



United States
Department of
Agriculture

Farmers
Home
Administration

Washington
D.C.
20250

FmHA AN No. 1727 (1955)

February 12, 1988

SUBJECT: Protecting and Enhancing Wetlands and Floodplains
on Farmers Home Administration Inventory Property

TO: All State Directors, State Directors-at-Large, State
Environmental Coordinators, Farmer Program Chiefs,
District Directors, and County Supervisors

Purpose/Intended Outcome

This AN serves two major purposes. First, it provides field offices with recommended language for insertion in the deeds of Farmers Home Administration (FmHA) Farmer Program inventory property containing wetlands or floodplains. Second, it answers frequently asked questions regarding FmHA's responsibilities for the wetlands and floodplains that are located on these properties.

Comparison with Previous AN

There is no previous AN on this subject.

Implementation Responsibilities

Section 1955.137(a) of FmHA Instruction 1955-C and paragraph 3.b.(2) of Exhibit C of FmHA Instruction 1940-G require that appropriate restrictions be placed on the use of FmHA property containing floodplains or wetlands. Such restrictions are to be placed in leases and deeds. The requirements to place restrictions on the use of affected properties stem from Executive Order 11988, Floodplain Management and Executive Order 11990, Protection of Wetlands. The Executive Orders place affirmative responsibilities on Federal agencies to preserve and enhance wetlands and to preserve and restore floodplains in managing and disposing of Federal lands. FmHA inventory property is, of course, Federal land. Federal agencies that are not willing to protect and enhance Federally owned wetlands and floodplains through the use of restrictions are to withhold such property from lease or sale.

EXPIRATION DATE: February 28, 1989

FILING INSTRUCTIONS: Preceding
FmHA Instruction 1955-C



Farmers Home Administration is an Equal Opportunity Lender.
Complaints of discrimination should be sent to:
Secretary of Agriculture, Washington, D.C. 20250

1727(1955)

Although the above referenced FmHA Instructions have contained requirements to include floodplain and wetland use restrictions in leases and deeds for some time, compliance with these requirements has not been consistent across FmHA's field offices. One of the main reasons for execution of the Memorandum of Understanding (MOU) with the U.S. Fish and Wildlife Service (FWS) in May 1987 was to obtain the assistance of FWS in meeting these FmHA responsibilities (See Exhibit A of FmHA Instruction 2000-LL). By now, all FmHA field offices should be working closely with FWS offices to obtain reviews of all farm properties and recommendations regarding the protection of important resources found on these properties.

The greater emphasis and attention which the FWS MOU has placed on wetland and floodplain use restrictions has understandably resulted in several important questions surfacing to the National Office. The first set of questions concerns the proper content and scope of the use restrictions to be placed in deeds. Included in this AN as Attachment 1 is language for insertion into the deeds of properties containing wetlands and floodplains. Similar restrictions should be included in leases involving such properties. Attachment 1 also provides guidance when to use and not use particular provisions depending upon the property under review. The language in Attachment 1 should be used in almost all cases. You should consult with your Regional OGC to determine what specific language needs to be inserted in the deeds to cover a particular situation. If a unique case or class of cases arises, the National Office should be contacted for further guidance.

A second set of questions has arisen which are frequently asked and cover a variety of topics concerning the use restrictions. Attachment 2 to this AN lists and answers these questions.

We hope that you will find this AN responsive to your needs. The FWS has concurred in its contents, as indicated in Attachment 3, and will distribute similar guidance to its offices. After you have reviewed the AN, you should respond as expeditiously as possible to those pending recommendations that you have on your inventory farms from the FWS.

For additional assistance, FmHA State Coordinators for the FWS MOU should contact Louis Carter, (FTS) 475-4014 or John Hansel (FTS) 382-9619. For those State Offices not on FTS, please use area code 202.

Thank you for your attention to this matter.



VANCE L. CLARK
Administrator

Attachments

Exhibit 1

Following is standard language to be inserted in deeds for FmHA inventory property containing wetlands and/or floodplains. In several instances, brackets have been placed around portions of the language with guidance provided as to when the bracketed language will be used.

