

1986

A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbustin, Swampbusting, and the Conservation Reserve

Linda A. Malone

William & Mary Law School, lamalo@wm.edu

Repository Citation

Malone, Linda A., "A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbustin, Swampbusting, and the Conservation Reserve" (1986). *Faculty Publications*. 589.
<https://scholarship.law.wm.edu/facpubs/589>

A HISTORICAL ESSAY ON THE CONSERVATION PROVISIONS OF THE 1985 FARM BILL: SODBUSTING, SWAMPBUSTING, AND THE CONSERVATION RESERVE*

Linda A. Malone**

Rain on the scarecrow, Blood on the plow.
This land fed a nation; This land made me proud,
And Son I'm just sorry there's no legacy for you now.
Rain on the scarecrow, Blood on the plow . . .¹

The conservation provisions of the 1985 Farm Bill are a symbolic turning point in farmland conservation at the federal level. The Ninety-ninth Congress, in its first session, passed a farm bill that includes three conservation measures — the so-called sodbusting, swampbusting, and conservation reserve provisions — to curb the rapidly declining quality and quantity of our nation's topsoil. Congress' promulgation of these measures establishes a significant precedent for future conservation efforts at the federal level.

I. SODBUSTING, SWAMPBUSTING, AND THE CONSERVATION RESERVE

The sodbuster program discourages farmers from converting highly erodible land to cropland in the future by denying price supports and other farm benefits for their crops if the farmers choose to so convert. Similarly, the swampbuster program denies farm benefits to producers who convert wetlands to croplands. The conservation reserve program, in contrast, encourages the removal of fragile land from *present* use as farmland by reimbursing farmers for devoting fragile cropland to less intensive uses.

This Article reviews the preliminary Senate, House, and Administration versions of the sodbuster, swampbuster, and conservation reserve

* Copyright, 1986, Linda A. Malone. The author gratefully acknowledges the assistance provided for this Article by Ray C. Culver, Legislative Assistant for Senator Dale Bumpers, and by Tom Japhet, research assistant.

** Associate Professor of Law, University of Arkansas Law School, Fayetteville. B.A. 1975, Vassar College; J.D. 1978, Duke Law School; LL.M. 1984, University of Illinois College of Law.

1. *Rain on the Scarecrow*, written by John Mellencamp and George M. Green (1985, Riva Music Inc. (ASCAP) and Riva Music Ltd. (PRS)).

provisions, concentrating on the differences between the three proposed bills. It also addresses the final compilation of these provisions, agreed to by both the House and the Senate, that was signed into law on December 23, 1985.² Primarily, however, this Article discusses the significance of these conservation measures in the historical context of the development of federal land use controls to protect fragile lands.

Congress had refused twice before to pass conservation legislation similar to the conservation title of the 1985 Farm Bill. The relatively uneventful passage of the conservation programs arguably resulted from a combination of four key developments: the first opportunity since 1981 for a comprehensive revamping of agricultural policy; the spiraling cost of farm programs calling for reduced farm output and government subsidies; the growing recognition of the environmental destructivity of many agricultural policies; and — perhaps most importantly — the recognition by urban and suburban interests as well as environmental groups of their stake in the farm bill debate.³ Conservation organizations such as the American Farmland Trust, the National Audubon Society, and the Sierra Club battled fiercely to ensure passage of the conservation provisions.⁴ The Sierra Club, for example, distributed a "Farm Bill Alert" to its members urging them to lobby for establishment of sodbusting, swampbusting, and conservation reserve programs.⁵ The vigorous debate over other provisions of the bill obscured the significance of the conservation provisions and, as a result, the opposition (including the Reagan Administration) focused its resources in other areas.⁶ The outcome was the relatively easy passage of the most forceful federal soil conservation measures since the "Dust Bowl" legislation of the 1930's.

II. AN HISTORICAL PERSPECTIVE — LAND USE SCARECROWS TO SCARE AWAY CONVERSION OF AGRICULTURAL LANDS

A. *The Great Depression and an Era of Agricultural Surpluses*

Most existing federal conservation agencies and farmland programs were established during the Great Depression of the 1930's. At that time soil erosion, the depressed economy, and high unemployment

2. See Food Security Act of 1985, Pub. L. No. 99-198, 1985 U.S. CODE CONG. & AD. NEWS I [hereinafter cited as Food Security Act].

3. Visser, *Farm Bill Has Potent Soil Conservation Provisions*, Northwest Arkansas Times, Jan. 24, 1986, at 9, col. 2.

4. *Id.*

5. Letter from Sierra Club to Membership (June 17, 1985) (discussing the 1985 Farm Bill).

6. Visser, *supra* note 3.

were viewed as inextricably interrelated.⁷ In 1935, the Soil Conservation Service (SCS) was created as a permanent agency within the United States Department of Agriculture (USDA) to implement a program of soil and water conservation.⁸ By 1927 many states had established soil conservation districts and soil conservation had become a national goal.⁹

By leaving to the states the responsibility of creating soil conservation districts to regulate erosive farming practices, the SCS avoided the controversial political issue of federal regulation of private land use.¹⁰ Shortly after the SCS was established, the USDA was authorized under the Soil Conservation and Domestic Allotment Act of 1936 to make federal payments to farmers to share in the cost of soil conservation practices.¹¹ The Agricultural Conservation Program was to be administered by the Agricultural Stabilization and Conservation Service.¹²

From the 1930's to the 1960's, Congress established several programs, including the Small Watershed Program, the Great Plains Conservation Program, and the Rural Clean Water Program, to address specific conservation concerns.¹³ These programs, however, were designed to provide technical assistance and cost sharing for conservation measures, not to impose mandatory controls. From the post-depression period until the 1970's, the nation produced a surplus of agricultural products. There seemed to be little need for concern about a potential shortage of farmland or quality soil.

