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An Agricultural Law Research Article

The Farmers Home Administration Community Facility Program: A Mandate for Rural Development

by

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Originally published in SOUTH DAKOTA LAW REVIEW
23 S. D. L. REV. 585 (1978)

THE FARMERS HOME ADMINISTRATION COMMUNITY FACILITY PROGRAM: A MANDATE FOR RURAL DEVELOPMENT

by TERENCE M. BRADY*

INTRODUCTION

> [T]he highest priority must be given to the revitalization and development of Rural Areas.[1]

In the spring of 1977, a writer for the Wall Street Journal reported with surprise that the number of employees in the United States Department of Agriculture exceeds the number of farmers in this country.[2] The seeming paradox is resolved, however, when the role of the Department of Agriculture is reexamined in the light of nearly two decades of intense Congressional activity in resisting the steady decline of rural America occasioned by decades of out migration to urban centers.[3] The Congressional effort culminated in the enactment of the Rural Development Act of 1972,[4] which initiated new programs of federal aid to rural communities and residents, expanded several then existing rural community development programs, and added rural development as a basic mission of the Department of Agriculture.[5]

The Farmers Home Administration (FmHA), a rural credit agency of the United Stated Department of Agriculture (the Department), has served as one of the Department's major resources in fulfilling its rural development mandate. At present, FmHA is obligating nearly one billion dollars annually[6] in low interest, long term loans to finance community facilities[7] in rural communities and places of not

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The author acknowledges the special assistance of D. Charles Valsing, James V. Loughran, Jr., and Hugh L. Cannon, of the Office of the General Counsel; and Denton E. Sprague of the Farmers Home Administration.

1. Agricultural Act of 1970, Pub. L. No. 91-524, § 901(a), 84 Stat. 1383 (1970).

2. Elliott, *Growing Deadwood*, Wall St. J., Apr. 12, 1977, at 1, col. 1.

3. Rural Development Goals. First Annual Report of the Secretary of Agriculture to the Congress, January 1974, A-2.

4. Rural Development Act of 1972, Pub. L. No. 92-419, 86 Stat. 657 (codified in scattered sections of 5, 7, 16, 42 U.S.C.) [hereinafter cited as Rural Development Act of 1972].

5. 7 U.S.C. § 2204 (b) (1972).

6. *Hearings Before the Subcomm. on Agriculture and Related Agencies of the House Comm. on Appropriations for 1978*, 95th Cong., 1st Sess., 509-10 (1977) (Statement of Denton E. Sprague [hereinafter cited as *1978 Budget Hearings*].

7. As used in this article, "community facilities" denotes all facilities eligi-

more than ten thousand in population.[8] Some fifteen hundred new water supply and waste disposal systems or system improvements as well as over three hundred other projects, including community halls, fire halls, hospitals, nursing homes, schools and libraries, are being financed annually.[9] Direct and substantial assistance from private attorneys is essential in implementing this loan program for eligible entities,[10] namely municipalities and other organizations operated on a non-profit basis.

HISTORICAL OVERVIEW

The grim dust bowl days of the 1930's spawned many federal rural assistance programs, including FmHA's Community Facility Program (the Program). As in the case of its depression era contemporaries, today's Program has evolved over the years in response to changing social ideals and aspirations to a point where it bears little resemblance to the original. Nonetheless, an understanding of this evolutionary process can be a useful aid to anyone working with the present-day Community Facility Program.

The Water Facilities Act of 1937

The Program originated with the enactment of the Water Facility Act of 1937, which authorized the Secretary of Agriculture (the Secretary) to make direct, long-term, low interest loans to develop water facilities for household and farm use, and to assist in the construction of facilities for water utilization and storage.[11] The legislation grew out of the report and recommendations of the President's Great Plains Committee entitled, "The Future of the Great Plains."[12] As originally conceived, the program was limited in scope

ble for funding under FmHA regulations published in 42 Fed. Reg. 24232 (1977), amending 7 C.F.R. Chapter XVIII (1977) by promulgating new Subchapter J, Part 1933, Subpart A §§ 1933.1-.50 entitled "Community Facilities Loans." Accordingly, it includes community facilities programs such as water systems and sanitary sewerage systems, sometimes referred to by FmHA officials as "water and waste disposal loans," as well as other essential community facilities not of a public utility nature. *See generally* § 1933.17.

8. *1978 Budget Hearings, supra* note 6. For definition of "rural" and "rural area" as used in the Community Facility Program, *see* 7 U.S.C. § 1926(a)(7), which provides that "rural" and "rural area" do not include "any area in any city or town which has a population in excess of ten thousand inhabitants."

9. *1978 Budget Hearings, supra* note 6 at 509-10. *See also* for a brief history of Farmers Home Administration (1977), presented by Denton E. Sprague, Assistant Administrator, 1978 Budget Hearings, at 524-28. For a general history of federal involvement in rural development from colonial times to the present, *see* Rural Development Goals. Second Annual Report to the Congress, June 1975, 39-59.

10. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(2)).

11. The Act of August 28, 1937, Pub. L. No. 75-399, 50 Stat. 869 (repealed by Act of August 8, 1961, Pub. L. No. 87-128, 75 Stat. 294, 318) [hereinafter cited as Water Facilities Act of 1937].

12. Letter from True D. Morse, Under Secretary of Agriculture to Joseph W. Martin, Jr., Speaker, U.S. House of Representatives, March 10, 1954, in H.R. REP. NO. 2290, 83d Cong., 2d Sess. 3, *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 3049-51, [hereinafter cited as Letter from True D. Morse].

to the "arid and semi-arid areas of the United States."[13] As administered by the Farm Security Administration,[14] FmHA's predecessor agency, assistance was confined to the "[seventeen] Western States commonly understood to contain most of the arid and semi-arid areas of the country."[15] Furthermore, the Water Facilities Act by direct implication required the benefit of loans thereunder to be on farms.[16] By interpretation, loans to associations were not made absent a showing that a major part of the use of the facility was to be by farmers.[17] Unrealistically low limitations on the amount of federal assistance available to any one project further limited the Act's effectiveness.[18]

The 1954 Amendments

In 1954 Congress amended the Water Facility Act to extend it to the entire continental United States, as well as Alaska, Hawaii, Puerto Rico and the Virgin Islands.[19] The 1954 Amendments also increased project spending limits to two hundred fifty thousand dollars in the case of loans to incorporated municipalities and associations and lowered spending limits to twenty-five thousand dollars in the case of aid to individuals, partnerships, and unincorporated associations.[20] Other important changes made in the Water Facility Act included the abolition of the Secretary's authority to actually construct small projects and the authorization of insured loans of up to twenty-five million dollars in any one year from the revolving insurance fund created by the Bankhead-Jones Farm Tenant Act.[21] This was five times the amount requested by the Department for direct loans from the U. S. Treasury.[22]

The Consolidated Farmers Home Administration Act of 1961

The passage of the Consolidated Farmers Home Administration Act of 1961[23] as Title III of the Agriculture Act of 1961[24] initiated an

13. Water Facilities Act of 1937, *supra* note 11, at 75-399 § 1.

14. *See* Farmers Home Administration Act of 1946, Pub. L. No. 79-731, 60 Stat. 1062, which reconstituted the Farm Security Administration into the Farmers Home Administration. *See also 1978 Budget Hearings, supra* note 6, at 526-28 for early history of FmHA and its predecessor agencies.

