

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CLARICE A. STAHL, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

BRIEF FOR APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case involves a dispute over the liability of farmers under Shared Appreciation Agreements that they entered into with the Department of Agriculture in exchange for a write-down of their delinquent farm loans. The plaintiffs, farmers who signed such agreements, brought this action seeking a declaratory judgment that they do not owe money under the agreements. The district court dismissed for failure to state a claim.

The government does not object to appellants' request for oral argument, but we respectfully suggest that fifteen minutes per side would be sufficient.

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The district court entered a final judgment on May 21, 2002. See Appellants' Appendix ("Aplt. App.") 193. Plaintiffs filed a notice of appeal on July 16, 2002, see Aplt. App. 194, which was timely under Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Title 7 U.S.C. § 2001 authorizes the Secretary of Agriculture to write down delinquent farm debts. In return, the Secretary may require farmers to sign Shared Appreciation Agreements, under which she may recapture appreciation in the value of the farm over the term of the agreement. The issues

presented for review are:

1. When the term of a Shared Appreciation Agreement ends, may the Secretary recover part of the appreciation in the value of the farm?

Israel v. Department of Agriculture, 282 F.3d 521 (7th Cir.), cert. denied, ___ U.S. ___, 2002 WL 1312733 (Oct. 7, 2002); OPM v. Richmond, 496 U.S. 414 (1990); 7 U.S.C. § 2001(e).

2. Is the Secretary's recovery under a Shared Appreciation Agreement limited to the "equity recapture account amount" shown on a now-discontinued form that accompanied a 1989 regulation?

7 U.S.C. § 2001(e).

3. Did the district court err in considering official documents of an administrative agency in ruling on a motion to dismiss?

Porous Media Corp. v. Pall Corp., 186 F.3d 1077 (8th Cir. 1999); Jenisio v. Ozark Airlines, Inc., Retirement Plan, 187 F.3d 970 (8th Cir. 1999).

STATEMENT OF THE CASE

Plaintiffs are a group of farmers who were delinquent on loans from the Department of Agriculture. In exchange for a write-down of their debt, they entered into Shared Appreciation Agreements whereby they agreed to repay part of the appreciation in the value of their farms over the term of the agreement. Plaintiffs thereafter brought this action, seeking a declaratory

judgment that they did not owe money under the agreements. They claimed that when the term of the agreements ended, they had no obligation to pay. They also claimed that, if they did owe money, they owed only the amount shown on a separate form used by the Department of Agriculture to record the agreements. The district court dismissed the complaint for failure to state a claim.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. This case involves Department of Agriculture loans to farmers. See generally 7 U.S.C. § 1921 et seq. In the late 1980s, due to the weak farm economy, the Department faced the prospect of widespread foreclosures on farm loans. In response to this problem, Congress enacted the Agricultural Credit Act of 1987. Pub. L. No. 100-233, 101 Stat. 1568 (1988). The statute gives the Secretary of Agriculture the authority to "modify delinquent farmer program loans" in order to "avoid losses to the Secretary on such loans" and to "ensure that borrowers are able to continue farming or ranching operations." 7 U.S.C. § 2001(a). The Secretary is directed to give "priority consideration" to "writing-down the loan principal and interest." Ibid.

In exchange for a write-down of a farm loan, the Secretary is authorized to require farmers to enter into a Shared Appreciation Agreement (SAA) providing for the eventual repayment

of amounts written down. See § 2001(e) (1). An SAA permits the Secretary to recapture part of the appreciation in the value of the farm over the term of the agreement, which must not exceed ten years. See § 2001(e) (2). Under the statute,

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.

§ 2001(e) (4). If recapture occurs within four years of the restructuring, the Secretary may recover 75 percent of the appreciation; thereafter, she may recover only 50 percent. See § 2001(e) (3).

2. Exercising this statutory authority, the Secretary has required defaulting borrowers who qualify for a write-down of their debt to execute an SAA. See 7 C.F.R. § 1951.909(e) (5) (iii) (D) (1989). The SAAs that are at issue in this case were executed by the Farmers Home Administration (FmHA), which today is the Farm Service Agency. The agreements provided as follows:

This Agreement is entered into between (FmHA) and (Borrower's name) (called "Borrower") on (Date) and expires on (Date) (maximum term of ten (10) years).

Borrower is indebted to FmHA for loan(s) as evidenced by the note(s) described below:
[Description of loan and of property securing it]

As a condition to, and in consideration of, FmHA writing down the above amounts and restructuring the loan, Borrower agrees to pay FmHA an amount according to one of the following payment schedules:

1. Seventy-five (75) percent of any positive appreciation in the market value of the property securing the loan as described in the above security instrument(s) between the date of this Agreement and either the expiration date of this Agreement or the date the Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs four (4) years or less from the date of this Agreement.

2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of this Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs after four (4) years but before the expiration date of this Agreement.

The amount of recapture by FmHA will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of farming and the value of the security at the time this Agreement is entered into. If the borrower violates the term of this agreement, FmHA will liquidate after the borrower has been notified of the right to appeal.

7 C.F.R. Part 1951, Subpart S, Exh. D (1989), reprinted at Aplt. App. 31-32.

By regulation, the Secretary prescribed instructions to be sent to farmers describing debt write-downs and the SAA program.

