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October 16, 2006

BY FACSIMILE
ORIGINAL TO FOLLOW BY U.S. MAIL

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RE: Audit Report No. 10099-5-SF
Request for Correction by Chattowah Open Land Trust

Dear Counsel:

This Request for Correction is written in response to Audit Report No. 10099-5-SF (the "Report"), which made certain findings regarding the Alabama operations of Chattowah Open Land Trust (the "Trust") under the Farm and Ranch Lands Protection Program ("FRPP"). This Request is not intended to respond to each and every allegation contained in the Report. The Trust has endeavored to submit this Request in a timely manner, and its internal investigation into the Report's allegations is ongoing. Further, the Department of Agriculture's Office of Inspector General ("OIG") has pertinent documents through its audit process which have not been made available to the Trust, such as written statements from landowners.¹ In light of the above, the Trust does not admit or deny any of the Report's allegations unless specifically stated herein, and it reserves the right to further respond to any statement contained in the Report upon completion of its investigation.

The Trust is a public charity which depends entirely on the generous contributions of its patrons, and dedicates itself to protecting land for present and future generations. Through its twelve years of operation, the Trust has built an excellent reputation in the conservation community and it currently maintains conservation easements on approximately 50,000 acres of land throughout the South. The FRPP is a voluntary program intended to help farmers and ranchers keep their land in agriculture in the face of increasing urban sprawl. Through FRPP, the Trust has placed conservation easements on 651 acres of Alabama farmland. The typical FRPP

¹ The Trust believes that OIG possesses all documents referenced herein. However, if there are supporting documents which OIG does not possess and wishes to review, please contact the undersigned.

conservation easement transaction takes many months to complete and requires a great deal of work by the Trust. In their efforts to cooperate with NRCS to efficiently and properly administer the program, the Trust has devoted significant resources to FRPP and hired additional staff dedicated solely to FRPP tasks.²

Despite the Trust's efforts to comply with FRPP's complex program requirements, the Audit Report alleges two basic areas of fault with regard to the Trust's FRPP participation. First, the Audit Report alleges that the Trust employed a scheme or device for purposes of obtaining federal matching funds. Second, the Audit Report alleges that the Trust failed to meet its obligations regarding appraisals of FRPP easements. The Trust requests that these findings be corrected, as they clearly disregard certain important factual information. Further, the Audit Report makes aggressive and overly broad statements of opinion which are unsupported by appropriate application of relevant legislation, regulations, contracts, and directives to the alleged facts, and the Audit Report intimates that fault lies with the Trust for alleged actions and deficiencies beyond the scope of its responsibilities under FRPP. The Trust values its relationship with the USDA and the government's conservation goals. While the allegations contained in the Audit Report may constitute technical contractual deficiencies in relation to the Cooperative Agreement under the FRPP, any such deficiencies did not constitute material noncompliance, nor did the actions by the Trust constitute a scheme or device to circumvent FRPP requirements. As detailed below, the Trust requests that the OIG correct its Audit Report, especially in light of certain ambiguities and inherent complexities, and to eliminate conclusions that a scheme or device to circumvent may have existed, or that there was any material noncompliance under the Cooperative Agreement.

I. Matching Funds

The Audit Report alleges that the Trust employed a "scheme or device for the purposes of obtaining NRCS approval of the 2003 easement purchases, receiving Federal matching funds equal to 50 percent of the easements' FMV, and obtaining title to four easements with little or no financial contribution."³ In order to conclude that there was a scheme or device, the OIG must find based upon competent and credible evidence that the Trust violated the terms of the FRPP through "coercion, fraud, [and] misrepresentation."⁴ The OIG should correct its public pronouncement that the Trust perpetrated a scheme or device because the Trust never received clear instruction regarding the matching funds requirement of FRPP, the Trust endeavored to comply with NRCS guidance while attempting to further the purposes of FRPP, and there is no evidence that the Trust had any improper motive or intent.

A. The applicable regulations and contract language did not clearly prohibit alleged actions by the Trust.

² The Trust hired two staff members solely dedicated to completion of FRPP tasks. Staff member No. 1 worked for the Trust from July 1, 2003 through November 30, 2004, and staff member No. 2 worked for the Trust from February 1, 2003 to April 30, 2003. In addition, nearly all other staff at the Trust were involved in some aspect of FRPP operations.

³ See, e.g., Audit Report, p. ii.

⁴ See, e.g., Audit Report, p. ii.

