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CAN CONSERVATION EASEMENTS PRESERVE AGRICULTURE IN KENTUCKY WITHOUT EXPRESSLY PROTECTING WATER RIGHTS?

Rebecca Price*

INTRODUCTION: THE NEED TO PROTECT WATER IN AGRICULTURAL CONSERVATION EASEMENTS

Water is essential for human life, ecosystems, and agriculture.¹ Climate change is rapidly reducing the supply of this fundamental necessity in the United States, especially in the southeastern part of the nation. Throughout the region, droughts, caused by higher temperatures, have damaged the surface water supply for both human consumption and agricultural uses.² The problem is so intensified that in recent years the increased strain on the availability of water has caused the southeastern states to enter into litigation regarding the different states’ claims to the use of shared watercourses.³ Kentucky is not immune from the problems faced by neighboring states. In 2012, the Drought Management Association imposed a Water Shortage Watch on twenty-seven Kentucky counties. Reports show that droughts significantly reduced Kentucky’s crop yields for harvest in 2012. As water becomes scarcer the trend continues to worsen.⁴

A changing climate and an increasingly urban society threatens the agriculture industry.⁵ In an effort to preserve the viability of agriculture and protect the integrity of farmland, forty-nine states have enacted legislative

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¹Senior Staff Member, KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 2015-2016; B.A. 2013, Samford University; J.D. expected May 2016, University of Kentucky College of Law.


⁶Southeast, supra note 2.
schemes that create conservation easements. Conservation easements place limitations on an owners use of land in an effort to protect the agricultural, ecological, or historical value of the real property. To aid in the acquisition of these easements, and to incentivize property owners to limit their land ownership rights, some states have enacted Purchase of Agricultural Conservation Easements (“PACE”) programs. These undertakings allow landowners to receive government compensation for restricting the use of their property to statutorily defined agricultural functions.

In 1994, Kentucky codified conservation easements and also created a PACE Program. Farmers may donate private easements to nonprofits, or the state may purchase conservation easements over farmers who volunteer their land for the state program. Kentucky’s conservation easement and PACE Program legislation are void of any mention of water. Not all states, however, created conservation easement statutes the same way Kentucky enacted its scheme. For example, Colorado expressly included the ability for farmers to limit their water rights through conservation easements. Admittedly, the two states have different water rights systems. Kentucky operates under a riparian water rights system that allows ownership rights of a parcel of land bordered by a watercourse to extend halfway into the water. Colorado, conversely, recognizes water rights through the prior appropriation system that holds a property owner’s right to water as “first in time, first in right” and requires owners to stake a claim to water and continuously use it to benefit their parcel of land.

To ensure that Kentucky’s agriculture industry is able to thrive in a changing climate, Kentucky must expressly include water in conservation easement statutes for both private and public titleholders. As water becomes a threatened resource, and governments increase regulations regarding the use and management of water, farms may not be able to maintain continued access to water that is needed for agricultural operations. A protection against this potentially devastating problem for
Kentucky agricultural producers and consumers can be found in the express inclusion of water in the conservation easement statutory scheme. This remedy fully utilizes an existing program by simply requiring the expansion of recognized property rights in the language of the statute to more completely protect the viability of Kentucky's farms. Legislators must act now, before the wellbeing of Kentucky agriculture is in jeopardy, to preserve Kentucky's farms and farmers' access to water, a vital resource.

The assertion that Kentucky's conservation easement statute's definition must be expanded to ensure the long-term viability of Kentucky's agricultural industry is supported in this note. Part II of this note outlines the express need for water conservation because of increasing water shortages in the southeastern United States and in Kentucky. Water rights are handled differently under different systems of law within the United States. Part III is a discourse on the two water rights systems that states use, the riparian system and the prior application system. After outlaying the needed background information, Part IV serves to inform about the history, purpose, and benefits of agricultural conservation easements in general. This section evaluates the easements in Kentucky, which operates under the riparian water system, and Colorado, which operates under the prior application water system. Part V recommends that the Kentucky legislature amend the Kentucky definition of agricultural conservation easements to expressly include water.

I. WATER SHORTAGES SPREADING ACROSS THE SOUTHEASTERN UNITED STATES AND KENTUCKY

A. Water Shortage in the Southeast

Scarcity of water supply plagues the globe and the problem continues to intensify.\textsuperscript{15} According to the United Nations Department of Economic and Social Affairs, approximately one-fifth of the world's population lives in an area where water is scarce, and another 1.6 billion people live in areas where there are documented water shortages.\textsuperscript{16} The United States is not immune from the growing problem of water shortages that effect the rest of the global community. The western United States has long experienced water shortages; derivatively resulting disputes over water rights are common in the region.\textsuperscript{17} The western part of the nation has an arid climate,

\textsuperscript{16} Id.
\textsuperscript{17} Gish, supra note 14.
receiving low precipitation, and often suffers from drought. In addition to
the dry environment, rapid population growth in the region depletes the
relatively little amount of surface water sources that are of a usable
quality.

