

# SOD SAVER:

THE ONE THAT GOT AWAY

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## INTRODUCTION

Some of my best memories growing up were the summers when my Grandpa would take my cousin and me on wagon trains throughout South Dakota. For three or four day periods, wagons would align in a caravan, escorted by horse-mounted outriders, traversing about fifteen to eighteen miles of trail a day. The enjoyment of the experience derived from spending time with friends and family, riding horse or guiding a harnessed team or buggy, and absorbing the simple pleasures and spectacle of the great outdoors.

While a few of these trains trekked the arid Badlands of South Dakota, and others passed through the mountainous Black Hills of southwestern South Dakota, most covered the State's vast, open prairie lands. One could ride for miles on prairie alone, all the while, looking into the distance and viewing what seemed as an endless measure of the same. On many occasions, the only thing that would disrupt the exclusive panorama of prairie would be the grazing of cattle. A decade-and-a-half later, and one would be hard-pressed to take many of the same wagon train routes without running into numerous fields— many newly broken. Similarly, when looking into the distance, one would no longer see a vast array of rolling prairie, but the intermittent, if not dominant presence of broken fields.

The area of my upbringings, Highmore, Hyde County, South Dakota is representative of this development (if you want to call it that). While the breakage of prairie ground is pervasive in the region, one plot of land, in particular, sticks in my mind: bordering the highway from which I return “home” to, its rock-laden surface serves as a constant reminder of how beautiful the land was while preserved as prairie, both aesthetically and otherwise, and how rocky, unsuited, and truly “broken” it is today, existing as cropland. These

particular acres, along with countless others across the region, remain as a skeletal shell of what they once were.

While serving as a prime illustration of the prairie-to-cropland phenomenon, this incident is only a microcosm of a much greater, more prolific problem. Our *nation's* native prairie grasses have been consumed and deteriorated at a rapid pace. This is why the addition of the “Sod Saver” provision to the Food, Conservation, and Energy Act of 2008 was a necessary component in preserving native prairie. Not only was this legislation necessary, but it maintains the additional benefit of being consistent in purpose with grass and wetland preservation measures like the Conservation Reserve Program (CRP) and Wetlands Reserve Program (WRP). Therefore, the Governors of the five states that the Sod Saver provision addresses should have been obliged to “opt in” to the Program’s compliance. Moreover, given the considerable preservation, conservation, and environmental benefits Sod Saver promotes, observance to its provisions should be mandatory, not permissive.

As it follows, this paper is dedicated to informing its readers of what Sod Saver entails; why its compliance should be mandatory; who favors, and who opposes its application; and how pro- and anti-Sod Saver interests affected the legislation’s ultimate product. Finally, it addresses the “empty promise” that Sod Saver became, and suggests how that reality should be dealt with moving forward.

### (I) WHAT IS SOD SAVER?

Sod Saver is a federal, statutory provision directed at removing government incentives for the conversion of native grasslands to cropland in the nation’s Prairie Pothole Region (PPR).<sup>1</sup> The PPR region, which includes lands of eastern North and South Dakota,

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<sup>1</sup> Ducks Unlimited (DU), *Administration Pushes for Grassland Protection*, <http://www.ducks.org/news/1422/Administrationpushes.html> (November 8, 2007).

and portions of Montana, Minnesota, and Iowa, is an often-times dry, drought and disaster prone area, generally containing of marginal to less-than-marginal crop-producing soil.<sup>2</sup> Sod Saver works to deter grass-to-cropland conversion by preventing PPR producers from breaking up native sod, and then buying tax-subsidized insurance to protect against the risk of crop failure.<sup>3</sup>

As offered for the 2007 Farm Bill, the United States Department of Agriculture's (USDA) proposal discouraged grassland-to-cropland conversion by providing that grassland not cropped for six years preceding the bill's effective date, but converted to cropland thereafter, would be permanently ineligible for certain farm program payments.<sup>4</sup> Under the proposal, native sod converted to crop production "would be permanently ineligible for a wide range of farm program payments, including direct and countercyclical, marketing assistance loan, conservation, disaster assistance, and crop insurance payments."<sup>5</sup> Therefore, the USDA's plan, as initially devised, called for a permanent ban on federal crop insurance and disaster payments on newly broken native sod, on a nationwide scale.

However, the Sod Saver provision actually enacted in Public Law 110-246, provided for something very different: a *five year* ban on federal crop insurance and disaster payments on newly broken native sod, *limited* in application to the *Prairie Pothole Region*.<sup>6</sup> As such, the enacted version allows for farm payments not initially contemplated by the USDA's

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<sup>2</sup> DU, *New Data Shows Grassland Losses Mount*, <http://www.ducks.org/news/1448/Newdatashowsgrasslan.html> (December 13, 2007).

<sup>3</sup>Around Dakota Ag, *Governors Weigh Sod Saver*, <http://magissues.farmprogress.com/DFM/DK10Oct08/dfm008.pdf> (October 10, 2008).

<sup>4</sup>United States Government Accountability Office (GAO), *Farm Program Payments Are an Important Factor in Landowners' Decisions to Convert Grassland to Cropland* (hereinafter, "Farm Program Payments"), available at <http://www.gao.gov/new.items/d071054.pdf>, P. 28 (September 10, 2007).

<sup>5</sup>*Id.*

<sup>6</sup>Pub. L. No. 110-246, § 12020 (June 18, 2008), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ246.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ246.pdf); *Incorporated in* 7 U.S.C § 1508(o); and 7 U.S.C. § 7333.

proposal, including “countercyclical, direct, loan deficiency payments, and those tied to average crop revenue election, or ACRE . . . .”<sup>7</sup> A common sense de minimus exception is also contained within the provision, whereby areas of five acres or less are exempt from its application.<sup>8</sup> The provision, as incorporated in the Food, Conservation, and Energy Act of 2008, provides in its entirety:

**SEC. 12020. CROP PRODUCTION ON NATIVE SOD.**

(a) FEDERAL CROP INSURANCE.—Section 508 of the Federal Crop Insurance Act (7 U.S.C. 1508) is amended by adding at the end the following:

“(o) CROP PRODUCTION ON NATIVE SOD.—

“(1) DEFINITION OF NATIVE SOD.—In this subsection, the term ‘native sod’ means land—

“(A) on which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing; and

“(B) that has never been tilled for the production of an annual crop as of the date of enactment of this subsection.

“(2) INELIGIBILITY FOR BENEFITS.—

“(A) IN GENERAL.—Subject to subparagraph (B) and paragraph (3), native sod acreage that has been tilled for the production of an annual crop after the date of enactment of this subsection shall be ineligible during the first 5 crop years of planting, as determined by the Secretary, for benefits under—

“(i) this title; and

“(ii) section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333).

“(B) DE MINIMIS ACREAGE EXEMPTION.—The Secretary shall exempt areas of 5 acres or less from subparagraph (A).

“(3) APPLICATION.—Paragraph (2) may apply to native sod acreage in the Prairie Pothole National Priority Area at the election of the Governor of the respective State.”.

(b) NONINSURED CROP DISASTER ASSISTANCE.—Section 196(a) of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333(a)) is amended by adding at the end the following:

“(4) PROGRAM INELIGIBILITY RELATING TO CROP PRODUCTION ON NATIVE SOD.—

“(A) DEFINITION OF NATIVE SOD.—In this paragraph,

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<sup>7</sup> *Governors Weigh Sod Saver*, *supra* n. 3.