Conservation Easement Reservations in the United States

By this instrument there is reserved in the UNITED STATES OF AMERICA, its successors and assigns, a perpetual conservation easement on the property conveyed by this deed.

This easement is under the authority and in furtherance of the provisions of federal law, including sections 331 and 335 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1981, 1985), Executive Order 11990 providing for the protection of wetlands, and Executive Order 11988 providing for the management of floodplains. The restrictions and covenants contained in this easement constitute a perpetual servitude on and run with the property. The Grantee and all successors and assigns ("landowner") under this deed covenants with the United States to do or refrain from doing, severally and collectively, the various acts mentioned later in this easement. The United States is reserved the rights enumerated in this easement for itself and its successors, agents and assigns.

I. Description of the Easement Area.

[Describe here (or by reference to an appended plat) the floodplain, wetlands and adjacent buffers to which this easement will apply. The area description may be subdivided to provide for specific conditions applicable to part, but not all, of the easement area.]

II. Covenants by the Landowner.

A. No dwellings, barns, outbuildings or other structures shall be built within the easement area.

B. The vegetation or hydrology of the described easement area will not be altered in any way or by any means or activity on the property conveyed by this deed, or property owned or under the control of the landowner, including (1) cutting or mowing; (2) cultivation; [(3) grazing;]¹ (4) harvesting wood products; (5) burning; (6) placing of refuse, wastes, sewage, or other debris, (7) draining, dredging, channeling, filling, discing, pumping, diking, impounding and related activities, or [(8) diverting or affecting the natural flow of surface or underground waters into, within, and out of the easement area.]²

¹Use only when paragraph III. F is used. See the answer to question number B. 8. in Exhibit 2 for further guidance.

²Use only for easement on wetland.

C. Notwithstanding the provisions of paragraph II-B above, the landowner shall be responsible for compliance with all federal, state and local laws for the control of noxious or other undesirable plants on the easement area. The responsibility for such plant control may be assumed in writing by and at the option of the easement manager where the control or manipulation of such plants is deemed by the manager to affect easement management programs or policies.

D. [Cattle or other stock shall not be permitted on the easement area, except that the easement manager shall permit access to and use of waters within the area necessary for stock watering under such terms and conditions as the easement manager deems necessary to protect and further the purposes of this easement, provided:

(1) the easement manager bears the costs of building and maintaining fencing or other facilities reasonably necessary to preclude stock from entering the easement area; and

(2) access for stock watering need not be permitted where other waters are reasonably available from other sources outside the easement area.]³

III. Rights Reserved in the United States.

The United States, on behalf of itself, its successors or assigns, reserves and retains the right, at its sole discretion, to manage the easement area including the following authorities:

A. The right of ingress and egress to conduct wetlands management, monitoring, and easement enforcement activities. The easement manager may utilize any reasonably convenient route of access to the easement area. However, the landowner may provide a designated route to and from the easement area so that damage to farm operations can be reasonably avoided.

B. The right to install, operate, and maintain structures for the purpose of reestablishing, protecting, and enhancing wetlands functional values including the taking of construction materials to and from said sites.

C. The right to establish or reestablish vegetation through seedings, plantings, or natural succession.

D. The right to manipulate vegetation, topography and hydrology on the easement areas through diking, pumping, water management, excavating, island construction, burning, cutting, pesticide application, fertilizing, and other appropriate practices.

E. The right to conduct predator management activities.

³Use only when paragraph III.F is used. See the answer to question B.8 in Exhibit 2 for further guidance.

F. [The right to construct and maintain fences in order to prevent grazing or other types of encroachment on the easement area.]⁴

G. [Notwithstanding permissive provisions of State or Federal law, the right to prohibit or regulate hunting or fishing or other taking of migratory birds, fish and wildlife. This right to prohibit any of these activities shall be effected by (1) the easement manager posting the area, or (2) otherwise giving notice of the prohibitions to the landowner.]⁵

H. [The right to exclude landowner and/or public entry, if such entry is deemed to pose a threat to fish and wildlife or their habitat.]⁶

IV. Easement Management and Administration. [Provision to be used for management by FmHA, Forest Service, or State fish and game agency.]