Despite the ongoing problem with water supply in the west, the eastern
region of the United States historically encountered water supply problems
even though the east has accessible fresh water supplies in comparison with
the west. Yet disputes in recent years have developed due to a changing
climate and rapid population growth. The Environmental Protection
Agency ("EPA") reports that 80 million people live in the southeastern part
of the United States; a statistic that includes Kentucky. As the climate
change persists, temperatures in the region will continue to rise, rainfall
will become heavier, and droughts and flooding may become more
frequent. This impact is important ecologically but is also economically
significant because water is an integral part of the region's economy.

Climate change may alter economic growth in the southeast. The
EPA projects that higher temperatures will cause more surface water to
evaporate and will intensify the region's droughts and cause more
groundwater pumping, potentially exhausting readily accessible freshwater
supplies. The depletion of groundwater and warmer temperatures may
devastate the region's agricultural industry by thwarting the growth of
crops and causing the premature slaughter of livestock, such as cattle.
Farmers may be forced to use more water than they previously used for
plants and animals to compensate for dryer soil, and to keep livestock
hydrated. Not only will a lack of water affect the growth of crops, but
heavier rainfall and flooding may damage crops or cause the soil to erode.
These factors could trigger farmers to delay planting crops, which would
ultimately reduce the region's harvest and the veracity of the agricultural
industry in the southeast.

Reduced water supply from a changing climate and increased demand
for water from population growth exposes the southeastern United States

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18 Water Resources, supra note 1.
19 Id.
20 Gish, supra note 14; see Southeast, supra note 2.
21 Southeast, supra note 2.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 See Water Resources, supra note 1.
28 Id.
29 Id.
to a rising number of disputes over rights to water sources. Perhaps the most prominent source of conflict arose from Florida, Georgia, and Alabama's contest for water rights to Lake Lanier. In 2011, the Eleventh Circuit reversed a lower court ruling that severely limited Atlanta's rights to water from Lake Lanier. The appeals court found that one of the purposes for making the lake was to supply water to Atlanta.

The Supreme Court denied certiorari to the appeal from the Eleventh Circuit, so Atlanta's rights to water from Lake Lanier are still valid. After the denial, Alabama, Florida, and Georgia petitioned Congress for a resolution to this increasing dispute over allocation of water from the lake. In summer 2013, Congress considered a comprehensive water bill. The Committees of Jurisdiction recognized a concern for water supply in the southeastern United States. Congress determined that interstate water agreements better solved the challenges of interstate water disputes. Congress weighed the concerns of those affected but left it to the governors of each state to reach an agreement on what constituted appropriate water usage for each state.

B. Kentucky's Water Shortage

Kentucky also suffers from the water shortage that plagues the southeast. To combat this increasingly threatening problem, the state created the Water Shortage Program that issues water shortage watches.

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31 In re MDL-1824 Tri-State Water Rights Litig., 644 F.3d at 1165.
32 Id. at 1166.
33 Id. at 1192.
37 Id.
38 Id.
39 Id.
and water shortage warnings. During a water shortage watch, the Kentucky Energy and Environment Cabinet announces the scarcity of water and alerts the community authorities to prepare for local water shortages. The Energy and Environment Cabinet’s Division of Water recommends that localities in the state enact plans to manage water supplies and monitor local conditions. If a water shortage becomes critical, or a water supply is depleted, the governor may declare a water emergency. After the emergency announcement, the Kentucky Division of Disaster and Emergency Services will haul water into the community and install pumps for water lines to aid local efforts to repair the water supply.

The Division of Water divided the state into Drought Management Areas to combat the water supply problems systematically and geographically. Currently the Barren River, Buffalo Trade, Bluegrass, Cumberland Valley, Green River, Kentucky River, Northern Kentucky, and the Pennyrile Drought Management Areas comprise the areas of the state where the Water Shortage Program issued water shortage watches. As of July 2012, water supply levels in 27 Kentucky counties were low enough to be placed under a water shortage watch.