<sup>8</sup> Pub. L. No. 110-246, § 12020 (June 18, 2008), *supra* n. 6.

the term ‘native sod’ means land—

“(i) on which the plant cover is composed principally of native grasses, grasslike plants, forbs, or shrubs suitable for grazing and browsing; and

“(ii) that has never been tilled for the production of an annual crop as of the date of enactment of this paragraph.

“(B) INELIGIBILITY FOR BENEFITS.—

“(i) IN GENERAL.—Subject to clause (ii) and subparagraph (C), native sod acreage that has been tilled for the production of an annual crop after the date of enactment of this paragraph shall be ineligible during the first 5 crop years of planting, as determined by the Secretary, for benefits under—

“(I) this section; and

“(II) the Federal Crop Insurance Act (7 U.S.C. 1501 et seq.).

“(ii) DE MINIMIS ACREAGE EXEMPTION.—The Secretary shall exempt areas of 5 acres or less from clause (i).

“(C) APPLICATION.—Subparagraph (B) may apply to native sod acreage in the Prairie Pothole National Priority Area at the election of the Governor of the respective State.”<sup>9</sup>

A reading of the language actually contained in the final product confirms a departure (albeit, compromise) from the USDA’s original proposal, which envisioned a nationwide, perpetual ineligibility for crop insurance and disaster payments for the breakage of “native sod.” More importantly, a reading of Section 12020’s final paragraph reveals what one could predict, and many feared, would be the provision’s biggest short-fall: the PPR governors’ discretion to elect, or stated alternatively, “opt in,” to the provision’s application. Before addressing this issue, it is important to understand why Sod Saver, and the objectives its incorporation sought, was necessary in the first instance.

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<sup>9</sup> *Id.*

## (II) WHY SOD SAVER SHOULD BE MANDATORY

There was a time, before the European settlement of North America, that grasslands like those Sod Saver seeks to protect, occupied one billion acres of the lower 48 states.<sup>10</sup> However, over the last three centuries, about half of this native sod has been converted to other uses, most commonly, cropland.<sup>11</sup> The Prairie Pothole Region, which had previously existed as one of the world's largest grassland ecosystems, serves as perhaps the best illustration of the mass-scale conversion.<sup>12</sup> Since the times of Lewis and Clark, this region has dramatically changed, with most of its productive portions having been converted to cropland, and the grasslands that remain, primarily confined to areas of poor soil, steep topography, and unsuitable climate conditions.<sup>13</sup>

As the subsections that follow illustrate, even marginal, formerly unsuitable lands like those aforementioned, face a real risk of conversion, due in-large to the current, incentive-based system that encourages such. These passages seek to evaluate the extent of grassland conversion and deterioration that has occurred; examine why such mass-scale conversion is, and has been occurring; and finally, emphasize why this conversion serves as cause for concern.

### (A) The Extent of Conversion

Seventy percent of the nation's native prairie has already been lost to one form of conversion or another.<sup>14</sup> According to a now, well-renowned study conducted by the United States Government Accountability Office (GAO) in September, 2007, the nation's private

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<sup>10</sup> *Farm Program Payments*, *supra* n. 4, p. 1.

<sup>11</sup> *Id.*

<sup>12</sup> DU, "Sodsaver": *Saving America's Prairie*, <http://www.ducks.org/conservation/prairiepotholeregion/2541/sodsaversavingamericasprairie.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *Administration Pushes for Grassland Protection*, *supra* n. 1.

grasslands decreased by nearly 25 million acres from 1983 to 2003.<sup>15</sup> Moreover, the propensity for (and of) conversion has intensified with the passage of time. For instance, USDA figures exhibited a 40% jump in native grassland-to-cropland conversions from 2006 to 2007.<sup>16</sup>

Data focused specifically on the Prairie Pothole Region has exposed it as the area of most intense conversion. Understanding the extent of grassland conversion that has been occurring in that region is perhaps best aided by an analogy to the Amazon: PPR grassland loss rates are about four times the rate of conversion of rainforest in the Amazon region of South America.<sup>17</sup> Farm Service Agency (FSA) statistics have revealed that 380,000 acres of PPR grasslands were converted during the last five years alone, providing additional proof that the nation's remaining prairie is being plowed under.<sup>18</sup> GAO's analysis of National Resources Inventory (NRI) data has also confirmed the highest rates of range-to-cropland conversion as occurring in the Northern Plains, where 2.61 million acres were converted between 1982 and 1997, and 590,000 acres between 1997 and 2003.<sup>19</sup> GAO's additional analysis of the National Agricultural Statistic Service's (NASS) Census of Agriculture, a census of U.S. farms and ranches conducted every five years, revealed that rangeland and pastureland declined by 21.9 million acres between 1978 and 1992, and 2.9 million acres between 1997 and 2002.<sup>20</sup>

Further narrowing the scope of analysis, data has revealed areas of North and South Dakota as having the highest rates of conversion. According to the USDA, North Dakota

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<sup>15</sup> *Farm Program Payments*, *supra* n. 4, p. 4.

<sup>16</sup> *Administration Pushes for Grassland Protection*, *supra* n. 1.

<sup>17</sup> DU, *Congressional Report Shows Need for Farm Bill Sodsaver Provision*, <http://www.ducks.org/news/1377/Congressionalreports.html> (September 18, 2007).

<sup>18</sup> *New Data Shows Grassland Losses Mount*, *supra* n. 2.

<sup>19</sup> *Farm Program Payments*, *supra* n. 4, p. 13.

<sup>20</sup> *Id.* at p. 14.

lost 125,000 acres of native grassland from 2002-2006—the equivalent of 195 square miles—and South Dakota lost 460 miles of native grassland during the same time.<sup>21</sup> Furthermore, according to existing, annual acreage reports, voluntarily submitted to FSA at county and state levels, conversions have been highest in western PPR counties, areas which contain many small but ecologically vital wetlands.<sup>22</sup> These reports revealed that, for the calendar year of 2005, in South Dakota alone, 54,404 acres of native grasslands were converted to cropland, and an additional 47,167 acres were converted in 2006.<sup>23</sup> Further FSA data has revealed that 298,000 of North and South Dakota’s remaining 13.8 million acres were converted to cropland between 2002 and 2005.<sup>24</sup> This constituted over a 2% annual rate of conversion, which if continued in the Missouri Coteau region, for instance, would result in the loss of half of the area’s remaining grassland in only 34 years.<sup>25</sup> Iowa, with only 5,400 acres of remaining native prairie, exemplifies how such laissez-faire regulation of conversion could result in the all-but-eliminated presence of native grasslands in these states as well.<sup>26</sup>

Once one absorbs the data and is able to appreciate the extent of the nation’s grassland conversion, particularly in the Prairie Pothole Region, that knowledge necessitates a further inquiry: what has prompted this phenomenon?

#### (B) Causes of Conversion

According to those who support Sod Saver, including those heavily engaged in the conservation movement, like Don Young, Executive Vice President of Ducks Unlimited,

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<sup>21</sup> DU, *N.D. Sens. Conrad and Dorgan Support Protecting Native Prairie*, <http://www.ducks.org/news/1373/NDSensConradandDorga.html> (September 13, 2007).

<sup>22</sup> *Farm Program Payments*, *supra* n. 4, p. 15.

<sup>23</sup> *Id.*

<sup>24</sup> “Sodsaver”: *Saving America’s Prairie*, *supra* n. 12.

<sup>25</sup> *Id.*

<sup>26</sup> Ltr. from Iowa Sportsmen and Women to Iowa Governor Chet Culver, *available at* <http://www.goosehuntingchat.com/viewtopic.php?t=7636> (October 2008).

