Tallgrass Preservation: The "Grassroots" Effort

www.nps.gov

The Prairies

These are the gardens of the Desert, these
The unshorn fields, boundless and beautiful
For which the speech of England has no name---
The Prairies. I behold them for the first,
And my heart swells, while the dilated sight
Takes in the encircling vastness.

William Cullen Bryant, 1832

Laurie J. Hamilton
Attorney, MO Bar #67782

Dedicated to Professor John W. Ragsdale, Jr.
UMKC School of Law
March 2014
Postscript added May 2014

Tallgrass Preservation: The "Grassroots" Effort

> Americans have always lived in a land of possibility—a place where the grass is "hopeful green stuff," as the poet Walt Whitman put it. Our habit is to wonder what we can make of a place, to gaze at the future instead of the present. As a result, nature often lies hidden beneath our expectations. That's why the Flint Hills of Kansas—the last great swath of tallgrass prairie in the nation—can be so hard to grasp. The Flint Hills are no longer hard to get to, no longer a matter of ox train and overland trail from somewhere east of the Missouri River. They're transected by roads of every description now. But when you get to the hills, when you rise onto the low shield of flint and limestone that defines them and walk up onto the highest brow and stand into the wind that's trying to pry your ears apart, what do you see?
>
> Open sky, open land, unending horizon, the "limitless and lonesome prairie," to quote Whitman again. But the word that also springs to mind may be "nothing." A glorious nothing, but nothing nonetheless.[1]

by Verlyn Klinkenborg, *National Geographic* Magazine

I. Introduction

A relaxed, adventurous group of professors, interested law students, and attorneys organized by Professor John W. Ragsdale, stand atop the highest point within the Tallgrass Prairie National Preserve, just northeast of Strong City, Kansas, listening to the measured remarks of a local biologist who shares responsibility for The Nature Conservancy to protect these precious acres. To the encircled group, quieted by the view and the whistling wind, it feels like being on top of the world, on this slightly overcast late-March afternoon.

During the prior days in a classroom setting, the group has heard or read rather sobering statistics that what we are seeing is some of the pristine acreage of the less than four percent of

[1] Verlyn Klinkenborg, *Splendor of the Grass*, National Geographic Magazine, April 1977.

what was once a vast grassland in North America extending from Texas north to Canada, and from the Rocky Mountains east to the Mississippi.[2] Really? What happened to the rest of the tallgrass prairie? Was it farming? Cattle-raising? Drought? Pestilence? Civilization? Neglect? What was it? Was it progress? Was the grassland not worthy of preservation? If not, then what is worthy of preservation? Should we work to preserve only man-made creations for man?

Each student, and perhaps each professor, silently asks, "For whom do we, as a society, make efforts to preserve nature? Why preserve nature?"

Rhetorical questions seem to elude answers, and, perhaps all too often, to circle back and then deflect solutions. But this question of preservation of these grasslands---the Flint Hills---for future generations directs this writing. The vision for this intimate preservation, held fervently by local citizens for decades against dissension, finds its foundation on a developed legal tool: the conservation easement. Currently, private, federal, and state organizations are creating collaborative partnerships to sustain this vision of tallgrass prairie preservation forever by harnessing humankind's ability to cooperate for the achievement of a shared goal. This grassroots foundation is strong and deep---to preserve the tallgrass prairie, but not without detractors.

[2] Flint Hills National Wildlife Refuge, U.S. Fish &Wildlife Service, *Land Protection Plan: Flint Hills Legacy Conservation Area Kansas* (July 2010).

II. Conservation Easements: A Property Right

A: What exactly is a conservation easement?

For anyone who prefers legal definitions, conservation easements are negative "servitude[s] for conservation or preservation purposes." [3] A conservation easement is somewhat of a *hybrid* property right coupled with a charitable contribution---part common law easement (generally negative, but it can include affirmative rights), part covenant (so that the rights run with the land past current ownership into the perpetual future), and part charitable contribution to a qualified organization that meets strict guidelines. Generally, the conservation easement is a non-possessory property right; is a negative easement to disallow adverse activities and conditions contrary to preservation; is an easement in gross (not an appurtenant easement attached to a particular piece of land); and a restrictive covenant running with the land (or equitable servitude) as defined in traditional property common law. This conceptual *brew* of legal definitions, requiring some detailed explanation, continues to be defined and shaped by the owner or grantor's intent by a charitable contribution to a land trust or other qualified organization.

Tax lawyer and author, David Dietrich, in his book Conservation Easements, deftly walks the layman, or the seasoned tax or estate planner, through the wickets of the legal property definitions to illustrate that "the term 'conservation easement' is the accepted name for a legal tool that fits in the real property law of easements like a square peg in a round hole."[4]

Characteristic traits of a conservation easement include: voluntary, perpetual, beneficial, financial, and charitable. These are the non-legal sounding words---as opposed to "appurtenant

[3] Restatement (Third) of Prop.: Servitudes § 1.5(1) (2000).
[4] Dietrich, David J. and Christian Dietrich, Conservation Easements, Tax and Real Estate Planning for Landowners and Advisors, xix (2011).

easement" or "equitable servitude"--- sprinkled in the discussions held by the people, organizations, and elected officials focused on the preservation of the Flint Hills of Kansas.

Professor and scholar Nancy McLaughlin defines a conservation easement with many of the same characteristic terms:

> Conservation easements are not private contracts between private parties entered into for private benefit, like right-of-way easements between neighbors. Rather, conservation easements are authorized under state law because they provide significant conservation or historic benefits to the public. They are held and enforced by government entities and charitable organizations on behalf of the public. And the public subsidizes their acquisition through, among other things, appropriations to federal and state easement purchase programs and the provision of federal and state tax benefits to easement donors.[5]

Because they permit landowners to voluntarily limit uses of burdened land, conservation easements are unique and effective tools for environmental protection, allowing conservation to occur by private transaction, rather than by governmental regulation.[6]

B: Who makes use of a conservation easement?

With the promise of protecting undeveloped or purposed land into perpetuity, and some handsome financial and tax incentives for their qualified use, conservation easements are attractive, topical, still evolving, and a target for detractors. The Land Trust Alliance, the thought

---

[5] Nancy A. McLaughlin is the Robert W. Swenson Professor of Law and Associate Dean for Faculty Research and Development at the University of Utah S. J. Quinney College of Law and offers this definition of conservation easements in a 2011 article adapted from the chapter on merger in her book on conservation easements forthcoming with Oxford University Press.

[6] Matthew J. Richardson, *Conservation Easements as Charitable Trusts in Kansas: Striking the Appropriate Balance Among the Grantor's Intent, the Public's Interest, and the Need for Flexibility*, 49 Washburn L.J. 175, 179 (2009).

and practice leader on the issues of land preservation, accounts that nearly 47 million acres as of year-end 2010 are protected by state, local, and national land trusts. As reported in its 2010 Census, 8.8 million acres are protected through conservation easements by private landowners working with federal, state, or private, non-profit land trusts.[7] For state and local land trusts, acres protected by conservation easements account for 55% of all land conserved, while 13% of total land saved is owned by land trusts.[8]

Active private land trusts in Kansas focusing on the tallgrass preservation in the Flint Hills include The Nature Conservancy, the Kansas Land Trust, and the Ranchland Trust. Federal land conservation programs include the Grassland Reserve Program (under the aegis of the Department of Agriculture) and the conservation efforts of the U.S. Fish & Wildlife Program (under the aegis of the Department of the Interior). Each of these organizations recognizes the inestimable conservation and historic value of the Flint Hills, and participates in the private/public partnerships to preserve these grasslands.

For the rancher or farmer or landowner (who may or may not be a full-time resident) in the Flint Hills, the conservation easement is one legal tool that can restrict the use of land from development or other unwelcome uses, and from uninvited plant species, such as in invader trees or scrub bushes. For conservationists in the Flint Hills, this legal tool serves as a powerful connector between unspoiled, indigenous acreage that is scarce and already under protection. The Flint Hills grasslands are revered as a complex ecosystem that requires unfragmented, contiguous mass to create sustainable sanctuary for the plants and wildlife of the region. These grasslands, home to some endangered animal and plant species, are vulnerable to non-indigenous

---

[7] Land Trust Alliance, 2010 National Land Trust Census Report, http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report (last accessed 4/28/13).
[8] *Id.*

plants, shrubs, and trees, but most importantly, ecological disruption and fragmentation. Development of the land with roads, bridges, buildings, and homes fragments this contiguous tallgrass prairie land.