In its Audit Report, the OIG admits that landowner contributions of any size are welcome and should be encouraged in support of the conservation goals under the FRPP. The government's instructions on issues related to matching funds under FRPP, however, are ambiguous. From the initial promulgation of FRPP regulations, public comments indicated confusion over proper application of 7 C.F.R. § 1491.21 (Matching Funds). In fact, several comments pointed out that "if a landowner donated 50 percent of the easement's value and the Natural Resources Conservation Service (NRCS) paid 50 percent, the letter of the law could be met without any cash commitment from the land trust." Farm and Ranch Lands Protection Program, 68 Fed. Reg. 95 (May 16, 2003) (to be codified at 7 C.F.R. pt. 1491). Another group of comments suggested "a landowner should be able to donate more than 25 percent of the appraised fair market value." *Id.* The agency responded to these comments by stating that it "did not intend to mislead readers that a landowner donation be limited to 25 percent." NRCS attempted to "clarif[y] the final rule language by inserting the '50 percent of the purchase price' option." *Id.* However, the "purchase price option" did not directly or effectively address either of these interpretations of existing regulation language.

The matching funds language, on its face, is difficult to understand, as evidenced by the groups of comments discussed above which are contrary to the NRCS' regulatory interpretation. However, the "purchase price option" clarification does not adequately explain the effect of a landowner donation greater than 25% of the easement's fair market value. In fact, the "purchase price option" fails to make clear that a landowner has the option of contributing more than 25% of the easement's fair market value. Moreover, because the term "purchase price" was never defined in the regulations and can reasonably be read interchangeably with the term "fair market value," the calculus for a transaction involving a landowner donation exceeding 25% is extremely difficult to surmise.

Without a definition of "purchase price" or language referencing a landowner donation of greater than 25%, the confusion regarding the option and effect of landowner donations beyond 25% persists. Under the original calculation, the landowner's donation is to be considered part of the entity's share of the matching funds. *See* 7 C.F.R. § 1491.21(b), (c). In contrast, under the "purchase price option," the landowner donation is held apart, and the entity and government funds are pooled together to calculate "purchase price."⁵ This intended method of calculation, as explained in the Audit Report, is not clear from the face of applicable regulations.

The FY2003 Cooperative Agreement's matching funds terms provide no additional clarification regarding the option or effect of a landowner donation beyond 25% of the easement value. The Cooperative Agreement provides:

Landowner donations up to 25 percent of the appraised fair market value of the conservation easement may be considered as part of the entity's matching offer. Where a landowner's donation is considered to be a part of an entity's matching

⁵ This understanding comes from the Audit Report at page 1 (which defines purchase price as "the easement's FMV less landowner donation). 7 C.F.R. § 1491.21(d) does not explain when the "purchase price option" is to be employed, or how one defines or determines "purchase price."

offer, the entity is required to contribute at least 25 percent of the fair market value of the conservation easement or fifty percent of the purchase price.

Without guidance on the differing definitions of "fair market value" and "purchase price," and without a clear explanation of alternatives, the letter of the law could be met by multiple calculations under various guidance from NRCS. For example, if a landowner donates 30% of the FMV: (1) under the "purchase price option" found at § 1491.21(d)(2), the Trust may be obligated to split the remaining 70% evenly with government; or (2) under the original calculation method found at § 1491.21(d)(1), the Trust would contribute only 25% and allow government to pay 45%; or (3) if one applies the language of the Cooperative Agreement, the government would pay its 50% share⁶, with no explanation for what happens to the remaining 5% contributed by landowner.

The only constant and clear message from FRPP regulations and the Cooperative Agreement is that the government will not pay more than the 50% of the easement's fair market value.⁷ Operating under such ambiguous guidance, the Trust proceeded to find interested landowners and navigate the complex FRPP process. In its early attempts to explain the program's terms to Alabama farmers, the program director stated that the government would pay no more than 50% of the appraised value of the easement, and that the Trust would charge the landowner a fee to compensate the Trust for the time, overhead, and costs expended in the proposal, acquisition, and enforcement of FRPP conservation easements. The matching fund guidance from NRCS until this time contained no prohibition, or any mention whatsoever, regarding whether a cooperating entity may charge a fee to participating landowners.

The first conservation easement under the subject Cooperative Agreement closed on February 24, 2004. As part of the closing on the property of [redacted], the Trust charged the landowner a fee of \$287,500. This fee was fully disclosed to the landowners in advance of closing, and directly documented in the easement closing statement, and they consented to its charge.⁸ Nevertheless, at [redacted] closing an NRCS representative approached the Trust's program manager and suggested that he believed the fee violated the Trust's duty to tender cash at the closing in order to satisfy its matching funds obligation.

B. The Trust attempted to comply with direction from NRCS subsequent to [redacted] closing.

⁶ See Cooperative Agreement No. 73-4101-3-01, section III (B), which provides that, "The United State's [sic] contribution...shall be up to but not more than 50% of the appraised market value." (emphasis added). The term "shall be" strongly suggests that the Cooperative Agreement requires the government to pay 50% FMV regardless of contributions by the Trust or a landowner.

