Private land conservation tools:

Covenants and easements, including in an agricultural context

What are we talking about?

Easements (American English) or **covenants** (King's English) are widespread in common (case) law countries. These are countries, essentially Anglo-American in culture and history, where the body of law is created by judges and similar judicial tribunals by virtue of being stated in written opinions.

On the European continent, and outside it wherever countries like Spain or France historically had overseas possessions, civil (or statutory, Napoleonic) law dominates. Here the main source of jurisprudence is a normative act (the law), based on Roman law.

In the common law countries, easements/covenants historically originated as legal tools to grant access to public roads across a neighbour's property, to give utilities the right to lay water pipes and power lines, and to prevent people from doing things that would harm a neighbour's property. They are granted by a landowner to another party – originally it would be to the neighbour who needed to cross the property, for instance. It is recorded in the land registry or in land records. Easements 'run with the property' – so whoever inherits or buys the property must respect the easement. If not, courts can and will enforce it.

These things European civil law covers also, e.g. through what we call '**servitudes**'.

What sets the common law countries apart is the voluntary use, by the landowners themselves, of easements/covenants to protect areas of natural habitat within their private property, or to protect areas that have been restored or re-created to natural conditions. Here the point is not to grant access but to prevent harm, i.e. all natural and legal persons, including the easement-granting landowners themselves, must 'cease and desist' from any activities that harm the protected values on the property.

Conservation easements/covenants of this type are widespread in common law countries, used by all sorts of landowners. By farmers too.
This kind of voluntary private legal restrictions and prohibitions on what a property can be used for, is hitherto uncommon in the civil law countries of Europe and elsewhere. The joint Eurosite-ELO ENPLC project and its two predecessors have been investigating how feasible these might be in a European context, and how they might be promoted. That is why there was a **workshop in Berlin on June 6 2023**, at which the Eurosite-ELCN Agriculture, Biodiversity and Climate (ABC) working group was represented by Anton Gazenbeek, its Chair.

ENPLC: European Networks for Private Land Conservation

Conservation easements in the USA

(from presentations by Phil Tabas, The Nature Conservancy, Renée Kivikko, Land Trust Alliance, & debate at the ENPLC workshop, June 6)

Easements in the USA are based on the concept that ownership of land is a 'bundle of rights' – the right to acquire, possess, control, use, derive profit from, exchange, sell, bequeath, donate ….land. Each of these rights can be split off and transferred to another party. For instance, the right to build on the land can be passed on to a real estate developer or a member of the family. In all cases, the landowner remains owner, and enjoys any and all rights which have not been given away by the easement.

In a **conservation easement**, the right to e.g. build on the land is given away to an appropriate entity, the **easement holder**, and extinguished. But after concluding such an easement, the landowner retains all other rights of ownership, including the right to live on the land; prevent trespass; sell, bequeath, or otherwise transfer the land. Conservation easements do usually have objectives – what is being conserved, what do we want to achieve – and depending on these, continued farming or forestry may or may not be possible on the land under easement, in whole or in part.

Photo: Beverly Moseley

A great breakthrough came in 1981 – the Uniform Conservation Easement Act. The Act served as a model for state legislation to enable qualified public bodies and private conservation NGOs (land trusts) to accept, acquire and hold easements for the purpose of conservation and preservation. All American states now have systems facilitating conservation easements to be held by third parties, whether public body or NGO land trust.

These holders have the right AND the duty, to monitor and enforce the conservation easement – to watch out that the owner or their successors don't build. But because this easement establishes a negative use – XYZ is no longer allowed, the land must remain in condition ABC – the easement holder has no right to any positive use of the property. Therefore, if nature restoration or recurring management is needed, a separate agreement must be concluded between landowner and easement holder.

Normally, an easement is in **perpetuity**, for ever, but 'term easements', valid for a specified time period, also exist. Easements can only be broken by public projects of overriding interest or when a court rules that the context has changed so much that the purpose of the easement is no longer achievable.

A striking aspect of the American situation – achieved after years of effort and political lobbying by the land trusts involved in holding conservation easements – are the **fiscal rewards** if an easement is donated to a "qualified" land protection organization, i.e. given free of charge by the landowner to an appropriate holder.
The basis is the loss the landowner incurs because of the conservation easement, which cuts off any future profit from residential or commercial development, or intensified forestry and farming. The value of the loss is generally determined by a qualified appraiser.

This loss can since 1980 be deducted from Federal income tax, if the landowner donates the conservation easement. In 2006 the number of tax years within which the tax deduction could be claimed, was extended, and the amount of otherwise taxable income that could be sheltered by a charitable gift of a conservation easement, was increased. Any amount of the value remaining after the first year of deduction can be carried forward and used in following years until the amount has been used up.

The reduction of tax on inheritance is important. The deceased's estate will be reduced by the value of the donated conservation easement. As a result, taxes will be lower. Inheritance tax can force the next generation to sell part or all of e.g. a farm to pay this tax, so this reduction is a big help and could already be one good reason for concluding a conservation easement. Heirs may even receive these benefits if they choose to conclude and donate a conservation easement, after the landowner's death.

Tax credits go a step further: the value of the loss caused by the easement, is subtracted from whatever tax is due (and if the result is negative, the difference may even be paid back by the taxman). Although not yet at federal level, several states use it. North Carolina was first, in 1983. Virginia is the most generous, allowing 40% of the easement value to be offset against tax due. In Colorado the tax credit is transferable— the landowner can sell the credit to someone else; the buyers can offset the purchased tax credit against their own taxes due. Such selling is interesting for people who have land but pay little tax.