See 7 C.F.R. Part 1951, Subpart S, Exh. A, Attachment 1 (1989), reprinted at Aplt. App. 64-74. Those instructions explained:

The shared appreciation agreement will not last longer than 10 years.

During this 10 years, [the agency] will ask you to repay part of the debt it wrote down if you do one of the following things:

- (1) Sell or convey the real estate.
- (2) Stop farming.
- (3) Pay off the entire debt.

If you do not do one of these things during the 10

years, [the agency] will ask you to repay part of the debt written down at the end of the ten years.

Ibid.

3. The Department of Agriculture's initial regulations interpreting the Agricultural Credit Act included a document called "Exhibit B." See 7 C.F.R. Part 1951, Subpart S, Exh. B (1989), reprinted at Aplt. App. 59-60. The document was used by the Department to record write-downs and SAAs in the Department's computer system. It included a form with spaces for the entry of such values as the loan balance, the market value of the land securing the loan, and the "net recovery value," i.e., the value of the loan to the Department if it were to go through liquidation procedures. See Aplt. App. 59. It also included a space for the "equity recapture account amount," which was defined as "the lessor [sic] of the difference between the loan balance and the net recovery value, or the difference between the market value and the net recovery value." Aplt. App. 60; see also 7 C.F.R. § 1951.914(a)(1) (1989) ("The County Office will input via the multifunction work station, an equity receivable account in the amount shown on Exhibit B of this subpart").

On June 7, 1989, the Department issued an Administrative Notice "to provide interim transaction processing guidance" under the statute. See Aplt. App. 81. The Notice explained that "the current Exhibit B does not contain the necessary data fields to record all the required servicing information and will be

eliminated in the final rule" implementing the statute. Ibid. Attached to the Notice was a new form, which asked for such information as the market value of the property, the net recovery value, and the amount written down. See Aplt. App. 84. The new form did not contain an entry for the "equity recapture account amount." See ibid. And its accompanying instructions explained that "the Amount Reduced by Debt Writedown" is "the potential recapture amount." Aplt. App. 85.

In 1992, the Department revised its regulations in response to statutory changes. See 57 Fed. Reg. 18,612 (Apr. 30, 1992). The proposed rule stated that "Exhibit B to Subpart S is removed and reserved." 56 Fed. Reg. 55,004 (Oct. 23, 1991). The final rule included an Exhibit B, but it was used for a completely different purpose than the original Exhibit B - it was a letter to be sent to distressed borrowers offering to restructure their debt. See 57 Fed. Reg. 18,658 (Apr. 30, 1992). Neither the proposed rule nor the final rule suggested that the removal of Exhibit B would change the way the maximum amount collectable under SAAs would be calculated.

B. Facts and Prior Proceedings

1. The appellants in this case are 109 farmers who borrowed money from the Department of Agriculture in about 60 separate loans. See Aplt. App. 37, 46. All of the farmers were delinquent on their loans, received loan write-downs, and signed

SAAAs as a condition of receiving the write-downs. See Aplt. App. 46. As the maturity date of the SAAAs approached, the farmers were notified of the date that recapture would be due and the procedures that would be used to appraise their farms. See 7 C.F.R. § 1951.914(b)(4), (c) (1989). Some of the farmers appealed the appraisal of their land and the agency's determination that recapture was due. See Aplt. App. 79-80; 7 C.F.R. Part 11. Others did not pursue an administrative appeal. See Aplt. App. 79-80.

2. The farmers brought this action seeking declaratory and injunctive relief barring the Department of Agriculture from attempting to collect on amounts due under the SAAAs. See Aplt. App. 52-55. They claimed that when the SAAAs "expire" after ten years, they cease to have any effect, so that farmers who have not sold their farms or ceased farming during the ten year period do not owe any money upon the expiration of the SAAAs. See Aplt. App. 48-49. In addition, they argued that the amount recoverable under the SAAAs was limited to the "equity recapture account amount" shown on Exhibit B to the agency's initial regulations. See Aplt. App. 50-51. They also claimed that the Department had violated their substantive and procedural due process rights and had unconstitutionally impaired their contractual rights. See Aplt. App. 51-52. They asked the district court to certify the case as a class action on behalf of all farmers who signed SAAAs,

a class that they estimated to contain between 16,000 and 20,000 farmers. See Aplt. App. 39.

The district court dismissed the complain for failure to state a claim. See Aplt. App. 172. It first rejected the farmers' argument that the SAAs did not permit recapture after ten years. The court noted that the SAAs must be interpreted in light of the statute that authorizes them, and that the statute indicates that "recapture will occur at some point, if the real estate security has appreciated in value." Aplt. App. 177. In particular, 7 U.S.C. § 2001(e)(4) provides that recapture "shall take place at the end of the term of the agreement," if it does not occur sooner. Aplt. App. 177. Similarly, the regulations provide for collection of recapture after ten years, and the instructions accompanying the SAAs informed farmers that the Department "will ask you to repay part of the debt written down at the end of the 10 years." Aplt. App. 178, quoting 7 C.F.R. Part 1951, Subpart S, Exh. A, Attachment 1.

