U.S. Judge Condemns FSA "Stonewalling" of NAD Appeal Decision

by James T. Massey

In a sweeping victory for lenders with FmHA/FSA loan guarantees—as well as agricultural producers who are successful in appeals to the USDA National Appeals Division—United States District Court Judge Sam R. Cummings of the Northern District of Texas has declared unlawful FSA's long-standing practice of failing and refusing to properly and timely implement NAD appeal decisions. In a written opinion and judgment entered April 3, 1998 in *First National Bank v. Glickman* (Civil No. 5-97-CV-133-C), Judge Cummings held that FSA "violated (the agency's) governing statutes and regulations" by refusing to implement the NAD appeal determination, or to timely process the Bank's loan guarantee application following the NAD determination. Rather, said the judge, the FSA "stonewalled" the NAD determination altogether, conduct he declared to be "arbitrary, capricious and not in accordance with the law" (under the Administrative Procedures Act, 5 U.S.C. § 706).

The Plaintiff, First National Bank of Haskell Texas, submitted a loan guarantee application to FmHA/FSA in September 1995 seeking a guarantee of a $400,000 loan to a Texas cattle rancher. The rancher's farm plan submitted with the application demonstrated a positive cash flow which included income from the sale of some wheat. Although this rancher had previously grazed his wheat production, cattle prices were down and wheat prices were up in 1995, leading the rancher and the Bank to conclude that it made better business sense that year to sell the wheat. Without inclusion of the wheat income, the plan would not have been feasible.

FSA/FmHA issued an "adverse action" decision October 20, 1995 denying the Bank's guarantee application. The decision contained several grounds, including a determination that none of the projected wheat income could be included in the rancher's farm plan since he had historically grazed the wheat and that, without that income, the rancher could not demonstrate repayment ability.

The Bank appealed this decision to the USDA National Appeals Division (NAD) pursuant to 7 U.S.C. § 6991 et seq. At an appeal hearing held April 2, 1996, the agency withdrew on the record all of the grounds stated for its denial of the Bank's loan guarantee application except the determination that income could not be counted from the sale of any wheat. On May 3, 1996 the NAD hearing officer issued an Appeal Determination reversing the agency's denial of the Bank's application. The hearing

officer noted FSA's withdrawal of all grounds for denial other than the wheat income, and concluded that the Bank met its burden of proving that the wheat income should have been considered by the agency and that the rancher's plan was thus feasible. The hearing officer remanded the appeal back to the agency "to implement this determination."

On May 8, 1996, the FSA state office requested that the national office seek review of the hearing officer's decision by the Director of the NAD. The national office declined to do so, but instructed the state office to "update" all financial information, and to create a "revised" financial plan based upon "current marketing plans." On June 21, 1996 the agency wrote to the Bank demanding this information, insisted that then current prices and appraisals be used in its "implementation" of the appeal decision and preemptively asserted a ground for denial of the guarantee which had been raised, but withdrawn by the agency in the previous appeal.

The Bank objected to the agency demanding new, revised and updated financial information and wrote to the agency on several occasions asking that the hearing officer's appeal decision be implemented on the basis of the original 1995 application. In doing so, the Bank relied upon statutory and regulatory provisions requiring FmHA/FSA to timely implement NAD's appeal decision on the effective or the date of the application, or the date of adverse action appealed from. The agency refused to implement the decision and, through the end of 1996, "stonewalled" the Bank by continuing to demand new and updated information and refusing to process the original application.

