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There are truths which are not for all men nor for all times.

— Voltaire

Action against Farm Credit Administration dismissed

Motions to dismiss plaintiffs' complaint were granted in *Coleman v. Federal Intermediate Credit Bank*, 600 F.Supp. 97 (D. Ore. 1984). Various causes of action has been alleged, all growing out of events surrounding the default and dissolution of the Willamette, Ore., Production Credit Association (WPCA).

Claims of tortious interference with contractual relationships by declaring WPCA in default, improperly cutting off loan funds, wrongfully freezing stock, breach of fiduciary duty, misrepresentation, conspiracy, securities violations and defamation — all brought against the Farm Credit Administration (FCA), the Federal Intermediate Credit Bank of Spokane, Wa., and Donald Wilkinson, governor of the system — were dismissed on the ground that they were barred by res judicata. The same relief was or could have been sought in a previous action involving the same parties that was dismissed with prejudice pursuant to a settlement agreement. Efforts to undo this settlement were unsuccessful. *VanLeeuwen v. Farm Credit Admin.*, 600 F.Supp. 1161 (judgment of dismissal with prejudice set aside), 600 F.Supp. 1173 (judgment of dismissal with prejudice reinstated) (D. Ore. 1984).

Coleman also involved tort claims against various FCA officers and attorneys. While these claims were not barred by res judicata, they were dismissed for the following reasons: federal executive officials are absolutely immune in suits arising out of ordinary tort law if the officials were acting within the outer perimeters of their duties; counsel for FCA serves a prosecuting role in presenting before the FCA issues such as liquidation of a PCA, and are thus entitled to absolute prosecutorial immunity.

— Donald B. Pedersen

Farmers must settle Payment-In-Kind disputes in U.S. Claims Court

In *Raines v. Block*, 599 F.Supp. 196 (D. Col. 1984), the United States District Court held that it did not have jurisdiction over any Payment-In-Kind (PIK) action in which the gravaman of the complaint is a claim for money damages in excess of $10,000 arising out of breach of contract. Such disputes are the exclusive province of the United States Claims Court under the auspices of the "Tucker Act," 28 U.S.C. §§1346(a) and 1491, and must be resolved therein.

The farmer-plaintiff in the *Raines* case had entered into a PIK contract with the United States Department of Agriculture (USDA) through the local Agricultural Stabilization and Conservation Service (ASCS) on March 10, 1983. After entering into the contract, plaintiff proceeded to comply with the terms and destroyed his growing wheat crop. Thereafter, a dispute arose with the ASCS as to the amount of "payment" the plaintiff was entitled to receive. The ASCS had unilaterally reduced the amount of wheat that the plaintiff was to receive under the original terms of the contract. Plaintiff exhausted his administrative remedies and filed this action in U.S. District Court, alleging breach of contract, promissory estoppel, negligence, unconstitutional taking of property, violation of civil rights under color of federal law and administrative misconduct.

The District Court, in reaching its determination, stated that the jurisdiction of the Claims Court could not be evaded by framing the complaint in non-contractual claims such as administrative review, tort or federal common law, where the genesis of any wrongdoing by the United States was a breach of contract. *Id.* at 199. The *Raines'* Court made no determination as to the relative merits of the plaintiff's claims, contractual or otherwise.

It should be noted that this determination by the District Court that it lacked subject matter jurisdiction is consistent with previous caselaw involving contractual disputes between farm program participants and the USDA. See *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 823 (10th Cir. 1981), government sponsored loans to sugar producers; *Jacoby v. Schuman*, 568 F.Supp. 843 (D.C. No. 1983), Farmers Home Administration.

— Mark L. Baldwin Jr.

Federally licensed warehouses

The U.S. Warehouse Act (USWA), 7 U.S.C. § 241 et seq., provides for the licensing of warehousemen who apply to the Secretary of Agriculture and meet departmental and statutory standards. Pursuant to Secretary's Memorandum No. 1020, May 10, 1984, the administration of USWA was transferred from the Agricultural Marketing Service to the Agricultural Stabilization and Conservation Service (ASCS). Existing regulations have been transferred to 7 C.F.R. Chap. VII and renumbered. For details, see 50 Fed. Reg. 1813 (1985). ASCS has now published a list of warehouses licensed under USWA as of Dec. 31, 1984, and a list of cancellation and/or terminations that occurred during calendar year 1984. For further information, contact Mrs. Judy Fry, Warehouse Division — ASCS, Warehouse Licensing Branch, USDA, Room 5968 — South Agriculture Building, Washington, D.C. 20013; (202) 447-3821.