In the early 1970's a change in market conditions brought preservation of farmland to the political forefront. Largely because of increased foreign demand for agricultural products, surpluses began to dwindle in the 1970's; the new but vocal environmental movement called for measures to preserve the quantity and quality of American farmland. By the late 1970's, Congress felt a growing frustration with established federal soil conservation programs. A 1977 report to Congress by the Comptroller General criticized all these federal programs and warned of the existence of a continuing soil erosion problem despite the forty-year history of federal soil conservation programs.¹⁴ The Soil and Water Resources Conservation Act of 1977 was designed

7. See R. SAMPSON, *FARMLAND OR WASTELAND: A TIME TO CHOOSE* 256 (1981).

8. *Id.* at 258-59.

9. *Id.* at 260.

10. *Id.*

11. *Id.* at 264.

12. *Id.*

13. *Id.* at 270.

14. GAO, *To Protect Tomorrow's Food Supply, Soil Conservation Needs Priority Attention* (1977).

to investigate the problem and propose a program to meet soil conservation needs.¹⁵ The limited usefulness of technical assistance and cost sharing was apparent, yet Congress still was unprepared to impose any federal land use controls on farmland.

On February 7, 1980, the United States House of Representatives, for the first time in history, seriously considered whether farmland is a limited resource to be protected by the federal government.¹⁶ The defeat of the so-called Jeffords Bill, which would have required all federal agencies to adopt procedures to minimize the adverse effects of their actions on farmland and would have established a presidentially appointed committee to study farmland protection issues,¹⁷ marked the advent of a new federal activism in farmland preservation. In 1981, the controversial National Agricultural Lands Study warned that increased urbanization posed an alarming threat to farmland acreage, and it called for increased federal protection.¹⁸

B. The Farmland Protection Policy Act of 1981 and the Beginning of Stricter Federal Soil Controls

In the environmentally sensitive 1970's, Congress passed several laws with indirect effects on state and local land use controls.¹⁹ These laws paved the way for the Farmland Protection Policy Act of 1981.²⁰ The Act charges the USDA with the responsibility of promulgating site assessment criteria for evaluating the effects of federal projects and programs on conversion of farmland to nonagricultural uses.²¹ Under the Act, federal agencies that embark on a project that will be located on certain categories of farmland must (1) apply site assessment criteria to consider the adverse effects of the project on farmland, (2) consider alternative actions with lesser impacts, and (3) assure that federal programs are consistent with state, local, and private farmland protection.²²

The Act, however, contains two provisions that severely restrict its usefulness in preserving farmland.²³ Reflecting the traditional reluctance to impose federal land use controls, the Act does "not authorize the Federal Government in any way to regulate the use of private

15. R. SAMPSON, *supra* note 7, at 287; 16 U.S.C. §§ 2001-2009 (1982).

16. *Id.* at 108.

17. *Id.*; H.R. 2251, 96th Cong., 1st Sess. (1979).

18. R. SAMPSON, *supra* note 7, at 109.

19. Grossman, *Prime Farmland and the Surface Mining Control and Reclamation Act: Guidance for an Enhanced Federal Role in Farmland Preservation*, 33 *DRAKE L. REV.* 209, 260 (1983-84).

20. *Id.* at 270. See Farmland Protection Policy Act, 7 U.S.C. §§ 4201-4209 (1982).

21. *Id.* § 4202(a).

22. *Id.* § 4202(b).

23. Grossman, *supra* note 19, at 272.

or non-Federal land, or in any way affect the property rights of owners of such land.”²⁴ Moreover, no suit can be brought to enforce the Act’s requirements.²⁵ Like the National Environmental Policy Act (NEPA), the Farmland Protection Policy Act is primarily a procedural statute in terms of its requirements; unlike NEPA, the Act’s procedural requirements cannot be enforced in court.

Two years after the Act became effective, the Secretary of Agriculture issued federal regulations to implement the Act.²⁶ The Secretary’s regulations, however, only underscore that the Act is merely a scarecrow of farmland protection — a feeble attempt to scare away the conversion of agricultural land to nonagricultural uses, with no real force behind it. The regulations reiterate the Act’s two substantive limitations and then further delineate the Act’s limited effect. The regulations state that if, after consideration of the adverse effects and alternatives by the agency, the applicant wants to proceed with the conversion, the federal agency *is not permitted* to refuse to proceed with the project.²⁷ The comments to the regulation suggest that such a refusal would violate the Act’s prohibition on federal intervention in land use.²⁸

This background indicates why the conservation title in the 1985 Farm Bill is a landmark in conservation of farmland. Although indirect in the sense that federal funds are denied to landowners and operators who fail to comply, the conservation provisions do require certain conservation practices for farmland on a nationwide basis. These provisions go beyond the Farmland Protection Policy Act by imposing substantive, not merely procedural, requirements. The Farmland Protection Policy Act is not designed to, and certainly does not, curtail a decline in the quantity or quality of the nation’s farmland.

A 1983 report to Congress by the Comptroller General²⁹ echoed the inadequacy of soil conservation programs outlined in the earlier 1977 report. A USDA report published in June, 1985 set forth the data relevant to the need for sodbusting legislation and reluctantly concluded that such legislation would remove “potentially large incentives to bring highly erodible land into agricultural production.”³⁰

24. 7 U.S.C. § 4208 (1982).

25. *Id.* § 4209.

26. Farmland Protection Policy Act, 49 Fed. Reg. 27,716 (1984) (codified at 7 C.F.R. § 658 (1985)).

27. *Id.* at 27,725 (codified at 658.3(c)).

28. *Id.* at 27,718.

29. COMPTROLLER GENERAL, AGRICULTURE’S SOIL CONSERVATION PROGRAMS MISS FULL POTENTIAL IN THE FIGHT AGAINST SOIL EROSION (GAO Report No. 84-48, Nov. 28, 1983).

