CHERRY COUNTY COMPREHENSIVE PLAN

Margaret Byfield’s Chapters

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VISION FOR CHERRY COUNTY'S FUTURE

This is what the people of Cherry County set out as their vison for the Comprehensive Plan in 1997, and what they wanted to be able to say about their community in the future. We also seek to likewise honor our roots as we plan for the future grounded in this timeless Cherry County vision.

(From the Cherry County Comprehensive Plan 1997)

Cherry County is a great place to live. The changes recent years have brought to our landscape have been well-managed by the community itself. There are still far more cattle than people, and everyone finds that balance acceptable.

The county's residents and communities are separated by many miles, but united by a shared history, the mutual respect of good neighbors, pride in being skilled stewards of the Sandhills landscape, and active participation in governing the communities, the county, the state, and the nation; Cattle Country traditions are cherished, but the cultures of all residents are respected. People care about each other and the land and water resources on which everyone depends.

Cherry County residents enjoy healthy lifestyles, a safe environment, and a stable economy. Public facilities and services, health care, education and training, recreation and entertainment, and employment and business opportunities are adequate to meet the needs of people of all ages. Efficient transportation and communication systems link people with each other, and the world, enhancing the sense of community and prosperity.

Private and public land and water resources are used wisely, sustaining for generations the ecological, economic, social, cultural, recreational, and aesthetic values that support the quality of life treasured by county residents. Maintaining these values also ensures that visitors have a memorable experience.

People could live other places. They choose to live in Cherry County.

[List Planning Committee Members]

Chapter 1 - Introduction

LOCATION

Cherry County is the largest county in Nebraska and one of the largest in the United States, comprised of 3,828,500 acres. Established on April 4th, 1883, it is located in north central Nebraska, along the Nebraska-South Dakota state line. The county is bounded on the north by

the State of South Dakota and the Rosebud Indian Reservation; on the east by Brown County and Keya Paha County; on the south by Grant, Hooker, Thomas, and Blaine Counties; and on the west by Sheridan County.

Seven highways cross the county including Nebraska Highways 12, 61, 97, Spur 16B, Spur 16 F, US Highway 20 and US Highway 83. The county is home to the communities of Cody, Crookston, Kilgore, Merriman, Nenzel, Valentine (county seat) and Wood Lake; plus, the unincorporated communities of Brownlee and Eli.

CHERRY COUNTY CULTURE

Since the County's founding, agriculture has been the way of life for the residents of Cherry County and the cause of the citizens economic prosperity. This continues today where beef cattle ranching is the dominate industry, earning Cherry County the national recognition of being the largest beef producing County in the United States. The robustness of this industry has occurred through the exceptional private land stewardship of its citizens, which has resulted in the improved grass cover of the unique sand dune system, known as the Sandhills, that dominates the Cherry County landscape.

The goals, objectives and policies of this plan are designed to ensure this essential agriculture industry and those services that support it, work together to ensure the citizens will retain the ability to adapt, improve and advance their agriculture operations far into the future by maximizing effective land stewardship practices, protecting the private property rights of the citizens, and limiting government and other restrictions that diminish these rights.

PLANNING PRINCIPLES

The purpose of the Cherry County Comprehensive Development Plan is to help citizens and decision makers guide change into the framework of this vision, which includes both a traditional respect for property rights and a strong sense of responsibility and stewardship.

The goals, objectives and policies set forth in this Comprehensive plan are developed to fulfill the following core principles:

1. All programs, services, activities and land-uses shall support, and not diminish, the continuation of the agriculture industry that is the foundation of the Cherry County culture and prosperity;

2. Private property rights shall be fully protected, and those activities that erode the full use and enjoyment of these rights by the citizens shall be deterred or prohibited as allowed by law; and

3. Protecting the health, safety and welfare of the citizens is the Counties highest priority and is the purpose for the policies contained within this plan.

These core principles are set forth to ensure the full measure of Article 1.1 of the Constitution of the State of Nebraska will be honored in Cherry County, which states:

> "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." (Neb. Const. art. I, sec. 1 (1875); Amended 1988, Initiative Measure No. 403.)

COMPREHENSIVE PLAN

The Cherry County Comprehensive Plan is designed to promote orderly growth and development for the county, as well as provide policy guidelines to enable citizens and elected officials to make informed decisions about the future of the county. It is intended as an information and management tool for county leaders to use in their decision-making process when considering future projects, such as the location of future developments and uses within the planning jurisdiction of Cherry County.

The comprehensive plan provides support to the most common implementation tool, the zoning regulation/resolution. The goals, objectives and policies set forth in this plan are the basis for the zoning regulations.

This Plan is intended to encourage a strong economic base so all goals can be achieved. It is not a static document, but rather should evolve as changes in the land use, population or local economy occur during the planning period.

THE PLANNING PROCESS

This Plan replaces the Cherry County Comprehensive Development Plan adopted in 1997 and incorporates the Natural Resource and Management Plan for Federal and State Managed Lands adopted in 2004. The update process began with a review of general goals and policies, based upon current and future issues faced by the county and its residents. These are intended to be practical guidelines for addressing existing conditions and guiding future growth.

Demographic and industry data is collected to provide a snapshot of the past and present conditions within the county. Analysis of this data provides the basis for developing forecasts for future land use demands, as well as future needs regarding housing and facilities.

The Comprehensive Development Plan is a **blueprint** designed to identify, assess, and develop actions and policies in the areas of population, land use, transportation, housing, economic

development, county facilities, and utilities. The Comprehensive Development Plan contains recommendations, when implemented, that will be of value to the County and its residents.

The Comprehensive Development Plan identifies the tools, programs, and methods necessary to carry out the recommendations. Once adopted by the governing body, implementation of the development policies contained within the Comprehensive Plan is dependent upon the leadership exercised by the present and future elected and appointed officials of the County.

PLAN PREPARATION AND DURATION

The Plan was prepared under the direction of Cherry County Planning Commission, with the assistance and participation of the Cherry County Board of Commissioners; County staff; the Plan Review Committee and citizens of Cherry County. The time period for achieving the goals, programs, and developments identified in the Cherry County Comprehensive Plan is 20 years. However, the county should review the Plan annually and update the document every 10 years (2030), or when major, unanticipated opportunity arises.

Completing updates every ten years or so will allow the county to incorporate ideas and developments not known at the time of the present comprehensive planning process.

COMPREHENSIVE PLAN COMPONENTS

Nebraska State Statutes require the inclusion of certain elements in a Comprehensive Plan. A "Comprehensive Development Plan," as defined in Neb. Rev. Stat. § 23-114.02 (Reissue 1997), "shall consist of both graphic and textual material and shall be designed to accommodate anticipated long-range future growth," and contain the following elements:

(1) A land-use element which designates the proposed general distribution, general location, and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land;

(2) The general location, character, and extent of existing and proposed major streets, roads, and highways, and air and other transportation routes and facilities;

(3) When a new comprehensive plan or a full update to an existing comprehensive plan is developed, an energy element which: Assesses energy infrastructure and energy use by sector, including residential, commercial, and industrial sectors; evaluates utilization of renewable energy sources; and promotes energy conservation measures that benefit the community; and

(4) The general location, type, capacity, and area served of present and projected or needed community facilities including recreation facilities, schools, libraries, other public buildings, and public utilities and services.

The Cherry County Comprehensive Plan is comprised of the following chapters:

1. Introduction

2. Population
3. Housing
4. Economics and Economic Development
5. County Facilities
6. Parks and Recreation
7. Public Safety
8. Communications, Utilities, and Energy
9. Hazards
10. Natural Resources and the Environment
11. Land Use
12. Implementation

Analyzing past and existing demographic, housing, economic and social trends permit the projection of likely conditions in the future. Projections and forecasts are useful tools in planning for the future; however, these tools are not always accurate and may change due to unforeseen factors. Also, past trends may be skewed or the data may be inaccurate, creating a distorted picture of past conditions. Therefore, it is important for Cherry County to closely monitor population, housing and economic conditions that may impact the County. Through periodic monitoring, the County can adapt and adjust to changes at the local level. Having the ability to adapt to socio-economic change allows the County to maintain an effective Comprehensive Development Plan for the future, to enhance the quality of life, and to raise the standard of living for all residents.

The Comprehensive Development Plan records where Cherry County has been, where it is now, and where it likely will be in the future. Having this record in the Comprehensive Development Plan will serve to inform County officials as much as possible.

The Comprehensive Development Plan is an information and management tool for County leaders to use in their decision-making process when considering future developments. The Comprehensive Development Plan is not a static document; it should evolve as changes in the land- use, population or local economy occur during the planning period. This information is the basis for Cherry County's evolution as it achieves its physical, social, and economic goals.

COMPREHENSIVE PLAN AND ZONING

Nebraska Revised Statutes §23-114.03 states: *Zoning regulations shall be adopted or amended by the county board only after the adoption of the county comprehensive development plan by the county board and the receipt of the planning commission's specific recommendations. Such*

zoning regulations shall be consistent with an adopted comprehensive development plan and designed for the purpose of promoting the health, safety, morals, convenience, order, prosperity, and welfare of the present and future inhabitants of Nebraska, including, among others, such specific purposes as:

1. Developing both urban and nonurban areas;

2. Lessening congestion in the streets or roads;

1. Reducing the waste of excessive amounts of roads;

2. Securing safety from fire and other dangers;

3. Lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters;

4. Providing adequate light and air;

5. Preventing excessive concentration of population and excessive and wasteful scattering of population or settlement;

6. Promoting such distribution of population, such classification of land uses, and such distribution of land development as will assure adequate provisions for transportation, water flowage, water supply, drainage, sanitation, recreation, soil fertility, food supply, and other public requirements;

7. Protecting the tax base;

8. Protecting property against blight and depreciation;

9. Securing economy in governmental expenditures;

10. Fostering the state's agriculture, recreation, and other industries;

11. Encouraging the most appropriate use of land in the county; and

12. Preserving, protecting, and enhancing historic buildings, places, and districts.

The Comprehensive Plan provides policy direction for the elements listed above that are issues of concern and relevant to Cherry County. These can be found at the end of the Chapter discussions.

ADOPTION

Zoning regulations shall be reviewed and developed to comply with the updated and approved Comprehensive Plan. Zoning regulations must comply with, and be consistent, with the adopted comprehensive plan.

PURPOSE OF ZONING REGULATIONS IN CHERRY COUNTY

Cherry County recognizes the seven overarching tenants of planning and zoning are meant to promote the **health, safety, morals, convenience, order, prosperity, and welfare of** present and future inhabitants. Cherry County uses the zoning tool in a limited manner so as not to encroach on the rights of the citizens to fully pursue these ends.

Beyond the seven overarching tenants listed above, planning and zoning can also help to provide more specific protections for numerous other goals, such as mitigating development that may negatively impact the agriculture industry. When development occurs, zoning helps to manage it in a proper manner to protect property rights and the tax base, support the agriculture community, and encourage efficient infrastructure designed to meet the needs of the rural character of Cherry County.

Proper development can also drastically improve public safety by reducing fire danger (preventing buildings from being built too close to one another) or overcrowding of population. Historic preservation is also much easier to accomplish with zoning designations. Land use designations can help to ensure proper water flow, water supply, drainage, sanitation, and a myriad of other safety measures so the health of producers and non producers alike is protected.

Planning and zoning, implemented in a limited manner can help ensure the agriculture industry and all the services it supports and depends upon will maintain the ability to adapt and advance well into the future.

JURISDICTIONAL ORGANIZATION

The Cherry County Board of Commissioners, which is a board of elected officials, performs the governmental functions for the County. Each incorporated community in Cherry County also has elected officials and officers overseeing how their community is governed.

The planning and zoning jurisdiction of Cherry County, pursuant to Neb. Rev. Stat. § 23-114 (Reissue 1997), includes all of the unincorporated portions of the County, excluding the established extraterritorial jurisdiction of each incorporated city or village.

Chapter 4 | Economy and Economic Development

GOALS AND POLICIES

Economics

Economic Goal 1

This plan and the accompanying zoning regulations should protect the culture and agricultural industry that is the foundation of Cherry County's economic prosperity.

Economic Policies and Strategies

> ECON –1.1 Conservation easements should be reviewed by the Planning Committee and Board of Commissioners pursuant to Neb. Rev. Stat. §76-2112(3) to ensure that proposed easements do not inhibit the continuation of unrestricted use of the lands for agriculture purposes. (See Conservation Easement Policy, Chapter 11)
>
> ECON-1.2 Policies and regulations need to be adopted limiting non-agricultural uses within the Cattle Country Agricultural Districts.

Economic Goal 2

The plan and accompanying zoning regulations should protect the value and productivity of the land, to ensure the current and future economic stability of the County and its citizens.

Economic Policies and Strategies

> ECON – 2-1 Conservation easements and all conservation programs that change the use of the land should be reviewed by the Planning Committee and Board of Commissioners pursuant to Neb. Rev. Stat. §76-2112(3) to ensure that proposed easements and programs do not reduce the taxable value of the land in the short-term nor in perpetuity. (See Conservation Easement Policy, Chapter 11)

Economic Goal 3

Cherry County is home to some of the States most unique recreational uses as a result of the conservation practices of the Cherry County agriculture community. The economic policies of Cherry County will continue to foster "the state's agriculture,

recreation and other industries," as required by Nebraska statue, by ensuring agriculture continues to be the priority use of the majority of lands in the County.

Economic Policies and Strategies

ECON-3.1

1. Cherry County should require the review of all conservation easements, land purchases, and conservation programs that prioritize recreation uses and conservation purposes above agriculture use.

13.

The county's tax base is protected when the highest and best use of the land is followed, which in Cherry County is agriculture.

ECON-3.2

Easements that are transferred to a non-profit or entity potentially exempt from paying property taxes, should be reviewed by the Planning Committee and Board of Commissioners pursuant to Neb. Rev. Stat. §76-2112(3) to ensure that proposed easements do not permanently reduce the taxable value of the lands. (See Conservation Easement Policy, Chapter 11)

ECON-3.3

Encourage additional tourism by promoting points of interest, recreation, hunting, fishing and the scenic beauty of the Sandhills and the Niobrara River valley. These items should always be driven by the local property owners and not state or federal governments. Expansion of recreational uses should be established in a manner that they protect the existing local tax base.

Economic Goal 4

Recognizing that the local farmers and ranchers are by far the best individuals to decide the long-term economic and conservation practices of the region, the County should advance policies that help landowners productively use their lands independent of federal, state and other local programs that may lead to increased restrictions on the uses of the land.

Economic Policies and Strategies

ECON-4.1

The County encourages landowners to carefully review federal conservation agreements,for provisions which may lead to the restriction of land uses and reduction in the county tax base.

ECON-4.2

Cherry County desires for all landowners to enjoy the freedoms associated with landownership, and to recognize that with land ownership comes the responsibility to steward the land for future generations, as well as, protect the tax base that allows the County to provide specific services and protections to all.

Chapter 6 | Parks and Recreation

Parks and Recreation

Cherry County has the most protected acres of land managed by the federal government in Nebraska. It is also home to several state parks and the Niobrara Wild and Scenic River.

Over the past decade the recreation use of the federal and state lands in the County has increased. The openness of Cherry County provides many recreational opportunities for residents and visitors, winter and summer. Conflicts between recreation users and other users of the lands are minimal, and can be kept to a minimum when federal and state land managers coordinate their planning efforts and management activities with the County.

The following is a brief description of the facilities within the jurisdiction of Cherry County that are operated by the U.S. Department of Interior, Fish and Wildlife Service and National Park Service, the U.S. Department of Agriculture, Forest Service, the Nebraska Game and Parks Commission, and Cherry County.

National Wildlife Refuges

U. S. Fish and Wildlife Service

Fort Niobrara National Wildlife Refuge

Fort Niobrara National Wildlife Refuge (NWR) is 19,131 acres in size and located along the Niobrara River in north-central Nebraska. Fort Niobrara NWR was established by Executive Order in January, 1912 as a "preserve and breeding ground for native birds." Its purpose was expanded later that same year to include the preservation of bison and elk herds representative of those that once roamed the Great Plains. Furthermore, the unusual, and unique assemblage of plant communities currently present at the Refuge (Sandhills Prairie, Mixed Prairie, Rocky Mountain Coniferous Forest, Eastern Deciduous Forest, and Northern Boreal Forest) support a rich diversity of wildlife generally unchanged from historic times. Under the Wilderness Act of 1964, a 4,635-acre portion of Fort Niobrara was designated a Wilderness Area in 1976; a portion of the Niobrara River through the Refuge was designated a National Canoe Trail by Congress in 1982; and, in 1991, a 76 mile stretch of the Niobrara River including the River through this Refuge was designated Scenic under the National Wild and Scenic Rivers Act. (Fort Niobrara Comprehensive Conservation Plan - September 1999)

Fort Niobrara National Wildlife Refuge is managed as part of the Fort Niobrara/Valentine National Wildlife Refuge Complex. Included in this complex is the Valentine and John W. and Louise Seier National Wildlife Refuges. The Refuge Complex headquarters is located at: Fort Niobrara National Wildlife Refuge, 39983, Refuge Road, Valentine, Nebraska 69201

Prior to the creation of the wildlife refuge, the lands were grazed by livestock owned by Cherry County ranchers. Since the refuge was established, livestock grazing has been significantly reduced as the Service has prioritized bison and wildlife management. This has harmed the Counties ability to protect the backbone of its agriculture economic engine, making it more difficult for the County to support the essential services that allow hunters, fisherman, and other recreationist to enjoy the refuge and other recreational areas within Cherry County.

It is because of this experience that the County opposes the additional expansion of the refuge system through federal or state land acqusitions, or by conservation easements held by government or non-profit entities without prior County approval.

Samuel R. McKelvie National Forest

Managed by the United States Forest Service

Located south of Nenzel in Cherry County, the Samuel R. McKelvie National Forest is a 116,000-acre area representing the unique Nebraska Sandhills. The area is used by the public for hunting, fishing, horseback riding, camping and bird watching. There is one small campground located on the southwestern edge of the forest, Steer Creek Campground, which has 23 campsites, 8 horse corrals, potable water, and the 1-mile Blue Jay hiking trail.

The Niobrara River Canoe Launch is a day use site on the Niobrara River for launching small water craft. Fishing is available in the nearby Merritt Reservoir. The Lord Lakes wetland complex has been recognized for its outstanding fishing.

source:
https://www.fs.usda.gov/recarea/nebraska/recreation/hiking/recarea/?recid=30324&actid=50

Niobrara National Scenic River

Managed by the U. S. National Park Service

The 76 miles of the Niobrara National Scenic River was set aside by Congress in 1991 to preserve "outstandingly remarkable values" including Fish and Wildlife, Scenery, Fossil Resources, Geology, and Recreation. The river was designated by Backpacker magazine as one of the 10 best rivers for canoeing in the United States.

Along the National Scenic River are numerous waterfalls that empty into the river from the surrounding cliff and canyon walls; the highest one is Smith Falls, which drops almost 63 feet (19 m) into the river valley. There are short sections of Class I and II rapids on the river, and several locations further downstream require a portage around the rapids. The westernmost 26 miles (40 km) of the Scenic River section, from the Fort Niobrara National Wildlife Refuge (just east of Valentine) to the Rocky Ford portage, offer outstanding canoeing, kayaking, and tubing opportunities.

The river has retained its world renowned qualities largely because it has been properly managed and conserved for generations by the private landowners that surround its banks. It has been this stewardship of the river that attracted national attention and led to its Wild and Scenic

designation. The landowners remain the rivers most important conservationists. Access to many parts of the river require permission from the landowners who continue to steward this important resource.

Around 75,000 people visit the river annually, with the months of June through August being the busiest. Water levels decline slightly in late summer, but the river can still be enjoyed by canoe, kayak, and inner tube. To reach the first public access on the Scenic River is on Nebraska Highway 12, northeast of Valentine.

Considered an extraordinary example of a Great Plains river, the Niobrara is home to over 500 plant species many at or beyond their usual range, including many not otherwise naturally found within several hundred miles. These species include birch, ponderosa pine and a rare hybrid aspen (quaking X bigtooth). Species from six different vegetation communities can be found in proximity. Northern boreal forest types occur on north facing slopes where shade and abundant ground water create cooler microclimates. Species growing here include paper birch, aspen, ferns and club mosses. Rocky Mountain forest plants include ponderosa pine, serviceberry, and horizontal juniper. Eastern deciduous forests grow on the moist bottom lands and islands of the Niobrara. They include American elm, basswood, cottonwood, green ash, bur oak, hackberry and box elder. Three types of prairie are found in the river valley, displaying a botanical transition between among the eastern tallgrass prairie, the Sandhills mixed-grass prairie, and Northern Mixed-grass prairie. Mule deer, beaver, mink, pronghorn, river otter and even bison can be found in the area. Approximately 300 bison and a few dozen elk are protected in the 19,000 acre (77km2) Fort Niobrara National Wildlife Refuge, which is located along the river.

In the Niobrara river, minnows such as sand shiners, red shiners and flathead chubs search for their food of aquatic insects near streambank margins. Larger fish, such as rainbow and brown trout, prefer cooler, clear water where springbranch canyon tributaries enter the river. Channel catfish, a popular game fish, prefer deeper waters or cover during the day and feed at night in the riffles. Softshell, snapping or painted turtles may be found sunning on logs in summer.

The scenic river is spanned by 15 bridges, including six which are listed on the National Register of Historic Places.

Source: https://en.wikipedia.org/wiki/ Niobrara_National_Scenic_River

Arthur Bowring Ranch State Historical Park

See Chapter 5 of this Plan.

Smith Falls State Park

Nebraska Game and Parks

Scenic Smith Falls State Park is home to Nebraska's highest waterfall, also called Smith Falls. The state park is a popular destination for campers, as well as canoers, kayakers, tubers and others who visit the area to experience the beautiful Niobrara River. Many outfitters use the park as a take-out spot, which make it a convenient camping site for those planning to paddle or float the river.

Smith Falls is named for Frederic Smith, who filed the first homestead patent on the land that encompasses the falls. The site became a state park in 1992. Not only is the land home to the beautiful falls, it is also an area of biological significance where several ice age species can still be found.

Source: http://outdoornebraska.gov/smithfalls/

Merritt Dam

Nebraska Game and Parks

Located in a picturesque valley of the Snake River 26 miles southwest of Valentine, Merritt Reservoir offers some of Nebraska's best fishing, along with boating and camping. It is a deep lake with excellent inflow from the Snake River and Boardman Creek.

Source: http://outdoornebraska.gov/merrittreservoir/

GOLF COURSES

There are three golf courses serving the Cherry County area. One is The Prairie Club and the second is Fredrick Peak Golf Club; while the final is CapRock Golf Course.

The Prairie Club

The Prairie Club is a membership club containing two 18-hole courses (Par 73) called the Dunes Course and the Pines Course. The third course, the Horse Course, is a 10-hole Par 3 course. The Prairie Club is located east of the Samuel R. McKelvie National Forest.

Fredrick Peak Golf Club

The Fredrick Peak Golf Club is located outside of Valentine. The course is a 10-hole course with driving range facilities. The golf club is open to the public. The clubhouse serves food and beverages.

CapRock Golf Club

CapRock Ranch is an 18-hole, private golf course tracing the caprock cliffs of the Snake River Canyon, in the Sandhills of Northwest Nebraska. Designed by Gil Hanse, this exclusive course leverages geography found nowhere else in the world, where the rolling Sandhills fall away from dramatic caprock cliffs to the Snake Riverbed carved over 6,000 years ago.