A. This easement shall be managed and administered by [name agency] which may be referred to as the "easement manager."

B. For purposes of management and administration of this easement, all rights of the United States in this easement are assigned to the easement manager. The easement manager may enforce all the terms and conditions of this easement, along with all rights and powers reserved in this easement through such general or specific regulations or orders as may, from time to time, be promulgated under its general governmental authorities.

IV. Easement Management and Administration. [Provision to be used for management by the U.S. Fish & Wildlife Service.]

A. All right, title and interests of the United States in this easement are assigned to the Secretary of the Interior for administration by the United States Fish and Wildlife Service as part of the National Wildlife Refuge System pursuant to the National Wildlife Refuge System Administration Act, 16 U.S.C. 668dd et seq. The U.S. Fish and Wildlife Service may enforce all the terms and conditions of this easement, along with exercising all rights and powers reserved in this easement through such general or specific regulations or orders as have been or may be, from time to time, promulgated under the authority of the Secretary of the Interior. Notwithstanding the above rights in paragraph(s) _____ retained by the United States, the U.S. Fish and Wildlife Service may permit the landowner to pursue such activities on said sites as would be consistent with the preservation and enhancement of floodplain and wetlands functional values.

⁴Use only when the easement manager intends to fence the easement area or a portion of the easement area. See the answer to question B.8. in Exhibit 2 for further guidance.

⁵See the answer to question number B.7. in Exhibit 2 for guidance on when this hunting restriction is to be used.

⁶Use only when FWS recommends, with recommendation based upon severe, existing or potential threat to fish and wildlife.

B. As used in this easement, the term "easement manager" shall refer to the authorized official of the U.S. Fish and Wildlife Service.

V. General Provisions.

A. The agreed upon purposes of this reservation are the preservation and maintenance of the wetland and floodplain areas existing as of the date of this conveyance as well as protection and enhancement of plant and animal habitat and populations. Such purposes shall constitute the dominant estate within the easement area. A "wetland" is defined by reference to section 7(c) of Executive Order 11990 and a "floodplain" is defined by reference to section 6(c) of Executive Order 11988. Any ambiguities in this easement shall be construed in a manner which best effectuates wetland preservation and fish and wildlife purposes.

B. Any subsequent amendment to or repeal of any federal law or order which authorizes this reservation shall not affect the rights reserved by the United States or subsequently held by its successors or assigns.

C. For purposes of this easement, wetland management rights reserved by the United States include, but are not limited to, inspection for compliance with the terms of this easement; research regarding water, wetlands, fish and wildlife and associated ecology; and any other activity consistent with the preservation and enhancement of wetland functional values.

D. The United States, its successors and assigns, including the easement manager, shall have the right to make surveys, take photographs and prepare such other documentation as may be necessary or desirable to administer the provisions of this easement. Any such map, plat or other suitable document may be recorded in the land records of the respective county in which the property is located.

E. The easement reservation does not authorize public entry upon or use of land. Unless the easement manager prohibits public entry, the landowner may permit it at the landowner's discretion.

F. [Subject to paragraph III-G in this easement,]⁷ the landowner and invitees may hunt and fish on the easement area in accordance with all federal, state, and local game and fishery regulations.

G. This easement shall be binding on the landowner, and the landowner's heirs, successors or assigns. The landowner covenants to warrant and defend unto the United States, its successors or assigns, the quiet and peaceable use and enjoyment of the land and interests in the land constituting this reservation against all claims and demands.

H. The easement manager shall be the agent of the United States or its successors and assigns. The manager shall have all discretionary powers of the United States under this easement. In the performance of any rights of the United States under this easement, the manager may permit, contract or otherwise provide for action by employees, agents, or assigns which may include the landowner.

[VI. State and/or local requirements.]

⁷ Use this introductory phrase whenever paragraph III-G is used.

1727(1955)

[Insert any State and/or local floodplain or wetland protection requirements that are more restrictive than those contained in the preceding paragraphs.]

