gender, and socio-economic equity and access to decision-makers.

#### *Common Property as a Solution for Low-Wealth, Low-Income Individuals*

Ownership of land or resources in common is often a successful tool for wealth building. Farmers and artisans often utilize cooperatives to access

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Islanders and 62,000 Native Americans live in neighborhoods with one or more commercial hazardous waste facilities.

<sup>83</sup> Bullard, Robert, 1993. *Confronting Environmental Racism: Voices From the Grassroots* 3

<sup>84</sup> Ferris, D. A Challenge to the EPA, *EPA J.*, Mar./Apr. 1992, at 28.

<sup>85</sup> See The Principles of Environmental Justice, [http://www.weact.org/ej\\_principles.html](http://www.weact.org/ej_principles.html)

markets that would not otherwise be open to them because they do not have the size or level of production necessary to reach large commercial centers. Cooperative ownership of land or other resources has long been utilized in tribal communities and through the ejido system in Mexico. One form of common land ownership that some people mistakenly find themselves is the 'tenancy in common' created by heir property, as mentioned in the previous section. If managed in a way that promotes communication amongst the heir owners related to needs and resources, heir property can be managed without turmoil and can serve as a foundation for future economic growth (without significant destruction of the resource itself).

Based on the current rates of home displacements resulting from foreclosures, failing farm businesses, and environmental degradations, it appears that shared land and resource ownership will be a useful tool for people to access land that will be necessary for economic stability.

### Conclusion

Land is a nonrenewable resource and the decisions we make today affect future generations. At this point, as we move toward increasing over-utilization of this resource and higher levels of wealth stratification, it become evident that we are not doing enough to protect low wealth and communities of color. As North Carolina continues to grow and many areas face increased development pressure, escalating rates of foreclosure, environmental injustices, we must act to ensure societal equity by protecting the rights of current landowners and those that become dispossessed of their land.