

# REVIEWABILITY OF ADMINISTRATIVE DETERMINATIONS UNDER 7 U.S.C. § 2001: DEBT RESTRUCTURING AND LOAN SERVICING

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## INTRODUCTION

When a regulatory agency of the United States, by its performance, indicates an inability to implement the clear intent of Congress, courts must not only enforce the congressional mandate, but withdraw the traditional judicial deference to that agency's determinations and decisions. When natural disasters, extremes in weather patterns and market conditions place the American farmer in economic distress through no fault of his own, Congress has mandated that the Farmers Home Administration (FmHA) provide debt restructuring of the farmer's outstanding agricultural loans to allow him to continue farming. If the FmHA fails this mandate, is judicial review available to the farmer?

In 1988, pursuant to the Agricultural Credit Act of 1987, important farmer-borrower debt restructuring provisions were added to statutes governing the Farmers Home Administration (FmHA).<sup>1</sup> Prior abuses and failure of the FmHA prompted much of the legislation changing FmHA operations, the restructuring provisions in particular.<sup>2</sup> In 1987, Congressional hearings raised concerns that the FmHA was neither ad-

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<sup>1</sup> Agricultural Credit Act of 1987, Pub. L. No. 100-233, Title VI § 615(a), 101 Stat. 1678 (1987).

<sup>2</sup> 7 U.S.C. § 2001 (1990). *See generally* 133 CONG. REC. H7686-7700 (daily ed. Sept. 29, 1987), 133 CONG. REC. 516,835-847 (daily ed. Dec. 1, 1987), 133 CONG. REC. 516,958-960 (daily ed. Dec. 2, 1987), 133 CONG. REC. 517,281 (daily ed. Dec. 4, 1987), 133 CONG. REC. H11802-805 (daily ed. Dec. 18, 1987), 133 CONG. REC. 518,466-470 (daily ed. Dec. 19, 1987).

hering to nor implementing the servicing of farmer program loans as Congress had intended.<sup>3</sup>

While the economic forces which served as the catalyst for the farming sector's problems in the early 1980's are not as prevalent today, the vestiges of the failures and attitudes of the FmHA, institutionalized by agency practices, remain. Illustrative of that period, the litigation originating with *Curry v. Block* in 1982, merits mention; in many ways it highlights the problems of the FmHA and prompted the recent reforms of the debt restructuring procedures.<sup>4</sup> While the FmHA is now implementing the Agricultural Credit Act of 1987, disobedience to statutory and judicial commands to implement loan servicing largely go unheeded.<sup>5</sup> Until such time as the FmHA proves that it is worthy of judicial deference to its opinions, FmHA agency decisions should be scrutinized to assure strict compliance with congressional intent to keep the American farmer on the farm.

When economic disaster strikes, the farmer's first recourse is FmHA review of his debts. However, because the FmHA has a poor record of

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<sup>3</sup> Proposed Changes in the Farmers Home Administration Credit Regulations: Hearing Before the Senate Committee on Agriculture, Nutrition and Forestry, 100th Cong., 1st Sess. (1987); see also Note, *Section 1981a Proposed Loan Deferral Regulations: The Saving Grace for FmHA Farm Borrowers?*, 16 U. TOL. L. REV. 941 (1985).

Illustrative of these concerns are the comments of Alan Bergman, President of the North Dakota Farmers Union,

[T]he reputation and credibility of FmHA has been dramatically lowered in the eyes of both farmers and non-farmers. Its regulations have been open invitations to lawsuits. And even successful lawsuits have been considerably side-stepped in regulations and practice. To put it bluntly, if FmHA were a child, Congress would have legitimate grounds to charge the USDA with child abuse. *Id.* at 140.

<sup>4</sup> *Curry v. Block*, 541 F. Supp. 506 (S.D. Ga. 1982), *aff'd* 738 F.2d 1556 (11th Cir. 1984). For a comprehensive discussion of the FmHA's response to *Curry*, see Coleman v. Lyng, 864 F.2d 604 (8th Cir. 1988).

<sup>5</sup> GAO Rpt. No. RCED-90-169, FARMERS HOME ADMINISTRATION, CHANGES NEEDED IN LOAN SERVICING UNDER THE AGRICULTURAL CREDIT ACT (Aug. 1990), Report to the Chairman, Committee on Agriculture, Nutrition and Forestry, U.S. Senate; *Love v. United States, et al.*, 90 C.D.O.S. 7539 (9th Cir. C.Ct.S. 1990). *Love* includes a FmHA failure to provide notice of debt servicing and subsequent foreclosure and sale of the Loves' livestock and machinery. The *Love* case is also of interest in that it permits an action under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), for the FmHA's breach of an "implied covenant of good faith and fair dealing". Under Montana law such a duty exists separate from and in addition to contractual terms; see also *Smithson v. United States*, 847 F.2d 791, 799 (Fed. Cir. 1988) (suggesting "FmHA's alleged failure to follow Federal regulations in providing loan servicing relief is a tort rather than a contract claim.").

protecting farm borrowers from financial ruin, the farmer's right to independent judicial review in federal court is vital. Judicial review of administrative decisions is not automatic, nor should it be. However, an important issue for the farmer-borrower is whether debt restructuring decisions may be reviewed in federal court, once full agency appeal and review is exhausted. A careful study of the law of reviewability of administrative determinations, in cases involving claims of administrative error, may provide some answers.

This article analyzes trends in the law of judicial reviewability of administrative decisions and assesses the reviewability of FmHA denials of debt restructuring. The law of availability or non-availability of judicial review is confused and uncertain, not only in this context but more generally.

The objective of this analysis is to bring order to an array of seemingly disparate cases. Because FmHA restructuring decisions have not been widely reviewed by the courts, analysis of cases involving judicial review of agency determinations in other areas of law provides valuable insight into the court's reasoning when reviewing FmHA rulings.

Section I explores the basic theory of nonreviewability by examining: (1) the historical evolution of the Administrative Procedures Act (APA);<sup>6</sup> (2) the rule that agency decisions are reviewable unless statutorily prohibited; and (3) the context in which an agency action is committed to agency discretion by law.

Section II analyzes discretionary agency decisions and statutory language. Congressional intent may expressly preclude review because of insufficient law or meaningful standards for the court to apply. In addition, deference to administrative expertise may preclude otherwise allowable review.

Section III examines selected language of 7 U.S.C. § 2001 (1990), containing the current debt restructuring provisions governing the FmHA. Examination of potential avenues of review under these provisions is appropriate, albeit controversial from a policy perspective. Given the structure and background of pertinent FmHA statutes, review of debt restructuring decisions may not be precluded once administrative remedies are exhausted. If there is law to apply and clear Congressional intent can be discerned from the statute, then review is mandated by the critical underlying policy permeating every restructuring decision. That policy is Congress' directive that the farmer be allowed to continue farming.

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<sup>6</sup> Administrative Procedures Act, 5 U.S.C. § 701 (1988).

