



July 20, 2004

Richard Swenson
Director
Easement Division
Natural Resources Conservation Service
P.O. Box 2890
Washington, DC 20013-2890

COMMENT ON THE GRASSLAND RESERVE PROGRAM INTERIM FINAL RULE

Dear Mr. Swenson:

Please find below American Farmland Trust's (AFT) comments on the Interim Final Rule for the Grassland Reserve Program (GRP) published in the Federal Register on May 21, 2004 by the United States Department of Agriculture (USDA).

America's grasslands continue to disappear at an alarming rate as landowners convert rangeland and pastureland to cropland, woodlands, and residential and commercial development.¹ With the loss of each additional acre of grassland, the environmental benefits associated with that grassland are lost as well. As a result, it is critical that USDA implement GRP in a manner that maximizes the long-term protection of the nation's grasslands most at risk to conversion.

The Grassland Reserve Program is a valuable new farmland protection tool. By requiring that sixty percent of program funds be used for easements and 30-year rental agreements, Congress made long-term protection of grasslands a program priority. AFT urges USDA to maximize the use of permanent easements to the extent provided by the statute. AFT also encourages USDA not to ignore grasslands subject to "urban development pressures" simply because the cost of easements may potentially be higher for these lands. As the National Resources Inventory demonstrates, the rate of conversion of grassland to developed uses continues to increase across the country. And unlike the conversion of grassland to cropland, the loss of grassland to developed uses is nearly always a permanent one. In fact, because of this, we encourage USDA to view the threat of urban conversion as a greater threat than conversion to other uses that may not result in the permanent loss of grasslands, and to give it greater weight in the project criteria. While AFT understands USDA's reluctance to use a program that does not allow for non-federal cost-sharing to purchase potentially costly easements, AFT encourages the

¹ According to the 2002 National Resources Inventory, between 1992 and 2002 the net decline in grazing land acreage was approximately 3 percent.

Secretary to address this concern by seeking authority from Congress to provide for cost-sharing on permanent easements, as is provided under the federal Farm and Ranch Lands Protection Program (FRPP).

We hope you will consider these thoughts and the detailed recommendations below as you develop the final rule for GRP.

Section 1415.1 Purpose.

Recommendation: AFT concurs with the Secretary's intention to take a common sense approach to implementing GRP and FRPP that allows the use of GRP to purchase easements in urbanizing areas where it is appropriate or strategically advantageous to do so. AFT urges USDA to allow those determinations to be made by NRCS State Conservationists, with input from the State Technical Committee, who are in a position to decide which of the two programs may provide the better tool to maximize environmental and economic benefits from a project. AFT also urges USDA not to set a per-acre dollar limit on GRP easement acquisitions, so that State Conservationists retain the right to make such individual project determinations.

Comment: While most of this country's grasslands were historically located outside of urban-influenced areas, much of the country's ranch and pastureland is now facing suburban and ex-urban development pressures. Landowners in localities facing residential and/or commercial and industrial development pressure should be afforded the opportunity to access the full complement of USDA conservation programs. Because of its non-federal cost-share requirement, the Farm and Ranch Lands Protection Program (FRPP) is clearly the more cost-effective program for USDA to use to permanently protect grasslands that have a high easement value. However, given the enormous backlog of demand for FRPP, especially in the eastern half of the United States, GRP offers a potentially valuable alternative for permanent protection of grasslands at risk of urban conversion.²

Should USDA decide to prohibit the use of GRP for easement acquisitions that exceed a certain dollar-per-acre value, requiring instead that those grasslands be protected through FRPP, then AFT encourages USDA to likewise preclude the use of FRPP to purchase permanent easements on grasslands that have a low cost per acre, and to require that these easements be purchased through GRP instead. This will ensure that FRPP funds are used strategically on projects that are most suited for non-federal cost-sharing.