C: Why are they used?

Talking to the conservation-minded individuals and organizations in the Flint Hills of Kansas, the answer to this question is resoundingly clear. These private owners, private land trusts, and federal conservationists love the land and want it preserved for future generations to experience the timeless bounty of nature where past and future connects in the land itself.

> The great conservation opportunities of the next century will be on privately owned land, and conservation easements are the most effective way to protect those lands. Landowners like conservation easements because they are a refreshing alternative to government regulation: they are voluntary, local, and respect private property rights. For the many people who love the land, it is the best way to ensure that it will be preserved for all time.
>
> Rand Wentworth, President, The Land Trust Alliance

In addition to being less intrusive, private conservation easements can be a more efficient conservation tool than government regulation.[9] Ranger Jack Bohannon of the Tallgrass Prairie Wildlife Preserve, under the U.S. Fish & Wildlife Program, candidly proffered that the timeline and expense to the landowner of a federal appraisal, before and after the conservation easement, was grossly disadvantageous in terms of cost and timeline.

In order to qualify for the favorable tax treatment, an attractive incentive for landowners in a variety of circumstances, a conservation easement must be granted in perpetuity to a

---

[9] Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739, 743 (2002)(explaining that conservation easements are an attractive private ordering alternative to traditional command and control land use regulation).

qualified organization, and must fulfill one or more allowable conservation purposes under IRC § 170(h)(4):

1. the preservation of an historically important land area or a certified historic structure,
2. the preservation of a land area for outdoor recreation by, or the education of, the general public,
3. the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, and
4. the preservation of open space (including farmland and forest land) where such preservation is

    (a) for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state, or local governmental conservation policy, and

    (b) in either case, will yield a significant public benefit. [10]

Conservation of the tallgrass prairie in the Flint Hills would arguably satisfy all four purposes: the preservation of a historically important land area; the preservation of a land area for outdoor recreation or education of the general public; protection of a relatively natural habitat; and preservation of open space for scenic enjoyment. These purposes, each cognizable in the Flint Hills, fuse organically into the "conservation values" of prairie preservation.

To supplement federal tax benefits, some states provide state tax benefits for the grantors of conservation easements although the provisions vary from state to state. Kansas does not currently allow deductions of conservation easements as charitable deductions from state income tax, but it does provide additional tax benefits to the donor in terms of reduced property tax values after the placement of the conservation easement, to reflect the reduction in

[10] IRC § 170(h)(4).

developmental value of the land burdened by the conservation easement which can be as much as 25-30% of the value of the underlying property.

D: How does it work?

In the Flint Hills where neighbors know each other on sight and build trust over years and through generations, the progress of conservation easements works slowly and cautiously. Although the federal law governs the charitable deductibility of conservation easements, the state statutes, and local zoning ordinances, as well as the specific agreements within the conservation easement document, require careful consideration.

Conservation easements achieve their objectives by enabling landowners to divide their property rights and transfer a non-possessory interest, or servitude, to a qualified organization as defined by IRS code. The holders of these servitudes, typically government entities or independent nonprofit organizations, have the right to prevent or control the development of the burdened land. In exchange for surrendering conservation servitudes, owners of burdened properties receive tax benefits or, less frequently, cash payments to purchase the conservation easement.[11]

Kansas adopted the Uniform Conservation Easement Act (UCEA) in 1992 into law[12] that allows the owner of a fee interest in land to transfer a conservation easement to a land trust or governmental entity, so that the land trust, governmental unit, or third party can then enforce the easement whether or not they are considered to own an interest in the property.

The UCEA provides that a conservation easement is valid even though:

1. it is not appurtenant to an interest in real property;
2. it can be or has been assigned to another holder;

---

[11] Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739, 742 (2002).
[12] Kan. Stat. Ann. § 58.3811-22 (2012).

3. it is not of a character that has been recognized traditionally at common law;
4. it imposes a negative burden;
5. it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
6. the benefit does not touch or concern real property; or
7. there is no privity of estate or of contract.[13]

The UCEA grants authority to the qualified donee organization to enforce affirmative obligations undertaken by the donor such as maintenance of the protected land area.[14] The enforcement power follows any subsequent owner of the fee interest in the property bound by the perpetual conservation easement.[15]

Flint Hills rancher and landowner Bill Haw, who along with wife Maggie, gave a conservation easement of approximately 13,000 acres to The Nature Conservancy forecasts, "If we don't have the conservation easements, we will lose this landscape. It [the grasslands landscape] is vulnerable. Once lost, it will be gone forever. We must protect it. This may be the most important work that my wife and I accomplish in our lifetimes."[16]

---

[13] Nat'l Conf. of Comm'rs on Uniform State Law, Uniform Conservation Easement Act § 3(a) (2007).
[14] *Id*. at § 1.
[15] *Id.* at § 4.
[16] Telephone interview with Bill Haw, a private landowner in the Flint Hills, in Kansas City, MO (April 16, 2013).

<u>**III. History of the Flint Hills**</u>

Courtesy of Kevin Sink, friend

At first, to be *here*, to be here *now*, was hard for me to do on the prairie. I liked the clarity of line in a place that seemed to require me to bring something to it and to open to it actively: see far, see little. I learned a prairie secret: take the numbing distance in small doses and gorge on the little details that beckon. Like its moisture, the prairie doesn't give up anything easily, unless it's horizon and sky. Search out its variation, its colors, its subtleties. It's not that I had to learn to think flat---the prairies rarely are---but I had to begin to think open and lean, seeing without set points of obvious focus, noticing first the horizon and then drawing my vision back toward middle distance where so little appears to exist. I came to understand that the prairies are nothing but grass as the sea is nothing but water, that most prairie life is *within* the place: under the stems, below the turf, beneath the stones.

William Least Heat-Moon, <u>PrairyErth</u> (1991)

A. Geological History

The geological formation of the Flint Hills began with the deposits of limestone, chert (or flint), and shale some 285 million years ago when a shallow sea covered Kansas. According to geologist Rex Buchanan, who has worked at the Kansas Geological Society based at the University of Kansas since 1978:

> [T]hese shallow, warm oceans teemed with life. Because the seas were shallow (likely less than a hundred feet deep) and the sea floor relatively flat, slight drops in sea level would expose broad areas as dry land, and slight increases in sea level meant that vast areas would be covered by water. In short, for millennia, the seas in eastern Kansas came in and the seas went out.[17]

The seas created layers upon layers of sedimentary deposits primarily limestone, holding the chert (or flint), and shale. The thin layers of soil and the unforgivingly hard flint made farming difficult if not nearly impossible. This earthbound characteristic spared the Flint Hills from the plowing and cultivation of pioneering farmers. From the first written observations of the Flint Hills by Zebulon Pike some 200 years ago, it is believed that little has changed from view when standing within an unfragmented expanse of tallgrass prairie.

Although there is evidence of glaciers in the northern region of the Flint Hills from about 600,000 years ago, it was not the glacial retreat, but the melting waters, that created the "draws" among the hills. Water, from the plentiful rainfall in the region, accumulates within the cracks, fissures, and pore space of the limestone, and shows up at the surface in the form of numerous springs and seeps.[18]

A feature documentary film, *Last Stand of the Tallgrass Prairie*, produced for Public Broadcasting Service's Natural History Division by regional filmmakers Aimée Larrabee and John Altman, was broadcast nationally in prime time beginning in 2001. The accompanying

---

[17] Rex Buchanan and Brian Obermeyer, *An Introduction to the Flint Hills and the Tallgrass Prairie*, The Symphony in the Flint Hills Field Journal 2011: Volume III (2011), at 61, 62.
[18] *Id*. at 64.

hardbound book, lovingly written by Aimée, a journalist by background, reveals the secret of the height of the tallgrasses in this region:

> Of all the prairie lands in North America, the tallgrass prairie always received the most rainfall. These grasses were farthest from the Rocky Mountain rainshadow, and they frequently received a flow of moist air from the Gulf of Mexico. Water was one of the keys to the renewal of these long grasses. At eye level, the prairie often could appear somewhat monotonous, but it was not so much broken up as embroidered by the trees that hugged the defiles of crucial watersheds, the only place woody plants could survive in this ecosystem shaped by regular fire.
>
> Mixed-grass and shortgrass prairie grew where rainfall was less abundant, so the height of these grasses was often fairly uniform. By contrast, the fabric of the tallgrass prairie was a quilt of huge, shifting patches: some areas recently burned, some recently grazed by bison, and others with mile after mile of grasses almost six feet tall.[19]

This flourishing tallgrass prairie ecosystem is home to hundreds of wildflower species, with a wide diversity of birds of some 250 species having been recorded,[20] dozens of reptiles and amphibians, dozens of mammal species, and millions of insects per acre.

