



## Decision

**Matter of:** U.S. Department of Agriculture—Operations of the Farm Service Agency during the Fiscal Year 2019 Lapse in Appropriations

**File:** B-331092

**Date:** June 29, 2020

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### DIGEST

During the fiscal year 2019 lapse in appropriations, the Farm Service Agency (FSA) in the U.S. Department of Agriculture (USDA) incurred obligations to perform various activities and ultimately recalled employees in all county offices back to work. FSA lacked available budget authority for these activities.

USDA permissibly relied on the exception to the Antideficiency Act for emergencies to protect property when it incurred obligations to prevent imminent threat to the federal government's security interests. However, USDA violated the Antideficiency Act when it incurred obligations to operate FSA county offices for regular, ongoing functions through December 28, 2018, and, subsequently, to provide warehouse receipts, process payments, sign checks, and implement farm programs. USDA must report the violation as required by 31 U.S.C. § 1351, and describe actions taken to prevent recurring violations in the event of future funding lapses. With this decision, we will consider such violations in the future to be knowing and willful violations of the Act.

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### DECISION

The Ranking Member of the Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs, then-Chairman, House Committee on Oversight and Reform, and Ranking Member, Senate Committee on Homeland Security and Governmental Affairs, requested a decision on whether FSA in USDA violated the Antideficiency Act during a lapse in appropriations that

occurred from December 22, 2018, through January 25, 2019.<sup>1</sup> Specifically, we consider whether USDA through FSA violated the Antideficiency Act with respect to the activities of FSA county offices during the lapse in appropriations. As discussed in detail below, FSA (1) carried out activities to prevent imminent threat to the federal government's security interests; (2) kept all FSA county offices open at the outset of the lapse; (3) provided various services to borrowers; and (4) carried out activities to implement programs funded by borrowing authority.

We conclude that USDA violated the Antideficiency Act when, during the lapse in appropriations, it incurred obligations from December 22, 2018, through December 28, 2018, to keep all county offices open, and incurred obligations beginning on January 17, 2019, to provide other services to borrowers, and to implement farm programs. USDA lacked available budget authority for these activities and no exception to the Antideficiency Act permitted USDA to incur these obligations. Therefore, USDA must report its Antideficiency Act violation as required by 31 U.S.C. § 1351. USDA is expected to ensure that obligations for these activities are recorded against appropriations available for USDA's fiscal year 2019 costs. We conclude that USDA's actions to prevent imminent threat to the federal government's security interests constituted an exception to the Antideficiency Act for emergencies involving the protection of property.

In accordance with our regular practice, we contacted USDA to seek factual information and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP); Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USDA (June 19, 2019). USDA responded with its explanation of the pertinent facts and legal analysis. Letter from Associate General Counsel, General Law and Research Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Sept. 16, 2019) (USDA Response).

## BACKGROUND

FSA's mission is to equitably serve all farmers, ranchers, and agricultural partners through delivery of agricultural programs. FSA's responsibilities include making farm operating loans. 7 U.S.C. § 6932; FSA, USDA, *History and Mission*, available at <https://www.fsa.usda.gov/about-fsa/history-and-mission/index> (last visited Apr. 10, 2020); FSA, USDA, *Agency History*, available at <https://www.fsa.usda.gov/about-fsa/history-and-mission/agency-history/index> (last visited Apr. 10, 2020). FSA has

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<sup>1</sup> Letter from Ranking Member, Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs; then-Chairman, House Committee on Oversight and Reform; and Ranking Member, Senate Committee on Homeland Security and Governmental Affairs, to Comptroller General (May 23, 2019).

more than 9,700 employees and uses its county field offices to implement farm policy and programs.<sup>2</sup>