Source: https://www.caprockranch.com/

Other area golf courses include:

Ainsworth Municipal

Bassett Country Club

Pelican Beach

Dismal River

Sand Hills Golf Course

Thedford Golf Course

Ord Golf Links

GOALS AND POLICIES

Parks and Recreational Goals

Parks and Recreation Goal 1

In order to ensure the continued robust recreation and tourism activities, and the health, safety, welfare and economic prosperity of the citizens, the County requires that all state and federal agencies coordinate the management of the recreation and conservation lands with the Counties Comprehensive Plan, Natural Resource Plan and Zoning Regulations.

Parks and Recreation Goal 2

Coordinate with federal and state agencies to increase multiple recreation uses in Cherry County including on all federal agency administered lands located within its boundaries. These should include high quality recreational opportunities and experiences at developed and undeveloped recreation sites by allowing historic uses and access while maintaining existing amenities, and by providing new recreation sites for the public's enjoyment.

Coordinate with federal and state agencies to increase public access opportunities in both motorized and non-motorized settings. Recognize that multiple recreation uses are mandated by the multiple use concept and that adequate outdoor recreation resources should be provided on all federal and state agency's administered lands and waterways.

Parks and Recreation Policies and Strategies

PR-2.1 Provide for continued multiple recreation uses in special and extensive recreation management areas, including those areas where state, federal and/or private funds and materials were or are considered to be used to provide for recreational facilities.

PR-2.2 In compliance with applicable local, state and federal laws, identify specific areas for: additional trailhead facilities for both motorized and non-motorized access, development and/or maintenance of roads, trails, and waterways for both motorized and non-motorized access, restoration of those areas formerly available for historical recreational uses, e.g. motorized and equestrian access for recreational and competitive events, hunting and boating.

PR-2.3 Provide for adequate outdoor recreation resources by revising the designated areas to decrease or eliminate limitations and restrictions where the review and evaluation shows that the limitations and restrictions are no longer appropriate and necessary.

PR-2.4 Plan and establish designated equestrian, foot, and off-road vehicle trail systems and waterways for compatible recreation, commercial, and other multiple uses so that such uses can continue unabated.

PR-2.5 Maintain existing facilities at developed recreational sites and upgrade, reconstruct and/or increase recreation facilities, when needs are indicated by monitoring data, at currently undeveloped sites.

PR-2.6 Describe methods of minimizing or mitigating documented use conflicts or damage and define the manner in which each method is expected to accomplish minimization or mitigation.

Parks and Recreation Goal 3

Cherry County will continue to work closely with different entities within the jurisdiction of the County, including the communities and Natural Resource Districts to maintain and enhance the existing parks, camps, riverfront, and lakes.

Parks and Recreation Policies and Strategies

PR-3.1 The County should continue promoting the areas recreational destinations.

PR-3.2 The County should continue to promote local Agri-tourism.

Parks and Recreation Goal 4

There shall be no additional designations of Wild and Scenic Rivers in Cherry County without County approval, as the exisiting rivers, segments or tributaries do not meet the standards for designation.

(To replace Chapter 8 section beginning at the "Energy" sub-heading to the end of the Chapter.)

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ENERGY

Nebraska law requires that new or updated Comprehensive Plans include an energy element that "Assesses energy infrastructure and energy use by sector, including residential, commercial, and industrial sectors; evaluates utilization of renewable energy sources; and promotes energy conservation measures that benefit the community." This section addresses these issues by analyzing the energy use by residential, commercial, industrial and other users, and examining the different types of energy sources that are utilized by these different sectors, and available for future needs.

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ENERGY USE BY SECTOR

Residential Uses

Within Cherry County, residential uses are provided a number of options for both power and heating and cooling. These include electrical power (both fossil fuel and renewable resources), oil, propane, and wood. The most dominant of the energy sources available and used by the residents of Cherry County is electricity produced from both fossil fuels and renewable resources.

The use of oil, propane and wood will be found typically as heating sources during the winter months. The type of fuel used will depend a great deal on where a residence is located within the county. Residents located within the more urbanized parts of Cherry County are more likely to have electrical furnaces. Propane and wood stoves are most likely found in the rural parts of the county where other sources are not always available.

Commercial Uses

Cherry County's commercial uses also have a number of options for both power and heating and cooling. These include electrical power (both fossil fuel and renewable resources), propane, oil and wood. The type of energy source is very dependent upon the specific commercial use and the facilities employed to house the use. The most dominant of the energy sources available is electricity produced from both fossil fuels and renewable resources.

Similar to residential uses, the use of oil, propane and wood will be found typically as heating sources during the winter months. The type of fuel used will depend a great deal on the type of commercial use and the construction of the building(s) involved.

The location of the commercial uses will also dictate, similar to residential uses, what type of heating fuels are used. However, in commercial uses such as repair garages and other uses in larger metal buildings, they may be dependent upon recycling used motor oils to heat their facilities.

Industrial Uses

Cherry County's industrial uses will be very similar to those discussed within the commercial section. However, in some cases, diesel fuel can play a role in both power generation and heating and cooling.

RENEWABLE ENERGY SOURCES

There are other energy sources advancing in technology that use wind, solar, water, geothermal and methane gas as an energy source. While Cherry County encourages the use of technological advances to improve and support the agriculture industry, this is done while carefully considering the long-term impact such systems may have on the unique Sandhills landscape.

Large-scale wind and solar farms in particular have a significant footprint on the landscape, requiring substantial infrastructure for roads, turbine and panel siting, and the required transmission lines. The people in Cherry County have been careful to limit those activities that may change the character of the unique Sandhills grazing and farming lands that may negatively impact the conservation and use of these lands for agriculture.

Unlike metropolitan communities, Cherry County does not have air quality issues and currently has no need to encourage the development of large-scale wind or solar energy systems. Nor does the County need an additional energy supply to service its citizen's needs. Large-scale renewable energy farms, if installed within the County, would be for the purpose of supplying energy to other areas. Careful consideration should be given to such projects that may negatively impact to the Sandhills for the purpose of outsourcing energy.

Large-scale renewable energy systems may be appropriate in places such as open, high-desert landscapes, that are so sparce it takes 50 acres to feed a cow, and where extreme weather events are rare. But this is not the landscape in Cherry County. Rather the opposite is true.

What may be appropriate in the County, however, are small-scale renewable sources to power windmills, rural buildings and other similar energy needs.

WIND

The wind is one of those resources in abundance in Nebraska. Wind is not a new technology to the State; the pioneers that settled in Nebraska used windmills for power and to work the water wells on their farms and ranches.

Wind can be used to produce electricity through the construction of small-scale or utility/commercial grade wind conversion systems (wind turbines). However, not all areas of the state have the ideal levels needed to produce electricity on a utility or commercial level; but the use of small-scale wind turbines on homes and businesses will work in most parts of Nebraska.

A large-scale, commercial wind energy field requires a substantial amount of acreage as well as new transmission lines designed specifically to carry the intermittent energy, therefore, requiring miles of new rights of ways that have the added impact of disrupting private agriculture

operations and pressure landowners through the right-of-way condemnation process. Additionally, wind turbines have a limited lifespan, requiring substantial replacement costs and large landfills to dispose of the old turbines engineered to resist biodegrading.

While in theory, the idea of using wind as an energy source can be appealing, the practicality of establishing a large-scale wind farm and the necessary rights of ways is prohibitive without significant government subsidies. However, small-scale or single use turbines may be beneficial to businesses and communities.

Wind Energy in the Cherry County area
Valentine Wind LLC

Currently, the Valentine Wind LLC project consists of one 1.7 MW turbine to supply power to the city of Valentine.

The C-BED State PROGRAM

In May 2007, Nebraska established an exemption from the sales and use tax imposed on the gross receipts from the sale, lease, or rental of personal property for use in a community-based energy development (C-BED) project. The Tax Commissioner is required to establish filing requirements to claim the exemption. In April 2008 L.B. 916 made several amendments to this incentive, including: (1) clarified C-BED ownership criteria to recognize ownership by partnerships, cooperatives and other pass-through entities; (2) clarified that the restriction on power purchase agreement payments should be calculated according to gross and not net receipts; (3) added language detailing the review authority of the Tax Commissioner and recovery of exempted taxes; and (4) defined local payments to include lease payments, easement payments, and real and personal property tax receipts from a C-BED project.

A C-BED project is defined as a new wind energy project that meets one of the following ownership conditions:

* For a C-BED project that consists of more than two turbines, the project is owned by qualified owners with no single qualified owner owning more than 15% of the project and with at least 33% of the power purchase agreement payments flowing to the qualified owner or owners or local community; or

* For a C-BED project that consists of one or two turbines, the project is owned by one or more qualified owners with at least 33% of the power purchase agreement payments flowing to a qualified owner or local community.

In addition, a resolution of support for the project must be adopted by the county board of each county in which the C-BED project is to be located.

A qualified C-BED project owner means:

- a Nebraska resident;

- a limited liability company that is organized
  under the Limited Liability Company Act and that is entirely made up of members who are Nebraska residents;

- a Nebraska nonprofit corporation;

- An electric supplier(s), subject to certain limitations for a single C-BED project.

In separate legislation (LB 629), also enacted in May 2007, Nebraska established the Rural Community- Based Energy Development Act to authorize and encourage electric utilities to enter into power purchase agreements with C-BED project developers.

SOLAR

Solar energy has been around for decades and it last hit a high in popularity in the 1970's. However, today's solar energy design is much more efficient and aesthetically pleasing. Some of the aesthetic improvements have to do with the fact that today's systems are not as bulky as their ancestors. Today, solar is being used much like wind turbines, on a small-scale level (home or business) or a much grander level (solar farms). Small-scale operations are generally compatible with the Cherry County landscape while large-scale operations would be viewed as incompatible depending on the scale and design.

GEOTHERMAL ENERGY

Geothermal energy is typically utilized through a process where a series of pipes are lowered into vertical cores called heat-sink wells. The pipes carry a highly conductive fluid that either is heated or cooled by the constant temperature of the ground. The resulting heat exchange is then transferred back into the heating and cooling system of a home or other structure. This is called a geothermal heat exchange system or ground source heat pump.

METHANE ENERGY

The use of methane to generate electricity is becoming more cost-effective to use in Nebraska. Methane electrical generation can be accomplished through the use of a methane digester which takes the raw gas, naturally generated from some form of decomposing material, and converts the gas into electrical power.

There have been some attempts to take the methane generated from animal manure and convert it into electricity; most have been successful but were costly to develop. Another approach to methane electrical generation is to tap into the methane being generated from a solid waste landfill; instead of burning off the methane, it can be piped into a methane convertor and generated into electricity for operating a manufacturing plant or placed on the overall grid for distribution.

Methane convertors make use of unwanted gases and are able to produce a viable product. As long as humans need to throw garbage into a landfill or the production of livestock is required, there will be a source of methane to tap for electrical generation.

NET METERING IN NEBRASKA

LB 436, signed in May 2009, established statewide net metering rules for all electric utilities in Nebraska. The rules apply to electricity generating facilities which use solar, methane, wind, biomass, hydropower or geothermal energy, and have a rated capacity at or below 25 kilowatts (kW). Electricity produced by a qualified renewable energy system during a month shall be used to offset any kilowatt-hours (kWh) consumed at the premises during the month.

Any excess generation produced by the system during the month will be credited at the utility's avoided cost rate for that month and carried forward to the next billing period. Any excess remaining at the end of an annualized period will be paid out to the customer. Customers retain all renewable energy credits (RECs) associated with the electricity their system generates. Utilities are required to offer net metering until the aggregate generating capacity of all customer-generators equals one percent of the utility's average monthly peak demand for that year.

STATE LAW OF SOLAR AND WIND EASEMENTS

Nebraska's solar and wind easement provisions allow property owners to create binding solar and wind easements for the purpose of protecting and maintaining proper access to sunlight and wind. Originally designed only to apply to solar, the laws were revised in March 1997 (LB 140) to include wind. Counties and municipalities are permitted to develop regulations, or development plans protecting access to solar and wind energy resources if they choose to do so. Local governing bodies may also grant zoning variances to solar and wind energy systems that would be restricted under existing regulations, so long as the variance is not substantially detrimental to the public good.

LB 568, enacted in May 2009, made some revisions to the law and added additional provisions to govern the establishment and termination of wind agreements. Specifically, the bill provides that the initial term of a wind agreement may not exceed forty years. Additionally, a wind agreement will terminate if development has not commenced within ten years of the effective date of the wind agreement. If all parties involved agree to extend this period, however, the agreement may be extended.

Energy Goals, Objectives, and Policies:

1. The County encourages the development of new energy sources within the County that have limited impacts on the natural landscape of the Sandhills;

2. Large-scale energy systems that require new right-of-way acquisitions to transport and deliver the energy to the user must first secure the necessary rights-of-way through the voluntary agreements of the landowners impacted.

Chapter 10 - Natural Resources and the Environment | Revisions

INTRODUCTION

This component of the Cherry County Comprehensive Plan provides a general summary of the environmental and man-made conditions, which are present in the county, and identifies and qualifies the characteristics of each which will directly or indirectly impact future land uses in the county. Much of the information referenced is from the Cherry County Soil Survey conducted by the United States Department of Agriculture – Soil Conservation Service in 2005.

The issues discussed in this chapter include:

- Climate
- Geology
- Relief and Drainage
- Wetlands
- Soil Association
- Prime Farmland
- Soil Limitations

NATURAL CONDITIONS

Climate

The climate in Cherry County is characterized by cold winters and long, hot summers. Heavy rains occur mainly in spring and early summer when moist air from the Gulf of Mexico interacts with the drier continental air. Snowfall is fairly frequent in winter, but the snow cover is usually not continuous. The annual precipitation normally is adequate for wheat, rye, and range grasses.

In winter, the average temperature is 22.3 degrees F and the average daily minimum temperature is 9.3 degrees. The lowest temperature on record, which occurred at Valentine on December 22, 1989, was -39 degrees. In summer, the average temperature is 71.6 degrees and the average daily maximum temperature is 85.8 degrees. The highest temperature, which occurred at Valentine on July 2, 1990, was 114 degrees.

The average annual precipitation is about 18.24 inches. Of this total, about 12.9 inches, or 71 percent, usually falls in May through September. The growing season for most crops falls within

this period. The heaviest 1-day rainfall on record was 3.76 inches at Valentine on May 29, 1949. Thunderstorms occur on about 46 days each year, and most occur between May and August.

The average seasonal snowfall is 34.1 inches. The greatest snow depth at any one time during the period of record was 22 inches, recorded on December 28, 1987. On the average, 55 days per year have at least 1 inch of snow on the ground. The heaviest 1-day snowfall on record was 18.4 inches, recorded on September 28, 1985.

The average relative humidity in midafternoon is about 48 percent. Humidity is higher at night, and the average at dawn is about 77 percent. The sun shines 74 percent of the time possible in summer and 62 percent in winter. The prevailing wind is from the south during the summer and fall and from the north and west during the rest of the year. Average windspeed is highest, about 10 to 11 miles per hour, from March to May.

Geology and Groundwater

The oldest exposed rocks in Cherry County occur in the eastern Niobrara River Valley and consist of brownish to pinkish, pale orange siltstone and silty sandstone. They have been correlated by some geologists with the Rosebud Formation of South Dakota and by others with the upper part of the Brule Formation. These strata are composed predominantly of volcanically derived grains (glass shards and crystals) and were for the most part deposited by the wind. They are upper Oligocene in age (Swinehart and others, 1985).

Overlying the Brule/Rosebud Formation in a few scattered exposures along the central and western Niobrara River Valley are fine grained, silty sandstones of the Arikaree Group. These sandstones contain a lower percentage of glass shards than the Brule or Rosebud Formation and are upper Oligocene to lower Miocene in age.

Sand, sandstone, and siltstone of the Ogallala Group overlie the Brule/Rosebud Formation and Arikaree rocks along the Niobrara River Valley and elsewhere in the county. The outcroppings of the Ogallala sediments have been subdivided into two formations—the Valentine Formation and the overlying Ash Hollow Formation. Subsurface correlation of these units has been difficult. Both formations were deposited by streams in a complex set of valleys locally cut deep into underlying strata. A widespread calcium-carbonate-cemented unit, the “Cap Rock,” occurs at the base of the Ash Hollow Formation. Several discrete beds of volcanic ash occur in the Ash Hollow Formation. The Ogallala Group beneath the Sandhills in the southern half of the county is fairly uniform fine and medium sand and lesser amounts of siltstone and coarse sand and gravel (Swinehart and Diffendal, 1990). The Ogallala Group is famous for its accumulation of fossil vertebrates. It is middle to upper Miocene in age.

A few exposures of Pliocene river-deposited sand and gravel occur in southeastern Cherry County. These have been correlated with the Broadwater Formation of Morrill County. Pleistocene alluvial gravel, sand, and silt are present locally along the Niobrara River Valley. The majority of Cherry County is covered by the fine and medium sand of the Nebraska Sandhills. Recent research indicates that the present dunes were formed during two or more periods of

aridity and dune movement in the last 8,000 years (Ahlbrandt and others, 1983). In some interdunes, peat and windblown sand are interbedded to a depth of 25 feet (Loope and others, 1995).

The Ogallala Group of the High Plains Aquifer is the main source of ground water in the county (Cronic and others, 1956). Almost all of the water for public and domestic use and much of the water for livestock is obtained from wells. Very little water can be obtained from the Brule/Rosebud sediments. The Arikaree Group would constitute a source if it were more extensive. The depth to water in areas of the Sandhills varies according to dune height and is generally less than 50 feet in interdune areas. In the tableland areas of the county, water depths generally range from 100 to 200 feet. The saturated thickness of the High Plains Aquifer is typically 300 to 500 feet in the southern half of the county and 100 to 300 feet in the northern half. Water is generally of good quality throughout the county. Total dissolved solids are typically less than 200 milligrams per liter, but higher concentrations are in the northeastern and northwestern parts of the county. Relatively few center-pivot irrigation systems have been installed.

Physiography, Relief, and Drainage

Cherry County is in the northern High Plains of the Great Plains physiographic province. More than 90 percent of the county is covered by sand dunes and interdunes of the prairie-covered Nebraska Sandhills, which make up about 20,000 square miles (Swinehart, 1990). The Niobrara River Valley, extending from west to east across the northern part of the county, and tablelands in the northeast corner and the extreme west-central parts of the county make up the other major landforms.

The Nebraska Sandhills is by far the largest sand dune area in North America. The sand dunes in Cherry County average about 150 to 250 feet high, 2 to 10 miles long, and one-half mile to 2 miles wide. These large dunes typically have steep south- to southeastern-facing slopes and rolling backslopes. They are separated from each other by nearly level to gently sloping interdunes. Certain areas of the Sandhills have many shallow lakes and interdunal wetlands. Some of the lakes and the interdunes surrounding them are moderately alkaline or strongly alkaline. Many interdunes have small streams, but drainage networks are poorly developed because the sandy soils allow little runoff. The Snake River, Minnechaduza Creek, and all other tributaries of the Niobrara River and the forks of the Middle Loup River all flow in valleys cut 50 to 200 feet below the level of the interdunes. The North Loup River and its tributaries flow east and southeast. They drain much of the southeastern part of the county, and their valleys are not cut so deeply.

The Niobrara River Valley has been entrenched 150 to 350 feet, and the valley sides are steep and very steep. Sandy alluvial bottom land makes up only a small part of the valley. The valley is steepest in western Cherry County, where a 10-mile region of incised meanders has formed. Remnants of a prominent high terrace underlain by deep, loamy and sandy soils occur along portions of the Niobrara River Valley. Rivers and streams within the county have quite constant flows because they are fed primarily by ground water and receive little runoff. The high

tablelands in the northeastern and extreme west central parts of the county are underlain by sandstone and are capped by loamy and sandy soils. These tablelands are among the few areas that contribute significant runoff to streams and rivers.

WETLANDS

Wetlands are areas where water covers the soil, or is present either at or near the surface of the soil all year or for varying periods during the year, including during the growing season. Water saturation (hydrology) largely determines the soil development and the types of plant and animal communities living in and on the soil.

Wetlands may support both aquatic and terrestrial species. The prolonged presence of water creates conditions favoring the growth of specially adapted plants (hydrophytes) and promote the development of characteristic wetland (hydric) soils. Wetlands vary widely because of regional and local differences in soils, topography, climate, hydrology, water chemistry, vegetation, and other factors, including human disturbance. Two general categories of wetlands are recognized: coastal or tidal wetlands and inland or non-tidal wetlands.

Inland wetlands spread across the entire county in the form of Freshwater Emergent Wetlands and Freshwater Forested/Shrub Wetlands. Inland wetlands include marshes and wet meadows dominated by herbaceous plants, swamps dominated by shrubs, and wooded swamps dominated by trees.

Many of these wetlands are seasonal (dry one or more seasons every year). The quantity of water present and the timing of its presence in part determine the functions of a wetland and its role in the environment. Wetlands can appear dry, at times, for significant parts of the year - such as vernal pools – and still provide habitat for wildlife adapted to breeding exclusively in these areas.

The federal government can regulate some wetlands under the Clean Water Act, depending on how “navigable waters” is defined. The Act gives the federal government the ability to regulate navigable waters, and the definition of this has been expanded and limited several times by courts and administrations, making what qualifies as wetlands as clear as mud.

What is clear, however, is that some of the measures used to protect wetlands, such as the Natural Resource Conservation Agencies wetlands reserve easement program, have significantly devalued the land. The Department of Revenue has found that wetland reserve easements has reduce the property value in some Nebraska counties by 40 percent.

Because wetlands play an important role in the ecology of Cherry County, the county supports continued state oversight of these waters, and opposes federal overreach into the long-term conservation of these resources. Wetlands are home to many species of wildlife, and provide an important service to nearby areas by holding and retaining floodwaters. These waters are then slowly released as surface water, or are used to recharge groundwater supplies. Wetlands also help regulate stream flows during dry periods. The counties policies must be coordinated with all

entities attempting to regulate wetlands within the counties jurisdiction to ensure these important functions are properly considered.

The U.S. Fish and Wildlife Service (FWS) tracks the characteristics, extent, and status of the Nation's wetlands and deep-water habitats. This information has been compiled and organized into the National Wetlands Inventory (NWI).

According to this database, Cherry County has the three wetland systems of estuarine, riverine, and lacustrine. The majority of the wetlands in the county occur, mostly along the Niobrara River and as meadow areas (mostly around the Wood Lake are). However, there are smaller wetland pockets scattered throughout Cherry County.

Figures 10.1, 10.2, and 10.3 depict common examples of the riverine, lacustrine, and palustrine wetlands, respectively. Figure 10.4 shows the occurrence of wetlands in Cherry County. These figures were produced by the United States Fish and Wildlife Service, and are taken from their 1979 publication entitled "Classification of Wetlands and Deepwater Habitats of the United States", some enhancement was completed in order to place accents on key areas.

Figure 10.1 shows the riverine system includes all wetlands occurring in channels, with two exceptions: (1) wetlands dominated by trees, shrubs, persistent emergent, emergent mosses, or lichens, and (2) habitats with water containing ocean derived salts in excess of 0.5%. A channel is an open conduit either naturally or artificially created which periodically or continuously contains moving water, or which forms a connecting link between two bodies of standing water. Therefore, water is usually, but not always, flowing in the riverine system.

