The Conservation Reserve Program: 1990 and Beyond. Legislative and Administrative Proposals to Enhance Long-Term Environmental and Economic Benefit from the Conservation Reserve Program

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Comment

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I. INTRODUCTION

As Congress begins work on omnibus agricultural legislation, several crucial decisions face the legislators with regard to the Conservation Reserve Program ("CRP"). Among these are whether the CRP will be extended, and whether changes will be adopted to make the current program more effective. How Congress addresses these questions will have a direct bearing on the long-term success of the CRP and on how many of the millions of acres of highly erodible land in the CRP will be subjected to replowing immediately upon expiration of the current ten-year contracts.

The purpose of this article is to propose legislative and administrative changes in the CRP to enhance long-term program benefits, including reduced soil erosion from wind and water, reduced sedimentation, and improved wildlife habitat. The article will begin with a brief look at the soil erosion problem in the United States and the factors which led to passage of the CRP legislation. The article will then examine the current CRP, with special emphasis on the tree-planting provisions. The article will also review the success of the CRP in Nebraska and will conclude with specific proposals for administrative and legislative changes.

II. BACKGROUND

A. America's Soil Erosion Problem

As the House Agriculture Committee recognized when it approved the CRP, "soil erosion on agricultural land is a major national problem. Unchecked, soil erosion will reduce the Nation's long-term capability to produce adequate amounts of food and fiber and the off-farm cost of dealing with soil sedimentation is estimated to be between $2

[billion] and $6 billion annually."[1]

According to the 1982 Natural Resources Inventory ("NRI"), conducted by the Soil Conservation Service, there are 421 million acres of cropland in the United States.[2] "Of this amount, 49 million acres were land classes IVe, VI, VII, and VIII; 40 million of which were in cultivated crops."[3] Of these acres, more than 24 million were eroding at twice the T value.[4] When all land classes were included, "One of every eight acres of cropland in our Nation—more than 50 million acres—has a soil erosion rate at least twice that which the soils [c]an tolerate without damage to their productivity."[5] It is estimated that enough fertile topsoil erodes from farmland each year to fill the Houston Astrodome 34,000 times.[6] The fact that soil erosion is widespread explains only part of the reason why the CRP was created. Another major factor is that the most severe erosion can be controlled by treating a relatively small portion of the nation's land. "[R]oughly 40% of all erosion occurs on only 6% of the cropland. Viewed a different way, about half of all erosion in excess of 5 tons per acre per year occurs on about 2 percent of all cropland."[7] Consequently, the CRP "is based in part on the precept that a large proportion of our soil erosion comes from a small proportion of our land in cultivation."[8]

1. H.R. REP. No. 271, 99th Cong., 1st Sess., pt. 1, at 77, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1181. The Committee's statement regarding sedimentation addresses an aspect of erosion that goes beyond its affect on crop production. "Ag erosion is the single greatest source of unregulated water pollution, causing an estimated three billion dollars annually in damages to water quality and navigation." Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swamp Busting, and The Conservation Reserve*, 34 U. KAN. L. REV. 577, 584 (1986).
2. H.R. REP. No. 271, 99th Cong., 1st Sess., pt. 1, at 79, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1183.
3. *Id.* Land class I is generally the least likely to erode and has the fewest limitations for growing crops, while Class VIII is unsuitable for growing crops at all.
4. *Id.* at 81, 1985 U.S. CODE CONG. & ADMIN. NEWS at 1185.

   The "T value" for cropland denotes the maximum level at which soil erosion can occur without affecting productivity. "The physical and climatic factors determine the inherent erodibility of soils. In conservation planning, land use and management are adjusted to reduce erosion rates to acceptable levels. Those levels are defined as the soil loss tolerance level (T value) at which productivity can be sustained." *Id.* at 80, 1985 U.S. CODE CONG. & ADMIN. NEWS at 1184.
5. *Id.* at 81, 1985 U.S. CODE CONG. & ADMIN. NEWS at 1185.
6. Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swamp Busting, and The Conservation Reserve*, 34 U. KAN. L. REV. 577, 584 (1986).
7. J. ZINN, AGRICULTURAL RESOURCE CONSERVATION ISSUES 2 (Congressional Research Service Issue Brief IB87132, September 7, 1988).
8. H.R. REP. No. 271, 99th Cong., 1st Sess., pt. 1, at 78, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1182. This language refers to H.R. 2100, 99th Cong., 1st Sess. (1985), the House version of the CRP.

B. The Impetus for Conservation Reserve Legislation

The CRP is the result of a remarkable piece of legislation. This is true not only because of the program's scope and significance, but because similar conservation legislation had repeatedly failed to pass Congress. It took an unprecedented convergence of factors including a farm recession, increased concern over erosion, surplus commodity production, and the establishment of a coalition between farm and environmental groups to bring about the establishment of the CRP, one of the most massive conservation efforts in history.[9]

The CRP was established as part of a much larger piece of legislation, the Food Security Act of 1985,[10] otherwise known as the 1985 Farm Bill. The CRP was one of three major conservation provisions in the Food Security Act; the others being the Sodbuster[11] and Swampbuster provisions. The sodbuster and swampbuster measures discourage conversion of land to agricultural use, while the CRP encourages removal of highly erodible land from production.

III. THE CONSERVATION RESERVE PROGRAM, ITS GOALS AND OPERATION

A. Description of the Conservation Reserve Program

The Food Security Act provides that "[d]uring the 1986 through 1990 crop years, the Secretary[12] shall formulate and carry out a conservation reserve program . . . through contracts to assist owners and operators of highly erodible cropland in conserving and improving the soil and water resources of their farms or ranches."[13] This authorizing language was used by the Department of Agriculture in promulgating regulations for actual implementation of the CRP. Under these regu-

9. One commentator observed that the CRP was the result of three factors: 1. The Food Security Act was the first opportunity since 1981 for a comprehensive revamping of agricultural policy; 2. The spiraling cost of farm programs calling for reduced farm output and government subsidies; 3. Recognition by urban and environmental groups of their stake in the farm bill debate. Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swamp Busting, and The Conservation Reserve*, 34 U. KAN. L. REV. 577, 578 (1986).

10. Pub. L. No. 99-198, 99 Stat. 1354 (1985). The Food Security Act was signed into law by President Ronald Reagan on December 23, 1985.

11. *See infra* Part IV.

12. "Secretary" refers to the Secretary of Agriculture. The program is actually carried out by the Agricultural Stabilization and Conservation Service, Soil Conservation Service and other agencies within the Department of Agriculture.

13. Food Security Act of 1985, Pub. L. No. 99-198, § 1231 (a), Subtitle D, 99 Stat. 1354, 1509 (1985). For an overview of the CRP, see 11 HARL, AGRICULTURAL LAW ¶ 91.03(4) (Special Supplement at 13A, p.30, July 1986). *See also* 131 CONG. REC. H12502 (daily ed. Dec. 18, 1985)(Summary of Conf. Rep. on the Food Security Act of 1985, by Agriculture Committee Chairman De La Garza of Texas); 131 CONG. REC. S17951-52 (daily ed. Dec. 18, 1985).

lations, "[t]he Secretary of Agriculture is authorized to enter into contracts and make payments to eligible owners and operators of eligible cropland to assist them in conserving and improving the soil and water resources of their farms and ranches by converting such land to permanent vegetative cover in accordance with an approved conservation plan."[14]

B. Goals of the Conservation Reserve Program

The CRP is designed to accomplish seven important objectives:

1. Protect America's long-term capability to produce food and fiber;
2. Reduce soil erosion on highly erodible land;
3. Reduce sedimentation in streams;
4. Create improved fish and wildlife habitat;
5. Improve water quality;
6. Curb production of surplus commodities; and
7. Provide needed income support for farmers.[15]

Although none of the goals are contradictory, considerable tension exists as to the priority between conservation objectives on one hand and economic considerations on the other. While the CRP has contributed greatly to the reduction of erosion and the establishment of wildlife habitat, it is arguable that the CRP's primary objective (as the program is currently implemented) is income support and reduction of surplus commodities.

C. The Conservation Reserve Program Details and Operation

1. Eligibility, Enrollment, and Bid Consideration

The Food Security Act provides that "[t]he Secretary shall enter into contracts with owners and operators of farms and ranches containing highly erodible cropland to place in the conservation reserve . . . ."[16] The Food Security Act then sets forth minimum and maximum yearly levels for cropland to be accepted into the CRP, as shown in the table below.

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14. The regulations were issued in final form at 52 Fed. Reg. 4,269 (1987) and codified at 7 C.F.R. § 704 (1988). The CRP is described at 7 C.F.R. § 704.1 (1988).
15. H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 81, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1185.
16. Pub. L. No. 99-198, § 1231 (b), 99 Stat. 1354, 1509 (1985).

