

Addendum N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

U.S. DISTRICT COURT
DISTRICT OF COLORADO

87 JUL 8 P4:23

Civil Action No. 85-K-2103

FRANK VELARDE and LYDIA VELARDE,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
ACTING THROUGH THE FARMERS HOME ADMINISTRATION,
WILLIAM H. CHANDLER and RUTH M. FOUNTAIN,

Defendants.

CAMERON HANCOCK, CLERK
BY _____ DEP. CLK.

MOTION AND BRIEF OF THE UNITED STATES
FOR SUMMARY JUDGMENT AFFIRMING AGENCY ACTION

The United States moves the Court for summary judgment under Rule 56 affirming the action of the Farmers Home Administration, Department of Agriculture, denying the loan application of the plaintiffs. The Administrative Record is filed herewith. This motion is directed at the Amended Complaint's First Claim for Relief based upon the Administrative Procedure Act, 5 U.S.C. §701, et seq.

The scope of judicial review of informal agency action is limited to the agency record except in exceptional circumstances. Wilson v. Hodel, 758 F.2d 1369 (10th Cir. 1985); CF&I Steel Corp. v. EDA, 624 F.2d 136 (10th Cir. 1980); King v. Berglund, 517 F.Supp. 1363 (D.Colo. 1981); Camp v. Pitts, 441 U.S. 138 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). A reviewing court will not review issues not raised before the administrative agency, and there is a presumption of regularity of the administrative proceedings. The standard for review is whether the agency decision was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law. Wilson v. Hodel, supra.

Factual Background

The plaintiffs are a ranch family living at Kim, Colorado. The United States, acting through the Farmers Home Administration, Department of Agriculture, made a "Farm Ownership" (FO) loan to the Velardes on or about September 25, 1980, in the amount of \$160,700, secured by a deed of trust on the Velarde ranch. The purpose of this loan, in part, was to bring current a loan by the Federal Land Bank. On November 11, 1980, the Velardes received a \$50,000 operating loan (OL), secured by a lien on crops, equipment, and livestock

In 1983, the Federal Land Bank of Wichita commenced foreclosure proceedings against the Velardes due to default on the first deed of trust. The Velardes failed to redeem from the foreclosure sale and on July 2, 1984, the FmHA redeemed by paying the Sheriff of Las Animas County the sum of \$62,673.51. The United States received a Sheriff's Deed to the Velarde ranch. The \$62,673.51 was added to the loan balance on the \$160,700 farm ownership loan, which was in default also for delinquent payment.

On or about January 15, 1984, the Velardes submitted to FmHA an application for a loan to purchase the ranch back from FmHA. The purpose of the loan was "To pay for my ranch and for operating expenses (\$290,000 plus at least \$10,000)." The FmHA declined the loan to the Velardes because of past credit history, infeasibility of the proposed farm plan, and a loan amount which would exceed the FmHA ceiling. The Velardes were advised of the reasons for denial of the loan request in a letter by defendant Chandler, the County Supervisor.

The Velardes, through counsel, elected to appeal the loan denial and received a hearing. The denial was upheld by the State Director, defendant Fountain, and by the Deputy Administrator of FmHA in Washington.

Statutes and Regulations

The law governing the loan at issue in this case is the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921 et seq. and 7 C.F.R. Part 1910 and Part 1943 (1985). In 7 U.S.C. §1925, the maximum FmHA loan is \$200,000; 7 C.F.R. §1943.17 also restricts the ceiling to \$200,000.

7 U.S.C. §1982 creates County Committees and §1983(b) sets forth the role of the committee as well as special conditions for loans. Section 1983(b) requires for loan approval that the County Committee certify that the applicant "meets the eligibility requirements for the loan, and has the

character, industry, and ability to carry out the proposed operations"

Section 1983(d) requires FmHA to supervise the borrower's operations as it deems necessary to achieve the objectives of the loan and protect the interests of the United States.

Section 1989 gives the Secretary of Agriculture power to make rules and prescribe terms for making loans.

Review of the Administrative Record

On September 4, 1984, the Sheriff's Office of Las Animas County served on plaintiffs a demand by FmHA for possession. Mr. Velarde or his counsel at the time, promptly requested a meeting with the State Director of FmHA, which meeting was held on September 11, 1984. Administrative Record (A.R. 1). In Mr. McDivitt's October 11, 1984, letter to the State Director, he made a proposal aimed at avoiding the Velardes' eviction; the thrust of the proposal was refinancing of the Velardes' indebtedness to FmHA.