Kentucky’s water supply is in danger and the entire state is experiencing the effects of the water shortage. A reduced water supply not only affects the amount of water available for individual consumption, but also imposes an adverse impact on one of the state’s leading industries: agriculture. A dry June 2012, coupled with a hotter than normal summer, caused drought conditions in the state that hit western Kentucky counties especially hard. Reports indicated that soybeans were not germinating due to the water shortage, and low water levels in ponds caused hardship in irrigating and watering livestock, which ultimately reduced the size of farmers’ annual yield. University of Kentucky Agricultural Meteorologist Tom Priddy told the news outlet that the water shortage could mean “western and central locations may be near the point where rain would provide little benefit for corn and soybean growth, development, and

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42 Id.
43 Id.
44 Id.
45 Id.
46 See Drought Monitoring, supra note 40.
47 Id.
48 Id.
49 Id.
50 WDRB.COM, supra note 4.
Without water, farms cannot produce and the agriculture industry will suffer.

II. WATER RIGHTS SYSTEMS ACROSS THE UNITED STATES

A. Riparian System

The riparian system and the prior appropriation system are the two systems of water rights that exist in the United States. The general premise of the riparian system is that a property owner who owns property bordering a watercourse owns property rights to use the water. Kraver v. Smith, narrowed the application of water rights allowed by the riparian water system to be limited so that the person who owns the property adjacent to a waterway may use the water in a way that is “beneficial to himself so long as he does not inflict any substantial injury to those below him upon the stream.” Kentucky operates under the riparian water rights system. A property owner’s rights to water, if a stream or some other waterway bounds a parcel of land, extend to the middle of the watercourse, unless the water right is otherwise limited.

Even though the riparian system allows property owners the right to adjacent bodies of water, water rights are not unlimited. A property owner has rights to use the water in the watercourse, yet the state owns the land under the water. The state has a long lasting interest in protecting public navigation of any watercourse. Further, the state can regulate access to water sources to preserve the public rights and benefits derived from those waterways.

B. Prior Application

The prior appropriation water rights system arose in the United States primarily from the incorporation of the arid, western states into the nation. This water rights theory operates under the “first in time, first in

51 Id.
52 Gish, supra note 14, at 4.
53 Id. at 2.
54 Kraver v. Smith, 177 S.W. 286, 290-91 (Ky. 1915).
55 Gish, supra note 14, at 3.
56 Whitson v. Morris, 201 S.W.2d 193, 195 (Ky. 1946).
58 Id.
59 Gish, supra note 14, at 5.
right" and "use it or lose it" principle. A property owner should have security and reason to invest in developing and maintaining water resources because he is unafraid of losing his claim to the water. The prior appropriation system has four key components that factor into the property holder's right to use water: (1) the amount of water used by the property holder; (2) the purpose for using the water; (3) the place where the water is used; and (4) the priority date that allows senior holders to divert water from junior water right holders so long as the water is put to a beneficial use.

The prior appropriation system separates property rights for water and land. The system also allows the recognition of water conservation easements. If the purpose of the conservation easement attaching to land is to protect water because water is either required for the preservation of land, or for the protection of agriculture operations, water is included in the easement. Prior appropriation recognizes water rights so long as the right holder puts the water to beneficial use. If either abandonment of water or a significant, enduring reduction of water consumption occurs, the owner of the water or land may lose the water right that the conservation easement protects.

### III. Agricultural Conservation Easements

#### A. History and Purpose

Conservation easements are negative easements, which prohibit the use of a parcel of land in a particular fashion. Typically courts disapprove of negative easements because "they can clout title, and they may raise recordation problems. Notice to future landholders is the difficulty." If legislation, however, stipulates proper recording techniques or limitations on who benefits from the easement, then negative easements are

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60 Id.
61 Id.
62 Id.
64 Id.
65 Id.
66 Id.
67 Id.
69 Id.
Due to the high social utility of conservation easements, forty-nine states enacted legislation to allow these easements.\(^7\) In 1981, the National Conference of Commissioners on Uniform State Laws passed the Uniform Conservation Easement Act (UCEA).\(^7\) The act is a model act that many states used as a guide for establishing their own conservation easement legislation.\(^7\) The UCEA allows public and private organizations to acquire land and hold agricultural conservation easements in fee simple.\(^7\) After the creation of the act, twenty-three states enacted laws that authorize conservation easements and twenty-six states passed their own laws that expressly allow the formation of conservation easements.\(^7\) Further, thirty-two states implemented state-level purchase of agricultural conservation easement (PACE) programs that pay property owners for easements that restrict the use of their land to certain practices to ensure the land's long-term agricultural use.\(^7\)

Many states that passed conservation easement legislation modeled their statutory schemes after the UCEA, which defines conservation easements as:

\[\text{[A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.}\]

Agricultural conservation easements are restrictions that property holders willingly put on their land to ensure that agricultural uses, the local environment, and historic or scenic locations are protected.\(^7\) With

\(^{70}\) Id.

