

KANSAS FARM BUREAU LEGAL FOUNDATION

A Guide to Conservation Easements for the Agricultural Landowner

Conservation easements can have many benefits, including environmental conservation, preservation of land for agricultural production, and last but not least, income or tax savings for landowners. Landowners and buyers, however, should not make decisions regarding conservation easements without some due diligence and thorough consideration. After all, most conservation easements are perpetual, and forever is a long time.

What is a conservation easement?

A conservation easement is a voluntary legal agreement between a surface landowner and a conservation easement holder, whereby certain rights of the landowner are given to the easement holder. Put another way, a conservation easement places restrictions on the landowner's use of their property. The landowner can either sell or donate a conservation easement to an easement holder. As with other easements, a conservation easement only grants the holder of it certain rights. Conservation easements can be granted for many different purposes, such as protecting wildlife habitat, keeping agricultural land in agricultural production, or mitigating environmental impacts of projects on other lands.

What financial benefits can a landowner experience?

Conservation easements are a way for landowners to receive financial benefit from their land, while not giving up all use of the land, provided that the conservation easement is drafted in a way that does not prohibit, either expressly or practically, the landowner's continued utilization of the land. If a landowner donates a conservation easement, they may be eligible for a charitable deduction.¹ These tax benefits are available because lawmakers perceive a public benefit from preserving wildlife habitat, agricultural lands, open space, and even historic buildings and sites. The federal tax code requires a conservation easement to be granted in perpetuity for the landowner to take advantage of the tax benefits. Alternatively, a landowner may choose to sell their conservation easement to an easement holder, in which case they will receive an economic payment from the conservation easement holder. In this case, the

easement holder will typically require the easement to be granted in perpetuity to maximize the conservation benefit of their investment, and to be consistent with other easements held in their portfolio of holdings. A less direct financial benefit to the owner could be the reduction in value of the land that results from limiting the available uses of the land. This "benefit" may seem counterintuitive, but the reduced value could diminish or even eliminate estate taxes upon the landowner's death.²

Landowners should keep in mind, though, that these financial benefits are one-time benefits, and typically only benefit the current landowner. Future owners of the land, including future generations of the landowner's family, would likely be restricted from maximizing their economic benefit from the land. Additionally, future buyers should, in most cases, expect to acquire land with a conservation easement at a discount, but buyer beware, the savings may not always be worth the hassle that can accompany some conservation easements.

What's in it for conservation easement holders?

Besides furthering their conservation goals, conservation easement holders, in return, can contract with other individuals or entities to allow easements it holds to be applied for mitigation credits to offset the environmental impacts of development projects these third parties have on other lands (i.e. mitigation banking). Easement holders are also able to raise funds for the purchase of additional easements through conservation-minded philanthropists.

What entities or groups are available to hold conservation easements?

A qualified conservation easement holder can be either 1) a private, nonprofit conservation organization, often called a land trust or conservancy, or 2) a governmental agency with authority to hold a conservation easement. Easement holders can have very different goals and strategies in place. Not all easement holders are created equal, so landowners desiring to enter into a conservation easement should consider all their options for easement holders.³

What should a landowner or buyer consider before entering into a transaction involving a conservation easement?

- **Perpetuity:** Probably the key thing for landowners and buyers to keep in mind is that most conservation easements are perpetual.⁴ Courts rarely find a basis to allow a perpetual conservation easement to be voided. The perpetual nature of conservation easements serves to only compound any negative effects of a conservation easement.
- **Purpose:** Landowners and buyers should thoughtfully consider what is the purpose of their conservation easement. As mentioned earlier, some easements preserve production agriculture, while others might greatly restrict, or even prohibit, certain agricultural practices, even if not done explicitly.
- **Future impact:** Before entering into a conservation easement, a landowner should consider the future of the property and their succession plan – perhaps even conferring with future generations before entering into a contract for a conservation easement.
- **Know the easement holder:** Landowners and buyers should do research on the easement holder with which they intend to contract, or who may hold a conservation easement on land they intend to purchase. Landowners and buyers can request a list of other landowner references from the easement holder, and perform general internet research to find out if other landowners who have already contracted with the easement holder are satisfied with their experience. Landowners and buyers should also keep in mind the goals of the easement holder. For example, if a conservation easement holder focuses on wildlife habitat or environmental conservation, their policies may not be very friendly to continued agricultural production.
- **Mortgage subordination:** If the property has a mortgage on it, or if a buyer requires financing for

their purchase, then the mortgagee will be required to subordinate its position to the easement holder.

- **Impact on other property rights:** It is important for landowners and buyers to consider the impact of the conservation easement on other property rights, such as surface water, mineral and oil/gas rights, which may be greatly limited by a conservation easement.
- **Know the easement terms:** Landowners and buyers should study the easement agreement to make sure they are fully aware of the easement terms. Using the land in a manner that violates the easement agreement could expose the landowner to substantial financial risk. Many easement agreements require a landowner to seek approval from the easement holder before improvements are made to the land. This approval should be obtained in writing to protect the landowner's actions and reduce a landowner's risk of financial liability.
- **Due diligence:** Title work done at the time of purchasing land should include the interest of an easement holder, but a buyer should also reach out to the conservation easement holder to inquire if there are any existing issues with the easement that title work may not reveal.
- **Get the right counsel:** The documentation of a conservation easement can be very complicated, so landowners should seek advice from an attorney with experience in real property transactions, including conservation easements. Landowners should also consult with their tax advisor about the tax implications of the transaction.

Conclusion:

A conservation easement can provide financial benefit for a landowner or buyer, and may help to further their conservation goals, but thorough consideration of the impacts of a conservation easement should be given before any arrangement is entered into that could impact their rights in land for perpetuity.

¹ This resource does not focus on the tax benefits of donating a conservation easement. For more information about the charitable deduction available for donated conservation easements, visit the legal foundation website for additional resources. To help determine if donating a conservation easement could be financially beneficial, a landowner should visit with their tax professional and attorney.

² The federal estate and gift tax exemption has grown in recent years to \$11.4 million per individual in 2019, or \$22.8 million per married couple, so a landowner's need to reduce the value of their estate to avoid estate taxes may not be as strong a driving factor as it once was.

³ Beware of aggressive easement holders that seek out absentee landowners who might have an interest in increasing income from their land, but who are disconnected enough that they do not fully appreciate the ramifications of entering into a conservation easement agreement.

⁴ The Natural Resource Conservation Service (NRCS), a part of the USDA, has programs that provides financial and technical assistance to help conserve agricultural lands and wetlands and their related benefits. Some of the wetlands conservation programs are available for substantial terms that are not perpetual. For more information on the assistance and programs available through NRCS, visit <https://www.nrcs.usda.gov>.

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