The court determined that this conclusion was supported by the text of the SAAs themselves. Although the SAAs use the term "expire," the court held that "whether termed 'expiration' or 'maturation,' the point remains that recapture is contemplated when the term of the SAA, which cannot exceed ten years, is reached." Aplt. App. 181. And the court noted that in Israel v. Department of Agriculture, 282 F.3d 521 (7th Cir.), cert. denied,

___ U.S. ___, 2002 WL 1312733 (Oct. 7, 2002), the Seventh Circuit had decided exactly the same question and reached the same conclusion. Aplt. App. 182. The court in Israel had explained that "the plain language of the Agreement provides for recapture at 'the expiration date of the Agreement.'" Ibid, quoting Israel, 282 F.3d at 527.

Next, the district court rejected the farmers' argument that the permissible amount of recapture was limited to the "equity recapture account amount" shown on Exhibit B. First, it noted that the argument "flies in the face of what the Court views as the clear Congressional intent of the [Agricultural Credit Act] generally and the SAA system in particular." Aplt. App. 189-90.

The statute specifically provides that SAAs require "the repayment of amounts written off or set aside." 7 U.S.C. § 2001(e)(1). There is no limitation on this amount, as required by the farmers' theory. See Aplt. App. 190-91. The "equity recapture account amount" is never discussed in the statute, but only in the regulations. See Aplt. App. 191. And the regulations do not suggest that the amount "somehow operates to limit USDA's potential recovery." Ibid. Having held that the complaint failed to state a claim, the district court denied the motion for class certification as moot. See Aplt. App. 192.

SUMMARY OF ARGUMENT

The district court correctly dismissed the complaint for failure to state a claim. The farmers contend that after the passage of ten years, they have no obligation to pay anything under the Shared Appreciation Agreements. Not only is this assertion highly implausible, raising a question as to why the government would have bothered to enter into the agreements, it also is contrary to the plain contractual language. Under the terms of the Shared Appreciation Agreements, the Secretary may recapture 50 percent of any appreciation in the value of a farm upon the expiration of the agreement.

Even if the agreements were ambiguous, which they are not, they must be interpreted so as to make them consistent with the governing statute and regulation. The statute provides that "[r]ecapture shall take place at the end of the term of the agreement," 7 U.S.C. § 2001(e)(4), and the regulation does the same. In addition, the only court of appeals to consider this question has agreed with the district court that the agreements provide for recapture at the end of their term. See Israel v. Department of Agriculture, 282 F.3d 521 (7th Cir.), cert. denied, ___ U.S. ___, 2002 WL 1312733 (Oct. 7, 2002).

The farmers also claim that the amount of recapture is limited by a number shown on a now-discontinued form used by the Department of Agriculture. That number, the "equity recapture

account amount," did not purport to be a limitation on the allowable recapture, and the form on which it appeared was not incorporated into or even mentioned in the text of the agreements. There is no indication that it was intended to limit the amount of recapture. Even if there were, it would have no effect because it would be inconsistent with the statute, which specifies the permissible recapture and makes no reference to the "equity recapture account amount."

Finally, the district court did not err by considering matters outside the pleadings when it ruled on the motion to dismiss. The only matters that the court considered were the pleadings and documents in the public record, such as the Shared Appreciation Agreements, the regulations, and administrative agency documents. In any event, even if the court had improperly considered matters outside the pleadings, the farmers failed to object to the error, and the error was harmless. Even now, the farmers have yet to identify any disputed fact that would be material to the legal issues in the case.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss de novo. See Botz v. Omni Air Int'l, 286 F.3d 488, 491 (8th Cir. 2002).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT BECAUSE IT FAILED TO STATE A CLAIM.

The district court correctly dismissed the complaint for failure to state a claim. Although some of the farmers failed to exhaust their administrative remedies, the district court acted within its discretion in dismissing the case on the merits before reaching the issue of exhaustion. On the merits, the district court appropriately concluded that the clear text of the Shared Appreciation Agreements provides for recapture after the expiration of the ten-year term of the agreements, and that any ambiguity in the agreements is resolved by reference to the statute and regulations. It also was correct in holding that the amount that may be recovered under an SAA is the amount specified in the agreement and in the statute, not the "equity recapture account amount" listed on a discontinued form used internally by the Department of Agriculture. Finally, the farmers' constitutional claims are merely derivative of their claims under the SAAs, so the district court properly dismissed them as well.

A. This Court Has Jurisdiction to Affirm the District Court's Ruling on the Merits.

In its motion to dismiss, the Department of Agriculture argued that the district court lacked jurisdiction over thirteen claims of the named plaintiffs because those plaintiffs had failed to exhaust their administrative remedies. The district

court did not consider this argument, because it determined that the complaint failed to state a claim. See Aplt. App. 173. In general, courts must consider jurisdictional questions before addressing merits issues. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998). Nevertheless, the district court acted properly in reaching the merits here, for two reasons.

First, this Court has limited the Steel Co. rule to questions of Article III jurisdiction. See Lukowski v. INS, 279 F.3d 644, 647 n.1 (8th Cir. 2002). Although exhaustion is a jurisdictional issue, it is statutory rather than constitutional.

Second, Steel Co. recognized an exception to the rule that jurisdictional questions must be considered first, for cases where "the merits question [must be] decided in a companion case." 523 U.S. at 98; cf. Center for Reprod. Law and Policy v. Bush, ___ F.3d ___, 2002 WL 31045183 (2d Cir. Sept. 13, 2002). Here, because some of the farmers did exhaust administrative remedies, this Court would have to reach all of the merits issues in this case even if it determined that some of the claims should be dismissed for failure to exhaust. Thus, the Court may affirm on the reasoning of the district court and need not consider the question of exhaustion.

