Agricultural Law: FmHA Farm Foreclosures, an Analysis of Deferral Relief and the Appeals System

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I. INTRODUCTION

Janice Stoss became delinquent in her loan payment to the Farmers Home Administration (FmHA) when a County Supervisor failed to process her loan in time for the planting season, refused to permit her to employ a hired-hand, refused to allow her to repair machinery, and refused to allow her to sell non-breeding cattle. FmHA then charged her with mismanagement when she could not make payments on her loan and started foreclosure proceedings.[1]

Janice's situation is not a unique one. Because of economic hard times,[2] and incidents like the above, a growing number of farmers have fallen behind in loan payments to FmHA.[3] Problems similar to the ones stated above, along with the targeted reduction goal in loans[4] by FmHA, have caused many farm-

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1. Matzke v. Block, 542 F. Supp. 1107, 1110 (D. Kan. 1982).

2. H. MORRIS, HOW TO STOP FORECLOSURE 11 (1983).

> In the farm belt, Iowa, Kansas, the Dakotas . . . it has been estimated that fully fifty percent of farmers will be in foreclosure by the end of 1983. The reasons . . . high interest rates . . . combined with bumper crops and recession low prices. The farmers simply can't make enough money to pay for the loans they need to survive.

Id. at 13.

"Without question, these are extraordinarily hard times for American agriculture." Emergency Agricultural Credit Act of 1983, H.R. REP. NO. 1190, 98th Cong., 2d Sess. 156 (1983) (statement of Carl T. Fredrickson, Senior Deputy Governor, Farm Credit Administration).

3. Farmers Home Administration (FmHA) delinquencies have risen since 1977, with drastic changes in the early 1980's. In 1977, $.353 billion were delinquent; in 1978, $.490 billion were delinquent; in 1979, $.660 billion were delinquent; in 1980, $1.16 billion were delinquent; in 1981, $2.15 billion were delinquent; in 1982, $3.56 billion were delinquent; and in January, 1983, $5.54 billion were delinquent. Interview with Robert Miller, Deputy Assistant Inspector General (1983). Taylor, *Bad Loans Mount at Battered Farmers Home*, FARM JOURNAL, June/July 1983, at 17. The delinquency rate was 52.4% in January 1983. *Id.*

4. FmHA responded to delinquencies in August of 1981 by setting a reduction goal of 23% for each state's farm loan portfolio. *See* A. HIGBY, H. HOFF, E. SEVERNS & J. HANSEN, FMHA FARM LOAN HANDBOOK 57 (1982) [hereinafter cited as HANDBOOK]. The goals have been continued into 1983. *Id.* In Kansas, there are 1204 delinquencies in farm ownership and operating loans. Two hundred and sixty-two of these, the FmHA has targeted for solution and or foreclosure. *See* Kansas City Times, Sept. 23, 1983, at B3, col. 1; Topeka Capital J., Sept. 23, 1983, at A7, col. 1. *See also* U.S. DEPARTMENT OF AGRICULTURE FMHA AN No. 742 (Aug. 20, 1982) (inter-

ers to be foreclosed or to "voluntarily" liquidate. As a result, these problems have reignited farm activism, noisy protests, isolated incidents of violence, and legal battles by hard-pressed farmers struggling to save their land.[5]

The purpose of this Note is to alert the practitioner to the urgent credit problems facing the American farmer, to describe the background, the procedures, and the appeals process of the Farmers Home Administration in particular, and to explore the use of deferral relief as a servicing tool to stay foreclosure.

II. BACKGROUND

A. *FmHA History*

The federal government has been involved in the area of agriculture for over 120 years.[6] It sought to carry out its policies through the dispensation of three commodities vital to farming—first land, then predominantly water, and now credit. The Homestead Act of 1863[7] was the first such involvement in which the government dispensed land. The government ran out of land to dispense in the early 1900's and began to dispense water in accordance with the Reclamation Act of 1902.[8] The government also ventured into cooperative federally-owned land banks (FLB) which were established in 1916.[9] The FLB financed family farms purchased with seed money from the federal treasury. Other federally-funded land banks grew out of the FLB.[10]

During the height of the Depression, when many farmers were facing foreclosure, the Resettlement Administration was created by Executive Order No. 7027.[11] This was the forerunner to what is now known as the Farmers Home Administration.[12] This agency was authorized to make small loans to farmers with the goal of helping families settle in rural areas and become self-sufficient. In 1937, Congress passed the Bankhead-Jones Farm Tenant Act.[13] This Act provided a program of supervised, long-term farm ownership loans

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nal memo). "States should plan for delinquency reviews in each county at the earliest feasible date, with plans for vigorous follow up by district directors and state office farmer program staff." *Id.* at Attachment A.

5. *See Foreclosures Reignite Farm Activism*, Kansas City Times, Oct. 11, 1983, at D18-19. *See also* Kansas City Star, Oct. 30, 1983, at 12A, col. 1.

6. *See* summary of FmHA background on the Agricultural Credit Act in H.R. REP. No. 980, 95th Cong., 2d Sess. (1978). *See also* 11 N. HARL, AGRICULTURAL LAW 966 (1982); HANDBOOK, *supra* note 4, at 1.

7. 12 Stat. 392 (1862). The Act was designed to provide farming opportunities to small scale, family farmers.

8. 32 Stat. 388 (1902). The government dispensed 160 acres worth of water to prospective farmers under this Act.

9. As a result of World War I, the Federal Farm Loan Act of 1916 was enacted, 39 Stat. 360 (1916). It established the Federal Farm Loan Board which divided the country into 12 districts, with a Federal Land Bank in each one. Loan associations were organized to provide federally-financed loans to be made to farmers acquiring land. *See generally* N. HARL, *supra* note 6, at 100-1 to 100-71.

10. The banks were the Federal Intermediate Credit Banks (1923) and the Banks for Cooperatives (1933). The government was also involved in making "natural disaster" loans pursuant to Presidential directive issued in 1918 in response to the drought.

11. *See supra* note 6.

12. *See supra* note 6.

13. Act of July 22, 1937, ch. 517, 50 Stat. 522 (1937).

to farmers without other credit sources.[14] In 1938, actions were taken to carry out the Farm Tenant Act, and the Resettlement Administration was renamed the Farm Security Administration and placed under the Department of Agriculture.[15] In 1946, the Farm Security Administration was changed to the Farmers Home Administration. This change did not affect the nature of federal involvement in agricultural credit, but was "to simplify and improve credit services to promote farm ownership."[16]

With changing conditions in the agricultural sector of the country, Congress was forced to update its program for agricultural credit. Congress' response to this need was to enact the Consolidated Farmers Home Administration Act of 1961.[17] The Act was designed as a "consolidation and modernization of the Secretary's authority to make available to eligible farmers who *cannot obtain credit elsewhere* direct and insured loans necessary to finance their acquisition, improvement, and operation of farms."[18] The Secretary of Agriculture was, and still is, allowed to loan money for three purposes: buying and improving real estate,[19] operating expenses,[20] and emergencies.[21]

Not only had FmHA been involved in this process, but since the enactment of the Housing Act of 1949, it had extended credit to farm owners to enable them to construct, to improve, and to repair their farms.[22] In 1972, the programs of FmHA were consolidated through an amendment to the Act of 1961. The Act was then changed to the Consolidated Farm and Rural Development Act. The programs continued to provide credit to "underprivileged" farmers.[23]

B. *FmHA Eligibility*

Anyone wishing to apply for a FmHA loan has the right to do so.[24] How-

14. FmHA has the same purpose today. *See infra* text accompanying notes 24 & 25 and note 35.

15. *See* N. HARL, *supra* note 6. The Farm Security Administration provided credit so farmers could be farm owners, counseling to borrowers, resettlement projects to establish new farms, and other social and economic programs. *Id.*

16. 1946 U.S. CODE & CONG. SERV. 1028.

17. Act of Aug. 8, 1961, 75 Stat. 307 (1961). *See also* 1961 U.S. CODE CONG. & AD. NEWS 2243, 2306. Farmers were starting to use more chemicals and machinery, and the cost of farming was becoming greater.

18. 1961 U.S. CODE CONG. & AD. NEWS 2243, 2305 (emphasis added). The Act of 1961 replaced the Act of 1946 "in order to provide for more effective credit services to farmers." Act of Aug. 8, 1961, 75 Stat. 301 (1961) (codified at 7 U.S.C. § 1921). No credit elsewhere is used by FmHA today in extending credit.

19. *See* 7 U.S.C. § 1923(a) (1982). These loans are called farm ownership loans, often abbreviated FO. Real estate security is often required for one of these loans. Real estate security includes: land, fixtures, buildings, water rights, fences, and other improvements. *See* 7 C.F.R. § 1943.19(d) (1982). FmHA can take a mortgage on the whole farm, 7 C.F.R. § 1943.19(b) (1982). *See also* HANDBOOK, *supra* note 4, at 39.

20. *See* 7 C.F.R. § 1942 (1982). Loans for operating expenses are often abbreviated OL. Chattel security is required for operating loans and FmHA will take real estate as additional security if needed. *See* 7 C.F.R. § 1941.19 (1982). *See also* HANDBOOK, *supra* note 4, at 39.

21. 7 C.F.R. §§ 1961a, 1963 (1982). Emergency loans are used for natural disasters and economic emergencies. Real estate or security is acceptable for these loans. *See* 7 U.S.C. § 1945.162 (1982). The abbreviations used for emergency loan are EM and EE.