⁷ See, e.g., 7 C.F.R. § 1491.21(b); NRCS Policy, 440-V-CPM, Amend. 21, April 2004, Subpart G §§ 519.52 (A), 519.60 (C) FRPP; Cooperative Agreement No. 73-4101-3-01, section III (B).

⁸ A "fee" or "in-kind" matching fund arrangement is allowed in many other Federal programs (National Wetland Conservation Act grants and national Fish and Wildlife Foundation grants) and approved by the Land Trust Alliance Policy.

Following the completion of [] easement acquisition, the NRCS in April 2004 sent a letter to the Trust, which, recognizing the lack of direction regarding permissibility of a fee charged to landowner, instructed:

- "NRCS believes that the [Trust] misunderstood the cost sharing provision articulated in the cooperative agreement, under which [] transaction was governed when it charged a fee to [] of \$287,500."
- "[U]nder no circumstances will NRCS provide FRPP funds to the [Trust] in cases where it continue (sic) to acquire its minimum cash requirement through additional cash contributions, loans, or payments made by the landowner or charged to the landowner."

As the April 2004 letter alludes, NRCS subsequently promulgated NRCS CPA-230 ("Exhibit K"), which required the Trust to certify at closing:

- "that the entity's share of matching funds listed above have not come from additional donations, payments, loans, or fees made by or charged to the above-mentioned Grantor."

The actions taken by the Trust in response to these two directives form the basis of the Audit Report's allegation that the Trust employed a scheme or device.⁹ For no less than three reasons, the Trust's practices after April 2004 did not constitute a scheme or device. First, the Trust correctly understood the above directives to prohibit a "fee" charged at closing to the landowner. Second, the Trust reasonably believed, but contrary to the position now taken by the government, that these directives did not apply to donations made after a transaction was complete. And third, the Trust made extraordinary efforts to ensure that landowners understood they were not legally obligated to make any payments to the Trust in connection with FRPP.

The language of the April 2004 letter and Exhibit K provides that a "minimum cash requirement" cannot come from "donations, payments, loans or fees *made by or charged to* landowner." (emphasis added) After receiving these directives, there is no dispute that the Trust ceased charging any fee to landowners and tendered cash at subsequent easement closings. The language in these directives, however, did not address landowner contributions made to the Trust subsequent to a closing, or, at minimum, such language was vague and ambiguous as to its application to such contributions.

The Trust did not receive notice that a landowner's donation to the Trust after a closing violated the instructions from NRCS. The government's current position is based on the "intent" of these directions, but such "intent" cannot be derived from the four corners of the subject documents. The verbs of the April 2004 letter and Exhibit K are written in the past tense and focus on funds "charged" to the landowner, and required that the entity's cash at closing "have not come from" landowners. This language requires the Trust to tender cash at closing which

⁹ Although the Audit Report repeatedly weaves together statements related to the Trust's actions before receiving this second round of NRCS direction, the NRCS stated in its April 2004 letter that there was no "scheme or device" arising out of Trust actions prior to the first closing. The repeated attempts to tie the Trust's understanding of program requirements prior to receipt of the April 2004 letter to discussions of actions after [] closing are misleading.

was not provided by a landowner. There is no language prohibiting a landowner from making a donation to the Trust after the FRPP transaction is complete.

If one applies the broad language in the April 2004 letter and Exhibit K to non-fee donations beyond the closing of an FRPP easement, NRCS would prohibit the most benign of transactions. A public charity is dependent upon the contributions of its patrons, and thus its funds at any closing necessarily "have come from" prior donors. The government's interpretation of the language of the April 2004 letter and Exhibit K would prohibit a landowner from participating in FRPP if he has ever donated to the Trust prior to conveying a conservation easement under the program. Similarly, in light of the position taken in the Audit Report, if these past tense verbs are read to apply prospectively after closing, the landowner arguably would be forever barred from contributing to the Trust because he would be replenishing the funds used to purchase his easement. Such interpretations would contravene strong public policy favoring charitable donations.

In light of the lack of specificity and clarity in both the April 2004 letter and Exhibit K, it was reasonable for the Trust to understand that NRCS simply wanted to ensure the Trust had cash on hand at the closing of each conservation easement. Such belief was reasonable because the issue raised by NRCS at [redacted] closing (which the Trust understood to be the origin of these subsequent directions) was the "fee" charged to the landowner, and a broader reading of this language would prohibit all charitable donations by FRPP landowners. Moreover, the Trust's ability to tender cash at closing would alleviate NRCS concerns about whether the Trust would have the resources to subsequently monitor and enforce the easement. The Trust complied fully with a reasonable interpretation of these directives, and it is undisputed that the Trust had sufficient cash on hand at each of the subsequent closings to provide matching funds.