— *Donald B. Pedersen*

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Aerial herbicide spraying programs

Save Our Ecosystems v. Block, 747 F.2d 1240 (9th Cir. 1984), addressed proposed separate programs by the Bureau of Land Management (BLM) and the Forest Service that would have sprayed large acreages of public lands with herbicides over a number of years.

The BLM program was enjoined because its environmental impact statement failed to contain a "worst case analysis" of the effects of herbicide use.

The Forest Service spraying program was initiated after a programmatic environmental impact statement was prepared. After spraying began, a number of serious health problems were reported in the spray area, including spontaneous abortions, birth defects in humans and animals, and other illnesses. In a subsequent environmental analysis, the Forest Service concluded that continued spraying would have no significant impact on the human environment, and continued spraying. The Ninth Circuit enjoined all spraying by the Forest Service.

The Council of Environmental Quality's NEPA regulations require that an environmental impact statement contain a "worst case analysis" when "the information relevant to adverse impacts is essential...and is not known and the overall costs of obtaining it are exorbitant or...the information ...is important and the means to obtain it are not known..." 40 C.F.R. §1502.22 (1981).

In the context of this fact situation, a worst case analysis must begin with the assumption that herbicides are not safe, and then consider a spectrum of possible events. With herbicide spraying, the worst result is that herbicides do cause cancer. "The duty of an ageney is to analyze the costs and environmental effects of the worst case and its costs and *then* to provide its assessment of the likelihood of the event occurring." 747 F.2d at 1246. Because the BLM failed to proceed in this way, its entire spraying program was enjoined.

The Court also held that NEPA requires research on the environmental effects of the Forest Service spraying program where no adequate data exists. The Forest Service had relied on research by the U.S.E.P.A., completed when that agency registered the herbicide pursuant to its authority under federal pesticides law. The Court found that EPA registration process for herbicides is inadequate to address environmental concerns under NEPA, especially where, as here, the registration is only conditional. Further research on the safety of the pesticides was necessary, whether carried out by the Forest Service, the chemical's manufacturer, or through independent studies commissioned by the Forest Service.

— *John H. Davidson*

Purchase of hypothecated farm equipment from farmer seller

In *United States v. Tugwell*, 597 F.Supp. 486 (M.D.N.C. 1984), farmer sold a combine, subject to Farmers Home Administration (FmHA) properly perfected security interest, to another farmer (Tugwell). FmHA brought a conversion action against Tugwell. While the court concluded that Tugwell's purchase was technically a conversion, it dismissed the action holding that FmHA's rights were adequately protected by a perfected security interest in the identifiable cash proceeds obtained by farmer from the sale. Interestingly, the court notes at the beginning of its opinion that Tugwell repeatedly tendered the combine to FmHA, but never refers to this again.

This decision merits comment. First, the court does not refer to Uniform Commercial Code (UCC) §9-307(1), but it must have determined that Tugwell was not a buyer in the ordinary course. Otherwise, no conversion could exist.

More importantly, the court's conclusion that the secured party's rights are protected because of its claim to identifiable cash proceeds raises some important questions. Does the court mean that the secured party is always required initially to proceed against the proceeds? If so, the court cites no authority for its conclusion. There is nothing in the UCC that requires this result and, in fact, the Code permits a secured party to pursue either the collateral or the proceeds from its sale. Comment 3 to §9-306 states:

> In most cases when a debtor makes an unauthorized disposition of collateral, the security interest...continues in the original collateral in the hands of the purchaser or other transferee. That is to say, since the transferee takes subject to the security interest, the secured party may repossess the collateral from him or in an appropriate case, maintain an action for conversion. Subsection (2) codifies this rule. The secured party may claim both proceeds and collateral, but may of course, have only one satisfaction.

