KANSAS LIVESTOCK ASSOCIATION

Since 1894

July 20, 2004

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

Re: Kansas Livestock Association comments and recommendations regarding USDA's Grassland Reserve Program and the interim final rule published May 21, 2004 in the Federal Register (Pages 29173-29187).

Dear USDA Personnel:

This letter, and list of concerns and suggestions, are comments of the Kansas Livestock Association (KLA) regarding the status and direction of the Grassland Reserve Program (GRP) and the interim final rule.

Background:
In recent years, ranchers and conservation groups in the western states have become increasingly concerned about the rapid conversion of open-space grasslands and working cattle ranches to commercial and residential development, "ranchettes," suburban shopping centers and other land uses that alter the landscape and erode the local farming and ranching land base. In response to these land conversion threats, local ranch owners and state cattlemen's associations have formed non-profit land trusts to facilitate, hold and administer conservation easements from landowners who desire to donate or sell their development rights and permanently preserve the ranch land resource.

Three years ago, volunteer KLA leaders formed an entity called the Kansas Livestock Association Ranchland Trust (KLA-RT). The purpose of this new organization is to "preserve the Kansas ranching heritage and open spaces for future generations through the conservation of working landscapes." Ranchers and landowners supporting this organization believe the vast acres of open-spaced ranch lands of Kansas will be under more intense developmental pressure in the future. While the federal tax code provides financial benefits for donated conservation easements, most farm and ranch owners have modest incomes to offset any federal tax incentives and are more likely to permanently restrict development on their land if appropriately compensated.

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History of GRP:

In 2001, the National Cattlemen's Beef Association (NCBA) and The Nature Conservancy developed and introduced a new federal conservation proposal to provide federal conservation funds to purchase conservation easements on working native grass ranch lands. (KLA also supported the original legislative proposal.) The fundamental premise of the original legislation was to offer financial assistance for *long-term* and *perpetual* conservation easements, on private working ranch lands, that prohibit current or future landowners from converting the grassland to tilled acres or residential, commercial and industrial development.

A GRP provision eventually was amended to the Conservation Title of the 2002 Farm Bill.

Direction of GRP:

We contend the GRP conservation easement should have limited property management restrictions and only prohibit actions that destroy, "disturb," or eliminate the grassland resource. KLA supports USDA programs and initiatives, such as EQIP, that improve and enhance grasslands. GRP, however, was intended to maintain and protect threatened grasslands utilized for grazing and ranching purposes. We suggest GRP should not be administered in a fashion that requires resource improvement and the regulation of specific land management practices with binding conservation plans, especially for landowners willing to preserve their grass land with a 30-year or perpetual easement.

2003 GRP parameters and sign-up in Kansas:

KLA was an active participant in the Kansas State Technical Committee (STC) efforts to design and recommend application ranking criteria for the 2003 GRP application period. The Kansas NRCS staff adopted the STC's recommendations, which targeted GRP funds to applications providing permanent protection (perpetual easements) on large tracts of native grasslands. KLA and other agricultural and conservation groups aggressively promoted GRP sign-up last summer. Consequently, landowners with 239 tracts of native grassland (118,876 acres) applied for 30-year and permanent GRP easements. No other state experienced more landowner interest in GRP easements during the first sign-up period.

With the Kansas GRP allocation in 2003, the Kansas NRCS office offered GRP easements and GRP payments to 12 applicants for the preservation of 6,300 acres of native grass ranch land. *At this time, it appears that most of these 12 applicants have rejected the 2003 GRP easement/contracts.* It's being reported the offers are being rejected because of an unacceptable *appraisal value* and because of the conditions / provisions of the GRP *easement.* We suspect applicants also are uneasy about future management requirements / prohibitions that could surface in the future.

Suggested changes for GRP:
At this time, we are not suggesting changes or modifications to the guidelines or statute governing the appraisal process. Our state NRCS staff has identified this issue as one that needs additional state review and discussion with the appraisal community. For now, we encourage USDA to authorize the option of "programmatic appraisals." This may be a feasible alternative in Kansas and a more favorable administrative approach for state NRCS staff.

We have serious concerns with the GRP easement document. The "Purposes" section includes "preservation and protection of natural habitat, wildlife habitat, biodiversity, and other conservation values" as the primary purpose of the easement. This reference goes beyond the basic list of eligible and prohibited activities listed in the statute. Section 1238 O (b) of the GRP law establishes the parameters of the easement and permits common grazing practices that maintain the viability of the land. Mowing/haying during specified nesting seasons, crop or fruit tree production, or actions that "disturb the surface" of the grassland are the *statutory* list of restricted or prohibited activities.