Springs discharging into a channel are also part of the riverine system. Uplands and palustrine wetlands may occur in the channel, but are not included in the riverine system. Palustrine Moss-Lichen Wetlands, Emergent Wetlands, Scrub-Shrub Wetlands, and Forested Wetlands may occur adjacent to the riverine system, often in a floodplain.

The Lacustrine System includes wetlands with all of the following characteristics: (1) situated in a topographic depression or a dammed river channel; (2) lacking trees, shrubs, persistent emergents, emergent moss or lichens with greater than 30% area coverage; and (3) total area exceeds 20 acres. Similar wetland areas totaling less than 20 acres are also included in the Lacustrine System if an active wave-formed or bedrock shoreline feature makes up all or part of the boundary, or if the water depth in the deepest part of the basin exceeds 6.6 feet (2 meters) at low water.

The Lacustrine System includes permanently flooded lakes and reservoirs (e.g. Lake Superior), intermittent lakes (e.g. playa lakes), and tidal lakes with ocean-derived salinities below 0.5% (e.g. Grand lake, Louisiana). Typically, there are extensive areas of deep water and there is considerable wave action. Islands of Palustrine wetlands may lie within the boundaries of the Lacustrine System.

The Palustrine System includes all nontidal wetlands dominated by trees, shrubs, persistent emergent, emergent mosses or lichens, and all such wetlands that occur in tidal areas where salinity due to ocean-derived salts is below 0.5%. It also includes wetlands lacking such vegetation, but with all of the following four characteristics: (1) area less than 20 acres; (2) lacking active wave-formed or bedrock shoreline features; (3) water depth in the deepest part of basin less than 6.6 feet (2 meters) at low water; and (4) salinity due to ocean-derived salts less than 0.5%.

The Palustrine System was developed to group the vegetated wetlands traditionally called by such names as marsh, swamp, bog, fen, and prairie, which are found throughout the United States. It also includes the small, shallow, permanent, or intermittent water bodies often called ponds. These wetlands may be situated shoreward of lakes, river channels, or estuaries; on river floodplains; in isolated catchments; or on slopes. They may also occur as islands in lakes or rivers.

WATER QUALITY, RIPARIAN AREAS, AND WETLANDS AND BEST MANAGEMENT PRACTICES

Best Management Practices (BMP) should be developed and used consistently in Cherry County for long term water quality conservation. Best Management Practices are a practice or combination of practices determined to be the most effective and practicable means of preventing or reducing the amount of pollution generated by non-point sources. In the absence of State of Nebraska or NRD approved BMPs, non- point source activities are to be conducted in a manner that demonstrates a knowledgeable and reasonable effort to minimize resulting adverse water quality impacts. "Knowledgeable" is herein interpreted to mean, based upon the best available science and "reasonable" is interpreted to mean, economically feasible for the agriculture operation(s) involved.

There is a vast diversity of riparian, groundwater and wetland areas in Cherry County, in terms of waterway or impoundment types, climatic factors, up and down stream watershed impacts, condition, trend, potential for improvement, and opportunity for management changes.

NATIONAL WILD AND SCENIC RIVER SYSTEMS

The National Wild and Scenic Rivers Act, 16 U.S.C. §§1271-1287, provides the guidance for identification and designation of individual river segments for study and for recommendation for inclusion in the system in order to provide balance with Dams (development) and to provide unique representation within the national system.

Section 1271 called for protection of "certain selected rivers of the Nation, which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values." Among those "certain selected rivers" there are now in Cherry County some rivers, which have either been included in the system or proposed for inclusion as "outstandingly remarkable" rivers.

The Cherry County Natural Resource Committee and the Board are satisfied that there is no further need for including any other segments of rivers or tributaries within Cherry County in the national system and that there are no others which meet the standards set by Section 1271.

Based upon inaction by Congress to further act on the additional areas, the remaining areas, if not already done, should be released from the designated program. Based upon 16 U.S.C. §1283...the section shall not be "construed to abrogate any existing rights, privileges, or contracts affecting Federal lands held by any private party without the consent of said party.

SOIL FORMATION AND CLASSIFICATION

Cherry County has over 100 different soil types scattered throughout the county. Some of these soils are similar; however, many are completely different from one another. The 2005 Cherry County Soil Survey identify key aspects of each soil. A summary of these soil qualities is included in Appendix ____. [Recommend placing the soil quality detail from this chapter in an appendix. Have deleted this information here for readability.]

OTHER FACTORS IMPACTING LAND USES

The previously discussed uses are typical to counties similar to Cherry County. Earlier in this Chapter, the issue of wetlands was covered in some detail and is very closely associated with surface and groundwater. The following topics are greatly influenced by the type of soil and its location in an area. The following paragraphs will focus on Prime Farmland and Percent of Slope.

Prime Farmland

Prime farmland is directly tied to the specific soils and their composition. The map in Figure 10.12 identifies Prime Farmland, Prime Farmland if Drained, Farmland of Statewide Importance, and Not Prime Farmland.

According to the USDA, Prime farmland

"...is land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops. It must also be available for these uses. It has the soil quality, growing season, and moisture supply needed to produce economically sustained high yields of crops when treated and managed according to acceptable farming methods, including water management. In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season, acceptable acidity or alkalinity, acceptable salt and sodium content, and few or no rocks. They are permeable to water and air. Prime farmlands are not excessively erodible or saturated with water for a long period of time, and they either do not flood frequently or are protected from flooding."

Prime farmland is one of several kinds of important farmland defined by the U.S. Department of Agriculture. It is of major importance in meeting the nation's short- and long-range needs for food and fiber. The acreage of high-quality farmland is limited, and the U.S. Department of

Agriculture recognizes that government at local, state, and federal levels, as well as individuals, must encourage and facilitate the wise use of our nation's prime farmland.

Prime farmland soils, as defined by the U.S. Department of Agriculture, are soils that are best suited to producing food, feed, forage, fiber, and oilseed crops. Such soils have properties that are favorable for the economic production of sustained high yields of crops. The soils need only to be treated and managed using acceptable farming methods. The moisture supply, of course, must be adequate, and the growing season has to be sufficiently long. Prime farmland soils produce the highest yields with minimal inputs of energy and economic resources, and farming these soils results in the least damage to the environment.

Prime farmland soils may presently be in use as cropland, pasture, or woodland, or they may be in other uses. They either are used for producing food or fiber or are available for these uses. Urban or built -up land and water areas cannot be considered prime farmland.

Prime farmland soils usually get an adequate and dependable supply of moisture from precipitation or irrigation. The temperature and growing season are favorable. The acidity or alkalinity level of the soils is acceptable. The soils have few or no rocks and are permeable to water and air. They are not excessively erodible or saturated with water for long periods and are not subject to frequent flooding during the growing season. The slope ranges mainly from 0 to 6 percent.

Soils that have a high water table, are subject to flooding, or are droughty may qualify as prime farmland soils if the limitations or hazards are overcome by drainage, flood control, or irrigation. Onsite evaluation is necessary to determine the effectiveness of corrective measures. More information on the criteria for prime farmland can be obtained at the local office of the Soil Conservation Service.

Cherry County contains approximately 3,845,903 acres of land within the county borders. The Prime Farmland found in the county is in two forms: Farmland of Statewide Importance and Prime Farmland, if drained.

Figure 10.12 shows the locations of the Prime Farmland within Cherry County. However, the amount of these two classifications are very limited. Farmland of Statewide Importance makes up a total of 20,725.4 acres or 0.54% of the total county; while Prime, if drained had 47,307.7 acres or 1.23% of the entire county. All together, Prime Farmland makes up only 1.77% of Cherry County.

Soils determined to be prime farmland need to be protected throughout the rural areas of Nebraska. These soils are typically the best crop producing lands.

Percent of Slope

The slope of an area is critical to the ability of the area to be used for agricultural purposes to constructing homes and septic systems. Typically the steeper the slope the more difficult these

issues become. However, lands with little to no slope can also create problems regarding the inability of water to drain away from a site.

Figure 10.13 shows the percent slope for Cherry County. Based upon the map, Cherry County has steep slopes in limited locations of the county throughout the entire county; however, some of the steepest are in the northeast along the Niobrara River.

Based upon Table 10.1 slope is factor in several soils/locations in the county. In a number of situations, any soil conditions based upon slope could likely be engineered to become more compatible. However, it is important to involve an engineer, geologist, or soil scientist in the issue in order to make the correct modifications throughout the county.

Permeability

Permeability is defined in the Cherry County Soil Survey as..."The quality of the soil that enables water to move downward through the profile. Permeability is measured as the number of inches per hour that water moves downward through saturated soils." Permeability is rated as:

V ery slow
Slow
Moderately slow

Moderately rapid

Rapid

Very rapid

Table 10.3 indicates the various permeability rates for each soil and at what depth the rating was taken. The Table indicates those considered to moderately rapid or higher in red. There are a number of soils in Cherry County with a permeability of twenty inches per hour or more.

There are a number of specific uses not compatible for soils rated as Moderately rapid or higher. Soils rated at these levels will move contaminated materials much faster through the profile and into the regional water tables and aquifers. These uses will typically include anything dealing with animal or human sanitary waste systems.

Permeability, as with other soil factors, can be overcome with the proper engineering and construction techniques. Caution is a must when dealing with these conditions since the potential for contaminating an aquifer that feeds an entire area with water is a risk.

WATER IMPACT ON CHERRY COUNTY

Water, along with the soils are the two most restricting environmental conditions faced by Cherry County. Damaging either one of these two elements will impact the residents of the

county for years to come. As with the soil descriptions and conditions, it is important to discuss the water factors impacting Cherry County during the present and coming planning period. Water in this section will apply to two topics, surface water and ground water.

Surface water applies to any water running across a surface and eventually runs into a minor drainage area, eventually ending up in a major waterway such as the Niobrara River. However, a certain portion of surface water can and is absorbed by the soil in order to support plant life including corn, soybeans, and grass lawns.

Cherry County lies in two distinct watersheds, these are defined and drainage areas controlled by the respective Natural Resource District. The two districts covering Cherry County are the Middle Niobrara Natural Resource District and the Upper Loup Natural Resource District. The Middle Niobrara is based in Valentine, Nebraska, while the Upper Loup is in Thedford, Nebraska.

GROUNDWATER/WATER TABLE ELEVATIONS

Groundwater refers to water found beneath the surface and includes smaller pockets of water as well as aquifers. This water source is where the residents of Cherry County both city and rural, get their potable water for everyday living as well as the irrigation water for crops. The ability to find water meeting these specific needs is critical to the placement of certain uses. These specific needs include water quantity, water quality, and water pressure.

Use of Groundwater

Groundwater use in Cherry County is in three forms; domestic and livestock supply, public water supplies, and irrigation. Each use is important to the overall viability of Cherry County.

Irrigation

Irrigated and Intensive agriculture, including row crops, are critical to the economic base of the County and are important to the economic stability of the County. The Nebraska legislature has recognized that importance in Nebraska statute, §23-114.04 [statutory reference corrected from original document].

Irrigation wells in Cherry County are very limited for two reasons: the typical depth to water and the type of soils are not conducive to crops like corn, soybeans, etc. The main location for irrigation wells in Cherry County are in the northern areas near the Niobrara River.

Domestic and Livestock supplies

Typically domestic and most livestock water supplies are obtained through the use of small diameter wells. Most of these wells are drilled only a few feet below the top of the water table, are low production wells, and equipped with electric powered jet or submersible pumps. The water yield of this type of well is usually no more than five gallons of water per minute.

Public water supplies

The public water supply is one of the most critical uses of groundwater resources. These supplies are used by the municipalities supplying water to its residents. In Cherry County, all of the incorporated communities have a publicly owned water supply system.

The State of Nebraska places a great deal of value on these systems across the state. The value is so high that a Wellhead Protection Program is available to municipalities through Nebraska Department of Environment and Energy. This program allows the municipalities, after a series of prescribed steps are completed, to designate special areas around their wells and well fields in order to protect the quality and quantity of the water within the underlying aquifers. Development of a community wellhead protection plan can help communities receive financial assistance to protect and secure the source of drinking water for the community.

Water Rights

General Rights

Nebraska water resources play a major role in the state's heritage and economy. Beginning with the state constitution, Nebraska surface waters have been governed by the Appropriative First-in-Time, First-in-Right Rule which allows diversion of water from the surface waters of the state based upon the date the water right was obtained. (Source: water.unl.edu/article/agricultural-irrigation/ regulations-policies)

Correlative Water Rights for Groundwater

Correlative Rights govern the use of Nebraska ground waters. Correlative Rights allow land owners to drill wells and extract groundwater from an underlying aquifer for beneficial purposes subject to management by the public. In 1957 the Unicameral passed legislation requiring the registration of all irrigation wells.

To execute this right, land owners now must first obtain a permit to drill a well from their local Natural Resources District. If approved, the well permit allows the land owner to drill a well and extract as much groundwater as needed as long as the use is deemed beneficial. When the well development is completed the well permit is registered with the NDNR which places the information in a statewide data base. (Source: water.unl.edu/article/agricultural-irrigation/ regulations-policies)

All rules and regulations governing the use of groundwater and surface water are found listed in, "State of Nebraska, Department of Natural Resources, Ground Water, Chapter 42, Article 2 and Article 6". These chapters and articles establish the nature of water rights as rights of reality, define the process by which such rights are acquired, protect such vested rights and establish the Nebraska Department of Water Resources as the control agency regarding surface and ground water.

Wellhead Protection

A Wellhead Protection Area is a delineated area indicating where a water source is located, as well as the area of travel for a specific well or well field. A wellhead protection area is important from the aspect that correctly implemented, the area will aid in protecting the water supply of a domestic well providing potable water to a community.

In Nebraska, the goal of the Nebraska Department of Environment and Energy Wellhead Protection Program "...is to protect the land and groundwater surrounding public drinking water supply wells from Contamination". Within the NDEE's program there are five steps to developing a wellhead protection area, which are:

1. Delineation
2. Contamination Source Inventory
3. Contaminant Source Management
4. Emergency, Contingency, and Long-term Planning
5. PublicEducation

The mapping process includes the use of computer modeling and other data. From this the NDEE can generate a map indicating the wellhead Protection Area. However, delineating an area is not sufficient for protecting the groundwater around a public supply well, the governmental entity must adopt an ordinance in order to enforce the area and the regulations used to protect this water supply. Another way to officially regulate a wellhead protection area is for the community to create an interlocal agreement with the County to regulate these areas as part of the county comprehensive plan and zoning regulations.

HYDRIC SOILS

Hydric soils are formed under conditions of saturation, flooding, or ponding. The process has to occur long enough during the growing season to develop anaerobic conditions in the upper part. Hydric soils along with hydrophytic vegetation and wetland hydrology are used to define wetlands. (USDA/NRCS, Fall 1996)

Figure 11.15 indicates where the hydric soils are located in Cherry County. The soils are classified as the following:

- All Hydric; or
- Not Hydric

The majority of the soils in Cherry County are considered Not Hydric. Overall, a small amount of soils are considered as 100% Hydric or All Hydric.

FLOODWAYS AND FLOODPLAINS

Flooding is the temporary covering of the soil surface by flowing water from any source, such as streams and rivers overflowing their banks, runoff from adjacent or surrounding slopes, or a combination of different sources. During a flooding event there are a number of components that make up the flooded area. These areas include:

Floodway which is the channel of a watercourse and those portions of the adjoining floodplains which are required to carry and discharge the 100-year flood with no significant increase in the base flood elevation.

Floodplain which is the low land near a watercourse which has been or may be covered by water from flood of 100-year frequency, as established by engineering practices of the U.S. Army Corps of Engineers. It shall also mean that a flood of this magnitude may have a 1 percent chance of occurring in any given year.

Floodway Fringe which is that portion of a floodplain that is inundated by floodwaters but is not within a defined floodway. Floodway fringes serve as temporary storage for floodwaters.

The floodplain also includes the floodway and the flood fringe, which are areas covered by the flood, but which do not experience a strong current.

The floodplain area of greatest significance in terms of state and federal regulation is the 100 year floodplain. This area is defined by the ground elevation in relation to the water elevation experienced during a 100 year flood event. The 100 year floodplain is calculated to be the elevation level of flood water expected to be equaled or exceeded every 100 years on average. In other and more accurate words, the 100 year flood is a 1% flood, meaning it defines a flood that has a 1% chance of being equaled or exceeded in any single year.

Preserving the floodplain and floodway are critical to limiting the level of property damage that can occur as well as the level of damage to life of the occupants of the area. Land when not flooded seems to be harmless, but it is those rare times that threaten life and property that need to be controlled.

All this said, the county of Cherry County as a whole is not mapped for floodplains and floodway. However, Valentine and Cody are in the flood program.

In recent years there have been numerous flooding occurrences in Nebraska and the Midwest. These events have included the Platte River, the Niobrara River (downstream from Cherry County, the Missouri River, and the Mississippi River, as well as their tributaries. Each of these events have caused significant damage to life and property. In order to protect an individuals property there are specific rules and guidelines that need to be followed. Most guidelines are developed for 100 year flooding events. The times the guidelines have not worked are typically referred to a 500 year event for lack of a better term. However, in some cases, due to mother nature and increases in development runoff, the area needed to handle the floodway and floodplain (100 year event) have increased due to the amount and speed of the water reaching the streams and rivers.

NATURAL RESOURCES/ENVIRONMENT GOALS AND POLICIES

Natural Resources

Natural Resource Goal 1

To maintain or improve the primary landscape soil, vegetation and watershed resources in a manner that perpetuates and sustains a diversity of uses while fully supporting the custom, culture, economic stability and viability of Cherry County and our individual citizens.

Natural Resource Policies and Strategies

- NR-1.1 Non-agricultural developments should maintain a vegetative cover on the land sufficient to prevent wind and water erosion.
- NR-1.2 Non-agricultural developments should protect wetlands and flood-prone areas.
- NR-1-3 "Good neighbor" standards should be developed for land use changes and set forth in the County zoning regulations as information required in a zoning permit application.

Water

Water Goal 1

Meet the requirements for water quality contained in the State of Nebraska water quality plan to the extent they can be met while complying with Nebraska constitutional and statutory law as to vested water rights and control of in-stream flow, and to maintain or improve riparian areas and aquatic habitat that represents a range of variability for functioning condition.

Water Policies and Strategies

- W-1.1 Encourage the use of Best Management Practices (BMP's) for those waters which have been specifically identified and documented as not meeting beneficial use. BMPs include but are not limited to: Prescribed grazing systems, off site water development, red cedar control, livestock salting plans, establishment of riparian pastures, herding.
- W-1.2 Develop and utilize standardized forms and procedures for all monitoring data related to riparian and aquatic, habitat, condition and trend.
- W-1-3 Develop BMPs for riparian, groundwater and wetland management based on the best available science, balancing the needs of current and future agriculture operation(s). The custom, culture, and economic stability of the County and private property rights and private property interests including investment backed expectations will be protected in the application of all riparian, groundwater and wetland management plans.

- W-1-4 All riparian, ground water and wetland management decisions are best resolved on a site-specific basis.

- W-1.5 Develop management plans for multiple recreation uses in high erosion hazard watersheds, or watersheds where accelerated erosion is occurring, which assure that planning documents and/or other agreements which alter multiple recreation use are formulated through coordination with Cherry County.

- W-1.6 Develop and implement a management plan for wildlife to minimize surface disturbance erosion adversely affecting riparian areas.

- W-1.7 Complete annual reviews and provide documentation and data to Nebraska Department of Natural Resources (NDNR) regarding in-stream flow impact on fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality.

- W-1.8 Provide for the development and maintenance of water systems.

Water (surface water and groundwater)

Water Goal 2

Protect both the surface water and groundwater that runs through and is under the county.

Water Policies and Strategies

- W-2.1 Encourage the private conservation of sensitive areas such as wetlands, wooded areas, waterways (streams, ponds, lakes, rivers, etc.).

- W-2.2 Protect all water supplies and aquifers from development activities that may affect the quality of water; development must demonstrate a positive or, at least, a neutral impact on groundwater.

- W-2.3 Continue participation in the FEMA National Flood Insurance Program to prevent flood- caused loss of life and property.

- W-2.4 Land use development within the floodplains of the county should be avoided.

- W-2.5 Cherry County encourages soil and water conservation efforts to aid in erosion, sediment, and run-off control where possible.

- W-2.6 Cherry County encourages protection of riparian vegetation from damage that may result from development.

- W-2.7 Cherry County will plan for and positively urge better development of water supply consistent with the statutory and constitutional standards and will work to protect established water rights in accordance with such standards.

- W-2-8 Cherry County opposes the expansion of the federal regulation of wetlands beyond the traditional understanding of navigable waters, which means waters that provide a channel for commerce and transportation of people and goods.

- W-2-9 Any rivers within Cherry County considered "outstandly remarkable areas" under The National Wild and Scenic Rivers Act, 16 U.S.C. §§1271-1287, that have not already been designated, should be released from consideration.

- W-2-10 Productive watersheds must be maintained within the county as essential factors to the preservation of irrigated agriculture.

LAND USE | Chapter 11

The elements of the Cherry County Land Use Chapter include:

Land Use in Cherry County

- Zoning and Property Rights
- Existing Land Uses
- Management and Ownership of the Land
- Management of Protected Species, Wildlife, and Wildlife Habitat
- Coordination with State and Federal Agencies

Land Use Policies

- General Land Use Policies
- Cattle Country Agriculture Area
- Niobrara River Corridor
- Threatened, Endangered and At-Risk Species and Plan Conservation Plans
- The National 30x30 Land Preservation Initiative and Other Similar Goals
- Conservation Easements
- Federal and State Coordination
- Wellhead Protection Areas
- Growth and Development
- Federal and State Natural Resource Management Plans

ZONING AND PROPERTY RIGHTS

When implementing zoning regulations, a primary concern of the County is to implement the policies in such a way as they do not infringe on the private property rights of landowners. When used correctly, land use policy and zoning are protective as opposed to restrictive, and should be implemented in a limited fashion for the purpose of protecting the historical culture and future opportunities of Cherry County citizens.

Protective land use policy and zoning should work to be a protection to each individual landowner so their neighbor's activities does not harm the property "value" and investment already committed to a piece of land. It is often forgotten that our individual rights cease once we infringe on another's rights. This document, specifically this Chapter, strive to protect every Cherry County citizen's rights and investment. A key means to protecting these rights is by

having a complete understanding of the existing uses in the county as well as the historical culture of the area.

The framers of the United States Constitution relied on the philosophy of John Locke, who argued that individual natural rights including the rights to obtain and hold property, were not derived from the sovereign or the government but were in fact **natural rights** in the nature of "the common gift of mankind." Locke's position was based upon a simple method of individual acquisition of property rights or property interests: "individuals are allowed to keep that which they first reduce to their own possession."

Locke's political philosophy set forth the view that the organization of a government does not require the surrender of all natural rights including property rights and interests to the sovereign. In accordance with that view if the government takes a property right or a property interest then it must pay for it.

The framers of the United States Constitution accepted the Locke theories and, as a result, the Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation.

EXISTING LAND USE

The predominate land uses in Cherry County are agriculture including row crops, livestock, grazing, and haying. In addition, Cherry County has natural amenities such as the Niobrara River, a major recreational corridor in the State.

CATTLE COUNTRY

As the largest beef producing county in the nation, Cherry County must continue to maintain its agricultural crop and livestock production, to ensure a productive and balanced natural environment. In addition, the area should promote new forms of agricultural production which is compatible with existing ranch and farm uses.