B. The Shared Appreciation Agreements Provide for Recapture of Appreciation After the Ten-Year Term of the Agreement.

The district court correctly determined that the Shared Appreciation Agreements provide for recapture when the agreements

expire in ten years. This conclusion is compelled by the text of the SAAs and is reinforced by the statute and regulations.

1. The text of the SAA explicitly provides for recapture at the expiration of the agreement:

Borrower agrees to pay FmHA . . . [f]ifty (50) percent of any positive appreciation in the market value of the property securing the loan between the date of this agreement and either the expiration date of this agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security.

Aplt. App. 57 (emphasis added). This clause unambiguously requires farmers to pay half of the appreciation upon one of four events: (1) the arrival of the expiration date, (2) the payment of the loan, (3) a cessation in farming, or (4) a transfer of the farm. The clause was not hidden from farmers; the operative provisions of the agreement are less than a page long. Nor is it particularly surprising; as the agreement itself explains, the obligation to pay recapture was undertaken "[a]s a condition to, and in consideration of," the partial forgiveness of the farmers' outstanding debt to the Department of Agriculture. Ibid.

The farmers note that the provision of the SAA describing the measurement of appreciation does not itself refer to the expiration of the agreement. See Aplt. Br. 39. Instead, it simply says that the "amount of recapture . . . will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of farming and the value of the security at the time this Agreement is entered into." Aplt. App.

58. Although this clause does not refer to all of the events that can trigger the obligation to pay - in addition to omitting expiration, it also omits payment of the loan in full - that is not its purpose. Its purpose is simply to explain that recapture is based on appreciation, which is to be measured by the difference in the value of the property. Its incompleteness cannot trump the provision of the agreement that specifically addresses when repayment is due. See Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984) ("It is . . . axiomatic that where general and specific terms in a contract may relate to the same thing, the more specific provision should control").

The farmers make much of the agreement's use of the terms "expire" and "expiration" to describe the end of the ten-year term. From these words, they infer that after ten years, the agreement becomes void and has no further effect. See Aplt. Br. 38. But the ordinary meaning of the terms is to the contrary. Webster's Third, for example, defines "expire" first as "to breathe one's last breath: DIE," a meaning that is not relevant here, and second as "to come to an end: CEASE," which is entirely consistent with the district court's understanding of the SAAs. Webster's Third New International Dictionary 801 (1967). And although the farmers note that Black's Law Dictionary defines the "expiration date" of an option as the date on which the option "ceases to exist," its definition of the more relevant term

"expiration" is simply "[a] coming to an end; esp. a formal termination on a closing date." Black's Law Dictionary 600 (7th ed. 1999). Again, this definition is entirely consistent with the district court's interpretation.

Simply because the term of the agreement comes to an end after ten years, it does not follow that the agreement no longer has any effect, or that all of the obligations it created are void. After all, the SAA was part of a single transaction that included not only the creation of an obligation to pay recapture but also the write-down of the farmers' debt. If the entire transaction were nullified after ten years, then presumably the write-down of debt also would be cancelled and the farmers would once again owe the full amount of their loans. Although the farmers do not advocate this result, it is a necessary implication of their theory.

2. The unambiguous language of the SAAs compels the conclusion that recapture is due upon the expiration of the ten-year term. But even if there were ambiguity in the text of the SAAs themselves, it could be resolved by examining the agreements in the context of the governing statute and regulations, which make clear that recapture is due upon the expiration of the agreement. The farmers invoke the maxim that ambiguities in a contract are to be construed against the drafter, in this case the government. See Aplt. Br. 35; United States v. Seckinger,

397 U.S. 203, 216 (1970). Their reliance on this principle is misplaced, for two reasons.

First, the maxim of construing ambiguities against the drafter applies only to latent ambiguities, that is, those not apparent on the face of the contract. See Jowett, Inc. v. United States, 234 F.3d 1365, 1368 & n.2 (Fed. Cir. 2000). Under the farmers' theory, any ambiguity in the SAAs was patent, because it was created by the agreement's use of the term "expire" and by the failure of the clause defining the recapture amount to mention the possibility of recapture upon the expiration of the agreement. When an ambiguity is patent, a contractor has a duty to seek clarification, which the farmers did not do. See Hunt Constr. Group, Inc. v. United States, 281 F.3d 1369, 1375 (Fed. Cir. 2002).

Second, and more fundamentally, the maxim of construing ambiguities against the drafter cannot be applied to produce an interpretation of the contract that would violate a federal statute or regulation. A government officer cannot enter into a contract binding the government to terms that are inconsistent with the law. See Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 63 (1984) ("[T]hose who deal with the Government . . . may not rely on the conduct of Government agents contrary to law"); cf. Parmenter v. FDIC, 925 F.2d 1088, 1094-95 (8th Cir. 1991). That is why "anyone entering into an

arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Federal Crop. Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). If the rule were otherwise, then government contracting officials - and courts interpreting government contracts - would have the power to direct the expenditure of public funds, whether or not Congress had appropriated those funds. This would violate the constitutional command that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9; see also OPM v. Richmond, 496 U.S. 414 (1990). The district court therefore was correct when it recognized that the government contracts at issue in this case must be interpreted "against the backdrop of the legislative scheme that authorized them." Aplt. App. 176, quoting Maricopa-Stanfield Irrigation and Drainage Dist. v. United States, 158 F.3d 428, 435 (9th Cir. 1998).