\(^{71}\) See Agricultural Conservation Easements, supra note 6.

\(^{72}\) ROBERT H. LEVIN, LAND TRUST ALLIANCE, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES 6 (2010).


\(^{74}\) See LEVIN, supra note 72, at 6; see also Agricultural Conservation Easements, supra note 6.

\(^{75}\) Agricultural Conservation Easements, supra note 6.

\(^{76}\) Id.


\(^{78}\) Id.
agricultural conservation easements, property owners "retain and protect agricultural value or productivity of their farmland on a permanent or long-term basis while maintaining private ownership and economic use of the land." Perpetual protection of agricultural land allows property owners to preserve the integrity of the parcel of land and sustain their desired use of the farmland.

Agricultural conservation easements can be private or publicly purchased parcels of land. A private easement is created by the donation or sale of a conservation easement to a qualified nonprofit conservation organization. The private group, after the transfer of the easement, bears the burden of monitoring and maintaining the easement. Each easement is specifically designed to conserve the particular tract of agricultural land and to preserve the owner's long-term intent for the farmland to be used for agricultural purposes. Tax incentives also exist for private easements. If an easement is donated the gift qualifies as a charitable contribution under IRS rules. Donating land to a private easement holder allows land to retain its taxable status as farmland rather than developmental property, which tends to keep property taxes lower. The tax incentives for offering private conservation easements incentivize farmers to adopt easements as an agricultural estate-planning tool.

Not all agricultural conservation easements are private. States can guarantee that farmlands continue to be used for agricultural purposes by purchasing agricultural conservation easements through Purchase of Agricultural Conservation Easement (PACE) programs. State programs purchase these easements with public funds. These funds represent a communal appreciation of the value of preserving farmland, and recognize the importance of the agricultural industry on the local economy. The government compensates participating landowners for their willingness to be involved in the program and for allowing the imposition of limitations on the use of their land.

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79 GARKOVICH, supra note 8, at 1.
80 Jones et al., supra note 63, at 12.
81 GARKOVICH, supra note 8, at 1.
82 Id.
83 Id.
84 Id.
85 Id.
86 See id.
87 Id.
88 GARKOVICH, supra note 8, at 2.
89 Id.
90 See id at 3.
91 Id. at 2.
A PACE program requires landowners to voluntarily contribute land to the program. After an owner completes an application, the state appraises the value of the easement for agricultural purposes. Factors such as historical significance or highly productive agricultural areas may cause a particular easement to be valued higher than other similarly situated easements. The landowner may then choose to accept or reject the government's offered purchase price for the land restrictions. If the offer is accepted, the owner maintains full ownership and use of the land, but is limited to only using that land for approved agricultural purposes. Funding for PACE programs is generated from several sources such as real-estate transfer taxes; levies to existing property taxes, which cause all members of the community to bear the cost of the agricultural easement; selling bonds; and cash donations to the PACE program fund. Community appreciation for this program is essential because it requires a significant amount of funding. Citizens must be willing to pay increased taxes or to make donations to the PACE Program fund to purchase the agricultural conservation easements.

B. Benefits and Drawbacks to Agricultural Conservation Easements

Agricultural conservation easements are legal limitations on parcelled lands that can be narrowly tailored for each farm or ranch. The individualized fashioning of the easements allows for the preservation of the distinct characteristics of the land or the specific purposes for which farmers use the land. Not only are the commercial agricultural qualities protected, but agricultural conservation easements also serve as a practical estate-planning tool for landowners who wish to leave farms to heirs. Agricultural conservation easements decrease the monetary value of property because the use of land is limited. A lower property value decreases the value of estate taxes. This allows the heirs of the property owner to benefit from a reduced tax burden, and the reduced value can also

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92 Id. at 3.
93 Id. at 2.
94 Id.
95 Id.
96 Id.
97 Id. at 3.
98 Id.
99 Id.
100 Agricultural Conservation Easements, supra note 6, at 1.
101 See id.
102 GARKOVICH, supra note 8, at 1.
103 See id.
104 See Agricultural Conservation Easements, supra note 6, at 2.
shrink, though not eliminate, property taxes.\textsuperscript{105} For current property owners, agricultural conservation easements provide tax benefits in the form of income, estate, and property tax reductions.\textsuperscript{106}