22. The Housing Act of 1949, 63 Stat. 432 (codified as amended at 42 U.S.C. § 1471 (1949)).

23. *See* Curry v. Block, 541 F. Supp. 506, 511 (1982). The legislation is to aid the "underprivileged farmer and therefore is a type of social welfare legislation." *Id.*

24. *See* 7 C.F.R. § 1910.3(a) (1982).

ever, as a practical matter, FmHA loans are available only to a limited group of farmers.[25] When applying for a loan, FmHA is required to explain the services available.[26]

Applying for a FmHA farm loan is a two-step process involving the approval of the County Committee and Supervisor.[27] The County Committee first determines eligibility.[28] The basic eligibility criteria include: creditworthiness,[29] citizenship,[30] sufficient training or experience in farming to insure success,[31] a need to rely on farm income,[32] character as it relates to repayment,[33] management ability,[34] no credit elsewhere,[35] and involvement in a "family farm" operation.[36] Insufficient security is not a criterion used at the eligibility stage; instead, it is a criterion used at the loan approval stage.[37]

Once eligible, the farmer is entitled to consideration for loan approval by the County Supervisor.[38] Loan approval criteria include: repayment ability,[39] adequate security,[40] farm suitability,[41] and soundness of the Farm and Home

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25. *See infra* notes 29-37 and accompanying text.

26. *See* 7 C.F.R. § 1910.3(c) (1982). *See also* HANDBOOK, *supra* note 4, at 26.

27. *See* HANDBOOK, *supra* note 4, at 31.

28. *See* 7 C.F.R. § 1910.4(b) (1982).

29. *See* 7 C.F.R. § 1910 (1982). Factors that will not constitute poor credit history are listed in 7 U.S.C. § 1910.5(c) (1982). The criteria used are a result of a consent decree issued in Vickers v. Bergland, Civ. No. 77-0355 (D.D.C. Mar. 16, 1978). *See generally* HANDBOOK, *supra* note 4, at 32.

30. *See* 7 C.F.R. § 1941.12(a)(1) (1982). *But see* 7 U.S.C. § 1996 (1982) giving the secretary discretion to give permanent resident aliens loan assistance. *See also* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Ramos v. United States Civil Serv. Comm'n, 430 F. Supp. 422 (D.P.R. 1977).

31. *See* 7 C.F.R. §§ 1941.12(a)(3), 1943.12(a)(3) (1982).

32. Family size, health, and education are considered. *See* 7 C.F.R. §§ 1941.12(a)(4), 1943.12(a)(4) (1982).

33. This criterion goes to the farmer's dependability and reliability in making payments. The farm and home plan is not to be considered at this stage. *See infra* notes 38-42 and accompanying text.

34. *See* 7 C.F.R. §§ 1941.12(a)(5), 1943.12(a)(5) (1982). The total responsibility, however, is not just on the farmer. FmHA has a duty to provide management assistance. *See* 7 C.F.R. § 1924.55 (1982).

35. *See* 7 C.F.R. §§ 1941.6(a), 1941.12(a)7, 1943.6(a), 1943.12(a)7 (1982). If credit can be obtained elsewhere, such as banks or savings and loans, FmHA is required to help the farmer in contacting that alternate credit source. *See* 7 C.F.R. § 1910.3(b).

36. "Family farm" is defined as a farm which "(3) is managed by the borrower . . . (4) has a substantial amount of labor requirements for the farm . . . provided by the borrower and family . . . ." 7 C.F.R. § 1941.4(d) (1982). *See* 7 C.F.R. § 1941.12(a)(8) (1982). *See also* HANDBOOK, *supra* note 4, at 34.

37. The county committee is not authorized to deny initial eligibility based on insufficient security; this is only a consideration of the county supervisor when determining if a loan will be approved or not. HANDBOOK, *supra* note 4, at 32. *See also infra* note 40 and accompanying text.

38. *See* 7 C.F.R. § 1910.6(a) (1982). The county supervisor approves or disapproves the loans of applicants found eligible by the county committee.

39. *See generally* HANDBOOK, *supra* note 4, at 40-41. Repayment ability is calculated on the Farm and Home Plan (form FmHA 431-2). It is determined by comparing the balance of debt payment (table J 16) and the principal and interest payments (table K). Most of the figures used to determine repayment ability are estimates and thus two people could come up with two different figures. This is important to understand when a farmer is negotiating with a county supervisor. *Id. See also* W. LEE, M. BOEHLJE, A. NELSON & W. MURRAY, AGRICULTURAL FINANCE (7th ed. 1980).

40. *See* HANDBOOK, *supra* note 4, at 39. Because FmHA is a lender of last resort, often the farmers who are eligible for a loan have little security. For that reason, the security requirement is flexible. Commercial lenders like an asset to debt ratio of 2:1; FmHA, however, does not have a specific ratio, and in some cases, allow for repayment ability to substitute for security. *Id. See supra* note 39.

Plan.[42] If the farmer meets the criteria, the farmer will most likely have a loan approved.

Once a loan is approved, the farmer signs three important documents: a Farm and Home Plan, a promissory note, and a security agreement. The nature and importance of these documents is not easily understood by a layperson and not always sufficiently explained by the FmHA supervisor. The Farm and Home Plan[43] is the farmer's annual financial statement which will influence the farmer's operation throughout the life of the loan, and for this reason, it should be understood by the farmer.[44] By signing the promissory note, the farmer agrees to pay back the loan at a certain interest rate, by installments, and also allow FmHA to accelerate the loan if the farmer defaults.[45] A security agreement is also signed by the farmer. It lists the secured property and requires the farmer to turn over the property or its proceeds if the farmer fails to perform.[46] Some security agreements have been written to create an interest in future crops and equipment.[47] Filing of these documents in the proper location results in perfection and its substantive rights.[48]

III. FORECLOSURE

Foreclosure technically may occur when a farmer has defaulted on the loan, showing an inability to pay.[49] However, foreclosures do not always or automatically occur when there has been a default.[50] Generally, a borrower will be sent an acceleration notice.[51] Some jurisdictions commence the foreclosure action by a notice to cure default.[52] Such a notice provides a warning

41. *See* HANDBOOK, *supra* note 4, at 39.

42. *See generally* HANDBOOK, *supra* note 4, at 35, 40-1. Farm and Home Plan provides financial information for calculating a farm loan and its approval. It indicates what the farmer expects the operating expenses, the living expenses, and the annual payments on debts to be. Also, the plan determines what income is expected. *Id.*

43. Form FmHA 431-2.

44. *See generally* HANDBOOK, *supra* note 4, at 35, 40-1. *See also supra* notes 39 & 42.

45. *See* HANDBOOK, *supra* note 4, at 49.

46. *Id.*

47. *Id. See also* Meyer, *Crops as Collateral for Article 9 Security Interest and Related Problems*, 15 U.C.C. L.J. 3 (1982).

48. *See* U.C.C. § 9-302(1) (1983).

49. *See* HANDBOOK, *supra* note 4, at 53; H. MORRIS, *supra* note 2, at 11; D. PEEBLES & J. ANCEL, *Farm Foreclosure Prevention and Reorganization* (1983).

50. *See* H. MORRIS, *supra* note 2, at 18 (a foreclosure is a process that takes time). "The notice or letter is just the first step. It is the beginning of the procedure that *could* but not necessarily will end up in a loss . . . ." *Id.* (emphasis added). FmHA officials have maintained that not all defaults or delinquencies end in foreclosure, and in fact, there is no correlation between the two. Emergency Agriculture Credit Act of 1983, H.R. REP. No. 1190, 98th Cong., 2d Sess. 18 (1983) (statement of Mr. Shuman, Administrator of FmHA). FmHA officials also indicate that they will not foreclose on borrowers who have acted in good faith, are good farm managers, and have a reasonable chance to repay. *Id.* at 24.

A farmer may prevent foreclosure by negotiating with the FmHA county supervisor. Negotiations may include a new loan, rescheduling of loan payments, informal or formal deferral, or a farmer may just manage to come up with the payments due. Alternatives to foreclosure might include liquidation or bankruptcy. *See infra* notes 54-56 and accompanying text. *See generally* HANDBOOK, *supra* note 4, at 47-67.

51. An acceleration means the lender is requiring full payment of the loan including interest. H. MORRIS, *supra* note 2, at 18. The basis for acceleration and foreclosure lies in the farmer having signed the promissory note. *See supra* text accompanying note 45. The acceleration notice that FmHA uses is form FmHA 455-21.

52. One state that uses a default notice is North Dakota. *See* N.D. CENT. CODE §§ 32-19-20,

to farmers in default that, if payment is not made, the note will be accelerated. Use of such a notice is arguably beneficial to both FmHA and the delinquent farmer.[53]

Alternatives to foreclosing may include involuntary[54] or voluntary[55] liquidation, filing of bankruptcy,[56] negotiations,[57] or applying for and receiving deferral relief.[58] In foreclosing, FmHA must follow state law.[59] Some states require judicial foreclosure, some do not.[60] A foreclosure sale may not neces-

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32-19-21, 32-19-28 (1983). California also has such a statute, CAL. CIV. CODE § 2924(c) (West Supp. 1980).

53. The theory behind the right to cure default notices is that the farmer may not appreciate the gravity of an acceleration, which would have the farmer go from owing only the arrearages to owing the full indebtedness. HANDBOOK, *supra* note 4, at 52. If the farmer is warned that acceleration might occur, it may cause the farmer to somehow come up with the payments or contact the county supervisor to negotiate. FmHA also seems benefited by such a system, as they could save the cost of foreclosure. *See also* H. MORRIS, *supra* note 2, at 13-14 (It is a well-known truth that foreclosure only works for lenders in good times; in bad times, lenders have a hard time reselling in a down market.).

54. Involuntary liquidation is the sale or transfer of secured property to recover money owed by the borrower by exercising foreclosure rights.

55. Voluntary liquidation is where the farmer voluntarily sells the property to a third party or transfers it to FmHA, including a transfer under the threat of foreclosure. *See generally* HANDBOOK, *supra* note 4, at 57, 65.

56. In deciding to file bankruptcy one must consider the type of debts causing the most problems, what the significant assets are, and how the debts were incurred and if they are secured. The general advantage of bankruptcy is that it discharges most debts and stops harassment by creditors. As of the date of filing, creditors are stayed from bringing an action against the debtor. The general disadvantage of bankruptcy is that it may cause a stigma to attach to the debtor of not being able to pay bills, the cost of filing may be too high, or all debts may be secured ones and the debtor does not have sufficient income to cure default even with the help of bankruptcy.

