

Decker, Denise - Washington, DC

From: Nancy Everhart [neverhart@vhcb.org]
Sent: Monday, March 16, 2009 2:44 PM
To: RA.dcwashing2.frpp
Subject: VT Housing & Conservation Board comments on FRPP Interim Final Rule
Attachments: VHCB comments on Jan.16.2009 FRPP rule.pdf

279

Please accept the attached comments from the VT Housing & Conservation Board on the Jan. 16, 2009 Interim Final Rule regarding FRPP. We would appreciate an acknowledgment that you have received our comments.

Thank you,

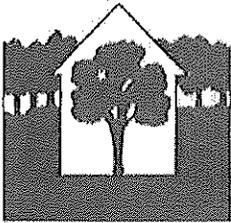
Nancy Everhart
VHCB

Nancy Everhart, Conservation Director
Vermont Housing & Conservation Board
58 E. State Street
Montpelier, VT 05602
802-828-5066
fax: 802-828-3203

Please update your contact information. Our office has moved (new address is above).

**Vermont
Housing &
Conservation
Board**

March 16, 2009



58 East State Street
Montpelier
Vermont 05602

TEL 802 828 3250
FAX 802 828 3203
WEB www.vhcb.org

Board of Directors

Christine H. Hart
Chair
Thomas G. Weaver
Vice Chair
Roger Allbee
Sarah E. Carpenter
Kevin L. Dorn
John T. Ewing
Roy Folsom
G. Kenneth Perine
Jonathan L. Wood

Gustave Seelig
Executive Director

Easement Programs Division
Room 6819-S
Natural Resources Conservation Service
US Department of Agriculture
PO Box 2890
Washington, DC 20013-2890

RE: Comments on the Farm and Ranch Lands Program Interim Final Rule

Friends,

Please accept the attached comments from the Vermont Housing & Conservation Board regarding the Farm and Ranch Lands Protection Program (FRPP) Interim Final Rule (Docket Number NRCS-IFR-08006) as published on January 16, 2009. As a long-time partner with NRCS in implementing FRPP in Vermont, we appreciate the opportunity to comment, and hope that our thoughts will be considered as NRCS revises the rule.

We welcome any questions you might have about our comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gustave Seelig".

Gustave Seelig
Executive Director

Vermont Housing & Conservation Board Comments

On the Interim Final Rule for the

Farm and Ranch Lands Protection Program

Docket Number NRCS-IFR-08006

Page | 2

Introduction

The 2008 Farm Bill made substantial changes to the Farm and Ranchland Protection Program (FRPP). The purpose of the program was changed from protecting topsoil to facilitating and providing funding for the purchase of conservation easements. A certification process was established to give eligible entities that met certain criteria longer agreements, and presumably more responsibility and flexibility, in carrying out the purposes of the program. Congress also broadened the definition of forestland, and included a new criteria for eligible land (land "the protection of which will further a State or local policy consistent with the purposes of the program.") Although the goal of Congress was to make the program more flexible and less bureaucratic, the Interim Final Rule, published in the last days of the Bush Administration, does not fulfill this congressional intent. The change in purpose makes it clear that the federal government is no longer buying an interest in land, but the rules still require duplicative and burdensome NRCS oversight for both certified and eligible entities. The rule fails to establish a meaningful certification process that would relieve overtaxed NRCS staff of unnecessary administrative burdens, and give qualifying, established programs the ability to accomplish FRPP goals in the manner most appropriate to that state or region.

Vermont has been working in partnership with the federal government on farmland conservation for 18 years. Vermont was the pilot state for the federal Farms for the Future program in the 1990s (the precursor of FRPP). The Vermont Farmland Conservation program, administered by the Vermont Housing & Conservation Board, received a clean GAO audit of the Farms for the Future program in 1994. Our strong partnership with the state NRCS office over many years has resulted in the conservation of almost 47,000 acres of farmland using FRPP funds and over 200 farm projects. Vermont's co-holder stewardship model of partnership with well-established land trusts such as the Vermont Land Trust and the Upper Valley Land Trust as well as the state Agency of Agriculture, Food & Markets, ensures that three established and capable organizations hold, steward and enforce each farm easement.

