

**Decker, Denise - Washington, DC**

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**From:** Mike Beam [mike@kla.org]  
**Sent:** Tuesday, March 17, 2009 2:44 PM  
**To:** RA.dcwashing2.frpp  
**Subject:** FRPP comments-Docket no. NRCS-IFR-08006  
**Attachments:** PORT FRPP interim rule comments \_03.17.09\_.pdf

Attached are comments regarding the FRPP interim final rule, provided by the Partnership of Rangeland Trusts.

Please let me know if you have any trouble receiving these comments.

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March 17, 2009

Easements Programs Division  
Natural Resources Conservation Service  
Farm and Ranch Lands Program Comments  
P.O. 2890, Room 6819-S  
Washington, DC 20013

Subject: **Docket Number NRCS-IFR-08006** (Comments on January 16, 2009 FRPP Interim Final Rule)

Dear Sirs:

The comments and suggestions of this letter 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.

The Farm and Ranchland Protection Program (FRPP) has been a tool for some of these conservation easement purchases, and we believe this program can be a significant boost in our efforts to conserve additional ranch lands. Our comments are intended to identify issues that will discourage landowner participation and impede our efforts to enroll lands that are strategically located to existing conservation priority areas in the western range and high plains area.

**Contingent Right of Enforcement vs. Vested Federal Property Interest:**

We contend Congress made deliberate and specific changes to FRPP when they amended and renewed this program with the passage of the Food, Conservation, and Energy Act of 2008 (Farm Bill). The preamble of the rule (page 2813) confirms the author(s) of the rule recognize the statutory changes clarify the new role of the federal government (NRCS) is to provide funding for conservation easements, versus acquiring a Federal interest in land. Furthermore we are encouraged the preamble notes the United States is no longer required to be named as a grantee on the FRPP funded conservation easement deed.

PORT is troubled, however, by the conclusion of NRCS that the United States will maintain a "vested real property right".

While Congress expects the federal government to maintain its ability to enforce the terms of a FRPP funded conservation easement if the grantee fails to do so, we believe this interpretation is contrary to Congressional intent and will create bureaucratic hurdles for responsible and experienced land trusts who partner with private landowners.

Potential landowner participants have, and may continue to receive, legal counsel advice that discourages their client (landowner) to enter into a perpetual conservation easement that includes two grantees...an eligible private land trust and the federal government. In many instances, PORT members enter into conservation easements with landowners who intend to transfer the encumbered land to the next generation of family members as a way of continuing the family farm and ranch business. Landowners who eventually assign a conservation easement to a private land trust (eligible entity) ultimately do so because they have confidence the land trust's future officers and staff will administer the conservation easement in a manner consistent with the terms of the agreement, which is a negotiated instrument between them and the land trust (grantee). Inheriting a second grantee, the federal government, will give most grantors pause and concern because they will be saddling their heirs with the ever-changing philosophies and interpretations by future governmental officials.

We encourage the agency to revisit this interpretation, and seek alternative avenues for fulfilling the "contingent right of enforcement" without claiming a "vested real property right".

**Eligible lands:**

PORT has concerns with Section 1491.4 (f) (1) that requires eligible land to "contain at least 50% prime, unique, Statewide, or locally important farmland..." We contend Congress made it clear, in Section 1238I (b), that FRPP is now for the purpose of protecting the agricultural use and related conservation values, in lieu of the previous purpose of protecting specific classes of prime, productive soils. We do support the language that allows the State Conservationists flexibility of designating agricultural lands important for protection and eligible for FRPP funding.

We find Section 1491 (f) (8) confusing, especially as it references the suitability condition of parcels that may be associated with current or planned highway or utility corridors. It's our contention that agricultural land, with sufficient resource values, located adjacent to utility corridors should not be ineligible for FRPP funding. 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. We urge the agency to exercise considerable discretion when determining on-site and off-site conditions for land eligibility in these instances.

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 new provision (Section 1491.4(f) (9) that does not automatically disallow FRPP participation in these instances.

**Eligible entities:**

Section 1491.4 (d) (5) requires a qualified non-governmental organization to have a “dedicated fund for the purposes of easement management, monitoring, and enforcement where such a fund is sufficiently capitalized in accordance with NRCS standards.” It is appropriate and desirable for entities to have an adequate stewardship endowment fund to assure they can meet the perpetual management of conservation assignments they hold and administer. In some instances, however, these restricted funds are designated solely for enforcement purposes. The conservation monitoring and management functions may be addressed separately in the organization’s operational budget. We suggest a change to clarify the dedicated fund be a necessary requirement for certified entities, but the uses of this fund is in place for enforcement purposes and the entities have a sufficient annual budget designation for annual monitoring and administrative functions for conservation easement management purposes.

**National criteria for ranking applications:**

We have concern with the provisions in Section 1491.6 that require the State Conservationist to utilize at least half of the national criteria in its state ranking system score. If states are forced to consider population density and growth as factors in ranking, it could make it difficult for land with a high resource value to compete with smaller tracts in the midst of higher populated areas. We suggest the agency deemphasize the use of national criteria, especially the requirement that it be at least 50% of the overall ranking system.

**State criteria for ranking applications:**

If the agency omits the specific national ranking criteria, we suggest the “proximity of the parcel to other protected land”, Section 1491.6 (f) (7), be included in the state criteria list. This criterion is helpful as our landowner clients attempt to strategically use FRPP in our conservation priority areas for multi-landowner projects.

The suggested state criterion for private land access is troubling, as it is not the purpose of FRPP to provide recreational opportunities for the public. We don’t believe proposals should compete with applications that intend to provide public access. We realize this is a state option, but ask the agency to omit this criterion.

**Funding:**

PORT acknowledges the changes in the matching requirements (Section 1491.21) by the participating entity, and views these changes as a welcome improvement from the previous rule. We note, however, the statute suggests the landowner contribution may be considered a portion of the participating entity’s 25% match. Section 1238I (3) (B) states “As part of the non-Federal share of the cost of purchasing a conservation easement or other interest in eligible land, an eligible entity may include a charitable donation or qualified conservation contribution (as defined by section 170(h) of the Internal Revenue Code of 1986) from the private landowner from which the conservation easement or other interest in land will be purchased.

We have advocated that many grantors are willing to donate a large portion of the value of the conservation easement if FRPP funds could provide some compensation for agreeing to a perpetual conservation easement that fits the purposes of the program.

For example, a grantor (landowner) may be willing to donate (assign) a conservation easement to a qualified entity (grantee) that has an appraised value of \$800,000 in exchange for \$300,000 in FRPP funds. Furthermore, the grantor is willing to consider a portion of his/her donation as the entity's conservation contribution. The qualified entity, that is an accomplished and qualified land trust, agrees to conduct the expensive and time-consuming due diligence to prepare the application and agrees to monitor, administer and enforce the conservation easement for perpetuity. We contend, in this instance, the qualified entity (grantee) should not be required to produce the 25% matching contribution. We encourage the agency to consider this exception to requiring a 25% cash match for bargain sales when less than 50% of the conservation easement value is provided by NRCS.

Thank you for considering our comments. Please let us know if we can provide additional information as the agency moves forward with this important conservation program.

Sincerely,



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