PACE programs also provide participating farmers or ranchers with benefits. Partaking in the programs is voluntary so the government cannot mandate landowner involvement; however, states can offer incentives for farmers to join the projects.\textsuperscript{107} Through PACE Programs, the government compensates farmers monetarily for the long-term restricted use of their land.\textsuperscript{108} Often participation in agricultural conservation easement programs leads to an offset of federal taxes if the landowner declines government compensation for the property.\textsuperscript{109}

Despite the benefits created by agricultural conservation easements, problems surrounding their legal operation exist. The easements do not guarantee landowners that the property will continue to be farmed in the future.\textsuperscript{110} The easements prevent the future use of the titled land for any nonagricultural purpose.\textsuperscript{111} However this does not guarantee that future possessors will farm the land because it merely limits the use of land for agricultural purposes—they cannot mandate that future titleholders actively do anything with the land.\textsuperscript{112} Thus, the easements restrict the use of land to farming, but cannot guarantee the continued agricultural use of the land on which the easement exists.\textsuperscript{113}

Easements also force the owner of the land to supervise the property and prevent any nonagricultural activities from occurring on the parcel.\textsuperscript{114} This stipulation places a time and monetary burden on the property owner.\textsuperscript{115} For subsequent titleholders, who are not always willing to monitor the land and may not to use the land for agricultural purposes, the easements limit the potential use of the property.\textsuperscript{116} Agricultural conservation easements are also subject to eminent domain because the purpose of the easement may potentially interfere with a needed public use of the land.\textsuperscript{117} The state may exercise eminent domain to prevent the
easement from running perpetually and put the land to public use.\textsuperscript{118} If the land is taken through eminent domain, the landowner and the easement holder must be compensated.\textsuperscript{119}

PACE programs also create challenges. The programs require the use of significant amounts of public funds, which necessitates community support for the conservation easements.\textsuperscript{120} Governments must divert funds from their budgets or increase tax revenues to source the programs.\textsuperscript{121} Further, the government assessment for the value of the property is founded upon the land's agricultural use, which may be less than the full market value for the property.\textsuperscript{122} The market value accounts for the potential uses for the land besides farming, such as a site for development for residential or commercial property.\textsuperscript{123} Finally, the parcels of land protected by the agricultural conservation easements are not necessarily contiguous.\textsuperscript{124} Therefore, the agricultural land protected by the easements can be disjointed and a future sale of land could terminate large scale farming operations by segregating the land into areas with different purposes.\textsuperscript{125}

\textbf{C. Kentucky Agricultural Conservation Easements}

Kentucky agricultural conservation easements are perpetual property interests that "restrict or prevent the development or improvement of the land for purposes other than agricultural production."\textsuperscript{126} The legislature adopted this form of conservation interest in an effort to promote and enhance the economic impact of the agriculture industry on Kentucky's economy.\textsuperscript{127} Agricultural conservation easements play a multifaceted role in aiding the promotion of the agriculture industry. First, the State has created a protocol for acquiring easements by statutorily defining agricultural conservation easements.\textsuperscript{128} "This guarantees that agricultural lands will continue to be used for farming, and it compensates landowners

\begin{footnotes}
\item[118] Id.
\item[119] Agricultural Conservation Easement, supra note 6, at 2.
\item[120] GARKOVICH, supra note 8, at 3.
\item[121] Id.
\item[122] Id.
\item[123] Id. at 2.
\item[124] Id. at 3.
\item[125] Id.
\item[126] KY. REV. STAT. ANN. § 262.900(1)(a) (West 2015).
\item[127] Id. § 262.902(1).
\item[128] Id. § 262.902(3)(a).
\end{footnotes}
for voluntarily accepting property restrictions. Next, conservation easements financially incentivize farmers to continue farming on their land. Agricultural conservation easements also secure farm operations from “incompatible non-farming uses that may render farming impractical” and from “complaints of public nuisance.”

Kentucky established the Kentucky Purchase of Agricultural Conservation Easement program in 1994. The state legislature formed the Purchase of Agricultural Easement Corporation to oversee the operations of the PACE program.

There is hereby created the Purchase of Agricultural Conservation Easement Corporation which shall oversee all issues involving purchases of agricultural conservation easements. The corporation shall be a de jure municipal corporation and political subdivision of the Commonwealth. The corporation shall be a public agency within the meaning of KRS 61.805 and 61.870 and shall be attached for administrative purposes to the Department of Agriculture.

The corporation is governed by a board of directors, comprised of seven private directors whom the governor appoints, and four public directors that includes the Agriculture Commissioner, the Energy and Environment Cabinet secretary, the dean of the University of Kentucky College of Agriculture, and the chair of the Soil and Water Conservation Commission. The members of the board are not compensated for their service to the PACE Corporation.