“[the] recent increase in the loss of grassland is driven mostly by a rise in the price of commodities such as wheat, corn, and, soybeans.”<sup>27</sup> While acknowledging the impact of commodity prices, organizations like DU have also recognized that they are not the only conservation-contributing factor. According to representatives at DU:

The accelerated loss of native grassland is a combined result of technological advances and unintended consequences of federal farm policy. The current Farm Bill provides substantial price support and risk protection to crop producers. The combination of loan-deficiency and disaster payments – coupled with crop insurance – makes crop production economically viable even if high yields are never achieved. The reduction in economic risk, combined with advances in herbicides, genetically engineered crops, and large farm equipment, provides the incentive to break new ground. Additionally, because there is negligible government support for the cattle ranching industry – the current land-use for most native grasslands – subsidized crop producers have a significant economic advantage when competing to rent and buy native grassland.<sup>28</sup>

Many of these causal deductions were also confirmed by conclusions reached in GAO’s, September 2007, report on the same. That study’s stated purpose was to determine: “(1) the extent of grassland conversions to cropland, and the cost of farm program payments related to these newly converted cropland acres; (2) the relative importance of farm program payments versus other factors in producers’ decisions to convert grassland to cropland; and (3) any impact the Sodbuster provision has had on limiting grassland conversions.”<sup>29</sup> As previously referenced herein (Subsection (II)(A)), the degree of grassland conversion sought to be determined by GAO’s first stated purpose is extensive. Within the framework of the study’s second purpose, GAO found, generally, that:

Farm program payments are an important factor in producers’ decisions to convert grassland to cropland, but rising crop prices and new farming technologies are also important factors in these conversions. . . . Genetically

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<sup>27</sup> DU, *Native Prairie: A Disappearing National Treasure*, <http://www.ducks.org/news/1417/NativePrairieAdisapp.html>.

<sup>28</sup> “Sodsaver”: *Saving America’s Prairie*, *supra* n. 12 (emphasis added).

<sup>29</sup> *Farm Program Payments*, *supra* n. 4, p. 3.

modified crops, such as herbicide-resistant soybeans, as well as new farming techniques, such as no-till planting, contribute to conversion decisions as well. These developments have increased the profitability of crop production in some areas that heretofore were considered marginally suitable or generally unsuitable for crop production.<sup>30</sup>

The GAO study also examined how potential producer rewards, in the form of crop insurance and crop disaster payments, have translated into increased government costs. The study recognized that: “Converting grassland to cropland, and thus bringing more land into production, has the potential to increase government costs because this new cropland is eligible for crop insurance, crop disaster assistance, and marketing assistance loan payments, and could become eligible for direct and countercyclical payments if an update of crop base acres is allowed in the future.”<sup>31</sup> With specific regard to crop insurance, the GAO’s analysis revealed, in part, that:

Our analysis of RMA’s crop insurance data indicates that conversions of grassland with no cropping history added disproportionately to government costs for crop insurance in South Dakota. . . . The 16 highest conversion counties had net crop insurance payments that averaged \$13.03 per acre from 1997 to 2006, almost twice as much as the \$6.66 per acre net payment received in South Dakota’s remaining 50 counties.<sup>32</sup>

The study revealed similar findings with respect to crop disaster assistance payments. There, the GAO determined “that conversions of grassland with no cropping history add disproportionately to government costs for disaster payments in South Dakota.”<sup>33</sup> The study found that while 50 of South Dakota’s counties accounted for \$292 million in crop disaster payments, the sixteen highest conversion counties received a disproportionately high, \$195 million in these payments.<sup>34</sup>

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<sup>30</sup> *Id.* at p. 4.

<sup>31</sup> *Id.* at p. 16.

<sup>32</sup> *Id.* at p. 17.

<sup>33</sup> *Id.* at p. 18.

<sup>34</sup> *Id.*

More generally, the GAO's study advanced a particular theme, time-and-again: because they reduce producer risks, and often times increase producer profits, farm program payments—including crop insurance, crop disaster assistance, and marketing assistance loan payments—are without-a-doubt, an important decision-making factor in making a grass-to-cropland conversion.<sup>35</sup> As one central South Dakota farmer articulated, when speaking of grass-to-cropland conversion: “The bottom line is what makes you go that direction . . . . Wheat was \$4 or \$5 a bushel a couple of years ago, and now it's up to \$10 or \$12 a bushel.”<sup>36</sup> This preoccupation with favoring short-term gains, at the potential expense of long-term detriments, was reinforced by the GAO's study, which found that:

. . . for certain years, high crop prices as well as farm program payments would provide economic incentives for a producer to convert native grassland used for grazing in a cow-calf operation to a cropping operation. In 3 of the 5 years, the conversion from grazing to cropping would have resulted in increased income. In the other 2 years, the conversion would have resulted in reduced income largely because cattle prices were high relative to crop prices and farm program payments were lower than in the other years. Without any farm program payments, income would have increased only in 2007, . . .<sup>37</sup>

Other economic studies, analyzed by GAO in the course of conducting their own, also support the notion that farm program payments have served as a conversionary catalyst of sorts, increasing expectations of profit, while simultaneously lowering risk.<sup>38</sup> These studies point to land value appreciation as another possible economic incentive for producers to break native sod. The argument goes, that since the value of agricultural land is partially

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<sup>35</sup> *Id.* at p. 21.

<sup>36</sup> U.S.A. Today, *America's Grasslands Vanishing Amid Agricultural Boom*, available at [http://www.usatoday.com/money/industries/environment/2008-03-27-farming-plowing-grasslands\\_N.htm](http://www.usatoday.com/money/industries/environment/2008-03-27-farming-plowing-grasslands_N.htm) (March 27, 2008).

<sup>37</sup> *Farm Program Payments*, *supra* at n. 4, p. 22.

<sup>38</sup> *Id.* at p. 24.

dependent on expected returns, land buyers will pay higher prices for property that is expected to provide future returns, in the form of farm program payments.<sup>39</sup>

Another persistent theme evinced in the GAO's report, is the frustration of an already tenuous grassland-cropland dichotomy, by the cross-working purposes of conservation and farm payment programs.<sup>40</sup> Programs like the Wetlands Reserve Program (WRP), the Grassland Reserve Program (GRP), and Conservation Reserve Program (CRP), were designed to encourage grassland protection, by among other means, paying producers to maintain grasslands or convert croplands to grassland. While beneficial when functioning in isolation, these programs are, and have been, at very least, at odds with, and at most, in direct competition with farm program payments that "incentify" grassland-to-cropland conversion. One GAO study, based on NRI data of South Dakota CRP, was particularly illustrative of this conflictive dichotomy. It revealed that, while from 1982-1997, 1.69 million acres of cropland in South Dakota were enrolled in CRP (primarily as planted grasses), at the same time, 1.82 million acres of South Dakota grassland were converted to cropland.<sup>41</sup> The GAO further concluded that South Dakota was not unique in this respect, as similar patterns were exhibited in other states during that time.<sup>42</sup>

Finally, the epidemic of grass-to-cropland conversion has been aggravated by the currently instituted and chiefly ineffective "Sodbuster" policy. As GAO's report related to its third study purpose—to determine the impact Sodbuster has had on limiting grassland conversions—those impacts were established as minimal. The study found that Sodbuster has generally had "little impact" in limiting the conversion of native sod to cropland: first,

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at p. 25.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

because much of the native grassland recently converted has not been “highly erodible,” and therefore not subject to Sodbuster; and second, even in cases where Sodbuster has applied, the costs associated with compliance have generally not been enough to deter conversion.<sup>43</sup>