The role of the land trusts

Decisions about whether to protect a piece of private property are landowner-driven. Landowners choose to protect their land for a variety of reasons. The primary motivation may be a desire to conserve the special qualities of their land — for example, its scenic beauty or valuable wildlife habitat. Tax incentives and other funding may also contribute: for some families, especially farmers and ranchers, the tax advantages of conservation easements allow them to stay on the land and pass it on to the next generation.

Privately-owned land makes up 60% of the United States, but only 3% of it is protected for conservation.

To close this gap and literally 'gain ground', conservation-minded citizens decades ago began setting up **land trusts**, or land conservancies, as non-profit, non-governmental organizations that actively work to conserve land (in some cases, they buy land outright) and to encourage landowners to establish a conservation easement on their land. The land trust's role is to answer the landowner's questions, provide conservation options and help the landowners determine if conservation easements are the right decision for them and their family.

GAINING GROUND

Together, saving land for us all

Image: Land Trust Alliance – the motto of its campaign to double the land conserved

Permanent conservation means not only protecting the land but taking care of it too. **Land stewardship** is defined as "the promise a land trust makes to care for the land forever". This stewardship can include annual monitoring of properties to ensure the easements are kept and the lands are properly managed for the long haul. An essential part of stewardship is maintaining good relationships with landowners and serving as a resource on land management issues.

Currently there are 1281 land trusts in the USA, and they are very diverse. Many land trusts are local in scope, but others operate at a regional or state level. They can be all-volunteer, or made up of a volunteer board of directors and paid staff that carry out the day-to-day activities.

To bring together this "diverse, far-flung and independent-minded nature of the private local land conservation community" into one strong, powerful force, the Lincoln Institute of Land Policy in 1981 convened the National Consultation on Local Land Conservation. This forum agreed a national organization for land trusts was needed, and so the Land Trust Exchange (now called **Land Trust Alliance** LTA) was incorporated the next year. In 1985 the first "Rally" (or annual meeting of land trusts) was held in Washington, with 257 people present. By 2022, when the LTA Rally was held in New Orleans, attendance had grown to 1500 – 2000, depending on the location.

Plenary session Rally 2022 New Orleans. Photo Anton Gazenbeek

948 land trusts are currently members of the LTA. Collectively they hold just over 61 million acres (over 24 million ha) of conservation easements and directly-owned land combined, an increase of 15 million acres (6 million ha) since 2010. These land trusts are backed by 234,000 volunteers and roughly 6.4 million supporters.

More information at https://landtrustalliance.org/what-we-do

The Land Trust Alliance has defined **standards and practices for trusts** – the first, in 1989, were quite general, but the latest version (2017) is much more precise – the LTA has learned and taken notes over time. See https://landtrustalliance.org/resources/learn/explore/2017-land-trust-standards-and-practices#content
Some key messages:

- Monitoring must be consistent
- Precise records must be kept
- A trust must be willing to be firm and if need be, to take a landowner to court
- It's important to have a positive relationship with the local community, to avoid situations where there is a conflict with the landowner and the community backs the owner or thinks the whole concept of conservation easements is silly

To help land trusts with the formidable costs and risk of judicial procedures, the Land Trust Alliance created Terrafirma Risk Retention Group LLC in 2011. It was designed in consultation with insurance specialists, attorneys, and land trusts, and is available for all Land Trust Alliance member trusts who meet the 13 eligibility criteria. Terrafirma is owned and managed by the participating land trusts. It insures its members against the legal costs of defending conservation easements and provides them with access to a national team of experts. A Claims Committee, comprised of outside experts and land trust representatives, oversees claims management, in collaboration with the insured land trusts. Terrafirma also provides information and training on risk management to the members.
The existence of Terrafirma is meant to send a clear signal that a land trust has the capacity to defend its easements and conserved lands, so that regulators, landowners and the public can be more confident that land trusts take permanence seriously and have the capacity and capability to uphold conservation forever. More information on the webpage https://terrafirma.org/about

Following media scare stories, in 2004 an **accreditation programme** was set up by the LTA, to reassure regulators and the general public about the reliability of trusts. 465 LTA member trusts are now accredited. Accreditation is not permanent – there is a renewal every 5 years. If in the meantime the trust slips below required standards, it will not get a renewal. See https://www.landtrustaccreditation.org/about/about-the-commission
The programme is voluntary, so non-accredited trusts are not expelled from LTA nor prohibited from holding easements (just one American state has a law that only accredited trusts may hold easements). But accreditation may give priority access to many funding programmes.

Longleaf pine forest managed by a land trust, Mississippi Delta. Photo: Anton Gazenbeek

Conservation covenants on farms in New Zealand and Australia

(from the presentation at the ENPLC workshop in Berlin, June 6, by Anton Gazenbeek, ABC working group, plus debate)

In **New Zealand** there are many farmers who have used conservation covenants to create private protected areas for wetlands and remnants of the original natural vegetation on their farms.
A significant part of New Zealand is legally protected as national park or similar. The map shows national parks and other protected areas.

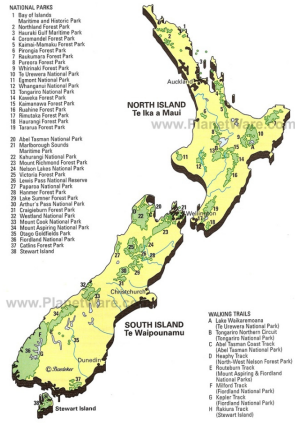

Image: Planetware

But most of this is mountainous land which is hard to farm because of its physical geography and climatic conditions. That's why it was relatively easy to protect by law.