AFT also notes the fundamental difference in purpose between the two programs. Congress enacted FRPP for the purpose of protecting prime, unique or other productive soils, by limiting nonagricultural uses of the land.³ The purpose of GRP, however, is to assist owners in restoring and conserving land that has been historically dominated by grasslands and that has the potential to remain in agricultural use while also serving as

² NRCS data shows a FRPP backlog in FY 2003 of 426 applications, 132,267 acres, and \$177,788,947.

³ 16 U.S.C. §3838i(a).

habitat for animal and plant populations of significant ecological value.⁴ Because many ranch and pasturelands do not contain prime or unique soils, the FRPP may not be suitable as an alternative tool for some grassland easement acquisitions.

Section 1415.2 Administration

Recommendation: In determining the state allocation formula, AFT recommends that program demand be reflected by combining and giving equal weight to (1) number of applications received; (2) acreage associated with those applications; (3) funding needs associated with those applications; and (4) term length of the applications received.

Comment: USDA seeks the discretion to use any one of or a combination of any of the first three factors to reflect program demand by state. Allowing USDA to use just one of the factors rather than an equal weighting of the first three factors together would clearly favor some regions of the country over others and have a significant impact on state allocations. Requiring that all three factors be considered – number of applications, acreage of those applications and their dollar value – will ensure a more accurate reflection of the need and demands of individual states.

In addition to considering the first three factors, AFT believes that USDA should also consider the term length of the applications received. While the first three factors capture important considerations, they fail to adequately address one of the major objectives of GRP, permanent protection of grasslands from the threat of conversion.⁵ Under the proposed rule, states with similar allocation formula values would be allocated the same level of funding even if most of the producers in one state submitted applications for easements and 30-year rental agreements while most of the producers in another state submitted applications for short-term rental agreements. This allocation system does not reflect the program's preference for permanent easements over short-term rental agreements.

In order to encourage permanent easements, AFT urges USDA to consider the term length of the applications received in each state as part of the demand component. This will ensure that the allocation process recognizes states in which a large number of producers have demonstrated a long-term commitment to protecting grassland, and will help USDA meet its statutory requirement that sixty percent of funds be used for permanent easements.

Section 1415.4(c) Conservation Plans

Recommendation: AFT concurs with USDA's decision to require GRP participants to implement a conservation plan to preserve the viability of the grassland enrolled in the program. However, AFT does not consider it necessary or reasonable to require

⁴ 16 U.S.C. §3838n(a) and 16 U.S.C. §3838n(c).

⁵ 69 Fed. Reg. 29181 (2004).

participants to fully restore project acreage to native species, and supports allowing participants to maintain the current cover, even if it is a monoculture of a less desirable species. AFT also recommends that the wording of the conservation plan language in the standard NRCS GRP conservation easement deed be the same as is used for FRPP easements, which clarifies that program participants are not required to comply with future requirements contained in the NRCS Field Office Technical Guide but simply with those provisions required in the manual at the time the easement is purchased.⁶

Comment: To protect the environmental integrity of the resource, it is reasonable that conservation planning be a condition for GRP participants, as it is for FRPP participants. Among other things, the development and implementation of a conservation plan will allow NRCS and program participants to determine the appropriate number of animal units that can be supported by the resource, to avoid degradation through overgrazing. With respect to project management, AFT notes the challenge USDA faces in balancing the program’s purposes of supporting grazing operations and maintaining and improving plant and animal biodiversity. AFT believes a balance can be achieved by encouraging the restoration of native or natural grass species where a grassland cover does not exist or in instances where a participant concurs that such restoration would not adversely affect the economic viability of the farm or ranch operation. However, AFT encourages USDA to manage the program in such a way that allows participants to continue to use their working grasslands to produce an agricultural product that contributes economically to the farm or ranch operation.

Section 1415.4(f) Grassland Reserve Program Conservation Easement Deed

Recommendation: AFT recognizes the program efficiencies provided by requiring program participants to use a standard easement developed by USDA. While AFT does not object to the use of a standard easement, AFT finds many of the provisions contained in the “Grassland Reserve Program Conservation Easement Deed” troublesome, and recommends that USDA clarify and modify several of the easement terms.