Since the promulgation of the 2006 FRPP Interim Final Rule, VHCB staff has observed our state NRCS partners increasingly burdened with responsibilities regarding FRPP, with no accompanying increase in the staff necessary to fulfill these duties. We urge NRCS to rewrite these rules to reflect the intent of Congress, to streamline the program by giving eligible entities that can demonstrate capacity and capability the authority and ability to carry out the purposes of the program as true NRCS partners.

Contingent Right of Enforcement

The Natural Resources Conservation Service ("NRCS") and the Office of General Counsel ("OGC") should conclude that the right of enforcement is **not a vested property right** subject to the Department of Justice Title Standards 2001 ("DOJ Title Standards") and that NRCS and OGC have the legal and programmatic discretion to require a more rigorous level of review for recipients of Farm and Ranch Lands Protection Program ("FRPP") funds which are not certified entities under 1491.4(d) of the Interim Final Rule ("IFR").

Page | 3

Section 1238I (f)(2) of the Food, Conservation and Energy Security Act of 2008 ("2008 Farm Bill") on FRPP instructs the Secretary to "... require the inclusion of a contingent right of enforcement for the Secretary in the terms of the conservation easement ... " However, the Joint Statement of Managers accompanying the conference report states that the Managers "do not intend this right to be considered an acquisition of real property, but in the event an easement cannot be enforced by the eligible entity, the Federal Government shall ensure the easement remains in force." After the enactment of the 2008 Farm Bill, working with American Farmland Trust ("AFT"), Senators Tim Holden and Patrick Leahy wrote to NRCS and provided legal arguments which show that NRCS has the discretion to conclude that a statutorily-mandated contingent right does not rise to the level of a federal property interest. See Letter to Secretary Edward T. Schafer from Senator Patrick Leahy and Senator Tim Holden dated October 23, 2009 ("Leahy/Holden Letter"), attached hereto as **Exhibit A** .

The Vermont Housing and Conservation Board ("VHCB") does not need to repeat the legal arguments in the Leahy/Holden Letter and in American Farmland Trust ("AFT") comments on this IFR dated March 9, 2009. However, VHCB proposes that NRCS can and should reconcile any ambiguous language in the law with the unambiguous language on the intent of Congress in the Joint Statement of Managers. This would make NRCS policy and practice fully consistent with the other FRPP sections of the 2008 Farm Bill while leaving NRCS the discretion to require a higher level of scrutiny for inexperienced Eligible Entities but not for well established, certified programs.

So, for the State of Vermont, VHCB asks that NRCS return to the policy and procedure in effect before the 2006 Interim Final Rule, meaning that FRPP conservation easements can include language which satisfies Section 1238I (f) (2) but such language does not trigger the DOJ Title Standards. Or, in the alternative, NRCS could interpret Section 1238I (f) (2) to allow Eligible Entities to propose alternative means of insuring that FRPP easements are enforced in perpetuity, including the structure used in Vermont where co-holders will steward and enforce FRPP easements if VHCB is unable to do so.

VHCB believes that **certified** farmland protection programs have sufficient legal protections to protect the investments of federal, state, county and local government in this nation's important farmland. And, as VHCB has said on countless occasions, additional title and other reviews by NRCS and OGC just do not add significant value to justify the cost, delay and inconvenience. Federal agencies doing business in Vermont do not have adequate staff to complete all their important work; for FRPP, NRCS has an opportunity to reduce the workload of NRCS and OGC with no significant risk to the government investment or stewardship of farms and farmland. So, where a certified Eligible Entity can demonstrate that it does excellent due diligence, it seems to make sense to forego duplicative review. On the other hand, for young land trusts just beginning to protect agricultural land and new state farmland protection programs, it may be prudent for NRCS and OGC to require a higher level of title and conservation easement review.

