



State Assistance in Watershed Dam Construction / Rehabilitation

Memorandum of Understanding & Conservation Easement

This Memorandum of Understanding (MOU), is entered into by and between the Kansas Department of Agriculture Division of Conservation (hereinafter referred to as “KDA”) and _____ (hereinafter referred to as “WSD”) effective as of _____, 20__ (the “Effective Date”).

WHEREAS, WSD has developed a plan for a dam project that requires a compensation mitigation conservation easement to be acquired by a third-party easement holder approved by the United States Army Corps of Engineers (hereinafter “USACE”); and

WHEREAS, WSD has identified the conservation easement area and has worked with USACE and the owner of the conservation easement area to achieve approval of a conservation mitigation plan; and

WHEREAS, KDA is willing to serve as third party easement holder of the conservation easement area located in ____ County, to be granted pursuant to a Conservation Easement (the “Conservation Easement”), by _____, as grantor, to KDA, as grantee, which real property (the “Real Property”) will be more particularly described in Exhibit A attached to the Conservation Easement; and

WHEREAS, KDA and WSD desire to set out pre-closing requirements and obligations of the parties prior to execution and recordation of the Conservation Easement; and

WHEREAS, KDA, as third-party easement holder, will have certain duties and obligations of inspection and maintenance of the Real Property during the term of the perpetual Conservation Easement; and

WHEREAS, WSD will benefit from the services provided by KDA as third-party easement holder, and has agreed to pay KDA fees and expenses for such services; and

NOW, THEREFORE, the parties hereto do agree as follows:

1. **CONSERVATION EASEMENT**. The Conservation Easement shall be attached hereto as Exhibit A upon execution and recording and shall be incorporated herein by reference and become a part of this MOU.

- 2. TERM.** The term of this MOU shall begin on the Effective Date and run in perpetuity unless and until the Conservation Easement is revoked by the U.S. Army Corps of

Engineers (the “Corps”) pursuant to the terms of the Conservation Easement or is otherwise lawfully terminated.

- 3. CLOSING REQUIREMENTS.** WSD has received a copy of the Closing Checklist for Third Party Easement from KDA, and acknowledges KDA’s requirements for closing the Conservation Easement set

forth therein. WSD shall be responsible for all costs and expenses of acquisition of the Conservation Easement, including but not limited to, survey costs, title costs, professional fees, other closing checklist items, and additional closing requirements. Should the parties fail to close the Conservation Easement for any reason, WSD shall reimburse KDA for all costs and expenses associated with its anticipated acquisition of the Conservation Easement.

- 4. THIRD PARTY EASEMENT HOLDER.** Upon completion of all closing requirements, as set forth in Paragraph 3 herein, KDA shall accept the Conservation Easement and perform the duties set forth therein as the third-party easement holder.
- 5. EASEMENT SERVICES.** KDA and WSD agree that, KDA will perform, or hire the necessary professionals or services providers to perform, all the inspection and maintenance duties required by the Conservation Easement.
- 6. COSTS.** For KDA’s agreement to serve as third party easement holder for the Real Property, WSD agrees to reimburse KDA for all costs associated with its performance of duties as a third party easement holder for the Real Property, including but not limited to, costs related to administration, inspection and maintenance of the Conservation Easement, and the costs of any litigation or civil fines or penalties associated with the Conservation Easement.
- 7. RETAINER.** WSD shall provide a retainer in the amount of \$_____, to be maintained in the compensatory mitigation fund established in K.S.A. 2-1904(g). Retainer funds are to be used for all costs associated with the performance of duties as a third-party easement holder for the Real Property, including but not limited to, costs related to administration, inspection and maintenance of the Conservation Easement, costs of any litigation or civil fines or penalties associated with the Conservation Easement, and any emergency service payments. Upon the request of KDA, the WSD shall immediately replenish to the original amount any funds that are used from said retainer. Failure to replenish said retainer amount within 90 days of a request to replenish by KDA shall constitute a breach of this MOU. If this MOU is terminated upon its terms and in accordance with the terms of the Conservation Easement, then any unused retainer, after KDA has received full payment for all outstanding costs, shall be returned to WSD.