15. Letter from True D. Morse, *supra* note 12, at 3, U.S. CODE CONG. & AD. NEWS at 3049.

16. Water Facilities Act of 1937, *supra* note 11, at 75-399 § 1.

17. S. REP. NO. 566, 87th Cong., 1st Sess. 1, *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2243, at 2323 [hereinafter cited as S. REP. NO. 566].

18. Letter from True D. Morse, *supra* note 12, at 4, U.S. CODE CONG. & AD. NEWS at 3050.

19. Act of August 17, 1954, Pub. L. No. 83-597 §§ 1, 2, 68 Stat. 735.

20. *Id.* § 4.

21. *Id. See also* note 25 *infra*, concerning Bankhead-Jones Farm Tenant Act for further information on financing the Program from various revolving insurance funds, and see *1978 Budget Hearings, supra* note 6 at 532-35.

22. Letter from True D. Morse, Under Secretary of Agriculture, *supra* note 12, at 4, U.S. CODE CONG. & AD. NEWS at 3051.

23. Consolidated Farmers Home Administration Act of 1961, Pub. L. No.

era of rapid expansion for Farmers Home Administration programs in general, and the Community Facility Program in particular. The ensuing sixteen years were to see the Program expand dramatically in scope and funding.

The Consolidated Farmers Home Administration Act of 1961, as its name suggests, was intended to consolidate and bring to date the authorities administered by FmHA for real estate, farm operating, emergency and water facility loans.[25] It replaced titles I, II and IV of the Bankhead-Jones Farm Tenant Act,[26] as amended, the Water Facility Act of 1937,[27] as amended, and Public Law 38 of the 81st Congress, which at that time constituted the Secretary of Agriculture's basic authority to make disaster loans.[28]

Sections 304 and 306 of the 1961 Act[29] replaced the Water Facility Act of 1937 in its entirety.[30] At that same time Congress permanently severed the water facility assistance previously provided both to individuals and associations under the same authority.[31] Section 306 expanded the Department's authority to make water facility loans, permitting for the first time loans to associations serving non-farming rural residents in open country or in towns of less than twenty-five hundred people, without regard to the number of farm families that shared the water supply.[32] The legislative history surrounding the expansion of the Program clearly demonstrates that the Congress specifically considered the issue of whether non-farmers should be served, and concluded that indeed they should be.

> This provision [Section 306] authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water.[33]

Other changes made in 1961 included (i) a new provision to protect the territory served by an FmHA financed community facility loan from curtailment or limitation resulting from competitive facilities that might be developed with the expansion of boundaries of municipal and other public bodies into an area served by an FmHA

87-128, 75 Stat. 307 (codified in scattered sections of 7 U.S.C.) For distribution of Title III in the Code, see Short Title Note under 7 U.S.C.A. § 1921. [hereinafter cited as the 1961 Act].

24. Agricultural Act of 1961, Pub. L. No. 87-128, 75 Stat. 294.

25. S. REP. NO. 566, *supra* note 17, at 2304.

26. Bankhead-Jones Farm Tenant Act, Pub. L. No. 75-517, 50 Stat. 522 (1937) (formerly 7 U.S.C. §§ 1001-1005d).

27. Water Facilities Act of 1937, *supra* note 11.

28. Act of April 6, 1949, Pub. L. No. 81-38, 63 Stat. 43.

29. 1961 Act, *supra* note 23, § 341.

30. Water Facilities Act of 1937, *supra* note 11, at 318.

31. 7 U.S.C. § 1926 (1976).

32. S. REP. NO. 566, *supra* note 17, at 2309.

33. *Id.*

34. 1961 Act, *supra* note 23, § 306(b) (codified at 7 U.S.C. § 1926(b) (1976)).

financed system;[34] (ii) an increase in the per project spending limits to one million dollars in the case of funds borrowed from the Agricultural Credit Insurance Fund and five hundred thousand dollars for funds borrowed from the U.S. Treasury;[35] (iii) an imposition of a maximum repayment period of forty years;[36] (iv) an increase in the maximum interest rate to 5% per annum;[37] and (v) in increase in the statutory authorizations of loans from the Agricultural Credit Insurance Fund to an annual limit of one hundred fifty million dollars.[38]

The 1965 Amendments

The passage of Public Law 89-240[39] in the fall of 1965 transformed the Community Facility Program into the nation's major rural water and sewer public works program by adding waste disposal facilities as an eligible loan purpose.[40] In requesting the addition of waste disposal to what had formerly been exclusively a water facility program for nearly thirty years, the Department explained that often a modern waste disposal system was a necessary prerequisite for developing a pure water supply.[41] The addition in 1965 of authority to make grants of up to fifty per cent of the development cost of projects for development, storage, treatment, purification or distribution of water, or collection, treatment or disposal of waste in rural areas added still another important dimension to the Program.[42] Congress also authorized grants to public bodies and other agencies for preparation of official comprehensive plans for development of rural sewer and water systems.[43]

Congress made many other important Program changes in 1965. Larger projects were authorized by increasing project funding limits from one million to four million dollars.[44] The amount of FmHA loan insurance authority for all real estate programs, including community facilities, was more than doubled in 1965 from two hundred million dollars to four hundred fifty million dollars annually.[45] To assure that the Program would not work at cross purposes with local gov-

34.
35. *Id.* § 306(a).
36. *Id.* § 307(a) (codified at 7 U.S.C. § 1927(a) (1976)).
37. *Id.*
38. *Id.* § 308.
39. Act of Oct. 7, 1965, Pub. L. No. 89-240, 79 Stat. 931 (codified in scattered sections of U.S.C.) [hereinafter cited as the 1965 Amendments].
40. This section also added recreational developments as an eligible loan purpose. 1965 Amendments, *supra* note 39, § 1 (codified at 7 U.S.C. § 1927(a)).
41. Letter from Orville L. Freeman, Secretary of Agriculture, to Harold D. Cooley, Chairman, Committee on Agriculture, U.S. House of Representatives, June 23, 1965, in H.R. REP. NO. 847, 89th Cong., 1st Sess. 6-10 at 6 (1965) (a similar letter, dated June 18, 1965, addressed to Allen J. Ellender, Chairman, Committee on Agriculture and Forestry, U.S. Senate, is contained in S. REP. NO. 500, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3405-15, at 3412-15).
42. 1965 Amendments, *supra* note 39, § 1 (codified at 7 U.S.C. § 1926(a)).
43. *Id.*
44. *Id.*
45. *Id.* § 2.

ernment objectives, review and approval of local municipal planners and state water pollution control agencies was made mandatory.[46] Another important change included among the 1965 Amendments was the increase from twenty-five hundred to fifty-five hundred in the population limits for communities eligible for assistance.[47]

During the consideration of the 1965 Amendments, the House and Senate split over the basic mission of FmHA. The Senate wanted the Agency's activities limited to serving areas "primarily engaged in or associated with agriculture."[48] By contrast, the House recognized the special need of rural communities without regard to whether they were primarily associated with agriculture.[49] The House view prevailed and the Senate Committee on Agriculture and Forestry's restrictive amendments were dropped from the bill as finally enacted.[50] In discussing the purpose and need for the bill, the House Committee on Agriculture explained:

> In addition to water and sanitation facilities for household use, farmers are finding it increasingly necessary, particularly in dairy areas and areas producing fresh fruits and vegetables for market, to have an ample supply of pure water and adequate sanitation facilities for the handling of their product. Not just any water will do these days—it must be pure and chemically acceptable.
> Some 30,000 rural communities need new water and sanitation systems. Until this need is met, these communities cannot grow and make their contribution to the overall growth of the Nation, and residents in these communities will be denied the ordinary, everyday facilities of water and sanitation which city residents have for so long taken for granted.
> The Congress has approved legislation providing Federal assistance to urban political bodies to provide adequate water and sanitation facilities for city people. Rural citizens have the same need and are entitled to the same kind and degrees of assistance and the purpose of this bill is to provide substantially the same kind and degrees of assistance to rural areas in developing adequate water and sanitation facilities as is now available to citizens or urban areas.[51]

The Rural Development Act of 1972

In Title IX of the Agricultural Act of 1970,[52] Congress adopted a national policy of balanced national growth giving highest priority to rural community development. Section 901(a) of that Act states:

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46. *Id.* § 1.
47. *Id.*
48. S. REP. NO. 500, 89th Cong., 1st Sess. *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3405-15, at 3406, 3407.
49. *Hearing on S. 1766 Before the H. R. Subcomm. on Conservation and Credit of the Comm. on Agriculture*, 89th Cong., 1st Sess. (1965) at 14, 15 [hereinafter cited as *Hearing on S. 1766*].
50. 1965 Amendments, § 1.
51. *Hearing on S. 1766, supra* note 49, at 2.
52. Agricultural Act of 1970, Pub. L. No. 91-524, 84 Stat. 1358, 1383 (codified in scattered sections of 7, 16, 42 U.S.C.).

> The Congress commits itself to a sound balance between rural and urban America. The Congress considers this balance so essential to the peace, prosperity, and welfare of all our citizens that the highest priority must be given to the revitalization and development of rural areas.[53]

The passage of the Rural Development Act of 1972 translated the national ideal expressed in the Agricultural Act of 1970 into a comprehensive set of concrete programs.[54] Included among some ten major new farm and rural development loan programs and nine new federal cost sharing programs was the expansion of FmHA's Community Facility Program to cover "all essential community facilities, including related equipment."[55] In the words of the Senate Committee on Agriculture and Forestry, "[t]hese [facilities] would include neighborhood and community centers as well as fire houses and other community facilities that the rural community might need to improve the living conditions of its residents or to hold or attract industry and business."[56] Congress also substantially increased the number of communities eligible for assistance under the Program by raising the population in the definition of "rural area" from fifty-five hundred to ten thousand.[57] Other important changes made in 1972 included (i) the increase in the annual appropriation authorization for grants for rural water, sewer, and solid waste disposal systems from one hundred million dollars to three hundred million dollars;[58] (ii) the elimination of the arbitrary four million dollar ceiling on FmHA assistance to any one community facility project;[59] and (iii) the authorization of community facility loans to Indian Tribes.[60] To fund the expanded Program Congress established the Rural Development Insurance Fund.[61]

The passage of the Rural Development Act of 1972 provided yet another occasion for Congress to consider whether general responsibility for rural development should be placed in agencies other than those of the Department of Agriculture. In rejecting that alternative, Congress in Section 603 of the Act added rural development as a

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53. *Id.* § 901(a), 84 Stat. 1383.

54. Rural Development Act of 1972, *supra* note 4.

55. *Id.* § 104 (codified at 7 U.S.C. 1926(a)).

56. Remarks to the Senate, August 17, 1972, by Senator Herman E. Talmadge, Chairman, in presenting the conference report on H.R. 12931, 92d Cong., 2d Sess., the Rural Development Act of 1972, in Staff of Senate Comm. on Agriculture and Forestry, 92d Cong., 2d Sess., Analysis and Explanation of Rural Development Legislation as amended by the Rural Development Act of 1972 (Comm. Print 1972) 44-677 at 54. *See also, generally, reprint in* [1972] U.S. CODE CONG. & AD. NEWS 3147-51.

57. Rural Development Act of 1972, *supra* note 4, at § 109 (codified in 7 U.S.C. 1926(a)(7) (1976)).

58. *Id.* § 105 (codified at 7 U.S.C. § 1926(a)(2)).

59. *Id.* § 110.

60. *Id.* § 104 (codified at 7 U.S.C. § 1926(a)(1)).

61. *Id.* § 116 (codified at 7 U.S.C. § 1929(a). For an explanation of how the Rural Development Insurance Fund works, see 1972 Comm. Print, *supra* note 56, at 70-71. *See also 1978 Budget Hearings, supra* note 6, at 741.

basic mission of the Department of Agriculture, mandated the Secretary of Agriculture to establish national goals for all elements of rural community development and further required the Secretary to coordinate the activities of all the agencies of the Executive Branch toward obtainment of the Act's goals.[62]

In presenting the conference report on HR 12931, 92nd Cong., 2nd Sess., the Rural Development Act of 1972, to the Senate on August 17, 1972, the Chairman of the Senate Committee on Agriculture and Forestry, Senator Herman E. Talmage, explained:

> [I]t is the intention of the Rural Development Act of 1972 that the Secretary of Agriculture shall be the President's Rural Development Director and that leadership, coordination, planning, research, and education in connection with all the rural development activities of the Federal Government shall reside in the Secretary of Agriculture and the Department of Agriculture. The Department is known and respected in rural America; its personnel are in daily direct contact with the people and problems of rural America. It is strategically located to provide both advocacy and leadership in the nationwide rural development effort.[63]

THE PROGRAM TODAY

In the intervening years since the passage of the Rural Development Act of 1972, there have been few statutory changes in the Community Facility Program provisions of the Act.[64] In accordance with Section 339 of the Consolidated Farmers Home Administration Act of 1961,[65] as amended, over the years the Secretary has caused to be published detailed regulations for the Program's administration.[66]

Program Purposes

FmHA is authorized to make loans for community facilities that primarily serve farmers, ranchers, farm tenants, farm laborers and other rural residents of open country and rural towns and villages of not more than ten thousand in population.[67] Funds may be used to construct, enlarge, extend or improve water, sewer and solid waste disposal systems, fire stations, libraries, hospitals, clinics, community buildings, industrial parks or other community facilities that provide essential services to rural residents, and also to pay related

62. *Id.* § 603 (codified at 7 U.S.C. § 2204).

63. Remarks of Senator Talmadge in 1972 Comm. Analysis, *supra* note 56, at 61-62.

64. Act of August 10, 1973, Pub. L. No. 93-86, § 816, 87 Stat. 240 (establishing grant program to assist certain rural volunteer fire department in purchasing fire fighting equipment) (codified in 7 U.S.C. 1926(a)(13)(A)).

65. Consolidated Farm and Rural Development Act, § 339, 7 U.S.C. § 1989 (1976) (formerly Consolidated Farmers Home Administration Act § 339, Pub. L. No. 87-128, 75 Stat. 307, 318).

66. 7 C.F.R. Part 1933A, §§ 1931.1-.50 (1978), originally published 42 Fed. Reg. 24232 (1977) (replacing 7 C.F.R. §§ 1823.1-.48).

