

# THE WETLANDS RESERVE PROGRAM: CHARTING A COURSE THROUGH THE WRP\*

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I.	Introduction.....	632
II.	History of the WRP.....	634
III.	WRP Eligibility.....	636
IV.	Easement Priority.....	637
V.	Easement Enrollment Process.....	638
	A. Easement Value Determinations.....	638
VI.	The Option Agreement to Purchase.....	639
	A. Examining the Option Agreement to Purchase.....	639
	i. Parties to the Contract.....	640
	ii. Option to Purchase.....	640
	iii. Consideration.....	640

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iv.	Taxes .....	641
v.	Statements Not Reflected in the Contract .....	642
vi.	Failure to Convey .....	642
VII.	Conservation Easements .....	643
A.	Conservation Easements – What is the NRCS Getting?.....	643
i.	Negative, In Gross Conservation Easements .....	644
B.	Conservation Easements – What is the Landowner Giving Up?.....	644
C.	Conservation Easements – What is the Landowner Getting? .....	646
D.	Landowner Options Within the WRP .....	646
VIII.	Easement Enforcement.....	647
A.	Monitoring .....	648
i.	The NRCS Approach .....	648
IX.	Dispute Resolution .....	651
X.	Conclusion .....	651

## I. INTRODUCTION

When the land does well for its owner, and the owner does well by his land – when both end up better by reason of their partnership – then we have conservation. When one or the other grows poorer, either in substance, or in character, or in responsiveness to sun, wind, and rain, then we have something else, and it is something we do not like.

Let's admit at the outset that harmony between man and land, like harmony between neighbors, is an ideal – and one we shall never attain. Only glib and ignorant men, unable to feel the mighty currents of history, unable to see the incredible complexity of agriculture itself, can promise any early attainment of that ideal. But any man who respects himself and his land can try to.<sup>1</sup>

The Wetlands Reserve Program (“WRP”) is the self-proclaimed premier wetlands restoration program in the United States.<sup>2</sup> Implemented in The Food,

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1. CURT MEINE, ALDO LEOPOLD: THE MAN AND HIS LEGACY 39 (Thomas Tanner, ed., S.C.S.A. 1987).

2. See NRCS, USDA, WETLANDS RESERVE PROGRAM, RESTORING AMERICA'S WETLANDS 1 (2000), available at [http://www.environmentalobservatory.org/library/uploadedfiles/Wetlands\\_Reserve\\_Program\\_-\\_Restoring\\_Americas\\_.pdf](http://www.environmentalobservatory.org/library/uploadedfiles/Wetlands_Reserve_Program_-_Restoring_Americas_.pdf) (last visited Mar. 1, 2004).

Agriculture, Conservation, and Trade Act of 1990, the WRP offers landowners, for the first time, an incentive to restore and protect the nation's wetlands.<sup>3</sup> The WRP authorizes the Natural Resources Conservation Service ("NRCS") to "purchase conservation easements from, or enter into restoration cost-share agreements with, eligible landowners who voluntarily cooperate in the restoration and protection of wetlands and associated lands."<sup>4</sup> The WRP has helped "restore and protect the functions and values of wetlands in the agricultural landscape," progress toward "the national goal of no net loss of wetlands, and improve the general environment of the country."<sup>5</sup> The program has enrolled nearly 1,075,000 acres as part of 6,500 restoration projects nationwide as of 2001.<sup>6</sup> The WRP also marks the first nationwide effort by the federal government to utilize conservation easements.<sup>7</sup>

The purpose of this article is to chart a course through the program requirements of the WRP, identifying a handful of legal issues along the way. The article will take a step-by-step approach through the WRP requirements, specifically identifying what is expected of potential program participants and what legal issues may arise throughout the process. First, the article sets the stage for this analysis by reviewing the history of the WRP. Second, the article will examine the processes involved in program participation, including how the NRCS will determine easement eligibility, priority, and value determinations. In addition, a description of encumbrances the landowner is placing on the easement property will be laid out. Next, the article will take an in-depth look at an important preliminary step in the WRP application process, the Option Agreement to Purchase.<sup>8</sup> It will explain the purpose of the document, setting forth what is expected of the landowner and exploring the legal issues involved with the real estate option contract. In part VII of this article, an analysis of easement management and enforcement will be set out, discussing what the NRCS must do to ensure that the easement will survive judicial scrutiny and serve its purpose as a

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3. See NRCS, USDA, RESTORING AMERICA'S WETLANDS: THE WETLANDS RESERVE PROGRAM 6, available at <http://www.nrcs.usda.gov/programs/wrp/wrpweb.pdf> (last visited Mar. 1, 2004).

4. 7 C.F.R. § 1467.4 (2003).

5. NRCS, USDA, 440-CONSERVATION PROGRAMS MANUAL pt. 514.01(b), available at [http://policy.nrcs.usda.gov/scripts/lpsiis.dll/MM\\_440\\_514.htm](http://policy.nrcs.usda.gov/scripts/lpsiis.dll/MM_440_514.htm) (last visited Mar. 1, 2004).

6. See NRCS, USDA, RESTORING AMERICA'S WETLANDS: THE WETLANDS RESERVE PROGRAM, *supra* note 3, at 7.

7. See Neil D. Hamilton, *The Role of Law in Promoting Sustainable Agriculture: Reflections on Ten Years of Experience in the United States*, 3 DRAKE J. AGRIC. L. 423, 429 (1998).