AFT recommends modifications to the text of the “Conservation Easement Deed,” as follows:

Paragraph I Section D: This paragraph should be modified to specifically reference the agricultural value of grasslands and the program’s purpose of supporting grazing operations.

Paragraph III Section E: This section prohibits altering the existing topography of the property by digging, plowing, disking, or otherwise disturbing the surface of the soil, except to protect and enhance conservation values, and manage the grassland uses referenced in paragraph III.A. This language appears to preclude participants from reseeding, disking, or drilling in order to enhance forage vitality, even though the proposed rule states that “enrolled lands will require periodic manipulation to maximize

⁶ NRCS Policy, 440-V-CPM, Part 519, Section 519.61(A) and 519.65.

wildlife habitat and preserve grassland functions and value over time,” and that GRP participants “will have the opportunity to utilize common management practices to maintain the viability of the grassland acreage.”⁷ AFT recommends that USDA modify the easement language to specifically reference the grantor’s right to disk and drill for the purpose of preserving or improving forage quality.

Paragraph III Section H: This section prohibits the construction of all new buildings or other structures on the property. This section should be modified to allow for the construction of buildings or other structures consistent with the needs of the agricultural operation and with the prior approval of the Grantee.

Paragraph III Section J: By prohibiting fencing that restricts the movement of wildlife, this section appears to prevent the use of any fencing for predator control. Fencing for such purpose should be allowed and specifically referenced in this section.

Paragraph III Section K: This section appears to preclude the construction of non-paved farm access roads and all-weather laneways for animals, even though such roads and pathways have minimal resource impact and are essential to many grazing operations. These practices should be specifically referenced as permissible in the easement.

Paragraph III Section Q: The wording of this section precludes the construction of wind power facilities for any purposes other than on-farm use, and prohibits the construction of any telecommunications structures and/or support facilities. AFT believes this prohibition is overly broad, and eliminates a potentially valuable source of revenue for farm and ranch operations. AFT encourages the Secretary to reconsider this provision and to allow the Grantor to seek written permission and site approval of the Grantee for construction and installation of wind power facilities and telecommunications structures.

Section 1415.4(k) Conversion of rental agreements to easements

Recommendation: AFT concurs in the decision by USDA to allow participants to convert existing rental agreements to easements.

Comment: AFT believes that allowing participants to convert rental agreements to easements will encourage program participants to consider permanent protection options for their grasslands. AFT believes that conversion from rental agreement to easement should be limited to permanent easements only, in order to maximize the permanent protection of grasslands.

Section 1415.5 (d) Minimum acreage requirement

⁷ 69 Fed. Reg. 29176 (2004) and 69 Fed. Reg. 29175 (2004).

Recommendation: AFT recommends that USDA provide NRCS State Conservationists and the State Technical Committees with broad authority to waive the forty-acre minimum requirement for any project they deem appropriate.

Comment: In AFT's view, the forty-acre enrollment requirement is arbitrary and limits the program unnecessarily by potentially excluding participants who wish to protect small but economically viable and environmentally significant grassland parcels. The forty-acre minimum is also not necessarily required for bird habitat, as many of the bird species in significant decline in some parts of the country require far less than forty-acre tracts of grassland for adequate habitat. AFT believes that State Conservationists and State Technical Committees should be vested with the authority to grant waivers, in order to recognize the regional differences in the size and nature of agricultural operations as well as the differing needs of bird species.

Section 1415.8 State Level Selection Criteria

Recommendation: AFT urges USDA to consider the permanent protection of prime farmland that is currently in rangeland or pastureland to be a national priority, and to include this in its national guidance to states. AFT also encourages USDA to allow NRCS State Conservationists, with input from State Technical Committees, to determine which types conversions pose the greatest threats to grasslands in their states.