On October 25, 1984, the State Director responded in detail to Velarde's proposal. Her letter, A.R. 3, pointed out that the real estate indebtedness was \$290,940, that FmHA had a \$200,000 ceiling on FO loans, and that \$90,000 participation by another lender would be necessary. The Director's letter also raised many questions about specifics of the Velardes' proposal. In conclusion, the Director wrote:

In summary, we see two problems that may be insurmountable to the Velardes' proposal. The loan restriction of \$200,000 on real estate loans is one problem. The second, and perhaps more important, is that it is very doubtful that sufficient cash flow projections can be developed from the proposal presented to service the indebtedness that would occur, pay expenses of the proposed operation, and provide the family a reasonable standard of living from the operation and other sources of income.

On December 10, 1984, the Director wrote Mr. McDivitt to point out that Velarde had not acted upon his proposals by contacting defendant Chandler, the County Supervisor. A.R. 6.

On December 13, 1984, Mr. McDivitt wrote the plaintiffs on this subject with a copy to FmHA. A.R. 7. McDivitt told the Velardes that FmHA had given them until December 28 to visit with Chandler to try to work out the loan situation.

Velarde met with Chandler and Richard Gomez, an FmHA official in the Alamosa District Office (with jurisdiction over the Trinidad County Office), and received loan application forms. McDivitt returned these forms, completed, to several FmHA officials in mid-January. A.R. 8-19. Paragraph 22 of the Application reads as follows:

22. For what purpose do you need Farmers Home Administration service?
To pay for my ranch and for operating expenses (\$290,000 plus at least \$10,000).

On February 11, 1985, Gomez transmitted a copy of the loan application to Chandler and directed him to take the FO application to the County Committee to consider Velarde's eligibility. A.R. 20. However, the County Committee had already met to consider the application on February 7. The County Committee, composed of Johanna Micek, Eldo Foster, and Robert H. Weston, ruled that Velarde was ineligible because:

Past credit history. Also not feasible and \$200,000 limit. Would need \$290,000 + for land.

This ruling was signed by each committee member. A.R. 21. A similar entry was made in the Record of County Committee Meeting by Chandler. A.R. 22-23.

On February 26, 1985, Chandler wrote Velarde a detailed explanation of FmHA's denial of the proposed loan. The letter gave several reasons, including loan payment delinquencies, doubts about the feasibility of Velarde's loan repayment plan, and FmHA's ceiling of \$200,000 and Velarde's need to find \$90,000 from another source. Velarde was informed of his right to appeal. A.R. 24.

On March 13, Velarde appealed. A.R. 28. The State Director assigned Jack Richardson, the District Director in LaJunta, to preside over an informal hearing at which the plaintiffs could provide information or present witnesses. A.R. 29. The subject of the hearing was restricted to the grounds stated in the County Supervisor's decision letter (A.R. 24):

1. Past credit history,
2. Lack of account for collateral,
3. Financial feasibility.

The burden was placed on the plaintiffs to establish that the "decision was wrong." A.R. 30. The Velardes desired to subpoena the County Committee members, but FmHA determined that no subpoena power existed. A.R. 32-35.

On May 23, 1985, Mr. Richardson conducted a hearing at the law offices of Mr. McDivitt. Testimony was taken from seven witnesses, including Mr. Chandler and Mr. and Mrs. Velarde, before a Court Reporter. See, Transcript, Hearing on Appeal of Frank Velarde.

Mr. Richardson stated that the purpose of the hearing was to be sure that plaintiffs would receive the benefit of any program for which they were eligible, and if the loan was denied it was for proper reasons. Transcript, p.2. Richardson also said that he was hearing the case for the State Director. Transcript, p.4. He reiterated the scope of the hearing. Transcript, p.5. There was also a colloquy between Richardson and McDivitt about the subpoenas for the County Committee. Transcript, pp. 5-7. At the conclusion of the Hearing, Richardson commented that loan limits could thwart FmHA's ability to provide any help. Transcript, p. 100-103.

On June 20, 1985, the State Director announced her decision on Velarde's appeal. She rejected all of Velarde's contentions in a four-page letter. A.R. 41.

On July 18, 1985, Velarde appealed to the Deputy Administrator, FmHA, A.R. 47.

On August 19, 1985, the Deputy Administrator denied the appeal in a letter which stated that FmHA did not consider satisfactory Velarde's past credit and farm management history, as stated in the State Director's June 20, 1985, letter, and further that loan limitations preclude FmHA's acceptance of the proposed credit sale to Velarde. A.R. 66.

Argument

A.

This action for judicial review is frivolous.