## I. THEORIES OF NONREVIEWABILITY

The Supreme Court has moved from an initial attitude of great deference to agency determinations, through a period of activist review as a result of the Administrative Procedures Act<sup>7</sup> (APA), to its current "hands-off" attitude of review under the APA.

At common law, the discretionary act of an administrator was considered judicially unreviewable.<sup>8</sup> The United States Supreme Court addressed this precise issue in its 1827 decision in *Martin v. Mott*:

Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.<sup>9</sup>

Nonreviewability of agency determinations is based on the doctrines of justiciability, separation of powers, standing and ripeness.<sup>10</sup> Although not strictly concepts of reviewability, these doctrines have often been used by courts to avoid review of agency determinations.<sup>11</sup>

Two reasons explain the hesitancy of courts to review agency decisions. First, courts often find it difficult to determine the "statutory delineation of the limits of discretion".<sup>12</sup> Second, without statutory standards to apply, courts often lack the expertise or experience to determine if an agency action or determination is correct.<sup>13</sup>

### A. Range of Agency Discretion

Questions of reviewability depend on the particular type of agency discretion being exercised. Discretionary actions may be evaluative or case specific. In other instances, agency discretion may implement regulations necessary to complete a statutory instruction.<sup>14</sup> Discretion can also flow from the authority to make "policy" determinations,<sup>15</sup> which

<sup>7</sup> 5 U.S.C. § 701 (1988).

<sup>8</sup> *Bayonet Point Regional Medical Center v. H.R.S.*, 516 So.2d 995, 1001 (Fla. App. 1 Dist. 1987), citing 4 K. DAVIS, ADMINISTRATIVE LAW § 28:1, p. 254 (2 ed. 1983).

<sup>9</sup> *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827); see also *Presumption of Unreviewability*, 55 GEO. WASH. L. REV. 596 (1987).

<sup>10</sup> Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 380.

<sup>13</sup> *Id.* at 382.

<sup>14</sup> Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986).

<sup>15</sup> *Id.* ("[P]olicy includes decisions that advance or protect some collective goal of the

is the broadest type of discretion available to an administrative agency.<sup>16</sup> Attention to the particular type of discretion exercised assists in understanding reviewability determinations.

By characterizing "policy" discretion as the broadest type authorized by Congress and the least likely to be subject to judicial review, and individualized discretion as narrow by comparison and more likely to be subject to review, then reviewability determinations are more easily understood.<sup>17</sup> Evaluative discretion falls somewhere in between, with reviewability determined by considerations of policy or individualized orientation.

### B. Deference and the Modern Trend

The Supreme Court's hesitancy to review administrative decisions gave way to a period of judicial activism in reviewability determinations.<sup>18</sup> The Court's activism was caused in part by the enactment of the APA. As issues concerning the APA have resolved, the Court has increasingly accorded administrative determinations greater deference.<sup>19</sup> Meanwhile, Congress has restricted administrative decision making<sup>20</sup> by enacting statutes containing a greater degree of specificity, thus restricting the latitude accorded to administrative decision makers.<sup>21</sup>

### C. The Administrative Procedures Act

The APA provides that all actions of an agency are reviewable unless review is statutorily prohibited or the agency action has been committed to agency discretion by law.<sup>22</sup> Before any action or determina-

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community.").

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, cf. Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877 (1989).

<sup>18</sup> Shapiro and Glickman, *The Supreme Court and the Quiet Revolution in Administrative Law*, 88 DUKE L.J. 819 (1988), Aman, *Administrative Law in a Global Era: Progress, Deregulatory Change and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101 (1988), Levine, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 86 DUKE L.J. 258 (1986), Levey and Glickman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989), Note, *Preclusion of Judicial Review of Agency Inaction Under the Administrative Procedures Act*, 62 ST. JOHN'S L. REV. 318 (1988).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 5 U.S.C. §§ 701(a)(1) and (2) (1988).

tion is subject to judicial review, "final agency action" or "exhaustion of administrative remedies" requirements must be met.<sup>23</sup> Statutory preclusion requires "a clear and convincing legislative intent" to preclude judicial review which must be "fairly discernible in the statutory scheme".<sup>24</sup> Furthermore, in the absence of statutory preclusion, a strong presumption exists that agency actions are reviewable. The exception to this presumption is applied only in those "rare instances" where there is "no law to apply".<sup>25</sup>

The United States Supreme Court decided that Congress, by enacting the APA, did not intend to "significantly alter" the immunity of certain administrative decisions from judicial review.<sup>26</sup> The Court, however, determines whether Congress has set substantive priorities or has otherwise circumscribed an agency's authority.<sup>27</sup>

## II. COMMITTED TO AGENCY DISCRETION

Judicial review of recent FmHA determinations is scarce. However, the courts apply similar reasoning when reviewing agency decisions from other areas of law. Applicable statutes and regulations are not always the object of the courts' analyses. The rationale and application of agency decisions is often the focus of the courts' inquiry. Insight into the courts' reasoning is gleaned from the cases discussed below.

### A. *The Analytical Framework*

Analysis of discretionary agency determinations and statutory language involves a step-by-step examination to determine whether there is Congressional intent to preclude review; if there is no intent to preclude review, is there law to apply? If there is law to apply, should the court give deference to the agency's expertise in the area? If the questions are answered as follows: (1) there is no intent to preclude review; (2) there is law to apply; and (3) the court need not grant deference to the agency's expertise; then the case should be judicially reviewable.

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<sup>23</sup> 5 U.S.C. § 704 (1988); *see also* Hudson v. FmHA, 654 F.2d 334 (5th Cir. 1981).

<sup>24</sup> Natural Resources Defense Council Inc. v. S.E.C., 606 F.2d 1031, 1043 (D.C. Cir. 1979), Block v. Community Nutrition Institute, 104 U.S. 2450, 2457 (1984), Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S. Ct. 1507, 1510 (1967).

<sup>25</sup> Natural Resources Defense Council v. S.E.C., 606 F.2d 1031 (D.C. Cir. 1979).

<sup>26</sup> Heckler v. Chaney, 470 U.S. 821, 831, 105 S. Ct. 1649, 1659 (1985), *referencing* 5 U.S.C. § 701(a)(2).

<sup>27</sup> *Id.* at 831.