If NRCS and OGC used the certification process to decide the level of legal review necessary, such action would also give appropriate deference to these new sections of FRPP law :

`(b) Farmland Protection- Section 1238I of the Food Security Act of 1985 (16 U.S.C. 3838i) is amended to read as follows:

(a) Establishment- The Secretary shall establish and carry out a farmland protection program under which the Secretary shall facilitate and provide funding for the purchase of conservation easements or other interests in eligible land.

`(b) Purpose- The purpose of the program is to protect the agricultural use and related conservation values of eligible land by limiting nonagricultural uses of that land.

`(c) Cost-Share Assistance-

`(1) PROVISION OF ASSISTANCE- The Secretary shall provide cost-share assistance to eligible entities for purchasing a conservation easement or other interest in eligible land.

...

(g) Agreements With Eligible Entities-

`(4) MINIMUM REQUIREMENTS- An eligible entity shall be authorized to use its own terms and conditions, as approved by the Secretary, for conservation easements ... [if they]--

`(A) are consistent with the purposes of the program;

`(B) permit effective enforcement of the conservation purposes of such easements or other interests; and

`(C) include a limit on the impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted.

Recommendation:

- Harmonize the letter and intent of the law by concluding that Section 1238I (f) (2) does not require USDA to treat the right of enforcement as a real property right which triggers the DOJ Title Standards. In its discretion, NRCS could still require full legal, appraisal and easement review and approval for non-certified eligible entities.

- As part of the certification of experienced and productive programs like Vermont's, revert to the approach used before the 2006 Interim Final Rule, meaning that FRPP conservation easements can include a Contingent Right of Enforcement that does not trigger the DOJ Title Standards; **OR**
- Allow certified programs to use equally effective models of enforcement so that if an eligible entity is no longer able to enforce, another equally qualified entity with a farmland easement stewardship program could do so. For example, in Vermont one of VHCB's co-holders could enforce the easement if VHCB is unable to do so.

Eligible Entity Certification

We understood that the goal of certifying eligible entities was to give NRCS a process to ensure that partners were fully eligible and capable of carrying out the requirements of the FRPP program, and that, once certified, the administrative burden on NRCS would be reduced by allowing the certified eligible entities to administer, monitor and enforce easements and otherwise ensure that FRPP funds are spent appropriately and in a timely manner on eligible lands. In the Interim Final Rule certification appears to provide no advantage whatsoever for an eligible entity other than the possibility of five-year Cooperative Agreements (as compared to either a three year or a five year Cooperative Agreement for eligible entities that are not certified). Furthermore, the only criteria to achieve certification that are different than those needed for all eligible entities are experience enrolling parcels of land in FRPP, and the timeliness of completing easement acquisition. While we understand that closing on easement purchases and requisitioning FRPP funds in a timely manner are important, and have been identified by auditors as issues, it is often the FRPP rules that slow down the process. For example, in Vermont, NRCS technical appraisal reviews have taken as long as seven months to complete. Requiring state NRCS staff, who are already overburdened by other program responsibilities, to also review each closing packet and all documents prior to sending it to OGC, where legal staff review each document, adds to the time it takes to close. Requiring NRCS staff to review final title insurance policies, which have already been reviewed by legal staff at our partner organizations, prior to sending them to OGC for yet another review, all prior to submitting our requisitions for payment to the Commodity Credit Corporation (CCC), adds to the time it takes to process requisitions in a timely way.

As mentioned above in the discussion regarding the contingent right of enforcement and the change in the FRPP purposes, for certified eligible entities especially, we do not believe that NRCS needs to:

- Conduct appraisal reviews
- Ask OGC to review each easement deed and title insurance policy

The administrative burden of FRPP on state NRCS personnel continues to grow, without the needed resources to manage the work.