67. 7 U.S.C. § 1926(a)(1), (7) (1976), 7 C.F.R. § 1933.17(a)(2) (1978).

project costs, such as land acquisition and legal fees.[68] For water and waste disposal systems, grants are available for up to fifty percent of project development costs.[69] Grants are made to the most financially needy communities in order to keep rural residents' user rates at reasonable levels.[70]

Eligibility Standards

Loans are available to public bodies such as counties, small municipalities and special service districts.[71] Non-profit corporations having significant ties to the local rural community and assured sources of income, as well as certain Indian tribes, are also eligible for assistance.[72] Top priority is given to municipal borrowers in communities smaller than fifty-five hundred people desiring to enlarge or modify an inadequate water or sewer system or to restore a deteriorating water supply.[73]

In addition, prospective borrowers must (1) be unable to obtain needed funds from other sources at reasonable rates and terms;[74] (2) have legal authority to borrow and repay loans, to pledge security for loans, and to construct, operate and maintain the facilities or services;[75] (3) be financially sound, and able to organize and manage the facility effectively;[76] (4) base the project on taxes, assessments, revenues, fees or other satisfactory sources of money sufficient to pay for operation, maintenance, and reserve, as well as retire the debt;[77] and (5) plan projects consistent with applicable comprehensive and other development plans for the community, and comply with Federal, state and local laws.[78]

Rates and Terms

Community facility loans are limited to a maximum term of forty years.[79] Furthermore, in no event may the term exceed any statutory limits on an entity's borrowing authority or the useful life of the facility to be financed, whichever is less.[80] By statute, interest rates

68. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(3) (1978)).
69. 7 U.S.C. § 1926(a)(2) (1976).
70. *1978 Budget Hearings, supra* note 6, 776 at 785.
71. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. § 1933.17 (a)(2) (1978)).
72. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. §§ 1933.17(a)(2)(i)(c), 1933.17 (a)(2)(vi) (1978)).
73. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. § 1933.17 (a)(2)(vii)(A) (1978)). *See also* 7 U.S.C. 1926(a)(12) (1976).
74. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(2)(ii) (1978)).
75. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(2)(iii) (1978)).
76. *Id.*
77. 43 Fed. Reg. 24241 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(7) (1978)).
78. 42 Fed. Reg. 24242 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(10)(i) (1978)). *See also* 7 U.S.C. 1926(a)(9) and (10) (1976) for additional limitations concerning pollution.
79. 7 U.S.C. § 1927(a) (1976).
80. 42 Fed. Reg. 24239 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(5)(ii) (1978)).

are fixed at not more than five per cent of the unpaid principal balance.[81]

Security

Loans are required to be secured in a manner that will adequately protect the interests of FmHA throughout the repayment period of the loan.[82] Specific requirements for security for each loan are negotiated with prospective borrowers.[83] As a general rule, however, bonds or notes pledging taxes, assessments, or revenues will be accepted as security from public bodies if they meet all statutory requirements.[84] In the case of non-profit corporations, notes pledging revenues are usually accepted when secured by a perfected first lien on real and personal property.[85]

LAWYERS' ROLES

In virtually all instances, applicants are required to retain legal counsel for the loan transaction.[86] Non-profit corporations may use their regular attorney. Public bodies may use their regular attorney in conjunction with recognized bond counsel, however, recognized bond counsel usually must be retained in any event.[87] FmHA receives legal assistance from Government attorneys assigned to the Office of the General Counsel, United States Department of Agriculture (OGC).[88]

The Local Practitioner

Attorneys representing non-profit corporate clients considering building programs should advise them to consult with the staff at their local FmHA county office to obtain applications and discuss available services. Thereafter, applicants should not proceed with planning or obligate themselves for expenditures until authorized by FmHA.[89] FmHA will wish to evaluate the applicant's management

81. 7 U.S.C. § 1927(a) (1976).

82. 42 Fed. Reg. 24239-40 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(6) (1978)).

83. *Id. But see also* FmHA's standard loan covenants which are published in 42 Fed. Reg. 24243-44 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(13)(i)(A)-(N) (1978)).

84. 42 Fed. Reg. 24240 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(6)(i)(D) (1978)). FmHA may also require a lien on the project itself where this is permitted by local laws.

85. 42 Fed. Reg. 24240 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(6)(i)(A) to (C) (1978)).

86. 42 Fed. Reg. 24243 (1977) (to be codified in 7 C.F.R. § 1933.17(a) (11) (1978)).

87. 42 Fed. Reg. 24250 (1977) (to be codified in 7 C.F.R. § 1933.19(a)(1)(ii) (1978)).

88. 42 Fed. Reg. 24235 (1977) (to be codified in 7 C.F.R. § 1933.6(a) (1978)).

89. 42 Fed. Reg. 24243 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(12) (1978)) (Applicants awarding construction contracts prior to filing a preapplication with FmHA can result in disqualification of the undertaking for assistance under the Program). *See* 42 Fed. Reg. 24248 (1977) (to be codified in 7 C.F.R. § 1933.18(a)(9)(i)(E) (1978)).

capabilities,[90] financial situation[91] and ties to the community.[92] Accordingly, counsel should see that clients have complete records of their financial affairs and of their organizational proceedings, including articles of incorporation and bylaws. Model bylaws and articles of incorporation may be obtained from FmHA.[93] In the case of substantial deviation in substance between the applicant's organizational papers and the FmHA guidelines, FmHA may require modification as a prerequisite to providing assistance. The local attorney is normally responsible for preparing any such amendatory proceedings, as well as all other corporate proceedings authorizing the loan transaction and pledging of security. At closing, local counsel is usually required to deliver an approving legal opinion to FmHA concerning the validity and legally binding nature of the corporation's obligation. A transcript of corporate proceedings should accompany the legal opinion.

In the case of public bodies, FmHA requires an approving legal opinion of recognized bond counsel.[94] The local practitioner should advise his clients to retain bond counsel before undertaking any organizational proceedings or proceedings to authorize the loan transaction. This will prevent delays and other problems occasioned by bond counsel's requiring any proceedings to be redone.

Regardless of whether bond counsel is used in the financing, the local practitioner normally has responsibility for performing many other legal services customarily associated with secured transactions.[95] Included among these are the following:

(1) Performance of all title work, including preparation of deeds, rights of way and easements, in connection with the facility. All real property pledged to the Government as security for the loan must be accompanied by the local attorney's title opinion in favor of FmHA. The local attorney may have to arrange for title insurance on the mortgage property in those instances which FmHA requests it, as in the case of very large loans.[96]
(2) Review and approval of all contracts. The local attorney will be required to give FmHA an approving legal opinion on all construction contracts related to the project.[97]

90. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(2)(iii) (1978)).

91. 42 Fed. Reg. 24241 (1977) (to be codified in 7 C.F.R. § 1933.16(a)(7) (1978)).

92. 42 Fed. Reg. 24238 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(2)(vi) (1978)).

93. 7 C.F.R. § 1933.20 (1978). Guides included in this section are not published in the Federal Register and therefore are not codified in Code of Federal Regulations. They may be obtained, however, from national, state and county offices of FmHA.

94. 42 Fed. Reg. 24234 (1977) (to be codified in 7 C.F.R. § 1933.4(b) (1978)).

95. 7 C.F.R. § 1933.20(a) (1978) (*see* note 93, *supra*) (Guide 14-Legal Services Agreement).

96. Note, Office of the General Counsel, Policy and Procedure Manual, §§ 321, 311 (1976) require all title companies furnishing title evidence to be on the "approved list" of the U.S. Attorney General.

97. 42 Fed. Reg. 24236 (1977) (to be codified in 7 C.F.R. § 1933.9(a)(4) (1978)).