30. USDA, *Sodbusting: Land Use Change and Farm Programs* 23 (Agriculture Information Bulletin No. 536, June, 1985).

As early as the spring of 1983 the American Farmland Trust began to lobby for a conservation reserve.³¹ By the summer of 1985, a conservation title in the 1985 Farm Bill seemed inevitable.

C. An Evolving Consensus: Development of the Conservation Provisions

In June 1985, the Reagan Administration, in an apparent reversal of prior policy, decided to support the establishment of a twenty million acre conservation reserve. Then Secretary of Agriculture John Block announced the Administration's support of such a reserve despite its earlier opposition to the program as being too costly.³² The Administration's support for a conservation reserve, although relatively limited, paved the way for the more reaching conservation provisions ultimately included in the 1985 Farm Bill. The Ninety-ninth Congress found itself facing a surprising abundance of conservation proposals.³³

After its Independence Day recess, Congress began serious consideration of the conservation provisions to be included in the 1985 Farm Bill. Both the House and Senate Agriculture Committees went well beyond Block's proposal of a twenty million acre conservation reserve. The House Agriculture Committee, shortly after the recess, voted to set up a long-term reserve of twenty-five million acres.³⁴ The Senate Agriculture Committee responded by proposing a thirty million acre reserve.³⁵ Yet the most significant innovation in this period was the Senate Agriculture Committee's proposal to ban all federal farm program assistance to any farmer who continues to cultivate highly erosive land after 1988 without a government approved conservation plan, a surprising limitation with far-reaching consequences beyond the basic sodbusting prohibition which both Committees had easily approved.³⁶

The Senate Agriculture Committee reported a farm bill, S. 616, on September 19, with the majority in the 10-6 vote consisting of eight Democratic and two Republican Senators.³⁷ The House Agriculture

31. AMERICAN FARMLAND TRUST, SOIL CONSERVATION IN AMERICA: WHAT DO WE HAVE TO LOSE? 94 (1984).

32. *Administration Backs Soil-Saving Reserve*, 5 AMERICAN FARMLAND No. 4 (July-Aug. 1985).

33. See, e.g., S. 616, 99th Cong., 1st Sess. (1985); S. 1051, 99th Cong., 1st Sess. (1985); S. 1035, 99th Cong., 1st Sess. (1985); H.R. 2108, 99th Cong., 1st Sess. (1985); H.R. 2100, 99th Cong., 1st Sess. (1985); S. 1000, 99th Cong., 1st Sess. (1985).

34. *Soil Conservation Pushed*, Washington Post, July 12, 1985, at A9, col. 1 [hereinafter cited as *Conservation Pushed*].

35. *Id.*

36. *Id.* at col. 3.

37. Culver, *1985 Farm Bill Debate Update*, AGRIC. L. UPDATE, Oct. 1985, at 4.

Committee had already reported its farm bill, H.R. 2100, and began debate on the bill in early October.³⁸ The Senate followed suit and started debate on October 25, 1985.³⁹ Thus began a divisive battle over the future of the United State's farm policy on subsidies, farm foreclosures, and other heated issues, a battle that soon eclipsed what little controversy had been created by the conservation provisions proposed by the House and Senate Agriculture Committees.

In December 1985, the final House and Senate farm bills were sent into conference to be reconciled. A farm bill was approved by Congress and sent to President Reagan on December 18.⁴⁰ The five-year farm bill, entitled the Food Security Act of 1985, with its little-known conservation title to protect fragile land resources, was signed into law by President Reagan on December 23, 1985.⁴¹ After years of unsuccessful efforts by conservationists for meaningful soil conservation at the federal level, the most forceful soil conservation measures since the depression became law virtually unnoticed.

In light of the limited debate on the conservation provisions, those areas of disagreement become particularly interesting. To highlight these areas, the following analysis compares the conservation provisions in the House and Senate bills based on preliminary committee action in August of 1985, the complete House and Senate bills as sent to conference for reconciliation, and the final act as sent to President Reagan on December 18 and signed into law on December 23, 1985.

1. The Preliminary House and Senate Provisions in August of 1985⁴²

a. The preliminary sodbusting proposals

Before discussing the so-called sodbusting provisions, one must first understand the nature of the problem these provisions addressed. From 1976 to 1982, more than 3.8 million acres of fragile land were converted from grass and trees to cropland — a 9.2% increase in fragile land crops.⁴³ Annual soil erosion rates on cultivated fragile lands average as much as fifteen to twenty tons per acre per year — five to seven times the rate that can be matched by new soil formation

38. *Id.*

39. *Senate Begins Debate on Fate of Farm Policy*, Arkansas Gazette, Oct. 26, 1985, at A19.

40. *Reagan Approves Farm Bill with Title that Would Retire Highly Erodible Land*, 16 ENV'T REP. (BNA) 1665 (Dec. 27, 1985) [hereinafter cited as *Reagan approves*]. See H.R. REP. NO. 447, 99th Cong., 1st Sess. (1985).

41. *Reagan Approves*, *supra* note 40. See Food Security Act, *supra* note 2.

42. The following analysis is drawn from a packet of news releases, marked-up bills, and preliminary reports from August of 1985 which were obtained from the office of Senator Dale Bumpers of Arkansas. These materials are on file with the KANSAS LAW REVIEW and the author, and will hereinafter be cited as Preliminary Conservation Title.