In an abundance of caution, the Trust made extensive efforts to ensure that any donation made to the Trust could not be categorized as being "charged" to a landowner. After receiving the April 2004 letter, the Trust met with each landowner and explained its understanding of the new interpretation of the matching funds rule. The Trust informed the landowner that the Trust could not charge a "fee" for its efforts to obtain and enforce an FRPP easement. Some landowners executed an acknowledgement that the Trust had explained that the landowner had "no legal obligation to pay any monies to [the Trust]."¹⁰

As drafted, the April 2004 letter and Exhibit K do not prohibit voluntary post-closing landowner donations. The Audit Report in effect takes the position that *any* post-closing donation to the Trust by participating landowners should be considered part of the matching funds for purposes of the FRPP transaction, and would make the landowner donation equal 50% of the fair market value/purchase price. However, the program regulations, the Cooperative Agreement and Exhibit K are unclear regarding whether a landowner may donate more than 25%, and what affect such a donation would have on each party's matching funds obligations. If the Audit Report's implications are adopted, any charitable contribution from a landowner after

¹⁰ After the [redacted] transaction closing (easement No. 2), subsequent landowners [redacted] (easement No. 3) and [redacted] (easement No. 4) executed a pre-closing acknowledgement which provides that the landowner has "no legal obligation to pay any monies to [the Trust]," and has not "been pressured in any way by [the Trust] to pay... any money or other consideration for any part of the FRPP transaction."

an FRPP closing, regardless of when it might take place, would either re-configure the terms of a completed transaction or be prohibited all together. A contribution by a landowner a day, a week, a month or even a year or more after his easement closing would require a reconfiguration of the closing terms, and might in addition result in a government allegation of a "scheme or device" by the cooperating entity. Such an interpretation is contrary to the strong public policy encouraging charitable donations in support of conservation easements.

C. The evidence does not support a finding of a "scheme or device"

In light of the complexities and ambiguities associated with FRPP's matching funds requirement, and the strong public policy encouraging charitable donations, there is not sufficient credible evidence for OIG to support an allegation that the Trust was engaged in a scheme or device. The Audit Report alleges that the Trust employed a "scheme or device for the purposes of obtaining NRCS approval of the 2003 easement purchases, receiving Federal matching funds equal to 50 percent of the easements' FMV, and obtaining title to four easements with little or no financial contribution." In order to prove a scheme or device, government must show that the Trust violated program requirements through "coercion, fraud, [and] misrepresentation."

A scheme or device cannot be proven for four principal reasons. First, the Trust was substantially financially vested in the FRPP program. Second, there is no "deprivation of payments" needed for a "scheme or device" because the government never paid more than the 50% FMV as mandated by the authorizing legislation, and all landowners received funds equal to 75% of FMV. Third, there is no evidence that the Trust understood the actual intent of NRCS' directions and sought to circumvent such intent. Last, the OIG relies on unsworn statements of landowners apparently obtained by NRCS personnel, which are contradicted by landowners' prior and/or subsequent statements.¹¹

The Trust was financially invested in the FRPP. Any allegation that the Trust obtained "title to four easements with little or no financial contribution" fails to recognize the significant evidence of the Trust's commitment to fostering the success of FRPP in Alabama. The commitment of time and resources by the Trust to this effort required actual and significant expenditures by the Trust from its own funds. The Trust estimates that it has invested no less than 2,000 man hours and hundreds of thousands of dollars in efforts to perform its role in the FRPP. The Trust specifically hired additional staff whose sole responsibility was to complete the many complex administrative tasks required by FRPP.¹² In addition to the significant capital expended in preparing and closing the FRPP transactions, conservation easements under the FRPP place a perpetual duty on the Trust to expend its resources in monitoring and enforcing the terms of the easement. The knowing assumption of these obligations cannot be characterized as anything less than a substantial financial commitment by the Trust.

¹¹ The Trust has not been provided access to any landowner statements taken by the NRCS, so must rely strictly upon descriptions of such statements in the Audit Report. The Trust renews its request that copies of such statements be made available to it so that it may complete its internal investigation and any additional request for correction resulting therefrom.

¹² See footnote 2, *supra*.

In addition, there is no "deprivation of payments" needed to show a "scheme or device."¹³ The repeated allegation that the Trust "receiv[ed] Federal matching funds equal to 50 percent of the easements' FMV" misstates the nature of these transactions. None of the closing documents, subsequent to [] closing, indicate any funds were tendered to the Trust. All Federal funds and matching offers from the Trust under the FY2003 Cooperative Agreement were tendered to the landowner. In addition, the government never paid more than 50% FMV for the subject easements. This is a requirement of FRPP legislation, and there has been no allegation that the Trust did anything to cause the government to exceed this statutory mandate. Any suggestion of a scheme or device based on the Trust's alleged receipt of Federal funds, or of funds owed to landowners, is without any evidentiary support whatsoever.