### 1. Congressional Intent

One of the first cases discussing reviewability of an agency's actions under the APA was *Abbott Laboratories v. Gardner*.<sup>28</sup> Abbott Laboratories challenged certain regulations issued by the Secretary of what was then the Department of Health, Education and Welfare. While *Abbott* involved a review of administrative rule-making, many of the rules determining reviewability were stated. *Abbott* holds that a "statutory scheme" may exclude an action from review.<sup>29</sup> *Abbott* also provides insight into the Court's examination of reviewability within the APA. The *Abbott* court ruled that review of a final agency action will not be cut off unless there is a persuasive indication Congress so intended, that Congressional intent must be by clear and convincing evidence, and specific reviewability of some actions does not exclude others from review.<sup>30</sup>

The most recent United States Supreme Court case considering agency decision reviewability is *Webster v. Doe*.<sup>31</sup> *Webster* involved a determination by the Director of the Central Intelligence Agency to terminate an employee. The National Security Act of 1947 (NSA) (as amended) § 102(c) provides that:

[T]he Director of the Central Intelligence Agency may, in his discretion terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . . .<sup>32</sup>

The Court found that the language "shall deem . . . [if] necessary or advisable" precluded judicial review under the APA.<sup>33</sup> The Court emphasized the specific nature of the language. Had the language stated "when the dismissal is necessary or advisable" instead of when the Director "shall deem" termination necessary or advisable, discretion would not be as clear.<sup>34</sup> The Court held that the employee termination decision was one entrusted to the Director's discretion by law.<sup>35</sup> The Court cited *Chaney* for its standard of an action which is committed to agency discretion by law. When there has been no Congressional preclusion of judicial oversight, "review is not to be had if the statute is

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<sup>28</sup> *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507 (1967).

<sup>29</sup> *Id.* at 141.

<sup>30</sup> *Id.*

<sup>31</sup> *Webster v. Doe*, \_\_\_\_ U.S. \_\_\_\_, 108 S. Ct. 2047 (1988).

<sup>32</sup> *Id.* at 2049, *citing*, 61 Stat. 498, § 102(c), 50 U.S.C. § 403(c).

<sup>33</sup> *Id.* at 2048, *citing* 5 U.S.C. § 701(a)(2).

<sup>34</sup> *Id.* at 2052.

<sup>35</sup> *Id.* at 2053.

drawn so that a court would have no 'meaningful standard' against which to judge the agency's exercise of discretion".<sup>36</sup> The Court emphasized that "committed to agency discretion by law"<sup>37</sup> determinations "require careful examination of the statute on which the claim of agency illegality is based".<sup>38</sup> The focus of the *Webster* court appears to be whether the governing statute provides a "meaningful standard" by which the Court can review the agency action.<sup>39</sup> The Court also stated that the "history of the National Security Act . . . indicates that the Congress vested in the Director of Central Intelligence very broad authority".<sup>40</sup> The Court relied not only on the language of the statute, but also the legislative history of the NSA in concluding that Congressional intent "fairly exude[d] deference to the Director".<sup>41</sup>

## 2. No Law to Apply

If Congressional intent does not preclude review, reviewability analysis examines whether the statute or regulation provides some standard against which agency decisions can be measured. This is called the "no law to apply" standard. In *Story v. Marsh*,<sup>42</sup> a case involving the United States Army Corps of Engineers and its compliance with the National Environmental Policy Act of 1969,<sup>43</sup> the court set out this standard:

[I]f no law fetters the exercise of administrative discretion, the courts have no standard against which to measure the lawfulness of the agency action. In such cases no issues susceptible of judicial resolution are presented and the courts are accordingly without jurisdiction.<sup>44</sup>

*Citizens to Preserve Overton Park v. Volpe*<sup>45</sup> was the first case to

<sup>36</sup> *Id.* at 2052, citing *Chaney*, 270 U.S. 821.

<sup>37</sup> 5 U.S.C. § 701(a)(2) (1988).

<sup>38</sup> *Webster*, 108 S. Ct. at 2052.

<sup>39</sup> *Community Action of Laramie County v. Block*, 866 F.2d 347 (10th Cir. 1989), a post-*Webster* decision, expands the exception of "committed to agency discretion by law" to include "traditionally unreviewable" agency determinations which are "sensitive and inherently discretionary judgment call[s]". This case indicates that the "common law" or traditional concepts of administrative review are still a factor in determining reviewability under the APA.

<sup>40</sup> *Webster* 108 S. Ct. at 2052.

<sup>41</sup> *Id.*

<sup>42</sup> *Story v. Marsh*, 732 F.2d 1375 (8th Cir. 1984).

<sup>43</sup> National Environmental Policy Act of 1969, § 2, 42 U.S.C. § 4321 (1969).

<sup>44</sup> *Story v. Marsh*, 732 F.2d 1375 (8th Cir. 1984), citing *City of Santa Clara, CA v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978), cert. denied 439 U.S. 859 (1978).

<sup>45</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971).



examine administrative determinations “committed to agency discretion” because there was no law to apply. The Court found the standard very narrow,<sup>46</sup> “applicable in those rare instances where statutes are drawn in such broad terms that . . . there is no law to apply.”<sup>47</sup> The Supreme Court recognized that some administrative decisions are unreviewable because a court cannot find objective standards to determine the correctness of agency action.

In *Overton Park* the Secretary of Transportation had concluded pursuant to statute that no “feasible and prudent alternative” existed to building a highway through a public park. The Court found the statute to be, however, clear. Only in the most unusual situations could the Secretary approve highway construction through public park lands.<sup>48</sup> Consequently, the terminology —“feasible and prudent”— was sufficient “law to apply”.<sup>49</sup>

The Court examined the legislative history of the Federal Highway Act of 1968 to see if it provided a standard by which to measure the meaning of “feasible and prudent alternative”.<sup>50</sup> The Court concluded that the legislative history was ambiguous and the language of the statute determined Congressional intent.<sup>51</sup> The term “feasible and prudent” were terms which the Court could objectively apply, so the Secretary’s decision to build a highway through a public park was reviewable. This conclusion demonstrates the Court’s preference for a standard which provides objective criterion by which to measure an agency determination.<sup>52</sup>

In contrast to *Overton*, in *Tuepker v. Farmers Home Administration*,<sup>53</sup> the language of the Emergency Agricultural Adjustment Act<sup>54</sup> failed to provide law to apply. Although the Act did not specifically preclude judicial review, it gave the Secretary of Agriculture authority to protect the government’s interest.<sup>55</sup> The Act provides in part that

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<sup>46</sup> *Id.* at 410.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 414.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 420.

<sup>52</sup> Ultimately the case was remanded to the district court for review of the record on which the decision was made. The Secretary’s decision was not wrong; rather, there was an inadequate effort to comply with the “feasible and prudent alternative” standard of the statute.

<sup>53</sup> *Tuepker v. Farmers Home Administration*, 708 F.2d 1329 (8th Cir. 1983).

<sup>54</sup> Emergency Agricultural Adjustment Act, Pub. L. No. 95-384, §206, 98 Stat. 429-433 (1978).

<sup>55</sup> *Id.*

[l]oans shall be insured or guaranteed under this title upon the full personal liability of the borrower secured by such collateral as is available that: together with the *confidence of the secretary*, and for guaranteed loans the confidence of the lender, in the repayment ability of the loan applicant, *is deemed by the secretary* adequate to protect the government interest . . . .<sup>56</sup>

The court saw the language "confidence of the secretary" and "deemed by the secretary" as clear expressions of Congressional intent to place these determinations within the "sole" discretion of the secretary.<sup>57</sup> Hence, there was "no law" to apply.