8. USDA, FORM AD-1157, OPTION AGREEMENT TO PURCHASE 1 (2002), available at <http://forms.sc.egov.usda.gov/efrms/Forms/AD1157.pdf>.

conservation tool. Finally, this article will examine the dispute resolution procedures required of program participants in the event a disagreement arises between the landowner and the NRCS. To that end we shall see if the partnership created by the WRP, between land, landowner, and the government, bring us closer to Aldo Leopold's ideal of harmony between man and land.<sup>9</sup>

## II. HISTORY OF THE WRP

Prior to WRP legislation, government policy viewed wetlands as useless and unproductive in their natural state.<sup>10</sup> Drainage districts were formed and legislation promoted conversion through monetary and technical assistance.<sup>11</sup> The government also encouraged commodity production on these converted wetlands through loans, price supports, and crop insurance.<sup>12</sup> The inception of the WRP indicates the changing policies and attitudes toward wetland regulation and conservation with both state<sup>13</sup> and federal governments recognizing the value of wetland conservation.<sup>14</sup>

In addition to WRP legislation, the Swampbuster provisions of the 1985 Food Security Act increased enforcement of section 404 of the Clean Water Act and the no-net-loss policy for wetlands was a clear indication of the changing attitude towards our nation's wetlands.<sup>15</sup> As this shift in policy and attitude toward wetland restoration has evolved, the result has become a complex regulatory program.<sup>16</sup> This policy shift also demonstrates the complex issues involved in conservation and the potential for additional policy changes in the future.

The WRP was initially authorized by Title XII of the Food Security Act of 1985 ("1985 Farm Bill"), setting a goal of one million enrolled easement acres

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9. See MEINE, *supra* note 1, at 39.

10. See Dalana W. Johnson, *Saving the Wetlands from Agriculture: An Examination of Section 404 of the Clean Water Act and the Conservation Provisions of the 1985 and 1990 Farm Bills*, 7 J. LAND USE & ENVTL. L. 299, 300 (1992).

11. See *id.*

12. See *id.*

13. See IOWA CODE § 456B (2003); see also James W. O'Brien, Note, *Federal and State Regulation of Wetlands in Iowa*, 41 DRAKE L. REV. 139, 173 (1992) (discussing how Iowa enacted legislation in 1990 regulating the drainage of protected wetlands and began an inventory program to account for wetlands throughout the state).

14. See NRCS, USDA, RESTORING AMERICA'S WETLANDS: THE WETLANDS RESERVE PROGRAM, *supra* note 3, at 2.

15. See O'Brien, *supra* note 13, at 140.

16. See *id.*

to be implemented between 1991 and 1995.<sup>17</sup> The 1985 Farm Bill was later amended to provide for the implementation of the WRP in the Food, Agricultural, Conservation, and Trade Act of 1990 (“1990 Farm Bill”).<sup>18</sup>

The 1990 Farm Bill adopted the acreage goal articulated in the 1985 Farm Bill and also created an umbrella program including, *inter alia*, the creation of the Environmental Conservation Acreage Reserve Program (“ECARP”), the conservation provision which includes the WRP.<sup>19</sup> Under the 1990 Farm Bill, the WRP began as a pilot program, introduced in nine states: California, Iowa, Louisiana, Minnesota, Mississippi, Missouri, New York, North Carolina, and Wisconsin, with the first easements being purchased in 1992.<sup>20</sup> Later, in 1994, the program was expanded to include Arkansas, Illinois, Indiana, Kansas, Nebraska, Oregon, South Dakota, Tennessee, Texas, Virginia, and Washington, a total of twenty states.<sup>21</sup>

The Federal Agriculture Improvement and Reform Act of 1996 (“1996 Farm Bill”) established a new program cap of 975,000 acres and provided for the enrollment of land in the WRP until 2002.<sup>22</sup> In addition, the 1996 Farm Bill expanded the WRP by authorizing the enrollment of non-permanent acres in the WRP through restoration cost-share agreements.<sup>23</sup> This modification provides for a cost-share agreement between the NRCS and a landowner who wishes to re-establish degraded or lost wetlands.<sup>24</sup> This non-easement alternative is generally a ten-year commitment and may involve technical assistance provided by the NRCS and other agencies or organizations.<sup>25</sup>

The WRP was recently reauthorized and extended in The Farm Security and Rural Investment Act of 2002.<sup>26</sup> The WRP has exceeded its original goal of

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17. See Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (1985) (current version at Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002)); see also 57 Fed. Reg. 23,908, 23,908 (June 4, 1992) (to be codified at 7 C.F.R. pt. 704).

18. See Pub. L. No. 101-624, 104 Stat. 3359 (1990); see also 57 Fed. Reg. at 23,908-09.

19. See Pub. L. No. 101-624, 104 Stat. 3359; see also 57 Fed. Reg. at 23,908-09.

20. See NRCS, USDA, RESTORING AMERICA’S WETLANDS: THE WETLANDS RESERVE PROGRAM, *supra* note 3, at 6.

21. See 59 Fed. Reg. 3,772, 3,774 (Jan. 7, 1994) (to be codified at 7 C.F.R. pt. 703).

22. See Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996); see also Wetlands Reserve Program, 61 Fed. Reg. 42,137, 42,139 (Aug. 14, 1996) (to be codified at 7 C.F.R. pts. 620, 1467).