The Audit Report repeatedly asserts that the Trust knowingly circumvented the intent of the FRPP. However, the Report provides no evidence whatsoever that the Trust fully understood the full intent of the April 2004 letter and Exhibit K, as currently interpreted by the OIG. The Trust has not attempted to conceal any aspect of its participation in FRPP, and cooperated fully with the OIG investigation, providing documents and voluntary interviews responsive to each OIG request. No facts related to FRPP transactions were hidden from NRCS. In fact, there can be no credible argument asserted that NRCS lacked awareness that landowners were considering making post-closing donations to the Trust.¹⁴ However, despite such knowledge, the NRCS never contacted the Trust to opine that program rules prohibit all such donations.¹⁵

The unsworn and contradictory statements of landowners should not form the basis for finding a "scheme or device." The landowner positions suggested in the Audit Report are contradicted by other landowner statements provided before and after the completion of their FRPP easement transactions.¹⁶ While NRCS has not shared the content of these letters with the Trust, the information available to the Trust suggests that the NRCS may not have been fully forthcoming with the landowners during the course of such interviews, not only in relation to underlying facts, but also as to the inherent ambiguities under FRPP guidance. The Audit Report should be corrected to remove language suggesting that the Trust engaged in a scheme or device to circumvent FRPP program requirements for a number of reasons, including without limitation: (1) there is insufficient evidence probative of an understanding by the Trust of the government's interpretation of ambiguous NRCS directives, (2) NRCS did not adequately notify the Trust of the NRCS interpretation that any post-closing donation was in violation of program requirements, and (3) landowner statements relied upon by the OIG were contradictory and, therefore, unreliable.

¹³ See Audit Report, p. 8 (citing 7 C.F.R. 1491.32 effective May 16, 2003).

¹⁴ See NRCS letter to the Trust dated Sept 30, 2004.

¹⁵ The Trust would expect NRCS officials to notify it of any perceived problems with the program, or to attend the closing of any transaction in which NRCS felt program requirements may not be met. However, no NRCS personnel attended any Alabama FRPP closings after [] transaction despite state official's relationships and ongoing communications with FRPP landowners.

¹⁶ The Audit Report's characterization of OIG's landowner interviews contradicts: (1) letters sent on behalf of [] to NRCS; (2) the acknowledgements executed by [] (See footnote 10, supra); (3) Exhibit K (executed by all landowners) which explains the prohibition on landowner agreements to provide the Trust's matching funds; (4) and accounts relayed to the Trust of landowner conversations with NRCS officials.

II. Appraisal

The Audit Report alleges that the appraisals submitted under the FY2003 Cooperative Agreement: (1) did not value easements using appropriate "before" and "after" values; (2) estimated easement values based on speculative and unsupported assumptions; (3) were prepared by appraisers lacking the required qualifications; (4) did not conform to appraisal development and reporting guidelines; and (5) had not been effectively reviewed by the Trust.¹⁷ The Audit Report does not allege there is any scheme or device associated with the appraisal issues, but rather alleges, "[t]he trust's circumvention of the program's... appraisal requirements seriously impaired the integrity of FRPP in Alabama."¹⁸ The Report goes on to say that "that the trust materially failed to comply with the appraisal provisions of the cooperative agreement."¹⁹ Any allegation that the Trust circumvented program appraisal requirements is unfounded because the Trust's obligation was to review appraisals for any obvious "red-flags." In addition, the Audit Report fails to explain how alleged technical deficiencies in the appraisal reports constitute material noncompliance by the Trust.

- A. The Trust met its fiduciary and program responsibility to conduct administrative reviews, and did not circumvent its obligations regarding appraisals.

Only one allegation among the Audit Report's five cited appraisal deficiencies relates to actions or omissions by the Trust. The Audit Report alleges appraisals "had not been effectively reviewed by the Trust." The Trust did not circumvent its obligation to conduct administrative reviews because the Trust is only responsible for identifying obvious "red-flags," and because it devoted sufficient resources for effective reviews.