Questions and Answers

A. FmHA's Authorities and Responsibilities

1. Can FmHA decline to implement placing restrictions on a floodplain or a wetland because it may devalue the property?

No. FmHA has an affirmative responsibility to protect wetlands and floodplains on the property that we sell or lease. See Section 1955.137(a) of FmHA Instruction 1955-C and paragraph 3.b.(2) of Exhibit C of FmHA Instruction 1940-G. These sections reflect the Federal policy to protect Federal wetlands and floodplains. Any possible financial loss to the government is considered to be outweighed by the benefits derived from protecting floodplains and wetlands.

Although devaluation is not a relevant consideration, it may also not be a realistic result in most cases. For example, the devaluation of wetlands, in terms of their value for agricultural production, occurred with the passage of the swampbusting provisions of the Food Security Act. In the case of floodplains, selling Federal floodplains that are subsequently developed by private parties can result in large Federal flood insurance costs.

2. Are conservation easements for wetland and floodplain protection and enhancement placed on inventory property before being resold to the prior owner?

Yes. This results because these requirements are affirmative responsibilities. They apply to all Federal lands whether or not they are being resold to a prior owner.

3. Do the Executive Orders require that we do more than protect floodplains and wetlands?

Yes. Executive Order 11988, Floodplain Management, requires that we restore and preserve the natural and beneficial values served by floodplains and Executive Order 11990, Protection of Wetlands, requires that we preserve and enhance the natural and beneficial values of wetlands. Because the Executive Orders go beyond protecting the status quo of these resources on Federal land, we are very grateful for the assistance of FWS. We need to encourage FWS's participation as often as possible because FWS has agreed to use its money and manpower to undertake restoration or enhancement activities at promising sites presently in FmHA inventory.

4. Who is responsible for legally describing and recording the protected areas as well as for paying the associated costs?

FmHA. The requirements to protect Federally owned floodplains and wetlands fall upon the Federal agency that owns the land including the costs associated in meeting the responsibilities.

5. Can FmHA permit FWS or other potential easement managers to conduct wetland and floodplain restorations or improvements on inventory property prior to resale?

Yes. There are two major advantages in doing this. First, it reduces the disruptions to the future owner. Second, for lands that may remain in inventory for some time, it allows the wetland restoration process to begin much sooner. Whenever FWS requests such permission, the below listed conditions need to be met before FmHA grants permission. You should also realize that in a September 24, 1987 letter to the Administrator, the FWS has agreed to accept responsibility and associated liability, including that related to personal and property injury that would otherwise fall upon the Farmers Home Administration for the wetland restoration improvements, for associated monitoring and maintenance needs, and for the resolution of any problems that may result from the improvements.

a. FmHA should permit the start of restoration activities on inventory land that FmHA has agreed would be subject to an eventual deed restriction for the protection of wetland or floodplains. This would require that the FWS provide us its formal deed restriction recommendations and the exact locations where the physical modification of the inventory property is to occur. Exact location is not intended to require a survey. It is intended to require a best estimate of where the water level will be as a result of the restoration work. Only where the flooding of another property is a possible concern will precise determination of the water level by the future easement manager be required prior to the start of the restoration work.

b. FmHA should ensure through consultation with the FWS that no other land on the inventory property or neighboring property will be adversely affected by the proposed work.

c. If there will be any cost to FmHA, we must follow Section 1955.64 of FmHA Instruction 1955-B. We can only authorize the payment of such costs to correct severe problems that would affect the value of the inventory farm. This should not be a problem since FWS had agreed to pay all of the typical costs related to the restoration work.

d. If FmHA or FWS has any questions regarding the design, installation or maintenance of the proposed measures, the Soil Conservation Service (SCS) should be consulted prior to approval. If legal questions arise, consult with your Office of General Counsel.

6. Can the FWS or a counterpart State agency be authorized caretaker status for a particular inventory property?

Yes. Properties on which this may be a particularly useful approach include: those containing large or significant areas of wetlands or floodplains; those where restoration work will begin prior to resale, and those close to land already owned or administered by the requesting agency.