23. See 61 Fed. Reg. 42,137, 42,139.

24. See NRCS, USDA, WETLANDS RESERVE PROGRAM, FACT SHEET 1 (Mar. 2003), available at <http://www.nrcs.usda.gov/programs/farbill/2002/pdf/WRPfct.pdf>.

25. See *id.*

26. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002).

restoring one million acres of wetlands, along with associated upland areas.<sup>27</sup> At the close of 2001, the program had enrolled 1,074,245 acres and over 600,000 acres remained unfunded.<sup>28</sup> Clearly, the program continues to be very popular among landowners wishing to conserve wetland areas. Today, the WRP is a nationwide program with restoration projects in forty-nine states and Puerto Rico.<sup>29</sup>

### III. WRP ELIGIBILITY

The NRCS has several eligibility criteria that both the landowner, and the land which is to be enrolled, must comply with. In order to be eligible, a landowner must own eligible land and have owned such land for at least twelve months prior to the time an intent to enter the WRP has been declared.<sup>30</sup> The twelve-month ownership rule may be waived by the NRCS for those landowners who have acquired land through will or succession or that can make proper assurances to the NRCS that the property was not acquired for the sole purpose of entering it into the WRP.<sup>31</sup> The landowner must provide any and all information to the NRCS that “the agency deems necessary or desirable to assist in its determination of eligibility for program benefits and for other program implementation purposes.”<sup>32</sup>

Land eligibility will be based on a determination made by the NRCS after consulting with the U.S. Fish and Wildlife Service.<sup>33</sup> Eligibility criteria will be based on “land [that] maximizes wildlife benefits and wetland values and functions [and] [t]he likelihood of the successful restoration of such land and the resultant wetland values merit inclusion of such land in the program.”<sup>34</sup> In addition, eligible land is further limited to the following:

- (i) Wetlands farmed under natural conditions, farmed wetlands, prior converted cropland, commenced conversion wetlands, farmed wetland pastures, and lands substantially altered by flooding so as to develop wetland functions and values; (ii) Former or degraded wetlands that occur on lands that have been used or are cur-

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27. See NRCS, USDA, RESTORING AMERICA'S WETLANDS: THE WETLANDS RESERVE PROGRAM, *supra* note 3, at 2.

28. See *id.* at 7.

29. See *id.* at 6.

30. See 7 C.F.R. § 1467.4(c)(1)-(2) (2003).

31. See *id.* § 1467.4(c)(2).

32. *Id.* § 1467.4(c)(3).

33. See *id.* § 1467.4(d)(2).

34. *Id.* § 1467.4(d)(2).

rently being used for the production of food and fiber . . . ; (iii) Riparian areas along streams or other waterways that link or, after restoring the riparian area, will link wetlands which are protected by an easement or other device or circumstance that achieves the same objectives as an easement; (iv) Land adjacent to the restored wetland which would contribute significantly to wetland functions and values including buffer areas, wetland creations, and non-cropped natural wetlands . . . ; (v) Other wetlands that would not otherwise be eligible but would significantly add to the wetland functions and values; and (vi) Wetlands that have been restored under a private, State, or Federal restoration program with an easement or deed restriction with a duration of less than 30 years.<sup>35</sup>

The NRCS has been given discretion, “based on the likelihood of successful restoration of wetland functions and values when considering the cost of acquiring the easement, . . . maintenance, and management costs” whether to include otherwise eligible land in the WRP.<sup>36</sup>

#### IV. EASEMENT PRIORITY

Once a landowner’s property has been deemed eligible by the NRCS it will then be ranked based on certain priority standards. These priority standards encompass a broad range of WRP goals including the maximization of wildlife benefits, especially habitat utilized by migratory birds, properties that are the least likely to be re-converted at the end of the enrollment contract, and easements that will involve matching funds from other WRP participants, including state and local governments or other partners in the WRP process.<sup>37</sup> Specific ranking criteria are to be based on “estimated costs of restoration and easement acquisition, availability of matching funds, significance of wetland functions and values, estimated success of restoration measures, and the duration of a proposed easement with permanent easements being given priority over non-permanent easements.”<sup>38</sup> Certain geographical locations within a state may be given higher priority if it is deemed by the NRCS that easements in those areas will better promote the goals of the program.<sup>39</sup> In areas where the adjacent property to a proposed restoration site is essential to successful wetland rehabilitation, other-

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35. *Id.* § 1467.4(d)(3).

36. *Id.* § 1467.4(d)(1).

37. *See id.* § 1467.6(a).

38. *Id.* § 1467.6(b).