NRCS policy directives instructed the Trust that its administrative review obligations are met by identifying "glaring problems or potential 'red flags.'" NRCS Policy, 440-V-CPM, Amend. 21, April 2004, Subpart G § 519.62 (F) FRPP. The directives did not require the Trust to employ professional appraisers capable of conducting an expert inquiry into appraisal methods, nor did they require the Trust to meticulously comb through USPAP standards to find fault in the complex appraisals required for FRPP. The Audit Report recognizes that the methods used to appraise each of the five easements are "highly complex."²⁰ The highly technical analysis described on page 13 of the Audit Report is indicative of the intricate inquiries involved in appraising FRPP conservation easements. Accordingly, any alleged failure by FRPP appraisers to fully comply with the technical requirements of USPAP is not a sufficient ground to allege the Trust breached a fiduciary duty without some evidence that the Trust made no attempt to identify "glaring problems or potential 'red flags.'" *Id.*

In fact, the Trust devoted significant resources to its participation in FRPP and endeavored to effectively review each appraisal.²¹ In efforts to complete the many administrative

¹⁷ See Audit Report, p. 11.

¹⁸ *Id.*

¹⁹ See Audit Report, p. 17.

²⁰ See Audit Report, p. 12.

²¹ See Audit Report, p. 16, "The trust administratively reviewed each of the five appraisal reports processed under the 2003 cooperative agreement."

tasks associated with FRPP, the Trust hired two employees dedicated solely to FRPP, and many of the Trust's other staff contributed significant amounts of time to FRPP tasks. Specifically, the Trust traveled to all easement sites to confirm facts related to the appraisals, reviewed appraisal values to ensure they met with staff's understanding of market conditions, interviewed appraisers to ensure they understood program requirements, and spent significant dollars and man hours to coordinate a reliable appraisal process. The Trust did not conceal any aspect of the appraisal process from NRCS, and submitted appraisal reports many months before closing so that NRCS could review and voice any questions regarding easement values.

Any allegation that the Trust attempted to "circumvent" its fiduciary duty to review FRPP appraisals is not supported by requirements of NRCS policy directives and the undisputable effort exerted by the Trust to meet those requirements.

- B. The Audit Report fails to show how alleged technical deficiencies by appraisers constitute material noncompliance with the Cooperative Agreement by the Trust.

Four of the five appraisal deficiencies alleged by the Audit Report were duties or actions that were the primary responsibility of hired appraisers. In making allegations that the Trust was in material noncompliance with the Cooperative Agreement, the Audit Report relies on various USPAP standards and program instructions to appraisers. In light of the Trust's administrative review obligations discussed above, and the fact that standards for these alleged technical deficiencies cannot be found on the face of applicable legislation, regulation, policy directive, or contract, the Audit Report fails to show how these allegations constitute material noncompliance by the Trust.

First, the language of the cited NRCS regulations and policy directives relating to "before" and "after" appraisal valuations makes clear that they are provided as instruction and guidance for appraisers providing services under the FRPP – they are not associated with other subsections explaining the duties of a cooperating entity. The instruction to the Trust in this regard, as cited by Audit Report in Cooperating Agreement No. 73-4101-3-01, section VII-B.10, only requires the Trust to "ensure that the consideration paid to any landowner...is no more than fair market value...[and that the appraisal] conform to [USPAP] or [UASFLA]." The Audit Report does not cite any USPAP standard violated by this alleged deficiency. Accordingly, without a showing that USPAP was violated, without a showing that any instruction or obligation in this regard was directed to the Trust, and without any evidence that easement values were actually affected, the Audit Report does not provide valid grounds for finding material noncompliance.

The Audit Report also alleges that the form and content of restricted use appraisal reports were inappropriate because "USPAP standards prohibit such reports from being used by third parties like the trust and NRCS." The report goes on to state that "[t]he trust should not have relied upon restricted use reports as the basis for receiving nearly \$1 million in Federal matching funds." First, the Trust received no monies from the government under FRPP – all Federal funds were tendered to landowners in consideration granting a conservation easement on their property. Second, and more to the point for the discussion of appraisals, NRCS is a partner of the Trust in this program, and the Audit Report fails to recognize that the agency had these reports

many months before FRPP closings and took no action in response to receiving such allegedly deficient reports before authorizing payment of Federal funds.²² Without notice to the Trust that NRCS believed the subject reports to be unreliable, and without any evidence that easement values were actually affected, a technical deficiency under a USPAP standard not found on the face of any applicable legislation, regulation, policy directive, or contract is not a sufficient ground for alleging material noncompliance with the Cooperative Agreement.

The entire discussion of alleged technical deficiencies related to “estimated easement values based on speculative and unsupported assumptions” has nothing to do with any action taken by the Trust. This allegation is based solely on certain techniques used by FRPP appraisers. Moreover, as the highly technical discussion under the cited USPAP rule indicates, this finding requires specialized expertise beyond the scope of the Trust’s duty to look for “red flags.” The Trust attempted to ensure proper appraisal values by inspecting the subject property sites and comparing the appraised values to the Trust staff’s understanding of market conditions. The now protected farms are in areas surrounded by urban growth (in furtherance of FRPP goals), and while surrounding neighbors may understandably oppose such growth, the properties’ potential for development is assured. Without a showing that the Trust failed to question any red flag values, and without direct evidence that appraisal values were actually affected by a technical deficiency, a finding of material noncompliance is not justified.

