



*Since 1894*

# The Energy Council

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# What is a Conservation Easement?

- Black's Law Dictionary, Seventh Edition
  - Easement: "An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose."
  - Conservation: "The supervision, management, and maintenance of natural resources; the protection, improvement, and use of natural resources in a way that ensures the highest social as well as economic benefits."
- **K.S.A. 58-3810. Uniform conservation easement act; definitions. (1992)**

As used in this act, unless the context otherwise requires:

(a) "*Conservation easement*" means a ***nonpossessory interest*** of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic or open-space values of real property, assuring its availability for agricultural, forest, recreational or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological or cultural aspects of real property.

# Characteristics of a Conservation Easement

- Voluntary – negotiated between the fee simple owner of the property and another entity, which may or may not eventually own the easement.
- Term - Perpetual or Determinable (most common is perpetual).
  - Some states like Kansas limit the term in duration to the lifetime of the grantor, unless expressly stated otherwise. K.S.A. 58-3811.
- Consideration – fee owner is paid something for his development rights:
  - Privately raised cash payment;
  - Government payment; or
  - Landowner donation in exchange for a tax credit.
- Restrictions on Land Use – the fee owner of the land is still in possession of the property and can use the land in a manner consistent with the easement.
- Land Trust – entity charged with holding/owning the conservation easement (could be a nonprofit or the government).

# Does Perpetual Really Mean Forever?

- In most instances the intent of the parties is that the easement shall run with the land and transition between owners uninterrupted, but common law and some state statutes provide methods to terminate perpetual easements.
  - Merger of Title – the owner of the servient estate becomes the owner of the dominant estate or the owner of the dominant estate becomes the owner of the servient estate.
    - Some land trusts are prohibited from owning land, whether by agreement or by law, often precluding the latter.
    - Conservation easements can place restrictions on the sale of the easement or on the merger of title:
      - If Grantee ceases to exist, then “Conservation Easement shall become vested in an organization mutually agreed upon by Grantor and Grantee which qualifies as an exempt organization . . . .”
      - “Conservation Easement can only be terminated or extinguished . . . by judicial proceedings.”

# Who Can Enforce a Conservation?

- Typically defined by the document.
  - Often limited to the property owner and the land trust or a government entity.
- State laws can limit to whom a holder can transfer an easement:
  - K.S.A. 58-3811(f) – a Kansas city or county, grantor or grantors' heirs, another qualified holder.
    - RTK easements prohibit transfers to a government entity
- State laws can place limits on enforcement.

# Who Can Enforce a Conservation Easement

**K.S.A. 58-3812. Same; judicial actions; who may bring action affecting conservation easement; modification or termination by court.**

(a) An action affecting a conservation easement may be brought by:

- (1) An owner of an interest in the real property burdened by the easement;
- (2) a holder of the easement;
- (3) a person having a third-party right of enforcement; or
- (4) a person authorized by other law.

(b) This act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

# Reasons for Entering Into a Conservation Easement

- Money
- Tax benefit:
  - Tax credit;
  - Estate tax valuation; and
  - Property tax valuation;
- Mitigation to offset a negative environmental impact; and
- Preservation:
  - Sensitive ecosystem, or
  - Farm or ranch operation.

# U.S. Department of Agriculture (USDA) Easement Programs

- Agricultural Conservation Easement Program (ACEP)
  - Voluntary federal conservation program implemented by the USDA Natural Resources Conservation Service (NRCS) to protect agricultural land and conserves wetlands.
  - ACEP-ALE provides matching funds to eligible entities to buy conservation easements on farm and ranch land.
    - NRCS may pay up to 50 percent of the appraised fair market value of the easement, though a waiver is available to increase the cost-share for grasslands of special environmental significance.
  - A right of enforcement for NRCS, which empowers the agency to enforce the easement if the eligible entity fails to uphold it.



# KLA & Conservation Easements

- Ranchland Trust of Kansas
  - 501(c)(3) land trust created by the Kansas Livestock Association in 2003.
    - KLA Board of Directors appoints a majority of the RTK Board of Directors.
  - KLA members interested in preserving native grasslands, but had a healthy mistrust of existing land trusts.
  - RTK and its partners hold 20 conservation easements totaling over 14,000 acres conserved for agricultural use for future generations.
    - Nearly double that amount awaits to be fully funded through the capacity development of RTK.
    - RTK does not seek participants and does not profit from its holdings.
  - <https://ranchlandtrustofkansas.org/>

# Goals and Components of RTK Easements

- Purpose: “Conserving the open spaces and natural ecosystems of Kansas farm and ranch land.”
  - Working lands: “The parties agree, however, that the current agricultural purpose of, and improvements to, the Property are consistent with the conservation purposes of this Conservation Easement.”
    - The Grantor reserves:
      - “All rights as owner of the Property to use the Property for all purposes that are not expressly prohibited . . . .”
      - “[T]he right to sell or otherwise transfer the Property to anyone the Grantor may choose.”
      - “Nothing . . . Shall give or grant the public a right to enter upon or use the Property . . . .”
      - “Physical and managerial control over the day-to-day operations of the Property.”