B. Abbreviated Political History

The development timeline for what today is the largest unfragmented acreage of prairie preservation begins with a Colorado cattleman in 1878, who purchased adjoining land parcels over several years before selling out his accumulated holdings to a neighbor and partner. For the following seventy years, there were divisions, sub-divisions, and sales of essentially the original

---

[19] Larrabee, Aimée and John Altman, last stand of the tallgrass prairie, Michael Friedman Publishing Group, Inc., (2001, at 28.

[20] William H. Busby, *Year-round and Migratory Birds of the Flint Hills*, The Symphony in the Flint Hills Field Journal 2012: Volume IV (2012), at 101.

combined property---in response to daily circumstances, market conditions, and business cycles, only to return to the recombination of parcels into the Z Bar Cattle Company Ranch in 1975 holding 10,894 acres.

In 1986 when the company disbanded, the land was placed into a bank-managed trust. The National Park Trust, a private land conservancy formed by the National Parks and Conservation Association in 1983, purchased the 10,894 acres for $4.79 million. Under an agreement with the National Park Service (NPS), all but 180 acres of the ranch will remain in private hands. Thirty-two acres containing the core visitor area, consisting of the limestone ranch building complex listed on the National Register of Historical Places, were donated to the NPS by the Trust.[21]

But to fast-forward in time to an intermediate conclusion, Senators Nancy Kassebaum-Baker (credited with the "great compromise") and Bob Dole introduced legislation in S. 695 to allow the federal government to create the Tallgrass Prairie National Preserve upon the bill's approval on November 12, 1996.[22] In 2005, the majority of the preserve was sold to The Nature Conservancy, acting as private owner and manager, and created a federal-private partnership to work together for prairie preservation. The beachhead for prairie preservation was now established.

But the period between 1986 and 1996 holds the seeds and fruits of disagreement that provide insight into the emotional ties of the local residents to these grasslands, and their deep distrust of federal use of eminent domain. In June 1988, the National Audubon Society (Audubon) secured an option to purchase the Spring Hill Z Bar Ranch from the bank-managed

---

[21] National Parks and Conservation Association, *Congress Asked to Make Tallgrass Prairie a New National Park (4/17/96)*, http://pbln.imsa.edu/model/problems/buffalo/documents/congreq.html (last visited 4/24/2013).

trust. This purchase option would further Audubon's mission "to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity." The news of closed planning meetings escaped publicity for months. In January 1989, Audubon leadership announced the intention to sell the land to the NPS. The announcement proclaimed that the Audubon society believed that the "highest and best use" of the property would be as a national monument.[23] Audubon leadership tried to exert damage control over the public reaction, and honorably held an open town hall meeting to discuss their interest and to listen to the enraged community.

The "Tallgrass Prairie National Preserve, Legislative History, 1920-1996," recounts:

> This event [the meeting] proved to be a critical turning point. It altered the balance of power between opposing sides just enough to set in motion a complex process of negotiations ultimately leading to successful legislation. However, the process moved haltingly, and important concerns were left unresolved by the legislative compromise finally enacted in 1996.[24]
>
> Audubon regional leadership contacted an elected congressman about the possibility of establishing the ranch as some type of NPS unit such as a tallgrass prairie monument perhaps connected to a tallgrass prairie parkway. Avoiding eminent domain purchase was the key issue in the discussions prior to the news slipping out into public view.

Forced to bring community leaders together before a fleshed-out proposal was fully formed from the discussions, Audubon leadership presented three options under consideration: (1) federal purchase with development, management and interpretation by the NPS; (2) purchase

[23] Nikki Christopher, *Cattle Ranch with Park Rangers: The Battle for a Tallgrass Prairie National Park in Kansas*, 18 Stan. Envtl. L.J. 211, 222 (1999).
[24] Tallgrass Prairie National Preserve Legislative History, 1920-1996, http://www/cr/nps.gov/history/online_books/tapr/tapr_7.htm (last accessed 4/1/13).

and operation by the National Audubon Society; or (3) purchase by the State of Kansas with operation through an appropriate state agency.[25] Initial community reaction was positive, but undercurrents of deep resistance began to ferment openly. The specter of the federal government's involvement produced skepticism, even anger. Active participation by the NPS provoked fear of private land taken by the federal government through eminent domain. The mounting resistance was fueled by deeply cherished values of private land ownership in the Flint Hills. The bureaucratic process of committees, feasibility studies, meetings, and repetition of the same began to produce division, distrust, and disharmony among residents. This lasted for years dividing neighbors and communities, but ultimately strengthened the commitment to preservation.

Prior to the S. 695, an unsuccessful H.R. 2369 in the summer of 1991 continued to stir anxiety, heat up tempers, and divide both neighbors and politicians. Rep. Pat Robert's comments to the subcommittee effectively articulated the sentiments of the opposing local citizens. He gave voice to the absent ranchers living in Chase County, Kansas, that "were justifiably fearful of 'outsiders' wanting to take this property and make changes that [would] dramatically change their land, their communities and eventually their lives and livelihoods."[26]

But momentum for preserving some portion of the Flint Hills for public access gained traction while the "Kassebaum Commission" from late 1991 to 1994 attempted to forge partnerships between private and public interests. Month after month of intense negotiations and lobbying by many groups in both the House and Senate finally resulted in the passage of S. 695, and was signed into law by President Clinton.

[25] *Id*.
[26] *Id*.

Federal law authorizes the Tallgrass Prairie National Preserve under Title X-Miscellaneous, Subtitle A, of P.L. 104-333[27], enacted November 12, 1996. True to the remarkable private-public partnerships operating in the Flint Hills region, the bill authorizes a 13-member Tallgrass Prairie National Preserve Advisory Committee to be appointed by the Secretary of the Interior. The committee members must include three representatives of the National Park Trust (a private land conservancy), three representatives of local landowners, cattle ranchers or other agricultural interests; three representatives of conservation or historic preservation interests; one person each recommended by the Chase County Commission, Strong City and Cottonwood Falls officials and the Governor of Kansas, and one range management specialist representing Kansas institutions of higher education. As mandated by law and chartered in September 1997, the committee's role is to advise the NPS on matters "concerning the development, management, and interpretation of the Preserve, including timely advice during the preparation of the general management plan for the Preserve."[28]

Some critics weighed in that the compromise failed to create public access for this national treasure of virgin grasslands. Although the opinion expressed by one J.D. candidate and published by the Stanford Environmental Law Review is now dated prior to widespread use of conservation easements and public/private collaboration, the viewpoint shows how time might change perspective.[29] (The quoted author is not a Kansan.)

> [This analysis discusses the] compromises Congress made to appease the opponents of the monument and how these compromises destroyed most of the preservation and recreation value of the preserve. [This section] concludes that the

[27] Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333 (1996).
[28] *Id*.
[29] Nikki Christopher, <u>Cattle Ranch with Park Rangers: The Battle for a Tallgrass Prairie National Park in Kansas</u>, 18 Stan. Envtl. L.J. 211, 213 (1999).

Tallgrass Prairie National Preserve, as established, does not meet the nation's needs and desires for a national park in the tallgrass prairie, nor does it serve the needs of Kansans who anticipated the economic benefits and increased access to the prairie that a national park would provide.

www.symphonyinthelfinthills.org

IV. The Preservation Players in Kansas

The November 2010 announcement by U. S. Department of the Interior Secretary Ken Salazar of the designation of 1.1 million acres in the Flint Hills as a Legacy Conservation Area, a new unit of the National Wildlife Refuge System, to be protected through voluntary, perpetual conservation easements[30] has spurred additional interest, activity, and caution. The announcement made in Strong City included then-Kansas Governor Mark Parkinson, Senator Sam Brownback (now governor), and Secretary of Health and Human Services Kathleen Sebelius to break ground on a new visitor center and administrative buildings at Tallgrass Prairie National Preserve.