In this case, any ambiguity in the SAAs is resolved by the statute and the regulations authorizing the agreements. Under the statute,

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.

7 U.S.C. § 2001(e)(4) (emphasis added). The farmers attempt to

obscure the clear language of this section by pointing out that the statute does not require the Department of Agriculture to enter into SAAs. See Aplt. Br. 39-40, quoting 7 U.S.C. § 2001(e)(1) ("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") (emphasis added). But § 2001(e)(1) simply gives the Secretary discretion as to whether to enter into an SAA; the Secretary does not have the discretion to alter the terms of SAAs as set forth in the statute. And § 2001(e)(4) directs that "[r]ecapture shall take place at the end of the term of the agreement" (emphasis added).

Any contrary interpretation of the SAA would make the agreement invalid under the statute, and it should therefore be rejected.

The clarity of the statute makes reference to the regulations unnecessary, but it is worth noting that the regulations are entirely consistent with this interpretation of the statute. The Secretary's regulations contained instructions to be sent to farmers describing debt write-downs and SAAs. The instructions explained:

The shared appreciation agreement will not last longer than 10 years.

During this 10 years, [the agency] will ask you to repay part of the debt it wrote down if you do one of the following things:

- (1) Sell or convey the real estate.
- (2) Stop farming.
- (3) Pay off the entire debt.

If you do not do one of these things during the 10 years, [the agency] will ask you to repay part of the

debt written down at the end of the ten years.

7 C.F.R. Part 1951, Subpart S, Exh. A, Attachment 1 (1989) (emphasis added); see also 7 U.S.C. § 1981d (requiring that delinquent borrowers be notified of debt restructuring programs).

According to these regulations - which, as the product of notice-and-comment rulemaking, are entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) - recapture is due at the end of the term of the agreement. Any ambiguity in the contract must be resolved in such a way as to make the contract consistent with this authoritative interpretation of the statute.

3. The only court of appeals to consider this question has reached the same conclusion that the district court did. See Israel v. Department of Agriculture, 282 F.3d 521 (7th Cir.), cert. denied, ___ U.S. ___, 2002 WL 1312733 (Oct. 7, 2002).¹ In Israel, the Seventh Circuit examined the language of the SAA and found it unambiguous. See id. at 527. It also held that its interpretation of the SAA was "strongly supported by the language of the relevant statute." Ibid. The farmers attempt to distinguish Israel on the ground that it applied a deferential standard of review. See Aplt. Br. 55. As noted above, however,

¹ The only published district court opinion to address the issue also reached this result. See Bukaske v. Department of Agriculture, 193 F. Supp. 2d 1162 (D.S.D. 2002).

it is entirely appropriate for a court to defer to an agency's authoritative interpretation of the statute it administers. It is also appropriate to defer to the agency's interpretation of its own regulations. See Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); Glover v. Standard Fed. Bank, 283 F.3d 953 (8th Cir.), cert. denied, ___ U.S. ___, 2002 WL 1013764 (Oct. 7, 2002). And in any event, the court in Israel gave no indication that the standard of review had any effect on its decision. On the contrary, it emphasized that "the plain language of the Agreement" supported the result it reached. 282 F.3d at 527. This Court should follow the Seventh Circuit's reasoning.

C. The Shared Appreciation Agreements Provide for Recapture of Appreciation, Which Is Not Limited to the "Equity Recapture Account Amount" Shown on the Discontinued "Exhibit B."

The amount due under a Shared Appreciation Agreement is specified in the agreement itself. See Aplt. App. 57. If the agreement comes due within four years, the farmer must pay 75 percent of the appreciation in the value of the farm; after four years, the farmer must pay 50 percent of the appreciation. See ibid. This amount is also specified in the statute, see 7 U.S.C. § 2001(e)(3), and it is stated in the regulations as well. See Aplt. App. 68. The farmers claim, however, that the amount due is limited to the "equity recapture account amount" listed on the now-discontinued Exhibit B form. This claim is without merit.

The Exhibit B form stated that it was "used to record the granting of noncash credit for farmer program loans." 7 C.F.R. Part 1951, Subpart S, Exh. B (1989), reprinted at Aplt. App. 34.

The form provided a space for an Agriculture Department official to sign, but there was no space for the borrower's signature. See Aplt. App. 33. This feature of the form, together with its third-person references to the borrower, suggest that it was meant to be completed by government officials, not borrowers. In other words, it was not part of the government's contract with borrowers, but was merely an accounting device for the government to keep track of SAAs.

The form called for the input of several numbers, one of which was the "equity recapture account amount," which was defined as "the lessor [sic] of the difference between the loan balance and the net recovery value, or the difference between the market value and the net recovery value." Aplt. App. 34. The Exhibit B form did not state that this amount was the maximum amount that could be recovered under an SAA. Indeed, it did not say anything about the purpose or function of the "equity recapture account amount."

