

## Real Environmental Obligations (ORE): Where are we now?

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### What is an ORE?

An instrument created by the French Biodiversity Law of 2016 to allow a landowner to voluntarily implement legally-binding environmental protection measures on their land via a contract with a legal person who becomes the guarantor of the environmental interest. In addition, as these protection measures are directly attached to the parcel of land, they are lasting, remaining in effect beyond future changes in ownership of the property (e.g. sale or succession).

### Legal basis:

**Law No. 2016-1087 of 8 August 2016 on the recovery of biodiversity, nature and landscapes<sup>1</sup>** which amends Article L132-3 of the French Environmental Code as follows:

*Owners of real property can enter into a contract with a public authority, public establishment, or legal person in private law acting in the interest of environmental protection, in order to stipulate the real obligations they deem appropriate, which shall be binding for themselves as well as for subsequent owners of the property, inasmuch as the aim of these obligations is to ensure the maintenance, conservation, management or restoration of elements of biodiversity or ecological functions.*

*Real environmental obligations can be used for environmental compensation.  
The term (duration) of the obligations, the reciprocal commitments, and the possibilities for revising or terminating the obligations must be specified in the contract.*

*The contract creating the real obligation must be drawn up and duly certified; it is not subject to registration fees nor does it give rise to collection of the cadastral tax, respectively provided for by Articles 662 and 663 of the French General Tax Code.*

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<sup>1</sup>[https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=1E8FA4783F446C28AEA15D6CDD18740F.tpdila11v\\_2?idArticle=JORFARTI000033016419&cidTexte=JORFTEXT000033016237&dateTexte=29990101&categorieLien=i](https://www.legifrance.gouv.fr/affichTexteArticle.do;jsessionid=1E8FA4783F446C28AEA15D6CDD18740F.tpdila11v_2?idArticle=JORFARTI000033016419&cidTexte=JORFTEXT000033016237&dateTexte=29990101&categorieLien=i)

*Under sanction of absolute nullity, a property owner whose land is leased through a rural lease can only implement a real environmental obligation with the prior consent of the tenant and subject to the rights of third parties. Lack of response to a written request for consent within the stipulated period of two months is tantamount to acceptance. Any refusal must be justified. The implementation of a real environmental obligation cannot in any way infringe on rights relating to hunting or hunting reserves.*

*As from 1 January 2017, municipalities can, if decided by the municipal council, waive the property tax on land for property owners who have established a real environmental obligation.*

### **Key characteristics:**

- An ORE must concern:
  - \* *the maintenance, conservation, management, or restoration*
  - \* *of elements of **biodiversity** or **ecological functions***
- An ORE pertains to a **real property**: land and/or immovables contained on the property: trees, bodies of water, etc.
- An ORE can:
  - \* concern **remarkable** and **ordinary** biodiversity
  - \* pertain to **natural, farm or forested areas**
- the parties are:
  - \* a landowner
  - \* a qualified entity falling under one of the following categories:
    - public authority,
    - public establishment,
    - legal person in private law acting in the interest of environmental protection
- Term: the term can be any duration, up to 99 years. The ORE is renewable.
- The two parties have obligations specified in the contract, which may be **obligations to do** (positive obligations) **or not to do** (negative obligations) something in order to maintain, conserve, manage or restore elements of biodiversity or ecological functions. Examples include:
  - \* landowner's obligations: not to build buildings, not to disturb or jeopardise fauna, flora or habitats, to restore soil quality, to maintain ecological infrastructures, to use organic farming methods, etc.
  - \* co-contractor's obligations: to provide counsel and assistance (e.g. take inventories), to provide financial support for the implementation of the action plan, to help carry out improvements/developments, etc.

### **The legal aspect: an innovation**

- a **private contract** between at least two persons (natural or legal persons) (= law of persons) through which the owner of a real property promises to grant certain interests in their property to a legal person acting as the guarantor of the environmental protection.
- a **real obligation**: it is said that the ORE is a real obligation (= real right) because, like easements, is attached to the specific piece of property. This means that "the

ORE stays with the land”, following it from one owner to another. In other words, subsequent owners will also benefit from or suffer this obligation.

- the ORE is therefore a **hybrid instrument**: “the real obligation binds the persons, but with regard to a specific property (*intuitus rei*), to which it automatically remains attached through any changes in ownership”<sup>2</sup>. In this respect, it is different from conservation easements and *servitudes* (French instrument, explained below) (see box).

- Breaking with the usual environmental protection practices in France (protection through public management and administrative policing that limits private landowners’ ability to use and dispose freely of their property), OREs are based on the idea of “using contractual freedom and ownership to serve ecological objectives” (ibid).