Other courts have held that where a debtor makes an unauthorized disposition of collateral, the secured creditor has the op-

(continued on page 5)

The 1985 Farm Bill debate and the potential impact on federal agricultural programs

by Neil D. Hamilton

Recently, a great deal of public attention has been focused on federal efforts to provide some form of credit relief to financially troubled farmers. At the same time, a somewhat quieter, but nonetheless more far-reaching, political struggle has been developing in Washington with the beginning of the quadrennial effort to draft and enact a new federal farm bill. Current federal legislation expires September 30th and the passage of a new farm bill is of crucial importance to the agriculture sector. The importance stems both from the omnibus nature of legislation — it deals with all forms of federal food and agricultural policy, including price and income policy, domestic food assistance, exports, soil conservation and credit — and from the fact that the bill will establish the policies, that for the next four years, or possibly longer, will define the basic guidelines of the relationship between the federal government and the agricultural sector.

As a result of the magnitude and importance of a farm bill, efforts in recent years to enact such measures have become increasingly difficult. To pass a farm bill, Congress must resolve a multitude of conflicting interests and policies, including clashes between consumers and agriculture, and sometimes even within agriculture. All of this must be accomplished in one piece of legislation that will have extensive financial impacts and that can determine the fate of various federal programs, each with its own established constituency. The difficulty of reaching such compromises is illustrated by the fact that the 1981 farm bill passed the House by one vote in December, over three months after previous authority had expired.

The battle over the 1985 farm bill will be no exception to this trend and may in fact represent a political watershed of historic significance. This is true because the debate has become an ideological battle between supporters of the "free market" orientation, who seek a limited governmental role in agriculture as lead by the Reagan administration, and the supporters of a continued strong role in agricultural price and income policy, as lead by Senate and House Democrats, and a surprisingly united coalition of traditional farm groups.

What is at stake is the very continuation of traditional federal agricultural policies that use price and income policies, as supported by production controls, to promote higher prices for agricultural producers. These policies, which have remained substantially unchanged in theory, have been the foundation of federal agricultural programs since the Roosevelt years of the 1930s.

The 1985 farm bill debate is of great importance to all involved in agriculture whether as producers, input suppliers or attorneys who service agriculture. The passage of or failure to pass a 1985 farm bill promises to have a serious impact both on the economic health of the agricultural sector and on the nature of the various individual federal programs that affect agriculture. The debate over the 1985 farm bill has been joined and is presently progressing through the introduction and consideration of a variety of alternative proposals being forwarded by various major players in the agricultural policy debate. The sources of these proposals include the Reagan Administration, the American Farm Bureau Federation (AFBF), Senate Agricultural Committee Chairman Helms and Senate farm state Democrats. The best way to communicate the essence of the debate is to present a discussion of the Reagan Administration's proposed program, then a comparative analysis of the various alternative proposals that have been forwarded to date and to then discuss the legal impact of selected proposed changes.

The Administration's Proposal

On Feb. 22, 1985, Secretary of Agriculture John Block announced the Administration's "market oriented" farm bill proposal. The bill, titled "The Agricultural Adjustment Act of 1985," represents a significant shift from previous legislation, with the goals of reducing federal spending, increasing exports through the "market oriented" lowering of federal support prices and establishing a long-term policy. The proposals of the Administration's bill can be summarized as follows:

- **Legal Authority** — replaces existing permanent authority, passed in 1949, and would extend for 15 years.
- **Support Prices** — gradually lowers support prices for wheat, feed grains, cotton and rice and by 1991, sets them at 75% of a three-year average market price.
- **Target Prices** — lowers and then phases out target price deficiency payments by 1991.
- **Price Support Loans** — caps the size of non-recourse loans available at $200,000 per producer; no limit on recourse loans above $200,000.
- **Deficiency Payments** — lowers the cap on direct producer payments (usually in the form of deficiency payments) to $20,000 in 1986 and to $10,000 by 1988.
- **Grain Reserves** — abolishes the farmer-owned grain reserve and replaces it with a 500 million bushel "humanitarian" reserve of wheat and feed grain.
- **Production Controls** — establishes a voluntary acreage reduction program for three years, at 15% for 1986, 10% for 1987 and 5% for 1988, and would remove authority for production controls in subsequent years.
- **Soil Conservation** — creates a modified "sod buster" provision denying farm programs benefits to a producer for crops grown on land not farmed in the previous three years, unless the land was farmed pursuant to an approved conservation plan.
- **Exports** — reauthorizes PL 480 - foreign food assistance programs, continues the current export credit guarantee program, and requires a report to Congress on trade barriers and actions needed to reduce them.
- **Dairy** — gradually lowers milk price support levels and phases them out in 1988, to be replaced by deficiency payments, limited to $10,000 per producer.