There are three bankruptcy options—Chapter 7, 11, and 13. Chapter 7 (straight bankruptcy) is appropriate when the farmer wants to discontinue farming and eliminate or limit liability. Chapter 11 allows the farmer to reorganize the farm operation through the adjustment of debts and equity interest. A farmer can use Chapter 11 when there is over $350,000 in secured debts, and over $100,000 in unsecured debts. A noncorporate farmer who has smaller debts can file under Chapter 13. *See generally* 11 U.S.C. § 101 (Supp. IV 1981); HANDBOOK, *supra* note 4; D. PEEBLES & J. ANCEL, *supra* note 49; Landers, *Reorganizing a Farm Business Under Chapter 11*, J. AGRIC. TAX'N & LAW 11 (1983).

When filing bankruptcy one should be aware of applicable exemptions. Kansas does not allow the use of the federal bankruptcy exemptions found at 11 U.S.C. § 522(d) (Supp. 1981). *See* KAN. STAT. ANN. § 60-2312 (Supp. 1982). However, Kansas has its own state exemptions found at KAN. STAT. ANN. § 60-2301 (Supp. 1982). One can also take advantage of federal nonbankruptcy exemptions such as: Social Security benefits, 42 U.S.C. § 407 (1981); veterans benefits, 42 U.S.C. § 352(e) (1981); civil service retirement fund benefits, 5 U.S.C. §§ 729, 2265 (1981); and foreign service retirement and disability payments, 22 U.S.C. § 1104 (1981).

Creditors cannot institute forced bankruptcy proceedings against a farmer. *See* 11 U.S.C. § 303(A) (1981).

57. Negotiation is always a tool that should be used when first attempting to deal with a foreclosure action.

58. *See infra* notes 62-163 and accompanying text.

59. *See* United States v. Kimball Foods, Inc., 440 U.S. 715 (1979). In analyzing the FmHA loan program, the Court concluded that state law is applicable. It considered three factors: whether the federal program by its nature must be uniform; whether specific objectives of the federal program would be frustrated if state laws were applicable; and the extent to which uniform federal laws would disrupt commercial relationships predicated on state law. *Id.* at 728-29, 740. FmHA has conceded internally that state foreclosure laws are applicable to mortgages. Memorandum from James Loughran, Director, Community Development Division, USDA Office of General Counsel to All USDA Regional Attorneys (July 24, 1979).

60. States that require judicial foreclosure are: Alabama, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming. States that do not require judicial forclosure are: Alaska, Arizona, California, Colorado, Idaho, Illinois, Mississippi,

sarily mean the farmer has lost the farm; there may be a right of redemption.[61]

IV. DEFERRAL RELIEF

Deferral relief[62] is a type of loan service that FmHA is to consider for the farmer who cannot make payments; it is a special kind of rescheduling.[63] It allows a farmer to postpone all principal and most interest payments.[64] The relief does not cancel the interest or the principal, but instead it is a provision enacted by Congress to help the farmer who temporarily cannot make payments "due to circumstances beyond his control."[65] It can be used together with reamortization,[66] rescheduling,[67] and consolidation[68] to give the farmer the best chance to continue farming, to maintain viable farm operations, and to prevent foreclosure.[69] The purpose of deferral and other servicing devices is to accomplish the loan objective and to protect the government's security interest.[70] Courts have repeatedly held FmHA's obligation to service its loans, a condition precedent to initiating foreclosure.[71]

The deferral provision, 7 U.S.C. § 1981a,[72] provides that the Secretary of

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Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oregon, Tennessee, Texas, Utah, Washington, and West Virginia. States that allow foreclosure by both procedures are: Arizona, Kentucky, and Maryland.

61. Kansas, like most states, has a redemption period of twelve months. *See* KAN. STAT. ANN. § 60-2414 (1983); *accord* IOWA CODE ANN. § 628-3 (West 1982); KY. REV. STAT. § 426.530 (1983); MINN. STAT. ANN. § 581-10 (West 1983); N.D. CENT. CODE § 32-19-20 (1983). *See also* United States v. Stadium Apartments, Inc., 425 F.2d 358 (9th Cir. 1970) (dissent provides good discussion of history and purpose of right of redemption).

62. Deferral relief is provided for at 7 U.S.C. § 1981a (1982). *See also* 7 C.F.R. § 1951.33 (1982).

63. Rescheduling adjusts the size and due date of future principal and interest payments considering the farmer's ability to pay. Rescheduling is the term used for loans secured by chattels. Deferral relief is one type of rescheduling.

64. *See* 7 U.S.C. § 1981a (1982).

65. *Id.*

66. Reamortization is the term used for rescheduling when real estate is used as security. *See supra* note 63. *See also* 7 C.F.R. § 1951.40 (1982).

67. *See supra* note 63.

68. Consolidation is where a new loan is given while another loan exists, and the two loans are consolidated. It is possible to have a new loan approved even if an existing loan is delinquent. All consolidated loans must be repaid within seven years. *See* 7 C.F.R. § 1951.33(c) (1982).

69. Appellee's Brief at 3, Curry v. Block, Civ. No. 82-8544 (1982).

70. *See* 7 U.S.C. §§ 1872.1(b), 1962(a)(2) (1982).

71. *See* Rau v. Cavanaugh, 500 F. Supp. 204 (S.D. S.D. 1980) (housing case in which FmHA was required to give notice and a hearing before foreclosure was initiated); United States v. Villanueva, 453 F. Supp. 17 (E.D. Wash. 1978) (FmHA must provide borrower with notice of availability of moratorium relief); United States v. Rodriguez, 453 F. Supp. 21 (E.D. Wash. 1978) (FmHA must inform borrower of availability of moratorium relief); United States v. White, 429 F. Supp. 1245 (N.D. Miss. 1977) (FmHA has responsibility to service real estate financed by FmHA loan); Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976) (FmHA failed to provide managerial assistance to borrower that was required by regulations); Pealo v. FmHA, 361 F. Supp. 1320 (D.D.C. 1973) (FmHA must determine if any relief at all is warranted in a particular claim); United States v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980) (failure of FmHA to advise borrower of possible moratorium relief is a valid defense to foreclosure).

72. 7 U.S.C. § 1981a (1982) provides:

> In addition to any other authority that the Secretary may have to defer principal and interest and forego foreclosure, the Secretary may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the Secretary under this chapter, or under the provisions of any other laws administered by the Farmers Home Administration, and may forego foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to

Agriculture "may" defer payment of principal and interest on any farm loan.[73] The deferral is considered at the farmer's request.[74] To be eligible for deferral relief, the farmer must demonstrate two factors: that the hardship is caused by circumstances beyond the farmer's control,[75] and that the farmer is only temporarily unable to continue making payments of principal and interest when due—without unduly impairing the standard of living.[76] FmHA's Deputy Administrator of farm and family programs[77] has indicated that FmHA has not implemented the deferral provision.[78]

Recently, litigation has occurred because FmHA has not offered deferral as a servicing tool. The litigation has concentrated on the interpretation of the § 1981a provision.[79] The crux of the controversy is whether the Secretary of Agriculture is *required* to allow a hard-pressed farmer to apply for a deferral, or whether it is a totally discretionary power.[80] Deferral relief is important because it is the most favorable servicing tool available to a farmer,[81] and in many cases it prevents foreclosure.[82]

A. *Issues*

1. *Permissive versus Mandatory*

Whether the implementation of 7 U.S.C. § 1981a is to be permissive or mandatory has been addressed by considering the plain language of the statute and its legislative history. FmHA argues that the word "may" indicates that

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> continue making payment of such principal and interest when due without unduly impairing the standard of living of the borrower. The Secretary may permit interest that accrues during the deferral period on any loan deferred under this section to bear no interest during or after such period: provided, that if the security interest as is included in the purchase price at such foreclosure shall become part of the principal and draw interest from the date of foreclosure at the rate prescribed by law.

Id.

73. *Id.*

74. *Id.* Here is seems only fair that the farmer have notice of the deferral option in order to be able to apply for it. *See also infra* notes 111-13 and accompanying text.

75. 7 U.S.C. § 1981a (1982).

76. *Id.*

77. The Deputy Administrator is H. Allan Brock.

78. *See* Appellee's Brief at 34-35, Curry v. Block, Civ. No. 82-8544 (1982). Mr. Brock was deposed by the plaintiffs in Curry v. Block on October 1, 1982, and was designated by FmHA as the most knowledgeable person in the agency about farm loan policies and laws. He said that the deferral provision had not been implemented at that time. *Id.*

79. *See* Rowell v. Secretary of Agriculture, No. 82-181-S (M.D. Ala. Dec. 6, 1982); Neighbors v. Block, No. LR-C-82-765 (E.D. Ark. Dec. 15, 1982); Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982); Matzke v. Block (Matzke II), No. 82-1075 (D. Kan. May 5, 1983) (unpublished order); Matzke v. Block, 542 F. Supp. 1107 (D. Kan. 1982); Jacoby v. Schuman, No. N83-0024-C (E.D. Mo. June 1, 1983); Gates v. Block, No. 83-6025-CU-SJ (W.D. Mo. May 5, 1983); Allison v. Cavanaugh, No. 80-4226-CU-C-H (W.D. Mo. Jan. 1, 1983); Allison v. Block, 556 F. Supp. 400 (W.D. Mo. Dec. 8, 1982); Turnbull v. Block, No. 82-6053-CV-SJ (W.D. Mo. 1982); Holmes v. Block, No. Cu82-L-606 (D. Neb. Dec. 29, 1982); Coleman v. Block, 562 F. Supp. 1353 (D.N.D. May 23, 1983); Moskiewicz v. Block, No. 82-C-231 (W.D. Wis. Sept. 7, 1982); Gamradt v. Block, 5-83 Civ. 158 (Minn. June 29, 1983); United States v. Hamrick, No. 82-608-3 (S.C. Nov. 15, 1982), *rev'd*, No. 82-2050, 82-1013 (4th Cir. Aug. 2, 1983). All of the above cases dealt with the interpretation of 7 U.S.C. § 1981a. *See infra* note 101 for holdings. *See also* HANDBOOK, *supra* note 4, at 66-67.