The caretaker agreement should normally cover the entire farm or tract and be in writing, such as in the form of a memorandum of agreement. If a large farm or tract has only a small wetland area affected, it is appropriate to assign caretaker status to only the wetland portion. The agreement should be signed by the State Director and an official with sufficient authority within the requesting agency. In cases where FWS will be the caretaker, the agreement will provide FWS with enforcement authority under the National Wildlife Refuge System Administration Act in a similar manner as paragraph IV. A. of Exhibit 1 does. Obviously, we would prefer that the agreement be at no cost to FmHA. However, the caretaking agency may have to incur costs that would normally be paid by FmHA, such as seeding costs, and these would

be appropriate for FmHA to pay as long as they do not exceed costs paid under existing contracts with other caretakers in the area.

7. Are there other inventory property situations besides the presence of wetlands and floodplains when the placing of use restrictions in the deed is an appropriate mechanism to avoid an adverse environmental impact.

Yes. Deed restrictions can be used to protect the following other important resources that may be located on or adjacent to the inventory property: listed or proposed endangered or threatened species or critical habitat; designated or proposed wilderness area; designated or proposed wild or scenic river; historic or archaeological site listed or eligible for listing on the National Register of Historic Places; coastal barrier included in Coastal Barrier Resources System; natural landmark listed on National Registry of Natural Landmarks; and sole source aquifer recharge area designated by the Environmental Protection Agency.

8. How can another Federal agency or a State agency currently acquire title to FmHA inventory land?

Presently, by purchasing it. The agency can participate in the sale process for surplus land. It can either place a bid on the property like any other bidder, or if no acceptable bid is received, it can negotiate a price with FmHA, whether or not it participated in the bidding process.

In the future, as a result of recently enacted legislation, FmHA will be able to transfer certain types of property including environmentally sensitive property to Federal and State agencies at no cost to the receiving agency. This approach will not be possible, however, until regulations are published to provide for it.

9. Should the Soil Conservation Service (SCS) be informed of the easement areas established on inventory property?

Yes. SCS should be given a copy of the easement so that it can be included in all future conservation planning for the property.

10. Is there a difference between conservation easements for the protection of floodplains and wetlands and other types of conservation easements that FmHA can place on inventory property?

Yes. As indicated in the answer to question A.1., FmHA has an affirmative responsibility to place conservation easements on floodplains and wetlands as well as those other areas identified in the response to question A.7. A second conservation easement program exists for inventory property as explained in Section 1955.139(a)(3) of FmHA Instruction 1955-C. This second program is discretionary and covers many other conservation purposes. Should FmHA receive a request for a conservation easement under Section 1955.139(a)(3) that overlaps an area to be protected with either a floodplain or wetland conservation easement or other type of deed restriction described in question A.7., the latter may be included in the broader conservation easement (Section 1955.139 (a)(3)) and without impacting the value of the broader easement.

During the present period in which there is a suspension on the sale and leasing of inventory property, you should continue to develop and approve conservation easements for floodplains, wetlands and the other areas listed in response to question A.7. because of their mandatory nature. Although

you can continue to accept requests for conservation easements qualifying under Section 1955.139(a)(3) of FmHA Instruction 1955-C, you should not approve any of these latter easements after January 13, 1988, and until the suspension is lifted and all prior rights to the property are resolved.

11. What should be FmHA's response to FWS if a property contains extensive floodplains or wetlands and the application of a conservation easement would appear to make the property unsalable?

Negotiate with FWS. We cannot simply decline to place a conservation easement for floodplain or wetland protection on a property because it appears to make a property unsalable. The proper approach is to negotiate the content and geographical range of the easement, if there is room for negotiation.