Initial reaction to the Administration's proposal has been very unfavorable and many politicians of both parties have referred to it as "dead on arrival." Criticism has focused on the proposed substantial reduction in government support prices that economists predict could substantially lower commodity prices and farm income for the next several years. The Administration's response is that lower prices will result in increased export rates, which in several years, may mean increased farm income even with lower prices. In addition, the Administration asserts that the only alternatives to their proposal are a continuation of current policies, which arguably have not worked and are too expensive, or a shift to mandatory production controls, with resulting higher prices and reduced exports.

Even the AFBF, which has traditionally favored a reduced role for government in agriculture and has espoused "market oriented programs," opposes the Administration's bill. The president of AFBF asserts that the Administration's proposal

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represents "too drastic a move towards market orientation." The Administration had difficulty finding congressmen to introduce its proposal, though Agricultural Committee Chairman Helms eventually did so in the Senate (S-501), and Rep. Edward Madigan, ranking minority leader of the House Agriculture Committee, did so in the House (H-1420). However, since introduction of the Administration's bill, both Senator Helms and the AFBF have proposed major alternatives and several farm state senators are preparing a program based on mandatory production controls.

Major Alternative Proposals

Perhaps the best way to discuss the various alternatives proposed to the administration plan is to present a comparative listing of the major features of these bills. (right)

This comparison demonstrates that central issues for resolution in the farm bill debate include the level of price supports, the continuation of target price deficiency payments, the sodbuster soil conservation provision, continuation of the farmer-owned grain reserve, payment limitations and export financing. Resolution of each of these central issues, plus many others, represents a significant challenge for lawmakers and the variety of matters to be decided illustrates the magnitude of their task.

The Senate is holding hearings on the proposals that have been introduced to date. It appears that the House of Representatives, which has not scheduled farm bill hearings, is going to let the Senate take the lead in developing the main guidelines of the 1985 farm program and will then react to what the Senate passes. At this time, observers believe that the Helms bill, with its combination of aggressive export policies and continuation of traditional price support policies, has the inside track for being the basis out of which the Senate farm program will emerge.

Observers also feel that while some consideration will be given to proposals to establish mandatory production controls, passage of such a program is doubtful. One major proposal that will be the focus of debate is establishment of a long-term conservation set-aside to retire marginal erosion-prone land for five- to 10-year periods. Such a program offers a way to promote soil conservation and obtain some produetion control, and is therefore a popular policy alternative.

In addition to these alternatives, several senators are considering proposing a major restructuring of price support policy, based on the "marketing loan" concept. Under this approach, the present system of price support loans would be replaced with government payments to producers equal to the difference between the world market price (as established periodically by the USDA)