The coasts and lowlands however were largely cleared of original vegetation in the 19th and early 20th century and converted to very productive farmland – agriculture is still NZ's biggest export earner.

Conservation and restoration efforts are most needed in these lowland areas, as almost none of their characteristic natural habitats like kahikatea forest or peat wetlands are left. That gives extra value to any protection of nature remnants on their land by New Zealand farmers.

QE II National Trust
For open space in New Zealand
Nga Kairauhi Papa

The **Queen Elizabeth II National Trust** (QEII Trust) was created in 1977 by an act of the New Zealand Parliament to help landowners draw up covenants, and to monitor existing covenants. It takes these tasks seriously. Witness these webpages:
https://qeiinationaltrust.org.nz/protecting-your-land/how-to-protect-your-land/ (= procedure to do a covenant)
https://qeiinationaltrust.org.nz/managing-your-covenant/
(= what landowners must do afterward e.g. fencing and pest control, recurring management)
Each covenanted area is visited once every two years by the Trust, which not only checks that the covenant is being respected, but also uses the opportunity to talk to the landowner about how the nature is evolving, any questions or problems. If requested, it will advise on management.

As of May 2023, the Trust looks after 5023 covenants, protecting 180,258 ha, mostly on farms. 45% of this is indigenous forest, 27% indigenous grasslands

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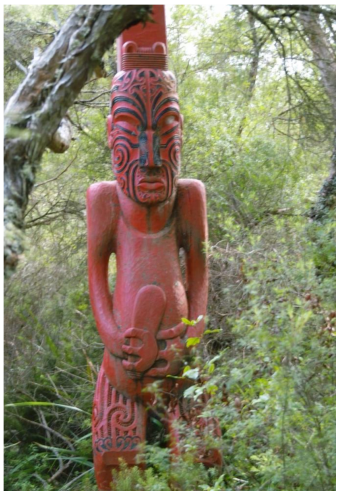
The Trust has staff, but no funds to hand out. **Landowners have to bear any costs themselves** and take care of site management. There have been no agricultural subsidies nor payments for environmental actions and services to farmers since 1985.

And yet across the country, farmers have since then locked up patches of biodiversity-rich indigenous forest and wetland on their farms in covenants, which means they will stay nature for ever. They have fenced out livestock and expanded such remnants of indigenous vegetation by natural regeneration and deliberate planting. And they're still doing it.

Why do they do it? When asked, these farmers often say it's **love of the land they live on** and pride in their task as 'kaitiaki', a Maori expression meaning guardians, of the land they will hand on to their descendants.



Symbolic representation of kaitiaki (photos Anton Gazenbeek)

Thanks to this mindset, the QEII Trust notes that most covenants are implemented well, even by new owners or farmers. Landowners often do more management work than what they originally committed to. A study by the University of Waikato Institute for Business Research estimated that the monetary value of this volunteering is $NZ25 million (= ca. 16 million €) a year. All the covenants together represent an estimated financial commitment of over 600 million € in terms of land value (including opportunity cost of not using the land in other ways).

(It's not just New Zealanders who feel this way. As one farmer in our ABC group put it, "We believe that our mission as farmers is to leave the place better than we found it. If we don't, we are damaging our assets which makes no sense - undermining natural capital leads to long-term degradation".
Could we build on that sentiment in our work here in Europe? Maybe – but conservation practitioners often complain that many of the farmers they work with are not spontaneously willing to devote part of their land to nature, unless there is a financial reward, and they must generally be watched closely to be sure they are correctly carrying out the nature management work they committed to.)

Very motivating for farmers surely is recognition by their peers. The **New Zealand Farm Environment Trust** – an NGO set up by farmers' associations, banks and companies supplying farm materials and equipment – encourages farmers to improve the environment on their farms.

Its website has many examples and stories: https://nzfetrust.org.nz/stories/ (filter by farm type – choice of beef, dairy, pork, vineyards etc).

What's more, it hands out annual prizes – 'Oscars for farmers' - to those farmers whom a jury of peers has judged to excel in conserving nature and the environment (https://nzfeawards.org.nz/). Quite good prizes too – before covid they included trips to visit farms in Ireland and the USA.

2023 prize-giving ceremony (Images: NZ Farm Environment Trust)

(There is a similar initiative in Europe: Farming for Nature in Ireland has for several years held competitions for 'nature ambassador', awarded to farmers who have done outstanding work improving biodiversity on their farm. Like the NZ awards, a great idea worth expanding to other countries).

In **Australia** farmers also protect native vegetation, landscape features and species habitat through covenants.
A good example is **Woomargama Station** in New South Wales (https://woomargamastation.com.au) , whose owner, Clare Cannon, gave a presentation to the ABC group in 2022. Again, we see an attitude like the Kiwi farmers in her statement "you don't own the land, the land owns you".

Woomargama farmstead and land Photo: Clare Cannon

Clare partnered with the Biodiversity Conservation Trust, which has much the same role and competence as the QEII Trust. Together, they surveyed the Woomargama sheep and cattle farm, and carried out restoration work like tree planting, or fencing livestock out of creeks and ponds inhabited by a rare fish species.