The farmers argue that the Exhibit B form - which was not referred to in the SAAs - must somehow have altered the terms of the SAA to limit the amount that could be recaptured. But this argument is entirely without support in the text of the Exhibit B

form. Nor do the farmers offer any reason why recapture should have been limited to this rather oddly defined quantity. After all, if the "equity recapture account amount" were larger than the recapture amount permitted by the SAA, surely it would not have been understood to increase the farmers' liability. Of course, even the form had purported to alter the terms of the SAA, it could not have done so, since those terms were fixed by statute. Likewise, the form cannot estop the government from asserting its rights under the SAA, because the unauthorized acts of government officials cannot give rise to estoppel against the government. See Richmond, 496 U.S. at 424-34.

This understanding of the Exhibit B form is confirmed by the form's history. On June 7, 1989, the Department issued an Administrative Notice "to provide interim transaction processing guidance" under the statute. See Aplt. App. 81. The Notice explained that "the current Exhibit B does not contain the necessary data fields to record all the required servicing information and will be eliminated in the final rule" implementing the statute. Ibid. Attached to the Notice was a new form, which did not contain an entry for the "equity recapture account amount." See Aplt. App. 84. The Administrative Notice gave no indication that the discontinuation of the Exhibit B form would effect any substantive change in the treatment of SAAs. The same is true of the 1992 change in the

regulations, see 57 Fed. Reg. 18,658 (Apr. 30, 1992), which completely eliminated the Exhibit B form without suggesting that there would be any change in the way the maximum amount collectable under SAAs would be calculated.

The farmers object that the 1989 Administrative Notice was invalid because it altered the regulation. But under 5 U.S.C. § 553(b) (3) (A), an agency may make or alter "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" without using notice-and-comment rulemaking. Here, notwithstanding its publication in the Code of Federal Regulations, the Exhibit B form had no substantive effect and was simply a general statement of policy or rule of agency procedure. Cf. ANR Pipeline Co. v. FERC, 205 F.3d 403, 407 (D.C. Cir. 2000) ("A policy statement does not become a regulation simply because an agency chooses to publish it in the Code of Federal Regulations"). Thus, it was entirely proper for the Department of Agriculture to alter it through the Administrative Notice.

D. The Farmers' Constitutional Claims Merely Recharacterize Their Contract Claims and Plainly Lack Merit.

The farmers also argue that the Department of Agriculture has violated their constitutional rights. Specifically, they claim that its interpretation of the SAAs deprives them of constitutionally protected property rights, see Aplt. Br. 47-48,

and violates their rights under the Due Process Clause, see Aplt. Br. 48-49. These claims are entirely derivative of the farmers' theory that the Department has misinterpreted the contract; the farmers have simply dressed their contract claims in constitutional garb. For that reason, these claims do not require separate analysis, and the district court acted correctly in rejecting them.

The constitutional claims suffer from an additional, independent flaw. As a general matter, the Constitution does not prohibit the government from interfering with contractual rights; it only prohibits it from doing so without due process. See Lujan v. G&G Fire Sprinklers, Inc., 532 U.S. 189 (2001); Mid-American Waste Sys., Inc. v. City of Gary, 49 F.3d 286 (7th Cir. 1995). In this case, there is an established remedial procedure available to farmers who disagree with the Department of Agriculture's interpretation of the SAAs. They may take an administrative appeal of any determination of liability under an SAA, see 7 U.S.C. § 6996, and if dissatisfied with the results of the administrative appeal, they may seek review in district court, see 7 U.S.C. § 6999. The farmers do not explain why these review procedures are inadequate to satisfy the requirements of due process. Their constitutional claims must therefore be rejected.

II. THE DISTRICT COURT DID NOT ERR IN DECLINING TO TREAT THE MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT.

In this appeal, the farmers only indirectly address the flaws in the merits of their claims that are discussed above. Instead, they place their principal reliance on the procedural argument that the district court should have treated the government's motion to dismiss as a motion for summary judgment, because it considered matters outside the pleadings before it granted the motion. A careful examination of what the district court did, however, reveals no error. Although various documents were submitted to the court by both parties, the court's decision was based only on the pleadings and on matters of public record that it properly could consider on a motion to dismiss. In any event, the farmers waived this argument by failing to raise it in their opposition to the motion to dismiss. And even if the district court's action was a technical violation of Rule 12, any error was harmless because the farmers have not shown that any genuine issue of material fact existed.

A. The District Court Did Not Improperly Examine Matters Outside the Pleadings in Ruling on the Motion to Dismiss.

The district court fully complied with the requirements of the Federal Rules of Civil Procedure when it granted the government's motion to dismiss. Under Rule 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief

may be granted." The farmers rely on the last sentence of Rule 12(b), which provides that if, when a court rules on a Rule 12(b)(6) motion, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." This rule is not relevant here, because the government's Rule 12(b)(6) motion did not present matters outside the pleadings, and the court did not consider such matters in ruling on the motion.

1. The government's motion to dismiss made no reference to any factual or evidentiary issues in the case. Rather than contend that the farmers had failed to provide evidentiary support for their claims - as would be proper in a motion for summary judgment, see Celotex Corp. v. Catrett, 477 U.S. 317 (1986) - the motion argued that "the facts alleged by plaintiff, when presumed to be true, do not entitle plaintiff to relief." Appellee's App. 14-15.² Nor was the motion accompanied by any depositions, answers to interrogatories, or admissions, as is appropriate in a motion for summary judgment. See Fed. R. Civ.

² The memoranda in support of and in opposition to the motion to dismiss are included in Appellee's Separate Appendix because of their relevance to the farmers' argument under Rule 12(b) and to the government's claim that the farmers have waived that argument, see p. 35, infra.