Recommendation:

- Develop a meaningful certification program for certified entities that would give them the authority, assuming they met the certification standards and periodic program evaluations, to conduct their own appraisal and title reviews, use their own project selection criteria and process, and their own template easement deed.
- In states with multiple easement holders (such as Vermont), NRCS could choose to waive the contingent right of enforcement language altogether, since three separate parties already have an obligation to enforce the easement terms.
- The certification program should include standards other than speed of easement acquisition, to ensure that certified entities are fully capable of administering the requirements of the program without constant oversight from NRCS, thereby relieving NRCS staff of unnecessary and duplicative work. NRCS could still review projects on an individual basis for entities that do not meet the certification standards.
- Certification standards in addition to those listed in the rule regarding monitoring, enforcement, FRPP experience and having a dedicated stewardship fund could include:
 - documentation of policies and procedures regarding project selection criteria that are compatible with FRPP goals;
 - documentation of appropriate legal capacity to review title and other closing documents;
 - documentation of appropriate financial systems to track and use FRPP funds as required;
 - proven track record of successful partnerships with other governmental and non-profit organizations as a part of achieving FRPP goals.

Treatment of Forested Land

The rule includes as eligible land forest land “that contributes to the economic viability of an agricultural operation or serves as a buffer to protect an agricultural operation from development” (language that is taken directly from the statute). However, the rule also stipulates that FRPP easements “must not include forest land of greater than two-thirds of the easement area,” and further requires that “forest land that exceeds the greater of 10 acres or 10 percent of the easement area shall have a forest management plan before closing.”

In Vermont, the definition of agriculture specifically includes the cultivation of Christmas trees and maple sap, and the production of maple syrup. Vermont farms often include significant wooded acreage, which could involve both a sugarbush that is a vital part of the farm operation and income, as well as forestland periodically harvested for lumber, which also provides another revenue stream for the farm. In some cases, the percentage of woodland exceeds 67% -- and the rule provides no flexibility. The effect of this requirement in Vermont has been, and will continue to be if it is not changed, to contribute to the parcelization and fragmentation of Vermont’s working landscape. Farmers who wish to conserve their lands using FRPP funds must exclude wooded lands beyond 67% of the easement area, leaving those parcels unprotected, and at risk of subdivision. Even if not developed, small parcels of forested land are difficult to manage and harvest efficiently.

Vermont farmland conservation easements require a forest management plan prior to a commercial harvest, and Vermont's Use Value Appraisal Program requires a forest management plan, updated every 10 years, if the farm has more than 25 acres of wooded land (that is not an active sugarbush). Most conserved farms are also enrolled in the Use Value Appraisal Program; if not, the easement requires a forest management plan prior to any commercial harvest. The new FRPP requirement for a forest management plan prior to closing is unnecessary. It is not clear to what standards the forest management plan would be written, but if different than the Use Value Appraisal program and the easement requirements, it would be an additional burden for the farmer. Neither NRCS nor any other partners have the resources to write additional forest management plans – this burden would fall squarely on farmers, who would have to pay qualified foresters to write them, and then the administrative burden of reviewing them would presumably fall on NRCS staff, who are already swamped with other responsibilities. Requiring that the plans be submitted prior to closing will add to the already lengthy list of closing requirements, making it that much more difficult for both landowners and NRCS' partners to access FRPP funds.

Page | 7

VHCB does not believe that Congress intended to require forest management plans, or to increase NRCS oversight (and administrative burden) over forested land in FRPP easements, by adding language expanding forest land eligibility. Rather, we believe that Congress intended to broaden the definition to allow states more flexibility in developing criteria suited to the agricultural operations specific to their locations. In the Northeast, particularly New England, where farms typically include forested land as a part of the working landscape, including wooded land in easements may make sense; in other parts of the country, the situation may be entirely different.