8. **LIABILITIES.** KDA and WSD acknowledge that each is a local or state governmental agency, and that liability is determined in accordance with the Kansas Tort Claims Act. The obligations of WSD in this paragraph shall survive the expiration or termination of this Agreement.
9. **ENFORCEMENT.** The terms and conditions of this MOU may be enforced in an action at law or equity by KDA against WSD should WSD violate or attempt to violate the same. Venue for any such action shall be in Shawnee County, Kansas. Enforcement of this MOU shall be at the reasonable discretion of KDA, and any forbearance on behalf of KDA to exercise its rights hereunder in the event of any breach by WSD shall not be deemed or construed to be a waiver of rights. If KDA shall prevail in an enforcement action, KDA shall also be entitled to recover its cost of restoring the land to the natural vegetative and hydrologic condition existing at the time of execution of the Conservation Easement or to the vegetative and hydrologic condition required by the mitigation approved by USACE that relate to the Real Property.
10. **INDEPENDENT CONTRACTOR.** Both parties hereto, in the performance of this MOU, will be acting in their individual capacity and not as agents, employees, partners in a joint venture, or as associates of one another. The employees or agents of one party shall not be named or construed to be employees of the other party for any purpose whatsoever.
11. **REPRESENTATIVES.** Designated representatives for the parties are:
- KDA:
[Name and contact info]
- WSD:
[Name and contact info]
12. **TERMINATION / NOTICES.** In addition to the termination provisions set forth in this MOU, this MOU may only be terminated in a manner consistent with the terms and requirements of the Conservation Easement.
- a. **Termination by WSD.** WSD may terminate this MOU for any reason by providing at least thirty (30) days written notice of termination to KDA; provided, however, that in such event, WSD shall identify a replacement third party easement holder acceptable to USACE for any remaining term of the Conservation Easement. Upon termination of this MOU by WSD, KDA will assign the Conservation Easement to the replacement third party easement holder identified by WSD.
- b. **Termination by KDA.** KDA may terminate this MOU for any reason by providing at least one-hundred eighty (180) days written notice of termination to WSD. In such event, WSD shall identify a replacement third party easement holder acceptable to USACE at least ninety (90) days prior to the effective date of

termination, to which KDA will assign the Conservation Easement upon termination. If WSD fails to identify a replacement third party easement holder acceptable to USACE at least ninety (90) days prior to the effective date of termination, KDA shall identify and assign the Conservation Easement to a qualified and willing grantee acceptable to USACE.

c. Termination Notices.

i. Notices to KDA shall be addressed as follows:

Chief Counsel
Kansas Department of Agriculture
1320 Research Park Drive
Manhattan, KS 66502

ii. Notices to WSD shall be addressed as follows:

[Name and contact info]

d. Costs due in the event of termination. Notwithstanding any termination of this MOU, WSD shall reimburse KDA for all costs associated with performing services as the third-party easement holder pursuant to the Conservation Easement during the term thereof.

In WITNESS WHEREOF, the parties hereto have affixed their signatures.

Date: _____

**KANSAS DEPARTMENT OF AGRICULTURE,
DIVISION OF CONSERVATION**

By: _____
_____, _____

Date: _____

[WATERSHED DISTRICT]

By: _____
_____, _____

Exhibit A

Conservation Easement

(Attach a copy of the conservation easement once it has been executed and recorded.)

Exhibit B

Conservation Easement

THIS DEED OF CONSERVATION EASEMENT is given this day of ____, 20 ____, by _____, having an address of _____, having an address of _____ ("Grantor") to _____, having an address of _____ ("Grantee"). As used herein, the term "Grantor" shall include any and all heirs, successors, or assigns of the Grantor, and all subsequent owners of the Property (as hereinafter defined), and the term "Grantee" shall include any successor or assignee of Grantee.