The Development Rights language, in paragraph M, states the development rights will be "terminated and extinguished." Under some state laws property rights may not be "terminated." Perhaps more appropriate language would say the development rights are "permanently retired or not available." The property right still exists and is held by the federal government.

The GRP easement prohibits water rights from being transferred, leased, sold, or otherwise separated from the property. If the use or transfer of an applicant's water right is not contradictory for the purpose of protecting and maintaining the grassland, it should not be restricted by the easement. Furthermore, water rights and water appropriation policies are state jurisdictional issues.

A conservation plan is required under the "Affirmative Duties" section. The fact that a GRP landowner will be required to implement a NRCS-approved document that is subject to change in the future is unsettling to landowners. What if Congress, 25 years from now, moves all conservation programs to the Environmental Protection Agency or Department of Interior? The landowner/GRP participant could then be obligated to abide by management schemes and requirements designed and enforced by individuals not exposed to the culture of NRCS or involved in the original design of the program.

The grantee, USDA, has ultimate authority to determine if a GRP easement is in compliance. Since these easements are permanent or 30-year contracts, there is a likelihood an inspector in the future will not be satisfied with the management activities on the GRP property. The landowner may need an avenue to settle disputes without

incurring expensive litigation. We suggest the easement "Enforcement and Remedies" section contain a clause allowing a landowner to challenge and / or dispute any arbitrary decisions by a USDA employee.

Paragraph "G" of General Terms say the GRP easement is to be enforced under federal law. Property law (especially water policies) is traditionally a state issue. The GRP easement directs disputes to Federal court. State courts are more experienced with real property issues.

Our legal counsel is troubled and concerned with paragraphs "H" and "I" of the General Terms of the easement. Grantors cannot "warrant" the items listed, without carrying environmental insurance or incurring substantial costs of environmental assessments prior to entering into this agreement. Does this provision place an affirmative duty on the Grantor to "inspect" and disclose such findings? Landowners rarely know the complete history of their land, and cannot warrant against activities that may be naturally occurring or man made prior to their ownership. Furthermore, this provision places the landowner / applicant responsible for all costs of corrective action.

The landowner is at financial risk if USDA, or the federal government, is sued for an activity on the property. (It's our understanding USDA is frequently sued by groups and individuals). The grantor (landowner / GRP participant) must pay all the legal expenses, and other expenses, without any say in the legal defense. It appears that the federal government, which enjoys considerable tort liability protection, is trying to shift the burdens to the landowner. The risk associated with this provision, coupled with the high costs of litigation defense, make this provision extremely egregious to landowners considering this easement. In litigation, the practical effect would be for the grantor to loose all interests in the property. This provision has the practical effect of placing an additional restriction on the land without compensation.

It's important to note KLA is a strong advocate of reasonable and straightforward conservation easements, granted to third parties on a voluntary basis, that permanently preserve and protect open space native grasslands. Since the passage of GRP, KLA has taken considerable efforts to participate in the STC deliberations to design a program to prioritize GRP funds in areas that provide the greatest environmental benefits.

Because of the GRP easement conditions, however, we cannot advise or encourage KLA members to participate in the 30-year or permanent options of GRP.

We also are disappointed in USDA's determination that qualified third party land trusts are not able to take ownership and hold GRP easements. The primary purpose and mission of KLA-RT, and other land trusts, is to identify key areas that need long-term protection and provide outreach programs to garner support for perpetual conservation

easements. Most original supporters of GRP understood that private conservation organizations would be a valuable partner in this program. The managers' report and statute expressly states qualified private groups may hold and administer GRP easements. We're finding that landowners, especially ranch land owners, feel more comfortable if they sign a perpetual easement that is held, enforced, and monitored by a responsible local private organization. This approach should be welcomed by USDA, especially if there is a transfer provision that allows the easement to be transferred to USDA if the original private organization dissolves or chooses to relinquish their responsibility for the easement.

We recognize there may be a number of applicants who will be agreeable to the current easement terms and conditions. Since there is a long list of easement applicants, and limited federal GRP funds appropriated, USDA may eventually sign-up enough landowners to spend the allocated GRP funds. Unfortunately, the easements conditions will inhibit enrollment and protection of grasslands that offer the highest conservation value. The fact that most of the highest ranked easement contracts in Kansas are withdrawing is proof the program is not reaching its potential. Furthermore, limiting the involvement of private land trusts prevents GRP from being a tool for strategic conservation planning. With existing GRP guidelines we likely will see a patch work enrollment of small tracts spread across the country and participants will be those most willing to accept the restrictions of GRP easements and yet to be developed conservation plans. We fear those who enroll in the GRP easement program will later be dissatisfied. This dissatisfaction likely will curtail future voluntary grassland protection efforts by USDA and the private land trust community.