Since its founding, the PACE Corporation has purchased agricultural conservation easements on 108 farms totaling 25,280.79 acres. The average cost of the purchase is $854 per acre and the average size of the farms upon which easements exist is 234 acres. In addition, landowners

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129 Id.
130 Id. § 262.902(3)(b).
131 Id. § 262.902(3)(c).
132 Id. § 262.902(3)(d).
133 GARKOVICH, supra note 8, at 2.
134 Id.
135 Id. § 262.906(1).
136 Id. § 262.906(2)(a).
137 Id. § 262.906(4).
139 Id.
have donated sixty-one agricultural conservation easements. The total amount of land restricted by agricultural easements from the Kentucky PACE Program has risen to 33,780 acres. The PACE Corporation has received 816 applications from farmers in 75 Kentucky counties, which covers over 160,000 acres of land that can be conserved for agricultural purposes.

The Uniform Conservation Easement Act served as a model for Kentucky’s classification of conservation easements. The Kentucky statute defines conservation easements as an interest less than fee simple in real property for a purpose of:

[R]etaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

Kentucky allows governmental bodies, such as the PACE Corporation, or another charitable organization, to serve as the holder of the easement. The governmental acquisition of conservation easements occurs through the state purchase of a voluntarily offered parcel of land. The state cannot force farmers to participate in the purchase of agricultural conservation easements program. The government can compensate the owner in a lump sum payment, pay outs over a term of years, or installment payments. The state also reserves the right to purchase surrounding agricultural land if the “acquisition is necessary to maintain the agricultural uses of the property” protected by the easement.

Participants of the Kentucky PACE Program are restricted to use the parceled land on which the easement exists for:

[T]he production of crops, livestock and livestock products, and nursery and greenhouse products including

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140 Id.
141 Id.
142 Id.
143 See LEVIN, supra note 72, at IX.
144 KY. REV. STAT. ANN. § 382.800(1) (West 2015).
145 Id. § 382.800(2).
146 Id. § 262.904(1).
147 See id.
148 Id. § 262.904(2).
149 Id. § 262.904(4).
the processing or retail marketing of these crops, livestock and livestock products, and nursery and greenhouse products if more than fifty percent (50%) of the processed or merchandised products are produced on the subject land, and for the raising and stabling of horses for commercial purposes. For the purposes of this section and administrative regulations promulgated under its provisions, “crops, livestock and livestock products, and nursery and greenhouse products...”

The landowner, his agents, or lessees cannot use the land for any purpose besides one of the aforementioned agricultural purposes defined by the Kentucky legislature. By participating in the PACE program, the titleholder recognizes that the PACE Corporation’s board will enforce the statutory provisions governing the use of the land over which the easement runs, and ensure the landowner’s use of the property complies with Kentucky law. While a landowner is not required to repair the condition of the land if a natural disaster damages the property, the landowner will not alter the agricultural purposes for which the land is used as a result of such an act. Just as landowners are required to use the land for agricultural purposes, the state cannot hamper the agricultural use of the land by placing “landfills, sewage treatment plants, or other public service facilities” on the land.

The statute requires that landowners create a conservation plan for soil and water, and operate the farm consistent with the plan. Though the legislation limits, in detail, the ways the land can be used under the conservation easement, the landowner retains all non-restricted rights. Property owners must pay all taxes associated with the land and finance any assessments of the land that are required by the PACE Program. The farmer also has the responsibility of maintaining the land that has the conservation easement; neither the PACE Corporation nor the state government accepts any responsibility for upkeep. Thus, while the PACE Program limits the farmer’s access to the complete bundle of rights

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150 Id. § 262.910(1).
151 Id.
152 Id. § 262.910(2)(a).
153 Id. § 262.910(2)(b)-(c).
154 Id. § 262.910(2)(d).
155 Id. § 262.910(3)(a).
156 Id. § 262.912(1).
157 Id. § 262.912(2).
that come with property ownership, it benefits the farmer through monetary incentives and the security that the land’s agricultural character will be preserved perpetually.

D. Colorado Conservation Easements

The only negative easements in gross, limiting the use or enjoyment of a piece of property, that Colorado recognizes are those that are expressly authorized by statute, such as conservation easements. In 1976, the Colorado General Assembly adopted legislation that created conservation easements and circumvented the traditional bar on negative easements in gross. The legislature allowed “owners of the surface land and, if applicable, owners of the water or water rights beneficially used thereon” to create conservation easements on a parcel of all of the owner’s property. The landowner retains the right to use and enjoy the land and water that are not included in the parcel of land on which the easement falls, so long as the use does not interfere with the conservation easement.