80. *See infra* notes 83-100 and accompanying text.

81. Deferral is advantageous because it allows the farmer time to make loan payments. It does not require the farmer to make a new loan and it does not obligate the farmer to larger loan payments later in the life of the loan which the farmer might not be able to make.

82. *See infra* notes 121-63 and accompanying text.

the statute is permissive and thus provides for a solely discretionary power unless the statutory content clearly demonstrates that it should have a mandatory use.[83] It then determines that it "may" implement § 1981a at its discretion. FmHA further argues that the plain language of § 1981a just clarifies other provisions of § 1981.[84] However, advocates for the farmer argue that the word "may" in the provision does not necessarily mean that FmHA has the discretion to implement the deferral program or not implement it at all, but instead, that FmHA's discretion applies *after* the deferral program has been implemented and the borrower has notice of, and has made application for, deferral relief.[85] Neither side is content to rest its case on the plain-meaning rule; both also analyze legislative history.

Farm advocates argue that FmHA is in direct derogation of the will of Congress. To support such an argument, they turn to hearings conducted when the deferral relief provision was enacted in 1978,[86] and they point to the findings of Congress that there "was a need for an emergency credit package to avoid foreclosure on a large number of farms."[87] They also point to a Senate resolution passed in 1981, stating that Congress had provided the Secretary of Agriculture with deferral authority, and that this authority should be pursued to the maximum extent possible.[88] They then maintain that an executive agency cannot simply ignore congressional intent.[89]

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83. *See* United States v. Reeb, 433 F.2d 381 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1971) (interpretation of "shall" and "may" depends upon background circumstances, context of use and legislative intention); Thompson v. Clifford, 408 F.2d 154, 158 (D.C. Cir. 1968); Koch Ref. Co. v. United States Dep't of Energy, 504 F. Supp. 593 (D. Minn. 1980), *aff'd*, 658 F.2d 799 (Temp. Emer. Ct. App. 1981) (word "may" is permissive and vests discretionary power unless context of its use indicates a mandatory use).

84. *See* Matzke v. Block (Matzke II), No. 82-1075, slip op. at 22 (D. Kan. May 5, 1983). *But see* Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982) (court said § 1981a *did more* than just clarify other provisions). The provision does clarify in *several respects* since unlike § 1981d, § 1981a specifically addresses deferrals and covers general standards. *See* H.R. REP. NO. 986, 95th Cong., 2d Sess. 4 (1978).

85. Pealo v. FmHA, 361 F. Supp. 1320, 1324 (D.D.C. 1973) (citing a portion of an opinion by former Assistant Attorney General William H. Rehnquist, now a Justice of the Supreme Court). "[On] the question of trying to find a mandatory intent on the part of Congress, it is not a question of looking for the word 'shall' as opposed to 'may.'" *Id. See also* Curry v. Block, 541 F. Supp. 506, 515 (S.D. Ga. 1982).

86. The hearing centered on the severe economic crisis confronting the agricultural industry. *See also infra* note 87.

87. H.R. REP. NO. 986, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1106, 1118.

> The Secretary should have explicit authority to provide a moratorium on payment of principal and interest and to forego foreclosure on Farmers Home Administration loans, upon a showing by the borrower that due to circumstances beyond his control he was temporarily unable to meet an installment when due without impairing his standard of living. Comparable language appears in the Housing Act with respect to housing loans by the Farmers Home Administration.

Id.

88. The Senate Resolution was passed December 11, 1981.

89. *See* Ross v. Community Serv., Inc., 396 F. Supp. 278 (D. Md. 1975), 405 F. Supp. 831 (D. Md. 1975), *aff'd mem.*, 544 F.2d 514 (4th Cir. 1976), *cert. granted sub nom.* Harris v. Ross, 431 U.S. 928 (1977), *remanded for consideration of settlement*, 439 U.S. 1001 (1978). The issue in these cases was whether HUD had a duty to pay operating subsidies to project owners pursuant to 12 U.S.C. § 17152-1(f)(3)(g) which authorized the Secretary to do so. The court held that HUD could not disagree with a congressional policy and refuse to implement it. Ross v. Community Serv. Inc., 396 F. Supp. at 286. *See also* Abrams v. Hill, 415 F. Supp. 550 (C.D. Cal.), *aff'd*, 547 F.2d 1062, 1067 (9th Cir. 1976), *cert. granted sub nom.* Harris v. Abrams, 431 U.S. 928 (1977),

From the above premises, farmers argue that finding the provision totally discretionary would not be consistent with Congress' intent to provide relief for the depressed farmer. This argument is extended by noting a comparison that was made when promulgating § 1981a,[90] between it and the Housing Act of 1949.[91] The Housing Act has threefold significance: legislative history indicates that the deferral program be implemented in regulations comparable to the rural housing moratorium regulations;[92] language of § 1981a tracks the language of the Housing Act;[93] and case interpretation of the Housing Act demonstrates that a mandatory duty is placed on FmHA to implement the program.[94] The conclusion is that the two similar statutes should be interpreted consistently.[95]

FmHA argues that the loan schemes involved in the two provisions are different in size and payment schedules in particular.[96] These differences, at least to some courts, are considered insignificant when comparing the intent of the provisions.[97] FmHA also argues that existing authority to defer loans pursuant to § 1981d,[98] which is discretionary, is also sufficient to implement § 1981a. However, § 1981a provides that its authority is "in addition to any

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remanded for consideration of settlement, 439 U.S. 1001 (1978) (court reviewed legislative intent and refused HUD's argument that implementation of operating subsidy was discretionary).

90. In another amendment to Title 1, Mr. Moore proposed that the Secretary should have explicit authority to provide a moratorium on payment of principal and interest and to forgo foreclosure on Farmers Home Administration loans, upon a showing by the borrower that due to circumstances beyond his control he was temporarily unable to meet an installment when due without unduly impairing his standard of living. Comparable language appears in the Housing Act with respect to housing loans by [FmHA] and was recommended by Mr. Moore in order to clarify the Secretary's authority.

H.R. REP. NO. 986, 95th Cong. 2nd Sess. 22, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1106, 1132. "Comparable language" of the Housing Act can be found at 42 U.S.C. § 1475 (1982). Although H.R. REP. NO. 986 discusses a proposed § 1982a different from that passed by Congress, the differences are insignificant. Curry v. Block, 541 F. Supp. 506, 517 n.11 (S.D. Ga. 1982).

91. 42 U.S.C. § 1475 (1976).

92. *See supra* note 90.

93. The rural housing statutory authority creating moratorium rights provides:

[T]he Secretary is authorized . . . to grant moratorium upon the payment on interest and principal on such loan for so long a period as he deems necessary, upon a showing by the borrower that due to circumstances beyond his control, he is unable to continue making payments of such principal and interest when due without unduly impairing his standard of living.

42 U.S.C. § 1475 (1976).

94. *See* Pealo v. FmHA, 361 F. Supp. 1320 (D.D.C. 1973) (FmHA unsuccessfully argued that the rural housing interest credit program could be suspended. The court found that the term "may" only gave FmHA discretion to grant a particular person interest credit, and not discretion as to the implementation of the program.). *See also* Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982) (court compared § 1981a to § 1475 and found § 1981a was to be mandatorily implemented); Rocky Ford Housing Auth. v. USDA, 427 F. Supp. 118 (D.D.C. 1977) (secretary not implementing rural rent supplement program was abuse of discretion and in excess of authority).

95. Northcross v. Board of Educ., 412 U.S. 427, 428 (1973). *See* Finberg v. Sullivan, 461 F. Supp. 253, 258 (E.D. Pa. 1978), *vacated on other grounds*, 634 F.2d 50 (3d Cir. 1980) (legislature is presumed to act with knowledge of existing laws). *See also* Cannon v. University of Chicago, 441 U.S. 677, 696 (1979); Curry v. Block, 541 F. Supp. at 518 (court compared Title IX and Title VI and found that legislators were aware of the interpretation of VI and applied it to IX).

96. FmHA maintains that the rural housing loans involve a small amount of money and are made monthly so the forgiveness of one payment or a series of payments involves only a small amount of money. It contrasts this with farm loans which are larger and made ony a few times a year, and thus, involves more money that could not be collected. Appellant's Brief at 9, Curry v. Block, Civ. No. 82-8544 (1982).

97. *See* Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982).

98. 7 U.S.C. § 1981d (1982).

other authority that the Secretary may have to defer principal and interest."[99] This indicates that Congress intended § 1981d to operate in different ways.[100]

2. *Regulations*

When and if a court finds that § 1981a is mandatory,[101] the next question is whether the implementation of § 1981a should be effectuated through the promulgation of regulations. It is argued that the requirement of regulations is inherent in the due process clause and the Federal Administrative Procedure Act (APA).[102] It is further argued that the Department of Agriculture has waived any exemption it may have claimed from the Act.[103] Thus, the restraints of the APA must be placed on the discretionary powers of the FmHA just as they have been placed on other administrative agencies to protect the individual from the arbitrary power of the agency. The APA demands that the agency's discretion be controlled by rulemaking.[104]

A contrasting argument is that other regulations already in existence are sufficient to implement deferral relief.[105] However, these regulations arguably make little sense when applied to the deferral relief enunciated in § 1981a.[106]

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99. 7 U.S.C. § 1981a (1982).

100. Congress also established criteria for those seeking FmHA deferral relief, suggesting its mandatory nature to the discretion allowed in § 1981d.