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The biggest action was a **covenant in favour of box woodland** on the farm, a habitat type of which only 5% is left in southern Australia. Clare put a covenant, monitored and managed by the Biodiversity Conservation Trust, on 600 hectares – one third of the farm property – to protect box woodland. Box woodland visually resembles wooded pastures, and indeed low density grazing is allowed for up to 6 months a year in the covenanted areas, because it mimics the Aboriginal 'cool burning' which kept this woodland open, maintaining habitat for birds and grazing marsupials.

Box woodland under covenant at Woomargama. Photo: Clare Cannon

Woomargama Station gets an **economic boost from this covenant and its other nature work.**
Because so much biodiversity is protected, Woomargama meets the strict environmental standards of ZQ Merino, a quality label which sells wool to VF Corp, owner of brands like Icebreaker and North Face, and to the Kering Group, one of the biggest textile buyers in the world (supplying Hugo Boss among others).

And Woomargama also meets the criteria of Never Ever, which sells beef guaranteed to be grass-fed to discerning customers. ZQ and Never Ever pay well over normal market prices, so this is what Clare means when she says that although after putting a covenant on a third of the farm, Woomargama's land value declined by 150,000 $AUS, its brand value increased by 150,000 $AUS. Covenanting the box wood opened up market opportunities Woomargama would otherwise never have had.

Woomargama is now also one of the farms taking part in La Trobe University's Farm-Scale **Natural Capital Accounting** project to help farmers measure natural capital on their farms and produce farm-scale natural capital accounts. The objective is to respond to demands from farmers and agri-business for natural capital reporting tools and data in order to inform farm management decisions, demonstrate sustainability credentials, increase transparency in the supply-chain, and satisfy environmental performance requirements for market access.

The farm-scale accounts the team at La Trobe, headed by Dr Jim Radford, is developing will provide the right balance between rigorous data and reducing complexity, in order to produce simple yet valuable and usable accounts for farmers and their downstream produce buyers. The goal is for farmers to be able to track the health of their environment and identify and monitor the relationship between farming practice, environmental impact and farm business performance.

Having spent three years surveying and analysing soils, plants, invertebrates, birds and carbon cycles on the farm and in the lab, the project is now in its final year, and the accounts per farm, down to field level, will become available by the end of 2023.

The latecomer: conservation covenants in England

(from the presentation at the ENPLC workshop in Berlin, June 6, by Graeme Kerr, Natural England, and debate)

England is a common law country too, in fact common law originated there in the Middle Ages and spread to America, Australia, New Zealand and the rest of the 'Anglo' world from the British Isles. So it is surprising, paradoxical even, that conservation covenants hitherto did not play any role in England.

Farmscape in Devon (England) Photo Anton Gazenbeek

That is now changing. Conservation covenants were proposed for England in 2014 by the Law Commission and the appropriate legislation was finally adopted in 2022, so that now the implementation phase is beginning.

They are a **private agreement** between a landowner and a 'responsible body' , which establishes that the land in question will be used for a conservation purpose (this can be conserving nature, but also archaeological sites, historic landmarks, architectural heritage etc). The agreement is registered as a local land charge on the land registry, so it is binding on future owners. It must describe what the landowner and 'responsible body' will do to conserve – both restrictively (what is not allowed) and positively (what either will do, for instance actions like management and restoration work). It can have provisions about monitoring and inspection; duration (perpetuity is legally possible); and any payments of one party to the other.

The **'responsible body'** has the task of following up the conservation covenant and making sure it is being obeyed (hence the name 'responsible body'). This entails effort and costs, so many potential 'responsible bodies' are not keen. The more so because the British Treasury has made it clear it will not release any public funding to support 'responsible bodies'
The responsible bodies are appointed by the state secretary for the environment, who also has the power to remove a responsible body which is not performing as it should. This does raise the question: who decides when performance is insufficient?

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But the demand is there: farmers are already approaching Natural England to ask about the covenants, because they love what they've achieved nature-wise and don't want their successors to change that.

Peatland hydrology restoration by farmers' cooperative Ffermyr Wnion, Wales. Photos: Nature-Friendly Farming Network

Trying out conservation covenants and easements in civil law countries: the Chilean experience

The ABC group meeting of May 12 featured a presentation by Elena Whitelaw about the Pichimahuida project she and her husband John carried out. This land, in Patagonia, was originally old-growth forest, cut down to make way for sheep (like so much forest in New Zealand). Overgrazing ruined the land.

Image: Pichimahuida Project

The Whitelaws acquired it and began a huge ecosystem rehabilitation effort.
To protect their successful private restoration achievements, they needed an appropriate and effective legal instrument.

Chile is not a common law country, but has a Napoleonic, civil code like most of Europe. From the 1980s the private nature protection and land conservation movement has been developing in Chile. In the absence of government regulations, a solution for the legal protection of private protected areas was needed.

Approximately at that time this dialogue started between American land trusts and Chilean conservation associations:

- US: "We have a great tool for nature and land conservation, including agricultural land - land trusts and conservation easements".
- Chile: "Perhaps, but we have a completely different legal system, which does not provide for a legal basis for such a tool, including all its elements".

In the early 2000s the Chilean conservation movement was so pressing that a draft law was initiated, finally adopted in 2016: the Chilean law 20930 on the "**Derecho Real de Conservacion Medioambiental**" = the "In Rem right of environmental conservation" (https://www.carey.cl/en/creation-of-a-new-law-that-creater-an-in-rem-right-of-conservation/) (www.centroderechoconservacion.org)

It is the only Chilean legal instrument which very vaguely can be interpreted as somehow resembling the common law easements, though strictly legally speaking it is a real rights' contract.

