

Decker, Denise - Washington, DC

From: Mike Beam [mike@kla.org]
Sent: Monday, March 23, 2009 3:41 PM
To: RA.dcwashing2.grp
Subject: GRP interim rule comments by PORT
Attachments: PORT GRP interim rule comments-Final_03 23 09_.pdf

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Attached are comments, submitted on behalf of the Partnership of Rangeland Trusts (PORT), regarding the January 21, 2009 notice in the Federal Register for the Grassland Reserve Program interim final rule.

Please contact myself if you have any questions or problems opening this document.

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March 23, 2009

Easements Programs Division
Natural Resources Conservation Service
Grassland Reserve Program Comments
P.O. 2890, Room 6819-S
Washington, DC 20013

Subject: Grassland Reserve Program interim final rule, published January 21, 2006

Dear Sir or Madam:

These comments and suggestions, regarding the interim final rule for the Grassland Reserve Program (GRP), are submitted on behalf of the Partnership of Rangeland Trusts (PORT). PORT is an association of six (6) statewide, agriculturally oriented land trusts in California, Colorado, Oregon, Kansas, Texas and Wyoming. Land trust members of PORT focus their efforts on working with private ranchland owners to conserve working landscapes and economically viable ranches, primarily with the use of perpetual conservation easements. PORT members collectively hold and administer 279 conservation easements encompassing over 702,000 acres.

Background

GRP was originally proposed in 2001 as a joint effort of the National Cattlemen's Beef Association and The Nature Conservancy to create a new conservation initiative to designate USDA/NRCS funding for the purchase of development rights on privately owned working grasslands. The objective was to reimburse grassland owners, on a voluntary basis, for agreeing to encumber their property with a perpetual conservation easement that prohibited conversion of these lands to crop land or residential, commercial, or industrial development. Furthermore, it was proposed that participating landowners should have the option to transfer the ownership and administration of these NRCS funded conservation easements.

The 2002 Farm Bill launched the first GRP, which contained several provisions not envisioned in the original NCBA and TNC proposal. As expected, many owners of grazing lands applied for this program and funding was essentially exhausted in three years. PORT, and numerous cattle producer and conservation organizations, supported a continuation of this program as part of the Farm Security and Rural Investment Act of 2008.

GRP's future

GRP has successfully protected a significant number of acres and has provided financial assistance to landowners for agreeing to protect their grasslands for grazing purposes and for conserving plant and wildlife resources for future generations. PORT believes GRP can provide additional private and public benefits, especially with changes made to the GRP statute and with an administrative approach that is landowner friendly.

Section 1415.2-Administration

PORT is encouraged by several aspects of this section and commends the agency for authorizing state NRCS (and FSA) officials to “*determine how funds will be used and how the program will be implemented at the State level*” [1415.2 (a) (5)]. We also support the direction in 1415.2 (b) (2), allowing state officials to identify state priorities for project selection (with input from the State Technical Committee) and authority for states to develop ranking criteria, as provided in 1415.2 (b) (8). These provisions should allow local stakeholders to identify priorities for GRP funds, which is essential because of the diverse grassland protection needs throughout the United States.

Section 1415.3 - Definitions

The definition of *dedicated account* requires a separate account for the purposes of easement management, monitoring, and enforcement of conservation easements, which cannot be used for other purposes. This definition is referenced in Section 1415.17 (b) (5) as a requirement for an eligible entity entering into cooperative agreements to own, write, and enforce GRP funded conservation easements.

We agree it is appropriate and desirable for entities to have an adequate stewardship endowment fund to ensure they meet the perpetual management of conservation assignments they hold and administer. We suggest requiring a dedicated fund for certified entities for the express purpose of enforcement.

An additional requirement for eligible entities should be a sufficient annual budget allocation for annual *monitoring* and *administrative* functions for conservation easement management purposes. The agency has the ability to step in later, Section 1415.17 (e) (1), if the eligible entity is unable to fulfill its obligation to monitor and administrate the conservation easement agreement.

The definition of *enhancement* refers to the viability of grassland resources but fails to recognize the grazing values. The definition refers only to wildlife habitat, which is just one purpose of the program.

We believe the definition of *right of enforcement* is consistent with the statute and should limit the federal government's “vested property right”, which is referred later in this document.

Section 1415.4

Subsection (c) indicates participants may have to agree to and implement a *grazing management plan* and a *conservation plan*, when a participant receives ranking points for resource concerns other than grazing resources.