43. USDA, 6 SOIL & WATER CONSERVATION NEWS 2 (June 1985).

on these lands.⁴⁴ From 1979 to 1981, the largest proportion of conversions was in the Corn Belt, followed by the northern Great Plains area.⁴⁵

USDA commodity programs encourage conversion of fragile lands to cropland by raising commodity prices and reducing the market risk to producers. Beneficial capital gains tax treatment for the increase in land value when land is converted from grass or tree production to cropland also encourages short-term conversion to cropland of land highly susceptible to excessive erosion. These fragile lands can only sustain intensive crop production for a few years. The high erosion rates, during and particularly after conversion to cropland, result in a high volume of sediment being washed into water systems, with increased wind erosion and loss of soil moisture. The off-farm cost of erosion was recently estimated at six billion dollars a year, or about one hundred dollars per American family, for water pollution control, harbor dredging, loss of recreational opportunities, and other impacts. One-third of these costs is attributable to cropland.⁴⁶

It has also been estimated that every year 3.1 billion tons of fertile topsoil erodes from farmland — enough to fill the Houston Astrodome thirty-four thousand times.⁴⁷ Agricultural erosion is the single greatest source of unregulated water pollution, causing an estimated three billion dollars annually in damages to water quality and navigation.⁴⁸ In 1977, only six percent of the United States' cropland accounted for forty-three percent of total sheet and rill erosion on cropland.⁴⁹

The general intent of sodbusting provisions is to discontinue government subsidization of conversion by denying commodity subsidies to producers of program crops grown on highly erodible land.

The Administration's version of the sodbusting bill provided that a person who grows a crop on highly erodible land would be ineligible during that crop year for the following benefits:

- (1) Any program benefits made available through the CCC or by the ASCA;
- (2) Any loan assistance made available through the Farmers Home Administration; or
- (3) Crop insurance under the Federal Crop Insurance Act.⁵⁰

The House and Senate versions were similar except in the benefits for which a producer would be ineligible. The preliminary House and

44. *Id.*

45. USDA, *Taking Aim at Sodbusting*, 6 FARMLINE 7 (Aug. 1985).

46. E. CLARK, J. HAVERCAMPT & W. CHAPMAN, *ERODING SOILS: THE OFF FARM IMPACTS* (1985).

47. AMERICAN FARMLAND TRUST, *supra* note 31, at 99.

48. *Id.*

49. *Id.*

50. Preliminary Conservation Title, *supra* note 42, at 1.

Senate proposals provided that a person who grows a crop on highly erodible land would be ineligible during that crop year for:

- (1) Price support or other payments made available under law;
- (2) Commodity Credit Corporation farm storage facility loans;
- (3) Federal crop insurance;
- (4) Federal disaster payments;
- (5) A new loan made, insured, or guaranteed by the Farmers Home Administration, if the Secretary determines that the loan proceeds will be used for a purpose that will contribute to excessive erosion of highly erodible lands; and
- (6) Leasing storage to the Commodity Credit Corporation.⁵¹

The sodbusting provisions were not to apply to all producers who grew crops on highly erodible land; all three proposals provided exemptions. All the proposals provided that the prohibition of federal benefits did not apply to producers who grew crops on highly erodible land according to an approved conservation system.⁵² Also exempt to some extent in all three proposals were producers who had grown crops on the highly erodible land in question, prior to the enactment of the Act.⁵³ Thus, the proposals were mainly aimed at preventing the subsequent conversion of highly erodible land to cropland.

The Senate's version went further than this, however. It phased out the prior production exemptions and banned federal farm program assistance to any producer who cultivated highly erodible land after 1988 without an approved conservation plan, regardless of the prior use.⁵⁴

b. The preliminary conservation reserve program proposals

Over fifty percent of all soil erosion occurs on just twelve percent of the nation's cropland.⁵⁵ The conservation reserve program would pay farmers an annual fee for a number of years to convert highly erodible cropland to less erosive, but still profitable uses. In contrast to sodbuster provisions, which are intended to discourage future conversions, the conservation reserve is aimed at taking land out of crop production.

Some studies indicate that a conservation reserve program, despite the potential ten years of annual fees, would reduce costs of the current farm program by as much as one billion dollars per year.⁵⁶ The Administration originally opposed the idea based on cost, but in June

51. *Id.* at 1.

52. *Id.* at 2-3.

53. *Id.* at 2.

54. *Id.* at 3.

55. See Letter, *supra* note 5, at 2.

56. *Id.*

1985, then Secretary of Agriculture John Block proposed that as much as twenty million acres be devoted to a conservation reserve to protect the environment and reduce surplus crop production.⁵⁷ The projected cost of the program was eleven billion dollars over ten years, which was expected to be offset by lower federal outlays for commodity loans and deficiency and storage payments.⁵⁸

All of the proposed conservation reserve programs were designed to remove highly erodible land from crop production. This goal was to be accomplished by the USDA entering into contracts with the owners and operators of highly erodible land under which the owners and operators were paid to make other, less intensive use of the land (such as permanent grass or trees).⁵⁹ However, the proposals differed on specific provisions. In particular, the proposals differed on the number of acres that were to be included in the conservation reserve, the period during which conservation contracts would be entered into by the government, the length of these contracts, and the payment limitations.

The Administration's bill proposed creating a conservation reserve of twenty million acres.⁶⁰ Under the Senate version, up to thirty million acres were to be removed from production, with a minimum of twenty-five million acres.⁶¹ The House version put the limit at twenty-five million acres and further provided that at least five million acres of this amount was to be funded by Commodity Credit Corporation surplus commodities.⁶²

The Administration's bill did not state the period for which the Secretary of Agriculture was to enter into conservation contracts under the program. The length of the conservation contracts under the Administration's proposal was to be ten years.⁶³

The House proposal provided for contracts up to ten years in length, which were to be entered into by the Secretary between October 1, 1985 and September 30, 1990.⁶⁴ The Senate version provided that the Secretary was to enter into contracts during the fiscal years 1986 through 1990. Under the Senate plan, the contracts were to be seven to fifteen years long.⁶⁵

Regarding limitations on payments, the Administration's plan limited the annual payments a producer could receive to fifty thousand dollars.