In closing, I want to mention my appreciation for the sincere efforts of Kansas NRCS staff responsible for GRP. Their responsive and competent actions to date are proof to us that state NRCS officials want GRP to succeed in Kansas. NRCS and USDA personnel at the national offices also have been helpful and courteous.

We hope to continue these communications and offer full support in future USDA efforts to make GRP an effective grassland preservation program.

Sincerely,

Mike Beam

Mike Beam
Sr. Vice President
Kansas Livestock Association

Sectional analysis and comments of GRP rule from the Kansas Livestock Assn.

Purpose (1415.1):

The rule's definition and explanation for the *purpose* of GRP is consistent with the statutory language of the Farm Bill and the "Managers Report" with one exception. An objective, listed as (iv), indicates the program is to "maintain and *improve* plant and animal biodiversity." Clearly GRP was intended to protect, preserve, and maintain the natural resource value of enrolled grasslands. No where in the statute and report does it indicate the program is intended to improve the resource.

KLA supports NRCS programs, such as EQIP, that specifically are designed to improve and enhance the vitality of grazing lands for improving forage production, water quality wildlife habitat, and plant diversity. KLA has been an active participant in the Kansas State Technical Committee's discussions of criteria and priorities for our states "Grazing Lands Health" initiative within the parameters of EQIP. Furthermore, the association has provided several outreach sessions for grassland owners in an attempt to encourage participation in this program. While NRCS programs for improving the grazing land resource is an important and needed objective, we believe GRP was not intended or created to assist landowners in enhancing their grazing resource. GRP was developed and introduced as a new and separate program to provide funds for the permanent protection and preservation of large, intact native grasslands and ranches threatened by development and other conversion pressures. If 2 million acres of grasslands (enrollment goal of GRP statute) are protected from various development pressures, GRP will provide a significant and long-term conservation value for ranching communities, landowners, wildlife and the federal taxpayer. Injecting an element for *improving* the resource creates additional demands for NRCS and regulatory requirements for participants. Since the GRP easements are long-term or perpetual in length, any instrument that requires NRCS review / approval of management practices on a continual basis will inhibit the enrollment of property by many ranchland owners.

Administration (1415.2):

We generally support the state allocation formula that's based on support for biodiversity of plants and animals, grasslands under the greatest threat of conversion, support for grazing operations, and state demand. As a member of the Kansas State Technical Committee, I've observed overwhelming support for emphasizing and targeting GRP funds to native grass areas. KLA supports this approach and suggests an additional allocation adjustment. USDA should consider a national pool of GRP funds to target high quality / large acreage / multi-ownership projects that may not be funded at the state level because of limited allocated dollars. This special pool of federal GRP dollars could be used to target large scale proposals that offer a significant impact in the perpetual protection of native grass ranch lands. This approach especially could be helpful in the final phases of the 2 million acre program.

The authority and direction for NRCS State Conservationists and FSA State Executive Directors to identify and develop project selection priorities has worked will in Kansas. We encourage USDA to continue this approach to state management of GRP.

Program requirements (1415.4):
It would be more acceptable if the access authority of USDA on enrolled GRP property contained a provision requiring notification before entering property. The access provision in 1415.7 is more landowner-friendly and would be a consistent policy as it relates to USDA access on potential and enrolled GRP lands.

Subsection (f) requires the GRP easement to protect grassland *and other conservation values.* As mentioned earlier, GRP clearly is intended to protect and maintain the grazing resource. Stating the GRP easement must protect "other conservation values" is a broad brush approach that stimulates an easement contract with provisions not necessary for the protection of grasslands from conversion threats. The more provisions / restrictions the GRP easement contains the more likely landowners will withdraw their application prior to closing the contract.

Land eligibility (1415.5):
Subsection (e) could prohibit GRP enrollment on land under a CRP or EQIP contract. While it is logical to deny GRP enrollment on land *permanently* protected by an easement, there may be merit in accepting CRP grassland and land subject to an EQIP contract into the GRP. Perhaps a landowner with a CRP contract should be allowed to terminate their CRP agreement if they are accepted for enrolling the same parcel in a long-term GRP (20+ years) lease agreement or GRP permanent easement. Furthermore, from a conservation perspective, why should USDA deny a perpetual GRP easement to a grassland owner who has a short-term EQIP contract designed to enhance and improve the resource?