	AFBF	Helms
Legal authority	- 4 years	- 6 years
Price support loan rates	- 75% of average domestic price for last 5 years (removing high & low year).	- 75-85% of the average domestic price for last 5 years (removing high & low year).
Loans	- No limit on amount of loans.	- No limit on loans, but interest required even if grain forfeited to CCC.
Target prices deficiency payments	- 1986 target price same as '85 in '87 and after, 110% of 5-year average market price, with no annual adjustment, greater than 5%. - Maintains the present $50,000 payment limitation.	- 110-125% of 5-year average market price, established by Secretary. - Limit on deficiency payments equal to median family farm income for previous year (presently $24,600).
Farmer-owned grain reserve	- Terminates present reserve system, replaced by interest free, 9-month price support loan and 9-month extension, with interest available.	- Maintains present reserve program, but prohibits early entry and removes interest waiver authority.
Acreage reduction	- Extends present authority through 1989, with 50% of benefit at time of signup. - Requires Secretary to implement acreage reduction program when world carryover of wheat or feed grains exceeds 4% of annual world utilization.	- Maintains present authority for production controls, at the discretion of the Secretary.
Soil conservation	- Establishes a conservation reserve program, with 7- to 15-year contracts to convert erosion-prone land to less intensive uses. Sodbuster provision making a farmer ineligible for any crop benefits on entire farm, if highly erodable land brought into production.	- Contains a sodbuster provision denying farm benefits if highly erodable land brought into production.
Exports	- Extends export credit revolving fund and exempts blended credit and other export subsidies from cargo preference. - Increases minimum level of PL-480 shipments as farmer-owned reserves are liquidated.	- Removes cargo preference requirements export from all agricultural shipments. - Requires use of at least $325 million of CCC funds each year for next 2 years to boost exports in areas where barriers or unfair practices have reduced U.S. sales. - Requires export of 150,000 million tons of CCC dairy stocks in each of next 3 years. - Requires $1 billion be used annually for direct or guaranteed intermediate export credit programs. - Authorized 3- to 10-year financing on PL-480 sales.
Dairy	- Sets price support at 90% simple average price for "all milk" received by farmers for preceding year, adjusted up if government purchases less than 5 billion lbs./year, and down if greater than 5.99 billion lbs.	- Maintains $11.60 price support for '86, then allows Secretary to lower the support rate to point where government purchases stabilize between 2 and 4 billion lbs./year (currently around 10 billion lbs.).

and a Congressionally-established target price. There would be no government storage or reserve programs and no price support loans. The program would achieve an export market orientation through floating world prices, but would maintain producer income at Congressionally-established levels through the "market loans," which basically would be like existing deficiency payments.

Selected Legal Aspects of '85 Farm Bill Debate

The outcome of the 1985 farm bill debate has the potential to bring significant changes throughout the structure of federal farm programs. A number of the issues in the debate have particular legal significance.

First, an important constraint on consideration of the 1985 farm bill is the spector of what will happen if no bill is adopted by September. Present farm legislation is in the form of an amendment to the 1949 Act, which establishes the permanent authority for present programs. Thus, if Congress fails to or decides not to act, farm programs for 1986 would revert to what is authorized in the 1949 programs (see 7 U.S.C. §1421 et seq.). These programs utilize a system of price supports tied to high levels of parity, contain authority for producer referenda on mandatory production controls, as well as marketing quotas and allotments. The Administration has attempted to use the possible reversion to these very high levels of price supports as an argument for speedy action on their proposals. In fact, the USDA is reported to be preparing to hold a referendum on 1986 production controls among wheat producers later this summer. But, while a reversion to the 1949 authorities would result in much higher price supports and intrusive government programs, many farm leaders are considering the possible economic benefits and attraction of higher farm prices. If Congress fails to act, the return to 1949 programs would create a great deal of confusion as to the nature of farm programs and would raise a number of legal questions about availability and ownership of allotments and marketing quotas.

The lingering threat of a return to costlier permanent authorities is the main reason why the Administration proposes to replace them and to make the 1985 farm bill "market oriented programs" the new permanent authority. In addition, the Administration has proposed that the 1985 farm bill authority extend for 15 years instead of the usual four, so that the farm bill battles won't have to be waged so frequently. The likelihood of passage of either proposal, new permanent authority or 15-year duration, is questionable given the general reaction to the Administration's proposal and the political importance of federal farm legislation.

A second major legal issue concerns the administration of caps, or limitations on the size of loans and deficiency payments a producer can receive. Several of the alternative proposals contain such restrictions, which are either new, as in the proposal to cap non-recourse loans, or contemplate a significant reduction in present limitations such as with deficiency payments. The legal significance of such proposals relates both to economic effect of the application of these restrictions to individual producers, and to the system of regulations, guidelines and procedures that would be necessary to implement them. The Agricultural Stabilization and Conservation Service (ASCS) has experienced some difficulty applying the present direct payment limitation of $50,000 as producers have tried to devise organizational arrangements to evade the application of the limitation, see e.g., *U.S. v. Batson,* 706 F.2d 657 (5th Cir. 1983). A substantial lowering of the limits would make them more widely applicable and would increase both the necessity of interpreting the provisions and the incentive to evade them.