57. Washington Post, July 12, 1985, at A9, col. 1.

58. USDA, *supra* note 45, at 9.

59. See Preliminary Conservation Title, *supra* note 42, at 4.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 5.

64. *Id.*

65. *Id.*

The House and Senate versions also limited payments under the program to one producer to fifty thousand dollars, but further provided that the payments could be in cash or in-kind.⁶⁶

One source estimates that the conversion of the 12.5 million acres of cropland suffering the highest rates of sheet and rill erosion would yield soil savings of 600 million tons per year over a period of five to ten years.⁶⁷ Such savings would reduce sheet and rill erosion of cropland by approximately one-third over that period.⁶⁸

c. The preliminary swampbusting proposals

Wetlands provide wildlife habitat, nesting areas, groundwater recharge, and flood control, yet fewer than half of our nation's original wetlands still exist.⁶⁹ Four of every five acres of lost wetlands are lost to agricultural use.⁷⁰

The Administration's bill contained no provision for a swampbusting prohibition.⁷¹ The House and Senate versions were virtually identical. These bills provided that a person who grows a crop on converted wetland is ineligible during that crop year for those benefits also withheld from persons growing crops on highly erodible land.⁷²

d. The major differences between the House and Senate bills

Early in the legislative process, the Administration's version of the bill was virtually abandoned, and debate focused on the more detailed House and Senate versions. The major differences between the Senate and House conservation titles of the 1985 Farm Bill were in the conservation reserve program. In terms of acreage limits, the Senate bill established a conservation reserve program of twenty-five to thirty million acres. It required not less than ten million acres to be set aside in each of 1986 and 1987 crop years, and between five and ten million acres set aside during the 1988 and 1989 crop years. The House bill established a reserve of only twenty-five million acres with no per year minimum or maximum acres specified. Total acres could be entered within five years. The House bill specified that at least five million acres should be funded from surplus commodities in the Commodity Credit Corporation. It was the intent of the House that this five million acres be contracted first, before any other land to be contracted.

66. *Id.* at 8.

67. AMERICAN FARMLAND TRUST, *supra* note 31, at 100.

68. *Id.*

69. Letter, *supra* note 5, at 2.

70. *Id.*

71. See Preliminary Conservation Title, *supra* note 42, at 12.

72. See *supra* text accompanying note 51.

The bills also differed in the base reduction for purposes of other farm support programs. The Senate bill required the permanent reduction of the base acres, but only during the life of the contract. Base acres were to be reduced by the same ratio as the ratio of conservation reserve acres to total cropland acres on the farm.

The bills also differed as to the length of contracts, with the Senate stating seven to fifteen years as the contract term, and the House stating a period of not less than ten years. As to commercial harvest, the Senate bill allowed only what was expressly permitted in the contract. The Secretary may allow haying and grazing on a state by state or part of a state basis. The House version was essentially the same, but no haying or grazing was allowed during the life of the contract except in emergency conditions. The contract had to specify that the land would not be used to commercially harvest and sell Christmas trees. Thinning of trees, including the selling of pulpwood and fence posts resulting from the thinning, would be allowed.

The Senate bill only specified that, to the extent practicable, at least ten percent of the total acreage shall be devoted to shelterbelts in areas prone to wind erosion. It further provided that a portion of the contract shall be for those who agree to plant trees as vegetative cover. The House bill allowed trees but did not specify any certain amounts. The Secretary could consider contracts that include shelterbelts.

Under the sodbuster program, the main difference between the Senate and House bills was in the definition of "highly erodible land" (*i.e.*, the land to which the bill applies). The Senate version defined "highly erodible land" as "land classified by the soil conservation service as class IIIe, IVe, VI, VII, or VIII land."⁷³ The House version's definition was the same, except class IIIe land was not included.⁷⁴

Perhaps the most significant difference between the House and Senate swampbuster programs was that the Senate bill provided that, starting with the 1988 crop year or two years after the farmer has a soil survey, farmers must be farming according to a conservation plan that has been approved by the soil conservation districts in order to be eligible for farm program benefits.⁷⁵

2. Reconciliation of the Major Differences in the Final House and Senate Bills in Conference

A joint House and Senate conference convened in December to reconcile the remaining conflicts in the conservation titles of the House

73. Preliminary Conservation Title, *supra* note 42, at 15.

74. *Id.*

75. *Id.* at 3.

and Senate bills.⁷⁶ The issues were not merely technical; disagreement remained over such important questions as the definition of "highly erodible" land in the sodbusting program and the impermissibility of haying and grazing on conservation reserve land. It appears that in most instances, the conference settled direct conflicts in favor of the House version.

The major conflict in the sodbuster program centered on the land covered within the definition of highly erodible land. The House bill, as it went to conference, defined "highly erodible land" qualifying for the sodbuster program as "land that is classified by the Soil Conservation Service . . . as class IVe, VI, VII, or VIII land . . . or that, if used to produce an agricultural commodity, would have an excessive average annual rate of erosion in relation to the soil loss tolerance level . . . as determined by the Secretary through application of factors from the universal soil loss equation and the wind erosion equation, including factors for climate, soil erodibility, and field slope."⁷⁷ The Senate bill as amended defined " 'highly erodible land' in reference only to land classes and include[d] all land classes in the House bill as well as land classed as IIIe by the Soil Conservation Service."⁷⁸ The conference adopted the House version, thus simultaneously broadening the definition by including land not within the specific land classes, and narrowing the definition by excluding class IIIe land.⁷⁹

As of August, only the Senate bill required farmers of all highly erodible land, starting with the 1988 crop year or two years after the farm has a soil survey, to farm according to an approved soil conservation plan in order to be eligible for farm program benefits.⁸⁰ Between August and December, the House formulated its own provision imposing a similar requirement.

The House bill provided that the exemption from the sodbusting prohibition for producers who were growing crops on highly erodible land prior to the act would end on January 1, 1990, or on a date two years after the land was mapped by the SCS, whichever is later, unless the producer actively applies an approved conservation plan.⁸¹ In other words, all farmers of highly erodible land would be required after this time to apply a conservation plan in order to be eligible

76. *Reagan Approves*, *supra* note 40, at 1665.