Table 1 - Conservation Reserve Acreage, Crop Years 1986-90[17]

Range	1986	1987	1988	1989	1990
			Million acres		
Minimum	5	15	25	35	40
Maximum	45	45	45	45	45

To qualify for participation in the CRP, land must be both "highly erodible" and "cropland."[18] The term "highly erodible" is not defined in the Food Security Act and has been the subject of considerable controversy. The extremely technical criteria promulgated by the United States Department of Agriculture ("USDA") for identifying highly erodible land were modified between publication of the interim and final rules so that eligibility of land for the CRP is based both on the erosion potential of soils and upon the amount of erosion which actually occurs on the land.[19]

Information provided to farmers since January 1988 states that in order to qualify as "highly erodible," crop land must meet one or more of the following five criteria:

1. An erodibility index[20] equal to or greater than 8 for either wind or water erosion, with an erosion rate

a. Calculated with cover and maintenance, and practice factors reflecting the crop years 1981 through 1985. [and]

b. Greater than that recommended by the SCS Field Office Technical Guide.

2. An erosion rate of 3T or greater if land capability class is II, III, IV, or V.

3. An erosion rate of 2T or greater if land capability class is II, III, IV, or V and a serious gully erosion problem exists.

4. Land capability class VI, VII, or VIII regardless of the erosion rate.

5. An erosion rate of 2T or greater if land capability class is II, III,

17. L. GLASER, PROVISIONS OF THE FOOD SECURITY ACT OF 1985 47 (United States Department of Agriculture, Economic Research Service - Agriculture Information Bulletin Number 498).

Minimum acreage figures may be reduced by the Secretary yearly by up to 25% if he determines that the rental payments to be made are likely to be significantly lower in the succeeding year. Pub. L. No. 99-198, § 1231 (c)(1)(A), 99 Stat. 1354, 1509 (1985).

18. An exception is provided in the case of filter strips and trees. *See infra* notes 20, 81.

19. The interim rules are found at 51 Fed. Reg. 8,780 (1986) and 51 Fed. Reg. 17,167 (1986). The final rules are at 52 Fed. Reg. 4,265 (1987), and the new criteria are codified at 7 C.F.R. § 704.8 (1988).

20. An erodibility index represents the erosion potential of the particular land.

IV, or V and trees will be established on the designated acres.[21]

The definition of "cropland" is less controversial and is defined as "land that has been tilled annually to produce an agricultural commodity other than orchards, vineyards, or ornamental plantings or has been set aside in a production adjustment program in two of the crop years from 1981-1985 and is suitable for crop production."[22]

The amount of land estimated as being eligible for the CRP varies with the criteria and source. Five different sets of criteria have been used since 1985.[23] At the time the CRP was developed, the House Agriculture Committee estimated that land which had an inherent erodibility of at least 20 tons per acre and an actual erosion rate of at least twice the rate at which the soil can maintain its productivity (2T), equalled 52.7 million acres.[24] Under the initial criteria developed by the USDA, the estimate of eligible land rose to nearly 69.5 million acres.[25] Material published by the USDA in March 1988 under the revised criteria stated that "[o]ver 100 million acres are eligible for enrollment. . . ."[26]

To date, seven signup periods have been offered for enrollment in the CRP. Through the first six periods 25.5 million acres were entered,[27] and total signups now equal about 30 million acres.[28] It was projected that another signup period would begin in February 1989.[29]

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21. AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, USDA, FARM PROGRAM FACT SHEET-CONSERVATION RESERVE PROGRAM 2 (January 1988).
    Land devoted to filter strips does not have to meet these eligibility requirements. "Filter strips, cropland areas 66-99 feet wide with a permanent cover, next to streams, lakes and estuaries are eligible for CRP even if the soil erosion criteria is not met. . . ." *Id.* at 1.
22. *Id.* The criteria for "cropland" are found at 7 C.F.R. § 704.7 (a) (1988).
23. For a chronological account of changes in eligibility see J. ZINN, THE CONSERVATION RESERVE: A STATUS REPORT 5-7 (Congressional Research Service Report for Congress 87-804 FNR, Sept. 21, 1987).
24. H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 83, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1187-88. Of this 52.7 million acres, Nebraska had more than 2.7 million acres, ranking behind only six states (Texas, Iowa, Missouri, Montana, Colorado, and Kansas).
25. L. GLASER, *supra* note 17. Under this estimate, Nebraska has more than 3.1 million eligible acres-more than all but five states.
26. ECONOMIC RESEARCH SERVICE, USDA, AGRICULTURAL OUTLOOK 30 (March 1988).
    Paul D. Smith, Resource Conservationist with the Soil Conservation Service in Lincoln, NE, estimates eligible acreage at 84 million. Letter to author (Oct. 24, 1988). This figure is apparently based on the newest criteria, but does not include the land still eligible under the old criteria. Together they total 101 million acres. *See* J. ZINN, *The Conservation Reserve: A Status Report* 7 (Congressional Research Service Report for Congress 87-804 FNR, Sept. 21, 1987).
27. J. ZINN, *supra* note 7, at 15.
28. Letter from Paul D. Smith, SCS Resource Conservationist, to the author (Oct. 24, 1988).
29. Letter from Gaylen L. Suhr of the Lancaster County ASCS Office to the author (Oct. 25, 1988).

In addition to meeting technical eligibility requirements, a farm owner or operator who desires to enter the reserve must be accepted on the basis of the annual rental payment he or she is willing to accept in return for removing the land from crop production. "At the time of application, producers must submit bids stating the annual rental payment they would accept to convert their highly erodible cropland to permanent vegetative cover."[30] The farmer makes his bid by comparing the projected returns from commodity sales and farm programs if the land remained in production, to CRP rental payments if the land was entered in the reserve.

Under Federal regulations the local Agricultural Stabilization and Conservation Serivce ("ASCS") County Committee "is authorized to approve CRP Contracts on behalf of Commodity Credit Corporation ("CCC") in accordance with instructions issued by the Deputy Administrator."[31] Due to great variance in the value and productivity of cropland the ASCS has divided the country into 139 "bid pools" based on the value of returns from production and other factors.[32] These pools are the basis for determining the maximum levels acceptable for bids, and thus the annual rental payments the USDA is willing to make. The highest maximum acceptable bid (per acre) is $115 in Illinois pool number two. The lowest maximum acceptable bid is $30 in Minnesota pool number two and Wisconsin pool number one. Nebraska has four pools ranging from $45 to $75.[33] Since the maximum acceptable bid levels in each pool are known to the public, farmers are likely to bid in a very narrow range.[34]

Other factors may also enter into the bid acceptance process, especially when bids are monetarily equivalent. The ASCS is authorized to take into consideration the extent of erosion and productivity of the land involved, and may give priority to owners and operators under

30. ASCS, USDA, FARM PROGRAM FACT SHEET-CONSERVATION RESERVE PROGRAM 1 (January 1988). This bidding process is authorized in the Food Security Act itself. Pub. L. No. 99-198, § 1234(2)(A), 99 Stat. 1354, 1512 (1985).

31. 7 C.F.R. § 704.11 (2)(e)(1988).

32. J. ZINN, *supra* note 23, at 14. According to Paul D. Smith, Resource Conservationist with the Soil Conservation Service in Lincoln, Nebraska, the local county committees submitted information to the State ASCS office which was forwarded to Washington. This information included rental costs, production statistics, tax levels, average yields, and local commodity prices. Letter from Paul D. Smith to the author (Oct. 24, 1988).

An additional factor in determining recent maximum acceptable bid levels is FY 88 appropriations legislation which requires that the reserve cannot accept any bids that exceed the prevailing local land rental rates for comparable land. J. ZINN, *supra* note 7, at 6-7.

33. ASCS, USDA NOTICE CRP-108, NEBRASKA NOTICE CRP-192, at 1, 3, 6 (Sept. 2, 1988).

34. As an indication of the acceptance rate, in the February 1988 signup period bids were submitted on 4.5 million acres and were accepted on 3.4 million acres. J. ZINN, *supra* note 7, at 4.

the greatest financial stress.[35] In addition, special consideration may be given to contracts which provide for the establishment of shelterbelts, windbreaks, and filter strips.[36] Contracts which enroll land formerly used to produce subsidized crops may also be favored, since removal of this land from production reduces government outlays. For example, a one-time bonus of $2.00 per bushel was offered on all corn-producing land enrolled in the fourth signup.[37]

2. Participant Obligations

An owner or operator who contracts to place highly erodible land in the reserve in exchange for rental payments has a number of duties.[38] Under the CRP contract the farmer must agree "to implement a plan approved by the local conservation district . . . for converting highly erodible cropland normally devoted to the production of an agricultural commodity on the farm or ranch to a less intensive use . . . such as pasture, permanent grass, legumes, forbs, shrubs, or trees, substantially in accordance with a schedule outlined in the plan. . . ."[39] As part of this plan, vegetative cover must be established on the land,[40] and once enrolled, CRP land may not be used for agricultural purposes.[41]

In addition to setting forth the conservation measures and practices to be carried out during the term of the CRP contract, the conservation plan may provide for the permanent retirement of any existing

35. HARL, *supra* note 13, at supplement 130, p. 30.

36. Pub. L. No. 99-198, § 1234(3)(A), (B), 99 Stat. 1354, 1512 (1985). For a detailed examination of this provision *see infra* secton VII.A.