With respect to the former, NRI data has revealed that between 1997 and 2003, an estimated 59% of Northern Plains (comprising Kansas, Nebraska, and North and South Dakota) rangeland conversion was classified as non-highly erodible, and therefore not subject to Sodbuster.<sup>44</sup> In regards to the latter, according to FSA and NRCS officials:

even when native grassland that is to be converted is classified as highly erodible, producers generally perceive that the potential profits from cropping the land outweigh the potential costs of controlling soil erosion as required by Sodbuster. As such, officials in Montana, Nebraska, North Dakota, and South Dakota counties that have had relatively high conversion rates said that the costs associated with meeting Sodbuster’s soil erosion standards usually do not discourage native grassland conversion, especially when crop prices are high and crop production is profitable. Specifically, these officials said Sodbuster rarely or never deterred conversions. According to these officials, the cost of complying with Sodbuster has been reduced by new crop production technologies. For example, almost all of the officials cited no-till planting as a low-cost management practice that controls soil erosion sufficiently to meet Sodbuster requirements and added that the development of herbicide-resistant crops has facilitated producers’ adoption of no-till planting by making it easier to control weeds without using tillage.<sup>45</sup>

The information provided in foregoing subsections (II)(A) and (II)(B) exemplify the hefty extent of grassland-to-cropland conversion, and shed light on factors that have contributed to, if not directly catalyzed, wide-scale conversion. However, upon reaching this appreciation, one is persuaded to ask: even assuming the truthfulness of the data, does a problem really exist, or stated alternatively, is there need to be concerned with the subject? If GAO’s recommendations, made in light of its report findings, were any indication of how it would respond, it would likely answer in the affirmative. In concluding its report, the GAO

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<sup>43</sup> *Id.* at p. 26.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at pp. 26-27.

advised USDA to: “(1) track the annual conversion of native grassland to cropland to provide policymakers with more comprehensive and current information on such conversions; and (2) study the extent to which farm program payments and conservation programs may be working at cross purposes and report findings to the Congress. USDA ultimately agreed with these findings and recommendations.”<sup>46</sup> What follows in Subsection (II)(C) explains why the alarming rate of grass-to-cropland conversion does in-fact pose great risks, both economically and ecologically, and accordingly, why it merits immediate address.

### C. Conversion: A Cause for Concern

While few would question the significant benefits conferred by croplands, likely due to the immediate and obvious nature of their byproducts (i.e. food, fuel, etc.), one may more commonly fail to appreciate the valuable economic and environmental resources conveyed by the grasslands they displace. Although these benefits may have fallen on deaf ears to many, they have not been lost upon conservationists, ranchers, outdoor enthusiasts, and others who dearly value what these grasslands have to offer. The vitality of native grasslands, although understood by many, was encompassed, perhaps best, in a DU article entitled, “Sodsaver”: Saving America’s Prairie.” A passage from that article divulges:

Temperate grasslands, like those in the PPR, are at highest risk of conversion to cropland yet have some of the lowest rates of protection of any major ecological biome on earth. The grasslands of the PPR provide critically important habitat for prairie wildlife and are the heart of the breeding range for many North American ducks and shorebirds. The region also hosts numerous grassland-dependent songbirds, species that are experiencing a steeper population decline than any other bird group in North America. Currently, only one endangered species exists in the PPR. However, a “train wreck” of endangered species listings could result if the current pace of grassland loss continues.

Additionally, the native grasslands of the PPR are fundamentally important for livestock producers and their ranching lifestyle. Ranching, recreational

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<sup>46</sup> *Id.* at Highlights page & pp. 30-31.

hunting, and nature-based tourism associated with the native prairie, provide economic diversity and thus greater stability to rural economies. Further loss of native grassland is also an economically costly policy, as it brings additional, disaster-prone farmland into cultivation and thus creates taxpayer liability for the manifold subsidies that are associated with crop production on marginal land.

Lastly, conversion of native grasslands also has important impacts on critical, associated habitats such as wetlands. For example, in the wetland-rich PPR of North and South Dakota, 60% of the remaining 5.9 million acres of unprotected wetlands occur in native pasture and hayland. Cattle producers consider wetlands valuable assets when they occur in pastureland, because they provide livestock water and quality hay during drought conditions. If producers convert grasslands to cropland, wetlands become liabilities because they are obstacles for farm equipment. This puts them at greater risk of being destroyed or degraded by sedimentation and contamination from pesticides, herbicides and fertilizer. Unless we halt the loss of grassland, we risk losing both the native prairie and the associated wetlands . . . .<sup>47</sup>

As the passage above indicates, a strong correlation, or even interdependence, exists between wetlands and native prairie. The two maintain an ecological partnership of sorts, whereby shallow wetlands team with nutrient-rich grasslands above, to cooperatively provide an idyllic habitat for the life they maintain. Many bird species, particularly waterfowl, are dependent on native prairie's inclusion in this collaboration.<sup>48</sup> For instance, United States Fish and Wildlife Services (USFWS) has estimated a population decrease of 25,000 ducks for every one percent loss in native prairie in the PPR<sup>49</sup> (which produces nearly two of every three ducks, annually, taken by duck hunters in the country).<sup>50</sup> As it relates to the breeding of waterfowl, in particular, grasslands are every-bit-as-important as the wetlands they surround.<sup>51</sup> Accordingly, as the abundance of grassland increases, so does the success of waterfowl nesting. Conversely, inadequate amounts of grassland result in low nesting

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<sup>47</sup> "Sodsaver": *Saving America's Prairie*, *supra* n. 12.

<sup>48</sup> DU, *Protecting 2,000,000 Acres of Grasslands for Tomorrow*, <http://www.ducks.org/page49.aspx#publicpolicy>.

<sup>49</sup> DU, *Background of Priority Farm Bill Programs*, <http://www.ducks.org/Conservation/FarmBill/2823/BackgroundofPriorityFarmBillPrograms.html#3>.

<sup>50</sup> *ND Sens. Conrad and Dorgan Support Protecting Native Prairie*, *supra* n. 21.

<sup>51</sup> *Protecting 2,000,000 Acres of Grasslands for Tomorrow*, *supra* n. 48.

success. Therefore, ensuring healthy waterfowl populations is dependent upon protecting existing grasslands and restoring others.<sup>52</sup>

According to DU, a great deal of the conversion that is, and has taken place, is specifically from grassland to *cropland*, due in large part to subsidy-driven incentives. This creates particular cause for concern, since “cropland provides few or no resources for breeding birds.”<sup>53</sup> From DU’s perspective:

The Northern Great Plains is quickly becoming a highly fragmented landscape in which remnant patches of grassland are interspersed within large, monotypic crop fields. This mix of land uses provides poor habitat for prairie wildlife, and skews the composition of the mammalian predator community to favor species that are particularly harmful to ground-nesting birds and fragments the landscape in a manner that enhances the nest-searching efficiency of these predators. Consequently, nesting success of waterfowl, shorebirds and songbirds plummets, and their populations decline.<sup>54</sup>

As to whether the loss of native prairie represents a concern of import, many of DU’s sentiments were shared by the people at the Government Accountability Office. Their study recognized that grasslands provide: “land for livestock grazing; recreational opportunities, such as hunting and fishing; and environmental benefits, such as reducing soil erosion, improving water quality, increasing carbon sequestration, and providing wildlife habitat. In particular, some grassland provides habitat for threatened and endangered and other at-risk species. Converting grassland to cropland reduces or eliminates these benefits, and can result in additional spending on federal farm programs.”<sup>55</sup>

While it reflected many of the same grassland benefits emphasized by Ducks Unlimited, GAO’s report elaborated on several others. For instance, while GAO identified native grasslands as a provider for wildlife habitat, particularly bird species, its report further

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Farm Program Payments, supra* n. 4, p. 1.

recognized that “the conversion of native grassland to other uses, including introduced grasses, can change the structure and function of habitat such that it no longer supports native wildlife species.”<sup>56</sup> For example, habitat supporting the federally endangered Attwater’s prairie chicken was eliminated due to the loss of native prairie grasses on Texas’s coast.<sup>57</sup> Given the rate of conversion currently taking place, and barring its reduction, additional species extermination is to be anticipated.