77. H.R. REP. NO. 447, 99th Cong., 1st Sess. 455 (1985).

78. *Id.*

79. In a USDA background release, the USDA set forth on a state-wide basis the number of acres eligible for the conservation reserve program and a basic outline of the program. USDA, *Backgrounder — Conservation Reserve Program* (Jan. 13, 1986).

80. *See Conservation Pushed*, *supra* note 34, at col. 3.

81. H.R. REP. NO. 447, 99th Cong., 1st Sess. 458-59 (1985).

for federal benefits. The conference adopted the House version of the plan.⁸²

The major differences in the conservation reserve program of the House and the Senate Bills as of August were: (1) the acreage limits; (2) the reduction of the base acreage for purposes of other federal programs; (3) the length of contracts; (4) the permissible extent of commercial harvesting; and (5) the acreage which may be devoted to trees. As to overall acreage, the conference adopted the Senate bill as it existed after August, which required the Secretary "to place acreage in the conservation reserve as follows:

- (1) during the 1986 crop year, not less than 5, nor more than 45, million acres;
- (2) during the 1986 and 1987 crop years, a total of not less than 15, nor more than 45, million acres;
- (3) during the 1986 through 1989 crop years, a total of not less than 25, nor more than 45, million acres;
- (4) during the 1986 through 1989 crop years, a total of not less than 35, nor more than 45, million acres; and
- (5) during the 1986 through 1990 crop years, a total of not less than 40, nor more than 45, million acres."⁸³

Therefore, the adopted version requires the Secretary to remove between forty and forty-five million acres of highly erodible land from production into the conservation reserve during fiscal years 1986 through 1990.

This acreage requirement adopted by the conference thus is significantly greater than the earlier House or Senate proposals.⁸⁴ The House bill provision for an additional five million acres to be put in reserve with payment in Commodity Credit Corporation (CCC) surplus agricultural commodities was rejected by the conference.⁸⁵

On the effect of inclusion in the conservation reserve on the base history of the land, the conference chose the provisions of the House bill as amended by the conference. Under the House bill, a conservation plan "may provide for the *permanent* retirement of any existing cropland base and allotment history for the land."⁸⁶ The conference determined that the length of contracts for the conservation reserve should be not less than ten nor more than fifteen years in duration.⁸⁷

As for commercial harvesting and planting of trees on conservation reserve land, the conference adopted a combination of the Senate and House bills with an amendment of its own.

82. *Id.* at 459.

83. *Id.* at 462.

84. *See supra* notes 61-62 and accompanying text.

85. H.R. REP. NO. 447, 99th Cong., 1st Sess. 462 (1985).

86. *Id.* at 468 (emphasis added).

87. *Id.* at 462.

The conference adopted the House provision on haying and grazing under which the owner or operator is required to agree in the conservation contract not to harvest, graze, or make other commercial use of the forage grown on the highly erodible land. The Secretary of Agriculture may make exceptions to this rule, and allow the commercial use of forage from the land, but only in response to an emergency.⁸⁸

The conference added a requirement concerning the planting of trees. A conference amendment specified that at least one-eighth of the land placed in the conservation reserve each year should be planted with trees, if practical.⁸⁹

3. The Long Awaited Conservation Provisions of the Food Security Act of 1985

The bill reported out of the conference underwent no further revisions before being signed into law on December 23, 1985. The final act, however, reflected many significant changes made in the conference for purposes other than reconciliation of the House and Senate bills. In the definitional section, the conference ultimately adopted the House's definition of "wetland,"⁹⁰ "converted wetland,"⁹¹ and "highly erodible cropland."⁹² It included the Senate's definition of "agricultural commodity" (amended after August to encompass

88. *Id.* at 463.

89. *Id.* at 464.

90. *See id.* at 454: Except when such term is part of the term "converted wetland," "wetland" is defined as "land that has a predominance of hydric soils and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions."

91. *See id.*: "Converted wetland" is defined to mean "wetland that has been converted by certain activity making the production of agricultural commodities possible that would not have been possible but for such activity and that, before such activity was taken, was wetland and not highly erodible land nor highly erodible cropland with several exemptions listed."

92. *See id.* at 455: "Highly erodible cropland" is defined as "highly erodible land that is in cropland uses, as determined by the Secretary." "Highly erodible land" in turn is defined as:

land that is classified by the Soil Conservation Service of the Department of Agriculture as class IVe, VI, VII, or VIII land under the land capability classification system in effect on the date of enactment of the bill; or that, if used to produce an agricultural commodity, would have an excessive average annual rate of erosion in relation to the soil loss tolerance level, as established by the Secretary, and as determined by the Secretary through application of factors from the universal soil loss equation and the wind erosion equation, including factors for climate, soil erodibility, and field slope. For purposes of this paragraph, the land capability class or rate of erosion for a field shall be that determined by the Secretary to be the predominant class or rate.

Id.

"sugarcane planted and produced in a State"),⁹³ "hydric soil,"⁹⁴ "hydrophytic vegetation,"⁹⁵ "shelterbelt,"⁹⁶ "state,"⁹⁷ and "field."⁹⁸ The conference formulated its own compromise definitions of "conservation payment,"⁹⁹ "rental payment,"¹⁰⁰ and "vegetative cover."¹⁰¹

Among the more important substantive provisions adopted in conference, the final provisions of the sodbuster and swampbuster programs stated that

any person who, after enactment, produces during any crop year an agricultural commodity on highly erodible land or on converted wetland shall be ineligible for . . . any type of price support or payments, farm storage facility loans, [f]ederal crop insurance, disaster payments, and FmHA . . . [loans] if the [loan] would be used for a purpose that would contribute to excessive erosion of highly erodible land, or conversion of wetlands

for any commodity the person produced during that crop year.¹⁰² Also,

a person who produces an agricultural commodity on highly erodible land or converted wetland shall be ineligible, as to any commodity produced during that crop year by such person, for a payment made under section

93. See *id.* at 454: "Agricultural commodity" is defined as "any agricultural commodity planted and produced in [any] [s]tate by annual tilling of the soil, including tilling by one-trip planters; or sugarcane planted and produced in a state."