We contend the management issues for each plan are interdependent and requiring participants and grantees (NRCS or eligible entities) to develop and follow two separate “plans” adds complexity and confusion.

A preferable and more practicable approach would be to require the grazing management plan to incorporate specific conservation objectives if the application is accepted because of State priorities for local conservation needs. We want to stress that any management plan must be developed and agreed to by the grantor (landowner) and grantee (eligible entity or NRCS) prior to the closing of the conservation easement deed.

Furthermore, especially for lands encumbered with perpetual conservation easements, it may be necessary to modify or restructure management plans as environmental conditions and grassland management knowledge and opportunities develop in the future. As in the past, we suggest changes to the management plans are possible, provided they are modified by mutual consent between the landowner and entity managing the plan.

[PORT supports Section 1415.12 (b)]

Subsection (h) (6), limits “infrastructure development” along *existing* rights-of-ways, but appears to prohibit any development on *future* right-of-ways. With the push for increased renewable energy sources, landowners in our member states are experiencing significant interest (demands) for new electronic transmission corridors. These actions are beyond the control of private landowners. It would be our suggestion that NRCS, the grantor, and grantee (if an eligible entity) should have the ability to use discretion for future right-of-ways, especially “when it is determined to be in the public benefit and the grassland resources and related conservation values will not be adversely impacted”.

The list of easement prohibitions in this section [Section 1415.4 (i) (3)] includes “wind power facilities for off-farm power generation”. While we are not suggesting GRP conservation easements should allow for commercial wind energy structures, we want to emphasize there may be instances for the marketing of excess electricity generation from smaller wind turbines and other renewable energy structures such as Hydroelectric facilities and solar panels (designed for “on-farm” use) through “net-metering” or “parallel electricity generation”. NRCS should consider allowing such small scale use on GRP lands and allowing landowners to utilize the various renewable energy sources that are available as long as they do not adversely impact the Conservation Values.

Section 1415.5

The rule acknowledges that many lands have **split estates** with segregated mineral interests, yet have considerable resource values worthy of perpetual conservation. We support the language in Section 1415.5 (e) that does not automatically disallow GRP funding in these instances.

Section 1415.8

This section appears to give considerable flexibility to State officials, with input from the State Technical Committees, to establish ranking criteria. PORT is supportive of this approach as it allows for more strategic conservation efforts and recognizes there are diverse resource concerns for grasslands across the United States.

Section 1415.12

PORT questions how Section 1415.12(a) will be interpreted. We suggest that NRCS clarify that conservation easements may be amended, if such amendments clearly preserve or benefit the conservation values of the property. Most easements include an

amendment provision and amendments to conservation easements are necessary to ensure the perpetual protection of conserved lands. A strict no amendment standard may have adverse and unintended consequences in the future as management practices change and knowledge of proper resource management advances.

Section 1415.14

Subsection (b) (2) states NRCS has the right to enter upon conservation easement lands, “upon notification of the participant”. This is an important component that is critical for GRP acceptance to potential landowner participants. **We urge the agency to insert this language in all aspects of the rule, grazing management plans (or conservation plans), and conservation easement deed where access is contemplated.**

Section 1415.17

Again, we suggest changes to the requirement of a *dedicated account*. (Please refer to comments with regard to dedicated account above.)

PORT has questions, and possible concerns, with the suggested role of eligible entities requirement to monitor and enforce a grazing management plan or conservation plans referenced in Section 1415.17 (c) (10). Is it the responsibility of the eligible entity (grantee) or NRCS to develop these plans? If this is the role of NRCS, we suggest the eligible entity should have input into the plans if these entities are expected to monitor and enforce these documents.

We believe Section 1415.17 (c) (11) is consistent with the statutory language, and clearly allows the eligible entity to include a portion of the landowner’s qualified conservation contribution as the entity’s share of the cost to purchase the easement, required by Section 1415.17 (c) (14). The GRP statute explicitly states that the Secretary should “allow an eligible entity to “include a charitable donation... from the landowner [arising from their selling their easement at below fair market value] as part of the entity’s *share* of the cost to purchase an easement. PORT contends the statute does not require a *cash* match from the eligible entity if the landowner is willing to treat a portion of their bargain sale as the entity’s matching requirement. It’s important to note that eligible entities are providing a significant role in furthering the purpose of GRP by committing to *perpetually* monitoring and enforcing the terms of the conservation easement and management plans!

We also note that many states with considerable grassland resources do not have dedicated state resources for leveraging federal Farm and Ranch Protection Program funds. Let’s not inhibit GRP participation in areas of the country where local conservation easement purchase funds are limited or nonexistent.