In summary, if an administrative decision is within the statutory directive and within the scope of a "qualitative, subjective decision" of the secretary, the court has no law to apply, and the determination is nonreviewable.<sup>58</sup>

### 3. Deference to Agency Expertise

In addition to ruling that there was "no law to apply", the *Tuepker* decision is significant in showing that while the Emergency Agricultural Credit Act<sup>59</sup> (EACA) does not specifically preclude judicial review, it vests the Secretary of Agriculture with the discretion to deem the repayment ability of the loan applicant adequate or inadequate.<sup>60</sup> The case exemplifies the third level of reviewability analysis: whether deference should be given to agency expertise. Under the EACA, the borrower must secure the confidence of the Secretary in order to obtain a loan. Gaining the Secretary's confidence is a purely subjective determination and is therefore nonreviewable. The court is forced to defer by statutory language to the Secretary's expertise.

Some agency actions are unreviewable because the actions are based solely on agency expertise. *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*<sup>61</sup> presents a pragmatic approach to reviewability. In dicta, the court expressed concern over impairing an agency's effectiveness and concluded that some determinations may best be left to the "agency in its expert judgment".<sup>62</sup> The court also

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<sup>56</sup> *Id.* (emphasis added).

<sup>57</sup> *Tuepker*, 708 F.2d at 1331.

<sup>58</sup> *Id.* at 1332.

<sup>59</sup> Emergency Agricultural Credit Act of 1978, Pub. L. No. 95-384, § 206, Stat. 429-433 (1978).

<sup>60</sup> *Id.*

<sup>61</sup> *Natural Resources Defense Council, Inc. v. S.E.C.*, 606 F.2d 1031 (D.C. Cir. 1979).

<sup>62</sup> *Id.* at 1045. The manner in which the court applied the "pragmatic considera-

considered Congress' intent that administrative agencies engage in "quasi-legislative" factual determinations in specialized areas concerning matters of social and economic policy,<sup>63</sup> and may be more competent than the courts to make these determinations.<sup>64</sup>

In *Board of Univ. and School Lands v. Yeutter*,<sup>65</sup> the Secretary of Agriculture denied an application to place lands in the Conservation Reserve Program.<sup>66</sup> The Court concluded that the legislative history and statutory framework of the Conservation Reserve Program did not provide a meaningful standard by which it could assess the decision.<sup>67</sup> The Court ruled that absent any "criteria" for determining whether "adequate assurances" existed, no standard of review existed.<sup>68</sup> Furthermore, Congress delegated broad discretion to the Secretary.<sup>69</sup>

The Conservation Reserve Program places decisions within the subjective confidence of the Secretary, implying Congressional intent to preclude the determination from review. Generally, determinations that are "qualitative and subjective" in nature, "based on agency expertise" and "within the bounds of statutory directives," are not subject to judicial review.<sup>70</sup>

Thus, it is no longer only "agency expertise" which determines reviewability; the determinative factors are whether the statute itself provides a "meaningful standard" by which the Court can ascertain the complexity of the determination *and* the standard to be applied.

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tions" test has subsequently been found inappropriate. *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1048.

<sup>65</sup> *Board of Univ. & School Lands v. Yeutter*, 711 F. Supp. 517 (D.N.D. 1989).

<sup>66</sup> Conservation Reserve Program, 16 U.S.C. § 3835(a)(1)(c) (1988 Supp.). The program is intended to induce owners of highly erodible land to remove it from agricultural use.

<sup>67</sup> *Yeutter* 711 F. Supp. at 520, *citing* Conservation Reserve Program, 16 U.S.C. § 3835(a)(1)(c) (1988 Supp.). The application was denied because, in the view of the agency, "adequate assurances" did not exist to waive the three-year ownership rule. The statute provided that the Secretary must "determine" he had "adequate assurances" there would be repayment before granting waiver of the three-year ownership rule.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 410 U.S. 402.

### B. Defining and Applying the Present Test

Courts usually begin with a "strong presumption that Congress intends judicial review of administrative action".<sup>71</sup> In *Bowen v. Michigan Academy of Physicians* the Court stated that to overcome this presumption it will look to

specific language or specific legislative history that is a reliable indicator of congressional intent or a specific congressional intent to preclude judicial review that is "fairly discernible" in the detail of the legislative scheme.<sup>72</sup>

The Court, after examining the language of the statute, will look not only to the agency action, but also to the intent of the legislature when enacting the provisions in question.

Thus, the Court has adopted the test of whether legislative intent has made the decision one that is nonreviewable by the Court; whether there is a lack of law to apply; and whether the Court possesses the expertise to review the agency action by determining and applying a "meaningful standard".

In *Woodsmall v. Lyng*<sup>73</sup> the FmHA's determination that applicants for a loan were not creditworthy was an action that was "committed to agency discretion" by law and nonreviewable. The court in *Woodsmall* applied the test of *Tuepker*:

In determining reviewability of an agency's actions, a court must look at the allegations raised in the complaint, together with the governing statutes and regulations, and determine: (1) whether the challenged agency action is of the type Congress intended be left to a reasonable exercise of agency expertise; and (2) whether the problem raised is one suitable for judicial determination. It is only then that a court can sufficiently ascertain whether there is "law" to apply . . . .<sup>74</sup>

The court found that it was "not equipped" to reevaluate the FmHA's determination that the Woodsmalls were not creditworthy,<sup>75</sup> and that it had neither the "training [n]or experience" of the FmHA's Loan Officer.<sup>76</sup> The court found the determination of "creditworthiness" to be a "qualitative, subjective decision based on agency expertise".<sup>77</sup> Under *Woodsmall*, FmHA decisions are unreviewable absent

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<sup>71</sup> *Bowen v. Michigan Academy of Physicians*, 476 U.S. 667, 670, 106 S. Ct. 2133, 2135 (1986).

<sup>72</sup> *Id.* at 670, *referencing* *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S. Ct. 2450 (1984).

<sup>73</sup> *Woodsmall v. Lyng*, 816 F.2d 1241 (8th Cir. 1987).

<sup>74</sup> *Id.* at 1244.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1245.

discernable statutory standards by which to measure agency determinations.

### C. Defining the Standard

The standard utilized to determine the reviewability of an agency action under the “committed to agency discretion by law” command of § 701(a)(2) of the APA is a multifaceted test. In addition, statutory language and legislative history defining Congressional intent provide insight to reviewability determinations. Statutory construction questions include:

- (1) Is there statutory intent? Does a careful examination of the statute reveal an intent to preclude review? *Webster*.
- (2) Is there “law to apply”? *Overton Park/Webster*.
  - (A) Has Congress indicated an intent to permit review by providing objective criteria which the court can apply? *Overton Park*.
  - (B) Is there a meaningful standard by which to measure the agency action? *Chaney/Webster*.
- (3) Is the agency action an appropriate subject for judicial review? *Tuepker/Webster*. Is the determination a “qualitative, subjective decision based on agency expertise”? *Tuepker*.