94. See *id.* at 456: "Hydric soil" is defined as "soil that, in its undrained condition, is saturated, flooded, as ponded long enough during a growing season to develop an anerobic condition that supports the growth and regeneration of hydrophytic vegetation."

95. See *id.*: "Hydrophytic vegetation" is defined as "a plant growing in water or in a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content."

96. See *id.* at 457: "Shelterbelt" is defined as "a vegetative barrier with a linear configuration composed of trees, shrubs, and other approved perennial vegetation."

97. See *id.*: "State" is defined to mean "each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, The Virgin Islands of the United States, American Samoa, The Commonwealth of Northern Mariana Islands, or the Trust Territory of the Pacific Islands."

98. See *id.* at 455: "Field" is defined as "that term . . . defined in 7 C.F.R. 718.2. Under section 718.2, a 'field' is defined as a part of a farm that is separated from the balance of the farm by permanent boundaries such as fences, permanent waterways, woodlands, croplines (in cases where farming practices make it probable that such cropline is not subject to change), or other similar features . . . [A]ny highly erodible land on which an agricultural commodity is produced after the date of enactment and that is not exempt under section 1612 (listing exemptions) shall be considered as part of the field in which such land was included on the date of enactment unless the Secretary permits modification of the boundaries of the field to carry out the subtitle."

99. See *id.* at 456.

100. See *id.* at 457: "Rental payment" is defined to mean "a payment made by the Secretary to an owner or operator of a farm or ranch containing eligible [highly erodible cropland] to compensate the owner or operator for retiring such land from crop production and placing such land in the conservation acreage reserve."

101. See *id.* at 457: "Vegetative cover" is defined as "perennial grasses or legumes with an expected life span of 5 or more years, trees, [forbs, or shrubs]."

102. *Id.* at 458.

4 or 5 . . . of the Commodity Credit Corporation Charter Act during such crop year for the storage of an agricultural commodity acquired by the Commodity Credit Corporation.¹⁰³

The Act exempts from the sodbuster provisions highly erodible land that was not cultivated during any of the 1981 through 1985 crop years pursuant to a USDA program designed to reduce production, unless otherwise provided in the conservation reserve provisions.¹⁰⁴

The Act also makes exemptions as to wetlands. The Act exempts from the swampbuster prohibition converted wetland, if the producer began modification to the wetland, or obligated funds to such a modification, prior to the enactment of the bill.¹⁰⁵ Also exempt from the swampbuster ineligibility provisions are producers of a commodity grown on wetlands created by irrigation, or on artificial lakes and ponds.¹⁰⁶

In carrying out the wetland provisions, the Act requires the Secretary of Agriculture to consult with the Secretary of the Interior.¹⁰⁷ The Act also requires the Secretary of Agriculture to set up an appeal procedure applicable to all the conservation programs.¹⁰⁸

The conference apparently devoted its primary attention to formulation of the final conservation reserve provisions. In addition to the provisions discussed above in Section 2, the final conservation reserve program contained several other provisions deserving of mention. The Act provided that, in addition to highly erodible land, the Secretary may include in the reserve program land that poses an off-farm environmental threat or land that poses a threat to productivity due to soil salinity.¹⁰⁹ The Act generally limits the amount of land from any one county that can be put in the reserve to twenty-five percent of the land in that county.¹¹⁰ The Secretary has some discretion in this matter, and may exceed the twenty-five percent limit if this would not have an adverse effect on the local economy.

Regarding transfer of land which is subject to a conservation reserve contract, the Act authorizes the Secretary to make adjustments to the contract at the time of transfer, unless the transferee assumes all of the contract obligation.¹¹¹ Also, the Secretary is allowed under the Act to include land on which shelterbelts, windbreaks, and similar strips are to be established.¹¹²

103. *Id.*

104. *Id.*

105. *Id.* at 460.

106. *Id.*

107. *Id.* at 461.

108. *Id.* at 460-61.

109. *Id.* at 461.

110. *Id.* at 462.

111. *Id.* at 463.

112. *Id.* at 464.

The Act limited the amount of payment any one owner or operator could receive under a reserve contract to fifty thousand dollars annually.¹¹³ The mode of payment may be in cash or in-kind commodities.¹¹⁴

The cost of establishing the conservation measures called for in a conservation contract is to be shared equally by the government and the owner of the land. The Act directs the Secretary to pay fifty percent of the cost of such measures.¹¹⁵

Funding for the conservation reserve program comes from the CCC under the Act, at least in fiscal years 1986 and 1987. The CCC will also fund the conservation reserve in subsequent years if it receives the proper appropriations.¹¹⁶

4. Future Issues Under the Act

By combining and coordinating the Senate and House versions of the Bill, the conference formulated a more detailed conservation title, which answered many questions left unanswered by the individual bills. However, there are two areas noted by the conference in which agency interpretation and implementation of the Act will largely determine the effectiveness of the Act in preserving fragile cropland. First, the Act denies agricultural program benefits after January 1, 1990 to crops produced on highly erodible land, subject to certain exceptions set forth above, including an exception if a person "is actively applying a conservation plan based on the local Soil Conservation Service technical guide and approved by the local soil conservation district or the Secretary of Agriculture."¹¹⁷ The conferees noted that "historically the SCS technical guides in some states have included the provision that for land to be considered adequately treated, soil losses had to be reduced to an arbitrary standard called the soil loss tolerance or 'T' value . . . [which] ranges from two to five tons per acre per year."¹¹⁸ The conferees suggest that this absolute T value should not be inflexibly required in the situation where erosion has been significantly reduced pursuant to a conservation plan, and that the T value can only be met by imposition of additional, expensive conservation practices.¹¹⁹ The conference report states:

113. *Id.* at 465.