37. J. ZINN, *supra* note 7, at 6.

38. Participant obligations under the CRP are codified at 7 C.F.R. § 704.12 (1988). A summary of these obligations can be found at HARL, *supra* note 13, at supplement 13(c), p. 31-32. Farmers are given a detailed list of these requirements as part of their contract. *See* COMMODITY CREDIT CORPORATION, USDA, APPENDIX TO FORM CRP-1, CONSERVATION RESERVE PROGRAM CONTRACT 3(A)(1)-(12) (January 22, 1988).

39. Pub. L. No. 99-198, § 1232 (a), 99 Stat. 1354 (1985).

40. *See* HARL *supra* note 13 at supplement 13(c)(3), p. 32. The definition of "vegetative cover" is a compromise definition developed by the House-Senate Conference Committee during conference on the Food Security Act. The Senate definition was modified by adding shrubs and forbs as eligible vegetation. This expanded definition originated as part of the "shelterbelt amendment" proposed by Congresswoman Virginia Smith of Nebraska and offered to the House Agriculture Committee by Congressman Pat Roberts of Kansas. The expanded definition gives added flexibility to CRP plans and is utilized in developing vegetative cover which is better suited for wildlife habitat.

41. Pub. L. No. 99-198, § 1232(a)(3), 99 Stat. 1354, 1510 (1985). The farmer or rancher must establish vegetative cover on the land, *Id.* at § 1232 (a)(4), 99 Stat. at 1510, but may not use it for harvesting or grazing. *Id.* at § 1232(a)(7), 99 Stat. at 1510. However, an exception allows the Secretary of Agriculture to waive this provision. This exception was included primarily to allow grazing of CRP land during severe drought. *See id.* at § 1232(a)(3), (7), 99 Stat. at 1510.

cropland base and allotment history for the land in exchange for appropriate compensation.[42] Although most producers are unlikely to opt for permanent retirement of their crop bases, all such crop bases, quotas, and allotments on farms in the CRP are reduced during the contract period. The reduction is "based on the ratio between the total cropland acreage on the farm and the acreage placed in the conservation reserve. . . ."[43]

3. Government Obligations

The government has four primary obligations to farmers who enroll land in the CRP. The government, through the Commodity Credit Corporation and agencies such as the ASCS and the Soil Conservation Service ("SCS"), must: 1) share the cost with participants of establishing eligible conservation practices required by the conservation plan; 2) pay the participant an annual rental payment as specified in the CRP contract; 3) provide technical assistance to the participant in carrying out the conservation plan; and 4) preserve the participant's cropping history for use in any farm programs in effect upon the expiration of the contract.[44]

Cost share payments are authorized for up to 50% of the cost of establishing eligible conservation practices specified in the conservation plan.[45] Rental payments may be in either cash or commodities,[46] and may not exceed $50,000 per year.[47] However, the $50,000 payment limitation does not include payments under any other government program.

4. The Conservation Reserve Program Contract

The CRP contract is entered into between the farm owner or operator and the CCC. The process begins when an offer is submitted by a farmer to the local ASCS office. The offer is irrevocable for a period of 30 days, during which time it is evaluated and may be approved or

42. *Id.* at § 1232(b)(1), (2); § 1233(2)(B); § 1236(b), 99 Stat. at 1511, 1514. Cropland base and allotment history is used to determine a farmer's payments under farm price support programs.

43. *Id.* at § 1236(a), 99 Stat. at 1514.

44. 7 C.F.R. § 704.13(a), (b) (1988).

45. *Id.* at § 704.15(a).

46. Pub. L. No. 99-198, § 1234(d)(1), 99 Stat. 1354, 1512. *See also* 7 C.F.R. § 704.17 (1988).

When the payments are in "commodities" the farmer actually receives a negotiable payment-in-kind certificate. *See* ASCS, USDA FARM PROGRAM FACT SHEET- CONSERVATION RESERVE PROGRAM (January 1988).

In Nebraska, 1987 payments were in commodity certificates, while 1988 payments were in cash. Letter from Gaylen L. Suhr, County Executive Director, Lancaster County ASCS, to the author (Oct. 25, 1988).

47. 7 C.F.R. § 704.16(c) (1988).

rejected by the ASCS County Committee.[48]

The CRP contract is not a simple document. It includes Forms CRP-1, CRP 1A (Addendum), CRP-1 (Appendix), CRP-113 (Addendum), CRP-15, the conservation plan, and any addenda entered into in writing between the CCC and the participant.[49] In addition, the CRP regulations codified at 7 C.F.R. § 704 are incorporated into the contract by reference.[50] All CRP contracts are currently made for a period of ten years.[51]

5. Damages for Breach

If a participant violates a term or condition of the contract, the Secretary has two options for redress. If the Secretary determines that the violation is serious enough to warrant termination of the contract, the farmer must "forfeit all rights to receive rental payments and cost sharing payments under the contract and [must] . . . refund to the Secretary any rental payments and cost sharing payments received by the owner or operator under the contract, together with interest. . . ."[52] If the violation does not warrant termination of the contact, the Secretary may simply require the farmer to refund all or part of the rental or cost share payments.[53]

Beyond the above provisions, the CRP contract provides for liquidated damages in the event of breach. "[I]n addition to the other penalties . . . for breach of contract prescribed in this contract, the participant . . . agrees to pay an amount equal to the product obtained by multiplying: (1) 25% of the annual rental payment . . . by, (2) the number of acres which are the subject of the contract, as liquidated damages . . . ."[54]

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48. *See id.* § 704.11.
49. *See* COMMODITY CREDIT CORPORATION, USDA, APPENDIX TO FORM CRP-1, CONSERVATION RESERVE PROGRAM CONTRACT 1 (H) (January 22, 1988).
50. *Id.* at 7.
51. Although the Conservation Reserve section of the Food Security Act authorizes CRP contracts of "not less than 10, nor more than 15, years," Pub. L. No. 99-198, § 1231(e), 99 Stat. 1354, 1509 (1985), the regulations promulgated to implement the CRP provide that "All participants in the CRP must carry out the terms and conditions of the CRP Contract for a period of 10 crop years from the date the CRP Contract is entered into by the participant and CCC." 7 C.F.R. § 704.12(a)(1) (1988).

    Confusion seems to exist regarding the length of CRP contracts, as some publications still list the contract period as being ten to fifteen years. *See, e.g.*, J. ZINN, *supra* note 7, at 4. However, in the Discussion of Comments section of the Final Rules for the CRP in 52 Fed. Reg. 4265, 4268 (1987), the ASCS refused to modify the rules in response to suggestions that the contract period be extended to 15 years.
52. Pub. L. No. 99-198, § 1232(a)(5), 99 Stat. 1354, 1510 (1985).
53. *Id.* at § 1232 (a)(5)(A),(B), 99 Stat. at 1510.
54. COMMODITY CREDIT CORPORATION, USDA, APPENDIX TO FORM CRP-1, CONSERVATION RESERVE PROGRAM § 15 at p. 10 (January 22, 1988).

6. Restrictions

Several restrictions beyond the basic eligibility requirements apply to the CRP which may prevent some farmers from participating in the program. First, no more than 25% of the cropland in any county can be enrolled in the CRP.[55] This limitation was added to the original CRP proposal in order to avoid placing a burden on agricultural suppliers such as occurred during the 1983 Payment-In-Kind Program.[56] After six signups, 65 counties had reached their maximum participation level.[57] The 25% cap reduces the amount of highly erodible land eligible for the program by almost 40 million acres, and some worry that the effectiveness of the program will be reduced if the cap is not modified.[58]

Additional restrictions to CRP participation are designed to prevent investors from taking advantage of the CRP by buying land with the intent of entering it into the reserve.

> Contracts may not be awarded to owners or operators where the ownership of the land has changed in the three years prior to the first year of the contract, unless: (1) The new ownership was acquired by will . . . (2) The new ownership was acquired before January 1, 1985; or (3) The land was not acquired for the purpose of placing the land in the cropland reserve program.[59]

In order to protect tenants from unfair exclusion, these requirements do not apply if the operator has operated the land for at least three years preceding the date of the contract or since January 1, 1985, whichever is later.[60]

IV. APPLICABILITY OF THE SODUBSTER PROVISION TO CONSERVATION RESERVE PROGRAM LAND

One of the other major conservation measures included in the Food Security Act, the Sodbuster provision, also plays an important role in the CRP. The Sodbuster provision makes producers ineligible for benefits of USDA programs if they bring highly erodible land into

55. *See* H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1 at 82, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1186.