### **OREs, Easements and Servitudes:**

#### **- Easement:**

In Anglo-Saxon law, an easement is the voluntary legal act by which a landowner limits their own rights on their land by granting an interest in the land to another person. This instrument has been widely used for nature conservation purposes in the form of the Conservation Easement, by which a private owner places a restriction on certain uses of their property in the interest of a nature conservation foundation (land trust) or public organisation—for example: not to build on their land, not to cut down certain trees, to protect natural habitats or ecosystems of environmental interest, etc.<sup>3</sup> Easements are attached to the specific property and are therefore transferred from one owner to another. The conservation easement, which creates real rights, was a key inspiration for the ORE. Requiring only one owner and one property, a conservation easement is particularly well-suited to private initiatives in the area of environmental protection.

Widely used in the United States, Canada and Australia, conservation easements have played a major role in environmental protection, based on the voluntary commitment of private landowners. They can be given or sold to the beneficiary Land Trust or public agency. Because the creation of an easement significantly decreases the property value (in most cases, because it limits the building rights), easements generally give rise to tax incentives for the owner. The public agency or Land Trust that is the beneficiary of the easement is the guarantor of its implementation and can bring proceedings before the courts in the event of non-compliance. In this event, the private owner is required to restore the land to the condition stipulated by the conservation easement.

#### **- Servitude:**

A *servitude*, in French law, is “a charge imposed on an immovable for the use and utility of another immovable belonging to another owner” (French Civil Code, Article 637). Often translated in English as “easement”, a *servitude* is in fact a specific type

<sup>2</sup> Reboul-Maupin and Grimonprez. *L'obligation réelle environnementale : chronique d'une naissance annoncée*. (Real environmental obligation: chronicle of an announced birth.) Dalloz 2016

<sup>3</sup> See Land Trust Alliance, a platform grouping together most American Land Trusts: <http://www.landtrustalliance.org/what-you-can-do/conserv-your-land/questions>

of easement, what is referred to in English as an *easement appurtenant*. It can only exist between two separate properties belonging to two different owners: one of the immovables grants access to one of its attributes (e.g. right-of-way) or limits the use of some of its attributes (e.g. right-of-air) for the benefit of the other immovable. Thus, a servitude imposes obligations on the owner of a property (servient tenement) for the benefit of a neighbouring property (dominant tenement). A *servitude* constitutes a real right. It can be established in perpetuity.

Based on the existence of two separate properties and two separate owners, this instrument was not suited to the development of voluntary environmentally-minded obligations at the initiative of a single landowner. The specific ORE instrument was therefore invented to meet this particular need, and lies at the intersection between a personal right and a real right.

What are the differences?	Easement	Servitude	ORE
Negative obligation	X	X	X
Positive obligation	X		X
Requires a dominant tenement and a servient tenement		X	
Real right	X	X	Hybrid: real obligation (attached to the property) arising from a personal right <sup>4</sup>
Maximum term	Perpetuity	Perpetuity	99 years (renewable)

### ***Contractualisation and registration rules:***

- freedom and flexibility in the drafting of the contract (*content, format, term*) as in the law of private contracts
- registered by a notary (certified document)
- submitted to the land register service
- exempt from fees for entry in the land register and from the cadastral tax. At the initiative of the governing municipality, the ORE can also give rise to an exemption from the property tax on land.

### **ORE and farming:**

- An ORE can pertain to farmland
- A general principle of contract law is that any new contract must comply with all pre-existing contracts. Consequently, an ORE cannot be established between a farmland owner and a third-party guarantor without the consent of the farmer (tenant). The farmer must express their consent or refusal within a period of two months; any refusal must be justified. Lack of response within the allotted period is, by law, considered tacit consent. If the farmer has not been consulted or has not given their (written or tacit) consent, the contract establishing the ORE will be disallowed.

<sup>4</sup> On the hybrid nature of OREs, see: Reboul-Maupin and Grimonprez. 2016, *ibid*.

- Note: the ORE must also uphold the rights of third-party users (e.g. hunters)
- Implementing an ORE on farmland leased under the tenant farmers statute raises legal and practical issues<sup>5</sup>:
  - Is the farmer compensated for their role, whether primary or secondary, in implementing the obligations stipulated by the ORE? If yes, in what form (lower rent, subsidies from a public agency or the third-party guarantor, etc.)? And how is this compensation formalised (e.g. in the management plan)?
  - How to proceed if the ORE is not compatible with the existing lease: by establishing an ERL? Or with a supplementary contract, in addition to the lease, between the landowner and the farmer?
  - How to ensure that the landowner and the farmer clearly define their respective responsibilities, and if a dispute arises, how to ensure that they fulfil the remedial measures or assume the penalties imposed?
- Because it includes a management plan, an ORE can reinforce the implementation of an environmental rural lease (ERL)<sup>6</sup>. Where possible and when the landowner and farmer are in agreement, setting up an ORE on farmland leased under the tenant farmers statute would be optimised by also simultaneously establishing (or updating) an ERL.