(3) Recordation of all security instruments.[98]
(4) Certification to FmHA as of the closing date that no litigation is pending or threatened affecting the project or obligations issued to FmHA to finance it. If litigation is pending, FmHA may require local counsel to give an opinion as to the merits of the controversy and the likelihood of the plaintiff's success.
(5) Assisting the borrower in obtaining interim credit, usually from local lending institutions, for the construction phase of the project.[99]

Bond Counsel

In the case of loans made to public bodies, FmHA will ordinarily require that the borrower's obligation to repay the loan be evidenced by a municipal bond issue.[100] Except in limited circumstances, bonds must be accompanied by the unqualified approving legal opinion of recognized bond counsel.[101] The opinion should be addressed to FmHA and must state that the bonds are valid obligations of the municipality. It should also state whether they are exempted from Federal, state and local income taxes. Bond counsel is also responsible for preparing the bond transcript documenting compliance with state and local requirements and containing all supporting documentation.[102] Bonds must comply with state statutes and local requirements.[103] In addition, FmHA regulations with respect to payment dates, places of payment, form of bonds, redemption, additional bonds, maturity dates and other details must be followed.[104]

Office of the General Counsel

OGC represents FmHA in community facility loan transactions. In the case of loans to nonpprofit corporations, OGC prepares FmHA's standard forms of notes, mortgages, security agreements, financing statements and other customary loan instruments. In all cases, OGC customarily reviews the proposed transcript of legal proceedings prepared by local counsel and/or bond counsel to deter-

98. 7 C.F.R. § 1933.20(a) (1978) (*see* note 93, supra) (Guide 14-Legal Services Agreement).

99. 42 Fed. Reg. 24244 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(13)(iii) (1978)).

100. 42 Fed. Reg. 24242 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(8)(i) (1978)). *See generally* G. CALVERT, FUNDAMENTALS OF MUNICIPAL BONDS (9th ed. 1973) [hereinafter cited as FUNDAMENTALS], for an excellent introduction to municipal bonds. *See also* Greenberg, *Municipal Securities: Some Basic Principles and Practices*, 9 Urb. Law. 338 (1977) [hereinafter cited as Greenberg].

101. 7 C.F.R. § 1933.19(a)(2)(xii) (1978). *See also* FUNDAMENTALS, *supra* note 100, at 121-35; Greenberg, *supra* note 100, at 361-63 for general discussions of role of bond counsel.

102. 42 Fed. Reg. 24251 (1977) (to be codified in 7 C.F.R. § 1933.19(a)(2)(i)(xii) (1978)).

103. 42 Fed. Reg. 24243 (1977) (to be codified in 7 C.F.R. § 1933.17(a)(10)(i)(B) (1978)).

104. 42 Fed. Reg. 24251-52 (1977) (to be codified in 7 C.F.R. § 1933.19(a)(3)-(8) (1978)).

mine whether they are legally sufficient and in compliance with FmHA regulations. OGC also reviews all legal opinions for form and substance, as well as any substantive deviations or changes in FmHA forms. After completing this review, OGC issues closing instructions advising FmHA how best to complete a particular loan transaction. Because they are relatively few in number, attorneys from OGC seldom attend loan closings except under special circumstances.

RELATED LEGAL ISSUES

Predictably, acceptance of financial assistance from FmHA obligates the recipient to comply with various other Federal laws and regulations covering a wide variety of legal issues such as civil rights and environmental protection. Although an exhaustive treatment of all these related laws and regulations would be beyond the scope of this article, a brief overview of some of the highlights of this broad body of law follows to acquaint practitioners with some of the principal regulations and statutes that their clients will be expected to comply with should they receive funding under the Program.

National Environmental Policy Act of 1969

> The National Environmental Policy Act[105] (NEPA) declares that it is the continuing policy of the Federal government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.[106]

To assure compliance with this policy, Section 102(2)(C) of NEPA requires all agencies of the federal government to include in every recommendation or report on proposals for major federal actions significantly affecting the quality of human environment, a detailed statement by the responsible official on the following:

(i) [T]he environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

105. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970) *as amended by* 42 U.S.C. §§ 4332-4374 (Supp. V. 1975) [hereinafter cited as NEPA]. The very first NEPA case, *Texas Comm. on Natural Resources v. United States*, involved an FmHA loan for the construction of a golf course and park in Texas. The district court said with regard to that proposal that "there is little doubt that in the future the type of activity involved here would be covered by the statute." 359 F. Supp. 1322, 1 ENVIR. REP. 1303 (1970), vacated as moot after plans were abandoned, 430 F.2d 1315 (5th Cir. 1970). *See also* Anderson, *NEPA in the Courts* (1973) at 15, 58-59, 78, 85-86, 152-53. For a contrary holding involving two water systems, *see* Sierra Club v. Cavanaugh, 447 F. Supp. 427 (D.S.D. 1978).

106. 42 U.S.C. § 4331(a) (1970).

(v) any irreversible and irretrievable committments of resources which would be involved in the proposed action should it be implemented.[107]

FmHA's policies, procedures and guidelines for compliance with NEPA in the Community Facility Program are codified in 7 C.F.R. section 1901.301 through section 1901.309 (1978). Under FmHA regulations, compliance with NEPA includes the preparation of environmental assessments for all community facility loans.[108] FmHA regulations require this to be done before approving loans and grants.[109] It follows, of course, that the assessment must be done before funds are disbursed to any recipient. In assessing the environmental impact of a proposed action, all environmental aspects, including social and economic effects as well as physical, are considered. Significant impacts may include both beneficial and detrimental effects even if on balance the effect will be beneficial.[110] Sometimes secondary effects such as changed patterns of social and economic activity may be more significant than the primary action itself, and, accordingly, on those occasions FmHA may consider them as having a significant environmental impact.[111] Controversy is another factor considered in determining whether a proposed action is environmentally significant.[112] A detailed list of factors to consider and additional guides are published as Exhibits A through D to 7 C.F.R. section 1901.301-309 (1978).

In all cases, as a concurrent part of the application process the applicant must prepare an environmental impact evaluation on forms furnished by FmHA.[113] Applicants may also be requested to provide analysis and information for use in FmHA's making environmental assessments and evaluations.[114] FmHA regulations, however, specifically provide that in every case evaluation of the environmental issues, completion of a formal environmental assessment and, if needed, preparation of draft and final environmental impact statements are the responsibility of Agency officials.[115] The final determination of whether an environmental impact statement is needed is the responsibility of the FmHA State Director.[116]

Civil Rights Laws

FmHA's policy and procedures for implementing the antidis-

107. 42 U.S.C. § 4332(2)(C) (1970).
108. 7 C.F.R. § 1901.303(a)(4) (1978).
109. 7 C.F.R. § 1901.302(b) (1978).
110. 7 C.F.R. § 1901.304 (1978).
111. *Id.*
112. 7 C.F.R. § 1901.304(c) (1978).
113. 7 C.F.R. § 1901.305(a) (1978).
114. 7 C.F.R. § 1901.305(b) (1978).
115. *Id.*
116. 7 C.F.R. § 1901.305(c) (1978).

crimination regulations of the Department of Agriculture[117] issued pursuant to Title VI of the Civil Rights Act of 1964,[118] Title VIII of the Civil Rights Act of 1968,[119] and Executive Order No. 11246[120] are codified in 7 C.F.R. sections 1901.201 through 1901.205 (1978).