The news release[31] heralded the first new refuge unit created under President Obama's administration. The Flint Hills Legacy Conservation Area (FHLCA), created through efforts of the U.S. Fish and Wildlife Service, the Kansas Department of Wildlife and Parks, private landowners, and other agencies and partners demonstrates the breadth of the current bench of preservation players. Salazar noted that partnerships are at the heart of President Obama's America's Great Outdoors Initiative to create a new conservation ethic for the 21st century and to reconnect Americans to the great outdoors. Salazar's comment, "We want to tap into the power of partnership so evident here at the Tallgrass Prairie National Preserve." This federal and state, public and private, rancher and farmer team of partners is dedicated to saving this last 4% of the vast tallgrass prairie that once covered 140 million acres of North America.

---

[30] U.S. Fish and Wildlife Service: Flint Hills Legacy Conservation Area, http://www.fws.gov/refuge/flint_hills/partnerships/flint.html (last visited March 28, 2014).

[31] U.S Department of the Interior Home Page, http://www.doi.gov/news/pressreleases/Secretary-Salazar-Marks-Establishment-of-Flint-Hills-Legacy-Conservation-Area.cfm (last visited Apr. 27, 2013).

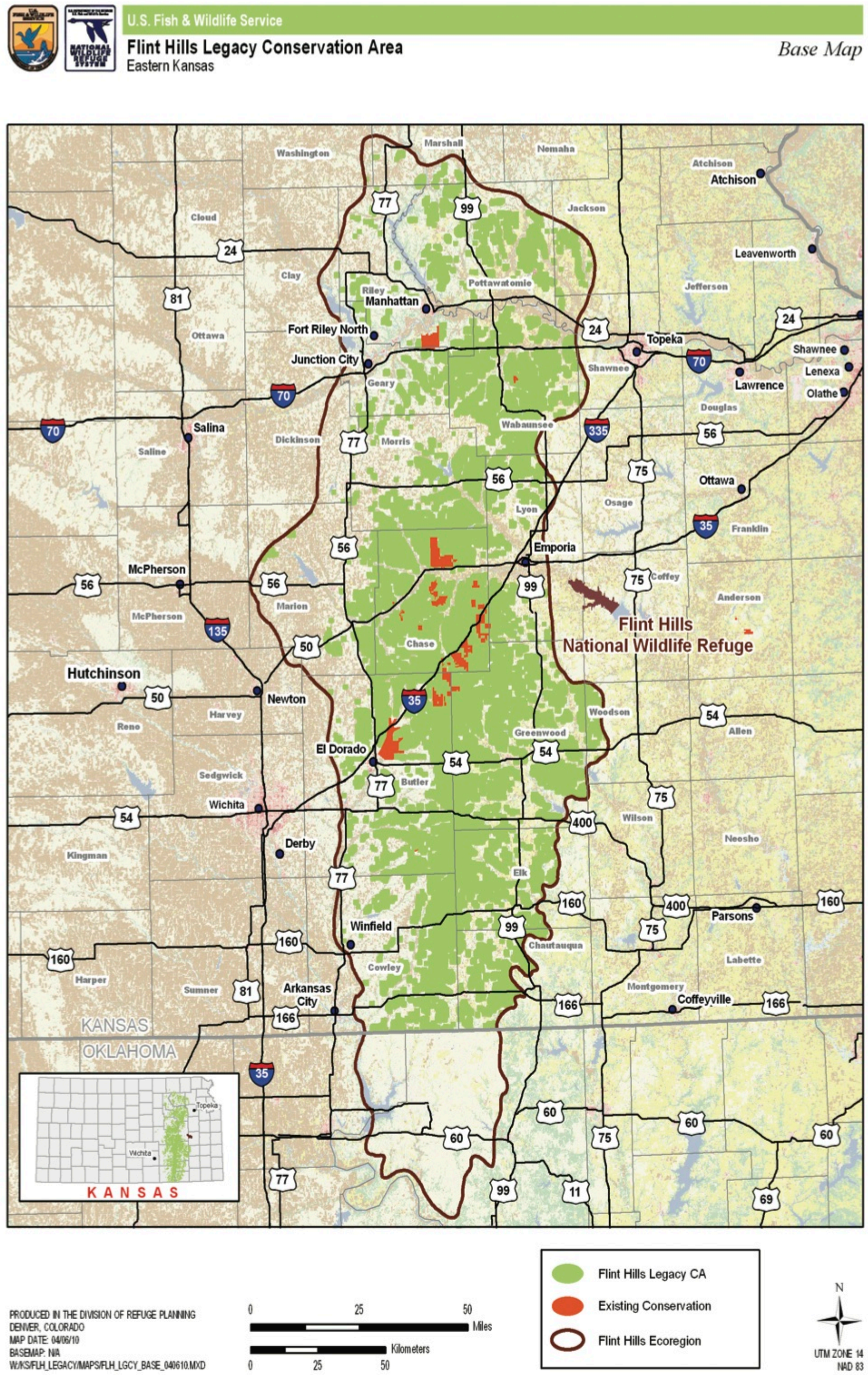


Figure 2. Flint Hills Legacy Conservation Area.

A. The Nature Conservancy (TNC)

Formed into a tax-exempt corporation in 1951 from earlier conservation efforts, The Nature Conservancy (TNC) concentrates on five distinct habitats: rivers and lakes, oceans and coasts, forests, grasslands and prairies, and deserts and aridlands to fulfill its vision "to leave a sustainable world for future generations. TCN is active in all 50 U.S. states and in 33 countries to date,[32] and dubbed by some locals as the "800 pound gorilla in the room" when it comes to speaking about Flint Hills preservation.

As part of TNC's ongoing efforts to preserve the tallgrass prairies of the Flint Hills, their leadership launched a community-based program, the Flint Hills Initiative, in 2001. TNC is the largest holder of the number of easements and acres in Kansas among the participating not-for-profit land trusts which complements its privately owned lands within the boundary of the Tallgrass Prairie National Preserve. TNC has deep roots within the community garnering respect and cooperation.[33]

In the public/private consortium of conservation organizations, TNC receives frequent acknowledgement as the leading ally for the Flint Hills, and an acknowledged, respected team player with other organizations. Brian Obermeyer, the Director of TNC's Flint Hills Initiative, oversees stewardship activities on 13,000 acres of Conservancy-owned land, including the Tallgrass Prairie National Preserve, as he negotiates conservation easements, and is readily available as an advisor or educator to other organizations.

Brian Obermeyer, Director of The Nature Conservancy's Flint Hills Initiative, provided the following chart as of March 2013 of permanent conservation easements held by Kansas

---

[32] The Nature Conservancy Home Page, http://www.nature.org/ (last accessed on 4/27/13).
[33] A copy of TNC's Conservation Easement for the Flint Hills landscape is in Appendix 2, reprinted with permission.

preservation players. Obermeyer's update added 1,899 acres for TNC in March 2014, and the in-process 2,450 acres for USFWS were purchased in October 2013.

Total impact of permanent conservation easements in Flint Hills

Flint Hills Conservation Easement Acres		
Organization	**Acres**	**Easements**
NRCS GRP (closed and pending easements)	37,055	62
The Nature Conservancy (closed easements)	38,617	15
The Nature Conservancy (in process)	11,545	3
Kansas Land Trust (closed easements)	12,439	23
Kansas Land Trust (in process)	1,001	6
US Fish and Wildlife Service (in process)	2,500	1
Ranchland Trust of Kansas (closed easements)	655	1
Total	103,081	113

(Note: Most easements are part purchase (sold by grantor) and part charitable contribution (gift by grantor). The USFWS purchased 2,450 acres of the in-process easement with funds from the federal Land and Water Conservation Fund.[34] No funds are available for 2014.)

B. Grassland Reserve Program (GRP)

The federal Grassland Reserve Program (GRP), administered through the U.S. Department of Agriculture (USDA) under the Natural Resources Conservation Service (NRCS), is a voluntary conservation program that emphasizes support for working grazing operations,

[34] National Wildlife Refuge System, "Slowly but Surely Preserving Prairie in Kansas," http://www.fws.gov/refuges/RefugeUpdate/JanFeb_2014/prairie.html (last visited Mar. 31, 2014).

enhancement of plant and animal biodiversity, and protection of grassland under threat of conversion to other uses.