It established an "in rem right to environmental conservation", basically the right to establish a legal servitude (the term "easement/covenant" does not exist in civil law legislations) which **goes with the land and protects certain of its natural, environmental features** (but not the land as a whole). Like the classic servitude where the holder can enforce the right to cross another property against all others, it gave the **right to enforce the preservation of environmental features against anyone**. The beneficiary holding this right can be any person, legal or physical, Chilean or not. The content and the form of the agreement constituting such a servitude is well described in the law. The agreements can be of any duration. Even the possibility of "perpetual" protection, if negotiated (similar to the perpetual protection in the Fiducie Lanaudière in Quebec https://fcelanaudiere.ca/english/) - though no agreements in Chile have yet done this. The servitude was designed to fit into the civil, rural and other legal codes of Chile, as well as its legal system in general.

The Whitelaws – Elena is a lawyer by profession – chose this new servitude as the tool to protect the restored Pichimahuida estate and have carefully documented their experience using easement-type tools in a civil law country which had just adopted them.

Image: Pichimahuida Project

Problems arose with the implementation of the new "Derecho Real de Conservacion Medioambiental" servitude. Professional legal advice and involvement of lawyers was almost non-existent, except for a couple of law firms which took up the 'Derecho Real de Conservacion' agreements. Yet it's exactly at this stage that landowners, whether for agricultural or strict nature conservation, need **professional support in order to apply the legislation to their land and situation**, taking account of all relevant domestic legal requirements.

There was a **chaotic creation of entities to hold such servitudes**, that were first called "Land Trusts", which then became "Foundations". None of them had the rights and obligations similar to those attributed to US land trusts, or the same way of functioning. "Standards" and guidelines developed by these entities have no legal basis. Some of them later turned out to be linked to real estate agencies, ex. Biosfera Austral (selling "rural parks") or Patagonia Sur, or sponsored by large businesses such as the mining industry. Some disappeared after a while, most of the rest abandoned the idea of working with small and middle-size landowners. No valid arguments were developed for small and middle-size agricultural landowners, inciting them to enter into the agreements.

But agreements with larger landowners brought their own issues. For instance, servitudes granted by municipalities: obliging a municipality to fulfil its obligations is a challenge, in particular given that their staff is changing every 4 years and they have limited financial resources.

The agreements also covered a diverse range of topics – not just complete habitats and ecosystems, but also individual features of a landscape, e.g. palm trees in tree plantations.
For examples of environmental servitudes based on this 'derecho real', see https://www.derechoaconservar.cl/casos/

The **effectiveness of these processes has never been evaluated, nor the survival rate of the newly created entities**. No control nor reporting procedures were established, neither for the foundations nor for the verification of the validity of the agreements concluded (which means some of them can be challenged in future). There is no body nor agency which supervises the homogenous application of the Derecho Real law, nor the enforcement of obligations in the agreements based on it. Currently, there are virtually no means for enforcement in case the agreement is not respected by any party.

The agreements under the Derecho Real will not protect the land and its owner from the **application of current legislation** (e.g. from nationalisation or expropriation, quite common in Chile) nor from future changes to rural land-related legislation.
Another negative are the very high **taxes** in Chile on donations, whether of physical property or rights.

John & Elena Whitelaw in Pichimahuida – image Pichimahuida Project

For their **Pichimahuida estate,** to safeguard their 20 years of land restoration efforts and investments, and as there were no land trusts/foundations they felt they could safely transfer a servitude to, the Whitelaws concluded 'derecho real de conservacion' agreements with lawyers who were specialists in servitude rights and other legal issues. They, as lawyers, had all the competencies to provide adequate protection to the land and to the negotiated agreements, and to carry out the respective responsibilities.

The agreements obliged protection of the ecological restoration attributes, and were entered in the cadastral land registry. When the Whitelaws felt confident enough to take on the task of land stewards, they registered the land as a family land and divided it into a part to be protected as a nature reserve and a "working land" part. They then transferred the 'derecho real de conservacion' to themselves as beneficiaries of the in rem rights, with the duty to obey the stipulations in the servitude agreement.

Now negotiations are under way with the respective authorities to donate the "nature reserve" part to the adjacent national park. The Whitelaws will retain the status of land stewards as long as needed, in order to prepare the land for adequate protection by the park's authorities. As for the "working land", where a nursery is being set up for native trees to be used for forest restoration in this very degraded area, they will retain the status of land stewards until a derecho real agreement is reached with a foundation from another civil law country (not Chile), with long-term experience of such agreements, and therefore having a good potential for ensuring a protection as "perpetual" and as professional as possible.

The French Experiment: the Obligation Réelle Environnementale (ORE)

(*From the presentation at the Berlin ENPLC workshop by Vanessa Kurukgy (Fédération des Conservatoires d'Espaces Naturels) and debate)*

The name of this tool explains its nature: *Obligation* (to do, or not do, something) *réelle* (= in rem, i.e. is attached to the estate, the land, and not to a person, so automatically transferred with ownership) *environnementale* (the purpose is environmental improvement)**.** Created in 2016 as part of the renewed French Environmental Code; it is mentioned in only one article of that Code, so the law gives little detail.

Obligations réelles environnementales, c'est quoi exactement ?