In Colorado, conservation easements are interests in “real property” that can be reassigned to fulfill the purposes of conservation easements. The legislature deemed that the limited property interests run in perpetuity unless the language of the easement creates a termination option, or abandonment occurs. The owner may release an easement voluntarily through a writing that fulfills the statute of frauds requirements. Easements may also be terminated through abandonment. Abandoning a negative easement in Colorado requires the landowner’s intention to abandon the land and a manifestation of that intent through the owner’s action. Not using the land, despite the length of time it has remained unused, is insufficient for abandonment without the landowner intending to abandon the land and an act demonstrating that intent.

Colorado, like most western states, operates under the prior appropriation system of water rights. Prior appropriation distinguishes

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160 Id. § 65:8.
161 COLO. REV. STAT. ANN. § 38-30.5-104(1) (West 2015).
162 Id. § 38-30.5-105.
163 Id. § 38-30.5-103(1).
164 Id. § 38-30.5-103(3).
165 KRENDL ET AL., supra note 159, § 65:7.
166 Id.
167 Id.
168 Id.
169 LEVIN, supra note 72, at 43.
water and land rights and requires separate claims to each of those rights.\textsuperscript{170} Colorado did not model its conservation easement statute after the Uniform Conservation Easement Act.\textsuperscript{171} In 2003, Colorado's first recognition of water rights in the legislation included the preservation of water as a valid purpose for the conservation easement; this was done to account for the implications of the prior appropriation system's distinction between land and water property rights.\textsuperscript{172}

'Conservation easement in gross,' for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area, airspace above the land or water, or water rights beneficially used upon that land or water area, owned by the grantor appropriate to the retaining or maintaining of such land, water, airspace, or water rights...\textsuperscript{73} (emphasis added)

The amendment to the statute makes Colorado the only state to expressly include airspace and water rights, along with traditional land use, in its conservation easement statute.\textsuperscript{174} Colorado's 2003 amendment expanded the scope of conservation easements to protect the character of both land and water for preservation purposes.\textsuperscript{175} The Colorado General Assembly, when describing the nature of conservation easements in gross, explicitly allowed the creation of a conservation easement that "encumbers water or a water right" only if the property owner voluntarily relinquishes some of the ownership rights to use and enjoy the water.\textsuperscript{176}

Colorado's conservation easement statute allows restrictions on the land, due to a negative conservation easement, to be considered in assessing the land for taxation.\textsuperscript{177} Because restrictions can cause property value to depreciate, if the government holds the easement for the land or water, the property is taxed at a lower rate than it would be without the easement.\textsuperscript{178} The tax benefit of a reduced property value assessment

\textsuperscript{170} Id.
\textsuperscript{171} See LEVIN, supra note 72, at IV.
\textsuperscript{172} See id.
\textsuperscript{173} COLO. REV. STAT. ANN. § 38-30.5-102 (West 2015).
\textsuperscript{174} LEVIN, supra note 72, at 8.
\textsuperscript{175} Id. at 43.
\textsuperscript{176} COLO. REV. STAT. ANN. § 38-30.5-103(5).
\textsuperscript{177} KRENDL ET AL., supra note 159, § 65:2.
\textsuperscript{178} Id.
incentivizes property titleholders to allow a conservation easement on their land, water, or air space.\textsuperscript{179}

IV. \textbf{KENTUCKY SHOULD EXPRESSLY ALLOW THE PROTECTION OF WATER IN ITS CONSERVATION EASEMENTS AND INCLUDE CONSERVATION EASEMENTS FOR WATER IN ITS PACE PROGRAM}

To support the long-term viability of the agriculture industry in the face of increasing water supply problems, Kentucky must amend its conservation easement statute to expressly give farmers the ability to preserve the integrity of Kentucky farms by voluntarily limiting water rights. In 1994, the Kentucky General Assembly announced that it was "a policy of the Commonwealth to retain agriculture and enhance the contribution that agriculture makes to its economy."\textsuperscript{180} Due to increasing water supply shortages, and potentially derivative governmental restrictions on water usages, Kentucky farms' water access may become limited. To guard against future changes in water supply that could damage farms, Kentucky should follow Colorado's example by expressly including water in the conservation easement statute and alter the PACE program to accommodate this definitional change. Without statutory acknowledgment of the importance of water in preserving Kentucky's agriculture industry, the protections afforded by conservation easements will only be nominal because agricultural operations do not have secured water sources.