The concept of this agricultural area is to encourage soil and water conservation, preserve water quality, and prevent contamination of the natural environment within the County, through the productive use of the land. Ranch and farm operations must be protected and have priority when conflicts arise with non-agricultural uses.

Overall, protecting the long-standing way of life in the rural areas of Cherry County is critical to the future. Uses incompatible with the current agricultural methods should be limited and any incompatible components should be mitigated prior to being allowed in this area.

[Note for Committee: The existing Comprehensive Plan includes a "Cattle Country Easement," Table 2, page 16. Does the committee want to keep this easement application in the updated plan?]

EXISTING LAND USE CATEGORIES

The term "Existing Land Use" refers to the current uses in place within a building or on a specific parcel of land. The number and type of uses can constantly change within a county and produce a number of impacts either benefiting or detracting from the county. Because of this, the short and long -term success and sustainability of the county is directly contingent upon available resources utilized in the best manner.

Overall, development patterns in and around Cherry County have been influenced by topography, water, soils and manmade features such as highways and some hard-surfaced county roads. These items will likely continue to influence development patterns throughout the course of the planning period.

The utilization of land is best described in specific categories providing broad descriptions where numerous businesses, institutions, and structures can be grouped. For the purposes of the Comprehensive Plan, the following land use classifications are used:

- Farmsteads/residential uses
- Commercial uses
- Quasi-Public/Public (includes churches and schools)
- Livestock facilities
- Agriculture

The above land use categories may be generally defined in the following manner:

Agriculture- Row crop, alfalfa, pastureland/grazing land and all grain crops are considered agriculture land uses. Cherry County is an agricultural based county and the existing land use map verifies these uses.

Nebraska N.R.S. §77-1359 defines agriculture and horticulture lands as follows:

(1) Agricultural land and horticultural land means a parcel of land, excluding land associated with a building or enclosed structure located on the parcel, which is primarily used for agricultural or horticultural purposes, including wasteland lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land;

(2) (a) Agricultural or horticultural purposes means used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture;

(b) Agricultural or horticultural purposes includes the following uses of land:

(i) Land retained or protected for future agricultural or horticultural purposes under a conservation easement as provided in the Conservation and Preservation Easements Act except when the parcel or a portion thereof is being used for purposes other than agricultural or horticultural purposes; and

(ii) Land enrolled in a federal or state program in which payments are received for removing such land from agricultural or horticultural production; and

(c) Whether a parcel of land is primarily used for agricultural or horticultural purposes shall be determined without regard to whether some or all of the parcel is platted and subdivided into separate lots or developed with improvements consisting of streets, sidewalks, curbs, gutters, sewer lines, water lines, or utility lines;

(3) Farm home site means land contiguous to a farm site which includes an inhabitable residence and improvements used for residential purposes and which is located outside of urban areas or outside a platted and zoned subdivision; and

(4) Farm site means the portion of land contiguous to land actively devoted to agriculture which includes improvements that are agricultural or horticultural in nature, including any uninhabitable or unimproved farm home site.

***Livestock facilities*–** These are specific confinement buildings including chicken and swine houses, dairies, open lots, and pastured cattle.

***Residential*–** This category includes residential dwellings either as a farmstead, acreage or residential developments located within the county. Residential units of this type are distributed throughout the County.

Commercial- Uses in this category consist of convenient stores; feed, seed, automobile and machinery sales; petroleum sales, etc. Commercial uses tend to be located near urban areas or in proximity to major highways for accessibility.

***Industrial/Railroad Right-of-Way* -** Land uses of this nature may include communication plants, light manufacturing, commercial storage, industrial parks, large salvage yards, etc. These uses tend to be located near municipalities and major transportation routes for accessibility purposes.

MANAGEMENT AND OWNERSHIP OF THE LAND

Cherry County has approximately 3,828,500 acres. The federal government owns approximately 207,290 acres and the State owns another 169,665 acres. Combined the State and Federal government owns 10 percent of the land within the jurisdiction of Cherry County. In addition to this, 23.7 miles of the Niorara River are designated a National Scenic River requiring additional restrictions on landowners within the designated area.

Ted Turner, through various corporations, controls a total of *** acres or ***%. Other entities such as The Nature Conservancy, a non-profit land trust, also have significant holdings in Cherry County.

Each of these entities have competing land use purposes that often conflict with the priorities of Cherry County. Where the land is managed by an individual property owner with roots in Cherry County, sometimes dating back to the original homesteads, their emphasis is on wisely using the lands in such a manner as the land can be passed down to future generations who can build on the same conservation principles. However, when the land is purchased by for-profit/non-profit entities, who often buy the land at inflated prices, with the goal of changing the land use from agriculture to protection of species or resources, these can conflict with the Counties policies. Additionally, when the land owned by Federal or State government is managed as protected areas, conflicts can arise with the counties policies and the landowners who are authorized to use these lands under Federal and State laws.

Historically, when the private lands have been acquired by entities with goals that conflict with agriculture uses, the local farmers and ranchers whose families have been on these lands for generations are harmed.

CORE PRINCIPLES OF FEDERAL AND STATE LAND MANAGEMENT

Fundamentally, Cherry County's policies regarding the use of our federal lands are aligned with the provisions made in the Federal Land Policy and Management Act of 1976 and the National Forest Management Act of 1976. These Acts require federal agencies to coordinate the land use inventory, planning, and management activities for such lands with the land use planning and management programs of local governments within which the lands are located. Equally important, Cherry County's policies support the guiding principles of ***multiple use*** and ***sustained yield***.

These core principles of this plan are defined as the following:

A. Multiple Use

The management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output. (43 USC 1702(c))

B. Sustained Yield

The achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use. (43 USC 1702(h))

C. Public Land Management

The public lands shall be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use. (43 USC 1701(a)(8)) Public lands shall be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 as it pertains to the public lands. (43 USC 1701(a)(12))

D. Coordination

The process of harmonizing Federal, state, and local plans to achieve consistent application of policies across multiple jurisdictions. Federal law requires the federal land management agencies work to make their policies consistent with local plans and policies to minimize conflicts and support economic growth. Coordination is a distinct process involving those governing jurisdictions that have planning responsibilities and often taxing authority and is a continuous process. (See ***Appendices 1 - 3***) for more guidance.)

[Note to Committee: Four documents should be included in the appendix, as referred to above, relating to Coordination. These are:

1. Coordination and Plan Consistency Review Under Section 202(C)(9) of the Federal Land and Management Act of 1976
2. Forest Service and State, County, and Local Government Coordination Under Section 6 of the National Forest Management Act
3. Guidelines for Coordination with the U.S. Department of Interior and U.S. Department of Agriculture]

E. Cooperating Agency

During the development of an Environmental Impact Statement (EIS) under The National Environmental Policy Act (NEPA), and Council on Environmental Quality regulations (CEQ Regs), State, local and tribal governments can be invited to participate with federal and state agencies, in the preparation of the impact analysis as a "Cooperating Agency." The development of the analysis can be for major federal actions such as the revision of a natural resource plan that will determine future management activities on the federal lands. Although "Cooperating Agency Status" was originally reserved for agencies, local governments have been allowed to participate in this process in recent years and contribute their respective areas of responsibility, authority and expertise to the analysis. It is vital to the County that it be allowed to participate in all NEPA processes to help insure a robust and complete analysis is prepared that includes the County's needs, policies and data.

F. Collaboration

The collaborative process is a beneficial way to bring agencies, State and local governments, private stakeholders and special interest groups together to work towards developing common goals that can help shape the management of the public lands. Although the outcome of the collaborative process is not binding on federal, state or local governments, the objectives, goals and suggested strategies should be considered during the various planning processes.

IMPACT ON AGRICULTURE

Management decisions for the federal and state lands directly impact the use of, and the economic value of, private land. Any reduction of the present use of these lands not only adversely impacts the rancher using them, but also the economic base of Cherry County. Inversely, increased use of these lands will have a beneficial impact to the rancher and likewise the economic base of Cherry County.

Restrictions on and reductions of grazing on federal lands, for example, would require a rancher to greatly increase grazing on private ground, reduce the size of their herd, find alternative grazing land, or seek relief through a combination of these measures. If they must graze their herd solely on their own private ground, then they will lose their source of winter forage for their herd.

There is limited alternative land available within the County, as well as in neighboring areas. Transportation costs would be extremely high and even prohibitive if producers had to graze their cattle outside the area. Either reduction in herd size, higher feed costs, or severely increased transportation costs would result in a critically adverse outcome for the rancher and the county as a whole. Economists hold that for every ranching dollar lost, there is a two-fold loss to business income in the surrounding area of the county.

IMPACT ON RECREATIONAL ACTIVITIES

The portion of the county's economy dependent upon the canoeing industry (on the Niobrara River) is conversely dependent on federal land management decisions regarding activities on the river. Severe restrictions by federal management agencies would curtail canoeing activities, resulting in the reduction of a critical component of the county's economic diversity.

Reductions in recreation use by federal and state management agencies will also result in adverse economic impacts on businesses in the county. The recreational uses in Cherry County are visited by users across the United States; many of these uses are located on state and federal lands. These users spend their money and time in the communities of Cherry County; therefore the economic stability of Cherry County rests upon continued multiple uses of federal and state lands.

MANAGEMENT OF PROTECTED SPECIES, WILDLIFE, AND WILDLIFE HABITAT

Cherry County has considerable wildlife including mule deer, white tail deer, birds including pheasant, smaller wildlife such as rabbits, raccoon, and others. Due to the uniqueness and vastness of the Sandhills ecosystem there are also wildlife considered to be endangered. Some of these species make their home in Nebraska while some pass through during key points of the year.

PROTECTED SPECIES

According to the U.S. Fish and Wildlife Service, there are 9 federally protected and candidate species and plants found in the Cherry County. These are:

- Regal fritillary (Speyeria idalia)
- monarch butterfly (Danaus plexippus)
- Western prairie fringed Orchid (Platanthera praeclara)
- Northern Long-Eared Bat (Myotis septentrionalis)
- American burying beetle (Nicrophorus americanus)
- Topeka shiner (Notropis topeka (=tristis))
- Whooping crane (Grus americana)
- Blowout penstemon (Penstemon haydenii)
- Piping Plover (Charadrius melodus)

The Nebraska Game and Parks lists additional species in Cherry County it considers at-risk through the Natural Legacy Project and the Nebraska State Wildlife Action Plan. These include:

- Northern Redbelly Dace
- Blacknose Shiner
- Small White Lady's Slipper
- Finescale Dace
- Swift Fox

The County will pay particular attention to any species designated in any category or classification for protection or consideration of protection under the Endangered Species Act and will expect the federal agencies to consider the conservation measures and policies of the county prior to advancing any proposal to federally protect a species or plant that may impact the County.

The Endangered Species Act requires that a determination to protect a species can only occur "after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas." (16 U.S.C.A., Section 1533 (B)(1)(A)).

The Act defines "conservation" efforts as the following:

“ Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation …” (U.S.C.A., Section 1532(3))

The Cherry County Natural Resource Committee and the Board has developed a conservation plan process for the purpose of establishing appropriate conservation measures for species that may be at-risk or considered threatened or endangered. This has been developed to ensure that the management or protection of a species does not conflict with, or infringe on, the existing land uses and property rights of its citizens. These conservation plans must be considered by all state and federal agencies engaged in any process that would potentially lead to the protected status of a species.

Regardless of whether there is a specific species plan developed by the county, this Comprehensive Plan and its policies was prepared with the land use goal of ensuring that all non-invasive species and plants that benefit the Sandhills ecosystem are provided adequate habitat, and therefore, this plan should be considered the conservation plan for all species and plants within the County.

WILDLIFE AND WILDLIFE HABITAT

All decisions for wildlife management should be for the purpose of maintaining the balanced wildlife populations, which our citizens have grown accustomed to enjoying in consumptive and non-consumptive manner.

The Nebraska Game and Park Service needs to be aware of big game impacts not only on private land forage supplies but on the property and property interest of permittees in their allotments. Hunting activity, allowable harvests and Departmental feeding programs must be coordinated with Cherry County to achieve a balanced multiple use.

Better coordination of deer hunting seasons with private property use and livestock management should be a priority of the state agencies. State management plans for hunting seasons should be coordinated with the county to help facilitate a good relationship with private landowners. These coordinated efforts will help to ensure a healthy balanced population of wildlife, workable hunting seasons with private property uses and livestock management, and incorporate depredation hunts to protect the value of the landowners investments.

COORDINATION WITH FEDERAL AND STATE AGENCIES

Federal law requires the federal lands be managed to maintain the multiple uses and sustained yield of the resources in coordination with States and local governments. Maintenance of such multiple uses necessarily includes continued maintenance of the historic and traditional economic uses which have occurred on federally and state managed lands in the county. It is therefore essential that federal and state agencies keep apprised of and consider the policies of Cherry County as set forth in this plan, and that these agencies inform the county of all pending

or proposed actions impacting the local communities and industries, as well as, coordinate these actions with the Board as required by law. (See Appendix 1-3 for more guidance)

The Cherry County Comprehensive Plan is the one unifying plan that takes into consideration all the different land uses, types of land ownership, management objectives of Federal and State agencies, as well as the needs and requirements of cities and special districts within the County's jurisdiction. The purpose of the Comprehensive Plan is to ensure the activities of all these entities are harmonized and do not conflict with each other or the Counties policies, to ensure the health, safety and welfare of Cherry County's citizens.

Because of this responsibility, delegated by the State of Nebraska to Cherry County, all entities must consider and coordinate their management plans with the Cherry County Comprehensive Plan as required by State and Federal Law.

[Note to Committee: The two paragraphs above should be added to Chapter 1 as a part of the purpose for the Comprehensive Plan.]

POLICIES

GENERAL LAND USE POLICIES

1. Private ownership of land is essential to the freedom of individuals, families and communities and to the economic interests of the citizens of the County.

2. Existing agricultural uses, methods of agricultural production, property values and the lifestyle and quality of life of the citizens of the County should be protected and preserved.

3. Changes in non-agricultural uses should occur in a manner and in locations which will not be incompatible with such existing uses, which will not damage the environment, which will not negatively impact the infrastructure of the County and which will not negatively impact property values or the quality of life in the rural areas of the County.

4. Land use regulations should be minimized to preserve the freedoms and property rights enjoyed by the citizens of the County.

5. The regulations should effectively address the needs to basic protection of the existing land uses, property values, the local environment and quality of life from development of future land uses which would be inconsistent with these needs.

CATTLE COUNTRY AGRICULTURE

General Purpose

This land use district is the means to maintain agricultural crop and livestock production which is in balance with the natural environment and promote other and new forms of agricultural production which is compatible with existing ranch and farm uses and the environment. These areas are also meant to encourage soil and water conservation, preserve water quality, prevent contamination of the natural environment within the County and to preserve and protect ranch and farm operations from conflict with non-agricultural uses.

Compatible Uses

1. Grazing land
2. Crop production
3. Family residential groupings
4. Livestock operations for all types of animals where conditions permit
5. Private grain storage
6. Commercial grain storage
7. Commercial uses related to agriculture such as: fertilizer processing and storage, grain elevators, etc.
8. Smaller commercial uses supporting the general area
9. Manure/fertilizer applications
10. Single acreage developments
11. Public and private recreational, wildlife and historical areas
12. Agri-Tourism activities such as: hunting preserves, fishing, vineyards etc.
13. Religious uses and structures
14. Educational uses and structures
15. Commercial mining

Incompatible Uses

16. Residential/Acreage developments not associated with a farming operation
17. Large commercial developments

Potential issues to consider

18. Sensitive Soils
19. Groundwater availability
20. Slopes
21. Topography
22. Natural amenities such as trees, ponds, and streams
23. Flooding hazards.
24. Groundwater contamination
25. Minimum lot sizes and residential densities
26. Wetlands
27. Existing and/or proposed sanitary systems
28. Wellhead protection areas

29. Proximity to conflicting uses such as new acreages near livestock confinements
30. Transportation systems (county roads, highways)

General Policies

1. Minimum residential lot sizes should be kept at the lowest possible size accommodating both private water and sanitary sewer.
2. Cluster developments should be considered and used whenever soils, topography, natural amenities warrant.
3. Separation distances should be applied to the livestock facility and rural acreages.

4. Small livestock feeding operations should be a permitted use; while larger livestock feeding operations be regulated through the conditional use process in order to help minimize environmental impacts and the health, safety and general welfare of the public.
5. Private property rights should be considered in all land use decisions.

CATTLE COUNTRY AGRICULTURAL LAND USE GOAL

Protect and preserve the livestock and agricultural lifestyles that Cherry County has become known for throughout its history.

Policies

- CCLU-1.1 Use the definition of agriculture as laid out within this document.

- CCLU-1.2 Every effort should be made to protect the overall culture of Cherry County for those living ad working in agriculture.

- CCLU-1.3 Where any non-agricultural development, other than development of a residential dwelling on a tract of land larger than 160 acres, should be required to execute and record a Cattle Country Easement.

- CCLU-1.4 Make every effort to ensure changes in the use of land and water resources have no adverse impacts on the present and future viability of agricultural operations on lands that neighbor any such land use changes.

CATTLE COUNTRY FEEDING OPERATIONS

New confined feeding operations should meet specific requirements since this type of livestock production is not part of the overall culture of Cherry County.

Policies

- CCLU-2.1 New confined livestock operations should be located in areas where their impact on neighboring land uses and the environment will be minimal.

- CCLU-2.2 Cherry County should allow agricultural production throughout the county; except where there may be potential conflicts with other policies of this plan.

- CCLU-2.3 Confined livestock operations should be encouraged to utilize odor reducing technologies such as methane digestion and composting.

- CCLU-2.4 Regulations should be established and implemented creating setback and buffer requirements to minimize the impacts of solid, liquid, and gas emissions from confined livestock facilities.

- CCLU-2.5 Protect the quality of groundwater in agricultural areas of Cherry County.

CATTLE COUNTRY PRIVATE PROPERTY PROTECTIONS

Cherry County should continue to be proactive in protecting property rights while protecting the sensitive environment of the county.

Policies

- CCLU-3.1 Work with livestock producers on a continual basis in evaluating protections and regulations.

- CCLU-3.2 Continue conversations with state and federal officials regarding limited governmental control of lands in Cherry County.

CATTLE COUNTRY AGRICULTURAL PROTECTION

Individuals moving to the Cattle Country area of Cherry County that are not associated with farming and ranching should be required to provide certain guarantees to existing property owners engaged in farming and ranching.

Policies

- CCLU-4.1 Non-agricultural developments abutting grazing land should be fenced as defined in Neb. Rev. Stat.§34-115.

    1) Fencing, or ensuring existing fences are sound should be the responsibility of the owner of the non-agricultural use. and

    2) Such fences should be maintained by such owner unless there is a written agreement between such owner and the owner(s) of adjoining grazing land.

    3) The only exception to this is if the non-agricultural landowners (s) having specific grazing agreements in place with the farmers and ranchers.

- CCLU-4-2 Where any non-agricultural development, other than development of a single residential dwelling, can be anticipated to generate increased traffic on a county road passing through open range, the owner of such non- agricultural development may be required to fence such road to protect motorists and livestock if the anticipated traffic volumes are more than 50% greater than existing traffic volumes.

- CCLU-4.3 Non-agricultural developments which abut grazing land should be required to install cattle gates or cattle guards with adjoining gate on all vehicular access points unless there is a written agreement between such owner and the owner(s) of adjoining grazing land.

- CCLU-4-4. All new residents not associated with a farming or ranching operation should be required to sign and acknowledge a statement outlining the potential conditions that impact those in Cattle Country.

NIOBRARA RIVER SCENIC PROTECTION CORRIDOR

General Purpose

This land use district is shown along the Niobrara River. The Niobrara River Protection Corridor has the environmental objective of protecting the natural environment, scenic views from the river, and scenic views of the river.

The Niobrara River Scenic River designation creates another layer of development review and guidelines along the River. These include building location, viewsheds, and more. The design review is conducted by the Niobrara River Council (NRC), which is made up of representatives from the various counties within the overlay area, individual landowners, representatives from Natural Resource Districts serving the area, and federal and state representatives. The NRC has two primary roles: (1) review zoning and development for protection of scenic river corridor; and (2) hold conservation easements.

Compatible uses

31. Crop production, including grazing lands
32. Private grain storage
33. Manure/fertilizer applications
34. Single acreage developments
35. Public recreational, wildlife and historical areas
36. Tourism activities such as: parks, hunting preserves, fishing etc.
37. Religious uses and structures
38. Educational uses and structures
39. Community/Recreational Center
40. Larger park and recreation areas

Incompatible Uses

41. Livestock operations

42. Large commercial developments
43. Large industrial developments
44. RV Storage located in the floodplain and/or floodway
45. Mobile homes as a single-family dwelling unless located within a mobile home park

Potential issues to consider

46. Sensitive Soils
47. Groundwater availability
48. Slopes
49. Topography
50. Natural amenities such as trees, ponds, and streams
51. Flooding hazards.
52. Groundwater contamination
53. Minimum lot sizes and residential densities
54. Wetlands
55. Existing and/or proposed sanitary systems
56. Wellhead protection areas
57. Proximity to conflicting uses such as new acreages near livestock confinements
58. Transportation systems (county roads, highways)

General Policies

- Residential lot sizes may vary depending upon the types of sanitary system installed and the source of potable water.

- Cluster developments should be considered and used whenever soils, topography, natural amenities warrant.

- Protection of view sheds towards and from the Niobrara River.

- Private property rights should be considered in all land use decisions.

NIOBRARA SCENIC RIVER CORRIDOR LAND USE

It is the desire of Cherry County to protect their natural resources, especially the Niobrara Corridor east of Valentine.

Policies

- RPCLU-1.1 The County should continue to promote the recreational potential of the area and work with existing property owners to establish specific eco-tourism opportunities.

- RPCLU-1.2 The Niobrara River Scenic River Corridor should be protected due to the natural amenities of the area.

- RPCLU-1.3 The establishment of chemical storage facilities including the manufacturing of chemicals should not be allowed in this area.

- RPCLU-1.4 Existing uses within the Niobrara River Scenic River Corridor having a high contaminate potential should be relocated to a more suitable location when possible.

- RPCLU-1.5 All new developments in the Niobrara Scenic River corridor should also comply with the standards for development and the related review procedures as set forth in the General Management Plan Environmental Impact Statement: Niobrara National Scenic River.

NO EXPANSION OF THE NIOBRARA SCENIC RIVER CORRIDOR

There is no further need for including any other WSA's or any other segments of rivers or tributaries within Cherry County in the National System of Wild and Scenic Rivers and that there are no others which meet the standards for designation.

Policies

- RPCLU-2.1 Provide for optimum scenic value in Cherry County through achievement of vegetation and soils watershed objectives and implementation of non-degrading, non-imparing range improvement activities, construction, use and maintenance of livestock management facilities, and facilities for public enjoyment of the land.

- RPCLU-2.2 Management policies for the affected area must be consistent with land use plans and the non-wilderness full multiple use concept mandated by the Federal Land Policy & Management Act and Public Rangelands Improvement Act.

- RPC-2.3 Develop and establish objective scientific classifications based upon vegetation condition and trend criteria which comply with the Federal Land Policy & Management Act.

THREATENED, ENDANGERED AND AT-RISK SPECIES AND PLAN CONSERVATION PLANS

(This policy is from the Cherry County Natural Resource and Management Plan for Federal and State Managed Lands.)