Title of the webpages of the Fédération des Conservatoires d'Espaces Naturels explaining what an ORE is and how it works

What is clear is that the **ORE is a formal contract**, concluded before a notary, and added to the land registry. The conditions for revising or terminating the contract must always be included, as well as the reciprocal commitments (e.g. who manages the land, who monitors the nature quality). **An ORE is compatible with economic activity, like farming**, providing this activity does not jeopardise the environmental objectives of the ORE.
Its duration is flexible, minimum is 5 years. Because perpetuity is not allowed under French law, **an ORE maximum duration is 99 years**. This is a major difference with Anglo-American easements/covenants.

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Because it is a contract, if a landowner goes against the terms of the ORE and e.g. subdivides and builds on land which has an ORE forbidding construction, that landowner is legally guilty of breach of contract and liable for damages.

Because it is a contract, **there must be two parties**. The landowner, and another person or entity. This other contracting party can take the owner to court for any breach of contract. The landowner can be a person or a corporation or an NGO or a public body, but the other contracting party must be a public authority, a public body or 'legal person that acts for the protection of the environment'. So never a physical person. The 'legal person that acts for the protection of the environment' can of course be a nature conservation NGO, but the wording also permits commercial environmental consultancies, for instance, to be contracting parties to an ORE.

Since 2016, over 50 OREs have been concluded, scattered over France. Their size ranges from 0.5 ha to a couple of hundred ha. The French Ministry for the Environment is setting up a data base of OREs.

Signature of first ORE in Normandy, by the David family farm: commit to preserve hedges & ponds for 50 years and manage a limestone slope for orchids. Image: Fédération des Conservatoires d'Espaces Naturels

OREs in an agricultural context are explicitly mentioned in the Environmental Code as a special case. If the landowner is a farmer, OREs can be concluded without any further ado. If however the landowner is NOT the farmer (the land is rented to a tenant farmer), then the farmer must approve of any ORE to be established. In other words, you can't dedicate farmland to nature if the farmer using that land does not agree.

The Environmental Code explicitly allows OREs to be used for **offsetting**. For the developer, this is cheaper than buying land (even if a compensation will usually have to be paid to the landowner); for the permitting authorities, the fact that the ORE dedicates land to nature for a very long term is a guarantee that the offset is lasting.

There are **no fiscal advantages**: property and inheritance taxes are the same for land under an ORE as for land which is not (even though an ORE generally reduces the taxable market value of land). Municipalities MAY grant exemptions from local taxes.

The Fédération des Conservatoires d'Espaces Naturels, the leading French private land conservation NGO, refuses to pay or compensate landowners for an ORE, but there are some other players (developers, water authorities) who are moving towards payments. This raises the question: how do they get their money back if the landowner breaches the ORE? On the other hand, when water authorities pay farmers and landowners for OREs which act against nutrient run-off and pollution, this is an interesting additional income.

Question: how does it fit with land use planning and other legal frameworks? For instance, an ORE dedicating land to nature, but this land is in an area zoned as residential building land. Which has precedence? There is no legal answer to this yet.

Conservation easements – some key questions

(debates ABC group meeting May 12 & ENPLC workshop June 6)

Each civil/statutory law country is unique and requires a different legal solution. The variety of terms used (derecho real/real rights, land stewardship, in rem servitudes, leases, obligations réelles, etc.) is a sign that we are talking about different legal tools. Needed therefore are comparative studies, by experienced lawyers from different civil law countries and representing relevant branches of law, assessing possible legal frameworks and their implementation and enforcement, as well as the identification of legal instruments, specific to each national legislation, which could be used. What needs to be set in place legally, and how could it be done in a civil law context? If no strong legal base is developed for permanent land stewardship tools, addressing the variety of conservation needs, this tool risks to be just another addition to the already cluttered toolbox of rural land conservation.

Photo Anton Gazenbeek

If a great deal of effort has been invested in restoring part of a farm or creating new nature there, **how can the owner make sure that this stays nature, that the effort is not wasted?** Conservation easements/covenants would be a way of voluntarily protecting that investment permanently (or at least very long term). They would be an alternative to the only route currently available, namely statutory protection by the competent authorities using nature conservation laws.

This long-term or even permanence, might make such conservation easements/covenants interesting for offsetters or for **carbon and biodiversity credit investors**, as they guarantee a supply of environmental goods over a long period.

Tō tātou whenua, ake ake ake taonga
Our land, protected forever ***(a motto of the QEII Trust, NZ)***
Photo Anton Gazenbeek

As the ENPLC project's test sites showed, **landowners often hesitate to enter commitments of very long duration**. A suggestion might be to begin with short-term arrangements, e.g. 5 or 10 years or so, with an evaluation at the end and the possibility to prolong if the landowner is happy with the experience. In the USA such 'term easements' are used to build trust and they do work – after their term is up the owners are often so pleased with the experience that they make the easement perpetual. The French OREs of shorter duration do sometimes have automatic renewal clauses – if no-one objects when the time is up, the ORE is prolonged for the same number of years.

Qui custodet custodes: Any 'guardian of the land' faces the problem: what comes after? How to ensure that the future owners respect the features I want to conserve? If they don't, who will call them to account?
That is why a **monitoring and enforcing** entity is essential. And this raises the issue of perennity. The holder or monitor of the easement, covenant or any civil law equivalent, must be an entity which is reliable and stable. This is particularly urgent for NGOs. There should be no risk that the holder goes bust, or dies a slow death of falling membership and fading activity. As Chile shows, if there are entities popping up which disappear again after a few years, the landowner giving the easement has no certainty that it will be maintained and defended long-term.
In this context, the Land Trust Alliance actions to develop and update quality standards, and to institute an accreditation programme, are extremely important.