Witnesseth:

WHEREAS, Grantor is the sole owner in fee simple title of certain lands situated in _____ County, Kansas, more particularly described in Exhibit A, attached hereto and incorporated herein ("Property"), and

WHEREAS, Department Permit No. _____ of the U.S. Army Corps of Engineers ("Corps") (hereinafter referred to as the "Permit") authorizes certain activities which affect waters of the United States; and

WHEREAS, the Permit requires that Grantor preserve, enhance, restore, or mitigate wetlands or uplands located on the Property, and

WHEREAS, Grantor, in consideration of the issuance of the Permit to construct and operate the permitted activity, and as an inducement to the issuance of the Permit, is willing to grant a perpetual Conservation Easement over the Property. Although this easement is granted in perpetuity, should the impact on the woodland, wetland, or stream ecosystems which required this mitigation and thus this easement be eliminated, the easement may be revoked *if* approval is provided in writing from the Corps, as per Paragraph 16, and

NOW THEREFORE, in consideration of the above and mutual covenants, terms conditions, and restrictions contained herein, together with other good and valuable consideration, the adequacy and receipt of which is hereby acknowledged, Grantor hereby voluntarily grants and conveys a perpetual Conservation Easement for and in favor of Grantee upon the property, which shall run with the land and be binding upon the Grantor, and shall remain in full force and effect forever.

The scope, nature, and character of this Conservation Easement shall be as follows:

1. **Purpose:** The purpose of this Conservation Easement is to retain and maintain land or water areas on the Property in their natural, vegetative, hydrologic, scenic, open, agricultural, or wooded condition and to retain such areas as suitable habitat for fish, plants, or wildlife. Those wetland or upland areas that are to be restored, enhanced, or created shall be retained and maintained in the restored, enhanced, or created condition.

2. **Rights of Grantee:** The following rights are conveyed to Grantee and the Corps of Engineers by this easement:

- a. The right to take action, to preserve and protect the environmental value of the Property; and
- b. The right to prevent any activity on or use of the Property that is inconsistent with the purpose of this Conservation Easement, and to require the restoration of areas or features of the Property that may be damaged by any inconsistent activity or use;
- c. The right to enter upon and inspect the Property in a reasonable manner and at reasonable times to determine if Grantor is complying with the covenants and prohibitions contained in this Conservation Easement; and
- d. The right to proceed at law or in equity to enforce the provisions of this Conservation Easement, and to prevent the occurrence of any of the prohibited activities thereafter set forth.

3. **Prohibited Uses:** Except for restoration, creation, enhancement, maintenance, and monitoring activities, or surface water management improvements, the following activities are prohibited on the Property:

- a. Construction of any structure or object (i.e., buildings, roads, above or below ground utilities, signs, billboard, etc.) without written approval from the Corps of Engineers prior to construction;
- b. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste, or unsightly or offensive materials;
- c. Removal or destruction of trees, shrubs, or other vegetation, and except for the removal of nuisance, exotic, or non-native vegetation in accordance with a maintenance plan approved by Grantee;
- d. Planting of nuisance, exotic, or non-native plants as listed by the State of Kansas;
- e. Exploration for, or extraction of, oil or gas in such a manner as to affect the surface, or excavation, dredging, or removal of coal, loam, peat, gravel, soil, rock, or other material substance,
- f. Use of motorized and non-motorized vehicles, the keeping or riding of horses, grazing, livestock confinement, or other surface use that may affect the natural condition of the Property, except for vehicle use for purposes of maintenance and upkeep;
- g. Tilling, plowing, planting of crops, digging, mining or other activities that are or may be determinantal to drainage, flood control, water conservation, water quality, erosion control, soil conservation, or fish and wildlife habitat preservation, including, but not limited to, ditching, diking, and fencing;

h. The extraction of water from the Property, or the impoundment of water on the Property; so as to affect the hydrology of the Property;

i. Acts or uses detrimental to the aforementioned retention and maintenance of land or water areas;

j. Acts or uses detrimental to the preservation of the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance.