1. LOCAL PLANNING UNDER THE ENDANGERED SPECIES ACT

In the Endangered Species Act of 1973 (as amended) the United States Congress has established it to be the national policy to maintain a balance in the ecological systems upon which human and all life

depend which prevents the unnatural, unnecessary extinction of a species of fish, economic and social hardship which would lead to extinction of human activities on the other.

In 16 U.S.C. Section 1533 the Congress has specifically required the Secretary of Interior to consider "economic impact" before designating a critical habitat, all governmental agencies--local, state and federal--are called upon to cooperate with each other and with other interested parties to conserve the ecological systems upon which all species depend.

The specifically expressed purpose stated in 16 U.S.C., Section 1531 is to provide a legislative and financial means through which conservation of ecological systems could be maintained with such balance. The Congress declared the national purpose to be to encourage states "through Federal financial assistance and a system of incentives" to develop and maintain "conservation programs." Such programs were defined to include scientific resource management activities such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, transplantation and *other* activities designed to bring about the balance in the ecological system which make protective actions under the Endangered Species Act no longer necessary.

Local planning must play a critical role in the development of programs, which will work toward that balance in the ecological system, which will protect all species of life, including human. In 16 U.S.C., Section 1533 (b)(1)(A) the Congress mandated that the Secretary of Interior must make his determinations to protect species "on the basis of the best scientific and commercial data available to him, and only"after taking into account those efforts, if any, being made by any state...or any political subdivision of a state...to protect such species." The Congress declared it to be the national policy that local conservation programs, research programs and habitat maintenance programs be looked to initially as the means to achieve the balance desired in ecological systems upon which all life depends. Of particular importance in the arid lands of the Nebraska is the requirement stated in 16 U.S.C. Section 1531(c)(2) that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."

The County will expect all federal agencies to follow the mandate of the federal statutes and to consult and cooperate with the County as it implements its local responsibility in accordance with the Endangered Species Act.

The county will protect the constitutional rights of citizens of Cherry County, from physical and economical damage resulting from illegal action or implementation of the Endangered Species Act. Also, from the harboring of and or for the release, relocation, reintroduction, and transportation of endangered species and or any other species that is detrimental or injurious to agriculture and the citizens of Cherry County.

Moreover, all federal land management agencies are advised that the County expects the federal land management agencies, in planning for the protection of any species in Cherry County, to coordinate its efforts with the County considering the specific statutory mandate of coordination set forth in 43 U.S.C. Section 1712 (c)(9).

2. RESEARCH AND REVIEW PROCESS

A. An Ecological Balance Subcommittee will oversee the implementation of the research and review process. A Chairman of the Subcommittee will be named by the Chairman of the Cherry County Natural Resource Committee and the members of the Subcommittee will be named by the Chairman of the Natural Resource Committee and the Chairman of the Subcommittee.

B. When an agency, citizen or group of citizens believes that a condition has caused or threatens to cause disruption to the balance of the ecological systems upon which human and all life depends in Cherry County, a request should be made to the Ecological System Balance Subcommittee to initiate the research and review process regarding such condition. If an agency, citizen or group of citizens believes that a species is declining, even though the cause for the decline is unknown, a request should be made to the Ecological Balance Subcommittee to initiate the process identified in this Part of the County Natural Resource Plan. Any member of the Subcommittee or of the Natural Resource Committee may request that the process be initiated, whether a request has been made by an agency or other citizen.

C. The subcommittee will review the request, and may invite the requesting agency, person or group to meet with the subcommittee to discuss the request. During this initial review, the subcommittee shall request information from state and federal agencies and interested citizens as to the species identified in the request. Thus, the subcommittee can take advantage of existing data and analysis regarding the species identified in the request. The subcommittee shall coordinate its review with state and federal agencies and interested citizens and citizen organizations.

D. When the subcommittee determines the nature of the condition, the potential impact on the ecological system which is or may become imminent, the courses of research necessary to fully study the condition, and the resources necessary to implement research and review, a report shall be submitted to the Committee. The Committee shall coordinate its review of the subcommittee report with state and federal agencies and with interested citizens and citizen organizations. After coordination, the Committee will then decide whether further research and review is necessary or desirable, and either direct the Subcommittee to implement full research and review or to close its file.

E. If the Committee directs further action, the subcommittee will notify, in writing, all federal agencies exercising land management activities in Cherry County, all federal agencies with responsibility under the Endangered Species Act, all federal agencies exercising land management planning activities in Nebraska, all state agencies exercising land or water management activities in Cherry County, all conservation groups and groups of citizens interested in the multiple uses of the federally managed lands in Cherry County of the County's initiation of the research and review process. An initial informational meeting will be included in the written notice.

F. The subcommittee will then conduct meetings, coordinate research efforts and review the condition, the problems presented to the ecological system, the necessity of corrective action or actions, the alternative corrective action or actions which are possible, the impact of each of such alternatives on the balance in the ecological system, means of financing the alternatives and expected results of the alternatives. If at any time during this process, the subcommittee

believes that a Memorandum of Understanding to Establish a Working Group is desirable, it shall make such recommendation to the Committee, and if it concurs, the Committee shall make such recommendation to the Board of Commissioners. If the Board of Commissioners concurs, a Memorandum of Understanding shall be prepared to establish citizens groups to won cooperatively and coordinately in planning for the maintenance of or re-establishment of the balance in the ecological system.

H. The subcommittee shall advise the Committee, and the Committee shall advise the Board of Commissioners of progress in the research and review process on a regular basis. No later than 180 days after the filing of the initial request for research and review a report shall be submitted to the Board of Commissioners regarding the status of the process, with attention being directed to all elements of study set forth above in subparagraphs f and g. If more research and review time is needed, the 180-day report shall be submitted to the Board of Commissioners regarding the reported condition and all elements of study set forth above in subparagraphs f and g.

I. Within 60 days of receipt of the final report, the Board of Commissioners will issue a report and decision based upon the research and review process. That further work is necessary or may continue implementation of the process under stated guidelines for future implementation.

J. All meetings of the subcommittee, Committee, and Board regarding the research and review process shall be open to the public. The subcommittee and Committee may hold public hearings and/or meetings during the process, and the Board of Commissioners shall conduct a public hearing prior to issuing its final report and decision.

K. Throughout the process identified in subsections a through j, the County will coordinate activities with state & federal agencies, interested citizens & citizen groups.

3. IMPLEMENTATION OF LOCAL PLANNING

Local Working Group MOU's

During the research and review process or after the issuance of the Board's report and decision, local working groups will be established through Memoranda of Understanding for implementation of local planning to maintain or reestablish the balance in ecological systems in Cherry County.

A. Disclosure in good faith of information regarding the particular purpose of the specific working group established by the MOU;

B. Efforts by the working group to secure funding from public or private sources to aid in pursuing the purpose of the MOU;

C. Regular meetings of the working group;

D. Continuing effort to identify and attempt to include all parties with a possible interest in the purpose of the MOU;

E. Establish and continue, to the extent possible, a comprehensive survey of the conditions of the ecological system and the species under study;

F. Develop and formulate an action plan to guide and coordinate the efforts of the working group;

G. Work cooperatively and coordinately to create and implement a management plan for the ecological system under study.

The County will seek the participation of all governmental agencies involved in the management of lands, water, and other natural resources in Cherry County or in any such management activities which will impact Cherry County, other adjoining counties which are impacted by events and actions in Cherry County, citizens and groups of citizens who use the federally and state managed lands in Cherry County, and citizens and groups of citizens who are interested in the natural resources of Cherry County and their use.

When specific MOUs are executed, they will be attached to the Cherry County Natural Resource Plan for the Federally and State Managed Lands and will be considered part of this Plan.

Conservation Agreements

The County may also study and support the development of Conservation Agreements through the program of the United States Fish and Wildlife Service, and/or conservation programs and/or agreements offered by other state and federal agencies and interested citizens and citizen organizations.

Specific Action Plans

The Cherry County Natural Resource Committee will recommend to the Board of Commissioners; specific actions regarding a particular species, a particular condition objective for and ecological system within the County; or the use of plans for the federally and state managed lands within the County when the Committee believes such plan is necessary or desirable to meet the planning standards established for such lands by federal and state statutes. This recommendation process will be coordinated with state and federal agencies and interested citizens and citizen organizations.

When such specific action plan is recommended, the Board of Commissioners shall conduct a public hearing regarding adoption of the plan. Public notice of the hearing will be published, and written notice will be mailed to all governmental agencies involved in the management of land, water and natural resources in Cherry County. Written notice will also be mailed to members of any working group involved with the subject of the proposed action plan.

After the hearing, the Board may adopt, reject, or modify the action plan. If the plan is adopted as presented or as modified, it shall be attached to this Plan and become a part of this Plan as fully as if set forth herein. The Board will then notify all governmental agencies involved in the management of land, water and natural resources in Cherry County of the adoption of the action plan.

Local Ordinances

When the Board of Commissioners deems it necessary, County planning standards for management of the federally and state managed lands in Cherry County will be established by County ordinance pursuant to Nebraska law.

THE NATIONAL 30X30 LAND PRESERVATION INITIATIVE AND OTHER SIMILAR GOALS

General Purpose

1. Cherry County currently enjoys numerous privately and publicly administered parks, wildlife management area and state recreation areas, as well as some privately held in conservation easements; and

2. Cherry County has a Natural Resource and Management Plan for Federal and State Managed Lands; and

3. Designating lands as wilderness or other through other protective categories does not assure its preservation. Left in an undisturbed or natural state, these lands are highly susceptible to wildfires, insect infestation and disease, all of which degrades the natural and human environment; and

4. Because of the predominance of federal land in Cherry County, the well- being, health, safety, welfare, economic condition, and culture of the County, its businesses, and its citizens depend on the manner in which these lands and their resources are used and access to these lands; and

5. Many of Cherry County's businesses and its citizens are involved in or otherwise depend on industries that utilize federal lands and their resources, including the forest products industry, livestock grazing, oil and gas exploration and production, mining and mineral development, recreational industries, hunting and other outdoor recreation; and

6. These industries are important components of the Nebraska economy, and are major contributors to the economic and social wellbeing of Cherry County and its citizens; and

7. On January 27, 2021, President Joseph R. Biden, Jr., issued Executive Order 14008 entitled Tackling the Climate Crisis at Home and Aboard (86 Fed. Reg. 7,619); and

8. In Section 216 of Executive Order 14008, President Biden directed the Secretary of the Interior, in consultation with the Secretary of Agriculture and other senior officials, to develop a program to conserve at least 30 percent of the lands and waters in the United States by 2030, which is called the "30 x 30" program; and

9. Under the 30 x 30 program, some 680 million acres of our Nation's lands would be set aside and permanently preserved in its natural state, preventing the productive use of these lands and their resources; and

10. There is no constitutional or statutory authority for the President, the Department of the Interior, the Department of Agriculture, or any other federal agency to set aside and permanently preserve 30 percent of all land and water in the United States, and no such authority is referenced in Executive Order 14008; and

11. The 30 x 30 program, if implemented, is likely to cause significant harm to the economy of Cherry County, and injure the County's businesses and its citizens by depriving them of access to public lands and national forest system lands and preventing the productive use of these lands' resources; and

12. The withdrawal of some 680 million acres of federal lands from multiple use and placement of such lands in permanent conservation status will cause dramatic and irreversible harm to the economies of many western states, including Nebraska, and in particular rural counties such as Cherry County whose citizens depend on access to federal lands for their livelihoods; and

13. The 30 x 30 program, if implemented, will conflict with the plans, policies and programs of Cherry County as expressed in the Cherry County Comprehensive Development Plan adopted 4/29/1997, which obligates the federal government to coordinate its policy development with Cherry County as also required by the Federal Land Management and Policy Act (FLPMA) and the National Forest Management Act (NFMA); and

14. Executive Order 14008 at 216(a) directs the Secretary of the Interior, in consultation with other relevant federal agencies to "submit a report to the Task Force within 90 days of the date of this order recommending steps that the United States should take, working with State, local, Tribal, and territorial governments, agricultural and forest landowners, fishermen, and other key stakeholders, to achieve the goal of conserving at least 30 percent of our lands and waters by 2030."

Policies

1. The Board opposes the 30 x 30 program, including its objective of permanently preserving 30 percent of the Nation's lands in its natural state by 2030, or any similar program that will set aside and prevent the productive use of millions of acres of our lands.

2. The Board further opposes the designation of public lands and national forests in Cherry County as wilderness, wilderness study areas, wildlife preserves, open space, or other conservation land, thereby restricting public access to such lands and preventing the development and productive use of the resources on or within such lands.

3. The Board supports the continued management of the public lands and the national forests under principles of multiple use and sustained yield, recognizing the Nation's

need for domestic sources of minerals, energy, timber, food, and fiber, and in careful coordination with Cherry County to ensure consistency with County land use plans and land management policies, as required by law.

4. The Board supports maintaining and enhancing public access to public lands and national forests and opposes road closures, road decommissioning, moratoria on road construction, and other limitations on public access for the purpose of fulfilling the 30 x 30 program's objectives.

5. The Board recognizes and supports the State of Nebraska water rights system, including the doctrine of First-in-Time, First-in-Right Rule and other state laws and programs governing water rights and water use, and opposes any federal designation of waters and watercourses within the County that would impair or restrict water diversions and uses authorized under Nebraska law.

6. The Board maintains that the designation of public lands and national forest lands as wilderness, wilderness study areas, wildlife preserves, open space, or other conservation land to fulfill the 30 x 30 program's objectives may lawfully occur, if at all, only through the planning process mandated by the Federal Land Management and Policy Act (for public lands) or the National Forest Management Act (for national forest lands) and in compliance with the Cherry County Natural Resource and Management Plan for Federal and State Managed Lands, including public notice and an opportunity to comment, analysis and disclosure of the impacts of such land acquisitions on the well-being, health, safety, welfare, economy, and culture of Cherry County, its businesses, and its citizens, and careful coordination with Cherry County to ensure consistency with County land use plans and land management policies.

7. The Board also maintains that any non-federal lands or other rights that are acquired to fulfill the 30 x 30 program's objectives should be acquired only from willing landowners and for the payment full and fair market value for all rights and interests acquired, and not through regulatory compulsion, and only after analyzing and considering the impacts of such land acquisitions on the well-being, health, safety, welfare, economy, and culture of Cherry County, its businesses, and its citizens.

8. The Board shall send a copy of this Resolution to the Department of Interior, Department of Agriculture and all other relevant Federal and State agencies; and

CONSERVATION EASEMENTS

Conservation and Preservation Easements Subject to County Approval

All conservation and preservation easements are interests in real property and subject to County approval pursuant to Neb. Rev. Stat. §76-2112(3). Conservation land-use restrictions that fall under the statutory definition of conservation and preservation easements include both

permanent and temporary instruments that impose a limitation upon the rights of the owner or an affirmative obligation on the owner for conservation purposes (See Nebraska Department of Revenue November 18, 2021 FAQ, “Conservation Easements – New Application & Governing Body Review”).

- Conservation easements are defined at Neb. Rev. Stat. §76-2,111(1) to mean, “a right, whether or not stated in the form of an easement, restriction, covenant, or condition in any deed, will, agreement, or other instrument executed by or on behalf of the owner of an interest in real property imposing a limitation upon the rights of the owner or an affirmative obligation upon the owner appropriate to the purpose of retaining or protecting the property in its natural, scenic, or open condition, assuring its availability for agricultural, horticultural, forest, recreational, wildlife habitat, or open space use, protecting air quality, water quality, or other natural resources, or for such other conservation purpose as may qualify as a charitable contribution under the Internal Revenue Code.”

- Preservation easements are defined at Neb. Rev. Stat. §76-2,111(2) to mean “a right, whether stated in the form of an easement, restriction, covenant, or condition in any deed, will, agreement, or other instrument executed by or on behalf of the owner of an interest in real property imposing a limitation upon the rights of the owner or an affirmative obligation upon the owner appropriate to the purpose of preserving the historical, architectural, archaeological, or cultural aspects of real property, or for such other historic preservation purpose as may qualify as a charitable contribution under the Internal Revenue Code.”

Those land-use conservation instruments that are subject to County approval include, but are not limited to:

- Conservation Easements in Perpetuity
- Wetlands Reserve Easements (WRE)
- Agriculture Conservation Easement Program (ACEP)
- Healthy Forest Reserve Program (HFRP)

Process for County Review

Either the land owner or easement holder can make an application to the County. This application must include a full and complete copy of the contract, including all applicable information. The application should be made prior to the easement being executed by both parties to determine whether or not it qualifies for a special use permit from the County. A “Conservation Easement Application,” prepared by the Nebraska Department of Revenue, Property Assessment Division is available from the [Insert name of County Office]. This should be submitted to the [Planning Committee / BOC / Clerk - to be decided by County].

The Planning Committee will review and make recommendations to the Board of Commissioners (BOC) within 60 days of receiving the application. If the committee fails to

provide comments to the BOC within this time frame, the easement will be deemed approved by the planning committee and the issue should be reviewed by the BOC.

The BOC may accept and approve the planning committee's recommendation, or may return the application to the committee to address additional questions. Additionally, the BOC may make a finding contrary to the committee after carefully considering whether the application meets the criteria set forth in the Comprehensive Plan.

If the application is approved, the BOC record of approval in the minutes will be communicated to the applicant by the Clerk of the Board. Once the easement contract is executed and signed by both parties, a complete copy of the signed contract should be reviewed by the BOC. If there are no changes, the checkbox on the application will be marked approved, and signed by the Chairman of the Board of Commissioners. The application should be filed with the Real Estate Transfer Statement (Form 521) in the Office of the Register of Deeds of the County.

If the application is denied, the checkbox indicating the denial will be marked and sent to the County Assessor for information purposes only. The County Assessor will not inventory the easement on the subject property when establishing the assessed value of the property.

Criteria for Review

An easement can be denied, pursuant to Nev. Rev. Stat. §76-2112(3), if it is inconsistent with the comprehensive plan, or any national, state or local program furthering conservation or preservation, or any known proposal by a governmental body for the use of the land. The Cherry County Comprehensive Plan requires a three-prong test to determine whether an easement is inconsistent with the plan which includes the easement's purpose, duration, and taxable value.

1. *Purpose:* The easement is inconsistent with the comprehensive plan if the purpose for the easement results in any one of the following conditions:

A. Substantially limits the expansion or modification of the agriculture activities, immediately or in the future, that would otherwise have been allowed prior to the easement;

B. Prohibits agriculture use permanently in the future;

C. Prohibits the ability to mine, extract, or develop the mineral resources on the land;

D. Conflicts with any of the policies enumerated in the plan.

2. *Duration:* The easement is inconsistent with the comprehensive plan if it is for a term of more than 30 years.

3. *Taxable Value:* The easement is inconsistent with the comprehensive plan if execution of the easement reduces the taxable value of the land more than 30 percent, compared to lands without easements, for more than 15 years.

The planning committee will request the County Appraiser to review similar lands with easements in the County to determine the average tax value reduction for the planning committee's consideration. If there are not enough comparable lands with easements within the County, the County appraiser can consider easement in similar landscapes within the State.

Transfer and Renewal of Conservation Easements

All approved conservation and preservation easements transferred to another owner or renewed for an additional term beyond that considered by the County will be considered terminated until a new application is made under the new terms. The same approval process applies to transferred or renewed easements as with the original application.

COORDINATION WITH FEDERAL AND STATE AGENCIES

(*The following coordination policy adopted by Cherry County is modeled from the document entitled, "Restoring the rule of Law and Federalism by Ensuring Coordination with State and Local Governments." This document was prepared by Chaves County, New Mexico; Garfield County, Colorado; Kane County, Utah; American Stewards of Liberty; and Norman D. James, Fennemore Craig P.C., and was advanced as a Presidential Executive Order by Members of Congress in 2017.)*

Section 1: GENERAL PRINCIPLES

1. It is in the national interest to ensure that Federal departments and agencies work closely with the States and their local governments prior to making decisions and taking actions because they may have significant local and regional impacts on land and resource uses as well as State and local land use planning efforts. Local governments such as Cherry County, are important units of government charged with planning authority and the responsibility to protect the health, safety and general welfare of the citizens. Effective and meaningful coordination between Federal agencies and Cherry County is essential to maintain the proper balance between the Federal government and the States, as envisioned by the Framers of our Constitution.

2. Meaningful coordination with Cherry County is especially important when Federal departments and agencies make decisions that involve federally owned land. The Federal government owns about 207,290 acres of land in the county. Moreover, Federal agencies often regulate aspects of land and resource uses occurring on non-Federal land. Consequently, the Federal government has tremendous impacts on State and local governments and their citizens. To minimize conflicts and support economic growth, Federal agencies should closely coordinate their land use planning and other regulatory actions with the States and their local governments.

3. Various Federal laws and agency regulations require that Federal departments and agencies coordinate with State and local governments for the purpose of ensuring that the issues and concerns of State and local governments are addressed and that their land use planning and management activities are harmonized with the planning, and management activities of Federal agencies. These policies are intended to ensure that Federal departments and agencies recognize

the important rights and interests of Cherry County under our Federal system of government and engage in effective and meaningful government-to-government coordination.

Section 2: GOVERNMENT-TO-GOVERNMENT COORDINATION POLICIES

1. The Cherry County Board of Commissioners are elected representatives of the public and are authorized to carry out specific planning and governing responsibilities as expressed in their plans, policies and programs. Government-to-government coordination shall serve as the process to harmonize Federal, State and local plans, policies and programs.

2. In accordance with State law, Cherry County often must exercise their duties through an open public process that includes public meetings and participation of the governing board. In these situations, Federal agencies are required to engage in meaningful coordination with local governments through their public meeting process. All information that may be relevant to coordinating the objectives, plans, policies and programs of Federal and local governments shall be disclosed and discussed through a public meeting process, unless doing so is precluded by law.

3. Coordination with Cherry County is expected to be a continuing process. When new planning efforts or policy changes are being considered, the Federal agency shall contact Cherry County to ensure the concerns of the County are identified early and are addressed as part of the decision-making process to avoid potential conflicts.

4. Prior to public comment on a plan, policy or program being developed or modified by a Federal agency, the Federal agency shall provide Cherry County with a written review document and shall incorporate into the Federal agency's public document any determination by the County as to whether the proposed Federal action will be consistent with Cherry county's objectives, plans, policies and programs, in accordance with section 2 of this Policy.

5. Prior to issuing a final decision on a plan, policy or program being developed or modified by a Federal agency, the Federal agency shall provide Cherry County with a written document that describes the efforts that have been made to coordinate, identifies any issues or conflicts with the County plan, policies and programs, and explains how those issues and concerns have been resolved in the final decision. Federal agencies shall make all reasonable efforts to achieve consistency between Federal, State and Cherry County's, plans, policies and programs and to address and resolve issues and concerns raised by the County, unless precluded by Federal law.

Section 3: FEDERAL LAND PLANNING AND MANAGEMENT COORDINATION POLICIES

1. The Secretary of the Interior and the heads of DOI agencies that are responsible for managing Federal land, as well as the Secretary of Agriculture and the Chief of the Forest Service with respect to National Forest System land, shall coordinate their land use inventory, planning, and management activities of or for such lands with the land use planning and management plans, policies, and programs of Cherry County within which the lands are located, unless contrary to Federal law.