Civil Rights Act of 1964

Under Title VI of the Civil Rights Act of 1964,[121] no recipient of FmHA assistance may directly or through contractual or other arrangements subject any person, or cause any person to be subjected, to discrimination on the ground, race, color, or national origin with respect to any facility financed under the Program.[122] Numerous specific examples of prohibited discrimination practices are contained in FmHA regulations.[123]

As a condition precedent to receiving money under the Program, recipients are required to enter non-discrimination agreements with FmHA[124] obligating them to comply with the provisions of Title VI of the Civil Rights Act of 1964.[125] Their operations will be periodicially reviewed by FmHA for compliance with the terms of the agreements.[126] The initial compliance review for water and sewer projects is performed prior to closing or before construction begins, whichever occurs first.[127] In all other instances, the initial review is performed within the first year after the transaction is closed or after Form FmHA 400-4 has been signed.[128] Subsequent reviews are performed at the FmHA State Director's discretion at intervals of not less than 90 days or more than three years.[129] In the case of water and sewer loans, after six years the interval may be extended to every sixth year.[130] Noncompliance can, after notice and opportunity to voluntarily comply, result in the termination or refusal of financial assistance.[131]

Executive Order No. 11246

As applied to the Program Executive Order No. 11246[132] man-

117. 7 C.F.R. §§ 15.1-.143 (1978).
118. 42 U.S.C. § 2000d-1 (1970).
119. 42 U.S.C. § 3601 (1970).
120. Exec. Order No. 11246, Sept. 24, 1965, 30 Fed. Reg. 12319, in notes to 42 U.S.C. § 2000e (1970).
121. 42 U.S.C. §§ 2000d to d-6 (1970).
122. 7 C.F.R. § 1901.202(a)(1) (1978).
123. *Id.* Specific examples of prohibited discrimination practices are contained in 7 C.F.R. § 1901.202(a)(2) (1978).
124. 7 C.F.R. §§ 1901.202(d) & (e) (1978).
125. 42 U.S.C. §§ 2000d to d-6 (1970).
126. 7 C.F.R. § 1901.204 (1978).
127. 7 C.F.R. § 1901.204(e)(2)(i) (1978).
128. *Id.*
129. 7 C.F.R. § 1901.204(e) (1978).
130. 7 C.F.R. § 1901.204(e)(1) (1978).
131. 42 U.S.C. § 2000d-1 (1978).
132. Exec. Order No. 11246, Sept. 24, 1965, 30 Fed. Reg. 12319, 42 U.S.C. § 2003 (1970).

dates equal employment opportunity without regard to race, color, religion, sex, or national origin and the elimination of all facilities segregated on the basis of race, color, religion, or national origin on construction work financed by FmHA involving a construction contract of more than ten thousand dollars.[133] FmHA regulations promoting compliance with Executive Order No. 11246 are codified in 7 C.F.R. Section 1901.205(1978). Construction is exempted from those regulations when the recipient's contract or subcontract is with a State or local government (or any agency, instrumentality or subdivision of such government) and such agency, instrumentality of subdivision does not participate in work on or under the contract or subcontract.[134] In all other FmHA financed construction contracts or subcontracts over ten thousand dollars, either before the financing is closed or construction started, whichever occurs first, the recipient must formally agree to comply with Executive Order No. 11246.[135]

The contractors and subcontractors themselves must submit compliance statements with their bids and insert equal opportunity clauses in their contracts.[136] Contractors or subcontractors with at least fifty employees and a contract of fifty thousand dollars or more are also required to develop affirmative action plans.[137] Finally, periodic reporting requirements are imposed on contractors and subcontractors employing one hundred or more employees, so long as they hold any FmHA financed contract over ten thousand dollars.[138]

Civil Rights Act of 1968

Section 801 of Title VIII of the Civil Rights Act of 1968 proclaims that "It is the policy of the United States to provide, within constitutional limitations, for fair housing within the United States."[139] To further this national policy, Section 804 of Title VIII prohibits discrimination in the sale or rental of housing. FmHA regulations promoting compliance with Title VIII are printed in 7 C.F.R. 1901.203 (1978). Since FmHA finances housing primarily under programs other than the Community Facility Program, Title VIII applies to that Program only in those rare instances when a portion of an essential community facility may be properly characterized as "housing." For

133. 7 C.F.R. § 1901.205(a) (1978).
134. 7 C.F.R. § 1901.205(b)(3) (1978).
135. 7 C.F.R. § 1901.205(c)(2) (1978).
136. 7 C.F.R. § 1901.205(c)(2) (1978). In addition to the requirements imposed by this section, if such contracts or subcontracts are to be performed in areas having Hometown or Imposed Plans regarding affirmative action and equal employment, they are then subject to the conditions set forth in the applicable plan and are further subject to the Model EEO Bid Conditions found at 41 Fed. Reg. 32483 (1976). *See* 7 C.F.R. § 1901.205(f). FmHA State Directors can advise whether Hometown or Imposed Plans apply to specific projects, however, these plans are more frequently associated with urban areas in which the Program does not operate.
137. 7 C.F.R. § 1901.205(e) (1978).
138. 7 C.F.R. § 1901.205(d) (1978).
139. 42 U.S.C. § 3601 (1970).

example, apartments for the well-aging can be constructed as part of an FmHA financed nursing home complex.

Selected Federal Construction Contract Laws and Regulations

FmHA regulations for procurement, bidding, contracting and performing construction on community facility projects are published in 7 C.F.R. section 1933.18(1978).[140] These regulations are in addition to state, local and internal procurement standards.[141] Civil rights laws applicable to construction contracts were covered in the preceding section and thus will not be discussed here.

Generally, formal advertising with sealed bids and public opening of bids is the rule for all FmHA financed procurements involving over fifty thousand dollars.[142] This rule applies regardless of whether the procurement is for construction or for acquisition of machinery and equipment.[143] FmHA regulations expressly require that "[a]ll procurement transactions, regardless of whether negotiated or advertised and without regard to dollar value shall be conducted in a manner so as to provide maximum open and free competition."[144] These regulations also require, however, that "[P]ositive efforts shall be made by the borrower to utilize small business and minority-owned business resources.[145] "Cost-plus-a-percentage-of-the-cost" method of contracting is flatly prohibited[146]—as are conflicts of interest.[147] Accordingly, bids may not be awarded to firms or corporations that are owned or controlled, wholly or in part, by a member of the governing body of a recipient or an individual who is such a member. Nor may officers or employees or agents of the recipient solicit or accept gratuities, favors or anything of monetary value from contractors or potential contractors.[149]

Construction contracts for community facilities must be approved by FmHA officials[150] and should be executed on standard contract forms prescribed for use by borrowers and grantees in Federally assisted projects.[151] These standard documents are published by FmHA as 7 C.F.R. section 1933.20(a) (Guide 19) and may be reviewed at local FmHA offices.[152] Other contract documents may be

140. Section 1933.18 also contains FmHA design policies.
141. 42 Fed. Reg. 24247 (1977) (to be codified in 7 C.F.R. § 1933.18(a)(9)(ii) (1978)).
142. *Id.*, at 7 C.F.R. § 1933.18(a)(9)(ii)(C)(5) (1978).
143. *Id.*, at 7 C.F.R.§ 1933.18(a)(9)(ii)(C)(1) (1978).
144. *Id.*, at 7 C.F.R. § 1933.18(a)(9)(ii)(B) (1978).
145. *Id.*, at 7 C.F.R. § 1933.18(a)(9)(ii)(C)(3) (1978).
146. *Id.*, at 7 C.F.R. § 1933.18(a)(9)(ii)(C)(4) (1978).
147. *Id.*, at 7 C.F.R. § 1933.18(a)(9)(ii)(A) & (B) (1978).
148. *Id.*, at 7 C.F.R. § 1933,18(a)(9)(ii)(C) (1978).
149. *Id.*, at 7 C.F.R. § 1933.18 (a)(9)(ii)(A) (1978).
150. 42 Fed. Reg. 24249 (1977) (to be codified in 7 C.F.R. § 1933.18(a)(9)(ii)(H) (1978)).
151. 42 Fed. Reg. 24247 (1977) (to be codified in 7 C.F.R. § 1977.18(a)(7) (1978)).
152. 7 C.F.R. § 1933.20(a)(Guide 19), *supra* note 93. (Applicants may also obtain copies of the documents from the American Consulting Engineers

used when modified to comply with FmHA regulations.[153]