The Farmers Home Administration has reiterated to plaintiffs at every stage of the administrative proceedings that FmHA has a \$200,000 limitation on FO loans, and that there is no way FmHA can finance fully the Velardes' repurchase of their ranch or farm. 7 U.S.C. §1925; 7 C.F.R. §1943.17. An operating loan (OL) cannot be used in a real estate purchase and thus could not be piggy-backed on a \$200,000 FO loan to provide the \$290,000 needed to refinance the real estate. 7 C.F.R. §1941.17. It is impossible for FmHA to approve the Velardes' loan application.

Thus, regardless of the allegations about procedural defects, this Court cannot grant any meaningful relief; the impossibility moots the claims.

B.

The Government does not agree that the Velardes can demonstrate any basis under the APA for judicial intervention.

There are only two procedural errors presented by the Administrative Record and they are of no importance. See A.R. 67. The first is the failure to send the Velardes FmHA Guide Letter 1924-B-1. 7 C.F.R. §1910.4(b). This letter is at A.R. 71. A reading of this letter shows it has no significance in this case whatsoever, a sham issue. The other "error" is not really an error. The County Committee, on its Certification, A.R. 21, commented on eligibility, which is within its authority, 7 U.S.C. §1983(b) and 7 C.F.R. §1943.12, 7 C.F.R. §1910.4(c). It also commented on feasibility and loan limits, which are matters for the County Supervisor. 7 C.F.R. §§ 1910.4, 1910.5, 1910.6(b), 1943.11(a). The matter is moot because the County Supervisor's letter to the Velardes denying the loan included eligibility, feasibility, and loan limits.

We note that Velardes' counsel, McDivitt, included in the record a letter purportedly containing statements by Mr. Gomez, a deputy District Director. A.R. 59. FmHA responded at A.R. 45, 62. We have several points to make. The first point is that the visit by Gomez and Chandler to the Velarde farm on or about January 3, 1985, is irrelevant because a) Gomez was not a deciding official in this case, b) Chandler was a deciding official and was already well-acquainted with the Velardes' farm via previous loans, and c) the value of the farm as collateral is not an issue in this case. The farm visit, therefore, was a courtesy only. (1)

Next, McDivitt reports that Gomez said that the State Office ordered the loan not be approved. Although we dispute this allegation, it would nevertheless be immaterial because the loan was beyond FmHA lending authority and thus this allegation would not change the outcome of this case. Further, this allegation was presented on appeal to the Deputy Administrator, who was unpersuaded and found adequate grounds to deny the loan.

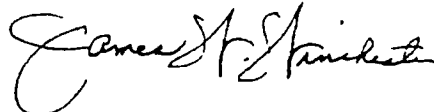
Finally, McDivitt reports that Gomez was not informed of the Hearing on Appeal. McDivitt knew of Gomez and made no record of any request for Gomez's attendance at the hearing, thus waiving any claim for review under the APA. Hodel v. Wilson, supra.

We submit that the decisions on eligibility, feasibility, creditworthiness, etc. are unreviewable because they are subjective criteria, there is no law to apply, and they are wholly within FmHA discretion. This Court should not endeavor to evaluate the viability of a farm plan involving sheep, alfalfa, and firewood, or attempt to choose the correctness of conflicting views on the subject. Deference to agency expertise is certainly appropriate. Woodsmall v. Lyng, 816 F.2d 1241 (8th Cir. 1987). Tuepker v. Farmers Home Administration, 708 F.2d 1329 (8th Cir. 1983); Williamson v. U.S. Dept of Agriculture, 815 F.2d 368, 375 (5th Cir. 1987); Poolman v. Nelson, 802 F.2d 304 (8th Cir. 1986).

Under the record in this case, the decision of FmHA must be affirmed.

Respectfully submitted,

ROBERT N. MILLER
United States Attorney

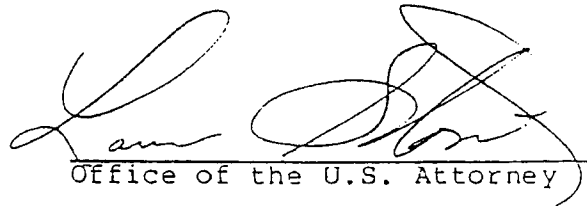


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CERTIFICATE OF MAILING

I hereby certify that on this 8th day of July, 1987, a true and correct copy of the foregoing MOTION AND BRIEF OF THE UNITED STATES FOR SUMMARY JUDGMENT AFFIRMING AGENCY ACTION was placed in the U.S. mail, postage prepaid, to:

A. Thomas Elliott, Jr., Esq.
1816 Race Street
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Office of the U.S. Attorney