2. The Secretary of the Interior and the heads of DOI agencies that are responsible for managing Federal land, as well as the Secretary of Agriculture and Chief of the Forest Service with respect to National Forest System land, shall keep apprised of the land and resource use plans, policies, and programs of Cherry County and fully consider those plans, policies, and programs of the County that are relevant to the development and implementation of their own land and resource use plans, policies, and programs.

3. In all cases, the plans, policies, and programs of DOI agencies and those of the Forest Service that concern the management or use of Federal land shall be consistent with the Cherry County Comprehensive plan, policies, and programs unless a Federal law specifically requires otherwise.

4. In the event of a conflict or inconsistency between a plan, policy, or program of a DOI agency or those of the Forest Service that concerns the management or use of Federal land or resources and a plan, policy, or program of Cherry County, the Federal agency shall resolve such conflict or inconsistency through government-to-government coordination with the County in accordance with section 2 of this Policy, with the goal of eliminating such conflict or inconsistency and recognizing the rights and interests of the County to plan for and manage land and resources within its jurisdiction.

Section 4: COORDINATION ON MAJOR FEDERAL ACTIONS UNDER NEPA.

(a) The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4370e, and the rules of the Council on Environmental Quality (CEQ) implementing NEPA, 40 C.F.R. §§ 1500–1508, require Federal agencies to consider State and local governments' position on proposed Federal actions and to identify and avoid conflicts with State and local government objectives, plans, policies, and controls for the area concerned.

(b) To facilitate coordination with Cherry County during the NEPA process, Federal agencies, when considering an action that might be considered a major Federal action within the meaning of NEPA, shall do the following:

i. Provide written notification to Cherry County of the proposed Federal action, along with a schedule of anticipated events, and invite the County to coordinate on the proposed Federal action, at the beginning of the NEPA process in accordance with section 2.

ii. The Federal agency shall review the land and resource use objectives, plans, policies, and programs of Cherry County. The results of this review shall be disclosed and discussed in the draft and final environmental analysis. The review shall include:

(A) Consideration of the objectives of Cherry County, as expressed in the Comprehensive plans, policies, and programs;

(B) An assessment of the interrelated impacts of these plans, policies, and programs, including any conflicts;

(C) A determination of how the proposed Federal action should be modified to address the impacts identified; and,

(D) Where conflicts are identified, consideration of alternatives for their resolution.

iii. Facilitate and document all in-person meetings or other forms of communication, with Cherry County on the proposed Federal action, including, where necessary, open meetings that allow the full participation of the governing board in the coordination process, as required by State law.

iv. Document all relevant issues, concerns, or requests for additional information communicated by Cherry County during coordination, including any conflicts or inconsistencies between the proposed Federal action and any land and resource use plans, policies, and programs of the County.

v. Prepare a written report that discusses how the issues and concerns were addressed during the coordination process, including an explanation of how any conflicts or inconsistencies with any land and resource use plans, policies, and programs of Cherry County were resolved prior to finalizing the proposed Federal action.

vi. Provide follow-up communication with Cherry County explaining how substantive issues and concerns, including any conflicts or inconsistencies with any land and resource use plans, policies, and programs of the County, were resolved prior to finalizing the proposed Federal action.

vii. Include in the Federal agency's record of decision or equivalent NEPA document a discussion of all relevant issues and concerns communicated by Cherry County during the coordination process and how those issues and concerns were addressed prior to the final decision, including a discussion of how any conflicts or inconsistencies with a land and resource use plan, policy, or program of the County were resolved.

(c) To ensure that the coordination process is properly completed, each Federal agency shall appoint an official who is responsible for ensuring that meaningful and effective government-to-government coordination is completed in advance of the Federal agency's completion of the NEPA process and the final agency decision.

Section 5. *Definitions.* For the purposes of this Policy:

"State"' or "States"' refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

"Local government" or "local governments" refer to the duly organized and legally recognized units of local government and other political subdivisions established by a State, such as Cherry County, whose powers and duties are germane to the proposed Federal action.

“Plans, policies, and programs” means the whole or a part of a statute, law, rule, regulation, ordinance, policy, plan, resolution, or other document of a State or local government that has been adopted by the entity’s governing body, is currently in effect, and sets forth the entity’s official position.

“Agency” or “agencies” means any authority of the United States that is an “agency” under 44 U.S.C. § 3502(1), other than those agencies considered to be independent regulatory agencies under 44 U.S.C. § 3502(5).

“Coordinate” and “coordination” refer to government-to-government oral and written communications between the authorized representatives of a Federal agency and the elected officials of a State or local government or their duly authorized representatives that are intended, in good faith, to identify, consider and resolve issues and concerns of a State or local government about a proposed Federal action, including conflicts with plans, policies, and programs of a State or local government. Coordination means the responsibilities of each government entity are equal, not subordinate, and therefore must be harmonized for effective governance. “Coordinate” and “coordination” do not include participation in the NEPA process as a cooperating agency or the submission of comments to a Federal agency during a public comment period.

WELLHEAD PROTECTION AREAS (OVERLAY)

General Purpose

This land use area is identified for the protection of public water supplies. These areas are identified but will not be strictly enforced through zoning until an interlocal agreement is approved by the county and other party owning the wellhead.

These areas are considered as overlays and are in addition to the requirements and policies of the underlying area.

Typical Uses

Use allowed in the underlying area that are not considered a contamination hazard to the wellhead area and the water supply.

Potential Issues to Consider

See underlying land use category.

Buildable Lot Policies

See underlying land use category.

Development Policies to Consider

See underlying land use category.

GROWTH AND DEVELOPMENT

The Growth and Development policies are for the purpose of guiding future growth and development in Cherry County in order to insure compatible uses are located together as appropriate.

General Policies

- GD 1.1 - Future land uses in the county should carefully consider the existing natural resources of the area, including soils, rivers, and groundwater.

- GD 1.2 - Cherry County should consider limited future commercial and industrial development to identified areas along the major highways spanning the county.

- GD 1.3 - The Cherry County Land Use Plan and Zoning Regulations should be designed to expedite the review and approval process where possible.

- GD 1.4 - All livestock production should be protected from the establishment of conflicting uses such as acreages.

- GD 1.5 - Cherry County should encourage uses referred to as "Agri-tourism."

RESIDENTIAL LAND USE GOAL

Residential development should occur within the communities of the county unless a residence(s) are part of a farming and ranching operation.

Policies

- RESLU-1.1 Develop and disseminate educational information to be included in the issuance of zoning permits for land use changes in the rural areas of the County. Such information should include information for new rural residents and owners of new commercial, industrial or other non- agricultural uses to help them understand the responsibilities that comes with land ownership including weed control, fence maintenance and erosion control.

- RESLU-1.2 Ideally, new residential development within Cherry County should be focused on the communities of the county; except for those still farming in the county. Large residential subdivisions should be located next to or near the communities within Cherry County.

- RESLU-1.3 Residential developments should be separated from more intensive uses, such as agriculture, industrial, and commercial development, by the use of setbacks, buffer zones, or impact easements.

- RESLU-1-4 Encourage low to zero non-farm densities in Cattle Country areas. Develop subdivision regulations to provide a quality living environment while avoiding inefficient and expensive public infrastructure expansions.

- RESLU-1-5 Develop subdivision regulations to provide a quality living environment while avoiding inefficient and expansive public infrastructure expansions.

- RESLU-1.6 New residential developments should include a subdivision agreement, which provides for the maintenance of common areas, easements, groundwater, use of plant materials and drainage.

- RESLU-1-7 Establish zoning and subdivision design standards requiring specific criteria to new developments.

- RESLU-1-8 Any new lots or tracts created should have a minimum area of 21⁄2 acres with a maximum lot depth to width ratio of 3 to 1.

- RESLU-1-9 All proposed rural area developments should be based on reasonable expectations and no large-scale development should be approved without:

    1. The submission and approval of a layout and design concept, with provision for the staging and servicing of all phases of the development;

    2. The approval of all federal and state agencies relative in any applicable health, safety and environmental controls; and

    3. An adequate demonstration of the financial capacity (escrows, performance bonds, etc.) and responsibility of the applicants to complete the development and provide for operation and maintenance services.

    4. Should be appropriately, if not uniquely, suited to the area or site proposed for development;

    5. Should not be located in any natural hazard area, such as a floodplain (unless a sandpit development mitigating the circumstances) or area of geologic hazard, steep slope, severe drainage problems or soil limitations for building or sub- surface sewage disposal, if relevant.

    6. Should be furnished with adequate access – when possible a minimum of two entrances and exits.

- RESLU-1-10 New residential construction or relocations should not be allowed along any minimum maintenance road unless the road is upgraded to county specifications and paid for by the property owner, prior to construction.

PUBLIC LAND USE INVENTORY

Utilize, to the greatest extent possible, agricultural entry, land exchange, and or land sale for disposal of all public lands which by virtue of their size or location render them difficult and expensive to manage and do not serve a significant public need or where disposal will serve important public objectives. Authorize as needed the use of those lands, not currently authorized, for rights-of-way, leases and permits.

Policies

- PLUI-1.1 Identify and give priority consideration to requests for exchanges or purchases from private land owners with fenced federal range, isolated tracts, or irregular boundary lines.

- PLUI-1.2 Develop an inventory of all federal land management agency's administered lands which should be disposed of in the public good and make available for further application for agricultural purposes those lands currently under Land Exchange application or Patent application that are relinquished or rejected.

- PLUI-1.3 Seek legal administrative access only through purchase or exchange where significant administrative need exists and consider significant public access needs in all land tenure adjustment transactions.

- PLUI-1.4 Manage newly acquired lands in accordance with existing land use plans for adjacent land.

- PLUI-1.5 In coordination with federal agencies and state and local government planning agencies and in cooperation with interested members of the public through the NEPA process, develop and implement an Action Plan for management of hazardous materials on state and public lands.

PUBLIC LAND RECREATIONAL USE

Provide for multiple recreation uses in Cherry County including all federal land management agency's administered lands located within its boundaries, including high quality recreational opportunities and experiences at developed and undeveloped recreation sites by allowing historic uses and access while maintaining existing amenities and by providing new recreation sites for the public's enjoyment. Pursue increased public access opportunities in both motorized and non-motorized settings. Recognize that multiple recreation uses are mandated by the multiple use concept and that adequate outdoor recreation resources must be provided on all federal land management agency's administered lands and waterways.

Policies

- PLRU-1.1 Provide for continued multiple recreation uses in special and extensive recreation management areas, including those areas where state, federal and/or private funds and materials were or are considered to be used to provide for recreational facilities.

- PLRU-1.2 In compliance with applicable local, state and federal laws, identify specific areas for: additional trailhead facilities for both motorized and non-motorized access, development and/or maintenance of roads, trails, and waterways for both motorized and non -motorized access, restoration of those areas formerly available for historical recreational uses, e.g. motorized and equestrian access for recreational and competitive events, hunting and boating.

- PLRU-1.3 Provide for adequate outdoor recreation resources by revising the designated areas to decrease or eliminate limitations and restrictions where the review and evaluation shows that the limitations and restrictions are no longer appropriate and necessary.

- PLRU-1.4 Plan and establish designated equestrian, foot, and off-road vehicle trail systems and waterways for compatible recreation, commercial, and other multiple uses so that such uses can continue unabated.

- PLRU-1.5 Maintain existing facilities at developed recreational sites and upgrade, reconstruct and/or increase recreation facilities, when needs are indicated by monitoring data, at currently undeveloped sites.

- PLRU-1.6 Describe methods of minimizing or mitigating documented use conflicts or damage and define the manner in which each method is expected to accomplish minimization or mitigation.

FEDERAL AND STATE NATURAL RESOURCE MANAGEMENT PLANS

General Policies

- NR-1.1 Develop a systematic procedure to coordinate all Federal and State land use inventory, planning, and management activities with Cherry County, to assure that consideration is given to Cherry County Natural Resource Plan, and to assure that agency land use plans are consistent with the Cherry County Natural Resource Plan to the maximum extent consistent with Federal law and State Law.
-
- NR-1.2 Develop & implement Allotment Management Plans (AMP's).

- NR-1.3 Review and adjust grazing stocking levels only in accordance with developed AMPs and/or trend monitoring data based on rangeland studies in accordance with trend monitoring completed at five year intervals following implementation of AMPs.

- NR-1.4 Assure that adjudicated grazing preference held by permitters is authorized according to the governing Federal statutes and that Temporary Non Renewable use is authorized in a manner that allows for use of excess forage when available.

- NR-1.5 Develop wildfire management plans for appropriate vegetation types and include in such plans livestock grazing and hay harvesting techniques as a tool for fire fuel management related to wildfires.

- NR-1.6 Include within, fire line and site rehabilitation plans, native or exotic vegetation capable of supporting watershed function and habitat for wildlife and livestock.

- NR-1.7 Develop grazing management plans following wildfires through careful and considered consultation, coordination and cooperation with all affected permitters and affected landowners to provide for use of grazing animal management to enhance recovery.

- NR-1.8 Develop and implement a red cedar abatement and control plan, by using livestock grazing and hay harvesting techniques for all sites where invasion is adversely affecting desirable vegetation and or wildlife.

- NR-1.9 Develop plans on soils with a high or very high erosion hazard rating for multiple recreation use, road building, range improvements and vegetation manipulation.

- NR-1.10 Develop and implement a Management Plan for wildlife through consultation with appropriate wildlife agencies to prevent and minimize vegetation deterioration and soil erosion caused by wildlife.

NATURAL RESOURCE VEGETATIVE MANAGEMENT

Provide for landscape vegetation maintenance and improvement which will support restoration of suspended AUM's, allocation of continuously available temporary non-renewable use as active preference, and will support continued use and or increased use of State school endowment trust lands.

Policies

- NR-3.1 Implement rangeland improvement programs, including but not limited to; water developments, rangeland restoration, red cedar control, and weed control to achieve forage and livestock grazing as well as other multiple use resource goals.

- NR-3.2 Identify and develop off-stream water sources where such opportunities exist, in all allotments pastures with sensitive riparian areas and in all allotments where improved livestock distribution will result from such development.

- NR-3.3 Identify and implement all possible livestock distribution, forage production enhancement, and weed control programs before seeking changes in livestock use levels.

- NR-3.4 Identify and initiate reductions in stocking levels, only when monitoring data demonstrates that grazing management supported by range improvements and specialized grazing systems, are not supporting basic soils, vegetation and watershed goals.

- NR-3.5 Assure that all grazing management actions and strategies fully consider impact on property rights of inholders, adjacent private landowners and state land lessees, and the potential impacts of such actions on grazing animal production.

- NR-3.6 Where monitoring history, actual use or authorization of temporary nonrenewable use demonstrates that supplemental use is continuously available, and can or should be used to improve or protect rangelands (e.g. reduction of fuel loads to prevent recurring wildfire), initiate a process to allocate such use to permitters as active grazing preference.

- NR-3.7 Authorize use of supplemental forage during those years when climatic conditions result in such availability.

NATURAL RESOURCE HABITAT

Maintain, improve or mitigate habitat in order to sustain viable and harvestable populations of big game and upland game species as well as wetland/riparian habitat for waterfowl, furbearers and a diversity of other game and non-game species.

Policies

- NR-4.1 Consult with the Nebraska Game and Parks Department all affected land owners, lessees and permitters to develop specific wildlife population targets, harvest guidelines, depredation mitigation and guidelines for future site specific management plans affecting upland, water fowl and big game habitat.

- NR-4.2 Conduct rangeland studies, pellet group plots, breeding bird transects and other appropriate studies to monitor wildlife relationships to available habitat as well as impacts of vegetation manipulation projects on wildlife.

- NR-4.3 Accelerate the planning, approval and completion of additional water developments, rangeland treatment projects with objectives for enhancement of big game and other wildlife habitat.

- NR-4.4 Assure that management agencies provide all necessary maintenance of enclosure fences not specifically placed for improved management of livestock.

- NR-4.5 Initiate cooperative studies with willing private landowners, of wildlife depredation and related concerns regarding wildlife habitat on private land.

NATURAL RESOURCE MINERAL AND ENERGY RESOURCE GOAL

Facilitate environmentally responsible exploration and development based on a preponderance of scientific evidence for locatable mineral, oil, gas and geothermal, and common variety mineral resources on federal land management agency's administered lands opened to location under mining and other appropriate statutes.

Policies

- NR-2.1 In coordination with federal agencies and state and local government planning agencies and in cooperation with interested members of the public, develop a land management mineral classification plan to evaluate, classify and inventory the potential for locatable mineral, oil, gas and geothermal and material mineral exploration or development, in Cherry County to insure that lands shall remain open and available unless withdrawn through the NEPA process.
- NR-2.2 Develop an evaluation program which relies upon and uses all available data retrieval and interpretation methods, including, but not limited to: Reviewing existing data, geochemical and geophysical testing, geological mapping and sampling, and, where appropriate, drilling testing.
- NR-2.3 Provide for mineral material needs through negotiated sales, free use permits and community pits.

NATURAL RESOURCE FOREST MANAGEMENT

Maintain or improve conifer tree health, vegetation diversity, wildlife and watershed values through active management of conifer forests in Cherry County and prevent encroachment of Red Cedar into these communities.

Policies

- NR-6.1 Plan and implement selective timber and firewood harvesting programs where dead and/or decadent trees need to be removed to improve forest health.
- NR-6.2 Plan and implement reclamation of disturbed forest sites.
- NR-6.3 Document all timber harvest activities on all federal land management agency's administered lands and State lands.
- NR-6.4 Plan and implement grazing management strategies designed to enhance conifer forest goals.

ADDITIONAL DOCUMENTS

November 18, 2021

FAQ: Conservation Easements – New Application & Governing Body (County Board) Review

All conservation easements in Nebraska are subject to review by the Appropriate Governing Body, which is typically the County Board. The Department of Revenue, Property Assessment Division (Division) has developed a Conservation Easement Application (Application) to facilitate this review and in 2021 has presented education regarding this topic across the state.

Conservation Easement Inventory

1. When will the information be updated?

The information regarding permanent and temporary easements for government programs will be updated once a year, in October.

New conservation easements that are reported to the Division will be updated as they are received.

2. Wetlands Reserve Program (WRP) contracts are permanent, is there anything that can be done to have the easement restrictions changed or removed?

Pursuant to Neb. Rev. Stat. §76-2,115 conservation easements are perpetual unless otherwise stated in the instrument that created the easement. It is encouraged that property owners do not enter into nor sign permanent conservation easements.

3. Will parcel identification numbers (PINs) be listed on the conservation easement inventory?

PINs will be listed for lands in Natural Resource District (NRD) Easements, WRP, Conservation Reserve Enhancement Program (CREP), and Public Hunting lands. PINs are not available for lands in Conservation Reserve Program (CRP) as the Farm Service Agency (FSA) will not provide legal descriptions.

Conservation Easement Application

4. Will the Conservation Easement Application need a Form 521?

All conservation easements require a Real Estate Transfer Statement, Form 521 (see Neb. Rev. Stat. §76-214). There will now be two forms required when a conservation easement is presented for recording, the Form 521 and the approved Application. 2

5. Will the Conservation Easement Application be recorded? If so, will documentary stamp taxes be charged?

No, the Application will not be recorded in the records of the Register of Deeds and therefore, a filing fee will not be charged for the Application.

6. What documents need to be filed?

Only the instrument creating the conservation easement (contract, warranty easement deed, etc.) will be filed in the records of the Register of Deeds.

7. If the Conservation Easement Application is not recorded, how long will they be kept?

The Division will keep the electronically submitted Form 521 for 10 years. If the Application is submitted to the Division with the Form 521, it would also be electronically archived for 10 years.

8. Does the Conservation Easement Application have to be filled out for existing easements?

No, the Application will be required for any new conservation easements that are presented for recording going forward.

9. Is the Conservation Easement Application necessary for permanent easements or temporary government programs like the Conservation Reserve Program (CRP) and Conservation Reserve Enhancement Program (CREP)?

Yes, Conservation Easements are defined in Neb. Rev. Stat. §76-2,111. A conservation easement does not have to be in the form of a conservation easement deed or a specific type of instrument. The definition includes temporary government programs for conservation purposes, including, but not limited to CRP and CREP.

10. Who files the Conservation Easement Application?

Either the landowner or the easement holder can file the Application.

11. How can the landowners be held accountable for filing the Conservation Easement Application?

County Assessors will not inventory the conservation easement acres or consider the conservation easement when determining the assessed value of the property if the conservation easement is not properly approved.

County officials are encouraged to work cooperatively to educate the public regarding these requirements. 3

12. How do we know if the county board approved the easement?

The Application has a check box for the Appropriate Governing Body to check approved or denied, and a signature of the appropriate governing body member, commissioner, or chairperson is required.

13. For CRP contracts, do we need a copy of the entire contract?

Yes

14. Can a conservation easement roll over to another county/jurisdiction?

Yes, an easement can cover land in multiple counties, in this case the landowner/easement holder would file the Application with the Appropriate Governing Body in each county.

15. Who is telling the landowner that the new CRP easement has to be approved by the county board and filed?

Notifying the public of these requirements will need to be a cooperative effort. The Nebraska Department of Agriculture has been in contact with federal agencies, the Division will provide information to the Department of Agriculture and to the Nebraska Department of Natural Resources and Natural Resource Districts (NRDs) within the state.
County Register of Deeds will need to inform taxpayers or persons presenting instruments for filing if the Application is missing. County Assessors, County Board members, and Planning and Zoning Administrators are also encouraged to educate the public regarding these requirements.

16. If an easement does not have a termination or end date is it a permanent easement?

Yes. See, Neb. Rev. Stat. §76-2,115.

County Board Authority

17. What can county boards do to prevent a landowner from entering into a contract with the federal government for a temporary program?

County boards have no authority to prevent a landowner from entering into a conservation easement contract. What the county board members should do is send a contract/document (conservation easement) that is presented to them to the planning/zoning commissioner for review and comment. After 60 days, the county board should review comments received and approve/deny the conservation easement based on the criteria listed in Neb. Rev. Stat. §76-2,112. 4

18. What if the county board denies the easement?

The conservation easement document and denial will be sent to the county assessor for informational purposes only. The county assessor will not inventory the easement on the subject property when establishing the assessed value of the property.

19. Do County Boards have the right to tell landowners they cannot enter into a contract with the federal government for a temporary program? What happens if land is enrolled into the program, but the easement is not approved?

Again, the county board has no authority to tell landowners not to enter into a contract with the federal government. What the county board can do is approve or deny the Application based on the criteria listed in Neb. Rev. Stat. §76-2,112.

The County Board cannot prevent a person from entering into a contract, however, the denial of the conservation easement will prevent the instrument creating the conservation easement from being recognized by the county assessor for assessment purposes.

20. When someone sells their water rights, should it be approved by the county board first?

Yes, sales of water rights restrict the landowner's right on property and are conservation easements.

21. Can the county board actually stop the transfer of water rights? The NRD has indicated that we cannot.

The county board cannot control what happens with the application of water on specific parcels. If the county board appropriately denies the conservation easement pursuant to Neb. Rev. Stat. §76-2,112, the sale of the water right should not be recorded in the records of the Register of Deeds. Also, the county assessor will not recognize the transfer in the assessment records.

22. What statute states, a Register of Deeds can reject a filing for a conservation easement without the County Board's approval?

The Register of Deeds can file a properly completed instrument that is presented for filing. The county assessor will not recognize the conservation easement without the approval of the county board, meaning the conservation easement will not be recognized for assessment purposes. There is a 2017 Attorney General's opinion regarding the Authority of a Register of Deeds to Refuse to Record and Instrument. 5

23. The FSA, USDA, and the Federal Government do not communicate with counties, how will we know what contracts are being renewed?