The current legislation surrounding agricultural conservation easements and the PACE Program does not refer to water ownership rights. Water is only used to describe the name of "soil and water conservation districts," entities that existed before the enactment of the agricultural conservation easement legislation.\textsuperscript{181} Arguably the omission is a result of Kentucky's recognition of water rights under the Riparian system, which is based upon the notion that ownership rights extend to a waterway that borders the land held by the owner.\textsuperscript{182} This system aptly applies to a state that has numerous sources of water for consumption and agricultural uses. Kentucky contains twelve major river basins, the land where a river drains and connects with its tributaries, and Kentucky's northern border is largely defined by the Ohio River.\textsuperscript{183}

\begin{footnotes}
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{KY. REV. STAT. ANN. § 262.902(1) (West 2015).}
\textsuperscript{181} \textit{Id. § 262.910.}
\textsuperscript{182} Gish, \textit{supra} note 14.
\end{footnotes}
Kentucky's geological makeup is vastly different from many of the western states that have arid climates and limited access to water. For example, Colorado, who expressly protects water rights in its conservation easement statute, operates under the prior appropriation system, which is an entirely different system of water rights. The prior appropriation system is popular in the western part of the nation where water resources are limited because it separates water and land property rights and, due to the scarcity of the resource, encourages owners to use their water rights effectively. Following this water rights theory, it is apparent that water was included in the conservation easement statutes in an effort to fully account for all potential forms of easements that could be issued to conserve property.

Kentucky's current ecological condition continues to change along with the altering climate of the southeastern United States. Due to warming climates and decreased rainfall, the region faces water shortage problems like a decrease in the supply of available water and a growing population with an increased demand for water. In 2012, twenty-seven Kentucky counties experienced levels of water low enough to place them on a water shortage watch. The drought conditions significantly affected annual crop yields in the state that year. Though Kentucky counties are only under a water shortage watch, the regional trend shows that the changing climate and population numbers only adversely affect water supply. If the water shortage problem in Kentucky worsens, the government may intervene and regulate or limit the consumption of freshwater. Government involvement in monitoring and controlling the water supply already exists. The Division of Water created the Water Shortage Program to alert local municipalities of water shortages and to intercede and alleviate extreme water shortages in cases of emergency. If Kentucky experiences a water crisis, the government could more strictly control water usage by both individuals and commercial operations.

Kentucky farms only function with readily available access to water. To protect the state's agricultural operations, the statutory scheme must expressly protect water rights. The Kentucky legislature created

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194 Gish, supra note 14.
185 LEVIN, supra note 72, at 43.
186 See Gish, supra note 14.
188 WDRB.COM, supra note 4.
189 Id.
190 Id.
191 Water Resources, supra note 1.
192 See id.; see also Drought Monitoring, supra note 40.
agricultural conservation easements with the intention to promote and preserve the state agricultural industry. If agricultural conservation easements and Kentucky's PACE Program are to serve as mechanisms that protect the integrity of the agriculture industry, the Kentucky General Assembly must amend the statutory scheme to specifically include water rights. Modifying the agricultural conservation easement legislation would be a shift in water rights philosophy. However, Colorado's conservation easement legislation can serve as a guide for Kentucky legislators. The purpose of the Colorado statute is to conserve land and water generally, whereas Kentucky's program is more narrowly tailored to protect the agriculture industry. Yet, adopting the purposes and property interests enumerated in the Colorado statute could enhance Kentucky's agricultural conservation easement legislation.

The first change that the Kentucky legislature can make to protect water rights is to expand the definition of conservation easements found in KRS § 382.800. The updated version of the statute could retain the same structure as the existing statute, but it should expressly include water as another kind of property interest over which the agricultural conservation easement runs. Another potential change for the Kentucky statute is to update the purposes the easements serve to match those listed by Colorado that include "retaining or maintaining of such land, water, airspace, or water rights..." The proposed changes to the Kentucky statute would amend KRS § 382.800 and expand the definition of agricultural conservation easements as follows:

'Conservation easement' means a nonpossessory interest of a holder in real property or water imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, constructively using that land or water area and maintaining land, water, airspace, or water rights, including enhancements, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property (amendments added)."
This recommended expansion of the definition of Kentucky's agricultural conservation easement is not a lengthy rhetorical change. The offered amendment to Kentucky's definition, modeled after Colorado's conservation easement legislation, would ensure that the state's issuance and purchase of agricultural conservation easements continues to promote and preserve the state's agriculture industry. Kentucky must be proactive in seeking a solution that will minimize the potential damage that the growing problem of water shortage could cause to Kentucky farms. By expanding conservation easements to expressly include agricultural conservation easements for water rights, Kentucky will have an effective safeguard to protect our farms and ensure the longevity of the agriculture industry.