Establishing priority for enrollment of properties (1415.8):
Subsection (c) requires states to establish and rank criteria and rank applications for easements and rental agreements on four principals. The first three factors are consistent with the program's objectives prescribed in the statute. Once again, it was not the intended purpose or specific instructions of Congress to "improve" plant and animal biodiversity. GRP is a program for the protection and preservation of grasslands with some authority for restoration and rehabilitation when warranted. Number (iv) should be eliminated in the list of ranking criteria.

Enrollment of easements and rental agreements (1415.9):
We are not clear on the enrollment and applicant commitment procedures set forth in this section. It appears a GRP easement participant will be committed to the easement before NRCS develops the conservation plan for the enrolled property. How can a landowner be expected to commit to a 30-year or permanent easement without full

understanding of his/her responsibilities forthcoming under a yet-to-be-developed conservation plan? We suggest the conservation plan requirement be withdrawn from the final rule.

In subsection (f), we suggest a provision for an extension of the "option to purchase agreement" should be allowed if both parties are agreeable.

Compensation for easements and rental agreements (1415.10):
KLA supports the suggested authority for "programmatic appraisals," on a regional level, as an alternative to specific parcel appraisals. We suggest this authority as an option for State NRCS Conservationists. It appears there is limited experience with conservation easement appraisals in Kansas and this option *may* provide an efficient and more acceptable appraisal method to interested landowners in our state.

Restoration agreements (1415.11):
The Kansas ranking criteria discounts applications requesting GRP cost-share funds for restoration. This approach, broadly supported by the State Technical Committee, does not discount applications that need restoration when the applicant/landowner agrees to pay for such improvements. Perhaps this section should clearly indicate USDA *may* provide restoration assistance in special circumstances.

Transfer of land (1415.13):
Subsection (g) could terminate a GRP rental agreement if a subsequent landowner is ineligible because of the Adjusted Gross Income Limitation provision of GRP law. This could be problematic if a son or daughter, with an income exceeding the income eligibility limit, inherits a GRP enrolled ranch from his/her parent before the long-term rental agreement has expired. Despite the new owner's desire to complete the contract and preserve the grassland, USDA could terminate the contract and allow the land to be tilled or developed. Perhaps this subsection could contain a provision allowing future landowners (ineligible because of the income limitation) an option to maintain the GRP rental agreement contract if annual GRP payments are used for additional conservation projects on the enrolled property.

Misrepresentation and violations (1415.14):
Authorization for USDA to access enrolled property (following prior notice) is necessary to monitor a GRP easement. Subsection (b) provides broader authority for USDA access when "… USDA deems such action necessary to protect important grassland and shrubland *functions* and *values* …" It is important to remember a GRP easement is in effect for 30 or more years. It is not advisable and necessary to give USDA this broad authority long after the principals involved in the easement transaction are retired, deceased, or have sold the property to another private owner.

Let's narrow the access authority to access property during a routine monitoring situation or suspected easement violation and *after* notification to the appropriate landowner.

Delegation to third parties (1415.17):
It is dishearting to see USDA's posture on the role qualified private conservation organizations can provide in GRP. Private rancing and conservation interests developed and introduced GRP as a new tool to permantly protect large scale private grazing lands. The National Cattlemen's Beef Association and The Nature Conservancy gave birth to GRP, primarily as a means for private (qualified) conservation groups to preserve working landscapes with native grass resources. The original legislation was presented with the understanding that landowners would have a choice for their easement ownership and management. Particiapants could select USDA or a responsible / qualified private conservation group, like the cattlemen's association land trusts or local chapter of The Nature Conservancy. The statute states qualified groups may "hold" and administer GRP easements. USDA's interpretation that hold only means manage will inhibit many quality conservation proposals from landowners who only will participate in perpetual easements if the contract is with the private sector.

It is important to note current federal policies recognize and accept qualified private conservation groups as an acceptable holder (owner) of federally funded easements. The Farm and Ranchland Protection Program clearly allows private conservation groups authority to hold, own and administer federally funded easements. The US tax code grants income tax deductions to landowners who donate conservation easements to qualified private conservation organizations. It was the intention of the sponsors of GRP, and specifically mentioned in the GRP law, that qualified private organizations may hold and administer GRP easements. If Congress did not intend for GRP easements to be transferred to private groups they would have specified GRP easements may only be administered by the private sector. We urge USDA to respect Congressional intent and reconsider their interpretation of this provision.

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