Another notable and critical GAO finding was that, once converted, restoring grassland is both difficult and expensive.<sup>58</sup> From an ecological standpoint, land that is converted back to native grassland does not generally attain the same ecological function enjoyed by undisturbed native grasslands.<sup>59</sup> Beyond the immediate environmental consequences of conversions, the economic costs of native grassland restoration are also high, estimated by the Fish and Wildlife Service (FWS) to be at \$200 an acre in eastern South Dakota—a significant amount in relation to that area’s native grass market value (ranging from \$651 to \$1,055 per acre in 2006).<sup>60</sup>

Finally, among the slough of analytical reasoning that has substantiated the import of native sod and grasslands generally; and the numerous environmental and policy reasons that necessitate enforcement of a protective measure like Sod Saver; a relatively obligatory concept tends to get lost in the mix—fairness. In this respect, responsible farmers, and ranchers especially (as their livelihood depends on the preservation of grasslands), have expressed the sentiment that the current subsidy-driven policy has placed them at a competitive disadvantage. As accentuated in a letter from Iowa sportsmen and conservation

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<sup>56</sup> *Id.* at p. 8.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at p. 9

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

groups to Iowa Governor, Chet Culver: “Multi-generation ranch families cannot compete for land when grassland conversion to program crops receives federal payments ensuring a positive income whether crops fail, thrive or anything in between.”<sup>61</sup> These competition-based concerns have been reiterated by the Izaak Walton League of America’s, Brad Redlin, who declared: “One of the greatest needs for Sodsaver is just to give responsible farmers and grass-based livestock producers a fair shot against their neighbors who are using the taxpayer-provided payments to out-bid them for land.”<sup>62</sup>

Appreciating the wide array of benefits native grasslands confer, economically, ecologically, and in the way of environmental justice and fairness; understanding how rapidly these grasslands are being converted; and realizing the detrimental impact that continued conversion is expected to have, one is compelled to ask:

### (III) Who Would Be Opposed to Sod Saver?

Support for Sod Saver’s inclusion in the 2008 Farm Bill came from tax watchdogs and conservationists alike.<sup>63</sup> Conservation organizations like Ducks Unlimited, whose Farm Bill slogan was “farm the best, conserve the rest,” supported Sod Saver for obvious reasons.<sup>64</sup> Conservationists emphasized the relief Sod Saver would provide in the way of native grassland habitat, which, as alluded to in Section (II)(B), is vital to waterfowl and grassland birds, alike (particularly as it relates to their nesting success).<sup>65</sup>

Ranchers, cattlemen/-women, and organizations representing their interests (i.e. the South Dakota Cattlemen’s Association) also expressed support for Sod Saver. While

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<sup>61</sup> Ltr. from Iowa Sportsmen and Women to Iowa Governor Chet Culver, *supra* n. 26.

<sup>62</sup> eNews, *Conservation Groups Issue Call for Mandatory “Sodsaver” Program*, [http://www.enewspf.com/index.php?option=com\\_content&view=article&id=5950:conservation-groups-issue-call-for-mandatory-sodsaver-program-&catid=88888928&Itemid=88889609](http://www.enewspf.com/index.php?option=com_content&view=article&id=5950:conservation-groups-issue-call-for-mandatory-sodsaver-program-&catid=88888928&Itemid=88889609) (February 18, 2009).

<sup>63</sup> *Id.*

<sup>64</sup> *Congressional Report Shows Need for Farm Bill Sodsaver Provision*, *supra* n. 17.

<sup>65</sup> *Farm Program Payments*, *supra* n. 4, p. 29.

certainly appreciative of Sod Saver's immediate ecological and environmental benefits, these factions' support was also rooted in Sod Saver's quality as a vehicle to level the competitive playing-field. According to this segment of supporters, farm program payments encourage native grassland conversions and crop production subsidization, thereby putting cattle producers at a competitive disadvantage.<sup>66</sup> From their perspective, the relatively unbridled rate of native grassland conversion, if allowed to continue or increase, coupled with the state of competitive disadvantage being experienced, could have the very real potential of putting them out of business (this, a result of farm program payments and potential property value increases, attendant and encouraging of, grass-to-cropland conversion).<sup>67</sup>

Sod Saver garnered additional support from those concerned with already-high Government spending. Members of this constituency advocated Sod Saver's implementation as a means of eliminating the federal government's large role in subsidization, here, accompanying grass-to-cropland conversion.<sup>68</sup> With Sod Saver, the financial risk of converting these rare grasslands would fall squarely on the shoulders of the individual, not society. As such, substantial taxpayer savings could be realized. In-fact, a 2002 proposal similar to Sod Saver, was projected to result in estimated savings of \$1.4 billion over ten years.<sup>69</sup> More recently, a Congressional Budget Office (CBO) study of the U.S. House of Representatives' version of Sod Saver, projected savings of \$33 million over five years, and \$99 million over ten years; and the Senate version at \$23 million of savings over five years, and \$119 million over ten years.<sup>70</sup>

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> "Sodsaver": *Saving America's Prairie*, *supra* n. 12.

<sup>69</sup> *Id.*

<sup>70</sup> Ltr. from Stephanie Herseth Sandlin, Rep. to the U.S. Congress, Farm Bill Conferees (April 15, 2008), available at [http://www.ducks.org/media/Conservation/Conservation%20Initiatives/\\_documents/Sandlin%20Support%20Letter.pdf](http://www.ducks.org/media/Conservation/Conservation%20Initiatives/_documents/Sandlin%20Support%20Letter.pdf).

Arguably then, Sod Saver would constitute good conservation and good fiscal policy. That such was, and still is a popularly held belief, was manifested in an April 15, 2008 letter from American conservationists and sportsmen-and-women, to United States congressional leaders. While the letter's content was certainly persuasive, perhaps more impressive was the numerous sources its support was garnered from: its signature block having contained *fifty* organizations—alphabetically listed, beginning with the “American Farmland Trust,” and concluding with the “World Wildlife Fund”—all advocating support for Sod Saver.<sup>71</sup> Many of the views expressed in that letter were shared in a May 29, 2007 letter, authored by Montana, North Dakota, and South Dakota wildlife agencies, in which the organizations responded to many of the often-posed, anti-Sod Saver arguments. The authors of that letter insisted:

- Sod Saver would not prevent farmers from responding to market signals because it would allow conversions to cropland.
- Beginning farmers would not have good prospects for success if they grew crops on marginal lands that have not been cropped previously, and beginning ranchers would benefit from Sod Saver because it would result in more grassland being available to them.
- Available FSA and NRCS data and anecdotal information about conversions are sufficient to justify the Sod Saver proposal.
- Soil erosion is still a significant problem in North Dakota and South Dakota, and the conservation compliance provisions, including Sodbuster, do not prevent the conversion of native grassland to cropland.<sup>72</sup>

Despite these and other insistencies posed by Sod Saver supporters, the program had, and still maintains its fair share of critics. Specifically, certain farm, crop, and livestock organizations have expressed opposition to Sod Saver, including: the American Farm Bureau

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<sup>71</sup> Ltr. from U.S. Conservations and Sportsmen-and-Women, to Congressional Leaders, *available at* [http://www.ducks.org/media/Conservation/Conservation%20Initiatives/\\_documents/Sodsaver%20support%20letter%204-15-08%20\(3\).pdf](http://www.ducks.org/media/Conservation/Conservation%20Initiatives/_documents/Sodsaver%20support%20letter%204-15-08%20(3).pdf).