4. **Reserved Rights:** Grantor reserves all rights as owner of the Property, including the right to engage in uses of the Property that are not prohibited herein and that are not inconsistent with the intent and purposes of this Conservation Easement.

5. **Taxes:** Grantor shall pay any and all applicable real property taxes and assessments levied by competent taxing authority on the Property.

6. **Maintenance:** Grantor shall, at Grantee's sole expense, operate, maintain and keep up the Property consistent with the purpose of this Conservation Easement. Grantee shall remove from the Property any nuisance, exotic, or non-native plants as listed by the State of Kansas and shall maintain the hydrology of the Property as it currently exists or as otherwise required by the Permit.

7. **Hazardous Waste:** Grantor covenants that if any hazardous substances or toxic waste exist or has been generated, treated, stored, used, disposed of, or deposited in or on the Property, or there are or have been any underground storage tanks on the Property, Grantee shall be responsible for any and all necessary costs of remediation.

8. **Public Access:** No right of access by the general public to any portion of the Property is conveyed by this Conservation Easement.

9. **Liability:** Grantor shall continue to retain all liability for any injury or damage to the person or property of third parties that may occur on the Property arising from ownership of the Property. Neither Grantor, nor any person claiming by or through Grantor, shall hold Grantee liable for any damage or injury that may occur on the Property.

10. **Recording Requirements:** After recordation of this Conservation Easement in the official records of _____ County, Kansas, Grantee shall re-record it at any time to preserve their rights. Grantee shall pay all recording costs, fees and taxes necessary at any time to re-record this Conservation Easement in the public records. Grantor shall thereafter insert the terms and restrictions of this Conservation Easement in any subsequent deed or other legal instrument by which grantor divests himself / herself / itself of any interest in the Property and shall provide a photocopy of the recorded Conservation Easement to the new owner(s).

11. **Enforcement:** The terms and conditions of this Conservation Easement may be enforced in an action at law or equity by the Grantee or the Corps against the Grantor violating or attempting to violate these Restrictions. Venue for any such action shall be in ____ County, Kansas. Enforcement of this Conservation Easement shall be at the reasonable discretion

of the Grantee or the Corps, and any forbearance on behalf of Grantee or the Corps to exercise its or their rights hereunder in the event of any breach by Grantor shall not be deemed or construed to be a waiver of rights. If the Grantee or the Corps shall prevail in an enforcement action, such party shall also be entitled to recover that party's cost of restoring the land to the natural vegetative and hydrologic condition existing at the time of execution of these Restrictions or to the vegetative and hydrologic condition required by the Permits.

12. Assignment of Rights: Grantee shall hold this Conservation Easement exclusively for conservation purposes. Grantee will not assign its rights and obligations under this Conservation Easement, except to another legal entity qualified to hold such interests under applicable state and federal laws and committed to holding this Conservation Easement exclusively for the purposes stated herein. Grantee shall notify the Corps in writing of any intention to reassign this Conservation Easement to a new grantee at least sixty (60) days in advance thereof, and the Corps must accept the assignment in writing. The new grantee shall then deliver a written acceptance to the Corps. The assignment instrument must then be recorded and indexed in the same manner as any other instrument affecting title to real property and a copy of the assignment instrument shall be furnished to the Corps. Failure to comply with the assignment procedure herein stated shall result in invalidity of the assignment. In the event of dissolution of the Grantee or any successor, or failure for 60 days or more to execute the obligations of this Conservation Easement, the Grantee shall transfer this Conservation Easement to a qualified and willing grantee. Upon failure of the Grantee or any successor to so transfer the Conservation Easement, the Corps shall have the right to sue to force such an assignment to a grantee to be identified by the Court.

13. Successors: The covenants, terms, conditions, and restrictions of this Conservation Easement shall be binding upon and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors, and assigns, and shall continue as a servitude running in perpetuity with the Property.

14. Notices: All notices, consents, approvals, or other communications hereunder shall be in writing and shall be deemed properly given if sent by United States certified mail, return receipt requested, addressed to the appropriate party or successor-in-interest.