P. 56(c).

To be sure, the motion to dismiss was accompanied by six documentary exhibits. But with one exception, none of these documents was a "matte[r] outside the pleading" within the meaning of Rule 12(b). See Jenisio v. Ozark Airlines, Inc., Retirement Plan, 187 F.3d 970, 972 n.3 (8th Cir. 1999) ("A district court may consider documents on a motion to dismiss where, as here, the plaintiffs' claims are based solely on the interpretation of the documents and the parties do not dispute the actual contents of the documents"). Two of the exhibits (Exhibit 1 and Exhibit 5) were the SAA itself and the "Exhibit B" form. These documents were central to the farmers' claims, and both had been exhibits to the farmers' complaint. See Aplt. App. 57-60. It is well settled that, in a case involving a contract, a court may examine the contract documents in ruling on a motion to dismiss. See Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999) (district court may consider materials that are "necessarily embraced by the pleadings"); see also Tierney v. Vahle, ___ F.3d ___, 2002 WL 31067679 at *3 (7th Cir. Sept. 18, 2002) (explaining that, if the rule were otherwise, "the plaintiff could evade dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that proved that his claim had no merit").

Three other exhibits were simply documents from the public

record. Exhibit 2 was a copy of Agriculture Department instructions to farmers explaining SAAs; the instructions had been published in the Code of Federal Regulations. See 7 C.F.R. Part 1951, Subpart S, Exh. A (1989). Exhibit 4 was a copy of a Department of Agriculture regulation. And Exhibit 5 was a copy of an Administrative Notice issued by the Department of Agriculture in June 1989. All of these documents were "matters of public record" that may properly be considered on a motion to dismiss. Porous Media Corp., 186 F.3d at 1079. District courts routinely consider such official documents in ruling on 12(b)(6) motions. See, e.g., Boateng v. Interamerican Univ., Inc., 210 F.3d 56, 60 (1st Cir. 2000) (documents from prior state court adjudications); Sebastian v. United States, 185 F.3d 1368, 1373 (Fed. Cir. 1999) (superseded regulations); Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1312 (4th Cir. 1995), vacated on other grounds, 517 U.S. 1206 (1996) (legislative history).

The only exhibit that could not properly be considered as part of a Rule 12(b)(6) motion was Exhibit 3, the declaration of Arthur Hall. See Aplt. App. 76. But this declaration was not introduced in support of the government's motion under Rule 12(b)(6). Instead, the declaration - which discusses the failure of several of the farmers to exhaust their administrative remedies - was introduced in support of the government's Rule 12(b)(1) motion to dismiss for lack of jurisdiction. It contains

nothing that is relevant to the merits issues in the case, and the government did not ask the district court to consider it in ruling on the merits.

2. A review of the district court's memorandum opinion reveals that the court did not consider any factual issues in ruling on the motion to dismiss. To be sure, the court stated that there was "insufficient evidence to support plaintiffs' contentions." Aplt. App. 190. But in context, it is clear that the court used the term "evidence" to refer to textual evidence supporting the farmers' interpretation of the documents in the case, not to the kind of evidence that would be produced through discovery.

The farmers rely heavily on the district court's reference, in the introductory section of its memorandum opinion, to its "consideration of the parties' submissions and the entire file."

Aplt. App. 172. From the use of the phrase, "entire file," they infer that the court must have considered matters outside the pleadings and must, therefore, have violated Rule 12(b). See Aplt. Br. 22. This is a slender reed on which to base a claim that the district court erred, and it is insufficient to overcome the presumption that district courts understand and comply with the federal rules. See, e.g., Marcus v. Iowa Public Television, 97 F.3d 1137, 1141 (8th Cir. 1996) ("We do not lightly assume

district court error"). Aside from the court's boilerplate mention of "the entire file," nothing in the opinion suggests that the court improperly considered materials outside of the pleadings. Although the farmers claim to have identified three instances in which the district court relied on improper material, none withstands scrutiny.

First, the farmers contend that the district court relied on the Hall declaration for the proposition that "[i]n calculating the amount that plaintiffs owed pursuant to the SAAs, [Farm Service Agency] officials used the total amount written down as the maximum amount collectible under the SAA." Aplt. Br. 23, quoting Appellee's App. 23. But the district court never cited the Hall declaration to support this or any other proposition. The farmers assert that the district court must have relied on the declaration because the government's memorandum mentioned it - albeit in a solitary citation unaccompanied by a quotation; but this assertion is unsupported by anything in the court's opinion. Cf. Homart Dev. Co. v. W.T. Sigman, 868 F.2d 1556, 1561 (11th Cir. 1989) ("Merely because the judge peruses the material tendered does not automatically convert a Rule 12(c) motion into a Rule 56 motion").

More to the point, the proposition for which the district court allegedly relied on the Hall affidavit was entirely uncontroversial. The farmers did not dispute that the

Agriculture Department "used the total amount written down as the maximum amount collectible under the SAA." On the contrary, their complaint said almost exactly the same thing. See Aplt. App. 47 ("USDA uses the written down amount . . . as the maximum collectible amount"). The issue in the case was not whether the Agriculture Department took this position, but whether it was proper for it to do so. Thus, the district court would have had no occasion to rely on the Hall declaration for this point.