Photo: Harmony Farm

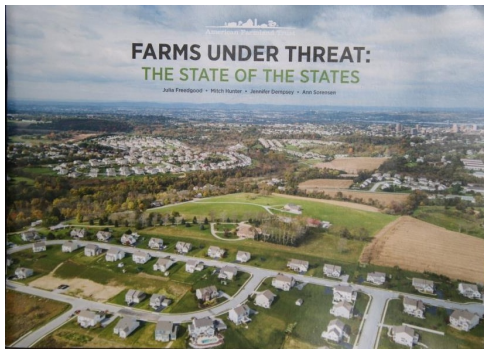
Keeping farmland agricultural: Farmland Conservation Easements

(presentation at the ABC working group meeting of May 12 by Anton Gazenbeek, ABC working group chair, plus debate)

This is a radically different kind of conservation covenant/easement, whose primary purpose is to protect, not wild nature, but farmland. It is an American phenomenon – in the USA it's been used for decades and millions of hectares are covered by such easements.

Why? The USA is a major agricultural producer, and farming and ranching families love their land. They have a deep connection to the ground, the water, the wildlife. And the public desire for fresh, local foods has never been greater. Yet many farmers and ranchers are forced by economic necessity to sell their land, which will more often than not then be converted to non-farm uses.

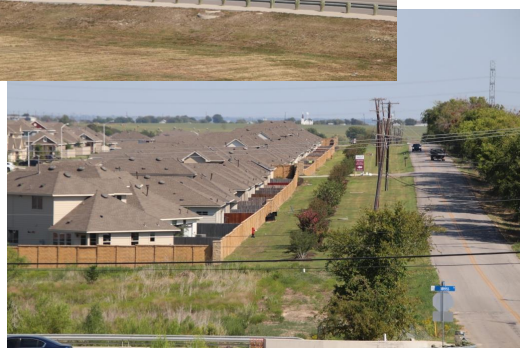
In significant parts of the USA, **residential, commercial and industrial development** is spreading out from urban centres into the countryside. Like the US Department of Agriculture, the NGO American Farmland Trust has been studying this loss of farmland for decades. Over 10 million ha has been lost since 1982.



Title page of American Farmland Trust's 2020 publication giving an excellent overview of farmland loss and what is being done about it.

Growth is remarkably rapid in several parts of America.

Pflugerville, a suburban town in the metropolitan area of Austin, Texas, went from 4,400 inhabitants in 1990 to over 65,000 in 2020.



Photos: Anton Gazenbeek

American Farmland Trust defines this as **ultra-high density** (UHD) developments, where farmland is lost completely to housing, shopping malls and industry parks. Fields of solar panels are included under this heading – interesting, as agri-voltaics, or solar farms, are coming to Europe too.

The Trust identified a second kind of development which is creeping and seeping into farmland and displacing agriculture: **low-density residential** (LDR). 2.8 million ha of farmland was affected by it between 2001 & 2016.

Image: American Farmland Trust

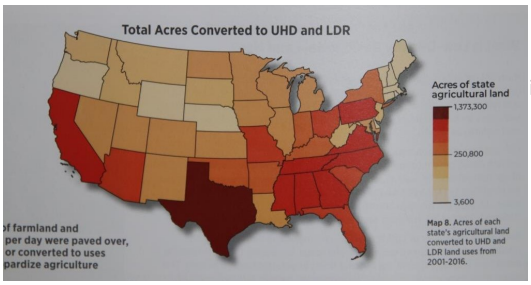
pg. 9

It's houses plunked into the countryside on large blocks of land. They may look rural – surrounded by trees and grass, with some animals roaming – but they use the land not to produce, but for hobby gardens, riding horses, a few donkeys or alpacas maybe. In New Zealand, where they also occur, they are aptly called 'lifestyle blocks'. Being scattered over the land, they make the remaining farmland harder to cultivate rationally. And one tends to be followed by another – the people who buy such plots are affluent and willing to pay high prices, very tempting for rural landowners.
It's an important phenomenon in the USA, especially around fast-growing urban areas. Remote working since covid may be accelerating it.

What about Europe? A recent Belgian statistic showed that 30% of land zoned as agricultural in the Province of Antwerp was not being used for farming, but was now used as rural cottages for commuters, for recreation, hobby gardening etc. Is this an exception or are there more regions like that?

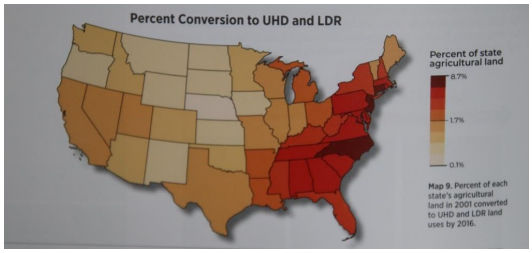
Adding up the loss of farmland to dense development and to low-density lifestyle properties, and mapping it, shows red 'cancers' spreading out, like in the map below, from economically booming cities like Houston, Dallas and Atlanta, where farmland has been built over or is being lost or fragmented.

These maps show the loss of farmland per state:



in absolute terms (total area lost)

in relative terms (% of farmland lost)



Map images: American Farmland Trust

The darker the colour, the worse the trend.

How to protect farmland against this? Political restrictions on freedom and private property are not particularly popular in the USA. Hence easements were brought in, as voluntary, incentive-based alternatives to land use regulations and binding zoning plans. The same NGO land trusts that promote nature conservation easements, were early into the breach. They took contact with willing farmers and ranchers to hold on to and permanently protect their working lands from development, while remaining productive and in private ownership. By conserving their land, farmers and ranchers can maintain their way of life and pass it on to the next generation.