56. The 25% limit was added to the House version of the CRP by Congressman Cooper Evans of Iowa on April 23, 1985. *See* H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 412, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1516. The 25% limit is now codified at 7 C.F.R. § 704.5 (1988).

57. J. ZINN, *supra* note 7, at 6. The Secretary has granted exemptions to many counties for the signup period in which the cap was exceeded, but these counties are not eligible for future signups unless they receive a further exemption. *Id.* This would require the Secretary to make a determination that additional acres would not adversely affect the local economy. *See* HARL, *supra* note 13, supplement 13A, at 30.

58. J. ZINN, *supra* note 23, at 19-20.

59. HARL, *supra* note 13, supplement 13E, at 33-34.

60. *Id.*

production, unless they do so under an approved conservation plan.[61]

All CRP land is, by definition, highly erodible. Thus, it falls under the sodbuster provision and a conservation system must be applied to all CRP land at the end of the 10 year contract if the producer wants to return the land to production and wants to be eligible for farm program benefits.[62] Consequently, a tremendous opportunity exists to implement conservation practices which will ensure long-term benefits from the CRP while avoiding the cycle of short-term fixes followed by a return to overproduction and erosion.

V. THE ROLE OF TREES IN THE CONSERVATION RESERVE PROGRAM

A. The Value of Conservation Trees

* Deuel County, Nebraska, March 1976 - Ferocious winds send temperatures plummeting and snow drifts piling. One rancher sustains catastrophic livestock losses while two miles away a second rancher with a windbreak loses none.
* Potter County, Texas, May 1981 - Blowing soil particles strip and tear young corn seedlings, reducing potential yields in unsheltered fields.
* Sherman County, Kansas, February 1985 - Gusting winds blow topsoil from fallow acres and increase winter-kill across unprotected fields of winter wheat.
* Logan County, Colorado, June 1988 - Blowing soil cuts young pinto bean seedlings off at the stem while a mile away a sheltered field sustains only slight damage.
* Great Plains, U.S.A., March-May, Any Year - Thousands of farmers spend thousands of hours driving thousands of tractors using thousands of dollars of fuel pulling expensive equipment scratching, turning and stripping the earth to save their crops from blowing soil driven by spring winds. Despite their efforts, tons of precious topsoil are blown away and potential crop yields are reduced.

The above scenes clearly demonstrate the ongoing problem of wind erosion and lack of shelter throughout large portions of the central and western United States. According to a report submitted to the House Agriculture Subcommittee on Conservation, Credit and Rural Development, "Wind erosion accounts for about 1.3 billion tons annu-

61. *See* Food Security Act of 1985, Pub. L. No. 99-198, § 1211, 99 Stat. 1506 (1985).

62. Letter from Gaylen L. Suhr, Lancaster County ASCS Executive Director, to the author (Oct. 25, 1988).

CRP land was specifically placed under Sodbuster requirements by the House Agriculture Subcommittee on Conservation, Credit and Rural Development on April 23, 1985 on an amendment by Congressman Cooper Evans of Iowa. *See* H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 414, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1518.

ally and is concentrated primarily in the Southern and Northern Plains and the Mountain States."[63]

Table 2. Cropland Acres and Annual Erosion (Million T/Yr)[64]

Production Region	Million Acres	Sheet & Rill Erosion	Wind Erosion
	Total	Total	Total
Northern Plains	93	282	236
Corn Belt	92	689	82
Southern Plains	45	112	477
Lake States	44	130	122
Mountain	43	89	292
Southeast	25	140	3
Pacific	23	67	35
Delta States	22	124	-
Northeast	17	67	1
Appalachian	16	136	1
Other	1	7	-
Total	421	1,843	1,249

In a Congressional hearing during development of the conservation section of the Food Security Act, the House Agriculture Subcommittee on Conservation, Credit and Rural Development was presented evidence on the use of trees to reduce wind erosion. One witness stated, "[w]ind-caused soil erosion is a major problem in the Great Plains. A system of properly designed and appropriately spaced field windbreaks protecting the land could reduce wind erosion to virtually zero."[65] Another witness, who represented the National Audubon Society, noted that "[o]ver the past decade University of Nebraska researchers have investigated the benefits of shelterbelts, which are known to provide nesting habitat and food for wildlife. In addition, Nebraska scientists have demonstrated yield increases from crops sheltered by such windbreaks."[66]

63. R. GRAY, LONG TERM CONSERVATION RESERVE FOR HIGHLY ERODIBLE AND SERIOUSLY ERODING LANDS, *reprinted in* HEARINGS ON THE GENERAL FARM BILL OF 1985 BEFORE THE SUBCOMM. ON CONSERVATION, CREDIT, AND RURAL DEV. OF THE HOUSE COMM. ON AGRIC., 99th Cong., 1st Sess., pt. 2, at 665, 666 (April 4, 1985).

64. Source: 1982 National Resource Inventory, as printed in R. GRAY, LONG TERM CONSERVATION RESERVE FOR HIGHLY ERODIBLE AND SERIOUSLY ERODING LANDS, *reprinted in* HEARINGS ON THE GENERAL FARM BILL OF 1985 BEFORE THE SUBCOMM. ON CONSERVATION, CREDIT, AND RURAL DEV. OF THE HOUSE COMM. ON AGRIC., 99th Cong., 1st Sess., pt. 2, at 665, 668 (April 4, 1985).

65. HEARINGS ON THE GENERAL FARM BILL OF 1985 BEFORE THE SUBCOMM. ON CONSERVATION, CREDIT, AND RURAL DEV. OF THE HOUSE COMM. ON AGRIC., 99th Cong., 1st Sess., pt. 2, at 907-10 (April 4, 1985)(Statement of the National Association of State Foresters).

66. HEARINGS ON THE GENERAL FARM BILL OF 1985 BEFORE THE SUBCOMMITTEE ON

The strong winds characteristic of America's high plains and rolling prairies will never be conquered or subdued by an act of Congress. Nonetheless, research done by agricultural scientists at the University of Nebraska[67] (referenced in the preceding Congressional testimony) and years of actual on-farm use have proven that much can be done to reduce wind erosion and blunt the force of nature's wrath by carefully planned windbreaks and shelterbelts.[68] Research shows that well designed windbreaks will reduce erosion up to 20 times the windbreaks' height downwind, control snow deposition, protect livestock and increase their productivity, increase crop yields, increase property values, and enhance wildlife habitat.[69]

B. Trees and the Conservation Reserve Program

A great step toward increased utilization of conservation trees was taken by implementation of the Food Security Act. Trees are included in the Food Security Act in the form of three conservation practices as part of the CRP: Tree Planting (CP3), Permanent Wildlife Habitat (CP4), and Field Windbreak Establishment (CP5).[70]

Trees are intended to play an important role in the CRP. In fact Congress has directed that, "[t]o the extent practicable, not less than one eighth of the number of acres of land that is placed in the conservation reserve . . . shall be devoted to trees."[71] This goal includes both the large acreages of timber planted primarily in the south as well as the small areas devoted to shelterbelts and windbreaks.

1. Legislative History

Although the Secretary of Agriculture is now authorized to enroll land on which shelterbelts and windbreaks are to be established[72], the

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CONSERVATION, CREDIT, AND RURAL DEV. OF THE HOUSE COMM. ON AGRIC., 99th Cong., 1st Sess., pt. 2, at 868 (April 4, 1985)(Statement of Maureen K. Hinkle of the National Audubon Society).

67. *See, e.g.*, Johnson, *Windbreak Economics*, 39:5 J. SOIL & WATER CONS. 339-43 (1984).

68. A shelterbelt, as defined in § 1201(n) of the Food Security Act, is "a vegetative barrier with a linear configuration composed of trees, shrubs, and other approved perennial vegetation." H.R. CONF. REP. NO. 447, 99th Cong., 1st Sess. 457, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2383.

69. M. KUHNS & D. ADAMS, TREES AND SHRUBS IN THE CONSERVATION RESERVE PROGRAM (Cooperative Extension Service, University of Nebraska Institute of Agriculture and Natural Resources pamphlet CC 338).

70. *Id.*

71. Pub. L. No. 99-198, § 1232(C), 99 Stat. 1509 (1985). *See also* HARL, *supra* note 13, supplement 13D, at 33. L. GLASER, *supra* note 17, at 48.

72. Pub. L. No. 99-198, § 124, 99 Stat. 1509 (1985). *See also* Malone, *supra* note 6, at 592.

Regulations promulgated by USDA include field windbreaks as an eligible conservation practice. 7 C.F.R. § 704.10 (1988) "Field windbreak" is defined as a

CRP as it came out of the House Conservation, Credit and Rural Development Subcommittee contained authorization only for large scale timber plantings. A "shelterbelt amendment" which authorized shelterbelts, windbreaks, stream borders and filter strips was added in the full House Agriculture Committee, at the request of Congresswoman Virginia Smith of Nebraska,[73] by Congressman Pat Roberts of Kansas.[74] The amendment was added to the list of criteria to be consid-

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"vegetative barrier with a linear configuration composed of trees or shrubs planted for the purpose of wind erosion control." 7 C.F.R. § 704.2 (13)(1988).