Thus, when analyzing statutory language, the general rule is if the language indicates that the Director or Secretary of the agency is to make a determination, absent a specific standard to apply, a decision will not be reviewable. The foregoing analysis demonstrates how the courts determine whether review will be granted:

- (1) *Overton Park*, “feasible and prudent alternative” — found to be reviewable.<sup>78</sup>
  - (2) *Tuepker*, “confidence of the Secretary” — found nonreviewable.<sup>79</sup>
  - (3) *Tuepker*, “deemed by the Secretary” — found nonreviewable.<sup>80</sup>
  - (4) *Webster*, “whenever he shall deem” — found nonreviewable.<sup>81</sup>
  - (5) *Board of Univ. and School Lands*, “adequate assurances” — found nonreviewable.<sup>82</sup>
- Statutory language,<sup>83</sup> with the exception of the language in number

<sup>78</sup> *Overton Park*, 401 U.S. 402.

<sup>79</sup> *Tuepker*, 708 F.2d 1329.

<sup>80</sup> *Id.*

<sup>81</sup> *Webster*, 108 S. Ct. at 2049.

<sup>82</sup> *Board of Univ. & School Lands v. Yeutter*, 711 F. Supp. 517 (D.N.D. 1989).

<sup>83</sup> Additional statutory language deemed to denote nonreviewability is “in such a manner as to encourage” and “granting a preference” found in *Greenwood Utilities Comm’n v. Hodel*, 764 F.2d 1459 (11th Cir. 1985). *Greenwood* examined the Flood

one (1) above, absent additional statutory criterion, vests the agency with nonreviewable discretion to make particular determinations. When such language is present, it must be determined whether the language is procedural in nature, requiring the agency merely to include certain considerations in its determinations, or whether the action itself is substantially limited by the language and, thus, reviewable.

These tests allow courts to determine whether Congress intends to preclude agency review. The broader the authority vested in the agency, the more likely the decision will be nonreviewable.<sup>84</sup> The more specific the established criteria, the greater the probability the determination will be reviewable. The question of nonreviewability must be analyzed strictly within the framework of § 701(a)(2) of the Administrative Procedures Act.

#### *D. The FmHA and the Reviewability Standard*

The Court's traditional hesitancy to review administrative decisions appears in cases involving issues with which the justices feel themselves ill-equipped to deal or where decisions are better left to the expertise of the administrative agency. But the Court's willingness to review decisions based on definite statutory and congressional intent is significant in determining whether FmHA debt restructuring decisions will be reviewable. Despite the difficulty of the case, the court must apply congressional standards.<sup>85</sup> Without judicial review, administrative determinations violating congressional intent go unchecked. When courts defer to administrative statutory interpretation, they defer on questions of law. Such deference departs from the traditional theory of review.<sup>86</sup> In the case of FmHA reviews, unwarranted judicial deference is an abdication of the judiciary's responsibility to enforce a clear legislative

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Control Act of 1944 § 5, 16 U.S.C.A. § 825. The court found that the Act did not provide a judicially manageable standard by which the court could judge the action of the agency; that the statute provided no legal standard to guide the court in determining which preferred customers received power; and the Act merely established general directives to control such decisions.

<sup>84</sup> *Arnow v. United States Nuclear Regulatory Comm'n*, 868 F.2d 223 (7th Cir. 1989); (The Commission is entrusted with unreviewable discretion. Review is precluded when there is not a sufficient standard by which to measure action.)

<sup>85</sup> *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985).

<sup>86</sup> Schwartz, *Administrative Law Cases During 1989*, 42 ADMIN. L. REV. No. 3 (1990), *cf.* *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *Gray v. Powell*, 314 U.S. 402 (1941).

directive.<sup>87</sup>

### III. APPLICATION TO FMHA DEBT RESTRUCTURING

Congress has commanded the Secretary of Agriculture to “. . . modify delinquent farmer program loans . . . to . . . facilitate keeping the borrower on the farm . . . .”<sup>88</sup> The restructuring and loan servicing provisions were enacted so qualified borrowers would be able to continue farming despite loan defaults. The FmHA regulations state the farmer-borrower’s rights to loan servicing, loan restructuring, involuntary liquidation, new loans and administrative appeals.

The contention that courts lack expertise or ability to review such agency interpretations of statutes has been addressed by the Supreme Court.

When a court reviews an agency’s construction of the statute which it administers it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.<sup>89</sup>

Where Congress clearly expresses an intent contrary to an agency’s construction of a statute, it is the court’s duty to enforce the intent of Congress.<sup>90</sup> An agency forfeits its right to deferential judicial review when it indicates an inability to implement the clear intent of Congress.<sup>91</sup> The FmHA has been unwilling or unable to implement the

<sup>87</sup> *Chevron*, 467 U.S. at 843-4. (“Judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

<sup>88</sup> 7 U.S.C. § 2001(a) (1990),

The Secretary shall modify delinquent farmer program loans made or insured under this chapter, or purchased from the lender or the Federal Deposit Insurance Corporation under Section 1929b of this title, to the maximum extent possible

(1) to avoid losses to the Secretary on such loans, with priority consideration being placed on writing down the loan principal and interest . . . . Whenever these procedures would facilitate keeping the borrower on the farm or ranch . . . .

<sup>89</sup> *Chevron*, 467 U.S. at 842-3.

<sup>90</sup> *Chemical Mfrs. Ass’n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985).

<sup>91</sup> *Children’s Habilitation Center, Inc. v. N.L.R.B.*, 887 F.2d 130 (7th Cir. 1989). *Massachusetts v. Morash*, 109 S. Ct. 1668 (1989).

congressional mandate concerning farm debt restructuring. Preserving the institution of the American farm is the heart of FmHA debt restructuring provisions.

A. *Congressional Intent Under 7 U.S.C. § 2001(a)*

When reviewing determinations made under the restructuring provisions of § 2001, the court must reject all agency determinations which violate the intent to keep farmers on the farm.<sup>92</sup>

This is not to suggest that an agency must permit unreasonable modifications of debt to keep a farmer farming; rather, any reasonable alternatives advanced by the borrower that will keep him on the farm must be accepted. The court must enforce the will and intent of Congress by reviewing nonconforming agency determinations.<sup>93</sup> The court must determine that an agency's statutory interpretation and implementation conforms to Congressional intent.<sup>94</sup> The court must look to the "provisions of the whole law, and to its object and policy,"<sup>95</sup> when determining administrative compliance with Congressional intent. Ensuring that the FmHA has not misconstrued the law is a judicial function.<sup>96</sup>

1. Are Any FmHA Loan Restructuring Determinations Reviewable?

In the event of a FmHA loan default, the defaulting farmer has the right to renegotiate the terms of the loan with the Secretary of Agriculture.<sup>97</sup> The renegotiation can result in reduction of principal, deferment of payments, modification of payments, or other repayment modification to make performance possible. The Secretary is required by section 2000(a) to modify delinquent loans when certain conditions are met. In addition, the Secretary must favor reduction in principal and interest over liquidation of farm property if the Secretary determines that the reduction will be less costly. To what extent are the Secretary's restructuring decisions judicially reviewable?