Second, the farmers object to the government's inclusion of the 1989 Department of Agriculture Administrative Notice in its memorandum supporting the motion to dismiss. See Aplt. Br. 23; Aplt. App. 81. It was entirely proper for the district court to consider the Administrative Notice, which was a matter of public record. As noted, in deciding a Rule 12(b)(6) motion, a court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." Porous Media Corp., 186 F.3d at 1079 (8th Cir. 1999), quoting Wright & Miller, 5A Federal Practice and Procedure: Civil § 1357 (2d ed. 1990). And as an official document of a government agency, the Administrative Notice was a "matter of public record" of which the district court could take judicial notice. See Fed. R. Evid. 201. In any case, the farmers themselves made an indirect reference to the document in their complaint. See Aplt. App. 50 (describing the Agriculture

Department's June 1989 discontinuation of the Exhibit B form). At no point have they disputed its authenticity.

Third, the farmers claim that in its reply memorandum in support of the motion to dismiss, the government presented the district court with a letter to Chester Bailey from Peter Scott of the Internal Revenue Service. See Aplt. Br. 23-24. This letter discussed the policy of the IRS concerning the tax treatment of SAAs. See Appellee's App. 88-89. It was introduced to help explain the Tax Court's decision in Lawinger v. Commissioner of Internal Revenue, 103 T.C. 428 (1994), which considered the question whether a farmer who receives a debt write-down and signs an SAA has realized income from cancellation of indebtedness. Specifically, the government presented the letter to explain how the decision "is entirely consistent with IRS policy." Appellee's App. 88. The district court did not discuss the letter, and it is difficult to see how the letter could be relevant to any issue in this case. Indeed, the court's only reference to the Lawinger decision was its observation that the decision has "no precedential value, as it is older than more recent contrary opinions and does not address the issue before the Court in any depth," an observation that had nothing to do with anything in the letter. Aplt. App. 184. Of course, even if the district court had considered the letter, it would not have been error. The letter was an official document stating the

legal position of the Internal Revenue Service, and the farmers have not disputed its authenticity.

B. The Farmers Have Waived the Argument That the District Court Failed to Comply With Rule 56, And Any Error Was Harmless.

The farmers have waived any argument that the district court improperly considered matters outside of the pleadings. As the farmers acknowledge, the allegedly improper materials considered by the district court were presented in the government's memorandum in support of its motion to dismiss. See Apl't. Br. 22-24. So even assuming that the district court's ruling is properly treated as a grant of a motion for summary judgment, the farmers had notice that such a motion had been made. See Angel v. Williams, 12 F.3d 786, 789 (8th Cir. 1993). Yet when the farmers filed a response to the motion, they did not object to the inclusion of any of the exhibits to the government's memorandum. See Appellee's App. 41-79. Nor did they argue that there were disputed factual issues in the case. On the contrary, they explicitly stated that at least one of their claims involved "strictly a question of law based on the plain language of the regulation" Appellee's App. 57. Thus, they waived any claim that the motion to dismiss should have been treated as a summary judgment motion.

Moreover, even if the district court erred, its error was harmless. An erroneous failure to treat a motion to dismiss as a motion for summary judgment is harmless "if the nonmoving party had an adequate opportunity to respond to the motion and material facts were neither disputed nor missing from the record." Gibb v. Scott, 958 F.2d 814, 816 (8th Cir. 1992); see also Davis v. Johnson Controls, Inc., 21 F.3d 866, 867 (8th Cir. 1994). As noted above, the farmers had an opportunity to respond to the government's motion. The farmers do not dispute the accuracy of any of the documents presented by the government. And even now, they have failed to identify any material fact that is missing from the record. In their brief, the farmers argue that the SAA is ambiguous, but they do not identify what extrinsic evidence they would have introduced to clarify it, nor do they explain why it would have been appropriate for the district court to consider extrinsic evidence. See Aplt. Br. 28-29. Likewise, they argue that the Department of Agriculture has interpreted its regulations inconsistently. See Aplt. Br. 29-30. Even assuming that this is relevant to any legal issue in the case, the farmers do not explain what evidence they might have introduced to support their argument.

To be sure, the farmers do identify some evidence that they unsuccessfully attempted to obtain in discovery. See Aplt. Br. 16, 30-31. Specifically, they sought to depose Chester Bailey,

an Agriculture Department official, and they also sought "internal communications, and other documents relevant to the drafters' intent and the agency's original interpretation" of the SAA and the regulations. Aplt. Br. 16. But the farmers acknowledged in the district court that the Bailey deposition was unlikely to reveal any new evidence. See Aplt. App. 159 (hearing transcript) ("THE COURT: You've already got a pretty good idea what he's going to say. You already told me that. MS. VOGEL [counsel for the farmers]: That's right"). More importantly, the agency's "internal communications" and the opinions of agency officials could not possibly have been relevant to any legal issue in the case, and in any event they were likely protected from discovery by the deliberative process privilege. See Morgan v. United States, 304 U.S. 1, 18 (1938) (It is "not the function of the court to probe the mental processes of the Secretary in reaching his conclusions"). Because no material facts were missing from the record, any technical violation of Rule 12 was harmless.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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OCTOBER 2002

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Local Rule 28A(c), that the foregoing brief contains no more than 9,121 words, according to the count of Corel WordPerfect 9.

Eric D. Miller

CERTIFICATE OF SERVICE

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