39. *See id.* § 1467.6(c).

wise eligible land may be excluded if the adjacent landowners are unwilling to enroll in the program.<sup>40</sup>

## V. EASEMENT ENROLLMENT PROCESS

Once the NRCS has completed its eligibility determinations, along with priority rankings, the process of enrolling easements into the WRP may begin. The NRCS, based on its priority rankings, will contact landowners with a tentative acceptance into the program.<sup>41</sup> The landowner is presented with a letter of intent to continue and must sign this letter within fifteen calendar days in order for the enrollment process to proceed.<sup>42</sup> This letter is only a tentative acceptance into the WRP and does not legally bind the NRCS or the landowner. Rather, it merely serves as an authorization to proceed.<sup>43</sup> Once the NRCS has received a signed letter of intent to continue, it will present the landowner with a contract describing the proposed easement area and the terms and conditions of participating in the program.<sup>44</sup> This contract is entitled *Option Agreement to Purchase* and represents the genesis of the landowner's legal relationship with the NRCS.<sup>45</sup> The effect of signing the *Option Agreement to Purchase* includes, *inter alia*, authorizing the NRCS to proceed with acquisition activities which may include conducting a survey of the proposed easement area, securing any necessary subordination agreements, obtaining title insurance where applicable and undertaking any other activity necessary to properly record the easement and implement the Wetlands Reserve Plan of Operations.<sup>46</sup> Because the *Option Agreement to Purchase* plays such a critical role in the administration of the WRP it will be examined in greater detail in part VI of the article.

### A. Easement Value Determinations

Generally, the value of an easement will be determined by each State Conservationist based on the lesser of (1) a predetermined geographic rate, (2) market appraisal value, or (3) an offer made by the landowner.<sup>47</sup> Land value as-

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40. *See id.*

41. *See id.* § 1467.7(a).

42. *See id.*

43. *See id.* § 1467.7(b).

44. *See id.* § 1467.7(c).

45. *See* USDA, FORM AD-1157, OPTION AGREEMENT TO PURCHASE, *supra* note 8.

46. *See* 7 C.F.R. § 1467.7(d).

47. *See id.* § 1467.8(b)(1).

assessments are based on information related to the agricultural value of the property, taking into consideration “soil types, type(s) of crops capable of being grown, production history, location, real estate market values, appraisals and market analyses, and tax rates and assessments.”<sup>48</sup> Once an easement value is determined, the NRCS is limited to enrolling only those easements that it can come to an agreed upon price with the landowner.<sup>49</sup> This value may or may not be the fair market value of the property, and voluntary participation by a landowner is deemed a waiver of any claim to fair market value deficiencies.<sup>50</sup>

## VI. THE OPTION AGREEMENT TO PURCHASE

“The *Option Agreement to Purchase* is the equivalent of a real estate option contract for purchasing land.<sup>51</sup> It is usually signed by the landowner before the NRCS proceeds with incurring costs for surveys, where applicable, title clearance and closing procedures on the easement.”<sup>52</sup> The NRCS uses this document as a “mechanism to obligate its funds.”<sup>53</sup> In addition, the document is used to transfer risk associated with the cost of procuring the easement to the landowner and any heirs, successors, and assigns. Potential program participants should be made aware of the legal consequences, especially risk allocation, that arise once the *Option Agreement to Purchase* is negotiated and executed.

### A. *Examining the Option Agreement to Purchase*

A close examination of the *Option Agreement to Purchase* used by the NRCS reveals a number of legal issues potential program participants are confronted with at this point in the WRP process. The following discussion represents a handful of those legal issues that may be encountered by program participants.

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48. *Id.* § 1467.8(b)(2).

49. *See id.* § 1467.8(e)(1).

50. *See id.*

51. NRCS, USDA, 440-CONSERVATION PROGRAMS MANUAL, *supra* note 5, at pt. 514.27(a).

52. *Id.*

53. *Id.*

i. *Parties to the Contract*

The *Option Agreement to Purchase* states the following: “This Option Agreement is between the United States of America (hereafter ‘United States’), and the following named Landowner(s), *their heirs, successors and assigns* (hereafter ‘Landowner’).”<sup>54</sup> Named parties to the contract include participating landowners as well as their heirs, successors, and assigns.<sup>55</sup> Landowners should be made aware that by entering into this contract they are committing not only themselves to the terms of the option, but also their heirs, successors and assigns. By including this class as parties to the contract, the NRCS is attempting to shift the costs associated with the survey and easement procurement fees not only to the landowner, but to all heirs, successors, and assignees to the property.<sup>56</sup>

ii. *Option to Purchase*

The United States, at this point, has negotiated an option to purchase an easement from the landowner, but is not clearly bound to do so. However, during the period of time that the *Option Agreement to Purchase* is held open, the landowner has agreed to certain restrictions on the easement property. Expressly stated in the contract, the landowner agrees not to do any act, or allow others to do any act, that will diminish the value or title to the property.<sup>57</sup> Outside of normal farming practices, the property that will be subject to the easement can not be altered or encumbered in a way that will diminish its value or encumber the property. This may include mortgaging the property, materially changing the nature of the farming operation in a way that may affect the ability of the NRCS to restore the wetland, or otherwise alienating all or a portion of the title.

iii. *Consideration*

In addition to an offer of one dollar, subpart 2 of the *Option Agreement to Purchase* provides the following information regarding consideration for the easement:

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54. USDA, FORM AD-1157, OPTION AGREEMENT TO PURCHASE, *supra* note 8, at 1 (emphasis added).