<sup>72</sup> *Farm Program Payments*, *supra* n. 4, p. 29.

Federation, National Association of Wheat Growers, National Corn Association, National Cotton Council, National Pork Producers Council, United Egg Producers, and USA Rice Federation.<sup>73</sup> Among the many concerns, several of those most commonly addressed by Sod Saver opposition have been that:

- Sod Saver would constrain farmers’ ability to adapt to changing market conditions related to the growing demand for crops to produce food and renewable fuels.
- Sod Saver would reduce the amount of farmable land available for beginning farmers.
- Current information on the extent of conversions is insufficient to justify the Sod Saver proposal.
- Existing policy—referring to the current conservation compliance provisions, including Sodbuster—is effectively controlling soil erosion on highly erodible land.<sup>74</sup>

Many of these sentiments have been echoed by local-level leaders in the industry as well. For instance, both the South Dakota Corn Growers Association (SDCGA) and South Dakota Farm Bureau Federation (SDFB) are on record as being opposed to Sod Saver. Both have urged South Dakota Governor, Mike Rounds, not to opt in to the Sod Saver provision, as well. Bill Chase, a Wolsey, South Dakota farmer and SDCGA President, has contended that the program will put eastern South Dakota farmers at a disadvantage to those outside the provision’s realm, who have the complete freedom to respond to market signals.<sup>75</sup>

According to Chase, who characterizes farmers as “the original conservationists,” countless considerations in the Sod Saver provision are “unclear and misguided” in their attempt to

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<sup>73</sup> *Id.* at p. 28.

<sup>74</sup> *Id.*

<sup>75</sup> South Dakota Ag Connection, *SD Farm Bureau to Governor Rounds: No on ‘Sod Saver’*, <http://www.southdakotaagconnection.com/story-state.php?Id=23> (January 1, 2009).

protect the native grasslands.<sup>76</sup> Specifically, Chase has addressed disapproval with the geographic limitations placed on the provision's application, having stated: "And why would they not include western South Dakota, with its grasslands? We think that's just wrong."

While also recognizing a conservationist need to preserve and protect selected native sod, SDFB President and Volga, South Dakota farmer, Scott VanderWal, also views the provision as an overly broad policy.<sup>77</sup> Instead, his organization has recommended that Governor Rounds promote an incentive-based program to help preserve the state's native grasses. In this regard, SDFB has suggested that a pilot program or a Conservation Reserve Enhancement Program be offered as an incentive to not break sod.<sup>78</sup>

Other program shortcomings, as recognized by SDFB, have been an inadequate definition of "native sod," and the need for a more localized approach in addressing the issue. In regard to the former, some have urged the adoption of a native sod definition that specifically identifies the applicable prairie grasses, such as "big bluestem, Indian grass, green needle grass, blue gamma grass, buffalo grass, little blue stem, etc."<sup>79</sup> According to those who support this notion, a list containing specific native sod criteria would need to be developed before the program could be properly instituted. With reference to the latter asserted shortcoming, as viewed by SDFB President VanderWal: "the truly sensitive areas need to be identified by the native grass on them, rainfall, soil type, and the environmental sensitivity of the soil to erosion from wind and water. Simply looking at a map of the nation and designating wide swaths of the country is a disservice to everyone."<sup>80</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> Dakota Farmer, *Speak Up About Sod Saver Program*, <http://magissues.farmprogress.com/DFM/DK01Jan09/dfm014.pdf> (January 2009).

<sup>78</sup> *Farm Bureau to Governor Rounds: No on 'Sod Saver'*, *supra* n. 75.

<sup>79</sup> SDFB, *SDFB Legislative Update*, <http://sdfb.fb.org/Leader%20Connection/12-15-08%20Connection.htm> (December 15, 2008).

<sup>80</sup> *Farm Bureau to Governor Rounds: No on 'Sod Saver'*, *supra* n. 75.

One of SDFB’s final (and major) Sod Saver concerns has also revolved around the rule’s definition of “native sod,” which SDFB President VanderWal has understood to mean: “land that has no record of being tilled (determined in accordance with FSA records) as of the date of enactment.”<sup>81</sup> According to VanderWal, the current language is more restrictive than that contained in the original Farm Bill, which did not limit the evidence or information a landowner could use to show that the land had not been used for production of an annual crop at some point in the past.<sup>82</sup> As VanderWal has explained: “Placing FSA in the position of determining if the soil has been tilled in the past, without an appeals process for the producer, is unacceptable. FSA records are available for only the last 30 to 40 years, while the land in eastern South Dakota has been operated for at least 100 years.”<sup>83</sup>

From all of this, one thing is abundantly clear: Sod Saver-related disagreement has persisted, not only as it has related to general pros and cons, but also, how the program should best be implemented. Having attained an understanding of the parties’ competing interests and arguments related thereto, an additional inquiry is induced: how did it all play out? One thing is fairly certain: no matter what end of the spectrum one was on—Pro- or Anti-Sod Saver—both parties’ interests were entertained on Capitol Hill. This was reflected in the provision’s transformation during the legislative process.

(IV) SOD SAVER’S TRANSFORMATION: HOW AFFILIATE  
INTERESTS INFLUENCED POLICY OUTCOME

As initially proposed by the USDA for the 2007 Farm Bill, Sod Saver was intended to be a national program, perpetual in application. However, as Section (I) herein disclosed, that was not the provision’s final product. By the time the Farm, Nutrition, and Bioenergy

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Act of 2007 (H.R. 2419) was passed by the House of Representatives on July 17, 2007, Section 11007—entitled *Crop Insurance Ineligibility Related to Crop Production on Noncropland* (aka, Sod Saver)— provided for a *four-year* ban on crop insurance for newly broken “noncropland.”<sup>84</sup> Further noteworthy was the provision’s location within the Bill’s Title XI, *Miscellaneous Provisions*. However, by the time H.R. 2419—at this juncture, referred to as the Food and Energy Security Act of 2007—was passed through the Senate on December 14, 2007, its Sod Saver provision, Section 2608—entitled *Crop Insurance Ineligibility Relating to Crop Production on Native Soil*—was contained in Title II, Conservation.<sup>85</sup> Unlike its predecessor, it termed the grasslands in question as “native sod”; created a *de minimis* exception, exempting five-acre units and less from application; and importantly, did not provide a minimum-years eligibility requirement for crop insurance on newly broken native ground. Instead, the Senate version provided a perpetual bar for such.<sup>86</sup>

While clearly different from one another, neither the House nor the Senate version of the provision contained a governor-opt-in clause. Furthermore, despite the more stringent consequences imposed by the latter’s version, the [Bush] administration still expressed concerns regarding its effect, specifically that it lacked the strength that the Administration desired.<sup>87</sup> While the Administration recognized the Senate’s Sod Saver version as a “good start,” it felt it “fail[ed] to meet the comprehensive protections provided by the Administration’s proposed ‘sod saver’ program.”<sup>88</sup>

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<sup>84</sup> H.R. 2419, 110<sup>th</sup> Cong. § 11007 (Sep. 27, 2007) (as passed by House), *available at* <http://thomas.loc.gov/cgi-bin/query/F?c110:3:./temp/~c1101yCpKd:e925449:>.