All contracts for construction must include a provision for compliance with the Copeland "Anti-Kickback Act"[154] as supplemented by Department of Labor Regulations printed in 29 C.F.R. Part 3 (1977).[155] That Act prohibits each contractor on a federally assisted project from inducing, by any means, any persons employed in the construction, completion, or repair of a public work, to give up any part of the compensation to which they are entitled.[156] In addition, full-time resident inspection is also required for all construction unless waived by FmHA in writing.[157] When used, resident inspectors are required to prepare daily inspection reports[158] and unless otherwise agreed, the resident inspector is normally provided by the consulting architect or engineer.[159] Further requirements may be imposed by FmHA depending on the size of the contract. For example, in the event that the contract exceeds twenty-five hundred dollars and has been negotiated, it must provide that the borrower, FmHA and the comptroller general, or any of their duly authorized representatives, shall have access to "any books, documents, papers, and records of the contractor which are directly pertinent to a specific Federal loan program for the purpose of making audit, examination, excerpts, and transcription."[160] Every contract in excess of twenty-five thousand dollars must contain FmHA's supplemental general conditions.[161] If a contract exceeds one hundred thousand dollars the contractor must agree to comply with requirements of the Clean Air Act,[162] and the Water Pollution Control Act Amendments of 1972,[163] relating to inspection, monitoring, entry, reports, and information.[164] In addition, in cases of contracts exceeding one hundred thousand dollars, the contractor is required to post bonds assuring performance and payment of

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Council, 1155 15th Street N.W., Washington, D.C. 20005; Associated General Contractors of America, 1957 E. Street, N.W., Washington, D.C. 20006; and the National Society of Professional Engineers, 2029 K Street, N.W., Washington, D.C. 20006).

153. 42 Fed. Reg. 24247 (1977) (to be codified in 7 C.F.R. § 1933.18(a)(7)(ii) (1978)).

154. 18 U.S.C. § 874 (1970).

155. 42 Fed. Reg. 24248 (1977) (to be codified in 7 C.F.R. §1933.18(a)(9)(ii)(F)(5) (1978)).

156. 18 U.S.C. § 874 (1970).

157. 42 Fed. Reg. 24249 (1977) (to be codified in 7 C.F.R. § 1933.18 (a)(12) (1978)).

158. *Id.*, at 7 C.F.R. § 1933.18(a)(12)(i) (1978).

159. *Id.*, at 7 C.F.R. § 1933.18 (a)(12) (1978).

160. *Id.* at 7 C.F.R. § 1933.18(a)(ii)(F)(9) (1978). These conditions are contained in the FmHA Guide entitled "Supplemental General Conditions" published at 7 C.F.R. § 1933.20(a) (Guide 18) (1978), note 93, *supra*.

161. *Id.*, at 7 C.F.R. § 1933.18(a)(9)(ii)(F)(6) (1978).

162. 42 U.S.C. §§ 1857-1857.1 (1970), *as amended by* Supp. V. 1976.

163. 33 U.S.C. §§ 1251-1376 (Supp. V, 1976).

164. 42 Fed. Reg. 24249 (1977) (to be codified in 7 C.F.R. § 1933.18(a)(9)(ii)(F)(7) (1978)). Contracts should contain specific provisions as set out in 7 C.F.R. § 1933.18(a)(9)(ii)(F)(7)(i)-(iii) (1978).

one hundred per cent of the contract cost.[165] Unless prohibited by state law, the United States acting through the Farmers Home Administration must be named as a co-obligee on those bonds.[166]

The Architectural Barriers Act of 1978

All FmHA financed community facilities that are accessible to the public or in which physically handicapped persons may be employed or reside, must be developed in compliance with the Architectural Barriers Act of 1968.[167] The Architectural Barriers Act of 1968 imposes design standards for federally assisted construction in order to facilitate the use and enjoyment of public buildings by approximately twenty-two million handicapped Americans.[168] Under the Act, the administrator of the General Services Administration (GSA) is required to issue regulations that apply to all Federal agencies and instrumentalities, including FmHA, and that are to be applied to facilities financed under their respective programs.[169]

The GSA Regulations require that every non-residential public building subject to the Act and designed, constructed or altered after September 2, 1969, be designed, constructed, or altered in accordance with the minimum standards contained in "American Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by the Physically Handicapped. Number A117-1-R 1971, approved by the American Standards Association, Inc. (subsequently changed to American National Standards Institute, Inc.)."[170] The standards are hereinafter referred to as the "ANSI Standards." Within the context of the Community Facilities Program, the ANSI Standards apply to community facilities such as hospitals, nursing homes, firehalls, community halls, courthouses, schools, bridges and other public structures. The ANSI Standards prescribe considerations for the design of ramps, walks, parking lots, entrances, doors and doorways, stairs, floors, toilet rooms, water fountains, public telephones, elevators, controls, warning signals, and other design matters.

The GSA Regulations do not apply the ANSI Standards to (a) any portion of the building that need not, because of its intended use, be made accessible to, or useable by, the public or by physically handicapped persons (e.g., sewer pumping stations); (b) the alteration of an existing building if the alteration does not involve the

165. 42 Fed. Reg. 24248 (1977) (to be codified in 7 C.F.R. § 1933.18(a)(9)(ii)(F)(3) (1978)).

166. *Id.*

167. The Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1970) and 42 Fed. Reg. 24243 (1977) (to be codified in 7 C.F.R. 1933.17(a)(10)(vii) (1978)).

168. S.R. No. 538, 90th Cong., 2nd Sess. (1967) in [1968] U.S. Code Cong. & Ad. News 3214, at 3216.

169. 42 U.S.C. § 4152 (1970). *See also* 42 Fed. Reg. 24243 (1977) (codified at 7 C.F.R. § 1933.17(a)(10)(vii) (1978)).

170. 41 C.F.R. § 101-19.603 (1977).

installation of, or work on, existing stairs, doors, elevators, toilets, entrances, drinking fountains, floors, telephone locations, curbs, parking areas, or any other facilities susceptible of installation; (c) the alteration of an existing building, or of such portions thereof, to which application of the ANSI Standards is not structurally possible; and (d) the construction or alteration of a building for which plans and specifications were completed or substantially completed on or before September 2, 1969.[171]

With respect to those few community facility structures that may be properly categorized as housing, such as apartments for the well-aging attached to an FmHA financed nursing home, the GSA Regulations do not apply.[172] Instead, regulations of the Secretary of Housing and Urban Development (HUD) apply to the design, construction and alteration of publicly owned buildings that are residential structures financed with federal funds.[173] They are substantially the same as the GSA Regulations but they apply only to publicly owned residential structures.[174]

National Historic Preservation Act of 1966

The National Historic Preservation Act of 1966[175] requires all Federal agencies having jurisdiction over a federally assisted undertaking in any state to take into account the effect of the undertaking on any district site, building, structure or object that is included in, or eligible for inclusion in the National Register of Historic Places.[176] The National Register is a register of districts, sites, buildings, structures, and objects, significant in American history, architecture, archeology, and culture maintained by the Secretary of the Interior under the authority of the Historic Sites Act of 1935[177] and the National Historic Preservation Act.[178] The National Historic Places list is published in its entirety in the Federal Register each year in February and supplemented by publication of addenda on the first Tuesday of each month.[179]