# RTK Easement – Prohibited Uses

- Construction of new buildings and homes
  - Exceptions:
    - Existing agricultural buildings – reasonable repair/replacement and enlargement thereof;
    - New loafing sheds, corrals, water infrastructure, and other minor agricultural structures; and
    - Fences;
- Roads, except to access buildings and other fixtures w/notice to Grantee;
- Billboards;
- Industrial and commercial uses;
- Cultivation, except in previously tilled areas;
- Confined feeding facilities;
- Dredge, fill, and excavation;
- Mining and mineral extraction; and
- Separation of water rights.

# Conservation Easements and Energy

- Limitations for Energy
  - Most conservation easements preclude energy development:
    - Example: “ There shall be no mining, drilling for or removal of oil, gas, or minerals from the Property.”
  - Conservation easements are not typically used on properties where mineral rights have been severed – in most instances a condition of USDA funding.
- Benefits for Energy
  - Species mitigation – allows exploration where oil and gas exist, but preserves areas where a species is present, but exploration is unlikely
    - Example: The Lesser Prairie-Chicken Range-Wide Conservation Plan

# Candidate Conservation Agreements with Assurances

## What is a CCAA?

A CCAA is a voluntary agreement that provides incentives for non-federal landowners to conserve candidate and other unlisted species likely to become candidates in the future. For the length of the agreement, landowners agree to undertake specific activities that address the identified threats to the target species. A range of conservation measures may qualify, such as:

- protecting and enhancing existing populations and habitats;
- restoring degraded habitat;
- creating new habitat;
- augmenting existing populations;
- restoring historic populations; and
- not undertaking a specific, potentially impacting/damaging activity.

In return for the participant's voluntary conservation action(s), the Service issues an Enhancement of Survival Permit under section 10(a)(1)(A) of the ESA. The permit, which goes into effect if the covered species is later listed as endangered or threatened under the ESA, provides assurances that, if the species is subsequently listed and no other changes have occurred, the Service will not require the permittee to conduct any additional conservation measures without consent. Additionally, the permit authorizes a specific level of incidental take of the covered species, should listing occur.

<https://www.fws.gov/service/candidate-conservation-agreements-assurances>

# Habitat Conservation Plan

## **What is a Habitat Conservation Plan?**

A Habitat Conservation Plan (HCP) is a planning document designed to accommodate economic development to the extent possible by authorizing the limited and unintentional take of listed species when it occurs incidental to otherwise lawful activities. The plan is designed not only to help landowners and communities but also to provide long-term benefits to species and their habitats. HCPs describe the anticipated effects of the proposed taking, how those impacts will be minimized or mitigated, and how the conservation measures included in the plan will be funded. If the Service finds an HCP meets the specified criteria, it issues an incidental take permit. This allows the permit holder to proceed with an activity that could otherwise result in the unlawful take of a listed species.

<https://www.fws.gov/service/habitat-conservation-plans>

# Legislative Interference with Property Rights

- KLA has opposed attempts to prohibit perpetual conservation agreements (HB 2587, Session 2012; HB 2365, Session of 2013).
  - Property rights belong to the landowner, not the government.
  - Federal income tax deductions for charitable contributions can only be taken if the easement is perpetual.
  - Limit USDA cost share under ACEP.
  - Prohibiting perpetual easements can harm energy development.
    - Mitigation – FWS views perpetual easements as having greater value than short term agreements.
    - Insufficient mitigation could lead to incomplete no assurances for developers.

# Other Hot Button Policy Issues

- Biden Administration's 30 x 30 Initiative
  - This has caused undue concern about, and harm to, land trust reputations.
  - RTK and other private agricultural land trusts are not working with the federal government to carry out this initiative.
  - The only possible connection is if the federal government counts the separate and private work of the land trusts as “conservation”.
  - Concern among land trusts:
    - Federal government does not want to consider conservation easements on native grasslands as additional conservation.



# Parting Thoughts

- Conservation easements are voluntary.
  - Terms are negotiated on an individual basis.
  - Research land trust governance and staff.
  - Landowners should never agree to something unless they have received competent counsel and are comfortable with the terms.
  - Limitations are different in every state.
- Conservation easements are not for everyone!
  - BUT...government should not interfere with private property rights and land ownership decisions.
  - If government wants to curb perceived abuses of land trusts, there are tactics to do so without limiting the perpetual nature of easements, which could limit oil and gas exploration in some regions.



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# Questions?

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