In light of the above stated reasons, the Trust specifically requests the following language and passages of the Audit Report be corrected to more accurately reflect the Trust’ participation in FRPP:

1. The Audit Report repeatedly asserts that the Trust “circumvented” program requirements regarding matching funds.²³

Requested Correction: Many of the Trust’s actions as alleged by OIG do not violate the language of NRCS directions (April 2004 letter and Exhibit K). If the Trust’s alleged actions violate NRCS’ intent for those directions, the term “circumvent” is improper because the Trust did not interpret the directions to prohibit these alleged actions. Because NRCS’ intent was not clear, and the Trust had a reasonable differing interpretation, the Trust requests that the OIG remove all use of the term “circumvent” to describe alleged actions by the Trust.

2. The Audit Report repeatedly asserts that the Trust engaged in a “scheme or device” in regard to the matching funds requirements under FRPP.²⁴

Requested Correction: The Trust requests that OIG remove all allegations that the Trust was engaged in a “scheme or device” for the reasons stated previously in this letter.

²² See NRCS Policy, 440-V-CPM, Part 519.11 FRPP.

²³ See, e.g., Audit Report, pages i, ii, iii, 3, 4, 8.

²⁴ See, e.g., Audit Report, pages ii, 8.

3. The Audit Report repeatedly asserts that the Trust was not "financially vested" in FRPP transactions.²⁵

Requested Correction: The Trust requests OIG remove all suggestions that the Trust was not financially committed to FRPP in light of evidence of significant financial dedication outlined previously in this letter.

4. The Audit Report repeatedly misstates the actual flow of funds in FRPP transactions, as reflected on the relevant closing documents, by asserting that the Trust received Federal funds or that the Trust did not provide cash at closing.²⁶

Requested Correction: The Trust requests that the OIG amend all references to (1) the Trust's receipt of Federal funds; and (2) the Trust's failure to provide matching funds. The Audit Report characterizations are misleading and do not accurately reflect the nature of FRPP transactions. As reflected in the closing documents for the four easements in dispute, the Trust did not receive funds from any source at closing, and tendered cash to meet its matching funds obligation.

5. The Audit Report repeatedly mixes statements regarding the Trust's understanding of FRPP requirements prior to [] closing (that an "easement fee" was permissible) to actions and communications occurring after [] closing to suggest ongoing misrepresentation of program requirements by the Trust.²⁷

Requested Correction: Evidence shows that the Trust approached all landowners after [] closing to explain the interpretation by NRCS regarding "easement fees" and to inform landowners that such fees were no longer appropriate. The Trust requests all references to Trust representations prior to [] closing be removed from the Audit Report. If the OIG is referring to alleged representations made after [] closing, the Trust requests that the OIG insert "innocently misstated" in place of "misrepresented," in order to reflect the ambiguities of the April 2004 letter and Exhibit K.

6. The Audit Report repeatedly asserts that certain aspects of landowner and Trust activity under FRPP were "unbeknownst" to NRCS.²⁸

Requested Correction: There is significant evidence, including a letter from NRCS to the Trust dated September 30, 2004, that NRCS was aware that some landowners were considering making voluntary post-closing donations to the Trust. The Trust requests that OIG remove any assertions that aspects of the Trust's FRPP operations were "unbeknownst" or otherwise hidden from NRCS.

²⁵ See, e.g., Audit Report pages ii, 2, 3.

²⁶ See, e.g., Audit Report pages ii, 3, 4, 16.

²⁷ See, e.g., Audit Report pages i, ii, 3, 5, 9.

²⁸ See, e.g., Audit Report, p. 5.

7. The Audit Report repeatedly relies on alleged statements from FRPP landowners, and summarizes OIG interviews with landowners on pages 5-8 of the Audit Report.

Requested Correction: The Audit Report's characterization of the OIG landowner interviews contradicts many other statements from the same landowners and lacks sufficient reliability to support the OIG intimations that there may have been improper intent by the Trust. The audit interviews were not conducted under oath, nor in the presence of Trust personnel. Specifically, the interview summaries contradict: (1) letters sent on behalf of [] (2) the acknowledgements executed by [] (See footnote 9, supra); (3) Exhibit K (executed by all landowners) which explains the prohibition on landowner agreements to provide the Trust's matching funds; and (4) accounts relayed to the Trust of landowner conversations with NRCS officials. The Trust requests these interview summaries be removed from the Audit Report.

8. On page 7, the Audit Report alleges that landowner No. 3 stated that "the trust program director threatened him and became verbally abusive."