First, if only floodplains are present, discuss with FWS the possibility of using only paragraph II.A. of Exhibit 1 to protect them. (See question B.5). Next, make sure wetland buffers are not larger than are needed (See question B.4). Third, since the most heavily restricted site(s) or subdivision(s) within the easement area is a restoration site, make sure that these are specifically defined (See question B.3) and negotiate the number of restoration sites, if several are being recommended. Also, you may want to negotiate the scope of the restriction(s) to be placed on some of the restoration sites. Perhaps not all sites will need hunting restrictions (See question B.7). Finally, in cases where some or all of the wetlands on a property have been seriously degraded and will not be subject to restoration, consider a less restrictive approach on the degraded wetlands. For example, large expanses of wetlands in the Southeast have been drained and cropped with poor crop yields resulting. Placing only a no cropping restriction on such large expanses of degraded wetlands would allow some wetland restoration by natural processes while future landowners would retain control over these wetlands and could use them for such compatible uses as forestry and hunting.

Once these types of negotiations are completed, your regional OGC must concur in the wording of the easement. The property must then be advertised for sale in a manner consistent with the negotiations concluded with FWS.

On some properties with large areas of wetland or floodplain, there will be little or no room for negotiation, because the floodplain provides important wildlife habitat or the wetland is in a naturally sound condition or easily restorable. You will need to sell the property with an extensive conservation easement (Exhibit 1) on it. As previously mentioned, you should realize, that in the near future a further alternative will exist for such properties. FmHA has recently been given the legislative authority to transfer certain types of property including environmentally sensitive property to Federal and State agencies at no cost to the receiving agency. This will not be a feasible alternative, however, until regulations are published to provide for it.

12. How should FmHA offices with large numbers of inventory properties coordinate the review of these properties with FWS?

Through the establishment of a priority processing system. It is not possible for FWS to review a large number of properties during the same forty-five-day review period established in the MOU. Neither is it possible for FmHA to sell all of these properties simultaneously. Consequently, FmHA State Coordinators for the MOU should work with FWS to establish a priority

processing system. Properties that you plan to actively market in the near future or that have the greatest likelihood of selling should head the list. Once this backlog of reviews is completed by FWS, new properties coming into inventory should generally be reviewable within forty-five days from notifying FWS. When FWS requests additional time and FmHA's efforts to sell the property would not be seriously impacted, FmHA should agree to an extension of time.

13. How does Section 616, Transfer of Inventory Lands, of the recently passed Agricultural Credit Act of 1987, P.L. 100-233, affect FmHA's conservation alternatives for inventory property?

Adds new transfer authority. FmHA has been given the authority to transfer to any Federal or State agency, without reimbursement and for conservation purposes, suitable or surplus property, or an interest therein, that has marginal value for agricultural production, is environmentally sensitive, or has special management importance to a Federal or State agency. Regulations are being prepared and should be in effect early this summer. Once in effect the transfer process will allow either a conservation easement or full fee title transfer of an entire inventory property or portion of an inventory property.

Pending issuance of regulations, the conservation easement program in relation to wetlands and floodplains should proceed as it presently exists under the MOU with FWS. Additional easement considerations for property still in inventory will be possible once the new authority is in effect. Full fee title transfer of properties that are proposed for extensive floodplain or wetland conservation easements under the present program may be an appropriate future consideration in some instances. Larger easement areas of land beyond the present wetland, wetland buffer, and floodplain limitation may also be appropriate.

14. Will wetland and floodplain conservation easements still be appropriate if a property is to be transferred to another Federal or to a State agency?

Yes. The Executive Order responsibility must be fully accomplished as a prior condition to transfer to a State agency. If the transfer is proposed to another Federal agency, that agency, will have to certify that needed wetland and floodplain protection measures are to be fully honored as a condition of transfer. These measures will, therefore, need to be formulated prior to the transfer.

B. Scope and Content of the Restrictions

1. The standard language in Exhibit 1 refers to the establishment of a conservation easement. Is this easement the same as the deed restrictions that have been previously discussed in FmHA training sessions?

Yes. Since the term conservation easement is more broadly understood, we have decided to use it instead of the deed restriction terminology. Consequently, these deed provisions should be referred to as conservation easements for the protection of floodplains and wetlands.

2. Must all of the provisions in the standard language cover all of the easement area?

No. The easement area can be subdivided and in some cases will have to be. For example, if hunting restrictions are necessary, they would only apply to

those subdivisions in which the FWS will undertake its restoration activities. (See a discussion of hunting under question B.7.)