73. Congresswoman Virginia Smith, the Ranking Minority member on the House Agriculture Appropriations Subcommittee, is not a member of the House Agriculture Committee. Consequently, the shelterbelt amendment was introduced at her request by neighboring state committee member Congressman Pat Roberts of Kansas.

74. The shelterbelt amendment has a more detailed and lengthy history than would be expected of a provision its size. A partial chronological history of its development in the House of Representatives follows:

1. Research on shelterbelts is conducted by agricultural scientists at the University of Nebraska during the late 70s and early 80s. *See, e.g.*, Johnson, *supra* note 67, at 339-43.
2. The National Association of State Foresters develops an "Agricultural Forestation" proposal in anticipation of the 1985 Farm Bill. The proposal includes shelterbelts. *See* HEARINGS ON THE GENERAL FARM BILL OF 1985 BEFORE THE SUBCOMM. ON CONSERVATION, CREDIT, AND RURAL DEV. OF THE HOUSE COMM. ON AGRIC., 99th Cong., 1st Sess., pt. 2, at 907 (1985)(testimony by the National Association of State Foresters).
3. Nebraska State Forester Gary Hergenrader testifies in favor of a shelterbelt provision before House Ag Subcommittee. *Id.* at 781. National Audubon Society representative testifies in favor of a shelterbelt provision, citing research at UNL. *Id.* at 868.
4. Despite the preceding efforts, the shelterbelt provision is not included in the CRP by the Subcommittee.
5. Nebraska State Forester contacts Congresswoman Virginia Smith with shelterbelt proposal.
6. Smith Legislative Assistant ("L.A.") reviews shelterbelt proposal and recommends approval.
7. Smith approves shelterbelt amendment and directs L.A. to contact her allies on House Ag Committee.
8. Smith's shelterbelt amendment is presented to L.A. of Congressman Roberts of Kansas.
9. Roberts introduces shelterbelt amendment during a session of the full House Ag. Committee on behalf of himself and Congressman Daschle of South Dakota.
10. Chairman Jones of Tennessee voices approval and committee adopts shelterbelt amendment on voice vote.
11. House passes its version of Food Security Act.
12. Senate passes its version of Food Security Act.
13. Conference Committee adopts House version of shelterbelt provision. *See* H.R. CONF. REP. NO. 447, 99th Cong., 1st Sess. 464, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2390.
14. Congress passes Food Security Act.
15. President Reagan signs Act.
16. USDA promulgates regulations including windbreaks.

ered when CRP bids are accepted, and reads as follows:

> In determining the acceptability of contract offers, the Secretary may take into consideration the extent of erosion on the land . . . [and] where appropriate, accept contract offers that provide for the establishment of shelterbelts and windbreaks or permanently vegetated stream borders, filter strips of permanent grass, forbs, shrubs, and trees that will reduce sedimentation substantially. . . .[75]

The Senate version of the CRP originally specified that, to the extent practicable, at least 10% of the total acreage should be devoted to shelterbelts in areas prone to wind erosion.[76] However, it did not specify that shelterbelts should be considered in accepting CRP bids.

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17. ASCS accepts CRP bids including windbreaks.

18. Windbreaks are planted in Nebraska and across the country.

The official legislative history of the shelterbelt amendment is contained in H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 417, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1519, 1521, and is as follows:

> On July 9 [1985] the Committee considered Title XII, Resource Conservation, as reported by the Subcommittee on Conservation, Credit, and Rural Development.
>
> . . . .
>
> Mr Roberts, for himself and Mr. Daschle, offered a technical amendment to broaden the types of plants that could be planted on conservation reserve lands to include forbs and shrubs. The amendment would specifically authorize the Secretary to accept contracts providing for the establishment of shelterbelts, windbreaks, or permanently vegetated stream borders, filter strips of permanent grass, forbs, shrubs, and trees that will reduce sedimentation substantially. Mr. Jones of Tennessee expressed his support for the amendment. The Committee agreed to the Roberts-Daschle amendment by voice vote.

H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 417, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1519, 1521.

The official transcript of the July 9th House Agriculture Committee Markup, available only by in-person inspection in 1303 Longworth House Office Building in Washington, D.C., contains the discussion of the Committee members and acknowledges the role of Congresswoman Smith in presenting the amendment. (Five attempts were made to secure a copy of this transcript. Committee policy, however, forbids photo-copying the transcript. Visual verification was made by the staff of Congresswoman Smith at the author's request on November 3, 1988.)

75. Pub. L. No. 99-198, § 1234(3)(A),(B), 99 Stat. 1509 (1985).

76. S. REP. NO. 145, 99th Cong., 1st Sess. 306, 470 (1985), *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1972, 2136.

The Senate Report, in a statement of purpose and need, describes the Senate version of the shelterbelt provision as follows: "This program recognizes the value of reforestation and the establishment of shelterbelts that are necessary for effective wind erosion control. The Committee bill requires that, to the extent practicable, at least 10 percent of the Conservation acreage must be devoted to shelterbelts in areas prone to wind erosion, but the landowner may not devote more acres to shelterbelts than can be used for effective wind erosion control. The Secretary is also required to allocate a portion of funds available to carry out this program to landowners who agree to plant trees on erosion prone cropland." The Senate shelterbelt provision is also described in the Senate Report in the Summary of Major Provisions-Title XVI-C. Conservation, Conservation Acreage Reserve at 35-36, U.S. CODE CONG. & ADMIN. NEWS at 170-11 and in the Section-

Although the House and Senate versions of the shelterbelt provision were compatible rather than conflicting, only the House version survived the Conference Committee in its original form. It is important to note, however, that it was *not* the intent of Congress to eliminate the Senate provision, de-emphasize shelterbelts, or to reduce the Senate goal of 10% conservation trees. In Conference Committee, Senate CRP § 1632(c) (containing the 10% conservation tree provision) was *adopted* but the language was amended to read "not less than one-eighth of the number of acres of land placed in the conservation reserve each year . . . to the extent practicable, shall be devoted to trees."[77] Unfortunately, the regulations promulgated by USDA to implement the CRP do an inadequate job of fulfilling Congressional intent. Consequently, large southern timber plantings have received significant amounts of time and resources from the USDA while conservation tree plantings have been relegated to secondary importance.

The Report accompanying the House version of the CRP underscores Congressional intent regarding conservation trees and provides insight as to the purpose and need for the shelterbelt provisions in the CRP.

> [T]he bill authorizes the Secretary to enter into contracts which provide for the establishment of shelterbelts, windbreaks, or permanently vegetated stream borders which would reduce sedimentation substantially. Such structures are proven and time-tested methods of erosion control, and were commonplace during the dust bowl period of the 1930s. However, many such structures were plowed under and otherwise removed as a result of larger farm machinery, changes in farming practices and the general expansionary trends of the 1960s and 1970s. This was a mistake, and H.R. 2100 [the House CRP bill] provides an excellent opportunity to correct these past practices.[78]

2. *Implementation*

Statistics on the use of field windbreaks in the CRP indicate that through the first five signups only 827 farmers signed contracts for windbreaks despite the 50% cost-share arrangement to establish windbreaks.[79] Three fourths of these contracts were in the Northern Plains and Lake States;[80] 445 contracts were in Minnesota and 188 were in Nebraska. These preliminary statistics indicate two things. First, the shelterbelt-windbreak practice is not being utilized to the extent desireable, and second, some states are doing a much better job

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by-Section Analysis, Title XVI-Conservation at 470-71, U.S. CODE CONG. & ADMIN. NEWS at 2136-37.

77. H.R. CONF. REP. NO. 447, 99th Cong., 1st Sess., 464 (1985), *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2390.

78. H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 81-82, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1185-86.

79. USDA, ERS, THE CONSERVATION RESERVE PROGRAM, IMPLEMENTATION AND ACCOMPLISHMENTS, 1986-87, at 105 (Statistical Bulletin Number 763).

80. *Id.*

than others of informing CRP participants of the opportunity to include windbreaks in their conservation plans.

Total tree planting statistics under the CRP are more impressive, but still below the Congressional goal of about 12% of CRP land. Over 1.5 million acres have been entered in the various tree planting practices.[81] Most of this is in the southern states in the form of pine forests.

In order to encourage more tree planting, CRP regulations were amended on January 12, 1988. The new rule allows land to be entered in the CRP under much less stringent requirements if the participant agrees to plant trees on the land.[82] In addition to the new government regulations, a private public education campaign has been undertaken by the National Arbor Day Foundation to encourage the planting of conservation trees.[83]

VI. THE CONSERVATION RESERVE PROGRAM IN NEBRASKA

A. Statistics and Scope of Program

Due to its soil types, extensive cultivation, and climate, Nebraska is one of the key states in the CRP in terms of eligible land and participation. It has been estimated that of the 101 million acres of highly erodible land in the U.S. which fit CRP criteria, 5.03 million acres are in Nebraska.[84] Only six states have more eligible acres.[85] Through

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81. Letter from Paul Smith, Resource Conservationist, SCS, Lincoln, NE., to the author (Oct. 24, 1988).