Requested Correction: As the OIG is aware, the program director has denied threatening or verbally abusing any landowner. The Trust requests that all references to this disputed issue be removed from the Audit Report, as they are uncorroborated and not supportive of any conclusion reached.

9. On page 9, the Audit Report states that "letters from the landowners [support] the trust's...policy of requiring landowners to donate the matching funds back to the trust after closing."

Requested Correction: This language misstates both the content of the subject letters and the Trust policy. The Trust requests that this characterization of the subject letters be removed from the Audit Report.

10. The Audit Report repeatedly asserts that the Trust "provided" the appraisal reports in question.²⁹

Requested Correction: All appraisals were performed and provided by the identified appraisers. NRCS Directives instruct appraisers to "accept full responsibility for the appraisal." NRCS Policy, 440-V-CPM, Part 519.62 (B). The Trust simply included appraisals in landowner proposal packets to NRCS. The Trust requests that all references to the Trust providing appraisals be removed.

11. The Audit Report repeatedly implies that the appraised values of FRPP conservation easements may have been inflated.³⁰

²⁹ See, e.g., Audit Report pages 10, 15.

Requested Correction: The Trust requests that OIG remove all such speculative assertions regarding the proper value of subject easements. Without adequate factual support, these opinions are not proper for an Audit Report.

12. The Audit Report repeatedly asserts that the administrative reviews of appraisal reports by the Trust were “ineffective,” were not “meaningful,” or provided “little or no oversight.”³¹

Requested Correction: As stated in this letter, the Trust conducted administrative reviews which met the standards of NRCS policy directive to identify “red-flags.” The Trust requests OIG remove any finding that the Trust’s administrative reviews were ineffective.

13. In the first paragraph of page 10, the Audit Report states “[w]e found serious deficiencies in all five appraisals.”

Requested Correction: The Audit Report should remove the term “serious” since most of these alleged deficiencies are based on highly technical appraisal standards, and there is no evidence that any alleged deficiency materially altered the easement’s value.

14. On page 10, “Under NRCS program regulations, directives, and the terms of the cooperative agreement, cooperating entities are responsible for identifying the FMV of easements through appraisal reports done in accordance with USPAP or UASFLA.”

Requested Correction: The cited regulation and policy directive to support this statement, 7 C.F.R. § 1491.4(e) and NRCS’ FRPP Policy, Part 519.62 (D), do not place this responsibility on the cooperating entity, but are clearly intended as instruction to appraisers. The Trust requests such references be deleted from the Audit Report.

15. On page 10, the Audit Report cites NRCS FRPP policy directives to assert that “[p]rogram appraisal requirements also include...[r]equiring use of State-certified or State-licensed general real property appraisers.”

Requested Correction: NRCS Policy, 440-V-CPM, Part 519.62 FRPP provides that, “Pending offers having appraisals completed and signed by State certified or licensed general appraisers shall receive higher funding priority...Prior to FRPP fund disbursement and NRCS acceptance of the conservation easement, an appraisal conforming to USPAP or UASFLA is required.” Nowhere in the cited language does the guidance state that appraisals must be done by general property appraisers – only that such proposals “shall receive higher funding priority.” The Trust requests this statement be deleted from the Audit Report unless there are other valid grounds for such an assertion.

³⁰ See, e.g., Audit Report pages 10, 12, 14.

³¹ See, e.g., Audit Report pages iii, 16.

16. On page 14, the Audit Report asserts that “[e]nsuring the contracted appraisers are qualified for the assignment is a critical part of a cooperating entity’s control over the easement valuation process.”

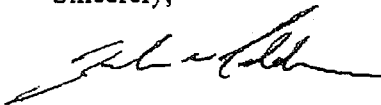
Requested Correction: The regulations cited for this proposition do not place a duty on the Trust to ensure appraiser qualifications. NRCS had equal access and ability to make this determination. Moreover, the Trust did not “control” the easement valuation process, and did not influence values reached by FRPP appraisers. The Trust requests this statement be removed from the Audit Report.

17. On page 15, the Audit Report states, “The trust should not have relied upon restricted use reports as the basis for receiving nearly \$1 million in Federal matching funds...”

Requested Correction: The NRCS had ample opportunity to inspect these appraisals, determine their reliability, and raise any such problems with the Trust. Moreover, the Trust never received any Federal funds. The Trust requests this statement be removed from the Audit Report.

For the reasons stated previously herein, the Trust requests that OIG correct the Audit Report to more accurately reflect the facts regarding the Trust’s participation in FRPP, and remove the broad and disparaging statements of opinion which are not justified.

Sincerely,



Jack W. Selden

jws/tde

cc: Rick Gilbert

Ms. Kathleen S. Tighe, David Gray
September 22, 2006
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bc: Katherine Eddins