101. *See* Rowell v. Secretary of Agriculture, No. 82-181-5 (M.D. Ala. Dec. 6, 1982) (Secretary's authority is discretionary); Neighbors v. Block, No. CR-C-82-765 (E.D. Ark. Dec. 15, 1982) ("may" is permissive); Curry v. Block, 541 F. Supp. 506, (S.D. Ga. 1982) (implementation mandatory); Matzke v. Block, 542 F. Supp. 1107 (D. Kan. 1982) (provision is mandatory); Jacoby v. Schuman, No. N83-0024-C (E.D. Mo. June 14, 1983) (provision is mandatory); Gates v. Block, No. 83-6025-CV-55 (W.D. Mo. May 5, 1983) (provision is mandatory); Allison v. Block, 556 F. Supp. 400 (W.D. Mo. Dec. 8, 1982) (provision is mandatory); Coleman v. Block, 562 F. Supp. 1353 (N.Dak. May 23, 1983) (provision is mandatory); Moskowiewicz v. Block, No. 82-C-231 (W.D. Wis. Sept. 7, 1982) (provision is permissive); United States v. Hamrick, No. 82-608-3 (So. Car. Nov. 15, 1982), *rev'd*, No. 82-2050, 82-1013 (4th Cir. Aug. 2, 1983) (lower court found "may" to mean permissible, appeals court found it mandatory).

102. *See* 5 U.S.C. § 522(a)(1) (1982).

103. 36 Fed. Reg. 13,804 (1971). *See* Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975) (sustained the waiver, required USDA to comply with Administrative Procedure Act rule making requirements in operation of the Food Stamp Program). *See also* National Welfare Rights Organ. v. Mathews, 533 F.2d 637, 646 (D.C. Cir. 1976).

104. *See* Historic Green Spring, Inc. v. Bergland, 497 F. Supp. 839 (E.D. Va. 1980) (required Secretary of Interior to promulgate regulations setting out substantive criteria); City of Santa Clara v. Kleppe, 418 F. Supp. 1243, 1261 (N.D. Cal. 1976), *aff'd in part and rev'd in part on grounds sub. nom.*, City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978). "[D]ue process means that administrators must do what they can to structure and confine their discretionary powers through safeguards, standard principles and rules." *Id. See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE 7:26 (2d ed. 1976) (due process requires standards both substantive and procedural, to control agency discretion). 5 U.S.C. § 522(a)(1) requires the publication of all matters relating to the nature, method, and rules of procedure in the Federal Register. "[A] person may not be adversely affected by a matter required to be published in the Federal Register which has not been so published." *Id. See also* Morton v. Ruiz, 415 U.S. 199, 232 (1974).

105. FmHA has promulgated regulation for deferral on operating loans, 7 C.F.R. § 1941.18 (1982), for deferrals on farm ownership loans, 7 C.F.R. § 1943.18, and for deferrals on emergency loans, 7 C.F.R. §§ 1945.68(c), 1951.33. All of the above were in effect before § 1981a. *But see supra* note 81.

106. The regulations allowing for deferment in the particular programs have quite different criteria than that which is to be used under § 1981a. *See* 7 C.F.R. § 1951.33 (1982) (indicates that deferment cannot be used to delay liquidation, to remove delinquency, or to circumvent farmers graduation requirements; the farmer must be making satisfactory progress and cooperating); *See also* Appellee's Brief, Curry v. Block, Civ. No. 82-8544 (1982), (deposition of FmHA official Bryant is cited which indicates deferral relief is considered only when the farmer wishes to continue

And, in fact, they are contrary to the congressional intent.[107] Other approaches suggest that regulations are not necessary, as they can be implemented through the administrative appeals process.[108] Still another approach compares the regulations promulgated pursuant to the Housing Act of 1949 and those used to implement § 1981a, and it finds the latter are inadequate.[109]

Although several courts have found the language of § 1981a mandatory, they have disagreed whether formal regulations are necessary.[110]

3. *Notice*

Another major issue is whether FmHA has a duty to make the farmer aware that deferral relief may be available or whether the duty is on the farmer to find out what the options are. The language of § 1981a allows consideration of deferral "at the request of the borrower."[111] This language has been construed by some courts to require FmHA to give notice as to the availability of deferral relief in order that the borrower may request consideration of such relief.[112] The basis of such a finding is that the farmer cannot be expected to ask for consideration of deferral relief if the farmer has no indication that it exists.[113] Some courts have required that personal notice be

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farming, has not acted in contravention of the loan, and when it is an advantage to both the government and the farmer).

107. The intent of Congress is to avoid the farmer's liquidation. *See supra* notes 86-88 and accompanying text. *See also* CONF. REP. No. 1519, 96th Cong., 2d Sess. 19 (1980), it provides:

> Evidence before the Appropriations Committee and other committees points up the fact that many of those engaged in business, manufacturing, retailing or agriculture face the imminent threat of bankruptcy or liquidation because of high costs and/or poor crops. Four short crop years coupled with spiraling increases in costs have left many farmers and businesses short of cash . . . .
>
> If these business interests are forced into bankruptcy at this time or forced to liquidate their assets to prevent bankruptcy, it would jeopardize the national economy. Certainly, it would spread . . . .
>
> Both the Small Business Administration and *the Farmers Home Administration have existing authority and we are providing funds to help meet this problem. Section 1981 of Title VII of the United States Code sets forth the Secretary of Agriculture's authority in this area*. It provides a means of refinancing, stretching out the repayment date, and perhaps postponing a year's payments and interest, when the facts justify such action . . . .
>
> *Therefore, the conferees will expect both the Farmers Home Administration and the Small Business Administration to provide procedures for meeting these problems, including refinancing, deferral of interest payments and even a moratorium of repayments, in those individual cases where necessary and warranted to avoid bankruptcy or forced sale of assets* . . . .

Id. (emphasis added).

108. Matzke v. Block, No. 82-1075 (D. Kan. May 5, 1983) (Matzke II) (unpublished order). *See also infra* note 110.

109. Curry v. Block, 541 F. Supp. at 522.

110. *See* Coleman v. Block, 562 F. Supp. 1353 (N.D. May 23, 1983) (FmHA can implement by whatever agency means it chooses); Matzke v.Block, No. 82-1075 (D. Kan. May 5, 1983) (unpublished order, FmHA could implement through administrative appeals process); Allison v. Cavanaugh, No. 80-4226-CU-C-H (W.D. Mo. Jan. 1, 1983) (regulations should be established). *See also* Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982) (required formal regulations be promulgated).

111. *See* 7 U.S.C. § 1981a (1982).

112. *See* Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983) (holding that an ordinary farmer cannot be expected to spend time reading the United States Code and the Federal Register); Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982) (court found the language implied personal notice based on the plain language of the statute).

113. *See supra* note 112.

given.[114] Although FmHA maintains there is no statutory or constitutional entitlement to individual notice of every servicing alternative,[115] farmers disagree.[116] Another court has found that constructive notice through the Federal Register is sufficient.[117] However, at least one court has found that a public regulation does not constitute legally sufficient notice within the meaning of due process.[118] FmHA has made some attempts to draw up a form that would put the farmer on notice that the farmer could ask to be considered for deferral relief.[119] One court found this form "totally flawed," as it gave biased, incomplete information through threatening language.[120]

B. *Cases*

1. Curry v. Block

Curry v. Block[121] was the first case to thoroughly examine the deferral relief problem. The court enjoined FmHA from foreclosing on farms in Georgia, finding that § 1981a was a mandatory provision requiring formal regulations and personal notice.[122]

The plaintiffs were rural Georgia farmers who had each received credit from FmHA.[123] Most of the farmers started experiencing financial difficulty

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114. *See supra* note 112.

115. *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (court found that regulations published in Federal Register were sufficient even though that person had no actual knowledge); Wolfson v. United States, 492 F.2d 1386 (Ct. Cl. 1974) (when regulations are published in the Federal Register, they give legal notice to all who may be affected); R-T Leasing Corp. v. Ethyl Corp., 494 F. Supp. 1128 (S.D. N.Y. 1980) (Federal Register regulations provide legal notice). *See also* 44 U.S.C. § 1507 (Supp. 1981). FmHA contends that there is no property right or interest in servicing which relates to their loans. Appellee's Brief at 41, Curry v. Block, Civ. No. 82-8544 (1982). *But see infra* note 116.

116. Farmers argue that 44 U.S.C. § 1507 provides two exceptions to the rule that Federal Register publication is enough to provide notice. The two exceptions are: where constructive notice is "specifically provided by statute" and where "notice by publication is insufficient by law." It is argued that farmers fall under the first exemption and that 7 U.S.C. § 1981a specifically provides for individual notice which is the key by which farmers learn of availability of this relief so that they may request consideration of the relief as is required of them by the statute. *See* Appellee's Brief at 37, Curry v. Block, Civ. No. 82-8544 (1982). *See also* 44 U.S.C. § 1507 (1982) which provides:

> *Unless otherwise specifically provided by statute*, filing of a document, required or authorized to be published by Section 1505 of this title, *except in cases where notice by publication is insufficient in law*, is sufficient to give notice of the contents of the document to a person subject to or affected by it . . . .

Id. (emphasis added).

117. Matzke v. Block, No. 82-1075 (D. Kan. May 5, 1983) (Matzke II).

118. Kodiak-Aleutian Chapter of Alaska v. Kleppe, 423 F. Supp. 544, 547 (D. Alaska 1976) (citing Shroeder v. City of New York, 371 U.S. 208, 211 (1962)) (due process requires notice to apprise parties of an action and a chance to be heard). *See also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (holding due process requires that notice must be calculated to apprise interested parties of the pendency of the action and to afford them the opportunity to present objections).

119. Farmer Program Borrower Responsibilities Form FmHA 1924-14.

120. Curry v. Block, 541 F. Supp. at 524 (court relied on William v. Butz, Consent Decree No. 176-153 (S.D. Ga. Oct. 7, 1977)).

121. 541 F. Supp. 506 (S.D. Ga. 1982).

122. *Id.* at 525-26. *See generally supra* notes 83-100 and accompanying text. This case is on appeal to the 11th Circuit and has not been decided. Curry v. Block, Civ. No. 82-8544 (filed Nov. 1982).