55. *See id.*

56. *See id.*

57. *Id.*

Subject to the terms of this Agreement, the United States will pay the Landowner (A) \$ \_\_\_\_\_ for conveyance of the easement. The Landowner agrees to accept this amount as the full and final compensation for the easement. This offer is based on an *estimated* (B) \_\_\_\_\_ acres subject to change based on final acreage determination.<sup>58</sup>

This lump sum offer provided for in the *Option Agreement to Purchase* is a likely source of disagreement between the NRCS and participating landowners. The NRCS has explicitly reserved the right to adjust its offer in the option contract.<sup>59</sup> The offer, at this point, is based only on an estimated number of acres that will be encumbered by the easement. Once the survey is complete the NRCS will adjust the offered price to adequately reflect the number of acres within the easement boundaries. This value may be increased or reduced depending on the outcome of the survey. A participating landowner should be aware of the tentative nature of this offer and the likelihood of price adjustment based on the survey's final acreage determination.

iv. *Taxes*

The landowner is required to pay, at closing, any applicable conveyance tax and tax owing against the property at the time of closing.<sup>60</sup> Once the easement is established, the landowner may be eligible for a bargain sale tax deduction for the easement area.<sup>61</sup> This is subject to Internal Revenue Service regulations, and the NRCS does not guarantee that all easements will be eligible for this benefit.<sup>62</sup> Another tax issue that should be investigated is how local real estate taxes will be assessed against the property. This is a question of local concern and varies widely from county to county, however, it may be profitable for the landowner to investigate this issue and request a reduction in the assessed value that adequately reflects the value of the property once the easement is in place.

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58. *See id.*

59. *Id.*

60. *See id.*

61. *See* 7 C.F.R. § 1467.8(g) (2003).

62. *See id.*

v. *Statements Not Reflected in the Contract*

The terms and conditions set out in the *Option Agreement to Purchase* reflect the whole agreement.<sup>63</sup> Any statements outside of the contract, either oral or written, should not be relied upon by the landowner and will not be considered part of the contract.

vi. *Failure to Convey*

Subpart 8 of the *Option Agreement to Purchase* requires the landowner to reimburse the United States for survey costs and other expenses incurred by the United States related to the easement.<sup>64</sup> The contract states the following:

Except for reasons beyond the control of the Landowner, if the Landowner fails to convey the easement, the Landowner will be in default and shall pay the United States the amount of costs incurred by the United States [the NRCS] for survey and all other actions taken after the date, and in furtherance, of this Option Agreement.<sup>65</sup>

By now, the United States has likely, at its own expense, arranged and paid for the survey of the easement property. In addition, the United States has likely begun the process of closing and recording the easement, which may involve title insurance and certain recording costs. Even though the United States has not yet paid the landowner the value of the easement, it has clearly detrimentally relied on the landowner's conveyance of the easement. It has done so by procuring survey and other easement procurement costs, and it will have a strong argument for enforcement under a breach of contract theory or, in the alternative, a promissory estoppel argument. It is important to note that provision eight does not ask for specific performance of the option contract, rather it demands reimbursement for costs incurred by the United States for survey and related expenses, a position mandated by the regulations implementing the WRP. Recall this is a voluntary program.

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63. See USDA, FORM AD-1157, OPTION AGREEMENT TO PURCHASE, *supra* note 8, at 1.

64. *See id.*

65. *Id.*

## VII. CONSERVATION EASEMENTS

The WRP authorizes the NRCS to purchase a conservation easement with volunteer landowners who meet program eligibility requirements.<sup>66</sup> Non-permanent acres are also authorized under the WRP through the use of restoration cost-share agreements between volunteer landowners and the NRCS.<sup>67</sup> In order to participate in the WRP, a landowner must grant an easement to the United States or enter into a restoration cost share agreement.<sup>68</sup> The easement requirements include, *inter alia*, that the enrolled land be “maintained in accordance with WRP goals and objectives for the duration of the term of the easement, including the restoration, protection, enhancement, maintenance, and management of [the] wetland and other land functions and values.”<sup>69</sup> This will be accomplished through the implementation of a Wetlands Reserve Plan of Operations (“WRPO”).

The WRPO development is the responsibility of the local NRCS representative with technical input provided by the U.S. Fish and Wildlife Service and local conservation districts.<sup>70</sup> The WRPO will be designed to “restore, protect, enhance, maintain, and manage the hydrologic conditions of inundation or saturation of the soil, native vegetation, and natural topography of eligible land.”<sup>71</sup> The WRPO should specify how the proposed easement site will restore and protect wetland functions and values, in addition to maximizing wild habitat in a cost-effective manner.<sup>72</sup> Finally, the WRPO should specify how the easement area will be managed and maintained to further the objectives of the WRP.<sup>73</sup>

A. *Conservation Easements – What Is The NRCS Getting?*

In furtherance of the objectives outlined in the WRP regulations, the NRCS is making a long-term commitment to restore and maintain the conservation easements it acquires along with its biological functions and values in accordance with the goals and objectives of the program.<sup>74</sup> These easements provide

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66. See 7 C.F.R. § 1467.4(a) (2003).

67. See *id.* § 1467.4.

68. See *id.* § 1467.10(a).

69. *Id.*

70. See *id.* § 1467.11(a).

71. *Id.* § 1467.4(a).