FmHA regulations effecting compliance with the National Historic Preservation Act require the FmHA State Director to make an historical and archeological assessment for loans and grants to construct, enlarge, extend or otherwise improve community

171. 41 C.F.R. § 101-19.604 (1977).
172. 42 U.S.C. § 4152 (1970).
173. 42 U.S.C. § 4153 (1970), *See also* 24 C.F.R. § 40.1-40.6 (1977).
174. *Id.*
175. The National Historic Preservation Act of 1966, 16 U.S.C. §§ 470 through 470h (1970), as amended by 16 U.S.C. §§ 470a, 470h, 470i, 470m and 470n (Supp. V. 1976) and Acts of Sept. 28, 1976, Pub. L. No. 94-422, 90 Stat. 1320.
176. 16 U.S.C. § 470f (1970), as amended by Act of Sept. 28, 1976, Pub. L. No. 94-422 Title II, § 201(3), 90 Stat 1320. Note: Criteria for inclusion in the National Register of Historic Places are codified in 7 C.F.R. § 1901.253 (1978).
177. 16 U.S.C. § 462(b) (1970). *See* 43 Fed. Reg. 5161-5345 (1978) for most recent listing of National Historic Places.
178. 16 U.S.C. § 470a(a)(1) (1970).
179. *See, e.g.*, 43 Fed. Reg. 5161-5345 (1978).

facilities.[180] Any FmHA County Supervisor who receives an application or preapplication for financial assistance that may have an effect on properties included in (or eligible for inclusion in) the National Register is required to develop and submit information on this aspect of the proposed project to the FmHA State Director as part of the preapplication or application process.[181] As a concurrent part of the preapplication/application review, the State Director will prepare an historical and archeological assessment of the undertaking.[182]

If the State Director determines that there are properties included in the National Register that may be affected, he/she is required to consult with the applicant, its representatives and appropriate historical and archeological authorities and officials "to plan appropriate measures to avoid or initiate any adverse effects."[183] The FmHA State Director must also notify the Advisory Council on Historical Preservation[184] and the Secretary of the Interior and afford them an opportunity to comment.[185] Comments received within forty-five calendar days of notification will be considered in further development of the project.[186]

When a State Director's assessment concludes that a property may be eligible for inclusion in the National Register but is not, he/she will request the Department of the Interior to cause a survey of the project area to be made to determine the historical and archeological significance of the property.[187] If the survey concludes that the property may be eligible for inclusion, the State Director will request appropriate state officials to nominate the property for inclusion.[188] Should the property be accepted for inclusion, the State Director will then proceed as outlined in the preceding paragraph.[189]

In the event properties of significant historical or archeological value are discovered during construction, FmHA regulations require the State Director to "immediately" consult with the recipient, the National Park Service and appropriate state officials to "determine whether there is sufficient factual evidence to warrant a decision to stop construction and undertake detailed survey and recovery."[190] If after consultation, the National Park Service determines that construction should be halted, FmHA regulations obligate the recipient to stop work so that the National Park Service can initiate

180. 7 C.F.R. § 1901.254(a)(4) (1978).
181. 7 C.F.R. § 1901.255(a) (1978).
182. 7 C.F.R. § 1901.255(b) (1978). *See also* Hall County Society v. Georgia Department of Transportation, 447 F. Supp. 741 (N.D. Ga. 1978), holding that the responsibility may not be delegated to state officials.
183. 7 C.F.R. § 1901.255(c)(2) (1978).
184. 7 C.F.R. § 1901.253(k) (1978).
185. 7 C.F.R. § 1901.255(c)(2) (1978).
186. *Id.*
187. 7 C.F.R. § 1901.255(c)(3) (1978).
188. 7 C.F.R. § 1901.255(c)(6) (1978).
189. *Id.*
190. 7 C.F.R. § 1901.259(a) (1978).

measures to recover the properties within sixty days of notification of a discovery.[191] On the other hand, if the consultations do not produce a National Park Service determination to stop construction, FmHA regulations permit construction to continue provided the recipients "proceed with caution."[192] It should be noted that the Secretary of the Interior is authorized to compensate any person, association, or public entity damaged as a result of a delay in construction or a temporary loss of use of land.[193]

CONCLUSION

"Today you don't even have to be a farmer [to be assisted by FmHA,]" and that troubles some people, like the Wall Street Journal reporter alluded to at the opening of this article.[194] Admittedly, FmHA's name may be a misnomer, but it does not follow that the expansion of that Agency's mission in the sixties and seventies has been a self-serving exercise in bureaucratic empire building. On the contrary, the Agency's, salary and expense levels have remained remarkably flat in the face of a sharply escalating loan portfolio.[195]

In the first forty years of its existence, FmHA loaned over four billion dollars in more than twenty thousand community facility loans.[196] Some nine thousand water and waste disposal systems ranging in coverage from small local communities to intercommunity and even multi-county rural areas have been built with FmHA financing since 1965 when Congress transformed the Program into the Nation's major rural water and sewer program.[197] Furthermore, over thirty other types of community facilities from fire trucks to hospitals have also been financed under the Program since Congress expanded it in 1972 to cover any essential community facility.[198]

Today, with over 1,750 local offices,[199] FmHA is the largest Federal loan agency dealing directly with borrowers.[200] Its soaring program levels reflect the tremendous emphasis during the sixties and early seventies that Congress placed on revitalizing rural America. Moreover, Congress has held the Federal agencies charged with this mission accountable.[201] The annual accountings by the Secretary of Agriculture submitted in recent years demonstrate that real tangible progress towards a rural renaissance is being made. Decades of out migration have finally been reversed, job opportunities are increas-

191. 7 C.F.R. § 1901.259(b) (1978).
192. 7 C.F.R. § 1901.259(c) (1978).
193. *Id.*
194. Elliot, *supra* note 1, at 39, col. 6.
195. *1978 Budget Hearings, supra* note 6, at 539.
196. *Id.*, at 533.
197. *Id.*, at 536.
198. *Id.*
199. *Id.*, at 524.
200. *Id.*
201. 7 U.S.C. § 2204(b) (1976).

ing, community services are improving and quality housing is becoming increasingly available.[202] A significant factor in this remarkable achievement, although obviously not an exclusive one, has been the FmHA Community Facility Program.

The Secretary has publicly indicated that he has no intention of relinquishing the Department's relatively recently acquired mandate for rural development in favor of traditional conceptions of what a department of agriculture should be. Instead, he has announced his intention to streamline the Department and focus its resources even more on rural development.[203] Accordingly, the progress and the promise of rural development begun in the sixties will not be abandoned in the seventies merely to preserve labels at the expense of effective programs that have demonstrably benefited long neglected rural regions of this country in direct and substantial ways. Instead, the Secretary has announced that the labels themselves will be changed to more accurately reflect what the Department's agencies do.

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202. Rural Development Progress, Third Annual Report of the Secretary of Agriculture to the Congress, May 1976, at 6, 10, 12 and 22. *Generally, see also* the Fourth Annual Report, January 1977. On a growing corporate trend toward relocating in rural settings, see Ricklefs, *Does Out of the City Mean Out of Touch? Some Firms Say No*, Wall St. J., Jan. 3, 1978, at 1, col. 4.

203. Elliot, *supra* note 2, at 39, vol. 6.