Recommendation:

- Delete the maximum forest land acreage, and the forest management plan requirement.
- Instead, direct state NRCS offices, working with the State Technical Committees (or the FRPP Subcommittee), to develop guidelines regarding forest land inclusion in FRPP-funded easements.

If NRCS continues to feel that forest land eligibility must be documented, the state conservationists, with advice from the State Technical Committee, can adopt eligibility determinations that provide some flexibility, that might include, for example, proof of the land's enrollment in a state's use value program, receipts from a maple syrup operation, or an existing forest management plan.

Eligible land issues

The rule retains the existing FRPP program requirement that at least 50% of the soils on the parcel be prime, unique, statewide or locally important farmland, unless otherwise determined by the State Conservationist. The rule also contains the new statutory language allowing land to be eligible if it "furthers a State or local policy consistent with the purposes of the program."

VHCB staff believes that Congress inserted this new language to give states the flexibility to recognize as eligible land with resource values compatible with agriculture that might be unrelated to soil quality. For example, lands that contribute to watershed protection and to water supply, or that provide a link to other conserved lands, establishing blocks of protected lands, might enhance the agricultural protection – and overall conservation benefits -- of a parcel, even if they do not contain ranked agricultural soils. Since the rule does not include an explicit definition of “a State or local policy consistent with the purposes of the program”, VHCB assumes that state NRCS offices will have the ability to make this determination.

Recommendation:

- **Give NRCS State Conservationists, with input from the State Technical Committee and FRPP partner organizations, the ability to decide what lands might “further the definition of State or local policy consistent with the program.”**

National Ranking criteria and proposal selection process

Section 1491.6 outlines specific national criteria for scoring and ranking pending offers, although the 2008 Act does not mention the need for such a process. VHCB recommends that for eligible entities that achieve a meaningful certification status, as recommended above, that the selection process be delegated to those certified entities. This would relieve already overburdened NRCS staff and streamline the process, and would allow NRCS to truly “facilitate and provide funding for the purchase of conservation easements”, as specified in the revised statutory purpose of the program. That way, well-established state and local farmland conservation programs could rank projects according to state and/or local goals and objectives, reflecting the agricultural uses and other conservation values in that state or local area. If NRCS receives applications from both certified and non-certified eligible entities in some states, and needs to compare projects, VHCB recommends that NRCS develop broad categories of ranking considerations for certified entities to address, leaving the specifics to those entities.

Impervious surfaces

The 2008 Act requires that eligible entities: “include a limit on the impervious surfaces to be allowed that is consistent with the agricultural activities to be conducted.” With this language, VHCB expected that NRCS would direct certified eligible entities and/or state NRCS offices to adopt policy on impervious surfaces that made sense in that state. Instead, Section 1491.22 (i) of the rule maintains the requirement that impervious surfaces shall not exceed two percent of FRPP easement area, allowing the State Conservationist to waive this limitation on a parcel by parcel basis to up to ten percent. This rule does not follow the intent of the statute: to give state programs and certified entities the discretion to adopt appropriate impervious surface

limits that reflect the realities of agricultural uses in their locations. For example, in Vermont, we have seen an increase in the number of small, intensive vegetable operations interested in selling development rights. These farms typically include multiple greenhouses, as farmers strive to extend Vermont's short growing season, and respond to the strong demand for year-round local food. Even in Vermont, farmers are experimenting with new ways to grow cool season crops through the winter in unheated greenhouses. Although most greenhouses are used to grow produce in the ground (meaning that the soil itself is still available and used for agriculture), they still count as impervious surfaces, since the plastic covers are indeed impervious. The goal of Vermont's Farmland Conservation Program is to protect good agricultural land that will remain in active and economically viable agricultural use. In some cases, limiting impervious surfaces to 2% may limit farmers' ability to have a profitable, viable operation.