The rule [Section 1415.17 (c) (13)] expressly disallows GRP funds for “expenditures such as appraisals, surveys, title insurance, legal fees, costs of easement monitoring, and other costs...” If GRP appropriations are used for these costs when a landowner chooses to assign their easement to NRCS, we contend it is appropriate for GRP funds to be used on at least a cost-share basis when a *qualified* eligible entity is conducting this administrative function under a *cooperative agreement*.

We have concerns with the reference in Section 1415.17 (e) (1) that the United States has a “vested interest in real property...” This provision will likely turn away landowners with properties that have considerable grazing land resource values. While we understand the statute states NRCS must maintain a “right of enforcement”, the statement regarding a “vested interest in real property” could provide a nexus for existing or future executive orders relating to lands of the United States (the endangered species act is one example). PORT would like to see the agency take an alternative approach to fulfill their interests in GRP lands.

Section 1415.18

In subsection (b) we suggest language be added to allow for periodic inspections *upon appropriate notice to the landowner*.

Our earlier reference to the definition of dedicated fund [Section 1415.18 (d) (5)] is also applicable in the instances where GRP conservation easements are transferred to an eligible entity.

Standard Easement Document

Because of the statutory changes to GRP, PORT suggests the agency’s easement template deed (used when a landowner/participant assigns a conservation easement to NRCS) should be modified and improved for landowner acceptance.

The contents of this document is critical, especially since it is an instrument that specifies what may and may not occur on the affected lands on a perpetual basis. **Therefore, we urge the agency to consider the following changes and submit a draft GRP-NRCS easement deed for public review and comment before sign-up begins.**

During the initial application period for GRP, we heard from several landowners about their concerns and objections to entering into perpetual agreements under a “take it or leave it” standard easement document. In many instances, landowner-applicants offered tracts of grazing lands that had a significant ecological value (as ranked at the state level) but later withdrew their application upon review of the standard easement document. We offer the following recommendations for changing or amending this document (NRCS-CPA-12/2004):

1. Prohibited activities (III, Permitted, Prohibited, Restricted and Reserved Activities E. Non-grassland land uses) – We urge NRCS to omit the language that prohibits “any activity that breaks the surface of the soil”. Taken literally, this provision could impair a landowner’s ability to step on his or her own property during wet conditions. We note the new statute (list of prohibitions in subsection (d) of Section 1238O) dropped language in the 2002 farm bill (subsection (b) of Section 3838o) that required a prohibition of activities that “disturb the surface of the land”. It’s our contention this was a deliberate and conscience action by Congress to refine the program in a manner to direct a more practical approach to grassland protection.

2. Prohibited activities (III, Permitted, Prohibited, Restricted and Reserved Activities H. Waste) – We question the need to require prior approval in writing for every instance of applying animal waste to property subject to a GRP easement. Proper use of animal waste as fertilizer could be addressed in the grazing management plan. Furthermore, EPA’s requirement for nutrient management plans offers adequate assurances that animal waste is applied in a manner that’s safe for the environment. Furthermore, fertilizer (including animal waste) is seldom applied on native grasslands.

3. Prohibited activities (III, Permitted, Prohibited, Restricted and Reserved Activities U. Utilities) – The first sentence of this provision prohibits the “installation or relocation of new public or private utilities, including electric, telephone, or other communications services”. This paragraph concludes, however, an allowance for “The installation, repair, and maintenance of underground utilities” if the Grantee determines the activities “will result in only a temporary disturbance to the surface”. In many instances grasslands desirable for GRP participation are in remote areas where future public utility access is unavoidable. While we support the prohibition of development, we suggest a total prohibition will only invite unnecessary conflicts between public utility interests, neighboring landowners, local and state governments, and GRP participants. Language that assures that any public utility access must be done in a manner that maintains the grassland and other conservation values is sufficient to preserve the objectives of the program.

4. Notices (VI General Terms, J. Notices) – It seems to be over-burdensome to require any notices (i.e. spread of animal waste as fertilizer) required by the easement deed to be in “writing and personally delivered or sent by certified, return receipt requested to Grantor and Grantee”. We suggest an electronic (email) correspondence is sufficient in most instances.

Thank you for considering these comments. Please don't hesitate to contact us if you have any questions or comments relating to these suggestions or other matters regarding GRP. We appreciate the agency's dedication to making GRP an effective conservation program, which will provide significant public benefits for future generations to come.

Sincerely,



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