Comment: AFT supports USDA's decision to provide NRCS State Conservationists and FSA State Executive Directors in each state with the authority to develop ranking criteria consistent with national criteria and objectives for the selection of GRP projects. This provision recognizes the diverse nature of agriculture and the unique circumstances facing each state. It also enables states to develop criteria that will allow them to use state and federal conservation programs in a coordinated effort to address grassland concerns. .

In order to ensure transparency in the process, AFT urges USDA to continue to make the ranking criteria for all states available for public scrutiny. We also encourage USDA to continue to provide, by state, a listing of the number of rental agreements funded and easements acquired annually, as well as the annual backlog of applications by type, acreage, and dollar value.

Section 1415.10(b) Compensation for Rental Agreements

Recommendation: AFT recommends that USDA consider foregone income in calculating grazing values for rental rates. This will compensate participants for lost income that occurred due to restrictions placed on grazing and haying during nesting season.

Comment: AFT notes again the difficulty in trying to balance the program's purposes of supporting grazing operations and protecting the nesting habitat of birds. While AFT supports the decision to allow the State Conservationist, in consultation with the State

Technical Committee, to prohibit mowing, haying and harvesting of grass seed until after the conclusion of the nesting season of local bird species in significant decline, AFT notes that, in some parts of the country, this delay will result in the loss of virtually all the nutritional, and hence agricultural, value of that grassland to the program participant. As a consequence, there will be little incentive in certain areas for farmers and ranchers to participate in the program, unless the rental rate and easement values reflect the agricultural income participants will forego as a result of the restrictions. This foregone income should be calculated at the state, county or local level.

Section 1415.10(e) Programmatic Appraisal

Recommendation: AFT understands USDA’s rationale for proposing a programmatic appraisal process that could establish regional average market values and grazing values at minimal expense, and concurs that USDA should have such authority. However, to ensure that program participants believe that they are receiving a fair value for their easement, AFT encourages USDA to allow for at least a review appraisal of the parcel’s fair market value for any potential participant who requests one. Using a programmatic appraisal to establish regional values fails to capture significant differences in fair market value that can occur on neighboring properties.

Comment: AFT concurs with USDA’s decision to use programmatic appraisals to establish regional grazing values, but fears that a programmatic approach to determine the fair market value of easements will be difficult, given that fair market values can fluctuate significantly within a small geographic area. Relying on a regional average market value may deprive some landowners of the actual fair market value of their property, and cause potential participants to believe that they are not receiving adequate compensation for their development rights. In states where USDA pursues a programmatic appraisal to establish regional average market values, AFT encourages USDA to provide potential program participants that are dissatisfied with the regional average market value with the opportunity for at least a review appraisal. This is necessary to ensure that program participants are satisfied that they are being fully and fairly compensated for the value of the easement.

Section 1415.17 Role of Third Parties

Recommendation: AFT encourages the Secretary to seek authority from Congress to provide for cost-sharing on permanent easements, as is provided under the federal Farm and Ranch Lands Protection Program (FRPP).

Comment: The Interim Final Rule limits the role that third parties can play in GRP. While the statute allows third parties to “hold” an easement, USDA has interpreted this to mean “administer,” effectively limiting the role of third parties to monitoring and enforcement. This provision fails to recognize the experience, expertise and

financial resources that third parties such as land trusts, state and local governments can provide as potential program partners.

The Summary of Provisions and Request for Comment that proceeds the Interim Final Rule states that:

The GRP statute does not provide the Secretary the flexibility to offer easement applicants amounts lower than the fair market value less the grazing value, nor does the USDA have the authority to share with other third parties the cost of acquiring easements.⁸

Allowing third parties to cost-share on permanent easements, as is provided under FRPP, would enable USDA to leverage GRP funds and expand the potential reach of the program. For this reason, AFT urges USDA to seek authority from Congress that will allow, but not require, the Department to share the cost of acquiring permanent easements with third parties. This will enable USDA to leverage Federal funds with non-Federal funds in situations where it is appropriate. It will also increase the interest and role of third parties such as land trusts and state and local governments in GRP.

⁸ 69 Fed. Reg. 29178 (2004).