15. Severability: If any provision of this Conservation Easement or the application thereof to any person or circumstances is found to be invalid, the remainder of the provisions of this Conservation Easement shall not be affected thereby, as long as the purpose of the Conservation Easement is preserved.

16. Alteration or Revocation: This Conservation Easement may be amended, altered, released, canceled, or revoked only by written agreement between the parties hereto or their heirs, assigns, or successors in interest, which shall be filed in the public records of _____ County, Kansas. No action shall be taken, however, without advance written approval thereof by the Corps. Corps approval shall be by letter attached as an exhibit to the document amending, altering, canceling, or revoking the Conservation Easement, and said letter shall be informal and shall not require notarization. Specifically, although this easement is granted in perpetuity, should the impact on the woodland, wetland, or stream ecosystems which

required this mitigation and thus this easement be eliminated, the easement may be revoked *if* approval is provided in writing from the Corps. Such authorization must be received prior to extinguishment and will occur at the discretion of the Corps after verification that the restoration is complete. It is understood and agreed that Corps approval requires a minimum of sixty (60) days written notice, and that the Corps may require substitute or additional mitigation, a separate conservation easement or alternate deed restrictions, or other requirements as a condition of approval. Any amendment, alteration, release, cancellation, or revocation together with written Corps approval thereof shall then be filed in the public records of _____ County, Kansas, within 30 days thereafter.

17. Controlling Law: The interpretation and performance of this Conservation Easement shall be governed by the laws of the State of Kansas.

GRANTOR FURTHER COVENANTS that Grantor is lawfully seized of said Property in fee simple; that the Property is free and clear of all encumbrances that are inconsistent with the terms of this Conservation Easement and that no mortgages or other liens exist; that Grantor has good right and lawful authority to convey this Conservation Easement, and that it hereby fully warrants and defends the title to the Conservation Easement hereby conveyed against the lawful claims of all persons whomsoever.

If the grantee named herein is, for any reason, determined not to be authorized or entitled to hold the interest granted herein, the Grantor shall within 60 days after notification thereof execute a substitute conservation easement to a new grantee containing terms and conditions similar to this conservation easement. The determination of lack of authority or entitlement may be made by either (a) a court of competent jurisdiction, (b) the precedential authority of a ruling by a court of competent jurisdiction, (c) a title insurance company's written refusal to insure the real property interest of the grantee named herein, or (d) a title opinion issued by an attorney at law licensed in the State of Kansas. Notification of lack of authority or entitlement of the grantee named herein may be made to the grantor by any person, including persons not privy to this easement. The substitute grantee shall be properly qualified as a "holder" under the Kansas conservation easement law, Kansas St. 58-3810 et seq. or successor statute.

TO HAVE AND TO HOLD, the Grantor covenants that he, she, or they are vested with good title to the easement area and will warrant and defend the same on behalf of the Grantee against all claims and demands. The Grantor covenants to comply with the terms and conditions enumerated in this document for the use of the easement area and adjacent lands for access, and to refrain from any activity not specifically allowed or that is inconsistent with the purposes of this easement deed. The covenants, terms, conditions, restrictions, and purpose imposed with this Conservation Easement shall be binding upon Grantor and shall continue as a servitude running in perpetuity with Property.

Dated this _____ day of _____, 20____.

Grantor(s): _____
Print Name

Signature

Print Name

Signature

ACKNOWLEDGMENT

STATE OF KANSAS

COUNTY OF: _____

On this _____ day of _____ in the year 20____, before me, the undersigned notary public, personally appeared _____, known to me to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged that he/she/they executed the same for the purposes therein contained. In witness whereof, I hereunto set my hand and official seal.

Notary Public

Residing at _____

My Commission Expires _____

ACCEPTANCE BY GRANTEE

I _____ (print name), _____ (title), being the duly authorized representative of the Grantee, do hereby accept this Conservation Easement Deed with respect to the rights and duties of the, Grantee.

Dated this _____ day of _____, 20.

Signature

Title