82. 7 C.F.R. § 704.7 (1988). This rule allows land to be admitted into the CRP as "highly erodible" if one-third or more of the land meets eligibility requirements. Normally, two-thirds of the land must meet the requirements for the field to be included. "The amendments made by this rule provide greater flexibility for achieving overall program goals."

. . . .

"Only about 5% of the approximately 23 million acres placed in the CRP to date has been planted to trees. . . . To encourage the placing of land in the CRP on which trees are to be planted, this interim rule amends the regulations to provide that, if a participant agrees to plant trees on land in a field, such field may be considered to be predominantly highly erodible if one-third or more of the land in such field meets the erodibility criteria set forth in the regulations." *Id.*

83. *National Arbor Day Foundation Goal: To Increase Tree Planting in Conservation Reserve Program, Arbor Day* 4 (July/August 1987).

The July/August 1987 issue of *Arbor Day* magazine states that "The National Arbor Day Foundation's 'Conservation Trees Make the Difference' public service education program supports what may become America's most massive tree-planting project ever - the Conservation Reserve Program." The National Arbor Day Foundation project includes television ads with entertainer Eddie Albert, a free brochure on conservation trees, and two editions of the Arbor Day magazine devoted to conservation trees. The program places heavy emphasis on the planting of shelterbelts.

84. J. ZINN, *supra* note 23, at 15.

the sixth signup period in February 1988, approximately 10,000 Nebraska farms (about one of every six farms in the state) had signed up to participate in the CRP. These farms entered over one million acres of highly erodible land into the program,[86] for an average of 106 acres per farm.[87]

As of November 30, 1988, six Nebraska counties had reached the maximum allowable CRP signup of 25% of the total cropland in the county. These included Kimball and Banner counties in the Panhandle; Cherry and Rock in the North Central part of the state; and McPherson and Arthur Counties in the Sandhills.[88]

The average CRP rental payment in Nebraska is $54.94 per acre, while the national average is $43.38.[89] The payment a Nebraska

85. *Id.* The top ten states by number of acres eligible for the CRP are as follows:

	State	Eligible Acres (x 1,000)
1.	Texas	13,932.4
2.	Iowa	8,846.1
3.	Montana	8,601.4
4.	Kansas	7,032.0
5.	Colorado	5,469.4
6.	Missouri	5,226.8
7.	Nebraska	5,034.2
8.	Illinois	4,017.5
9.	Wisconsin	2,994.5
10.	Oklahoma	2,949.3

Source: US. Department of Agriculture, ASCS. Derived from J. ZINN, *supra* note 23, at 15.

86.

Nebraska Farms and Acreage Enrolled in CRP

Signup	Farms	Acreage
2/86	388	39,205
5/86	818	90,165
8/86	1,227	151,399
3/87	4,109	495,498
7/87	1,522	130,449
2/88	1,728	127,783
8/88	NA	NA
Total	9,792	1,034,499

Source: Nebraska State ASCS Office

87. The average is somewhat higher in the western part of the state. For example, ASCS data shows that in Deuel County the average CRP acreage was 137 acres after six signups.
88. Nebraska ASCS Office.
89. Letter from Paul Smith, SCS Resource Conservationist, to the author (Oct. 24, 1988).

farmer receives depends upon the price at which he bids in his land, and is largely determined by the bid pool in which his land is located. These pools represent geographic areas and operate as a maximum bid price. These pools are based on factors such as cost of production and local rents. Nebraska's four bid pools are $45.00, $52.00, $60.00, and $70.00 respectively.[90]

Not only have thousands of Nebraska farmers benefited from the CRP, but most conservation and environmental groups in Nebraska give the program high marks. One representative of a wildlife organization comments that "The Act is considered, at least by people interested in its benefits to wildlife, as landmark legislation. In fact, it went beyond what most had expected to be enacted into law."[91] Other conservation experts and leaders voice similar views.[92]

B. Tree Planting

Tree planting on CRP land in Nebraska has been less successful than the program as a whole. In one county, for example, nearly 24,000 acres of cropland had been enrolled in the CRP as of October 1988. Of this, only 75 acres were planted to trees.[93] However, support for the tree planting provisions of the CRP remains enthusiastic and many Natural Resource Districts in Nebraska provide additional cost share assistance to encourage more tree planting.[94]

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90. AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, NEBRASKA NOTICE CRP-192, at 3 (Sept. 2, 1988).

    Accepted bids tend to be close to the maximum price level within each pool since the maximum acceptable bid level is public information.

91. Letter from Keith W. Harmon, Western Field Representative, Wildlife Management Institute, to the author (Oct. 18, 1988).

92. Letter from Paul D. Zillig, Assistant General Manager, Lower Platte South Natural Resources District, to the author (Oct 21, 1988)(stating "We feel the program is very successful. . . . I feel that we have some very erosive land treated because of this program.").

    Letter from Hal Nagel, Ph. D., of the Big Bend Audubon Society at Kearney, Nebraska, to the author (Oct. 20, 1988)(stating that "The Conservation Reserve Program is excellent, overall.").

    Letter from Michael D. Onnen, General Manager of the Little Blue NRD, to the author (Oct. 24, 1988)(stating that, "the CRP has had a very positive effect on the adequate treatment of highly erodible lands.")

93. Letter from Mark A. Svoboda, Administrative Assistant, Middle Missouri NRD, to the author (Oct. 27, 1988)(referring to Thurston County).

94. Letter from Ken Berney, Assistant Manager of the Lower Elkhorn NRD to the author (Oct. 25. 1988)(states that, "As a whole, the Lower Elkhorn NRD is very supportive of CRP, and particularly supportive of the tree planting provisions. . . . The tree planting provisions were of special importance to us because of our local conditions. Northeast Nebraska has always suffered from an insufficient number of trees. Recent agricultural developments, such as center pivot irrigation and larger farming equipment, have increased the removal of many windbreaks.

    As an added incentive to plant trees on CRP acres, the LENRD . . . reimburses the landowner's share of the cost of planting trees (50% CRP payment and 50%

Tree planting figures for Nebraska show that through five signups, 348 farms had planted 1,686 acres of trees. Through four signups, 916 acres had been planted solely to windbreaks. In addition, 193,306 acres had been accepted for wildlife vegetation, which may sometimes contain trees.[95]

C. A Typical Conservation Reserve Program Contract in Nebraska

While participation in the CRP has been generally good in Nebraska, enrollment by farms in the wheat producing region of western Nebraska has been particularly high. A look at one such farm gives an overview of how the CRP works.

Valley View Ranch, an unincorporated family farm in the Nebraska Panhandle removed 145 acres from production and entered it into the CRP in 1988. The contract is for a period of ten years at an annual rental payment of $45 per acre. The enrolled land, formerly used for wheat and summer fallow, is located on the transition slope between high plains table land and a valley. It is subject to erosion from the strong winds familiar to the Great Plains and also to sheet and rill erosion during the infrequent but often violent seasonal thundershowers.

As part of the conservation plan for this land, a temporary cover crop of forage cane was planted in July 1988 to prevent wind erosion during the winter months. The government's cost share on this practice was $10 per acre. The conservation plan then calls for permanent vegetative cover to be planted in the spring of 1989. This planting will be done between the existing cover crop rows to ensure continuous protection. The vegetative cover will consist of one of six different combinations of grass seed available. The government's cost share on this phase of the plan is one-half of the approximately $75 per acre cost, meaning the farmer essentially pays the equivalent of one of his ten rental payments.

This farm is also participating in the shelterbelt provision of the CRP. Three rows of cedars and elms have been planted along one edge of the CRP land, and the area has been scheduled for herbicide application to enhance tree survival.

NRD payment). The combination of the two payments have boosted tree planting impressively.").

The other Natural Resource Districts in Nebraska providing technical and financial assistance for tree planting on CRP land include the Lower Platte South NRD (additional 25% cost share), the Upper Elkhorn NRD (additional 25% cost share), Middle Missouri NRD (additional 25% cost share), and the Twin Platte NRD.

95. Nebraska ASCS/SCS CRP Summary.

VII. PROPOSALS FOR LEGISLATIVE AND ADMINISTRATIVE CHANGES IN THE CONSERVATION RESERVE PROGRAM

The long-term success of the CRP depends, in large part, on how much land is left in permanent vegetative cover such as trees and native grass after the expiration of CRP contracts. To some extent, then, the success of the program will depend on economic factors such as the price of farm commodities and land, tax considerations, global food demand and the size of U.S. surplus grain stockpiles. Other factors, however, will also have a significant impact on the degree of success of the CRP. These factors include legislative and administrative actions which can be taken to encourage conservation practices that produce long-term conservation benefits such as greater use of shelterbelts and other conservation trees, the establishment of native grass suitable for sustained grazing, and the development of conservation plans designed to ensure adequate erosion control on land brought back into production.