Participants voluntarily limit future development and cropping uses of the land while retaining the right to conduct common livestock grazing practices and farming operations related to the production of forage and seeding, subject to certain restrictions during nesting seasons of bird species that are in significant decline or are protected under federal or state law. An approved grazing management plan is required for participants.[35]

Where permitted by state law, all GRP conservation easement deeds must be perpetual. Eligible entities may utilize the GRP template conservation easement deed, but if any significant changes are made to the template deed, the federal Office of General Counsel (OGC) shall review the deed adding time and, potentially, further negotiation.

USDA Farm Service Agency's (FSA) Conservation Reserve Program (CRP) is a voluntary program available to agricultural producers to help them use environmentally sensitive land for conservation benefits. Producers enrolled in CRP plant long-term, resource-conserving ground covers to improve the quality of water, control soil erosion, and develop wildlife habitat. In return, FSA provides participants with rental payments and cost-share assistance from federal funds with contract duration generally between 10 and 15 years.

C. Kansas Land Trust (KLT)

The Kansas Land Trust (KLT), incorporated in 1990 and a member of the national Land Trust Alliance (LTA), worked hard to ensure successful passage of the Kansas Uniform Conservation Easement Act in 1993[36]. KLT "protects and preserves lands of ecological, scenic,

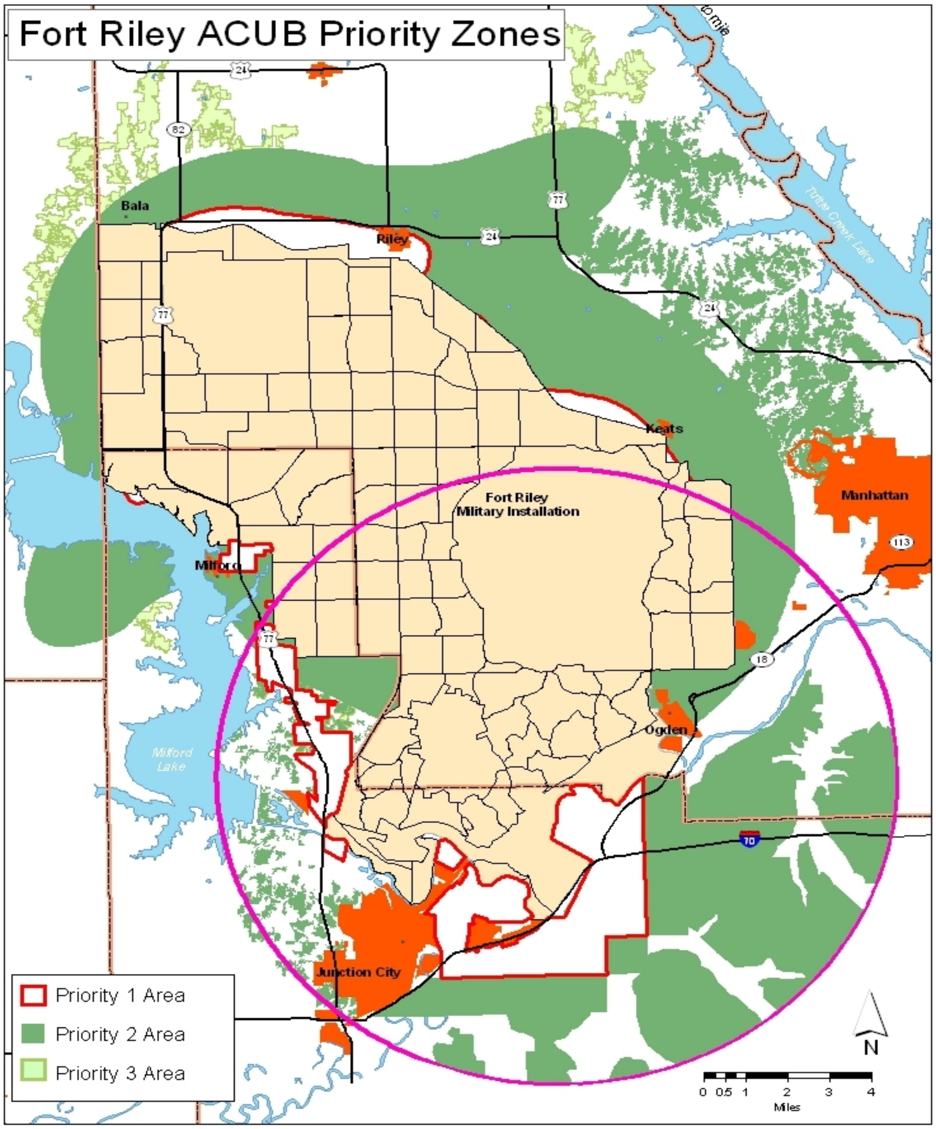
[35] http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=grp 4/24/13
[36] Kan. Stat. Ann. § 58.3810-22 (2012).

historic, agricultural, and recreational significance in Kansas, and receives funding from individual contributors, foundations, corporations, and government agencies."[37]

As part of its mission to preserve significant Kansas lands, KLT has placed a special emphasis on the Flint Hills, the largest remaining tract of native tallgrass prairie of nearly 3.5 million acres. KLT identifies that between 1982 and 1997, development claimed 768,800 acres for residential and commercial uses,[38] or roughly 22%. In January 2006, KLT announced a new partnership with Fort Riley officials to offer surrounding landowners conservation easement purchase opportunities using federal funds from the Army Compatible Use Buffer program (ACUB). Although the primary purpose is to restrict development use that is not compatible with the noise of training ammunition ranges and helicopter traffic, the created buffer provides significant natural corridors that protect working ranchland, wildlife, and water sources.

KLT has been working with land trust members, private landowners, and government agencies to leverage funds for the preservation of land. The purchase of the conservation easement from the Moyer Ranch[39] is a perfect example of this collaborative work by KLT to employ both federal and state funding to advance their objectives. Participants in the purchase of the 6,700 acres for a conservation easement included Fort Riley's ACUB program, the NRCS Farm and Ranchland Protection Program (FRPP), and the Kansas Department of Wildlife and Parks. This protected ranchland is directly south of Interstate 70 and will allow this scenic view of ranchlands to exist into perpetuity.

[37] Kansas Land Trust Home Page, www.klt.org (last accessed 4/27/13).
[38] *Id*.
[39] P.J. Griekspoor, Conservation Easement Protects Moyer Ranch, 6,700 Acres of Flint Hills, http://farmprogress.com/story-conservation-easement-protects-moyer-ranch-6700-acres-of-flint-hills-14-41469 (last accessed March 27, 2014).



(Find source)

D. Ranchland Trust of Kansas (RTK)

The Ranchland Trust of Kansas (RTK), an affiliate of the Kansas Livestock Association (KLA) founded in 2003 and also a member of the national Land Trust Alliance, presents its mission "to preserve Kansas' ranching heritage and open spaces for future generations through the conservation of working landscapes."[40] The Ranchland Trust of Kansas (RTK) is a qualified

[40]Ranchland Trust of Kansas Home Page, http://www.ranchlandtrustofkansas.org/missionandvalues.aspx (last accessed 3/27/14).

grantee, who agrees to hold and administer the terms of conservation easements it accepts. We are qualified, by IRS statutes (Sec 170(h)(3), to accept and hold a conservation easement where the grantor seeks tax benefits. If RTK accepts and signs a conservation easement, the organization is pledging to enforce the terms of the conservation easement in perpetuity.[41]

Mike Beam, the Executive Director of the KLA for nearly 30 years, witnessed community efforts to preserve the Flint Hills for decades, offers:

> Timing was a lot of what created the Flint Hills preservation momentum we see today. Everyone took a step back when we determined that there wasn't going to be a large federal acquisition. Ranchers and farmers and landowners put aside conflict for the most part to preserve the Flint Hills for future generations. There is a strong private ownership ethic in the Flint Hills area and throughout Kansas.[42]

Additionally, Mike indicates that some ranching operations use the cash from the purchase of their conservation easement to buy adjoining land when available to expand their operations, or to offer more equitable distribution of ranchland to next generation family members.