<sup>85</sup> H.R. 2419, 110<sup>th</sup> Cong. § 2608 (Dec. 14, 2007) (as passed by Senate), *available at* <http://thomas.loc.gov/cgi-bin/query/F?c110:5:./temp/~c1101yCpKd:e682678:>.

<sup>86</sup> *Id.*

<sup>87</sup> *Administration Pushes for Grassland Protection*, *supra* n. 1.

<sup>88</sup> *Id.*

By the time H.R. 2419, by this time known as the Food Conservation, and Energy Act of 2008, was presented to the President on May 20, 2008, Sod Saver was found in Section 12020, entitled *Crop Production on Native Soil*, and represented a compromise of sorts between the two assemblies' versions (and arguably, pro- and anti-Sod Saver interests): it termed the grasslands in question as "native sod" (adopted from the Senate's version); provided for *five years* of ineligibility for crop insurance after breaking native Sod (while the Senate wanted permanent ineligibility, five years of ineligibility represented one year more than the House's version required); incorporated a common sense de minimis exception (adopted from the Senate version); and finally, its language included a governor opt-in clause, not contemplated in either houses' initial version.<sup>89</sup>

Many of the adjustments made to H.R. 2419, however, were not considered strong or sufficient enough in the President's eyes, as evidenced one day later—on May 21, 2008—when President Bush vetoed the bill. In choosing to reject the Farm Bill in its entirety, as evident from passages of his veto message, the President relied on much of the same, fundamental reasoning promoted by supporters of Sod Saver. In that message, the President stated, in part: "At a time of high food prices and record farm income, this bill lacks program reform and fiscal discipline. It continues subsidies for the wealthy and increases farm bill spending by more than \$20 billion . . . ; and, "At a time when net farm income is projected to increase by more than \$28 billion in 1 year, the American taxpayer should not be forced to subsidize that group of farmers who have adjusted gross incomes of up to \$1.5 million. When

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<sup>89</sup> H.R. 2419, 110<sup>th</sup> Cong. § 12020 (May 20, 2008) (as presented to the President), *available at* [http://thomas.loc.gov/cgi-bin/query/F?c110:6:./temp/~c1109p1grU:e42735:.](http://thomas.loc.gov/cgi-bin/query/F?c110:6:./temp/~c1109p1grU:e42735:)

commodity prices are at record highs, it is irresponsible to increase government subsidy rates for 15 crops, subsidize additional crops, and provide payments that further distort markets.”<sup>90</sup>

Despite the President’s discontent with the bill, Congress overruled his veto with a two-thirds majority vote of the House on May 21, 2008 (316 Yeas to 108 nays); and the Senate on May 22, 2008 (82-13, yeas to nays).<sup>91</sup> Consequently, the compromised version of Sod Saver—now contained in Section 12020 of the Food Conservation, and Energy Act of 2008—that arrived on the President’s desk on May 20, 2008, was the same provision ultimately enacted in Public Law 110-234 on June 18, 2008.<sup>92</sup> (Replaced by Public Law 110-246; *See* footnote<sup>93</sup>). That being the case, where is Sod Saver today, and more importantly, where should it go from here?

#### (V) SOD SAVER: THE EMPTY PROMISE THAT IS; THE PROMISE THAT COULD BE

As it were, the addition of the governor opt-in clause to Section 12020 turned out to be the enigma that those who supported Sod Saver initially feared it would be. This was made apparent with the coming-and-passing of the February 15, 2009, USDA-recommended deadline for governors to opt in.<sup>94</sup> The deadline, which was set to insure that producers could make “timely and appropriate insurance decisions with respect to their farming operations,” came and passed, and although, technically, states still have the ability to opt in,

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<sup>90</sup> H. Doc. No. 110-115 (House of Representative- May 21, 2008) (Veto Message from the President of the United States), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2008\\_record&page=H4402&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2008_record&page=H4402&position=all).

<sup>91</sup> Thomas Library of Congress, H.R. 2419, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02419:@@R>.

<sup>92</sup> *Id.*

<sup>93</sup> The House and Senate passed H.R. 2419 over veto, enacting 14 of 15 farm bill titles into law. The trade title (title III) was inadvertently excluded from the enrolled bill. To remedy the situation, both chambers re-passed the farm bill conference agreement (including the trade title) as H.R. 6124, again over veto. H.R. 6124, in section 4, repealed Public Law 110-234 and amendments made by it, effective on the date of that Act's enactment.

<sup>94</sup> *Conservation Groups Issue Call for Mandatory “Sodsaver” Program*, *supra* n. 62.

none of the five state governors have done so, to-date.<sup>95</sup> That being the case, and given the promise Sod Saver's implementation could hold, why wasn't it given the chance?

Little has been said from the states' respective executives since the deadline's passing. Of the five states' governors, the one whose neglect to opt in was perhaps the most surprising was South Dakota Governor Mike Rounds, since all three of his state's congressional representatives (John Thune<sup>96</sup>, Stephanie Herseth Sandlin<sup>97</sup>, and Tim Johnson<sup>98</sup>) and its Department of Game, Fish, and Parks, all urged Congress's adoption of Sod Saver.<sup>99</sup> If Governor Round's comments are generally indicative of the other governors' viewpoints, Sod Saver was not given a chance to succeed, due to the unpredictability of success attendant such an unproven, untried program; in addition to the provision's arrival, simply occurring too late.<sup>100</sup> In addition to having expressed the opinion that, while the concept is right in the *long term*, there is no way of knowing if the program will actually work, Governor Rounds has also stated: "If the goal is to save that virgin sod, that is already lost. So what you'd be doing is penalizing people who have already done it, but the sod is already gone." In the alternative, Governor Rounds has suggested a transition toward

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<sup>95</sup> *Id.*

<sup>96</sup> Ltr. from John Thune, Sen., to the U.S. Congress, Congressional Agricultural Committee Members (April 14, 2008), *available at* [http://www.ducks.org/media/Conservation/Conservation%20Initiatives/\\_documents/Thune%20support%20%20letter.pdf](http://www.ducks.org/media/Conservation/Conservation%20Initiatives/_documents/Thune%20support%20%20letter.pdf).

<sup>97</sup> Ltr. from Stephanie Herseth Sandlin, Rep. to the U.S. Congress, Farm Bill Conferees (April 15, 2008), *supra* n. 69.

<sup>98</sup> Ltr. from Tim Johnson, Sen., to the U.S. Congress, Congressional Agricultural Committee Members (April 16, 2008), *available at* [http://www.ducks.org/media/Conservation/Conservation%20Initiatives/\\_documents/Johnson%20sodsaver%2004.16.08.pdf](http://www.ducks.org/media/Conservation/Conservation%20Initiatives/_documents/Johnson%20sodsaver%2004.16.08.pdf).

<sup>99</sup> Ltr. from South Dakota Department of Game, Fish, and Parks, to the U.S. Congress, Party Leaders and Agricultural Committee Members (April 15, 2008), *available at* [http://www.ducks.org/media/Conservation/Conservation%20Initiatives/\\_documents/South%20Dakota%20GFP%20Sodsaver%20support%20letter.pdf](http://www.ducks.org/media/Conservation/Conservation%20Initiatives/_documents/South%20Dakota%20GFP%20Sodsaver%20support%20letter.pdf).