Recommendation:

- **Require certified and eligible entities to adopt policy regarding impervious surfaces that is consistent with the agricultural activities to be conducted, and to include these limits in their easements.**

Congress of the United States

Washington, DC 20515

October 23, 2008

The Honorable Ed Schafer
United States Department of Agriculture
Washington, DC

Re: Applicability of Title Standards 2001 to
Farm and Ranch Lands Protection Program

Dear Mr. Secretary:

We are writing to spell out the legislative intent behind Section 1238I (f)(2) of the Food, Conservation and Energy Security Act of 2008 (the "2008 Farm Bill"), which provides for a contingent right of enforcement to be included in conservation easements funded under the Farmland Protection Program ("FPP"). As explained below, a contingent right of enforcement under FPP would not constitute the federal acquisition of an interest in land, and, therefore, a title review would not be required.

Relevant Statutory Provisions

The relevant provisions under Section 1238I are as follows:

Section 1238I (a): "Establishment – The Secretary shall establish and carry out a farmland protection program under which *the Secretary shall facilitate and provide funding for the purchase of conservation easements or other interests in eligible land.*"

Section 1238I (c)(1): "Provision of Assistance. – The Secretary shall provide *cost-share assistance to eligible entities for purchasing a conservation easement or other interest in eligible land.*"

Section 1238I (f)(2): "Contingent Right of Enforcement. – The Secretary shall require the inclusion of *a contingent right of enforcement for the Secretary in the terms of a conservation easement or other interest in eligible land that is purchased using cost share assistance provided under the program.*" [Emphasis added.]

USDA Interpretation of Relevant Statutory Provisions

In a meeting held on Thursday, September 25, 2008, USDA officials indicated to staff members from the House and Senate Agriculture Committees that USDA's preliminary interpretation of the provisions of the Farm Bill relating to FPP was that acquisition of a contingent right of enforcement would be equivalent to the acquisition of an interest in real property on the part of the Secretary. As a result, multiple title reviews would continue to be required in FPP.

Nature of Interest Acquired

The contingent right of enforcement provided for in the 2008 Farm Bill was not intended to amount to the acquisition of an interest in real property on the part of the Secretary, and thus these transactions would not be subjected to the cumbersome and time-consuming procedures required to be followed under 40 U.S.C. 3111 and the Department of Justice Title Standards 2001. In fact, Title Standards 2001 specifies the land acquisitions covered: "Interests in land covered by these Standards include fee simple title, easements, leases which have a term of more than thirty years, and restrictions or covenants." Each of these interests is distinct from a contingent right of enforcement.

This interpretation is supported by real property law, the Joint Explanatory Statement for this legislation, an examination of the prior law changed by this legislation, and an examination of other federal conservation easement acquisition programs.

A contingent right granting the Secretary legal standing to enforce a conservation easement in the event that the holder of the easement fails to enforce it must be distinguished from a provision which automatically and permanently vests title of the easement to the Secretary in the event of a failure to enforce. The latter is an executory interest, a recognized interest in real property. The former is not.

A majority of state laws do not provide, nor support an interpretation, that the contingent right of enforcement is a property interest as that term is used in Title Standards 2001. "[Property interests] are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law."¹ State conservation easement laws define certain interests and rights in conservation easements including the contingent right of enforcement envisioned by Section 12381 of the 2008 Farm Bill. Twenty-four states and territories have adopted the Uniform Conservation Easement Act (1981) ("UCEA") which distinguishes between a property interest and a right of enforcement.² With language similar to the UCEA, the enabling statutes of an additional six states codify the third-party right of enforcement, but do not provide

¹ *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980).