E. U.S. Fish & Wildlife Service (of the Department of the Interior)

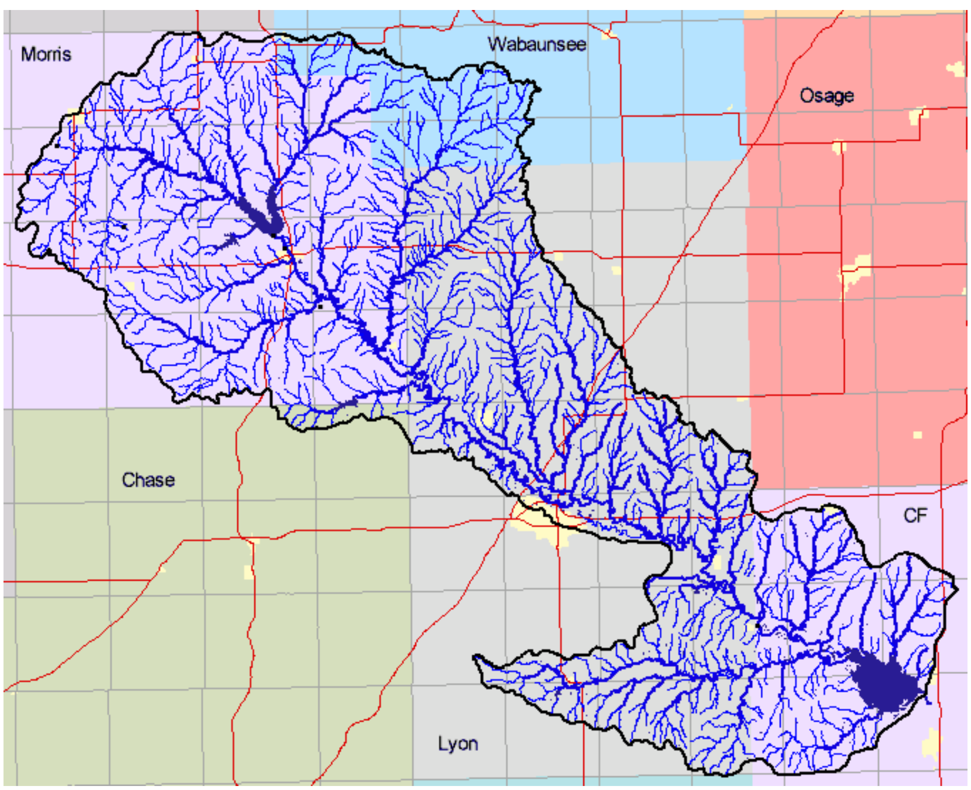
The U.S. Fish and Wildlife Service manages the Flint Hills National Wildlife Refuge consisting of 18,500 acres located on the upstream portion of John Redmond Reservoir on land owned by the Army Corps of Engineers.[43] (Please refer to map on page 19 to see how the flood plain approaches the Flint Hills Legacy Conservation Area.) Established in 1966, the refuge is a region that was historically native tallgrass prairie. Along with large numbers of migratory birds,

[41] *Id.*
[42] Telephone interview with Mike Beam, Executive Director of the Kansas Livestock Association, in Topeka, KS (April 16, 2013).
[43] U.S Fish &Wildlife Service, Flint Hills National Wildlife Refuge, www.fws.gov/flinthills/ (last accessed on 4/28/13).

the Flint Hills National Wildlife Refuge is a haven for white-tailed deer, wild turkey, bobwhite quail, and an assortment of other mammals, birds, reptiles, and insects.

Jack Bohannon, Head Ranger at the Flint Hills National Wildlife Refuge, praises the federal, state, and private collegiality and helpfulness in efforts to protect the Flint Hills Legacy Conservation Area. But he candidly admits that the federal process for review of a potential conservation easement, and the lengthy and expensive appraisal process are disadvantages when compared to a private organization's procedures.

This watershed map by the Kansas Geological Survey clearly shows the extension of the watershed area north and west of the Flint Hills National Wildlife Refuge into the counties of Morris, Chase, and Wabaunsee situated right in the heart of the Flint Hills region.



KS Geological Survey

V: Future of Conservation Easements to Protect the Flint Hills

A. Kansas Ecotourism

In 2012, Kansas Governor Sam Brownback established the 16-member Kansas Ecotourism Steering Committee (Committee) to explore the opportunities for this genre of tourism in the state. The governor charged the Committee to provide direction, guidance and marketing strategies to help grow the Kansas tourism industry. Kansas Wildlife, Parks, and Tourism (KWPT) Secretary Robin Jennison has led the Committee from its inception. In the first Committee meeting, Governor Brownback expressed the desire for quick, focused action. He mentioned the Flint Hills and Cheyenne Bottoms among places in Kansas where he believes the state can accomplish a great deal in a short period of time.[44]

The Governor's Report outlines significant risks including landowner liability and the use of federal funds to purchase conservation easements that would provide access to the Flint Hills and other areas. Eco-tourists who might enter the tallgrass prairie, by way of the conservation easements, could potentially create a liability for the property owner by improper behavior or waste (*def.* legal term for physical damage to real property) or unintended consequences. Safety of tourists, livestock, and wild animals are other concerns. Federal funding to purchase conservation easements presents issues of timely availability in a deficit economy amid property owners' apprehension to sign over rights to a governmental agency, whether federal or state.

Current conservation easements might require legal resources to enact amendments to support eco-tourism, specifically access to visitors, while maintaining the grantor's intent. After delay, the Committee's first published report is now expected in April 2014.

---

[44] 2013 EcoTourism, The Governor's Taskforce for EcoTourism, http://www.hfrr.ksu.edu/doc3687.ashx (last accessed 4/28/13).

B. Extension of Favorable Tax Law

At the Land Trust Alliance (LTA) Rally held in New Orleans in September 2013, authors Nancy L. McLaughlin and Stephen J. Small presented a paper entitled appropriately "Trying Times: Important Lessons to be Learned from Recent Federal Tax Cases."[45] They addressed developments in conservation easements (from their creation by IRC § 170(h) in 1980), how to file a tax return package to minimize the risk of audit, and other important issues. The attached Appendices to their paper include a Chart of Case Law, Treasury regulations, and Form 8283 suggestions are a must-read for someone wishing to create and to defend a conservation easement.

IRC § 170(h) authorizes a federal charitable income tax deduction for the donation of a conservation easement meeting specific requirements. To provide balance of supporting and detracting views, authors McLaughlin and Small calculate the deduction costs in Section II:

> The charitable income tax deduction under § 170(h) has been criticized as wasteful, inefficient, and subject to abuse. The potential that conservation easements will not be enforced over the long term, the inadequacy of public benefit, the prospect of overvaluation, and the lack of budget control have all been cited as concerns. The deduction is also very costly. One commentator has estimated a total revenue loss of $3.6 billion from the deduction provided to individual conservation easement donors from 2003 through 2008, and that figure would be larger if it included corporate donations. Unlike most charitable contributions, the donation of a conservation easement typically generates at least a six---figure deduction for the donor. The following chart indicates the number of conservation easement donations by year and the average donation per return.[46]

[45] Nancy A. McLaughlin and Stephen J. Small, Trying Times: Important Lessons to be Learned from Recent Federal Tax Cases, http://taxprof.typepad.com/taxprof_blog/2013/10/mclaughlin-small-.html (last accessed on 3/27/14).
[46] *Id.*

Year	Number of Donations	Ave. donation per Return
2005	2,307	$787,062
2006	3,529	$422,092
2007	2,405	$812,369
2008	3.158	$372,925
2009	2.102	$463,073
2010[47]	3,241	$261,027

The donation must be perpetual to deliver this favorable federal income tax deduction. But these tax laws accomplish much more than delivering benefits to the grantor that include a favorable federal tax deduction, reduced estate taxes, continuation of a lifestyle, and continued ownership by the grantor. The conservation easement tax laws make available and preserve into perpetuity for the public --- areas of beauty, areas for the continuation of native wildlife and animals, that otherwise would not be available --- and would never be recoverable.