The objective of the following recommendations is to encourage the adoption of legislative and administrative changes in the CRP which will increase long-term benefits from the CRP in the form of reduced wind erosion, reduced sedimentation, and increased wildlife habitat and livestock shelter. These recommendations are a syntheses of proposals from numerous conservation groups, local government agencies, and individuals from across Nebraska as well as from the author's research, discussions with farmers and conservationists.[96]

A. Conservation Trees

1. Rationale

As part of what is potentially the greatest conservation and tree planting program ever undertaken, the U.S. Congress included shelterbelts and windbreaks as part of the Food Security Act of 1985. Shelterbelts and other conservation trees have numerous benefits. Research shows that windbreaks increase crop yields; reduce soil ero-

96. Sources responding to requests for information include: the Nebraska ASCS Office; Lancaster County ASCS Office; Dennis Adams, Cooperative Extension Service - Forestry Division; Paul D. Smith, SCS Resource Conservationist; Congresswoman Virginia Smith; Congressman Doug Bereuter; Senator Dave Karnes; Senator Jim Exon; Congressman Charles Stenholm of Texas; Nebraska State SCS; Gary Hergenrader, Nebraska State Forester; Nebraska Game and Parks Commission; Jerry Duval, House Agriculture Committee; National Arbor Day Foundation; Center For Rural Affairs; Wildlife Management Institute; Big Bend Audubon Society; Upper Elkhorn NRD; Lower Platte South NRD; Lincoln Chapter, Izaak Walton League; National Farmers Organization; Little Blue NRD; Nebraska Wildlife Society; Middle Missouri NRD; South Platte NRD; Lower Elkhorn NRD; Upper Niobrara-White NRD; and the Twin Platte NRD.

sion; and reduce input costs for seed, fertilizer, fuel, and irrigation.[97] Windbreaks also provide substantial benefits to farmsteads and livestock. They can reduce winter heating bills in the Great Plains by 25%, reduce cattle feed costs in the midwest by 20%, increase stock cow milk production by 8%-25% (depending on the breed and windchill), and increase live calf crops by 2%. More importantly, for conservation purposes, data from the old Soil Bank Program shows that there is almost a 90% retention rate of trees after establishment.[98] This figure dramatically illustrates the fact that, in the long term, it is more cost efficient to spend CRP cost share money to establish trees than grass on CRP land.

Most, if not all Nebraska Natural Resource District officials recommend additional conservation tree planting including one official who stated,

> [t]his NRD encourages the planting of a greater proportion of CRP land to trees. Trees represent a more permanent type of vegetative cover and, therefore . . . more long-term benefits for the dollars invested. Greater technical assistance and emphasis should be placed on having CRP plans that include tree plantings for part of the acres involved.[99]

A number of changes are needed to increase participation and effectiveness of the CRP conservation tree provisions. Realization of the need for these changes and for an increased emphasis on conservation trees is widespread. The National Arbor Day Foundation has made conservation tree planting its top educational priority, while the National Association of State Foresters has made shelterbelts and other conservation trees its top legislative priority for the 1990 Farm Bill.[100]

2. Proposals

1. The single most important change necessary to increase use of conservation trees on CRP land is to allow modification of conservation plans at any time during the contract period to include conservation trees. At present, conservation trees must be included in the conservation plan when the contract is signed or they are forever excluded. Furthermore, even if trees are included in the plan the only time a participant can plant trees in more than one year is if tree seedlings are not available. Farmers who would otherwise plant conserva-

97. HEARINGS ON THE GENERAL FARM BILL OF 1985 BEFORE THE SUBCOMM. ON CONSERVATION, CREDIT, AND RURAL DEV. OF THE HOUSE COMM. ON AGRIC., 99th Cong., 1st Sess., pt. 2, at 909 (April 4, 1985)(Statement of the National Association of State Foresters).

98. *Id.* at 910.

99. Letter from John W. Williams, District Manager, Upper Niobrara-White NRD, to the author (Oct. 24, 1988).

100. Resolution of the National Association of State Foresters regarding the Conservation Reserve Program (September 12, 1988).

tion trees are being turned down because of this senseless "all or nothing" one year planting requirement. Planting windbreaks is a time consuming job and many farmers would plant trees throughout the program if allowed. To alleviate abuse potential, a minimum yearly planting requirement could be implemented as well as a minimum acreage requirement (such as 10 acres) for exemption from the one year rule.

2. ASCS and SCS personnel should be instructed to encourage more use of shelterbelts in CRP conservation plans. Conservation plans are already required for every CRP participant.

3. Each participant should be informed of tree planting opportunities and cost share programs at the time he develops his conservation plan.

4. Conservation tree planting goals should be developed for each state, and consideration of this goal should be given in accepting bids. Consideration of conservation trees in accepting bids is already authorized in the Food Security Act. However, it is not clear that bids containing trees are actually being given any special consideration under current procedures.

5. CRP contracts should be extended beyond 10 years for land planted to conservation trees. A Nebraska NRD official commented that "[d]espite all the efforts to encourage more tree planting our numbers of acres planted to trees remains very low. Obviously some additional incentive is necessary if we expect landowners to plant trees. This incentive could be in the form of an extended length for CRP contracts planted back to trees. . . ."[101]

6. Continuous signup should be allowed for land on which at least ten percent of the area will be devoted to conservation trees. This proposal would increase tree planting on CRP land and serve as an incentive for inclusion of trees in more conservation plans.

7. Reasonable, but sound, guidelines should be developed to establish acceptable erosion rates for conservation plans for land returned to crop production at the end of the CRP contract. This will not only ensure greater erosion control, but will also prevent the waste of tax dollars by preventing abusive practices on land which received rental and cost share payments during the CRP.

8. The entire CRP should be extended if Congress determines that it is economically and environmentally justified. Alternatively, Congress should consider extending the CRP for at least the most highly erodible land and land on which trees will be planted. For example, if a reduced scale CRP is desireable upon the expiration of the current contracts, a good approach would be to accept bids only if the

101. Letter from Paul D. Zillig, Ass't Gen. Mgr., Lower Platte South NRD, to the author (Oct. 21, 1988).

proposed conservation plan includes a certain percentage of trees. Highly erodible land could also be accepted without trees where the county committee determines that trees are unnecessary in preventing erosion.

9. The cost share for conservation trees in approved plans should be increased to 75%. Currently, conservation trees receive the same cost share as grass even though trees have a 90% historic retention rate and protect ten to twenty times the land area actually in trees.

10. Cost share should be allowed for simple drip systems where necessary to establish windbreaks. Cost share would not cover the watersource or well, pump, etc., but only installation and basic supplies such as plastic tubing. This would allow establishment of trees in areas where they would do the most good, and would be economically efficient since the tree survival rate is greatly enhanced.

11. Shelterbelts and other conservation trees should be required to be included in post-CRP conservation plans for highly erodible land returned to crop production where necessary to control wind erosion. Local ASCS and SCS personnel must be given enough flexibility and discretion to keep this requirement within reason while not allowing it to be ignored.

12. CRP regulations should be amended to allow entry of land into the CRP for use as shelterbelts, windbreaks or wooded wildlife areas when necessary to control wind erosion regardless of whether it meets current erodibility requirements. This action has already been taken with regard to land used for filter strips and is necessary for conservation trees in light of the low enrollment under current regulations. The enrollment of this otherwise non-eligible land could be curtailed at such time as the particular state or bid pool area reaches 90% of the Congressional goal of CRP land being one-eighth trees.

13. In lieu of, or in conjunction with other incentives, in-kind commodity bonuses could be offered to participants who agree to enroll land on which they will plant conservation trees. This proposal is similar to that used in the fourth signup period where an incentive was offered to encourage farmers to enroll corn land in the CRP.

14. All wildlife CRP contracts (CP4) should be required to include trees and or shrubs as part of the conservation plan.

15. Trees should be required in all filterstrip areas (CP12) when they are along streams unless the county committee determines it is undesirable or not beneficial. The goal of this proposal is to further reduce stream sedimentation and provide wildlife habitat.

16. Evaluations of conservation practices should be based on the area protected by the plan rather than on the area occupied. Current statistics list cost share per acre for conservation trees according to the acres actually in trees. This is an inaccurate comparison, when used to

compare cost share for grass, since trees protect ten to twenty times the area they cover.

17. A volunteer program should be established under which SCS and ASCS personnel may request assistance with planning and implementing conservation tree aspects of CRP conservation plans. National conservation organizations, land grant universities, community colleges and Vocational Agriculture students could be invited to participate. The purpose of this proposal is to provide assistance to government personnel who might not otherwise have time to include trees in conservation plans.

