**CHECKLIST FOR REVIEW**
**OF**

# CONSERVATION EASEMENTS

**AND**

# RESTRICTIVE COVENANTS

**1. Parties:** The "Grantor" is the owner of the property who is making the conservation easement ("Declarant" in the case of restrictive covenants). The "Grantee" is the recipient of the conservation easement who will be responsible for overseeing the property (there is no Grantee for restrictive covenants).

- The Grantor and Grantee of the conservation easement must be clearly identified (for restrictive covenants, the Declarant must be clearly identified).

- The Corps cannot be a Grantee, but the Corps must have third-party enforcement rights.

- Grantees must meet specific legal requirements. A Grantee must either be a governmental organization (e.g., Missouri Department of Conservation) or the Grantee must have previously been approved by the Corps for use in the state in question (e.g., MMOA for conservation easements in Missouri). It is possible that another party may be able to serve as Grantee, but any such proposed Grantee should be reviewed by OC prior to approval.

- Ensure the Grantor is the actual party that owns the property by checking the land records. Permittees frequently transfer the property to related entities after submitting the permit application but fail to notify the Corps.

- Check the names very carefully and that the Grantor's name is the same both at the beginning and end of the document. *All corporate names should be checked at the Secretary of State for the state in question and must be exactly correct* (e.g., "A.B.C. Corporation" is not the same as "ABC Corporation").

**2. Legal Description:** Ensure there is a proper legal description of the Property. This may be typed into the document but more typically is attached as Exhibit A (in lieu of a formal legal description, a plat by a professional surveyor or engineer showing the exact location and dimensions of the property may be acceptable). **Never approve any conservation easement or restrictive covenants unless Exhibit A has actually been attached!** For restrictive covenants, there must also be an Exhibit B, which must contain a legal description or plat of the overall plan of development.

**3. Content of Document:**

- The Corps model documents were prepared with input from numerous attorneys and draw on the experiences of several Corps Districts over a long period of time. The language and prohibitions were carefully worded and none of that particular language should be readily disregarded:

- Highlighted text in the model documents indicates a choice to be made by OD-R and the permittee. As long as OD-R is satisfied with the choice, it is legally sufficient:

    - Maintenance: The document must affirmatively state who is responsible for maintaining the property. Contact OC for a recommendation in a specific situation. What is NOT legally sufficient would be stating the maintenance responsibility in the negative; e.g., "Grantee shall not be responsible . . ."

    - Public Access: Either the Corps, or the Corps and the Grantee together, can determine whether the public should be allowed access to the property.

- Deviations from the model documents may be allowed where appropriate, but the document as a whole must substantially mirror the Corps model documents. OD-R should not accept draft documents that are not based on the Corps model documents. If the permittee wishes to deviate from the model documents, it must provide an electronic markup version for OC review and recommendation tracking all of the proposed changes. Whether to accept a deviation, however, is ultimately a matter for OD-R to decide as a matter of environmental and permitting judgment.

- Ensure that Grantor is not reserving the right to do some activity that would "gut" the protections. In the past, grantors have reserved the right to use protected land as a public park, for off-road vehicle/ATV/horse trails, or for a commercial hunting and fishing area. Some use may be acceptable, but the use should be limited to occasional use and the users should be specifically identified.

**4. Signature:** The document must be signed by the owner of the property and must have a proper signature for the type of entity that is signing.

- Ensure the signature is legible or that the individual's name is typed/printed. The document must be signed in the EXACT LEGAL NAME as the Grantor, and in accordance with the following rules.

- Consultants are NEVER allowed to sign without a written, notarized power of attorney (seek advice from OC).

- Limited Liability Company: An LLC is the most difficult entity to deal with. Depending on the LLC's charter, management is either "by the members" (in which case any member can sign) or "by the managers" (in which case ONLY a duly appointed manager can sign). However, the charter of the LLC is not available on-line and you need to get it from the LLC. In addition, sometimes the members or managers of LLCs are corporations, which have their own signature rules. Unless title insurance is provided, the signatures of any CE or restrictive covenants signed by an LLC should be submitted for review by OC.

- Corporations: Ensure the CE is signed by the appropriate corporate officer, that his/her title is shown, and that the corporate seal is used. Only the following titles should be accepted as signatories on behalf of a corporation without consultation from OC:

    - President: The President of a corporation always has authority to sign.

    - Vice-President, *but only with appropriate indication of authority.* The title of "Vice-President" by itself does not have carry authority to convey interests in real estate. The title of *Vice-President for Land Development* or similar title would be sufficient, or *Vice President for Operations* would be sufficient for a mining company whose operations require the company to obtain and convey land. Other Vice-Presidents should require specific delegation of authority in the form of a duly attested and certified Resolution of the Board of Directors.

    - A "Manager" could have legal authority, but only with a specific delegation of authority in the form of a duly attested and certified Resolution of the Board of Directors.

**5. Subordination of Liens and Mortgages:** "Subordination" means that the conservation easement takes precedence over any rights given by the lien or mortgage. The conservation easement should either state that there are no existing liens or mortgages, or else must provide a document in which the holder of each such lien and mortgage agrees to be subordinated to the conservation easement.

**6. Title Insurance:** Title insurance guarantees that the legal interest in the property being granted is protected. The title insurance company researches the title of the property and determines who is the legal owner and what other limitations exist on the property (e.g., mortgages; utility easements; tax liens, etc.). Therefore, title insurance not only protects the property, but it also ensures that OD-R is "getting what it paid for". Although not legally required, title insurance is strongly recommended, especially for large or significant mitigation sites (not applicable to restrictive covenants).

**7. Acceptance By Grantee:** For Kansas, proof of acceptance of conservation easement by the Grantee is required (recommended for other states). Ordinarily the Grantee would sign the conservation easement to do so, but it might be a separate document. NOTE: This rule is not applicable to restrictive covenants since there is no Grantee.

**8. Proof of Recording:** Grantor must provide a copy of the signed conservation easement or restrictive covenants, showing that the document has been recorded in the land records of the appropriate county. The recorded document will have a stamp indicating the date of recording and the "Book and Page" where recorded. Unfortunately, it is necessary to re-check the recorded copy to ensure that it has not been changed since OD-R approved the draft.

Prepared by:
John Simion, Assistant District Counsel
20080911