72. See *id.* § 1467.11(b).

73. See *id.*

74. NRCS, USDA, 440-CONSERVATION PROGRAMS MANUAL, *supra* note 5, at pt. 514.06.

for negative land-use restrictions and a commitment from the landowner for long-term maintenance and management.<sup>75</sup>

i. *Negative, In Gross Conservation Easements*

Conservation easements generally fall into the classification of in gross, negative easements, which are a special type of easement.<sup>76</sup> The Uniform Conservation Easement Act of 1981 defines this type of conservation easement as

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, or cultural aspects of real property.<sup>77</sup>

“The Act emphasizes that the obligations imposed by an easement bind not only landowners who actually agree to them, but their successors in title.”<sup>78</sup> Despite common law concerns, an easement will be held valid “regardless of whether a party to the covenant has any nearby land that would benefit from the covenant obligations or whether the obligations are positive or negative.”<sup>79</sup> These enabling statutes and a substantial body of case law recognizing new types of easements have addressed the question of validity regarding conservation easements.<sup>80</sup>

B. *Conservation Easements – What Is The Landowner Giving Up?*

Landowners wishing to enroll land in the WRP are required to convey title to the easement which is acceptable to the NRCS.<sup>81</sup> This is accomplished by

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75. *Id.*

76. *See, e.g.,* Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 104 (1997).

77. UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170 (1996) (noting that the statutory enactment was to address concerns regarding privately held conservation easements, easements held by the government have been recognized as valid).

78. David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 343 (1995).

79. *Id.*

80. *See id.*

81. *See* 7 C.F.R. § 1467.10(c) (2003).

executing the Warranty Easement Deed prepared by the NRCS. This document requires the landowner and all heirs, successors and assigns, to cooperate in the “restoration, protection, enhancement, maintenance, and management of the land in accordance with the easement and with the terms of the WRPO.”<sup>82</sup> The easement deed also reserves to the United States the right of access to the easement area, the right to permit compatible uses deemed appropriate by the NRCS, all rights, title and interest in the easement except those specifically reserved to the landowner, and the right to perform wetland restoration and maintenance activities throughout the term of the easement.<sup>83</sup> By executing the Warranty Easement Deed, the landowner is warranting to the United States that its rights in the easement are superior to all other interested parties in the property.<sup>84</sup> Creditors or any other interested party in the proposed easement property will be required to subordinate their interest in the land to the United States in order for the land to be enrolled in the WRP.<sup>85</sup> This process is accomplished through the execution of a document also prepared by the NRCS entitled Subordination Agreement and Limited Lien Waiver.<sup>86</sup> This document requires interested parties and lien holders against the property that will be encumbered by the easement to acknowledge that the easement rights will be superior to that of their own.<sup>87</sup>

A landowner wishing to participate in the WRP should also be aware of certain other requirements of the program. First, by agreeing to enter into and comply with the terms of the easement deed the landowner is agreeing to the permanent retirement of any existing cropland base and allotment history for the easement area.<sup>88</sup> Second, all persons subject to the terms of the easement, that is all landowners, heirs, successors, and assigns, are jointly and severally responsible for program compliance.<sup>89</sup> This may result in a refund or payment adjustment demanded by the NRCS if a term of the easement restriction is violated.<sup>90</sup> In addition, any successor to the easement property is required to report to the

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82. *Id.* § 1467.10(b).

83. *Id.*

84. *See id.* § 1467.10(c).

85. *See id.*; *see also* USDA, FORM AD-1158, SUBORDINATION AGREEMENT AND LIMITED LIEN WAIVER (2002), *available at* <http://forms.sc.egov.usda.gov/eforms/Forms/AD1158.pdf>.

86. *See* SUBORDINATION AGREEMENT AND LIMITED LIEN WAIVER, *supra* note 85; *see also* NRCS, USDA, 440-CONSERVATION PROGRAMS MANUAL, *supra* note 5, at pt. 514.27(a).

87. *See* SUBORDINATION AGREEMENT AND LIMITED LIEN WAIVER, *supra* note 85; *see also* NRCS, USDA, 440-CONSERVATION PROGRAMS MANUAL, *supra* note 5, at pt. 514.27(a).

88. 7 C.F.R. § 1467.10(d)(3).

89. *Id.* § 1467.10(b), (d)(6).

90. *Id.* § 1467.10(d)(6).

NRCS, in writing, all interests acquired in the property.<sup>91</sup> All rights and interests must be disclosed to the NRCS, whether acquired from the previous landowner or a creditor.<sup>92</sup> Failure to report an interest may be deemed a scheme or device by the NRCS and will require the refund or suspension of easement payments.<sup>93</sup> Landholders with WRP easements would be well advised to put possible successors to the easement area on notice of this requirement.

### C. *Conservation Easements – What Is The Landowner Getting?*

In addition to compensation for the easement restriction placed on the land, certain rights under the easement deed are reserved to the landowner.<sup>94</sup> These rights include the retention of record title to the property.<sup>95</sup> The landowner also has the right of quiet enjoyment on the easement area and to control access by the general public.<sup>96</sup> Recreational uses are reserved to the landowner and may include hunting and fishing and the right to lease these rights for economic gain.<sup>97</sup> In addition, the landowner has the right to all subsurface resources underlying the easement area, but any drilling or mining operations must be conducted outside the boundaries of the easement area.<sup>98</sup> Finally, the landowner has the right to convey, transfer, and otherwise alienate title to those rights reserved under the easement deed.<sup>99</sup>

### D. *Landowner Options within the WRP*

Under the WRP, landowners have the option of entering into a permanent easement, thirty-year easement, or a restoration cost-share agreement with the NRCS. A permanent easement provides for a conservation easement to be established in perpetuity.<sup>100</sup> For permanent easements, the lesser of the following values will be offered as payment: a value equal to the agricultural value of the

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91. *Id.* § 1467.18(c).