² Alabama, Alaska, Arizona, Arkansas, Delaware, District of Columbia, Idaho, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oregon, South Carolina, South Dakota, Texas, U.S. Virgin Islands, Virginia, West Virginia, Wisconsin, Wyoming.

that such right is a property interest.³ The remaining states with conservation easement enabling statutes do not specifically provide for or deny a third-party right of enforcement.⁴

Under the UCEA, the holder of a conservation easement is explicitly granted a property interest. A "conservation easement" is defined as a "nonpossessory interest of a holder in real property imposing limitations or affirmative obligations..." In the case of the Farmland Protection Program, the "holder" is the eligible entity, not the Secretary"

A contingent right of enforcement, however, is not defined as a property interest. A "third party right of enforcement," as the contingent right is called in the UCEA, is "a right provided in a conservation easement to enforce any of its terms granted to [an entity] which...is not a holder" (emphasis added). This right gives the third party standing to seek judicial action to enforce the terms of the conservation easement.⁵ This right does not entitle the third party to become the holder of the conservation easement.

The UCEA also notes that a "person authorized by other law" shall also have standing to seek judicial action to enforce the terms of a conservation easement.⁶ This generally refers to the state's attorney general, who has standing to enforce conservation easements as the supervisor of charitable trusts.⁷ A state attorney general is not deemed to hold a property interest, but rather has a right that derives from its powers as protector of the community interest to enforce the terms of a conservation easement when not enforced by the landowner or holder.

The contingent right of enforcement is analogous to the standing acknowledged to exist with a state attorney general. We do not believe that, nor did we intend that, a grant of a contingent right of enforcement amounts to an acquisition of a property interest as contemplated by the Title Standards 2001. It provides for the right to ensure that the terms of the easement are upheld by the parties charged with executing the easement.

Legislative History

The original version of the Farm Bill passed by the House and the original version of the Farm Bill passed by the Senate each contain language that makes it clear that the intent of both houses of Congress was to modify the Farmland Protection Program to eliminate the requirement that easement acquisitions under this program be subject to the procedures applicable to acquisitions of real property by the Federal government.

³ Florida, Georgia, Louisiana, New York, Pennsylvania, and Tennessee.

⁴ California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Rhode Island, Utah, Vermont and Washington. Of note, in the context of a state agency's rights in an easement other than as holder, the statute specifically provides that such right "is not an interest in real property." See Ohio Rev. Code. Ann. Sec. 5301.81 (2004).

⁵ Section 3(a)(3) of Uniform Conservation Easement Act (1981).

⁶ Section 3(a)(4) of Uniform Conservation Easement Act (1981).

⁷ See Comment to Section 3 of the UCEA.

House Bill 2419 provided in pertinent part as follows:

(c) FEDERAL CONTINGENT RIGHT OF ENFORCEMENT. – The Secretary may require the inclusion of a Federal contingent right or executory limitation in a conservation easement or other interest in land for conservation purposes purchased with Federal funds provided under the program, in order to enforce the easement as a party of last resort. The inclusion of such a right or interest shall not be considered to be the Federal acquisition of real property and the Federal standards and procedures for land acquisition shall not apply to the inclusion of the right or interest.⁸

Similarly, the Senate Bill 2302 provided:

(d) Protection of Federal Investment –

(1) IN GENERAL – The Secretary shall ensure that the terms of an easement acquired by the eligible entity provides protection for the Federal investment through an executory limitation by the Federal government.

(2) RELATIONSHIP TO FEDERAL ACQUISITION OF REAL PROPERTY – The inclusion of a Federal executory limitation described in paragraph 1 shall –

(A) not be considered the Federal acquisition of real property; and

(B) not trigger any Federal appraisal or other real property requirements, including the Federal standards and procedures for land acquisition...⁹

Both versions of the bill passed by each respective chamber, specifically provided for the inclusion in FPP easements of an executory limitation in favor of the Federal government. Because an executory limitation is clearly recognized as an interest in real property, in order to ensure that the procedures for Federal land acquisitions would not apply, both versions of the bill had to specifically provide that the inclusion of such an interest in an FPP-funded easement was not to be considered a Federal acquisition of real property

The House bill differed from the Senate bill in that in addition to providing for the acquisition of an executory limitation, it provided in the alternative for the acquisition of a contingent right. The final 2008 Farm Bill adopted the alternative approach provided for in the

House bill precisely because the Federal land acquisition procedures would not be applicable if only a contingent right was being acquired. The final bill eliminated any reference at all to the

⁸ Farm, Nutrition, and Bioenergy Act of 2007, H.R.2419, 110th Cong. Sec. 12381(e) (2008).