123. 541 F. Supp. at 509.

in 1977 due to adverse weather and economic conditions.[124] Because of these problems, the plaintiffs sought to take advantage of FmHA loan servicing, particularly the deferral program.[125] The farmers alleged that FmHA had inadequately implemented 7 U.S.C. § 1981a.[126]

In assessing the issues, the court found provisions of § 1981a comparable to language in § 1475 of the Housing Act.[127] Viewing the two as similar, the court not only found that § 1981a was mandatory,[128] as is the Housing Act, but also found personal notice was required in both provisions.[129] As to notice, the court specifically cited a consent order[130] that FmHA had signed in a Housing Act case in which it agreed that the language of § 1475 gave borrowers a right to personal notice.[131] The court then applied that proposition to the deferral relief provision.[132]

Independent of *Curry*, FmHA proposed two sets of regulations dealing with personal notice.[133] One provided a "guide letter" used to notify the farmer at the beginning of the production season. It would contain conditions to be met for continued FmHA eligibility and would notify them of alternatives, such as deferral, in case of delinquency.[134] The second was a document given at the time of loan application explaining responsibilities and alternatives available if the farmer became unable to pay.[135] The farmers argued that notice came too early or too late,[136] that the content was insufficient,[137] and that the notice was not conspicuous.[138] The court found timing sufficient, but content and placement insufficient,[139] thus the notice was not adequate.

2. *Kansas*

The United States District Court of Kansas has also interpreted the deferral provision. In *Matzke v. Block*,[140] a class action seeking a preliminary injunction was brought by some Kansas farmers against FmHA to prevent foreclosure.[141] For various reasons,[142] the farmers who had obtained loans from FmHA fell behind in the repayment of these loans. The farmers alleged

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124. *Id.*
125. *Id.*
126. *Id. See supra* note 105.
127. 541 F. Supp. at 523. *See also supra* notes 93 & 94.
128. *Id.* at 522.
129. *Id. See also supra* notes 112-14 and accompanying text.
130. *See* Williams v. Butz, No. 176-153 (S.D. Ga. Oct. 7, 1977).
131. 541 F. Supp. at 522-23.
132. *Id.* at 523.
133. *Id.*
134. 46 Fed. Reg. 49,908 (1981).
135. 46 Fed. Reg. 54,751 (1982).
136. 541 F. Supp. at 523-24.
137. *Id.* at 524.
138. *Id.*
139. *Id.*
140. 542 F. Supp. 1107 (D. Kan. 1982).
141. *Id.* at 1110.
142. One farmer testified she became delinquent in her account when the supervisor failed to process her loan in time for planting season, refused to permit her to hire a hired-hand, refused her machinery to be repaired, and refused to allow her to sell non-breeding cattle from her herd. FmHA then charged her with mismanagement when she could not make payments. *Id.* One had health problems. *Id.* at 111. Still another had five consecutive years of bad crops. *Id.*

that the Secretary of Agriculture and FmHA accelerated loans without affording them due process of law under the fifth amendment.[143] Further, that FmHA failed to refused to implement the deferral relief provision under 7 U.S.C. § 1981a.[144]

As a result, the court ordered a preliminary injunction of foreclosures until FmHA complied with 7 U.S.C. § 1981a.[145] The order was based on a finding by the court that the Secretary of Agriculture's authorization to forego foreclosure was a ministerial function as opposed to a discretionary one.[146]

The court confirmed the preliminary injunction in *Matzke v. Block* (*Matzke II*).[147] The court ordered FmHA to accept applications from Kansas farmers for deferral relief,[148] ordered FmHA to provide an informal hearing, to give "meaningful" consideration to the statutory criteria provided in § 1981a,[149] and ordered it to provide an applicant with written findings after the hearing to facilitate judicial review.[150] However, the court did not require FmHA to issue national regulations implementing § 1981a[151] or to provide actual notice as to deferral relief.[152]

The *Matzke II* case does not extend as far as other decisions on this issue.[153] Although the court found that § 1981a should be mandatorily implemented,[154] it also found that constructive notice and an informal hearing would suffice.[155] In reaching that conclusion, the court found that the language of the statute does not provide for notice or for a hearing on the record.[156] This is directly in conflict with courts that have found that the notice is implied by the statute[157] since it places the burden on the farmer to request deferral relief. In not requiring that actual notice be given to farmers concerning the relief available, the court is requiring the farmer to be aware of regulations in the Code or the Federal Register which may be many miles away and confusing to a layperson.[158] Thus, the farmer is not put in a better position with regard to notice than before. Further, in finding that the existing admin-

143. *Id.* at 1109. The plaintiffs argued they had been denied notice and an opportunity to be heard.

144. *Id.* One appealed and was denied relief without consideration of the deferral provision. *Id.* at 1110. One was told the relief only applied to farm housing loans and not to farmer program loans. *Id.* Most, if not all, were never notified of the deferral relief provision. *Id.*

145. *Id.* at 1115.

146. *Id.* The court maintained that when discretion is vested in an administrative agency and the agency refuses to exercise the discretion, that is an abuse of discretion. *Id. See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) (failure of Board of Immigration to exercise its own discretion over deportation was denial of due process).

147. No. 82-1075, slip op. (D. Kan. May 5, 1983) (unpublished order).

148. *Id.* at 26.

149. *Id.* at 7.

150. *Id.* at 8.

151. *Id.* at 21.

152. *Id.* at 18.

153. *See supra* note 110 and accompanying text.

154. Matzke v. Block, No. 82-1075, slip op. at 26.

155. *Id.* at 22.

156. *Id.*

157. *See supra* notes 112-14 and accompanying text.

158. *See* Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983) (court explicitly rejected constructive notice); Curry v. Block, 541 F. Supp. 506 (S.D. Ga. 1982) (court required personal notice). *See also supra* notes 111-20 and accompanying text.

istrative hearing procedures provide a farmer with ample protection,[159] the court overlooks the very decentralized nature of the appeals system.[160]

Matzke II is currently on appeal by FmHA, along with other cases addressing these issues. The Fourth Circuit Court of Appeals has already decided one case,[161] reversing the lower court and holding that the Secretary of Agriculture had a mandatory duty to implement § 1981a.[162] The United States District Court for North Dakota has also addressed the deferral issue and has recently turned a suit by nine farmers into a class action that includes 230,000 farmers across the nation, covering forty-four states.[163]

C. *Legislation*

Congress has been concerned about and has addressed the farm credit problems in the last several years, but at this time, has not taken any final action. In 1982, both the House and the Senate voted for loan deferral but failed to complete action on the bills.[164] The House and Senate have revived loan deferral authority in 1983.[165] The House has passed a deferral bill,[166] and the bill is now awaiting approval by the Senate. The bill being considered elaborates on current deferral relief provisions[167] in three substantial ways: it explicitly makes implementation of FmHA's deferral program mandatory;[168] it provides for three conditions a borrower must meet to be eligible;[169] and it creates procedural safeguards.[170]

This is a very controversial bill,[171] which the Administration opposes be-

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159. Matzke v. Block, No. 82-1075, slip op. at 22.

160. *See infra* notes 182-89 and accompanying text.

161. United States v. Hamrick, No. 82-2050, 83-1013 (4th Cir. Aug. 2, 1983).

162. *Id.* The court did not expand but merely made a finding.

163. *See* Kansas City Star, Oct. 30, 1983, at 12A, col. 1. Judge VanSickle presiding over Coleman v. Block expanded it to include not just nine farmers but 230,000 farmers from 44 states. Kansas, Georgia, Florida, Minnesota, and Mississippi are not included because there are already state class actions pending there. *Id.* Plaintiffs of the *Coleman* case have interpreted the order as a temporary injunction against foreclosures by FmHA in the 44 states. FmHA, however, argues that the ruling does not extend that for a clarification of the order has been requested. Conversation with Sara Vogel, plaintiffs' attorney (Nov. 10, 1983).

164. *See* 41 CONG. Q. WEEKLY REP. 1272 (June 25, 1983).

165. *Id. See also* 41 CONG. Q. WEEKLY REP. 1884 (Sept. 10, 1983) (H.R. 1190 is being considered and a similar bill, S.B. 24, is being considered in the Senate); 41 CONG. Q. WEEKLY REP. 482 (Mar. 5, 1983).

166. H.R. 1190, 98th Cong., 1st Sess., 129 CONG. REC. 2565 (1983). The bill was introduced by Subcommittee Chairman Edward Jones (D-Tenn.) and ranking minority member, Thomas Coleman (R-Mo.) in the House Agriculture Subcommittee with oversight responsibilities for FmHA. The bill passed the House 398-31 on May 3, 1983. The bill is now in the Senate.

167. 7 U.S.C. § 1981a (Supp. 1982).

168. This is not a mandatory deferral or blanket deferral, but requires the Secretary of Agriculture to use the authority to defer loans and forego foreclosures under specific circumstances. This deals exactly with the cases cited in this note. *See supra* notes 83-100.

169. The borrower must have used good "management practices;" be "temporarily unable" to make payments on loans because of circumstances "beyond the borrower's control;" and have "a reasonable chance of repayment" after the deferral period." *House Subcommittee Adopts Deferral Bill*, Small Farm Advocate, Winter 1982-83 at 2.

170. The bill grants a right of appeal for any farmer denied servicing relief. H.R. 1190, 98th Cong., 1st Sess. 129 CONG. REC. 2565 (1983).

171. Before the bill passed the House, it was trimmed significantly by critics. *See* Wehr, *Administration Still Objects To Trimmed Farm Credit Bill*, CONG. Q. WEEKLY REP. 891 (May 7, 1983). Opponents to the bill maintain it is unfair because most farmers who borrow from private lenders must keep their payments up to date. *Id.* They also argue that due to the improving

cause it views it as a blanket moratorium[172] inviting litigation.[173] If the bill should pass the Senate, which is questionable due to the history of similar bills,[174] the farmer would be assured that the deferral program would be implemented. However, there would be a heavier burden on the farmer to show the conditions had been met,[175] and if denied the relief, the farmer would be left to an appeal in a decentralized system.[176]

V. APPEALS SYSTEM

The FmHA appeals process[177] allows for appeals within the agency in certain situations.[178] It is arguable whether the present statute allows for a denial of deferral relief to be appealed.[179] However, if Congress should pass the proposed legislation,[180] a farmer will definitely have a right to an intra-agency appeal.[181] It is questionable, however, how useful to the farmer an agency appeal would be under the present procedure.