Is the decision to accept a principal reduction as "least costly", a

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<sup>92</sup> See *supra* note 88.

<sup>93</sup> *Chevron*, 467 U.S. at 843.

<sup>94</sup> *Id.* ("[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute." *Massachusetts v. Morash*, 109 S. Ct. at 1673).

<sup>95</sup> See *supra* note 87.

<sup>96</sup> *Id.*

<sup>97</sup> 7 U.S.C. § 2001 (1990).



subjective, qualitative decision relying upon agency expertise?<sup>98</sup> If so, is there a “meaningful standard” by which to measure the decision?<sup>99</sup> The language, “if the secretary determines,” is semantically close to the “deemed by the secretary” language of *Webster*,<sup>100</sup> and may indicate that the decision is non-reviewable.

On the other hand, favoring reduction of principal and interest over liquidation provides a meaningful statutory standard for the court to measure the FmHA determination. Section 2001(c)(5) provides the standard by which the Secretary must determine that the restructuring alternative results in least cost to the Secretary,<sup>101</sup> and states specifically that if the value of the restructured loan is greater than or equal to the recovery value, the Secretary must offer to restructure.<sup>102</sup> Consequently, the decision to foreclose or restructure is no longer merely a subjective determination of the Secretary, and is judicially reviewable.

## 2. Restructure Value and Recovery Value Defined

The specific standards for the calculation of “restructure value” and “recovery value” are contained in § 2001(c)(2) and (c)(3).<sup>103</sup> State Di-

<sup>98</sup> *Truepher*, 708 F.2d at 1329.

<sup>99</sup> *Webster*, 108 S. Ct. at 2049.

<sup>100</sup> *Id.*

<sup>101</sup> 7 U.S.C. § 2001(c)(5) (1990).

<sup>102</sup> *Id.*

<sup>103</sup> 7 U.S.C. § 2001(c)(2) Recovery Value. For the purpose of paragraph (1), the recovery value of the collateral securing the loan shall be based on —

(A) the amount of the current appraised value of the property securing the loan; less

(B) the estimated administrative, legal and other expenses associated with the liquidation and disposition of the loan and collateral, including —

(i) the payment of prior liens;

(ii) taxes and assessments, depreciation, management costs, the yearly percentage decrease or increase in the value of the property, and lost interest income, each calculated for the average holding period for the type of property involved;

(iii) resale expenses, such as repairs, commissions, and advertising; and

(iv) other administrative and attorney costs.

7 U.S.C. § 2001(c)(3) Value of the Restructured Loan.

(A) In general. For the purpose of paragraph (1), the value of the restructured loan shall be based on the present value of payments that the borrower would make to the Federal Government if the terms of such loan were modified under any combination of primary loan service programs to ensure that the borrower is able to meet such obligations and continue farming operations.

rectors<sup>104</sup> of the FmHA calculate the "recovery value" upon liquidation under subsection (c)(2). The appraised value of the property and assets is reduced by administrative, legal and other expenses associated with the liquidation. Additionally, expenses of resale, repair, commissions and advertising are considered.<sup>105</sup> Since liquidation expenses can significantly decrease the recovery value, an accurate and fair estimate is important.

The Secretary has delegated estimation of recovery expenses to the State Directors, who base their estimates of restructuring costs according to geographic location.<sup>106</sup> Costs are inserted in a computer program (DALR\$), and a restructure loan value is determined.<sup>107</sup>

A borrower may challenge an estimate of liquidation costs by providing an alternative estimate. If the borrower's alternative is reasonable and will allow the borrower to remain on the farm, Congress mandates that the borrower's estimate be used. Thus, the borrower may make a FmHA decision reviewable by offering a reasonable alternative.

The FmHA must also determine the "value of the restructured loan" under section 2001(c)(3).<sup>108</sup> The value of the restructured loan is the present value of the payments the borrower can make under the terms of the modified loan, using a discount of not more than the current 90-day Treasury Bill rate.<sup>109</sup> While the restructure value is a non-reviewable arithmetic calculation, an astute borrower may challenge a determination of his maximum affordable payment at the time eligibility for restructuring is determined.

### 3. Challenges Under Loan Eligibility Requirements

Section 2001(b)<sup>110</sup> contains the eligibility requirements for debt restructuring.<sup>111</sup> Not all delinquent farmers are eligible for FmHA loan

(B) Present Value. For the purpose of calculating the present value referred to in subparagraph (A), the Secretary shall use a discount rate of not more than the current rate on 90-day Treasury Bills.

<sup>104</sup> State Directors of the FmHA are full-time agency employees who have under them County Supervisors who are also full-time agency employees. 7 C.F.R. 1951.3 (1990).

<sup>105</sup> 7 U.S.C. § 2001 at (c)(2)(B)(iii) and (iv) (1990).

<sup>106</sup> 7 C.F.R. 1951.902(b), 1951.909(f) (1990), (Recovery value of collateral under § 2001(c)(2)(A) is estimated by the county supervisor).

<sup>107</sup> 7 C.F.R. 1951-s Exhibit J (1989).

<sup>108</sup> 7 U.S.C. § 2001(c)(3) (1990).

<sup>109</sup> 7 U.S.C. § 2001(c)(3)(B) (1990).

<sup>110</sup> 7 U.S.C. § 2001(b) (1990).

<sup>111</sup> 7 U.S.C. § 2001(b) (1990).

restructuring. The statute requires that the cause of the delinquency be outside the control of the debtor, that the debtor have acted in good faith, and that the debtor's restructuring plan be based on reasonable assumptions showing ability to meet living expenses, farm operating expenses and restructured debt service.<sup>112</sup> Determinations that "delinquency must be due to circumstances beyond the control of the borrower" and that the borrower "must have acted in good faith" appear to be nonreviewable discretionary determinations within the Secretary's discretion.<sup>113</sup> The Secretary has the sole authority to define "good faith".<sup>114</sup>

Although no cases have addressed reviewability of the loan restructuring eligibility decision, eligibility decisions under other FmHA statutes have been ruled nonreviewable because of no law to apply. In *Woodsmall*, eligibility for a Rural Housing Loan was denied.<sup>115</sup> The court found no law to apply in reviewing the Secretary's creditworthiness decision.<sup>116</sup> Similarly, in a challenge to a loan restructuring eligibility decision, no law appears to provide a standard for assessing the adequacy, fairness, or reasonableness of the denial.<sup>117</sup> Furthermore, the regulations are nonreviewable because no standard exists in the statute to measure their adequacy.