The Bank filed its action in federal court April 10, 1997. In the Complaint, the Bank claimed that, for nearly a decade, the FmHA/FSA had routinely ignored and refused to implement NAD/NAS appeal decisions with which it disagreed. The agency had done so, the Bank alleged, through a "revolving door" procedure of demanding "new," "revised" or "current" information upon which it would then issue a new denial of the application, or by "stonewalling" the decision altogether by never acting on it at all. The Bank asserted that this conduct violated 7 U.S.C. § 6998 and 7 C.F.R. § 11.12(b), which provide, identically that "a final determination issued by the Director shall be effective as of the date of filing an application, the date of the transaction or event in question, or the date of the original decision, whichever is applicable." The Bank also relied upon 7 C.F.R. § 1900.59(l)(1994), a regulation which applied to the Bank's appeal under 7 U.S.C. § 6995 and which required the agency to "implement" the NAD appeal decision by taking "the next step in a loan processing . . . required by FmHA regulations that would occur had no adverse decision been made and appeal filed." The Bank asked the Court to issue a judgment declaring that the agency's refusal to implement the NAD decision was unlawful and that the agency was required to issue the guarantee.

The Court did just that in its sweeping decision. First, the Court held that the agency decision "must be upheld, if at all, on the basis articulated by the agency itself," citing Institute for *Tech-Dev. v. Brown*, 63 F3d 445, 449 (5th Cir. 1995) and *Motor Vehicles Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 50, § 103 S. Ct. 2856, 2870, 77 L.Ed.2d 443 (1983). The Court declared that this determination must be based upon the agency record that was before the decision-maker at the time of decision, *Milena Ship Management Co. v. Newcomb*, 995 F2d 620, 624 (5th Cir. 1993) and that, because it was

reviewing an agency decision where the court concluded that facts were not at issue, the Court "owes no deference to the agency's determination." *Institute for Tech. Dev.,* 63 F3d at 450; *Pennzoil Co. v. Federal Energy Regulatory Comm'n.,* 789 F2d 1128, 1135 (5th Cir. 1986).

The Court further held that the agency's effort to supplement the record in this case would be denied, for two reasons. First, the court concluded that the government had filed to comply with FRCP 56 and the local rules of the court when it asserted unsupported factual allegations in response to the Bank's summary judgment motion. Second, the court concluded that, even if the government had procedurally complied with these rules, the government's evidence submitted in opposition to the Bank's Motion for Summary Judgment was inadmissable as a matter of law under the Administrative Procedures Act because "courts may not accept counsel's post hoc rationalization of agency actions" citing *Doty v. United States,* 53 F3d 1244, 1250 (Fed Cir. 1995).

The court next held that, on the basis of uncontroverted facts established by the Bank, the agency violated the appeal statutes and regulations cited above when it failed to implement the NAD decision. The court squarely held that those provisions required the agency to implement the decision "on the basis of the facts existing at the time the application was made or the original adverse decision was issued." Those facts, concluded the court, demonstrated feasibility of the rancher's operation. "The agency clearly did not implement the NAD decision within its own governing statutes and regulations" said the court; "what the agency did was essentially 'stonewall' the appeal determination. These actions are arbitrary, capricious and not in accordance with the law."

Finally, the court held that:

> This case will be resolved upon the merits, and will not be remanded for further administrative proceedings, as this case is purely a question of law. Where the record of a case leads to only one conclusion, as it does here, the district court need not remand to the agency for redetermination, but may declare the plaintiff's entitlement under the particular USDA program. *Justice v. Lyng,* 716 F. Supp 1570 (D. Arizona 1989).

To effect this determination, the court issued a judgment reversing the findings of the Secretary, stating that "plaintiff is entitled to the loan guaranty in question and " (the Court) ORDERS the Secretary to issue said guaranty."

The decision in *First National Bank v. Glickman* is the first clear federal court recognition and correction of a decade-long systemic FSA policy of refusing to implement NAD appeal decisions in which producers and guaranteed lenders have succeeded. The decision should serve as a warning to agency officials that this policy must come to an end.

(First National Bank is represented by James T. Massey. Pleadings and a copy of the court's decision can be obtained from Mr. Massey's office for a copying charge of $10.00 by writing to The Law Office of James T. Massey, P. O. Box 1689, Sisters, OR 97759.)