<sup>100</sup> Dennis Gale, Sioux City Journal (A.P. writer), *Rounds "Leaning Against" Sod Saver Participation*, *available at* [http://www.siouxcityjournal.com/articles/2009/01/10/news/latest\\_news/a941690215\\_bf407d8625753a00792f17.txt](http://www.siouxcityjournal.com/articles/2009/01/10/news/latest_news/a941690215_bf407d8625753a00792f17.txt) (January 10, 2009).

providing more opportunities for Conservation Reserve programs to be enhanced, so that more of the cropland production areas can be converted back to grass.<sup>101</sup>

Besides Governor Round's alternative suggestion sounding starkly similar to that proffered by SDFB President VanderWal (see Section (III)(A), p. 22, herein)—which may explain, at least in-part, where his decision not to opt in, derived from—the suggestion that although the plan may be good in the *long term*, but not in-fact a good idea over all, seems to imply a pre-occupation with the *short term* on the Governor's part. However, are governors not obligated to look beyond the limits of their own political terms and agenda, and to the overall, long term benefits of their constituents and the area they inhabit?

As Governor Round's concerns have related to unpredictability, the GAO's report acknowledged that a shortage of comprehensive and current data on the subject is a reality.<sup>102</sup> It further recognized that more complete information would help policymakers and stakeholders understand where conversions are occurring and the environmental implications thereof, and would assist in assessing costs and impacts resulting from farm program payments (that this knowledge would serve as an invaluable tool in allowing policymakers to balance environmental and economic benefits of grasslands against the rising demand for food, feed, fiber, and other cropland producing resources).<sup>103</sup> That being said, as evident in the GAO report itself, a plethora of reliable information, for instance, the NASS census and state and county-collected FSA data, is already available. Furthermore, given the rapid pace of conversion that is taking place, and the impending ecological consequences that have and will continue to follow it, there is no longer time to take a wait-and-see approach. No program of first impression has been *guaranteed* success. However, such untried programs

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<sup>101</sup> *Id.*

<sup>102</sup> *Farm Program Payments, supra* n. 4, p. 30.

<sup>103</sup> *Id.*

have been adopted, and more importantly, *implemented* on the basis of reliable information, which ample of exists in this context. As such, Governor Round's concerns of unpredictability are relatively without merit, and more importantly, moot given the rate of conversion and the consequences to be reaped if something is not done soon.

Finally, Governor Round's impressions that "the native sod" is already lost, and that Sod Saver would be punishing those who have already broke the sod are unfounded, and further misrepresent the issue.<sup>104</sup> Sod Saver would not punish those who have already broke native sod, unless of course, they broke the sod *after* the date of the provision's enactment. Governor Round's statements, as they relate to the sod already being "lost," are even more misguided. To use an old adage as analogy: while an "if it aint broke, don't fix it" mentality can be appreciated; an "if it's in the process of breaking, it's already too late, so keep breaking it" attitude cannot be tolerated. Rather than addressing the problem now, through means that possess the projected likelihood of *decreasing* government costs (i.e. Sod Saver), Governor Rounds seems to suggest that the proper redress is to continue the current course of conduct (tearing up invaluable native sod), and hope that individuals will later *replant* the land, via enrollment in Conservation Reserve programs and the like. There are two clear disadvantages presented by this approach, as compared to Sod Saver: first, as explicated in the GAO's report, once native habitat is destroyed, it generally cannot be fully restored to its former ecological function;<sup>105</sup> and two, programs like CRP, while beneficial in their own right, are Government-paid incentive programs, and thereof constitute a more costly alternative to Sod Saver.

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<sup>104</sup> "*Leaning Against*" *Sod Saver Participation*", *supra* n. 100.

<sup>105</sup> *Farm Program Payments*, n. 4, p. 9.

For whatever reason—whether it be those expressed by Governor Rounds (I, for one, hope not), or invariable others—the PPR governors chose not to enroll in the Sod Saver program. That being the case, provided the intrinsic benefits Sod Saver could afford if enforced, what more can be done to ensure its implementation?

To begin with, if conservation goals were of chief concern, then Sod Saver’s application would be *nationwide* in scope. As South Dakota Representative, Stephanie Herseth Sandlin, alluded to in a letter to Farm Bill Conferees: “To be most effective, **it is critical that Sodsaver be a nationwide program** . . . .”<sup>106</sup> Furthermore, if a genuine concern exists for the ecological and environmental threats that grass-to-cropland conversion pose—as it should—crop insurance ineligibility for breaking native sod would be *permanent*. As pointed out in South Dakota Senator, John Thune’s, letter to members of the Congressional Agriculture Committee, in which he expressed his support for Sod Saver: “Removing only crop insurance eligibility and for only four year is merely a *band-aid* approach to solving the problem of federal farm programs encouraging destruction of native grasslands.”<sup>107</sup>

Finally, and most important to Sod Saver’s potential success, the program needs to be *mandatory*! Gina DeFerrari, senior policy advisor to World Wildlife Fund (WWF), touched on an obvious, but critical point, when she stated: “The fact that no state has taken the requisite steps to opt-in to the program suggests that this voluntary approach won’t work. To stop the illogical practice of subsidizing the destruction of some of the world’s most biologically diverse and threatened grasslands, the Sodsaver provision must be strengthened

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<sup>106</sup> Ltr. from Stephanie Herseth Sandlin, Rep., to the U.S. Congress, Farm Bill Conferees, *supra* n. 70.

<sup>107</sup> Ltr. from John Thune, Sen. to the U.S. Congress, Congressional Agricultural Committee Members, *supra* n. 96.

and made mandatory.”<sup>108</sup> Although Ms. DeFerrari’s call for mandatory enforcement may seem relatively straightforward to some, its absence was also fundamental, to what was otherwise a hard-fought, well-formulated policy, resulting in nothing more than an empty promise. While progress in the form of the provision’s enactment undoubtedly provides reason for encouragement, and even some level of achievement, it must also be viewed as a missed opportunity to protect native prairie grasslands and save tax dollars in the process. Put bluntly, as it relates to this piece of legislation, the PPR governors were provided an escape clause, of which they chose to accept. In so doing, they were not required to provide a single word’s justification (as they would, for instance, with an “opt out” clause). As it were, their actions (or inaction, rather) mooted the work of many and precluded the high promise that the program had in store. The moral of the story: to curtail the federal subsidization of our native prairies, the Sod Saver program must be mandatorily implemented and enforced.

#### CONCLUSION

As evidenced by the statistical data, conversion of native grassland to cropland is prevalent. Just as real as the pervasiveness of conversion are the very real consequences it creates, not only ecologically and economically, but as it relates to impacts on the very livelihood of certain populations. In response to the conversion problem, Sod Saver’s proposals illuminated evident competition, not merely among pro-Sod Saver (i.e. ranchers and conservationists) and anti-Sod Saver interests (i.e. farmers and their representative organizations), but also between government programs that promote divergent goals (i.e. CRP vs. farm program payments).

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<sup>108</sup> *Conservation Groups Issue Call for Mandatory “Sodsaver” Program, supra n. 62.*

With respect to the latter, additional studies need to be conducted to identify the specificities of divergent program goals, and in response, new policy considerations need to be weighed and adopted that attempt to reconcile any contradictory results. In regards to the former, it appears, for now at least, that while Sod Saver supporters may have won the battle, they have lost the war. While Sod Saver's inclusion in the Food, Conservation, and Energy Act of 2008 was certainly an encouraging stride in the right direction—for which its supporters can and should be commended—it must also be recognized as an opportunity that got away. First, it serves to illuminate what areas of the provision *should be* improved, namely, nationwide application and a permanent bar on farm program and disaster payments for breakage of native sod. Finally, it should be viewed and serve as a teaching mechanism, the lesson being: to realize the vital, all-important goals that Sod Saver seeks to achieve, it is *imperative* that compliance with its provisions be mandatory.

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