Finally, the statutory language appears nonreviewable. "As defined by the Secretary", like the language "shall deem" in *Webster*, strongly

- (b) eligibility. To be eligible to obtain assistance under subsection (a) —
- (1) the delinquency must be beyond the control of the borrower, as defined in regulations issued by the Secretary;
  - (2) the borrower must have acted in good faith with the Secretary, in connection with the loan as defined in regulations issued by the Secretary;
  - (3) the borrower must present a preliminary plan to the Secretary that contains reasonable assumptions that demonstrate the borrower will be able to:
    - (A) meet the necessary family living farm operating expenses;
    - and
    - (B) service all debts, including those of the loan restructured;
 . . . ).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*, cf. GAO Rpt. No. 140123, FARMERS HOME ADMINISTRATION, LOAN SERVICING FOR BAD FAITH BORROWERS (1989), Fact sheet for the Chairman, Subcommittee on Agricultural Credit, Senate Committee on Agriculture, Nutrition and Forestry, (bad faith borrowers are eligible for buyout and preservation loan benefits).

<sup>114</sup> *Id.*

<sup>115</sup> *Woodsmall*, 816 F.2d at 1244.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*, cf. 7 C.F.R. 1951.909(c)(1) and (2) (1990).

suggests that implementation was "committed to agency discretion by law".<sup>118</sup> Most likely, the language "as defined by the Secretary" evinces congressional intent to place eligibility determinations within the realm of agency discretion and therefore nonreviewable.

#### 4. A Borrower's Alternative Plan and the Reasonable Assumptions Test

Section 2001(b)(3) provides that<sup>119</sup>

[the] borrower must present a plan to the Secretary that contains reasonable assumptions that demonstrate that the borrower will be able to

- (A) meet the necessary family living expenses and
- (B) service all debts, including those of loans restructured . . .<sup>120</sup>

Who determines the reasonableness of the assumptions? Who determines if the borrower has demonstrated that he will be able to meet the enumerated expenses and debt?

According to FmHA regulations, the County Supervisor determines whether the borrower has submitted a plan in accordance with § 2001(b)(3).<sup>121</sup> Additional regulations indicate that the FmHA, in reviewing whether the borrower's plan is feasible must use a standard of "realistic anticipated prices".<sup>122</sup> The FmHA apparently establishes "realistic anticipated prices" which are probably nonreviewable determinations committed to agency discretion.

The borrower must satisfy the Secretary that his restructuring plan contains reasonable assumptions.<sup>123</sup> Congress charged the Secretary with determining plan feasibility. In *Board of Univ. Lands v. Yeutter*, the Secretary was to have "adequate assurances".<sup>124</sup> Similarly, the language of *Tuepker* states that the Secretary must "deem [the assurances] adequate" to protect the government interest.<sup>125</sup> The intent of Congress is clear: The Secretary must evaluate whether the borrower's proposed plan is feasible.

Even though this language appears to vest discretion in the Secretary, his actions may still be reviewable if the statute gives the court

<sup>118</sup> *Webster*, 108 S. Ct. at 2047.

<sup>119</sup> 7 U.S.C. § 2001(b)(3) (1990).

<sup>120</sup> 7 U.S.C. § 2001(b)(3)(A) and (B) (1990).

<sup>121</sup> 7 C.F.R. 1951.909(c)(2)(d) (1989).

<sup>122</sup> 7 C.F.R. 1951.906 (1989).

<sup>123</sup> 7 U.S.C. § 2001(b)(3) (1990).

<sup>124</sup> *Board of Univ. & School Lands v. Yeutter*, 711 F. Supp. at 517.

<sup>125</sup> *Tuepker*, 708 F.2d at 1329.

some “law to apply”.<sup>126</sup> The determination of whether a borrower’s financial plan is feasible or not is not unlike a determination that an applicant is or is not creditworthy.<sup>127</sup> If the court in *Woodsmall* was unable to review a FmHA determination of creditworthiness, the even more complex determination of whether a borrower has submitted reasonable assumptions as to his farming operation, has a high probability of being found to be a *Tuepker/Woodsmall* subjective, qualitative determination. In the absence of statutory language, a court will probably not find “law to apply” and rule eligibility determinations as nonreviewable.

### 5. The Final Challenge Under a Reasonableness Standard

Before accepting the § 2001(b)(3) determination as nonreviewable, one final challenge may be raised. FmHA regulations state that only “realistic anticipated prices” and “reliable off farm income” will be taken into account.<sup>128</sup> The statute may require that a plan contain “reasonable assumptions”.<sup>129</sup> The regulatory requirement that the plan be “realistic” and “reliable” is arguably stricter than the statute. For example, an assumption may be more speculative than reliable, but still be reasonable. A speculative assumption would therefore be acceptable under the statute, but unacceptable under the regulation.

The key to review, using the *Woodsmall* and *Webster* analytical framework, is the “meaningful standard” by which to measure agency action. Courts should measure FmHA determinations against a meaningful standard of reasonableness after administrative remedies are exhausted.<sup>130</sup>

### *B. Reviewability Under the Shared Appreciation Arrangements of § 2001(e): Recapture Provisions are Based on Gain*

Issues of reviewability also arise under the recapture provisions of the Shared Appreciation Arrangement.<sup>131</sup> The statute commands that,

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<sup>126</sup> *Chaney*, 470 U.S. at 821.

<sup>127</sup> *Woodsmall*, 816 F.2d at 1241.

<sup>128</sup> 7 C.F.R. 1951.906 (1989).

<sup>129</sup> 7 U.S.C. § 2001(b)(3) (1990).

<sup>130</sup> *Webster*, 108 S. Ct. at 2049, *Woodsmall*, 816 F.2d at 1241.

<sup>131</sup> 7 U.S.C. § 2001(e) (1990) Shared Appreciation Arrangements.

(1) In general. As a condition of restructuring a loan in accordance with this section, the borrower of the loan may be required to enter into a shared appreciation agreement that requires the repayment of amounts written off or set aside.

upon the happening of certain events, such as a sale of the farm, recapture will occur. Recapture refers to the ability of the Secretary to collect a percentage of the appreciation of real property value in addition to the loan principal.

For example, if a farmer has a turkey ranch appraised at \$125,000 at the time of his loan restructuring, the Secretary may compel him to agree to pay half of any increase in the value of the ranch to the FmHA. If the farmer sells the turkey ranch in five years and his property has increased in value to \$200,000, he will pay the FmHA the loan balance plus the shared appreciation of \$37,500 (one-half of the \$75,000 increase).

Several events may trigger the debtor's obligation to pay the shared appreciation. One such event triggering recapture is the cessation of farming operations.<sup>132</sup> However, neither the statute nor the regulations<sup>133</sup> define a cessation of "farming operations". For example, could the farmer rent out his turkey ranch and still be involved in ranching operations? Could the farmer be a nonparticipating partner and be involved in ranching operations? Additionally, who decides that farming operations have ceased? Shared Appreciation Arrangement regulations do not furnish the answers.<sup>134</sup>

The statute sections addressing Shared Appreciation Arrangements provide little guidance as to Congressional intent. Nevertheless, after analyzing "farming operation" requirements with the loan restructuring provisions in sections 2001(c)(5) and (6), Congressional intent may be clearer.<sup>135</sup> Congress could intend the farmer to continue operations,

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(2) Terms. Shared appreciation agreements shall have a term not to exceed 10 years, and shall provide for recapture based on the difference between the appraised values of the real security property at the time of restructuring and at the time of recapture.