B. Native Grasses

1. Rationale

The planting of native or other grasses suited to permanent pasture use should be encouraged due to the likelihood that such vegetation will have a higher retention rate than other vegetative cover after expiration of the CRP contract. The establishment of native grass may require management techniques not allowed under current regulations. As one Natural Resource District General Manager states, "Just planting the grass and letting it lie idle for ten years will not guarantee a good establishment of grass."[102] This simple, but important reality brings to light several changes needed in the area of native grass establishment on CRP land.

2. Proposals

1. Where necessary, intense grazing over a short period of time should be permitted to help compact the soil for better root establishment. This practice could be used as an incentive for participants who agree to leave the land in grass for an additional period of time after expiration of the CRP contract.

2. Burning and/or haying should be included in conservation plans, where appropriate, to improve grass quality. Several restrictions must be placed on this proposal, however. These management practices should be allowed only on land planted to native or other grasses suited to *permanent* grazing or haying. Furthermore, haying should not be allowed where detriment to wildlife habitat outweighs benefits to grass quality or where haying would serve only short-term economic interests. Haying should not be allowed every year and should not be allowed where it would have a significant detrimental impact on commercial hay producers.

3. Emergency haying and grazing provisions should be applied

102. Letter from Paul A. Mann, General Manager, Upper Elkhorn NRD, to the author (Oct. 20, 1988).

sparingly and only in cases of severe need. When emergency haying is allowed, the participant should be required to leave intermittent vegetative cover for wildlife. The difficult decisions and competing interests in this area were well stated by one Nebraska conservationist.

> As for grasses, the CRP has greatly improved wildlife habitat, especially for game birds such as pheasants. It is unfortunate that haying and grazing were allowed this summer on CRP land, temporarily destroying much of the habitat that was just starting to become havens for wildlife. In the middle of the summer with yield forecasts dim to miserable, one is hardpressed to criticize the Department of Agriculture's decision to place human needs above those of wildlife.[103]

4. Cost share should be increased for participants who agree to plant native grasses suitable for long-term grazing or hay production. Alternatively, cost share payments could be lowered for those planting vegetation which is less likely to be retained.

5. Post-CRP conservation plans for lands which will be used for grazing upon the expiration of the contract should include pasture management. Measures may include cross fencing and rotation to prevent overgrazing and erosion.

As with all the preceding proposals, care must be taken to approach the conservation plan from the standpoint of helping the farmer or rancher to do what is best for his land while avoiding the undesirable situation where the government is perceived as telling the farmer how to farm.

C. Overall Conservation Reserve Program Effectiveness and Administration

1. Rationale

"I have lived through the first soil bank program that started in the late 1950s. Most [enrolled acres] were converted to cropland almost immediately after the contract ended. I have no reason to believe that it will be any different this time around."[104] These observations by a Nebraska conservationist stand as a challenge to Congress, the USDA, and all who believe in the goals of the CRP.

Changes must be implemented administratively and legislatively to safeguard the tremendous progress already made, while moving aggressively to maximize long-term benefit from the CRP. One conservation advocate wisely states that "Any remedy to agricultural conservation issues should discourage the repetition of past programs that are short term in nature. The cycle of alternatively paying for conservation practices followed with subsidies for abusive land use

103. Letter from Mark A. Svoboda, Administrative Assistant, Middle Missouri NRD, to the author (Oct. 27, 1988).

104. Letter from Hal Nagel, Ph. D., Big Bend Audubon Society, to the author (Oct. 20, 1988).

practices that are . . . resource depleting should be avoided."[105]

Several actions can be taken to prevent a repeat of past mistakes and the waste of tax money spent on CRP contracts.

2. Proposals

1. Stringent guidelines for conservation plans should be developed on land brought back into production at the end of the CRP contracts.[106] Erosion control levels must not be watered down to the point where the land will once again erode faster than it can sustain itself when returned to production.

In a letter to a United States Senator, the president of the Wildlife Management Institute warns that

> [R]ecent policy guidelines issued by the Soil Conservation Service (SCS) have the potential of reducing significantly the success of this important provision.
>
> On February 11, 1988 the SCS dropped all reference to soil tolerance ("T") levels for controlling and preventing erosion on highly erodible croplands. In its place, erosion reduction was to be evaluated according to local cropping system criteria set forth in SCS field office technical guides (FOTG).
>
> Evidence indicates that USDA officials may now be routinely developing conservation plans that allow erosion rates several times the soil's "T" value.
>
> Making "alternative conservation systems" available to anyone will result ultimately in many farmers choosing the more liberal practices even though economically and technically they are perfectly capable of reducing soil erosion to "T."[107]

Congress should conduct further hearings to determine whether SCS guidelines are adequate to protect CRP land from continued erosion. More stringent standards should be implemented if necessary. Flexibility must be allowed, however, where strict compliance would make farming infeasible. Such flexibility is advisable both on policy and legal grounds. Putting farmers out of business is not in keeping with the goals of the CRP and would raise questions of whether an unconstitutional taking had occurred.

2. Bid pool areas should be restructured to encourage enrollment of highly erodible land in areas where participation levels indicate

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105. Letter from Kristie Thorp, Center For Rural Affairs, to the author (Oct. 26, 1988).

106. This basic idea is supported by many groups including the Great Plains Agricultural Council Task Force On The Conservation Provisions Of The 1985 Food Security Act. The GPAC Task Force, in its preliminary recommendations presented in Las Cruces, New Mexico on June 7-9, 1988, makes the following recommendation: "Initiate efforts to help assure CRP land brought back into production after contract expiration meets the erosion level reduction requirements for "sodbusted" land (*i.e.*, control erosion rate to the soil loss tolerance level)."

107. Letter from Laurence J. Jahn, President, Wildlife Management Institute to United States Senator Tom Harkin (Oct. 4, 1988).

that the bid level is inadequate.[108] Bid levels could be lowered in areas where participation suggests a lower level would still attract participation.

3. Congress should resist pressure to eliminate the 25% county acreage limit for CRP signups. High county participation may indicate the bid price is too high when other counties in the same pool have low participation. The 25% cap prevents local economic problems and may currently be lifted on a case by case basis when necessary to enroll highly eroding land in areas where the economy would not suffer adverse affects.[109] The cap may provide the opportunity to shift resources to counties with poor participation.

4. A change that is intangible in concept, but practical in application, is the need for USDA to administer the CRP in recognition of the fact that "CRP" stands for Conservation Reserve Program and not "Commodity Reduction Program." The program seems to be administered to achieve maximum reduction of crop production while placing conservation considerations on a lower priority level. One NRD manager in northern Nebraska comments that "[t]he CRP program was set up as a commodity program and not a conservation program and that disturbs us."[110] Another NRD official states that "the harvesting allowed this year was not justified in many areas. It destroyed much wildlife habitat (which was a selling point for CRP), and was uncontrolled to the point of damaging some new grass plantings."[111] He further notes that the tremendous environmental and economic potential of the CRP "will be realized only if our legislators can resist political pressures to water down the provisions, and make it only an economic

108. Letter from Paul D. Zillig, Ass't Gen. Mgr. of the Lower Platte South NRD, to the author (Oct. 21, 1988)(comments that "there is such a variation in cash rent for cropland from one end to the other even though it is in the same pool. Because of this, 75% of the CRP acres are located in the extreme western part of the NRD where cash rent is near the annual CRP payment price. There is definitely erosive land in the eastern end of the NRD but economics will not permit them to enroll this highly productive but erosive land in CRP.").

109. Retaining the 25% cap does not mean that additional enrollment could not be allowed since current provisions give the Secretary discretion in this area. *See supra* note 56. Others believe that bidding should be reopened in all counties. Nebraska State Senator Dennis Baack comments that

> At this time, I have not seen any drastic problems created in Kimball County reaching their sign-up limit. As long as there is sufficient information regarding how much land will be out of production, most businesses have done a good job adjusting to the lower volume. I do believe that the program should be opened up again for more sign-up in Kimball County and any other county that has reached their limit, if there are farmers who are still interested in the program. The idea of a ten-year program does allow for some stability and for good planning.

Letter from Nebraska State Senator Dennis Baack to author (November 17, 1988).

110. This NRD official will not be identified.

111. *Id.*

package." This change in approach can be achieved without legislation with appropriate response from the USDA or it can be encouraged by specific legislative directives from Congress.

VIII. CONCLUSION

The CRP is one of the most significant conservation efforts in history. Americans will benefit from the program's erosion-reducing provisions for generations to come. Several shortcomings in the CRP's implementation, however, threaten to reduce the program's effectiveness and squander a golden opportunity to maximize long-term control of wind and water erosion. A number of administrative and legislative actions should be taken to encourage greater use of shelterbelts and other conservation trees, the establishment of native grass suitable for sustained grazing, and the development of conservation plans designed to ensure adequate erosion control on land returned to production.

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