⁹ Food and Energy Security Act of 2007, S.2302, 110th Cong. Sec. 2371(d) (2008).

acquisition of an executory limitation. Instead, it provided exclusively for the acquisition of a Federal "contingent right of enforcement."

The language in each of the two bills that specifically stated that the acquisition of the Federal interest in the easement was not to be considered an acquisition of real property was accordingly dropped from the final bill. This was done not because Congress intended for Federal land acquisition procedures to apply to acquisitions of contingent rights, but rather because that language was no longer necessary; instead of acquiring an interest that would otherwise be considered a real property interest--an executory interest--the Federal government would now be acquiring a mere contingent right, a right not considered an interest in real property in any context.

Joint Explanatory Statement

The conference report on this legislation also supports this interpretation. The Managers on the part of the House and the Senate issued the Joint Explanatory Statement of the Committee on Conference¹⁰. Under Title II "Conservation", the Managers note specifically that the Secretary shall not acquire property or property interest under the legislation.

"(19) Farm and Ranchland Protection Program (Section 1238I of FSA).

.....
The House bill provides for the Federal Government to retain a Federal contingent right of enforcement or executory limitation in an easement to ensure its enforcement. This right is not considered an acquisition of property.

.....
The substitute provides for the Federal Government to retain a Federal contingent right of enforcement in an easement to ensure its enforcement. *The Managers do not intend this right to be considered to be an acquisition of real property, but in the event an easement cannot be enforced by the eligible entity the Federal Government shall ensure the easement remains in force.* (Section 2401 of Conference substitute)" [Emphasis added.]

The Joint Explanatory Statement was prepared concurrently with the legislation.

2002 Farm Bill

The committee's intent to streamline the FPP by eliminating the requirements applicable to federal acquisitions of real property is also clear when one compares the provisions in the prior farm bill applicable to this program with the new legislation.

The new law specifically revised similar provisions in the Farm Security and Rural Investment Act of 2002 (the "2002 Farm Bill") related to the FPP, which suggest an acquisition of interest by the Secretary. Section 12381 (a) of the 2002 Farm Bill reads:

"In General. – The Secretary, acting through the Natural Resources Conservation Service, shall establish and carry out a farmland protection program under which *the Secretary*

¹⁰ Joint Explanatory Statement of the Committee on Agriculture on Conference, H.R. 2419, 110th Congress

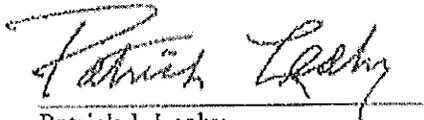
shall purchase conservation easements or other interests in eligible land that is subject to a pending offer from an eligible entity for the purpose of protecting topsoil by limiting nonagricultural uses of the land." [Emphasis added.]

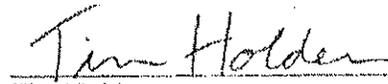
Since the 2008 Farm Bill specifically removed the reference of the Secretary purchasing easements and substituted language that says the Secretary is to facilitate and provide funding for the purchase of easements by an eligible entity, it is clear that Congress did not intend for the program to involve a federal acquisition of real property.

Conclusion

In light of the foregoing, we respectfully request that USDA reconsiders its interpretation of the provisions of the 2008 Farm Bill relating to a contingent right of enforcement so as to clarify that consistent with the Committee's intent, the acquisition of such a contingent right does not constitute the acquisition of an interest in real property for purposes of Title Standards 2001.

Very truly yours,


Patrick J. Leahy
United States Senator


Tim Holden
United States Representative