92. *Id.*

93. *Id.* § 1467.18(a).

94. COMMODITY CREDIT CORP., USDA, FORM CCC-1255, WARRANTY EASEMENT DEED (2003), available at <http://forms.sc.egov.usda.gov/efrms/Forms/CCC1255.pdf>.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See NRCS, USDA, WETLANDS RESERVE PROGRAM, FACT SHEET, *supra* note 24, at 1.

land, a pre-determined easement cap,<sup>101</sup> or an amount offered by the landowner.<sup>102</sup> The USDA is authorized to pay between seventy-five and one-hundred percent of restoration costs related to the wetland.<sup>103</sup>

Because the economic and ecological benefits realized from a non-permanent easement are less than that of a permanent easement, payments for a non-permanent easement are reduced accordingly.<sup>104</sup> Seventy-five percent of the value of a permanent easement will be offered as payment for a thirty-year easement.<sup>105</sup> In addition, the USDA is authorized to offer between fifty and seventy-five percent of restoration costs for thirty year easements.<sup>106</sup>

#### VIII. EASEMENT ENFORCEMENT

Consistent monitoring and enforcement actions are critically important to the long term management of WRP easements.<sup>107</sup> A proactive approach to site monitoring and enforcement will help prevent easement violations, build positive relationships with the landowner, and ensure the life of the easement.<sup>108</sup> Failure to enforce the restrictions set in place or failure to consistently monitor the site could possibly extinguish the easement.<sup>109</sup> Furthermore, close monitoring and enforcement of easement sites is important because damage to conservation sites may be irreparable and money damages may never compensate for the loss of environmentally unique property.<sup>110</sup> It should be noted that conservation easements held by public bodies are treated somewhat differently than easements held in the private sector.<sup>111</sup> "Because of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes . . . ."<sup>112</sup> However, this increased protection does not insulate publicly

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101. See 7 C.F.R. § 1467.8(a) (2003) (stating that easement rates may be predetermined by the State Conservationist after consulting with the State Technical Committee and applied to specific geographic regions within the state or to individual easement areas).

102. NRCS, USDA, WETLANDS RESERVE PROGRAM, FACT SHEET, *supra* note 24, at 1.

103. 7 C.F.R. § 1467.9(a)(1) (2003).

104. See *id.* § 1467.8(3).

105. WETLANDS RESERVE PROGRAM, FACT SHEET, *supra* note 24, at 1.

106. See 7 C.F.R. § 1467.9(2) (2003).

107. See Baldwin, *supra* note 76, at 120.

108. See *id.*

109. *Id.*

110. Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 446 n. 53 (1984).

111. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 (1998).

112. *Id.* § 7.11, cmt. a.

held conservation easements completely. The Uniform Conservation Easement Act provides that the 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.”<sup>113</sup>

#### A. *Monitoring*

According to one commentator “[e]ffective monitoring and enforcement of the easement . . . are critical to the continued existence of the restriction[s].”<sup>114</sup> However, perpetually guarding against violations of the terms of the easement can be a substantial burden on the easement holder.<sup>115</sup> To properly enforce the terms of the easement, the easement holder must monitor and visit the property on a regular basis and must maintain written records of the monitoring visits.<sup>116</sup>

##### i. *The NRCS Approach*

The NRCS program manual for the WRP states that easements are to be inspected annually for easement violations for the life of the easement.<sup>117</sup> On-site visits, consisting of walking the easement boundary and confirming that the interior of the easement site is not being used for unauthorized purposes and verifying that the easement boundaries are still clearly marked, shall be done every third year.<sup>118</sup> During years where there is no on-site inspection, monitoring will be done by slides, satellite imagery, aerial photography, etc.<sup>119</sup> This approach, however, must be adequate to ensure the integrity of the easement being monitored.<sup>120</sup> The following is a list of the minimum monitoring requirements for on-site inspections:

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113. UNIF. CONSERVATION EASEMENT ACT § 3(b), 12 U.L.A. 177 (1996).

114. Baldwin, *supra* note 76, at 113.

115. *See id.* at 114.

116. *See* JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 7 (1988).

117. NCRS, USDA, 440-CONSERVATION PROGRAMS MANUAL, *supra* note 5, at pt. 514.47(f).

118. *Id.*

119. *Id.*

120. *Id.*

- 1- Photographs will be taken during each on-site visit from designated photo points to document restoration progress.<sup>121</sup>
- 2- Comparison of planned and actual vegetation. Record:
  - three dominant plant species,
  - plant conditions, and
  - the presence of invasive species.<sup>122</sup>
- 3- Comparison of planned and actual hydrologic conditions. Determine:
  - if water control structures are in place and functioning properly, and
  - whether plans need to be modified to maximize hydrologic restoration.<sup>123</sup>
- 4- Comparison of planned and actual wildlife habitat conditions to determine whether adjustments are required to maximize wildlife benefits.<sup>124</sup>
- 5- Effects of surrounding landscape on the ecosystem.<sup>125</sup>
- 6- Documentation of findings. This includes:
  - deficiencies in achieving full restoration of functions and values
  - adjustments to plans, and
  - estimated costs necessary to make adjustments.<sup>126</sup>
- 7- Other items as determined by the State Conservationist.<sup>127</sup>

Management and monitoring responsibilities and other duties may be delegated to any state or federal agency, conservation district, or other cooperat-

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121. *Id.* at pt. 514.89.