3. How specific should the FWS recommendations be regarding wetland and floodplain conservation easements?

FWS recommendations should be as specific as possible regarding the actual land to be affected. For example, the specific sites where wetland enhancement activities will take place must be identified. This will provide prospective buyers with a clear picture of what FWS can do and where it can do it. This clarity is also needed to perform the appraisal. Also, this specificity allows for subdivisions to be created, if necessary, within the easement area. A subdivision established for a restoration site, for example, would be governed by all of the restrictions including the non-hunting of migratory birds restriction.

4. The standard language in Exhibit 1 references a buffer area, when should buffers be used?

Always, when wetlands are being protected. In a wetland area, the easement area referenced in Exhibit 1 must contain the following two components: the wetlands and an adequate buffer zone. A wetland cannot be protected without a buffer. The buffer prevents adjacent land uses from encroaching upon the wetland and reduces the drainage of pollutants such as residues from agricultural chemicals into the wetland. The size of an adequate buffer will vary from case to case but the intent is that the buffer be as minimal as necessary to prevent encroachment and adverse drainage.

In a floodplain only situation, a buffer outside of the floodplain is not needed. The floodplain is itself a buffer for its associated water course.

5. Should floodplains not containing wetlands be restricted in the same manner as wetlands?

Not in all cases. At a minimum, future construction activities within the floodplain should be restricted. See paragraph II.A. of Exhibit 1. Paragraph II.B. is used in a floodplain situation when based upon a recommendation by FWS, the floodplain area to be so restricted either is an important wildlife habitat or a buffer strip is needed along the water course to protect water quality. When II.B is used in a floodplain situation, it does not prevent the landowner from its legitimate use of water from the associated water course.

6. When the easement is recorded with the deed, how must the easement area be described?

At a minimum, the description must meet the recording requirements of your State. However, in many states these requirements are very minimal and will not suffice. The description must be sufficiently clear so that (1) the landowner knows where the boundaries of the affected area are and (2) there is sufficient legal certainty so that the easement manager can enforce any violations.

The best way to provide for the necessary clarity or certainty is to survey and monument the area. FWS has agreed to flag the affected areas in order to assist the surveyors in making accurate surveys. In some States, surveys will be required by State law or court precedent and you will have no choice in the matter. Where you do have a choice regarding legal surveys, one

factor to consider in making that choice is the number of properties that you have that will require conservation easements. The smaller the numbers, the more attractive the survey approach is. Another cost-effective consideration when doing surveys is to enclose protected areas with squares, rectangles or other polygons as long as too much extra land is not included.

In those States in which land is recorded on a quadrant system, reference to this system may serve as a viable substitute for a survey. The protected area is described according to the rectangular or square survey that presently exists for the land.

Another method which must be very carefully approached is recording a map with the protected area(s) delineated on it. This may meet your State recording standards, but if it does not provide sufficient certainty to the affected parties will create numerous long-term problems for FmHA. You must consult closely with your regional OGC to determine the level of detail to be required in any process using a map as the basic recording document.

Finally, where a less than survey approach provides the sufficient legal certainty in your State but the easement manager would prefer a survey, the easement manager should pay for the additional cost of the survey. Otherwise, this is an FmHA cost.

7. What are the opportunities for public access or public hunting on land subject to a conservation easement for floodplain or wetland protection?

FmHA does not have the latitude to make public access part of this type of conservation easement. If a public right-of-way is requested, it should be addressed under the provisions of Section 1955.139(a)(1) of FmHA Instruction 1955-C.