### **Implementation of OREs:**

- As of 15 June 2018, three OREs had been signed (to our knowledge):
  - One between the municipality of Yenne (Savoie) and CEN Savoie (Savoie Natural Area Conservatory) aimed at maintaining, preserving and managing the ecological function of, notably, the biological reservoir of the Lagneux marsh (see box).
  - one between a community of municipalities and a municipality
  - one between a community of municipalities and a private company
 These last two OREs were established to offset environmental impact.

- The Natural Area Conservatories (CEN), with the support of the NFCEN, are especially active in deploying and testing this new instrument:
  - \* other OREs are currently being prepared: in Savoie (2), in Aquitaine (2) and in Burgundy.
  - \* the goal is to test the wide range of contexts in which OREs can be set up: on farmland, natural areas and woodlands; with private landowners, companies, etc.; aimed at maintenance, conservation, management or restoration; etc.
  - \* Natural Area Conservatories (CENs) prefer for their obligations under the contract to be non-financial in nature: providing expertise, taking inventories, assistance in carrying out maintenance or restoration tasks (*notably by volunteers, etc.*).

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<sup>5</sup> For a preliminary exploration of this question, see CEREMA, 2018, summary sheet no. 8: *Comment articuler l'ORE avec un bail rural ?* (How to combine an ORE with a rural lease?)

<sup>6</sup> <http://www.accesstoland.eu/Environmental-rural-lease>

### **The first environmental conservation ORE entered into by a Natural Area Conservatory (CEN)<sup>7</sup>:**

In May 2018, CEN Savoie entered into an ORE with the municipality of Yenne, with the aim of preserving a wetland. For the past 30 years, the municipality has been acquiring, one by one, parcels in this sensitive wetland area, a classified *Natura 2000* zone. By signing this ORE with CEN Savoie, the municipality entrusts the CEN with joint responsibility for managing and enhancing this site for ecological, educational and tourism purposes.

With this ORE, on the one hand, the municipality (the owner of the land) commits:

- \* Not to build on the parcels in question (except the planned educational facilities);
- \* Not to cause harm to or jeopardise the plant and animal species and the habitats on the site;
- \* To make every possible effort not to disturb the fauna.

On the other hand, CEN Savoie commits:

- \* To ensure ecological management of the site in accordance with the ecological management plan defined and approved by the two parties;
- \* Taking inventories and keeping track of changes in habitats and species populations.

This ORE, signed for 30 years renewable (for 10-year periods), establishes a lasting framework for the preservation of this site and its remarkable ecological functions. The management plan is an addendum to the contract. To our knowledge, this is the first ORE that has been established not to offset environmental damage, but as a voluntary initiative aimed at preserving a natural site.

### **Points for consideration:**

- The text is ambiguous on the question of “*legal person(s) in private law acting in the interest of environmental protection*”. Our organisations consider that general interest cannot be guaranteed, a priori, by all legal persons in private law, and therefore advocate for the co-contractors to be limited to public establishments, public authorities, and legal persons in private law authorised for the protection of nature and the environment.
- There are risks of misuse in allowing the creation of OREs to offset environmental damage. We are calling for new reflection on this use of the instrument, how its implementation is managed, and its articulation.
- Financial support is one possible form of compensation provided by the third-party guarantor. It must not become the sole motivation for, or the principle behind, OREs.
- The tax incentives are insufficient and we are calling for them to be increased, in some cases, for example by expanding the exemption from the property tax on land.

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<sup>7</sup> On the signature of this first conservation ORE, see: <https://www.cen-savoie.org/node/213> and <https://www.afbiodiversite.fr/fr/actualites/les-obligations-reelles-environnementales-en-savoie> and <http://www.reseau-cen.org/fr/actualites-agenda/signature-de-la-premiere-obligation-reelle-environnementale-patrimoniale-en-france-par-le>

**Additional resources:**

- CEREMA, Real environmental obligation: summary sheet, June 2018, <https://www.cerema.fr/fr/actualites/qu-est-ce-qu-obligation-reelle-environnementale-ore>
- Nadège Reboul-Maupin, Benoît Grimonprez. L'obligation réelle environnementale : chronique d'une naissance annoncée. Recueil Dalloz, Dalloz 2016, 2016, p. 2074.
- the Ministry is to present a progress report on the implementation of OREs in 2018 (two years after the law was passed) (pending)
- Guide de la Fédération nationale des Conservatoires d'Espaces naturels (Manual of the National Federation of CENs) – Octobre 2018 (internal document)