Photo Anton Gazenbeek

Besides the classic conservation easements to preserve natural features, experiments began as early as the 1970s with **agricultural conservation easements** to preserve farmland against development. 'I want my ranch to always be a ranch' is the motivation for farmer landowners to conclude such easements, so that the farm can never be turned into housing or commercial buildings, but will stay in agricultural use for ever.

Because of the economic and electoral importance of the farming sector, state governments also got involved. Most states have set up **public agencies to become agricultural easement holders**: the farmer landowner who puts an easement on the land to forbid all developments and uses which threaten or cancel its agricultural use, can grant this easement to the public agency. The public agency then takes the responsibility for monitoring that the easement conditions are respected and for addressing any breach, for instance when a future owner or the children of the farmer try to cash in and develop the farm into a housing lot or a golf course.

Agricultural conservation easements can also be held by the **NGO land trusts**, and there are plenty of land trusts which specialise in holding agricultural conservation easements, or do this besides the nature conservation easements which are their core business. Most of these land trusts are active in only one state, or at an even more local level. The American Farmland Trust is the biggest such NGO, and it operates all over the USA, working closely with the federal Department of Agriculture and state governments.

What does a farm conservation easement look like? Examples can be found at:
https://farmlandinfo.org/sample-documents/?document_type=agricultural-conservation-easements

Granting an easement to keep the land in agricultural use forever, is a voluntary act. No landowner is obliged to do so. Which is why states and land trusts have come up with incentives to nudge and coax more farmer landowners to conclude easements, whether to keep farmland farmland or to protect natural values on the farm.
These incentives come in two kinds:

- purchase of easements
- fiscal rewards.

Purchase of easements: The public agency or the NGO land trust pays the landowner for granting them an easement. The amount is usually the loss of land value because of the easement. If for instance, the farmland is in an area where there is expansion of residential building, its potential value as building land is much higher than its current value as farmland. An easement which forbids building on the land, means that this potential value will never be realised. The difference between the value as building land and as farmland is the loss resulting from the easement, and this is what is then paid as compensation for granting the easement.
30 states have programmes to purchase agricultural easements (PACE is the acronym). Easements covering 2.6 million hectares have been bought since 1974, using $ 8100 million state and federal funds. But the vigour with which states apply their own programmes varies: 3 states average 70+ easement purchases a year; 20 less than 10. Expenditure per capita ranges from $6/year to less than a dollar.

For farmers, such a payment is doubly interesting because the amount paid out can be used as investment capital to improve the farm. It's a way of cashing in the value of the land as asset, without losing ownership of the land. Without the easement, the farmer would've had to sell some farmland, or get a bank loan, to be able to raise the same amount of capital.

There are considerable differences between states whether or not they purchase agricultural easements, and when they do, how vigorously. States employ a range of funding sources to finance such easement purchase. Besides their general budget, they use:

- *real estate transfer taxes*
- *lottery taxes*
- *cigarette taxes*
- *company taxes*
- *California uses proceeds from the state's ETS scheme (the reasoning: protecting farmland avoids GHG emissions which would be generated after it has been converted to more intensive uses)*

In Delaware, Pennsylvania and Maryland, young aspiring farmers can get zero interest loans from the state government or an exemption from property transfer taxes, if there is already an agricultural conservation easement, or they conclude one.

For landowners who have concluded agricultural conservation easements and donated (not sold) them to public agencies or land trusts, there are **fiscal rewards**. These are essentially the same as those available for donating nature conservation easements (see above, pg. 2).

It is very important to be aware that these agricultural conservation easements are all about keeping land in agricultural use – **the kind of farming is not part of the deal. It can be, and often will be, intensive**.....

Some easements do contain requirements to develop and implement conservation plans and practices, and some land trusts and easement holders do ask for soil and water conservation plans. But it's all completely voluntary – it's not automatically part of an agricultural conservation easement.

Image: American Farmland Trust

Although the American Farmland Trust (https://farmland.org) defends all farmland and see food security as the greatest challenge and objective ('No Farms No Food' is their slogan), they do realise that hyperintensive use which degrades soil, is not ideal. They therefore do suggest farmers to work with nature.

In this context, the Trust and its Farmland Information Centre are promoting much the same sort of **nature-friendly farming** ideas as we discuss in the ABC group. Quotes from their websites:

> "On-farm conservation can sustain agricultural productivity while achieving a range of environmental benefits. Learn how to understand the natural resources on your land and take action to protect them. Maintaining healthy soils can reduce a farmer's production costs and improve profits while also helping the land sequester more carbon, increase water infiltration and improve wildlife and pollinator habitat."

See:
https://farmlandinfo.org/improve-on-farm-conservation/
https://farmland.org/accelerate-regenerative-agriculture/

Are these farmland conservation easements useful for Europe? *Or are our land use planning laws and their enforcement more than sufficient to protect farmland?*
In the ABC group it was pointed out that even for a farmer it is very hard to change farmland into residential building land.
But what about changes within an agronomic framework? At the March 29 ABC meeting we heard from Nat Page (Fundatia Adept) how species-rich grasslands in Romania are being ploughed and sown with cereals. An easement stipulating that these grasslands must stay intact, might be a tool to prevent this ploughing.
The permanence of an easement also should make it easier to attract investors who want to fund long-lasting carbon sinks and biodiversity refuges.

Anton Gazenbeek, July 3 2023