A. *Structure*

The FmHA state organizational structure is set up in tiers. On the bottom tier is the County Supervisor[182] who is the person the farmer deals with. Also on this tier is the County Committee.[183] On the next tier is the District Director.[184] Directly over the District Director is the State Director[185] who is under

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economic conditions, it is unnecessary that it might be taken advantage of and result in an unwarranted gift, and that deferral relief means less money to lend in the future. *Id.*

172. Such a characterization seems incorrect, as deferrals are only to be allowed on a case-by-case basis.

173. The current deferral, or lack of deferral, has already invited litigation. *See supra* note 79 and accompanying text. The government's position has been said to be "It's okay to have farm assistance programs as long as no one knows about them." *House Subcommittee Adopts Deferral Bill*, *supra* note 169, at 9.

174. *See supra* note 171.

175. The bill as passed requires the farmer to "establish by substantial evidence" that the farmer meets the three criteria to the "satisfaction of the county supervisor."

176. *See infra* notes 177-214 and accompanying text.

177. *See* 7 C.F.R. §§ 1900-1900.100 (1982).

178. *See* 7 C.F.R. §§ 1900.51; 1900.53 (1982). Section 1900.51 provides the general actions which are appealable. Section 1900.53 provides decisions that *are not* appealable, it includes: FmHA decisions based on statutory requirements or objective standards such as: denial of § 504 grant, denial to those in an ineligible area, denial to ineligible organization, denial because application not filed timely, denial to release security, denial because of excessive income, denial of compensation for construction defects, and denials based on conditions of other agencies. Also not appealable is a decision to deny a new application when a previous appeal has been taken, an action taken by FmHA to protect its security interest, and appraisals of property.

179. *See* Coleman v. Block, 562 F. Supp. 1353 (D.N.D. 1983) (court thought that apparently 7 C.F.R. § 1900.53 would bar an appeal of a deferral denial, but did not discuss the issue). *But see* Matzke v. Block, No. 82-1075 (D. Kan. May 5, 1983) (unpublished order where the court found the present appeals system applicable to deferral denial).

180. *See supra* notes 163-76 and accompanying text.

181. The bill passed by the House allows a farmer to appeal a deferral denial. *See supra* note 170.

182. The county supervisor approves or disapproves loans of applicants found eligible by the county committee. 7 C.F.R. § 1910.6(a). The supervisor has a substantial influence over county committee and is the person with whom the farmer directly deals. HANDBOOK, *supra* note 4, at 17.

183. The county committee is a group of three local residents who serve three-year terms. They are appointed by state director at the recommendation of the county supervisor. Two of the three must be farmers, none can be applicants or borrowers of FmHA. HANDBOOK, *supra* note 4, at 16.

184. The district director reviews the county supervisor's handling of delinquent and problem

the Federal Administrator.[186]

The appeals system does not use an independently staffed division such as administrative law judges but instead follows the existing staff hierarchy.[187] This means that the decision-maker's immediate supervisor acts as a hearing officer on appeal.[188] So, for example, if a decision made by the County Supervisor is being appealed, the hearing officer would be the District Director.[189]

B. *Analysis*

Under the present appeals system, the Secretary of Agriculture has not appointed independent administrative law judges to rule on appeals.[190] FmHA maintains that although it may provide a more unbiased system of review, the cost to the government outweighs any benefits.[191] The United States Supreme Court, however, has held that cost is not an appropriate factor in determining if an agency[192] uses administrative law judges.[193]

The APA requires the appointment of administrative law judges.[194] FmHA, in its regulations, maintains that the Act does not apply.[195] Advocates for the use of administrative law judges in the system argue that the APA is applicable.[196] The rationale is that the APA applies to every case of adjudication required by statute or the Constitution,[197] and the FmHA appeals procedure is an adjudication.[198] The statute[199] and the regulations[200] provide for a hearing and an adjudication, and thus the appeal is within the purview of the APA.

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borrowers, this person also serves as hearing officer on an appeal of a decision made by the county supervisor. HANDBOOK, *supra* note 4, at 16.

185. The state director heads the state office. All current state directors have been appointed by the Reagan Administration. This person is responsible for the administration of all FmHA programs. HANDBOOK, *supra* note 4, at 16.

186. The Federal Administrator oversees the FmHA programs. HANDBOOK, *supra* note 4, at 14.

187. *See* 7 C.F.R. § 1900 Ex. D (1982).

188. If the County Supervisor makes the decision, the District Director acts as hearing officer and the State Director is review officer; if the county committee decides, State Director is hearing officer and the Administrator is review officer; if District Director makes a decision, the State Director is hearing officer, Administrator is review officer, and if State Director is the decision maker, the Administrator is the hearing officer and there is no review. *Id.*

189. *See supra* note 188.

190. *See* 7 C.F.R. §§ 1900-1900.100 (1982).

191. *See* Supplementary Information (3) preceding 7 C.F.R. § 1900 (1982).

192. "Agency" is defined at 5 U.S.C. § 551(1) (1982) as "each authority of the government of the United States, whether or not it is within or subject to review by another agency . . . ."

193. Wong Yang Sung v. McGrath, 339 U.S. 33, 46-47 (1950).

> Nor can we accord any weight to the argument that to apply the [APA] to such hearings will cause inconvenience and added expense [to the agency]. Of course it will, as it will to nearly every agency to which it is applied. But the power of the purse belongs to the Congress, and Congress has determined the price for greater fairness is not too high.

Id.

194. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 324 (1976).

195. *See* 7 C.F.R. § 1900.51 (1982).

196. *See infra* notes 198-200 and accompanying text. *See generally* Supplemental Brief for Plaintiffs, Coleman v. Block, No. A1-83-47 (D.N.D. May 5, 1983).

197. 5 U.S.C. § 554(a) (1982). *See also infra* note 201.

198. An adjudication is the equivalent of a determination and implies a hearing by a court, after notice, of legal evidence on the factual issue involved. BLACK'S LAW DICTIONARY 63 (rev. 4th ed. 1968).

199. 7 U.S.C. § 1983a (Supp. 1982).

200. 7 C.F.R. §§ 1900.51, 1900.56 (1982).

In a constitutional framework, if a hearing is required to provide due process, then the hearing falls within the APA.[201] In considering the farmers' situation, many courts have found that the farmer has a property interest in receiving a FmHA loan[202] similar to rights of welfare recipients. Welfare recipients under *Goldberg v. Kelly*[203] have the right to adequate notice and a hearing with the right to counsel, to present evidence, and to confront and cross examine witnesses.[204] Thus, the farmer should also be entitled to these protections. Consequently, an FmHA hearing is a constitutional right; the APA would be applicable; and administrative law judges would be required.

Further analysis of the present FmHA appeals system indicates that the process used by FmHA is the type of process the APA was designed to prevent.[205] The APA requires administrative law judges to insure unbiased hearings. Congruently, the Supreme Court of the United States has said "that no man is permitted to try cases where he has an interest in the outcome."[206] Due to the structure of the appeals system, however, the hearing/review officer is biased and does have an interest.[207] As a concrete illustration of this conflicting interest, the District Director is considered the one who basically acts as judge and prosecutor. The District Director is expected to serve as prosecutor on "foreclosures, accelerations, and liquidations on farms within his district, while simultaneously trying to act as an *impartial* judge on appeals for similar actions that occurred in a nearby district."[208] Such procedures are directly contrary to the APA which provides that a person who presides over a hearing cannot "be subject to supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."[209]

FmHA may argue that having a section in the regulations captioned "Be an unbiased presiding officer"[210] is sufficient to insure impartiality. However,

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201. *See* Wong Yang Sung v. McGrath, 339 U.S. 33 (1949) (Immigration Services hearings in this case were not "required by statute," but the court held that due process required a hearing, thus the hearing fell within the provisions of the APA.). *See also* Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977) (court relied on *McGrath* and held hearing provisions of the APA apply to specific administrative processes and do not depend on the presence or absence of the phrase "on the record".). *But see* Matzke v. Block, No. 82-1075, slip op. at 22 (D. Kan. May 5, 1983) (court considered fact that statute did not specifically call for a hearing "on the record").

202. *See* Matzke v. Block, No. 82-1075, slip op. at 13 (D. Kan. May 5, 1983) (court found farmers had a property interest and therefore must be afforded due process); Coleman v. Block, No. A1-83-47 (D.N.D. May 5, 1983) (court held farmers had a property interest). *See also* Fuentes v. Shevin, 407 U.S. 67 (1972) (held state pre-judgment replevins statutes violate possessor's due process rights); Rau v. Cavenaugh, 500 F. Supp. 204, 206 (D.S.D. 1980) (FmHA required to give notice and a hearing in housing case); Ricker v. United States, 417 F. Supp. 133, (D. Me. 1976) (due process required).

203. 397 U.S. 254 (1970).

204. *Id.*

205. *See In re* Murchison, 349 U.S. 133 (1955) (due process prohibits a court from serving as complaint-prosecutor and judge); *see also* Offutt v. United States, 348 U.S. 11 (1954) (justice must satisfy the appearance of justice); Tumey v. Ohio, 273 U.S. 510 (1927) (the balance should be held "nice, clear, and true" between the state and the accused).

206. *In re* Murchison, 349 U.S. 133, 136 (1955).

207. *See infra* notes 221-24.

208. *See* Plaintiff's Supplemental Brief at 16, Coleman v. Block, No. A1-83-47 (D.N.D. May 5, 1983) (emphasis added).

209. 5 U.S.C. § 554(d)(2) (Supp. 1982).

210. 7 C.F.R. § 1900 Ex. A (part C) (1982).

mere guidelines or exhortations do not address the underlying problems of the system.