Undoubtedly, there have been cases of abuse for conservation easement donation transactions involving inflated appraisals. Developers of golf course properties donated conservation easements along fairways for sizeable tax deductions. It is noteworthy that the Administration's fiscal 2013 revenue proposals included a proposal to eliminate the charitable deduction for conservation easements on golf courses.[48]

The tax law passed in January 2013 extended enhanced federal tax breaks for donating land development rights through 2013 (and retroactively back to January 1, 2012). According to Ashlea Ebeling of Forbes, "That's good news for land trusts which say that the enhanced

[47] *Id.* (The 2010 figures include both conservation easements encumbering land and façade easements. Figures for 2005-2009 relate to conservation easements encumbering land only.)
[48] *Id.*

incentives have helped farmers, ranchers, and other modest-income landowners increase the pace of conservation by a third to over 1 million acres a year."[49] The newly extended enhanced incentive allows a non-farmer to use the deduction for a conservation easement donation to wipe out 50% of his or her gross income in any year, up from the normal 30% that is a permanent part of the law. The temporary break also allows a donor to carry forward any unused write-off for a full fifteen years, instead of the normal five.[50]

Farmers and ranchers got an even more generous break in that they could offset up to 100% of their adjusted gross income with conservation easement donations, potentially zeroing out their tax liability for the next fifteen years. The enhanced conservation easement rules were initially effective for 2006 and 2007, and have been extended in one and two-year increments since. Before the latest extension in the American Taxpayer Relief Act in January 2013, they last expired on December 31, 2011 leaving two years of uncertainty that affected conservation easement activity.[51]

As of 2014, Ways and Means Committee Chairman Dave Camp has introduced his proposed comprehensive tax reform draft that includes the enhanced incentive for conservation easement donations. The Camp draft would make permanent the 100% AGI limit and the 15-year carryover for deductions taken by qualifying farmers or ranchers. According to the LTA's reading of the draft:

> All other easement donors would be subject to a 40% AGI limit on annual deductions --- less than the 50% AGI limit we have enjoyed under the enhanced easement incentive in the past, but more then the 30% AGI limit that now applies to easement donations. The draft Bill proposes that all donations, both of cash and

[49] Ashlea Ebling, "Good and Bad News for Conservationists in New Tax Law," http://www.forbes.com/sites/ashleaebeling/2013/01/15/good-and-bad-news-for-conservationists-in-new-tax-law/ (last accessed 2/6/13).
[50] *Id.*
[51] *Id.*

> of property, have a unified limit of no more than 40% of the donor's AGI. The draft also proposes to exclude golf courses from conservation easement deductions, as in S. 526, the Rural Heritage Conservation Extension Act.[52]

With sequestration, federal sources for funding to purchase conservation easements have been reduced, and some grantors of conservation easements are waiting for availability of a public funding source. Wyoming lawyer, Harriet Hageman, who has testified at the Kansas legislature hearings (in 2012 and 2013), voices extreme distrust of federal purchases, and distrust of purchases by some land trusts.

> The land trusts that were first set up to manage the easements were typically small, non-political and independent of government involvement. Land trusts have grown in size, and so has their association and influence with government. This has been the case with large national organizations, and, for many land trusts, the close working relationships with private landowners have become a close relationship with government agencies.
>
> Their mission has evolved from protecting open land and private stewardship to aiding governmental agencies in acquiring private lands. Some land trusts now operate like government agents, acquiring easements from private landowners, only to turn around and quietly sell them, sometimes at an enormous profit, to state or federal governments. They don't all act this way, but enough of them do that we should all be concerned about the unholy alliance they've created.
>
> Land trusts benefit because they can earn a profit from the taxpayer-funded arrangement, and government agencies like it because, unlike seizing private land

[52] Land Trust Alliance, http://www.landtrustalliance.org/policy/tax-matters/campaigns/the-enhanced-easement-incentive (last accessed 4/27/14).

> through land use regulation, zoning laws or eminent domain, they can obtain private property without public scrutiny.[53]

However, Kansas Governor Sam Brownback and supporters may have found appeal in Hageman's ultra-conservative views, or may be eyeing another source for Kansas tax revenue, or even speculating on the potential of extractive mining for natural gas or oil with the proposed Senate Bill No. 323. This bill was introduced on January 29, 2014 by the sponsoring Ways and Means Committee, sent to the Committee on Natural Resources the following day, and received a recommendation that the bill be passed as amended by the Committee on Natural Resources on March 24, 2014.[54] Although two hearings were held, the accelerated timeline cut short adequate public review and debate.

Although sixteen states have enacted legislation providing state tax benefits for qualified conservation easement donations to advance land conservation, Kansas is not one of them. The most powerful state incentives for conservation are the transferable tax credits available in Colorado, Georgia, New Mexico, South Carolina and Virginia. Such credits can be sold to an individual or corporation with high tax liability, generating immediate income for the donor.[55] Because property tax assessments are based on fair market value that considers the property's developmental potential, if a conservation easement reduces the developmental potential of the property and limits its use, the real property taxes <u>may</u> be reduced.[56] Property owners may also be able to reduce estate taxes dramatically by donating conservation easements in their lifetime,

---

[53] Christy Martinez, "Good, Bad or Ugly," Wyoming Livestock Roundup, http://www.wylr.net/the-roundup/archives/235-management/conservation-easements (last accessed 4/22/13).
[54] Kansas Legislature, Legislative Sessions 2013-2014, http://kslegislature.org/li/b2013_14/measures/sb323/ (last accessed March 28, 2014). The bill in its entirety is in Appendix 1.
[55] Land Trust Alliance, http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives (last visited March 29, 2014). The 16 states include Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Maryland, Massachusetts, Mississippi, New Mexico, New York, North Carolina, South Carolina, and Virginia.
[56] Daniel C. Stockford, Property Tax Assessments for Conservation Easements, B.C. Envtl. Aff. L. Rev. 823 (1990).

or in a will at their death.[57] These potential tax savings are undoubtedly attractive to grantors. But, when conservation easements are perceived or construed as charitable trusts that protect the public's benefit, there are undoubtedly attractive benefits for the public --- as is the specific of the tallgrass preservation in Kansas for future generations.

This Kansas S.B. 323[58] negates the donor's choice of perpetuity for the conservation easement in Kansas, therefore eliminating the federal tax deduction for a charitable contribution. If this bill passes, it will make Kansas the first state to eliminate the grantor's choice of perpetuity in conservation easements.[59] The current statute K.S.A. 58-3811(d) presumptively assumed the possibility of perpetuity with "Except as provided in subsection (b) of K.S.A. 58-3812, and unless the instrument creating it otherwise provides, a conservation easement shall be limited in duration to the lifetime of the grantor and may be revoked at grantor's request."[60] Thus, if the instrument creating the conservation easement specified perpetuity, then perpetuity was granted except in the notated exception. The language of subsection (b) of K.S.A. 58-3812 is "This act does not affect the power of the court to modify or terminate a conservation easement in accordance with the principles of law and equity."[61] This subsection is common in statutory law and is self-explanatory.

The critical amended language proposed in S.B. 323 for K.S.A. 3811(d) reads: "*Except as provided in in subsection (b) of K.S.A. 58-3812, and amendments thereto, conservation easements created on or after July 1, 2014, shall terminate upon the death of the grantor or upon*

[57] IRS, Estate Tax, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax (last visited Mar. 31, 2014). A filing requirement for estates with combined gross assets and prior taxable gifts exceeding $5.25 million for 2013 and $5.34 million for 2014 must be filed, with a top tax rate of 40%.
[58] Full text of S.B. 323 in Appendix 1.
[59] S.D. Codified Laws § 1-19B-56 to 1-19B-60 (2004) states "The term of the conservation easement shall be established by the parties." Proposed South Dakota H.B. 2083 would restrict a conservation easement to no more than 99 years. The previously proposed H.B. 1007, defeated in 2012, would have capped the conservation easement at 30 years.
[60] Kan. Stat. Ann. § 58-3811 (2009)
[61] Kan. Stat. Ann. § 58-3812 (2009)

a specified term of years contained in the instrument creating such easement, whichever occurs first."[62] It is this very language that removes the choice of perpetuity for the grantor of a conservation easement after July 1, 2014.

Kansas Governor Sam Brownback, was in attendance when U.S. Department of the Interior Secretary Ken Salazar announced the Flint Hills as the first Legacy Conservation Area in 2010 as recorded in the Federal Register.[63] Will proposed Kansas statutory language attempt to violate, or interfere with the purpose of federal administrative law? A legal argument based on the principle of pre-emption (derived from the Supremacy Clause) provides that a federal law, or federal administrative regulation,[64] can supersede or supplant any inconsistent state law or regulation. The removal of the choice of perpetuity for a Kansas grantor is inconsistent and substantially interferes with the purpose of the Flint Hills Legacy Conservation Area in Kansas.