114. *Id.* at 466.

115. *Id.*

116. *Id.* at 467.

117. *Id.* at 459.

118. *Id.*

119. *Id.*

It is not the intent of the Conferees to cause undue hardship on producers to comply with these provisions. Therefore, the Secretary should apply standards of reasonable judgment of local professional soil conservationist (sic) and consider economic consequences in establishing requirements for measures to be included in conservation plans prepared under this provision.¹²⁰

It is certainly reasonable to propose that producers should not be required to bear extreme economic hardship to meet an arbitrary T value where the minimal incremental benefit in terms of less soil erosion is drastically outweighed by the costs of compliance with the T value. It is equally clear, however, that the conferees did not intend for the Secretary or the SCS to engage in their *own* cost/benefit analysis to determine whether a producer will be eligible for agricultural program benefits in 1990. That cost/benefit analysis has already been struck by Congress in the Act in favor of soil conservation.

In considering contract offers, the conferees stated that the conservation reserve should be "administered, to the extent practicable, so as not to reward those who in recent years have converted highly erodible land to cropland uses."¹²¹ The Act itself does not impose any requirements that would necessarily mandate such an approach; therefore, it will be largely discretionary with the Secretary whether that goal is accomplished. The conferees also agreed that "the Secretary should inform all persons entering contracts . . . that upon expiration or termination of such contract any highly erodible cropland will likely be subject to the [sodbusting provisions] of the Act and therefore must be operated in accordance with an approved conservation plan" to qualify for agricultural program benefits.¹²² The conference did not, however, include a House provision that would have made that intent clear.¹²³ Finally, the Act does very little to clarify how payments under the conservation reserve should be apportioned between owners and operators, a difficulty which presumably will be addressed in regulations promulgated under the Act.

Although this Article has focused on the conservation provisions of the sodbusting, swampbusting, and conservation reserve programs, a few miscellaneous provisions of equal importance outside the conservation title of the new Act deserve mention. The Act "extends the Soil and Water Resources Conservation Act of 1977 (RCA) to December 3, 2008."¹²⁴ Under the RCA, as amended by the Act, the Secretary is required to conduct four appraisals of the nation's soil,

120. *Id.*

121. *Id.* at 464.

122. *Id.* at 467.

123. *Id.*

124. *Id.* at 469.

water, and related resources by December 31 in the years 1979, 1986, 1995 and 2005.¹²⁵ Outside of the conservation title, section 1314 of the Act authorizes the Farmers Home Administration to grant or sell "development rights" from any farmland the agency has acquired by foreclosure to state or local governments or private nonprofit organizations to keep the land in agricultural use.¹²⁶ Section 1318 of the Act also authorizes the Farmers Home Administration to forgive farmer debts in exchange for conservation easements to save topsoil, wetlands, and other natural resources.¹²⁷ Finally, under section 1255 of the Act, the Farmland Protection Policy Act is amended so that the Governor of an affected state where a state policy or program exists to protect farmland may bring suit to enforce the requirements of the Act.¹²⁸

III. CONCLUSION

Concern has already been expressed over whether the Department of Agriculture and the Soil Conservation Service will try to diminish the forcefulness of the conservation title in their implementation of the programs. A Sierra Club representative has stated that the Sierra Club "intends to scrutinize" in the coming months the actions of Secretary of Agriculture John Block's replacement and of Peter Myers, Assistant Secretary for Natural Resources and the Environment.¹²⁹

It has been estimated by the Sierra Club that the sodbusting, conservation reserve, and swampbuster provisions could together cut erosion by twenty percent nationwide.¹³⁰ The initial impact of these provisions, however, may be more symbolic than real. For example, as to the sodbuster provisions, of the 2.3 million acres of highly erodible land converted between 1979 and 1981, about 1.9 million acres were planted with program crops in 1982 — that is seventeen percent of the newly converted cropland, or less than one-half of one percent of total United States cropland.¹³¹ If owners of this land participated in farm programs, the farm program benefits would have made a significant economic difference in only about 384,000 acres, or about

125. *Id.*

126. *Id.* at 181.

127. *Id.* at 185-86.

128. *Id.* at 173.

129. Visser, *supra* note 3, at col. 3. Congress has already demonstrated some hesitancy in implementing other conservation measures in the 1985 Farm Bill. In the first week of February, 1986, Congress approved a technical correction to the Farm Bill which makes cross-compliance discretionary for all commodities and drops the two-year average from wheat and feed grain base calculations. In addition, cross-compliance will not be in effect for 1986. *See* 132 CONG. REC. S728 (daily ed. Jan. 30, 1986) and 132 CONG. REC. H282 (daily ed. Feb. 4, 1986).

130. Letter, *supra* note 5, at 2.

131. USDA, *supra* note 45, at 7.

one-fifth of the 1.9 million acres planted in program crops.¹³² The ultimate conclusion, using the above data, is that if the sodbuster law had been in effect from 1979 to 1981 only one-third of a million acres might not have undergone conversion as a result of the provisions.

There may be significant economic consequences to society, however, from long term soil degradation and off-site impacts of wind and water erosion that are not easily quantifiable on a short-term basis. More important than economic considerations is the ethical dilemma of government subsidization of the exploitation of our natural resources, which existed before passage of the conservation provisions. After nearly fifty years of federal soil conservation programs, we are just beginning to recognize that our nation's topsoil is a valuable, limited resource. The heart rending famine in Ethiopia has created a public awareness of the catastrophic effects of a disaster brought about in large part by exhaustion of a country's topsoil. Soil conservation programs that depend on purely voluntary participation have proven to be ineffective in this country. More meaningful, forceful federal involvement in soil conservation is long overdue and now, hopefully, is forthcoming.

132. *Id.* at 8.

133. *Id.*