(3) Percentage of Recapture. The amount of the appreciation to be recaptured by the Secretary shall be 75 percent of the appreciation in the value of such real security property if the recapture occurs within 4 years of the restructuring, and 50 percent if the recapture occurs during the remainder of the term of the agreement.

(4) Time of recapture. Recapture shall take place at the end of the term of the agreement, or sooner —

(A) on the conveyance of the real security property;

(B) on the repayment of the loans; or

(C) if the borrower ceases farming operations.

<sup>132</sup> 7 U.S.C. § 2001(e)(4)(c) (1990).

<sup>133</sup> 7 C.F.R. 1951.914(b)(3) (1989).

<sup>134</sup> 7 U.S.C. § 2001(e).

<sup>135</sup> 7 U.S.C. § 2001(c)(5) and (6) (1990).

but as a requirement of the loan restructuring, enter into a shared appreciation arrangement.<sup>136</sup> Thus, the shared appreciation arrangement may provide a standard by which the recapture amount will be measured.<sup>137</sup> The provisions for termination of loan obligations, i.e., appreciation value or gain upon the cessation of farming, furnish the standard.<sup>138</sup>

Because the intent of the shared appreciation arrangement and the timing of the recapture provisions are keyed to a gain factor,<sup>139</sup> the court has a "meaningful standard" by which to measure the determination of when farming operations have ceased. If the borrower has removed himself from the farming operation such that he recognizes gain in excess of the restructured value or the recovery value, the FmHA may conclude that the "borrower has ceased farming operations".<sup>140</sup> Conversely, even if farming has ceased, no recapture can occur without a showing of gain.

The language of section 2001(e) contains no indication that the determination of what triggers recapture be left to the Secretary. However, one "meaningful standard" is the amount of gain realized by the borrower.<sup>141</sup> If the borrower obtains a gain from his farm property and is no longer farming, recapture should occur. A court should have no difficulty comparing the Secretary's determination with this simple standard. Therefore, the Secretary's decision to recapture appreciation in a debtor's farm property is reviewable.

Despite this standard, should the court defer to the agency's expertise?<sup>142</sup> If the court is able to postulate a "feasible and prudent" alternative to the agency's determination of farming cessation, then the court should be able to evaluate the gain in a borrower's status, and the final agency determination should be reviewable.

### *C. Reviewability of Appraisal Upon Appeal of Determinations Under the Provisions of § 2001(j)*

The appraisal provisions of § 2001(j) govern the valuation of any real property securing a FmHA loan.<sup>143</sup> The statute gives the farmer-

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<sup>136</sup> 7 U.S.C. § 2001(e)(1) (1990). See also 7 C.F.R. 1951-s Exhibit D (1989).

<sup>137</sup> 7 U.S.C. § 2001(e)(1)-(4) (1990).

<sup>138</sup> 7 U.S.C. § 2001(c)(6) (1990).

<sup>139</sup> *Id.* § 2001(e)(4)(c).

<sup>140</sup> *Id.*

<sup>141</sup> *Chaney*, 470 U.S. at 821.

<sup>142</sup> *Woodsmall*, 816 F.2d at 1241; ("a qualitative, subjective determination").

<sup>143</sup> 7 U.S.C. § 2001(j) (1990). Independent appraisals. An appeal filed with the

borrower the right to appeal an appraisal utilized in the restructuring determination.<sup>144</sup> The only command contained in the statute is that the results of the appraisal "shall be considered" by the Secretary in any final determination.<sup>145</sup>

The FmHA's regulations giving notice of the right to an independent appraisal<sup>146</sup> do not give the borrower much advantage because the language presupposes an adverse decision.<sup>147</sup> Given this predisposition to an unfavorable result, the deference given an independent appraisal is questionable.

The command in § 2001(j) is similar to that found in *Missouri Coalition*,<sup>148</sup> where the Corps of Engineers was statutorily commanded to consider the effects of its actions.<sup>149</sup> Here, the command is to consider the appraisal.<sup>150</sup> Beyond the command to consider the appraisal, the statute provides "no law" by which the court could limit agency action.<sup>151</sup> Therefore, as long as the Secretary considers the appraisal of the borrower, the determination will be unreviewable.

#### CONCLUSION: THE FINAL ARGUMENT

Section 2001(a) commands that "the secretary shall modify delinquent farmer program loans . . . to the maximum extent possible . . . whenever these procedures would facilitate keeping the borrower on the farm . . . and ensure continued farming operations . . ." <sup>152</sup> The intent of this command is to give the borrower every possible break, within the statutory framework, to keep him on the farm. All provi-

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appeals division under section 333B [7 USCS § 1983b] may include a request by the borrower for an independent appraisal of any property securing the loan. On such request, the appeals division shall present the borrower with a list of three appraisers approved by the county supervisor, from which the borrower shall select an appraiser to conduct the appraisal, the cost of which shall be borne by the borrower. The results of such an appraisal shall be considered in any final determination concerning the loan. A copy of any appraisal made under this paragraph shall be provided to the borrower.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> 7 C.F.R. 1951.909(b) (1989).

<sup>147</sup> The regulation states that "[o]nce the appeal is concluded and the *adverse* decision is upheld . . ."; it then concludes with the procedures for denying restructuring (emphasis added).

<sup>148</sup> *Missouri Coalition for the Environment v. Corps of Engineers*, 866 F.2d 1025, 1032 (8th Cir. 1989).

<sup>149</sup> *Id.*

<sup>150</sup> 7 U.S.C. § 2001(j) (1990).

<sup>151</sup> *Woodsmall*, 816 F.2d at 1241.

<sup>152</sup> 7 U.S.C. § 2001(a).



sions in the statute must be interpreted in light of this overriding congressional command. The determinations of the Secretary should be reviewable to ascertain whether they conform with the "meaningful standard" of facilitating keeping the borrower on the farm.

The Congressional mandate to keep the American farmer farming is applicable to all sections of 7 U.S.C. § 2001 and should be advanced as a manifestation of Congressional intent to allow judicial review. The purpose of keeping the farmer engaged in farming, allows the court to adjudge the agency's exercise of discretion and to determine whether the agency has acted in accordance with the purpose of the statute.<sup>183</sup> The court should therefore closely review FmHA determinations and allow a farmer-borrower every opportunity to show he is capable of remaining in farming and repaying his restructured obligation.

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<sup>183</sup> *Webster*, 108 S. Ct. at 2047, *Chaney*, 470 U.S. at 821.