The Nebraska Department of Agriculture (NDA) has asked these federal agencies to provide information directly to counties and to the NDA. County and state officials will need to work together to inform the public of these requirements.

24. Will the state be notifying the federal agencies of the new Conservation Easement Application and requirements?

The Nebraska Department of Agriculture (NDA) has asked these federal agencies to provide information directly to counties and to the NDA. County and state officials will need to work together to inform the public of these requirements.

25. How can we get the federal government to be more cooperative?

State government cannot compel the federal government to cooperate, however, several state agencies have been advocates to ensure more cooperative sharing of information. County officials are encouraged to contact members of Congress with their concerns.

26. If someone renews a CRP or CREP contract, is the county board supposed to approve the renewal?

Yes

27. Will the state notify the NRDs of this requirement?

Yes

28. Does this include utility easements, neighbor easements, etc.?

No

29. Why would a county board NOT approve a conservation easement?

Conservation easements are permanent unless stated otherwise. The county board's right to review conservation easements is to ensure that the easement is in the best interest of the public. The county board should ensure that the easement is consistent with the comprehensive plan for the area, any known proposal of a governmental body for use of the land, or any other provisions covered by Neb. Rev. Stat. §76-2,112.

30. Can a county board deny the Conservation Easement Application without cause?

No, denial of the easement must be for a reason that is allowed under Neb. Rev. Stat. §76-2,112. 6

31. Does the county board have to approve the conservation easement before it is approved by the NRCS, FSA, or any other governmental agency?

No, the county board should review the Application after it is signed by the landowner and the easement holder, but before it is presented for recording with the County Register of Deeds.

32. The 60-day turnaround time may not be enough time for review due to the need for multiple boards to provide public notice of meeting dates, what can be done about this?

The 60-day requirement is currently provided in Neb. Rev. Stat. §76-2,112, contact your state senator or the Nebraska Association of County Officials (NACO) if legislation is needed to modify this timeframe.

33. What about WRP easements prior to 1981?

Any conservation easements that were recorded prior to 1981 were recorded without review by the appropriate governing body, no action should be taken to review these easements.

34. What if the county doesn't have zoning?

Every county should have a comprehensive plan. If you have questions regarding your plan, consult with your county attorney. The Nebraska Association of County Officials (NACO) also has resources related to Planning and Zoning and may be of assistance.

35. Can the county board ask for maps showing where the easement/program acres lie?

Yes, the county board can request additional information from the taxpayer or easement holder, however the county board cannot deny the easement only because additional information has not been provided.

36. Is it up to the Register of Deeds to determine if the correct governing body signed off on the easement?

No, if a governing body receives an Application for land that they do not have jurisdiction over, they should forward it to the Appropriate Governing Body. (See Neb. Rev. Stat. §76-2,112)

37. Is it the responsibility of the Register of Deeds to ensure that the legal description for the conservation easement is correct?

No 7

Valuation

38. I heard that the assessor may be able to lower the value of the assessment if a conservation easement is reported, isn't the value still based on market value?

Yes, however, a conservation easement separates the rights associated with a parcel, with fewer rights, the property usually has a lower market value.

39. If the landowner has an easement with the Federal government is the whole parcel exempt?

No, the land continues to be taxed to the owner of the land, only the easement value is exempt.

40. Is there a notification process if a parcel is not re-enrolled in a temporary program?

No, the county assessor should track the expiration date and contact the landowner to determine whether the program will be renewed or whether the use of the land will change. If the program is renewed, the landowner should file an Application with the county clerk. If the program is not renewed, the county assessor should review the property for current land use and assess it accordingly.

41. If the county board does not approve, then the county assessor cannot change the value?

The county assessor should not recognize a conservation easement that is not approved by the board. County assessors should always value property at 75% of market value for agricultural land and 100% of market value for non-agricultural land.

42. If an easement is taxed, would you create a new parcel for an easement?

The county assessor will need to create a new record to tax the holder of the easement for the value of the easement, consult your vendor for instructions, this would be like an Improvement on Leased Land (IOLL) where a portion of the property is assessed to another entity.

43. If Joe has 140 acres, with 20 acres of easement, do I subtract the 20 acres from his land assessment?

No, conservation easements do not divide land. Joe continues to own 140 acres of land and will need to be assessed for 140 acres. However, 20 of Joe's 140 acres will likely be assessed at a reduced rate and if the easement is taxable, the value of the easement will be assessed to the easement holder.

44. Are you going to provide a course on how to value easements?

8

Yes, the Property Assessment Division (PAD) will be providing education regarding conservation easement valuation in the future. Information will be provided on the 2022 PAD Education Calendar.

45. If a landowner is getting paid rent for CRP or other programs, how can we not value it like other CRP?

Real property should always be assessed based on its market value; if the property is enrolled in CRP but was not approved or denied by the county board, the county assessor will not classify it as CRP. The county assessor should consider what the present use of the land is, if it is not actively being utilized for agricultural purposes, the land may need to be assessed at 100% of market value.

Government Programs

46. Why did WRP end?

The funding for the WRP program expired. The Agricultural Act of 2014 established funding under a new program, the Agricultural Conservation Easement Program (ACEP). This program contained provisions for Wetland Reserve Easements, which are currently offered and are comparable to the WRP program.

Comprehensive Plans

47. Do you have suggested language for the comprehensive plan?

The Property Assessment Division (Division) does not have suggested language but encourages you to review the resolutions passed by other county boards on the Nebraska Department of Agriculture's website nda.nebraska.gov/30x30, and to work cooperatively with other counties in your area.

48. Do we need to attach the resolution to the Comprehensive plan?

It is recommended that each County's Comprehensive Plan be amended to include any resolution the county board has passed regarding conservation easements.

49. What is the percent of property already in CRP?

Approximately 2% of the agricultural land in Nebraska is currently enrolled in CRP.

Zoning Administrators

50. When the planning and zoning board review the conservation easement, should it be a public hearing?

If the planning and zoning board is required to hold open meetings, then it should be a public hearing. The duty of the planning & zoning board is to review the easement and provide comments to the county board regarding the conformity of the proposed easement to the comprehensive planning for the area. (See Neb. Rev. Stat. §76-2,112)

51. Is there a fee for the Conservation Easement Application?

No

52. Is there an ability to charge for the Conservation Easement Application/review/or hearing?

No, the county board's authority to fix a schedule of fees for the issuance of permits is covered under Neb. Rev. Stat. §23-114.04 and is specifically for the issuances of permits prior to the erection, construction, reconstruction, alteration, repair, or conversion of any nonfarm building or structure within the zoned area.

FOREST SERVICE AND STATE, COUNTY, AND LOCAL GOVERNMENT COORDINATION UNDER NFMA SECTION 6

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The National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600–1614, provides the framework by which the United States Forest Service manages the National Forest System. NFMA requires the Forest Service to develop and implement land management plans for the national forests and grasslands, set standards for timber sales, and create policies to regulate timber harvesting. Section 6 of NFMA provides the requirements for land and resource management plans, and requires the Secretary of Agriculture, through the Forest Service, to "*coordinate[] with the land and resource management planning processes of State and local governments* and other Federal agencies." 16 U.S.C. § 1604(a) (emphasis added). Coordination is an important requirement that is intended to ensure that States and local governments play a significant role in the planning and management of National Forest System resources.

Unfortunately, units of State and local government often are relegated to cooperating agency status under the National Environmental Policy Act (NEPA) or to providing comments on draft documents, as if they are a special interest group. This undermines the intent of Section 6 of NFMA, which recognizes that State and local governments have important land and resource planning and management responsibilities that both affect and are affected by the management of the National Forest System. Coordination offers an opportunity to develop mutual understanding, address resource management issues on a wider scale, and ensure consistency between forest plans and local plans and polices. This is particularly important in many western States, where resource management issues significantly impact local and regional economies. We submit that the Forest Service needs to reemphasize coordination with States and local governments, as Congress intended.

A. The Obligation to Coordinate with State and Local Governments.

The coordination requirement was initially provided in the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA), Pub. L. No. 93-378, § 5, 88 Stat. 476 (1974), and strengthened the state-federal cooperation that was provided by the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528–531. The MUSYA "authorized" the Secretary of Agriculture to "cooperate with interested State and local governmental agencies." 16 U.S.C. § 530. With the RPA, Congress went beyond the discretionary authority provided in the MUSYA and expressly *required* the Secretary to "coordinate"[1] Forest Service planning with State and local planning processes. The RPA provided:

[1] The verb "coordinate" means "to put in the same order or rank" or, alternatively, "to bring into common action, movement, or condition: HARMONIZE." Merriam-Webster's Collegiate Dictionary 255 (10th ed.
2

2000). In other words, the requirement to "coordinate" requires that the Forest Service treat the land use planning and management activities of State and local governments as equal in rank and harmonize the

Forest Service's land and resource management planning activities with the activities of State and local governments.

[T]he Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

Pub. L. No. 93-378, §5(a), 88 Stat. 476 (codified at 16 U.S.C. § 1604(a)).

In its "Section-by-Section Explanation and Justification" of the RPA, the United States Senate Committee on Agriculture and Forestry described its intent:

National Forest System plans are to be coordinated with the land use planning processes of state, local and other Federal agencies to the extent that they have such plans. This will prevent overlap and wasteful duplication. It will give the states a greater opportunity to be aware of the land use planning process within the National Forest System, and it will insure more effective coordination with this planning. Land use planning within the National Forest System is already authorized, and is being carried out under the provisions of the Multiple-Use Sustained-Yield Act of 1960. It is desirable that plans on the lands within the System give *major consideration* to their impact on plans developed by state or local governments.

S. Rep. 93-686 (Feb. 18, 1974) (emphasis added); *see also* 93 Cong. Rec. S14175 (Aug. 2, 1974) (statement of Sen. Humphrey) ("It is the intent of the bill that the Secretary will be free to proceed in developing management plans, but *a duty is imposed on him to consult and give careful consideration to the impact of these plans on State and local jurisdictions*." (emphasis added)).

In 1976, the RPA was reorganized and amended by the enactment of NFMA. However, the requirement to coordinate land and resource planning and management provided in the RPA was retained, unchanged, as Section 6 of NFMA. *See generally* National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (1976).

Section 6 of NFMA is based on settled law recognizing that the States and local governments are "free to enforce [their] criminal and civil laws on federal land so long as those laws do not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co*., 480 U.S. 572 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)). Even though the public lands are owned by the United States, State and local governments have the authority to plan for and regulate activities occurring on the public lands, unless such regulation is preempted by a federal law. NFMA Section 6 explicitly recognizes and protects that authority.

NFMA Section 6 also reflects the recommendations of the Public Land Law Review Commission. In its seminal report to the President and to the Congress, *One Third of the Nation's Land*, the Commission explained that State and local units of government "represent the people and institutions most directly affected by Federal programs growing out of land use planning." 3

One Third of the Nation's Land 61 (1970).[2] The Commission felt so strongly about the need to involve State and local governments in the planning and management of the public lands that it recommended the following:

2 Available at https://archive.org/details/onethirdofnation3431unit (last visited Aug. 28, 2017). The Public Land Law Review Commission was established as an independent federal agency by an act of September 19, 1964 (78 Stat. 982). Its function was to review the federal public land laws and regulations and recommend a public land policy. For more background, see National Archives, Records of the Public Land Law Review, available at http://www.archives.gov/research/guide-fed-records/groups/409.html (last visited Aug. 28, 2017).

[3] The effectiveness of State and local government coordination continued to be a concern, as reflected in the *Critique of Forest Planning*, U.S. Forest Serv., vol. 6 (1990).

To encourage state and local government involvement in the planning process in a meaningful way, as well as to avoid conflict and assure the cooperation necessary to effective regional and local planning, the Commission believes that consideration of state and local impacts should be mandatory. To accomplish this, *Federal agencies should be required to submit their plans to state or local government agencies*. . . .

The coordination [between federal agencies and State and local governments] which will be required if the Commission's recommendations are adopted is so essential to effective public land use planning that it should be mandatory. . . . *The Commission recommends, therefore, that Congress provide by statute that Federal action programs may be invalidated by court orders upon adequate proof that procedural requirements for planning coordination have not been observed.*

Id. at 63 (emphasis in original).[3]

B. The Forest Service's Planning Rules.

In order to implement NFMA's mandate to develop land and resource management plans, the Forest Service has promulgated a series of planning rules. The first generation of management plans issued pursuant to NFMA were issued under the 1982 Planning Rule, codified at 36 C.F.R. part 219 (1982). In accordance with NFMA Section 6, the 1982 Planning Rule contained detailed requirements for coordination with State and local governments, and provided:

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes.

(b) The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the State Clearinghouse for circulation among State agencies as specified in OMB Circular A-95. The same notice shall be mailed to all Tribal or Alaska Native leaders whose tribal lands or treaty rights are expected to be impacted and to the heads of units of government for the counties involved. These notices shall 4

be issued simultaneously with the publication of the notice of intent to prepare an environmental impact statement required by NEPA procedures (40 CFR 1501.7).
(c) The responsible line officer shall review the planning and land use policies of other Federal agencies, State and local governments, and Indian tribes. The results of this review shall be displayed in the environmental impact statement for the plan (40 CFR 1502.16(c), 1506.2). The review shall include—
(c)(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies;
(c)(2) An assessment of the interrelated impacts of these plans and policies;
(c)(3) A determination of how each Forest Service plan should deal with the impacts identified; and,
(c)(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.
(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.
(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.
(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.
36 C.F.R. § 219.7 (1982).
Beginning in 1997, the Forest Service began efforts to revise the 1982 Planning Rule, culminating in revised planning rules being published in 2000, 2005, and 2008. Each of these planning rules was challenged, and federal courts found each one to be legally insufficient on various grounds. Consequently, federal courts vacated each of the 2000, 2005, and 2008 planning 5

rules, resulting in the 1982 Planning Rule remaining operative. Although the 2000, 2005, and 2008 planning rules were set aside, their treatment of State and local government coordination is instructive in reviewing Forest Service policy.

Beginning with the 2000 Planning Rule, the Forest Service began eliminating much of the detail provided in Section 219.7 of the 1982 Planning Rule. *Compare* 36 C.F.R. § 219.7 (1982) *with* 36 C.F.R. § 219.14 (2000). Despite the lack of detail, the 2000 Planning Rule acknowledged the requirement to provide "early and frequent opportunities for State and local governments to: (a) Participate in the planning process, including the identification of issues; and (b) Contribute to the streamlined coordination of resource management plans or programs." 36 C.F.R. § 219.14 (2000). Importantly, neither the 2000 Planning Rule nor any of its supporting documents expressed any intention to depart from the coordination requirements in the 1982 Planning Rule. *See* 65 Fed. Reg. 67,514, 67,536 (Nov. 9, 2000) ("[T]he Department has strengthened section 219.14 of the final rule to provide 'early and frequent' opportunities for state and local governments to be actively involved in the planning process. In addition, the Department has also included language in section 219.14(b) of the final rule that acknowledges the need to coordinate resource management plans and programs with state and local governments. The final rule directs the continued building and fostering of these relationships."). Instead, the lack of detail was the result of the Forest Service's efforts to streamline its regulations and make them more readable, and not a change in agency policy to weaken NFMA's coordination requirement.

The 2005 Planning Rule restructured and rephrased the NFMA coordination requirement, providing:

The Responsible Official must provide opportunities for the coordination of Forest Service planning efforts undertaken in accordance with this subpart with those of other resource management agencies. The Responsible Official also must meet with and provide early opportunities for other government agencies to be involved, collaborate, and participate in the planning for National Forest System lands. The Responsible Official should seek assistance, where appropriate, from other State and local governments, Federal agencies, and scientific and academic institutions to help address management issues or opportunities.

36 C.F.R. § 219.9(a)(2) (2005). Again, neither the 2005 Planning Rule nor its supporting rulemaking documents expressed any intent to depart from the guidance provided in the 1982 Planning Rule. *See* 70 Fed. Reg. 1023 (Jan. 5, 2005). The 2008 Planning Rule continued the language of the 2005 Planning Rule with no significant commentary regarding the NFMA coordination requirement. 36 C.F.R. § 219.9 (2008); 73 Fed. Reg. 21,468 (Apr. 21, 2008).

After its attempts to revise the 1982 Planning Rule in 2000, 2005, and 2008, the Forest Service issued its 2012 Planning Rule. Although the 2012 Planning Rule was challenged in federal court, the court dismissed the challenge based upon standing grounds. *Federal Forest Resource Coalition v. Vilsack*, 100 F. Supp. 3d 21, 47 (D.D.C. 2015) ("Plaintiffs have failed to show that the 2012 Planning Rule threatens an injury-in-fact that is imminent, or particularized."). 6

Accordingly, the 2012 Planning Rule is the current operative rule, and, after 30 years, the 1982 Planning Rule is no longer in effect.[4]

[4] Provisions to the 2012 Planning Rule not relevant to this discussion were amended in 2016. 81 Fed. Reg. 90,723 (Dec. 15, 2016). Because those amendments did not affect the NFMA coordination requirement, those amendments are not discussed here.

Insofar as it pertains to the requirement to coordinate Forest Service management with State and local governments, the 2012 Planning Rule provides:

Coordination with other public planning efforts. (1) The responsible official shall coordinate land management planning with the equivalent and related planning efforts of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and State and local governments.

(2) For plan development or revision, the responsible official shall review the planning and land use policies of federally recognized Indian Tribes (43 U.S.C. 1712(b)), Alaska Native Corporations, other Federal agencies, and State and local governments, where relevant to the plan area. The results of this review shall be displayed in the environmental impact statement (EIS) for the plan (40 CFR 1502.16(c), 1506.2). The review shall include consideration of:

(i) The objectives of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and State and local governments, as expressed in their plans and policies;

(ii) The compatibility and interrelated impacts of these plans and policies;

(iii) Opportunities for the plan to address the impacts identified or contribute to joint objectives; and

(iv) Opportunities to resolve or reduce conflicts, within the context of developing the plan's desired conditions or objectives.

(3) Nothing in this section should be read to indicate that the responsible official will seek to direct or control management of lands outside of the plan area, nor will the responsible official conform management to meet non-Forest Service objectives or policies.

36 C.F.R. § 219.4(b). Accordingly, the 2012 Planning Rule returns much of the detail present in the 1982 Planning Rule. *Compare* 36 C.F.R. § 219.7 (1982) *with* 36 C.F.R. § 219.4 (2012); *see also* 77 Fed. Reg. 21,162, 21,196–21,197 (Apr. 9, 2012) ("Many of the coordination requirements of the 1982 planning rule have been carried forward into § 219.4(b)(1) and (2) of the final rule.").

Further, the 2012 Planning Rule details two distinct concepts: coordination under NFMA's Section 6 mandate (36 C.F.R. § 219.4(b)), and cooperating agency status under NEPA (*id.* § 7

219.4(a)). This conclusion is supported by the environmental impact statement prepared in support of the 2012 Planning Rule, which stated:

Section 6 of NFMA requires land management planning to be "coordinated with the land and resource management planning processes of State and local governments and other Federal agencies" (16 U.S.C. 1604 (a)). State, local, or tribal governments may request, or be invited, to be a cooperating agency [under NEPA] *as well*.

Final Programmatic Environmental Impact Statement, National Forest System Land Management Planning 262 (Jan. 2012) (emphasis added). This statement reflects the fact that NEPA cooperating agency status is in addition to, and not in substitution of, NFMA Section 6 coordination. *See also* Forest Service Handbook 1909.12 § 44.2 (Jan. 30, 2015) (explaining that NFMA coordination is distinct from NEPA cooperating agency status).

C. Section 6 Coordination Is Required at All Stages of Land Management.

Some Forest Service field and regional offices have asserted that NFMA's coordination requirement is only triggered during forest plan revisions, and not during the implementation of a forest plan (*i.e.*, not during that approval process of individual projects taken pursuant to a forest plan). This view is misplaced, however.

The Forest Service's three-phased planning framework of assessment, plan development, amendment and revision, and monitoring is fully contemplated in the coordination requirement. Section 6 of NFMA unambiguously requires an on-going coordination effort between the Forest Service and State and local governments. 16 U.S.C. § 1604(a) ("the Secretary of Agriculture shall *develop*, *maintain*, and, as appropriate, *revise* land and resource management plans . . . coordinated with the land and resource management planning processes of State and local governments" (emphasis added)). Maintenance, *i.e.*, monitoring,[5] of a forest plan expressly requires coordination. *Id.* Accordingly, NFMA Section 6 coordination is not a one-time effort, it is intended to be an ongoing relationship between the Forest Service and State and local governments. *See* 36 C.F.R. § 219.7(f) (1982) ("A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest . . . under the jurisdiction of local governments.").

[5] 36 C.F.R. § 219.12 requires the development of monitoring programs to "enable the responsible office to determine if a change in plan components or other plan content that guide management of resources on the plan area may be needed."

Additionally, implementation of individual projects pursued under a forest plan falls squarely into the *maintenance* of a forest plan. "Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." *Id.* § 1604(i). The Forest Service's review of a project proposal for consistency with a forest plan is not one-way. If, during that review, it becomes apparent that an amendment to the forest plan is necessary, a plan amendment is prepared concurrently with the analysis and approval of the proposed project. This necessarily entails coordination. 8

Moreover, principles of statutory construction require effect to be given to each word or phrase in a statute. *See United States v. Menasche*, 348 U.S. 528, 538–539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation omitted)). Thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected. If the Forest Service's interpretation were correct, and coordination was only required during plan development or revision, the word "maintain" would be rendered ineffective. This result is strongly disfavored, and must be rejected. Therefore, canons of construction support the plain reading of the statute, *i.e.*, that coordination is an ongoing duty and must be conducted at all stages of forest plan development, implementation, monitoring, and revision.

D. While Consistency with State and Local Government Plans and Policies Is Not Always Possible, Consistency Is the Goal of Coordination.

Although Section 6 of NFMA does not define "coordination," forest service planning rules and the Federal Land Policy and Management Act (FLPMA) are instructive. Though not binding on the Forest Service, FLPMA, which was enacted on October 21, 1976—one day before NFMA was enacted—contains a detailed coordination requirement, including plan consistency review. *See* 43 U.S.C. § 1712(c)(9). FLPMA requires that BLM land use plans be "consistent with State and local plans to the maximum extent [BLM] finds consistent with Federal law and the purposes of this Act." *Id.* In doing so, BLM is to consider State and local land management plans and policies, assist in resolving any inconsistencies between BLM and State or local land management plans and policies, and document the results of the consistency review. *Id.* Consistency between BLM, State, and local land use plans and policies is the overarching goal, although FLPMA acknowledges that consistency may not be possible in all circumstances and provides a mechanism through which federal, State, and local land managers are to work together to resolve, to the maximum extent possible, these inconsistencies.

The 1982 Planning Rule contained detailed instructions regarding coordination that are very similar to the principles of the consistency review mandated by FLPMA. Specifically, the 1982 Planning Rule required that the Forest Service consider the objectives of State and local governments, assess the interrelated impacts of State and local plans and policies, determine if there was conflict with any State and local plans and policies, and work with State and local officials to resolve such conflicts. 36 C.F.R. § 219.7(c) (1982). This consistency review was to be documented in the environmental impact statement prepared in association with the forest planning process. *Id.* Notably, this planning rule was developed shortly after NFMA was enacted, and remained in effect for 30 years.