The possible problems related to more stringent limitations on benefit eligibility illustrates a third legal issue surrounding the 1985 farm bill, which is the more general matter of the legalization of federal farm programs. Beginning with the payment-in-kind (PIK) program in 1983, the ASCS has required farm program participants to enter into binding contracts, accompanied by detailed technical appendices clarifying the government-producer relationship. The adoption of any government program that contains mandatory production controls, restrictive benefit limitations, cross compliance for soil conservation and production controls, or other complicated requirements will necessitate a legal mechanism to insure producer compliance, and place serious operational pressures on the ASCS county committee system.

The success of the government in actually implementing whatever is contained in the 1985 farm bill will depend on the ability to deliver it to producers and the government's success in obtaining producer participation will in part depend on how legalized the program becomes. As federal farm programs and the regulations and documentation necessary to implement them become more complicated, a number of things happen. The willingness of producers to participate is affected, the complexity and number of issues to be interpreted and resolved increases, and the importance of the lawyer's role in these matters — or conversely, the effect of federal farm programs on the legal community — becomes increasingly clear. It is for these reasons that the legal community has an important interest in the outcome of the 1985 farm bill debate.

PURCHASE

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tion of going after the collateral or the proceeds. *Dixie PCA v. Kent*, 167 Ga. App. 714, 307 S.E.2d 277 (1983); *Beneficial Finance Co. v. Colonial Trading Co.*, 4 U.C.C. Rep. Serv. 672 (Pa. Ct. Comm. Pl. 1967). Also compare §9-501(1) which states that rights and remedies under Part 5 are cumulative.

Finally, if Tugwell paid by check and it was deposited in the seller's general checking account, commingled proceeds are involved. Since the court discusses identifiable cash proceeds, one must assume that no insolvency proceeding (§1-201(22)) had been instituted. If one had been, §9-306(4) is the controlling section. This severely limits the secured party's right to commingled proceeds.

— Keith G. Meyer

More on FmHA debt adjustment program

In the March 1985 *Agricultural Law Update,* we described recent developments in the Farmers Home Administration (FmHA) debt adjustment program (DAP). DAP again has been amended with the publication of a new interim rule at 50 Fed. Reg. 9987 (1985) (effective March 13, 1985)..

One of the changes is the addition of an option whereby lenders are allowed to use a combination of an interest rate reduction and a write-down of principal. The benefit of this adjustment to the borrower must be equal to that of a write-down of principal of at least 10%. Further adjustment will be required if necessary to produce a positive cash flow for the farmer debtor. If all requirements are met, FmHA will guarantee the remaining loan at the same level as would have been guaranteed had the adjustment been accomplished solely by a principal write-down.

The March 13, 1985 changes also relax the positive cash flow requirement from 110% to 100%. The positive cash flow requirement is met if projections show that for each year of a five-year period, anticipated cash inflows are at least 100% of anticipated cash outflows. The cash flow projections necessitate a year by year listing of all of the borrower's anticipated cash inflows (farm and non-farm) and all the borrower's anticipated cash outflows (farm and non-farm), including operating expenses, debt repayment, family living expenditures and tax payments — but excluding capital expenditures.

The interim rule at 50 Fed. Reg. 9987 (1985) contains additional details and a number of examples that illustrate how the various DAP options work.

— Donald B. Pedersen

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Distinguished Service Award

The American Agricultural Law Association invites nominations for the "Distinguished Service Award." The Award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration or business. Any member of the Association may nominate another member for selection by submitting the name to the Chair of the Awards Committee. Any member making a nomination should submit biographical information in five copies of no more than four pages each in support of the nominee. A nominee must be a current member of the Association and must have been a member thereof for at least the preceding three years. Nominations for this year must be made by May 1.

Second Annual Student Writing Competition

The Association is also sponsoring its second annual student writing competition. This year, the Association will award two cash prizes in the amounts of $500 and $250. The competition is open to all undergraduate, graduate or law students currently enrolled at any of the nation's colleges or law schools. The winning paper must demonstrate original thought on a question of current interest in agricultural law. Articles will be judged for preceptive analysis of the issues, thorough research, originality, timeliness, and writing clarity and style. Papers must be submitted to the Association by May 1, 1985.

Inquiries concerning both programs should be directed to either:

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