A second, strong argument is based on the *Hodel v. Irving*[65]and *Babbitt v. Youpee*[66] decisions in which the Supreme Court rules on the question of whether abolishing the rights of a property owner, specifically decedent's rights, to dispose of property rights is a taking without just compensation, and therefore is a violation of the Fifth Amendment. In *Hodel v. Irving*, regarding escheat provisions in the Indian Land Consolidation Act of 1983, the Supreme Court ruled that the action did constitute a taking without implicating the guarantees of the just compensation. In *Babbitt v. Youpee*, the Court affirmed its earlier decision in *Hodel* that the narrow revisions that Congress had made to the law did not warrant a different disposition.

---

[62] Kan. S. B. 323, 2014, http://kslegislature.org/li/b2013_14/measures/sb323/ (last accessed on March 28, 2014).
[63] Establishment of the Flint Hill Conservation Area, Kansas, 77 Fed. Reg. 9693 (proposed Feb. 17, 2012).
[64] Minnesota by Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981) 1251-52.; Grand Lakes Estates Homeowner's Assn. v. Veneman, 340 F.Supp.2d 1162, 1167-68 (D. Colo. 2004).; Sherer v. U.S. Forest Service, 727 F. Supp. 2d 1080, 1097-98 (D. Colo. 2010).; Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250-57 (10th Cir. 2001).
[65] Hodel v. Irving, 408 U.S. 704 (1987).
[66] Babbitt v. Youpee, 519 U.S. 234 (1997).

In this application, a conservation easement is a common law right; every owner of land that wants to pass real property on to children in a restricted form, using a conservation easement, ensures that their children maintain it in the restricted form. If this Kansas S.B. 323 passes, even if the change in the law is prospective only, it will still constitute a taking of a private property right. The right to pass property to descendants, another devisee, or "grantee," protected by a conservation easement that assures the grantor's intent that the property remain undeveloped, is part of our American culture, and any abolition of those rights is unconstitutional.

C: Strength and Size of the Holders of Conservation Easements

The ongoing responsibilities of the qualified organizations, the grantees of the conservation easements, will require significant financial and legal resources. Top priorities will be stewardship of the conservation easements including regular monitoring and enforcement of circumstances or conditions, legal support for a variety of needs (change of circumstances, amendments, termination, disputes, hearings, opinions, etc.), and organizational sustainability. As an example, an earlier conservation easement may narrowly specify cattle grazing, but not include buffalo, elk, or antelope grazing. Amendments may be necessary, but should not affect continuity.

Landowners who intend to grant an easement for perpetuity need the affirmation and trust that the grantee organization will also last far into the future, and that the grantee organization has the sustainability to plan for succession. In some instances, successor trusts are named in the granting conservation easement document. These challenges of organizational sustainability can be met, but must be addressed.

Conservation easements, promoting tallgrass prairie preservation in the Flint Hills of Kansas, have provided a critical platform for collaboration between federal, state, and private partners--- whether organizations or individuals. The recent development of proposed law in Kansas regarding conservation easements is ominous and detrimental to current and future efforts.

The Land Trust Institute, in the Spring 2013 issue of Saving Land, published an article on collaboration that is prescient, or perhaps reminiscent, of the collaboration that has taken place in Kansas to protect the tallgrass prairie of the Flint Hills for generations to come. The spirit of this collaboration contains rugged self-reliance, community involvement, respect for self-determination, and deep love of the land by its residents and visitors. May it continue with the financial tool of the currently constructed conservation easement to perpetually protect these sacred grasslands.

D. Postscript: Kansas S.B. 323 and U.S. Tax Court Decision for ND

On April 4, 2014, of the Regular Session of the Kansas Legislature before break, S.B. 323 (to amend the duration of a conservation easement) advanced to Final Action with amendments. Senator Powell continued to be the driving force behind the bill pleading that these conservation easements were wasteful in failing to use natural resources effectively. The amendments,[67] that were considered, included:

- Limiting the conservation easement to fifty years (disallowing a longer limit due to the life of the grantor) (Passed);

---

[67] Corey Carnahan, Secretary of the Senate, Journal of the Senate, 2017, April 4, 2014, http://www.kanfocus.com/journals/sj040414.pdf.

- Allowing for an exception for conservation easements created to buffer airplane runways on any active military installations (Passed);
- Allowing for an exception for conservation easements created to buffer military installations (thus allowing *inactive* and *active* military installations) (Passed); and lastly,
- Reinserting the option for the conservation easement to terminate upon the death of the grantor (Withdrawn).

Governor Brownback, an advocate for conservation, supports conservation easements demonstrated by his consistent opposition to S. B. 323. Private reports indicated that the Governor did not want this bill to reach his desk, and in the unlikely event of that happening, he was prepared to veto the bill. On Final Action, the roll call vote for S.B. 323, as amended by the Senate,[68] was: Yeas 16; Nays 23. The official status of S.B. 323 as amended was now "killed in Senate."

. Conservationists, property owners, policymakers, and selected governmental officials in Kansas breathed a collective sigh of relief, along with observers in other states, and realized immediately that this debate would likely resurface in a future year. These same stakeholders resolved to continue to educate, to inform, and to promote the benefits of perpetual conservation easements.

On March 11, 2014, the U.S. Tax Court ruled that North Dakota conservation easements cannot qualify for a corresponding charitable deduction because of a state law that limits the

[68] Full text of the amended S.B. 323 is in Appendix 1.

duration of an easement to no more than 99 years.[69] The case[70] involves the Wachter Family and and their donation of valuable parcels of land to the North Dakota Natural Resources Trust over multiple years. In the case, the IRS argued that the North Dakota law restricting the length of conservation easements, enacted in 1977, prevents the federal tax deduction because the land would revert back to the family in 99 years. The Wachters claimed that the family's retention in the in the land interest was "essentially valueless." The Tax Court agreed with the IRS that the 99-year restriction was not a remote future event, but a date certain with a predetermined time.[71]

Perpetuity, an essential characteristic of a conservation easement, will continue to be a key issue in the debate and practice of this non-possessory land interest that holds the promise of preservation of the Flint Hills of Kansas. The debate must continue with education, information, and promotion of the benefits of a perpetual conservation easement.

[69] Jonathan Randles, Law360, Tax Court Says ND Easement Restriction Nulls Deduction (March 11, 2014), http://www.law360.com/articles/517530/tax-court-says-nd-easement-restriction-nulls-deduction.
[70] Wachter v. Comm'r, 2014 U.S. Tax Ct. LEXIS 8, 142 T.C. No. 7 (T.C. Mar. 11, 2014)
[71] *Id.*

{As Amended by Senate Committee of the Whole}

As Amended by Senate Committee

Session of 2014

SENATE BILL No. 323

By Committee on Ways and Means

1-29

AN ACT concerning property; relating to conservation easements; amending K.S.A. 58-3811 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 58-3811 is hereby amended to read as follows: 58-3811. (a) A conservation easement may be created only by the record owner of the surface of the land specifically stating the intention of the grantor to create such an easement under this act.

(b) Except as otherwise provided in this act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements.

(c) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

(d) Except as provided in subsection (b) of K.S.A. 58-3812*, and amendments thereto,* and unless the instrument creating it otherwise provides, a conservation easement shall be limited in duration to the lifetime of the grantor and may be revoked at *such* grantor's request. *Except as provided in subsection (b) of K.S.A. 58-3812, and amendments thereto, conservation easements* ~~*created*~~ ***{, except for conservation easements created to buffer airplane runways on any active military installations, executed, except for conservation easements created to buffer military installations, executed}*** *on and after July 1, 2014*~~,:~~

~~***(1)***~~ ***{,}*** *shall* ***be limited in duration to 50 years***~~***, or if the grantor is a natural person shall***~~ ~~*terminate upon the death of the grantor or upon a specified term of years contained in the instrument creating such easement, whichever occurs first*~~~~***; or***~~

~~***(2) for the purpose of compensatory mitigation required under section 404 of the clean water act (33 U.S.C. § 1251 et seq.) as in effect on July 1, 2014, shall be limited in duration to the life of the project***~~*.*

(e) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a grantor of the conservation easement.

(f) A conservation easement may not be conveyed or assigned by a holder to any entity or person other than a city or county of this state, an entity enumerated by subsection (b)(2) of K.S.A. 58-3810*, and amendments thereto,* or the grantor thereof or such grantor's heirs.

Sec. 2. K.S.A. 58-3811 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.