FmHA may, however, restrict public or even landowner access to all or a portion of the easement area. Hunting is one example of this. In order for FWS to either spend substantial funds restoring a wetland or maintaining a continuing management commitment, the affected easement area must contain at a minimum a restriction against the hunting of migratory birds. In unusual cases, such as the need to protect an endangered species, the hunting restriction may have to be applied to all fish and wildlife. Whenever FWS indicates that a hunting restriction is necessary, it must, therefore, also indicate the scope of the restriction; i.e., restricting just migratory bird hunting or all hunting and fishing. See paragraph III. G. of Exhibit 1. Since FmHA is seeking FWS' support in restoring wetlands, we support the hunting restriction to the extent that the property is not rendered unsalable. Consequently, FWS will confine its restoration requests to the actual management sites, including a small buffer (normally less than 150 feet). FWS will post the site(s) or otherwise notify the subsequent landowner of the hunting restriction. Such a FWS management or restoration site(s), if a portion of the easement area, would be described as a subdivision of the easement area within Paragraph I of the conservation easement.

8. Should the wetland and floodplain restrictions contain a requirement that the landowners construct and maintain fences around the protected area(s) in order to prevent grazing within it?

No. If there is a foreseen need to fence a proposed easement area or a portion of such area, a recommendation to this effect must be made by the proposed easement manager. It will be the responsibility of the easement

manager to build and maintain the fencing including building and maintenance costs. Likely instances in which the easement manager may recommend fencing include wetland areas that will be the subject of restoration work or wetland areas providing important wildlife habitat that could be severely damaged by overgrazing.

Because fencing and the limitations on property access that result can affect the appraisal and asking price of a property, the need for fencing must be decided prior to the language of the easement being completed. When fencing will be needed, the bracketed language in Exhibit 1 associated with footnotes number 1, 3, and 4, must be used. If only a portion(s) of the easement area will need fencing, that portion(s) of the easement area must be specifically designated as a subdivision(s) of the area with the referenced bracketed language made applicable to only that subdivision(s).

Finally, if a resource listed in the answer to question number A.7 above is present and fencing is necessary to protect the resource, FmHA will be responsible for the fencing including its costs.

9. Does the language in Exhibit 1 transfer water rights to the easement manager?

No. However, in wetland cases, item (8) of paragraph II. B. of Exhibit 1 prohibits the landowner from diverting or affecting the natural flow of surface or underground waters into, within, and out of the easement area.

If a prospective easement manager requests an allocation of the water rights, this request would be considered by FmHA under Section 1955.139(a)(3). Additionally, while the property is in inventory, if the prospective easement manager desires to begin any mutually agreed upon restoration activity, all of the available water rights for the property can be used in the restoration work, e.g., pumping water from one point on the property to the restoration site.

C. The Easement Manager

1. Can FmHA decline to implement use restrictions on a floodplain or wetland because FWS or a counterpart State agency declines to be an easement manager?

No. We hope that these other agencies will volunteer in all cases, but if they do not, FmHA is the easement manager for wetland or floodplain protection easements.

2. Who are eligible easement managers under FmHA's floodplain and wetland protection responsibilities?

FmHA has determined that the following three entities will be easement managers: (1) FWS, (2) the Forest Service, when easement land is an inholding in a National Forest, and (3) the State agency having counterpart responsibilities to the Fish and Wildlife Service.

3. Should there be more than one named easement manager?

No. To reduce as much as possible the amount of landowner uncertainty and concern in the future, only one easement manager can be named. Also, although the easement manager may supervise other agencies, entities, or

1727(1955)
Exhibit 3



United States Department of the Interior

FISH AND WILDLIFE SERVICE
WASHINGTON, D.C. 20240

ADDRESS ONLY THE DIRECTOR,
FISH AND WILDLIFE SERVICE

In Reply Refer To:
FWS/EHC/SP

JAN 22 1988

Mr. Vance L. Clark
Administrator, Farmers Home Administration
U.S. Department of Agriculture
Washington, D.C. 20250

Dear Mr. Clark:

As a part of our Memorandum of Understanding activities, our staffs have jointly developed base language to implement wetland and floodplain deed restrictions. I fully support this effort and commend your initiative in incorporating these important conservation features in the Land Disposal Process. I concur with the deed restriction language and the guidance contained in the accompanying question and answer document as currently written. I will continue to offer my staffs support should additional mutually agreeable changes become necessary. These documents will greatly facilitate field level conservation efforts.

Sincerely,

DIRECTOR