Finally, the FmHA appeals procedure is inconsistent with other appeal procedures that the United States Department of Agriculture (USDA) uses.[211] The USDA has a detailed system that uses administrative law judges.[212] Such a system provides advantages and protections to poultry dealers and commission merchants who fail to keep adequate records[213] and unsanitary meat-packing facilities,[214] but not to the hard-pressed farmer. Such a practice seems arbitrary and capricious.

Even if the APA were found not to be applicable, the present FmHA appeals system is still greatly flawed and requires the use of administrative law judges to insure that due process is not denied.

In *Coleman v. Block*,[215] the plaintiffs extensively deposed FmHA officials including the North Dakota District Directors, the State Director, and the Chief of the Farm Programs.[216] These depositions indicate that under the present FmHA appeals system, due process is denied.

In determining whether a particular hearing procedure complies with the due process clause, three factors are to be considered: the private interest that will be affected; the risk of erroneous deprivation of that interest; and the government's interest.[217]

The enormity of the private interest should be clear at a moment's reflection. Affected farmers face losing not only their homes but their livelihoods[218] and may not even be able to feed their families.[219]

In analyzing the risk of erroneous deprivation,[220] one finds the risk is great for several reasons. The District Directors have a financial interest in the process. They act as hearing officers on appeals of decisions to foreclose on

211. Inconsistencies include the following: USDA provides an impartial judge, 7 C.F.R. § 1.132(g), 7 C.F.R. § 1.144 (1982), FmHA does not; the USDA judge may issue subpoenas to compel attendance, FmHA does not allow subpoenas; USDA judges are prepared to rule on legal issues, FmHA officials are not; USDA regulations call for no *ex parte* contacts, 7 C.F.R. § 1.151, FmHA regulations only require hearing officer not to fraternize with the decisionmaker "in the presence of the farmer", 7 C.F.R. § 1900 Ex. A (1982); USDA provides a transcript at actual cost, 7 C.F.R. § 1.141(h) (1982), FmHA requires the destitute farmer to pay for transcript, 7 C.F.R. § 1900(d)(1). *See generally* Coleman v. Block, 562 F. Supp. 1353 (D.N.D. May 5, 1983) (plaintiff's supplemental brief).

212. *See* 7 C.F.R. § 1.130-1.151 (1982) "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes".

213. *See* 21 U.S.C. § 455 (Supp. 1982).

214. *See* 7 U.S.C. § 608 (Supp. 1982).

215. Civ. No. A1-83-47 (D.N.D. 1983) (*Coleman II*).

216. *See generally* Plaintiffs' Brief in Support of Disqualifying District Directors and the State Director of FmHA from ruling on Foreclosure Appeals, Coleman v. Block, Civ. No. A1-83-47 (D.N.D. 1983) [hereinafater cited as Plaintiffs' Brief].

217. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

218. *See* Plaintiffs' Brief, *supra* note 216, at 5 (citing deposition of Glenn Binegar at 23:2-5 (July 19, 1983) (District Director)). "[P]eople are losing their way of making a living, it's definitely going to be hard on them, just like people who lose their jobs." *Id.*

219. *See* Plaintiffs' Brief, *supra* note 216, at 8 (citing deposition of Dennis Larson at 34:4-5 (July 18, 1983) (District Director)). As soon as an acceleration letter is sent District Directors do not have authority to release security for any purpose except to preserve the security. *Id.*

220. This factor has been described as "the fairness and reliability of the existing procedure." Mathews v. Eldridge, 424 U.S. at 343.

real estate made by their boss, the State Director.[221] At the same time, the State Director is evaluating how well they accomplish their "loan collection objectives,"[222] in order to rate them to determine who gets a share of the "merit pay pool."[223] This suggests that the District Directors' rulings on appeal may affect his ratings[224] and thus there is an interest.

Not only do the District Directors have an interest but they have no legal training[225] and minimal appeals process training.[226]The regulations require the hearing officers make their decisions on applicable statutes and regulations,[227] however, the District Directors, by their own admissions, do not know what the applicable statutes are or what the law is.[228] In fact, one indicated he did not think he had the authority to make decisions on farmer program acceleration decisions.[229] Further, the State Director and District Directors are long-time employees and have worked together for decades.[230] This is another factor that makes impartiality highly suspect. Finally, the process itself does not bar *ex parte* contracts,[231] does not allow the farmer to cross-examine the decisionmaker,[232] and provides no right to appeal on allegations of conversion.[233]

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221. The State Director or whoever he appoints to act in his place has the authority to accelerate a real estate account. *See* Plaintiffs' Brief, *supra* note 216, at 14 (citing deposition of Ralph Leet 25:2-5 (July 18 and 19, 1983) (State Director)). The State Director also assigns specific District Directors to hear specific appeals of his decision. *Id.* (citing deposition at 87:7-22, 88:1-11). The District Director works directly under State Director. *Id.* at 13 (citing deposition at 57:13-14).

222. *See* Plaintiffs' Brief, *supra* note 216, at 14 (citing deposition of Ralph Leet at 59:18-22 (July 18 & 19, 1983) (State Director)).

223. *See* Plaintiffs' Brief, *supra* note 216, at 14 (The District Directors must compete with each other to get a share of the merit pay pool.) "I'm the one that makes the ratings. And their raise is dependant on how long they have been GS-13 and their rating . . . . It is a competitive deal . . . . They have to be recommended by their immediate supervisor." *Id.* at 15 (citing deposition of Ralph Leet at 66:2-25, 67:1-20, 68:1-4 (July 18 & 19, 1983) (State Director)).

224. *See* Plaintiffs' Brief, *supra* note 216, at 16 (citing deposition of Ralph Leet at 80:10-16 (July 18 and 19, 1983) (State Director) (denied rulings affect his ratings)). *Id.* (citing deposition of Odell Ottmar at 50:3-7 (July 18, 1983) (District Director) (denied rulings affected his ratings)). *Id.* (citing deposition of Glenn Binegar at 29:19-23 (July 19, 1983) (District Director)).

225. *See* Plaintiffs' Brief, *supra* note 216, at 19-28. Educational background also indicates District Directors have no legal training or very minimal training. *Id.* at 24-28.

226. In response to request for production of documents pertaining to training provided to appeal officers in *Coleman* only the regulations were provided. Depositions of the District Directors show there has been only one "formal training session" which lasted just over an hour. *See* Plaintiffs' Brief, *supra* note 216, at 28 (citing deposition of Glenn Binegar at 17:3 (July 19, 1983) (District Director); deposition of Dennis Larson at 19:6 (July 18, 1983) (District Director); deposition of Odell Ottmar at 12:5 (July 18, 1983) (District Director)).

227. 7 C.F.R. § 1900 Ex. A, 6(3) (1982).

228. *See* Plaintiffs' Brief, *supra* note 216, a 19 (citing deposition of Dennis Larson at 14:1 (July 18, 1983) (District Director) (Mr. Larson asked "what is 7 U.S. Code 1981a?")). When confronted with an acceleration involving a security interest question, Mr. Ottmar requested advice from the office of general counsel but was told the question was too difficult and they did not have time to research it. So Mr. Ottmar made a ruling without advice from an attorney and affirmed the acceleration. *See* Plaintiffs' Brief, *supra* note 216, at 20-24 (citing deposition of Odell Ottmar at 13:15-25, 14:9-25, 15:14 16:1-4, 19:25 (July 28, 1983) (District Director)).

229. *See* Plaintiffs' Brief, *supra* note 216, at 32 (citing deposition of Allen Drege at 25:5-6 (July 19, 1983) (District Director).).

230. *See* Plaintiffs' Brief, *supra* note 216, at 37. Mr. Leet worked with Mr. Ottmar for 20 years, with Mr. Aasmudstad 26 years, with Mr. Binegar 23 years, and with Mr. Larson for 26 years. *Id.*

231. *See* Plaintiffs' Brief, *supra* note 216, at 41-45.

232. *Id.* at 49-54.

233. *Id.* at 54-55.

As far as the state interest is concerned, FmHA officials view the appeals system as "an obstacle to delivering a good farm program to borrowers"[234] and feel the "demand for formal hearings has created a considerable strain on the FmHA staff."[235] FmHA has also shown concern over cost[236] but has not provided accurate figures of cost nor have they shown the cost is too great considering the interest at stake. The above analysis indicates that the present FmHA system of appeals is seriously flawed, in that it cannot possibly afford due process. The best way to remedy this situation is the application of the APA or a non-APA system with administrative law judges and the minimum due process protection mandated by *Goldberg v. Kelly*.

VI. CONCLUSION

The purpose and background of FmHA and the legislative history of the deferral relief provision indicate that FmHA should attempt to avoid bankruptcy and forced liquidations of farmers. However, the increased delinquency reduction program of the FmHA and its reluctance to afford the required debt relief provision of 7 U.S.C. § 1981a exacerbates the purpose and an already serious economic situation in Kansas and across the nation. Aggravating the farmers' situation is FmHA's failure to recognize the use of administrative law judges to insure the farmer the best possible chance of staying foreclosure.[237]

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234. *Id.* (citing deposition of Ralph Leet 92:4-6, 94:15-19 (State Director (July 18 & 19)).

235. *See* Plaintiffs' Brief, *supra* note 216, at 56 (citing deposition of Ralph Leet at 94:23-24, 95:1-4 (July 18 & 19, 1983) (State Director)).

236. "FmHA originally wanted a full-time administrative lawyer assigned to every state office to act as a hearing officer. . . . However, due to lack of funds and staff allocations this plan was put aside and the present procedure implemented." Analysis of appeals process, Farmers Home Administration; prepared under Contract No. 53000, Farmers Home Administration, May 1, 1980, at 13. *See also supra* note 193.

237. The handbook referred to in this article can be ordered from the Center of Rural Affairs, Walthill, Nebraska. The Center also can provide copies of pleadings and unpublished orders from various FmHA cases around the United States.

The author realizes that the unpublished opinions cited in this Note have no precedentual value, but discusses them to provide the practitioner insight into the courts' considerations.