The 2012 Planning Rule contains similar guidance regarding coordination. It requires the Forest Service to review the planning and land use policies of State and local governments, assess the compatibility and interrelated impacts of State and local land use plans and policies, and work to resolve or reduce conflicts between the forest plan and State and local government plans and policies. 36 C.F.R. § 219.4(b) (2012). Further, this compatibility review is to be documented in the environmental impact statement. *Id.*

The Forest Service has asserted that any "consistency review" would violate the Property and Supremacy Clauses of the United States Constitution by requiring the Forest Service to yield land management authority to the State and local governments. This contention is erroneous, 9

however. First, the Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. Thus, the Property Clause entrusts regulation of federal land to *Congress*, not to executive branch agencies. Pursuant to this authority, Congress has enacted the RFA and NFMA, which direct how the national forests are to be managed, including coordination with State and local governments.

The Supremacy Clause, U.S. Const., Art. VI, cl. 2, provides that federal laws generally takes precedence over State laws. The obligation to coordinate, including consideration of State and local land use plans and policies, is derived from federal law, namely NFMA Section 6. There will be times when a federal law preempts a State or local land use policy. But the Forest Service has been granted discretion in the development and implementation of its forest plans, and is required by NFMA Section 6 to exercise that discretion to minimize conflicts with State and local plans and policies, just as the BLM is required by FLPMA to minimize such conflicts in the development and implementation of that agency's land use plans. This obligation is consistent with the Supremacy Clause because it is based on federal law.

In short, NFMA Section 6 acknowledges the government-to-government relationship between federal, State, and local governments, and seeks to achieve, to the maximum extent possible, consistency with land use plans at all levels. It does not require the Forest Service to always align its forest plans with State and local plans and policies. Where consistency is not possible, Section 6 and the 2012 Planning Rule provide a process by which the public can assess any unresolved conflicts. This is the "major consideration" that was originally mandated in the RPA and carried forward into NFMA and FLPMA. *See* S. Rep. 93-686 (Feb. 18, 1974).

E. Cooperating Agency Status Is Not a Substitute for Effective Coordination.

Despite the Forest Service's recognition that coordination is a distinct and separate obligation under NFMA Section 6, Forest Service officials sometimes refuse to acknowledge their obligation to coordinate. Instead, in the face of agency guidance to the contrary, the Forest Service has asserted that cooperating agency status under NEPA satisfies the agency's coordination obligations under NFMA. This is erroneous.

NEPA, when applicable, requires federal agencies to complete a particular process prior to acting, including the preparation of an environmental impact statement prior to undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). However, NEPA does not impose any substantive requirements on federal agencies or override the laws that the agencies administer. The Supreme Court has explained:

[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action. 10

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989) (citations and footnote omitted); *see also Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (*en banc*) (NEPA "does not impose any substantive requirements on federal agencies—it exists to ensure a process." (quoting *Inland Empire Pub. Lands Council v. U.S. Forest Serv*., 88 F.3d 754, 758 (9th Cir. 1996)). Despite NEPA's unique role in agency decision-making, the Forest Service has used the NEPA process as a way to avoid complying with its obligations under NFMA Section 6. This is accomplished by inviting State and local governments to participate in the NEPA process as cooperating agencies. Under NEPA, cooperating agencies work under the direction of the lead agency—here, the Forest Service—to satisfy the procedural requirements imposed by NEPA. *See, e.g.*, 40 C.F.R. § 1501.6(b) (describing the duties of cooperating agencies); James Connaughton, Council on Environmental Quality, Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002) (the Connaughton Memorandum) (discussing factors to consider in determining whether State or local governments are capable of participating in the NEPA process as cooperating agencies and the circumstances under which they may be terminated). The Connaughton Memorandum cautions that "cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage in other governmental entity in a consultation or *coordination* process . . . ." *Id*. at p. 1, n. 1(emphasis added).
The Connaughton Memorandum also contains a list of factors to be used in determining whether to invite, decline or end cooperating agency status. These factors include:

- • Does the cooperating agency understand what cooperating agency status means and can it legally enter into an agreement to be a cooperating agency?

- • Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?

- • Can the cooperating agency provide resources to support scheduling and critical milestones?

- • Does the cooperating agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses?

- • Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

Thus, it is apparent that the role and duties of a cooperating agency differ significantly from, and cannot be used as substitute for, the coordination requirements imposed by NFMA Section 6. Moreover, the Forest Service's use of cooperating agency status as a substitute for meaningful coordination under NFMA Section 6 places an unfair burden on local governments. Some local governments may be unable to fulfill the obligations of a cooperating agency and 11

decline to become a cooperating agency. In that case, the Forest Service would be excused from coordinating, which would violate NFMA Section 6. NFMA Section 6 does not require State and local governments to become a cooperating agency before the Forest Service's obligations to coordinate are triggered.

For these reasons, it is improper to combine coordination under NFMA Section 6 with the NEPA process. Certainly, State and local governments that wish to participate in the NEPA process as cooperating agencies should be invited to do so in accordance with the Council on Environmental Quality's guidance and the Forest Service's regulations. But participation in the NEPA process as a cooperating agency is not a substitute for meaningful government-to-government coordination under NFMA Section 6. Regardless of whether a State or local government elects to participate in the NEPA process as a cooperating agency, the Forest Service must independently satisfy its obligation to coordinate with that unit of government in accordance with NFMA.

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COORDINATION AND PLAN CONSISTENCY REVIEW UNDER FLPMA SECTION 202(C)(9)

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The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 – 1787, requires that the Interior Secretary "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law." 43 U.S.C. § 1732(a). The requirements for the development of land use plans[1] are set forth in FLPMA Section 202, 43 U.S.C. § 1712. Subsection (c)(9) of this section imposes coordination and consistency requirements on the Interior Secretary. Specifically, this provision states:

[1] In its regulations, the Bureau of Land Management refers to "resource management plans" rather than "land use plans." We use the term "land use plans" to be consistent with the terminology used in FLPMA, unless quoting a BLM regulation or other agency document.

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, . . . and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, [1] to the extent he finds practical, keep apprised of State, local, and tribal land use plans; [2] assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; [3] assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and [4] shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act. 2

43 U.S.C. § 1712(c)(9) (reference to "statewide outdoor recreation plans" removed; numbering added for reference purposes).

This provision is based on settled law recognizing that the States and local governments are "free to enforce [their] criminal and civil laws on federal land so long as those laws do not conflict with federal law." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)); *see also People ex rel. Deukmejian v. Cty. of Mendocino*, 36 Cal. 3d 476, 491, 683 P.2d 1150, 1160 (1984) (holding that county regulation of aerial spraying of pesticides was not preempted by federal law). Even though the public lands are owned by the United States, States and local governments have the authority to plan for and regulate activities occurring on the public lands, unless such regulation is preempted by a federal law. FLPMA Section 202(c)(9) explicitly recognizes and protects that authority.

FLPMA Section 202(c)(9) also is based on the recommendations of the Public Land Law Review Commission. In its seminal report to the President and to the Congress, *One Third of the Nation's Land,* which provided the underpinning for much of FLPMA, the Commission explained that State and local units of government "represent the people and institutions most directly affected by Federal programs growing out of land use planning." *One Third of the Nation's Land* 61 (1970).[2] The Commission felt so strongly about the need to involve State and local governments in the planning and management of the public lands that it recommended the following:

[2] Available at https://archive.org/details/onethirdofnation3431unit (last visited Feb. 3, 2017). The Public Land Law Review Commission was established as an independent federal agency by an act of September 19, 1964 (78 Stat. 982). Its function was to review the federal public land laws and regulations and recommend a public land policy. For more background, see National Archives, Records of the Public Land Law Review, available at http://www.archives.gov/research/guide-fed-records/groups/409.html (last visited Feb. 3, 2017.

To encourage state and local government involvement in the planning process in a meaningful way, as well as to avoid conflict and assure the cooperation necessary to effective regional and local planning, the Commission believes that consideration of state and local impacts should be mandatory. To accomplish this, *Federal agencies should be required to submit their plans to state or local government agencies*. . . .

The coordination [between federal agencies and State and local governments] which will be required if the Commission's recommendations are adopted is so essential to effective public land use planning that it should be mandatory. . . . *The Commission recommends, therefore, that Congress provide by statute that Federal action programs may be invalidated by court orders upon adequate proof that procedural requirements for planning coordination have not been observed.*

Id. at 63 (italics in original). 3

The report of the House Interior and Insular Affairs Committee accompanying the House bill (which provided much of the text of FLPMA) similarly stated:

The underlying mission for the public lands is the multiple use of resources on a sustained-yield basis. Corollary to this is the selective transfer of public lands to other ownership where the public interest will be served thereby. The proper multiple use mix of retained public lands is to be achieved by comprehensive land use planning, *coordinated with State and local planning*.

H.R. Rep. No. 94-1163, at 2 (1976), *reprinted* in 1976 U.S.C.C.A.N. 6175, 6176 (emphasis added).

Unfortunately, the Interior Department agency chiefly responsible for complying with the requirements of FLPMA, the Bureau of Land Management (BLM), has largely ignored FLPMA Section 202(c)(9), including the requirement that federal land use planning be closely coordinated with state and local land use planning. Instead, the BLM has been shifting authority for land use planning and management from its field offices to Washington D.C. This trend was accelerated by two recent Interior Department programs, the Climate Change Adaptation Program and the Landscape-scale Mitigation Program. Both of these programs were created by administrative fiat through a series of executive and secretarial orders, manual revisions, and agency policy documents, without compliance with the Administrative Procedure Act.[3] These programs were to be implemented by means of new BLM planning rules and through new "mitigation policies" issued by another Interior Department agency, the Fish and Wildlife Service.[4]

[3] *See*, *e.g.*, Secretary of the Interior Order No. 3289 (Sep. 14, 2009) (amended Feb. 22, 2010); U.S. Dept. of Interior, *Climate Change Adaption Plan* (2014); Secretary of the Interior Order No. 3330 (Oct. 13, 2013); U.S. Dept. of Interior, *Landscape-Scale Mitigation Policy*, 600 DM 6 (Oct. 23, 2015).

[4] Bureau of Land Management, *Resource Management Planning*, 81 Fed. Reg. 89580 (Dec. 12, 2016); U.S. Fish and Wildlife Service, *Endangered Species Act Compensatory Mitigation Policy*, 81 Fed. Reg. 95316 (Dec. 27, 2016); U.S. Fish and Wildlife Service, *Mitigation Policy*, 81 Fed. Reg. 83440 (Nov. 21, 2016).

Needless to say, the development of these national programs, without any opportunity for input from public land and resource users or, for that matter, authorization from Congress, led to widespread mistrust of the Interior Department and its agencies, particularly in western states that are dependent on access to and use of the public lands. Planning for and management of the public lands had shifted to Washington, and was being controlled by national programs that the States and their local governments had no role in developing, despite the clear direction provided by FLPMA Section 202(c)(9).

The balance of this paper will discuss in detail the requirements imposed by FLPMA Section 202(c)(9). It will also address the BLM's improper attempt to use the process mandated by the National Environmental Policy Act to avoid meaningful coordination with the States and their local governments and ensuring that the BLM's planning and management of the public lands are consistent with State and local planning efforts. 4

A. An Analysis of FLPMA Section 202(c)(9).

On its face, FLPMA Section 202(c)(9) imposes a number of different and overlapping requirements and obligations on the Interior Secretary and, therefore, on the BLM with respect to coordinating with State and local governments and maintaining consistency with the land use plans, programs and policies of State and local governments. These requirements are discussed below.

1. 43 U.S.C. § 1712(c)(9) (first sentence)—Duty to Coordinate.

First, the BLM must "coordinate" the agency's "land use inventory, planning, and management activities" with "the land use planning and management programs of the States and local governments within which the lands are located." 43 U.S.C. § 1712(c)(9) (first sentence). In coordinating, the BLM must consider the "policies of approved State and tribal land resource management programs." *Id.* The verb "coordinate" means "to put in the same order or rank" or, alternatively, "to bring into common action, movement, or condition: HARMONIZE." Merriam-Webster's Collegiate Dictionary 255 (10th ed. 2000). In other words, the requirement to "coordinate" requires that the BLM treat the land use planning and management activities of State and local governments as equal in rank and *harmonize* the BLM's land use inventory, planning, and management activities with the activities of State and local governments "to the extent consistent with the laws governing the administration of the public lands."

The plain language of FLPMA Section 202(c)(9) indicates that the requirement to coordinate is significantly broader than simply coordinating BLM and local land use plans. Instead, coordination should occur with respect to all BLM "land use inventory, planning, and management activities" and all State and local government "land use planning and management programs." *Id.* Thus, coordination is required, for example, in connection with assessing the resource, environmental, ecological, social, and economic conditions prior to developing land use plans and other land planning and management guidance; developing and identifying the policies, guidance, strategies and plans for consideration in developing land use plans; formulating land use and resource management alternatives; and developing management measures that are used to implement land use plans following their adoption.

As noted, BLM inventory, planning, and management activities do not have to be coordinated with State and local governments if doing so is inconsistent with "*the laws governing the administration of the public lands*." *Id.* (emphasis added). Thus, on its face, this limitation applies when a federal *law* governing public land management, such as FLPMA, conflicts with a State or local government land use planning and management program. Federal laws that do not address the "administration of the public lands" are irrelevant to this limitation, however. Likewise, agency regulations, directives, policies, and guidance documents are irrelevant because they are not laws. Consequently, the existence of Secretarial orders, regulations, policies, directives, and similar agency guidance documents do not limit the BLM's obligation to coordinate, with the objective of resolving inconsistencies. Likewise, the existence of Secretarial and agency policies and directives do not serve as a basis to avoid ensuring consistency. 5

Finally, agency regulations, directives, policies, and guidance documents, such as BLM rules governing land and resource planning and management, Secretarial orders and directives, the BLM Land Use Planning Handbook, the Interior Departmental Manual, and the Interior Department's Climate Change Adaptation Plan and Landscape-scale Mitigation Program, are themselves subject to coordination under FLPMA Section 202(c)(9) to the extent such documents provide substantive direction for land use planning and management.

2. 43 U.S.C. § 1712(c)(9) (second sentence)—Implementation Requirements.

Second, "in implementing this directive," i.e., the requirement to coordinate, the BLM must do four things:

1. "to the extent [the Secretary] finds practical, keep apprised of State, local, and tribal land use plans;"
2. "assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands;"
3. "assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and"
4. "provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands."

43 U.S.C. § 1712(c)(9) (second sentence).

The first and third requirements are qualified by the phrase "to the extent [the Secretary] finds practical." The word "practical" has several meanings, but the one that makes sense in this context is "capable of being put to use or account: USEFUL." Merriam-Webster's Collegiate Dictionary 912 (10th ed.). In most cases, it will be useful to the BLM to perform requirements 1 and 3 because each requirement must be satisfied to properly complete the coordination process. Moreover, the performance of each requirement is necessary for the BLM to fulfill its obligation to ensure that BLM land use plans are "consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act," which appears in the final sentence of FLPMA Section 202(c)(9).

Requirement 2—giving consideration to State, local, and tribal plans that are germane in the development of land use plans for public lands—logically follows from the basic obligation to coordinate as well as the consistency requirement in the final sentence of FLPMA Section 202(c)(9). Obviously, meaningful coordination requires that the BLM carefully consider State and local land use plans that pertain to public land uses or that may be impaired by a BLM land use plan containing conflicting resource use designations or implementation strategies. Consequently, this requirement is not subject to any limitation. 6

Additionally, Requirement 4—requiring that the BLM provide "meaningful public involvement" for State and local government officials "in the development of land use programs, land use regulations, and land use decisions for public lands"—is not qualified by the phrase "to the extent he finds practical." Requirement 4 also applies broadly to a range of BLM actions that affect the planning and management of public lands. Thus, State and local governments must be provided "meaningful public involvement . . . in the development of land use programs, land use regulations, and land use decisions for public lands." 43 U.S.C. § 1712(c)(9) (second sentence). Again, this includes agency directives, policies, and guidance documents (e.g., Interior Department and BLM handbooks and manuals), which, as discussed above, also are subject to coordination. Coordination must take place before these documents are used in connection with land use planning and management, including the development of land use plans.

3. 43 U.S.C. § 1712(c)(9) (third sentence)—Advice to the Secretary.

The next sentence of FLPMA Section 202(c)(9) specifically authorizes "such officials," i.e., "State and local government officials, both elected and appointed," to advise the Interior Secretary (and BLM as the Secretary's delegated authority) on the "development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State." This sentence requires government-to-government coordination between State and local officials and the Secretary (or the BLM Director) on land use plans, guidelines, and regulations affecting the management and use of the public lands, thereby ensuring that the concerns and recommendations of State and local governments are recognized and addressed. This process allows the BLM to coordinate its own planning and management activities and maintain consistency with State and local governments to the greatest extent possible, including the BLM's development of rules, policies, and guidelines that apply when land use plans are developed and implemented.

4. 43 U.S.C. § 1712(c)(9) (fourth sentence)—Consistency with State and Local Plans.

The fourth and concluding sentence of FLPMA Section 202(c)(9) is extremely important. This sentence mandates that BLM land use plans "be consistent with State and local plans *to the maximum extent* [the Secretary] finds consistent with Federal law and the purposes of this Act" (emphasis added). This obligation is called the "consistency requirement" and is intended to ensure that BLM and local land use plans are consistent, *unless* a federal law or the purposes of FLPMA itself conflict with and, therefore, preempt the provision in the local land use plan.

The consistency requirement is related to and follows logically from the three previous sentences of this provision. As discussed, the BLM must coordinate its land use inventory, planning, and management activities with State and local governments and consider "the policies of approved State and tribal land resource management programs" (first sentence); keep apprised of State and local land use plans, assure that these plans are considered in the development of land use plans for public lands, and affirmatively assist in resolving inconsistencies between "Federal and non-Federal Government plans" to the extent practical (second sentence); and receive advice from State and local governments on "the development and revision of land use plans." 7

Based on this coordination, the BLM must identify and consider potential conflicts with State and local government planning documents, and ensure that these conflicts are avoided or resolved during the planning process to the maximum extent practical. This means that coordination should begin early in the land planning process so that potential conflicts and inconsistencies can be immediately identified and taken into account as the land use plan is developed. This ensures that consistency with State and local planning is maintained or, at worst, conflicts are minimized through coordination.

B. The Improper Use of Cooperating Agency Status to Avoid Coordination.

One of the most frustrating aspects of BLM land use planning is the BLM's refusal to acknowledge its obligations under FLPMA Section 202(c)(9). Instead, the BLM has attempted to claim that cooperating agency status under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332, satisfies the agency's coordination and plan consistency review obligations. The BLM's new Resource Management Planning Rules, adopted in December 2016, but rescinded by Congress under the Congressional Review Act, would have exacerbated this serious problem.

NEPA, when applicable, requires federal agencies to complete a particular process prior to acting, including the preparation of an environmental impact statement prior to undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). However, NEPA does not impose any substantive requirements on federal agencies or override the laws that the agencies administer. The Supreme Court has explained:

[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989) (citations and footnote omitted); *see also Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (en banc) (NEPA "does not impose any substantive requirements on federal agencies—it exists to ensure a process." (quoting *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996)).

The BLM, however, has been using the NEPA process as a way to avoid complying with its obligations under FLPMA Section 202(c)(9). This is accomplished by inviting state and local governments to participate in the NEPA process as cooperating agencies. Under NEPA, cooperating agencies work under the direction of the lead agency—here, the BLM—to satisfy the procedural requirements imposed by NEPA. *See*, *e.g.*, 40 C.F.R. § 1501.6(b) (describing the duties of cooperating agencies); James Connaughton, Council on Environmental Quality, Memorandum for the Heads of Federal Agencies: Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (Jan. 30, 2002) (the 8

Connaughton Memorandum) (discussing factors to consider in determining whether State or local governments are capable of participating in the NEPA process as cooperating agencies and the circumstances under which they may be terminated).[5] The Connaughton Memorandum cautions that "cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage in other governmental entity in a consultation or *coordination* process . . . ." *Id*. at p. 1, n. 1(emphasis added).

5 Available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf (visited April 5, 2016).

The Connaughton Memorandum also contains a list of factors to be used in determining whether to invite, decline or end cooperating agency status. These factors include:

- • Does the cooperating agency understand what cooperating agency status means and can it legally enter into an agreement to be a cooperating agency?

- • Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?

- • Can the cooperating agency provide resources to support scheduling and critical milestones?

- • Does the cooperating agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses?

- • Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

Thus, it is apparent that the role and duties of a cooperating agency differ significantly from, and cannot be used as substitute for, the requirements for coordination and plan consistency review imposed by FLPMA Section 202(c)(9).

The Interior Secretary has adopted regulations, codified at 43 C.F.R. part 46, to implement NEPA's procedural requirements as well as the Council on Environmental Quality's NEPA regulations. The Secretary's regulations also address the selection of cooperating agencies and their role in the NEPA process, and are generally consistent with Chairman Connaughton's Memorandum. *See* 43 C.F.R. §§ 46.225, 46.230. Among other things, these regulations require that the BLM "work with cooperating agencies to develop and adopt a memorandum of understanding that includes the respective roles, assignment of issues, schedules, and staff commitments so that the NEPA process remains on track and within the time schedule." 43 C.F.R. § 46.225(d).

Moreover, in the case of State and local governments, the memorandum of understanding 9

"must include a commitment to maintain the confidentiality of documents and deliberations" prior to the release of any NEPA document. *Id*. This requirement is problematic. Many local governments cannot effectively coordinate with the BLM if their discussions and any documents exchanged are subject to a strict confidentiality requirement. Elected officials involved in coordination meetings (e.g., county commissioners and supervisors) are required by open meeting laws and similar requirements to coordinate in an open and transparent fashion, including conducting meetings that are open to the public. Furthermore, most States and local governments are subject to public records acts which require disclosure of documents.

The Secretary's regulations also provide that "throughout the development of an environmental document" the BLM will "collaborate, to the fullest extent possible, with all cooperating agencies concerning those issues relating to their jurisdiction and special expertise." 43 C.F.R. § 46.230. Section 46.230 goes on to identify activities that, with the BLM's agreement, cooperating agencies may "help to do." *Id.* These activities are intended to assist the BLM in fulfilling its procedural obligations under NEPA, rather than coordinating on a government-to-government basis on BLM land use inventory, planning, and management activities.

Finally, the BLM's use of cooperating agency status as a substitute for meaningful coordination under FLPMA Section 202(c)(9) places an unfair burden on local governments. Some local governments may be unable to fulfill the obligations of a cooperating agency and decline to become a cooperating agency. In that case, the BLM would be excused from coordinating, which would violate FLPMA Section 202(c)(9). FLPMA does not require State and local governments to become a cooperating agency before the Secretary's obligations to coordinate are triggered.

For these reasons, it is improper to combine coordination under FLPMA Section 202(c)(9) with the NEPA process. Certainly, State and local governments that wish to participate in the NEPA process as cooperating agencies should be invited to do so in accordance with Council on Environmental Quality's guidance and the Interior Secretary's regulations. But participation in the NEPA process as a cooperating agency is not a substitute for government-to-government coordination under FLPMA Section 202(c)(9). Regardless of whether a State or local government participates in the NEPA process as a cooperating agency, the BLM must independently satisfy its obligation to coordinate with that unit of government and to ensure plan consistency in accordance with FLPMA.

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