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *Id.* at pt. 514.47.

ing partner that the NRCS determines to have the appropriate authority, expertise and resources necessary to carry out such delegated responsibilities.<sup>128</sup>

On its face, this schedule of site monitoring seems to be more than adequate to ensure that WRP objectives are being met and is likely necessary to ensure the perpetual survival of the easement. However, cynics have voiced their distrust in landholders' willingness to comply with the restrictions placed on their land.<sup>129</sup> As easements mature and title is passed to one or even several generations of heirs, successors, or assigns, it is reasonable to anticipate divergent and competing interests in the easement will clash.

In Iowa, the responsibility of monitoring and enforcement is generally delegated to district conservationists within the NRCS, although area wetland specialists are also utilized.<sup>130</sup> Other states, such as Illinois, have created a position within the NRCS to specifically be responsible for the monitoring and enforcement of the easement contracts.<sup>131</sup> Onsite visits to current easement sites generally are done annually, although the visit may be for purposes other than monitoring.<sup>132</sup> Site visits, other than for monitoring purposes, occur when adjustments are made in water restoration structures or visits totally unrelated to the WRP easement.<sup>133</sup> These visits have resulted in discovery of easement violations, such as boundary encroachments, the presence of noxious weeds, animal grazing violations and water structure tampering.<sup>134</sup> These violations have generally been resolved at the written request of the NRCS.<sup>135</sup>

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128. *Id.* at pt. 514.47(b)-(c).

129. See Andrew C. Dana, *The Silent Partner in Conservation Easements: Drafting for the Courts*, THE BACK FORTY, (The Newsletter of Land Conservation Law), Jan.-Feb. 1999, at 1 (noting "the importance of drafting conservation easements with the expectation that *every easement is likely to be violated at one time or another, so conservation easements should be drafted in anticipation of a court defense of easement terms*") (emphasis in original).

130. Telephone Interview with David Brommel, Wetland Restoration Team Leader, Iowa Natural Resource Conservation Service (Apr. 5, 2001).

131. *Id.*

132. *Id.* (stating that a current shift in restoration philosophy allowing deeper water structures has resulted in the NRCS revisiting sites and determining whether adjustments could be made. While onsite, NRCS employees will generally monitor the easement for possible violations as well as assess the general health of the easement).

133. *Id.*

134. *Id.*

135. *Id.*

## IX. DISPUTE RESOLUTION

In the event that a dispute arises between a program participant and the NRCS, all administrative remedies must be exhausted prior to seeking judicial review.<sup>136</sup> Chapter 7, section 614 of the Code of Federal Regulations controls the administrative appeals process for adverse decisions made by the NRCS.<sup>137</sup> A detailed examination of all administrative procedures required by WRP participants is beyond the scope of this article. Suffice it to say that the exhaustion requirement includes any determination made by the NRCS, including, *inter alia*, the eligibility of the land or landowner.<sup>138</sup> No action by the NRCS will be deemed final agency action for purposes of judicial review unless it was a decision made by the Chief of the NRCS.<sup>139</sup>

## X. CONCLUSION

The sign says, "You are entering the Green River Soil Conservation District." In smaller type is a list of who is co-operating; the letters are too small to be read from a moving bus. It must be a roster of who's who in conservation. The sign is neatly painted. It stands in a creekbottom pasture so short you could play golf on it. Near by is the graceful loop of an old dry creek bed. The new creek bed is ditched straight as a ruler; it has been "uncurled" by the county engineer to hurry the run-off. On the hill in the background are contoured strip-crops; they have been "curled" by the erosion engineer to retard the run-off. The water must be confused by so much advice.<sup>140</sup>

The history of wetland regulation in this country is not unlike that described above. The process of developing appropriate and efficient programs and rules that deal with wetlands is clearly an evolutionary process. The purpose of this article was to serve as a primer on the Wetlands Reserve Program. The goal was not only to explain the program and its requirements, but to identify certain legal issues related to program participation. The WRP is still in its infancy and as a result many of the legal issues are merely speculative. The resolution and

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136. 7 C.F.R. § 1467.17(b) (2003).

137. *See generally* 7 C.F.R. § 614 (2003) (setting forth informal procedures under which a landowner may appeal an adverse technical determination).

138. *See* 7 C.F.R. § 1467.17(b).

139. *See id.*

140. ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 118-19 (Oxford Univ. Press 1989) (1949).

even the identification of all of the possible legal issues related to the WRP is better left for another day. However, understanding the WRP's aspirations for the future will better aid lawyers, landowners, and policymakers in charting a course through the legal maze of option contracts and conservation easements utilized by the WRP.