FSA's activities are funded by several mechanisms. FSA receives a lump-sum appropriation which covers a number of programs, projects, or items for its operations. See, e.g., Pub. L. No. 115-141, div. A, title II, 132 Stat. 348, 351, 360–361 (Mar. 23, 2018) (appropriating \$1.2 billion for FSA's salaries and expenses for fiscal year 2018). Among other things, this appropriation covers the costs of operating FSA county offices and administering FSA programs.<sup>3</sup> In addition, many programs FSA administers are funded through borrowing authority Congress made available to the Commodity Credit Corporation (CCC).<sup>4</sup> Therefore, amounts for the programs funded through that authority were not impacted by the lapse in FSA's annual appropriations.<sup>5</sup>

On September 28, 2018, the President signed a continuing resolution appropriating amounts for FSA's operations through December 7, 2018.<sup>6</sup> Pub. L. No. 115-245,

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<sup>2</sup> See USDA, *USDA to Reopen FSA Offices for Additional Services During Government Shutdown*, Press Release No. 0005.19 (Jan. 22, 2019), available at <https://www.usda.gov/media/press-releases/2019/01/22/usda-reopen-fsa-offices-additional-services-during-government> (last visited Apr. 10, 2020) (regarding number of FSA employees) (Press Release No. 0005.19); FSA, USDA, *Structure and Organization*, available at <https://www.fsa.usda.gov/about-fsa/structure-and-organization/index> (last visited Apr. 10, 2020).

<sup>3</sup> Office of Management and Budget, *Appendix, Budget of the United States Government for Fiscal Year 2018*, (May 2017), at 92–93, available at <https://www.govinfo.gov/app/details/BUDGET-2018-APP> (last visited Apr. 10, 2020) (FY2018 Budget Appendix).

<sup>4</sup> See *FY2018 Budget Appendix*, at 100 (listing FSA programs that use CCC budget authority) and 101-104 (providing details on FSA programs that use CCC budget authority). The CCC is an agency and instrumentality of the United States, within USDA, created to stabilize, support, and protect farm income and prices, among other things. 15 U.S.C. § 714.

<sup>5</sup> The CCC is authorized to borrow from the United States Treasury and others to fulfill its purposes and carry out its programs. 15 U.S.C. §§ 714b(i), 714c. Borrowing authority is a form of budget authority that permits an agency to borrow money and then to obligate against amounts borrowed. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 21.

<sup>6</sup> A continuing resolution is “[a]n appropriation act that provides budget authority for federal agencies, specific activities, or both to continue in operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.” *Glossary*, at 35–36.

div. C, §§ 101(1), 105, 132 Stat. 2981, 3123, 3124 (Sept. 28, 2018). After an extension enacted on December 7, 2018, the continuing resolution expired at midnight on December 21, 2018. Pub. L. No. 115-298, 132 Stat. 4382 (Dec. 7, 2018). Accordingly, FSA experienced a lapse in appropriations from December 22, 2018, through January 25, 2019.<sup>7</sup>

FSA continued various activities during the lapse in appropriations. From December 22, 2018, through December 28, 2018 (the first week of the lapse), all FSA county offices remained open and carried out their regular activities and no employees were furloughed. USDA Response, at 5. County offices closed starting on December 29, 2018, and employees were furloughed. See *id.* Then, starting on January 17, 2019, FSA recalled some employees in order to provide cotton warehouse receipts, process payments in order to provide reports to the Internal Revenue Service (IRS), perform functions to protect FSA security interests, and sign checks related to loan collateral.<sup>8</sup> *Id.* at 5–7. Starting on January 24, 2019, FSA recalled all of its more than 9,700 employees back to work in order to implement programs that it said were not impacted by the lapse in annual appropriations.<sup>9</sup> USDA Response, at 8–9.

## DISCUSSION

At issue here is whether FSA, during the lapse in appropriations, could incur obligations for its operations.

The Antideficiency Act prohibits agencies from obligating or expending in excess or in advance of an available appropriation unless otherwise authorized by law. 31 U.S.C. § 1341. The Act further prohibits agencies from accepting voluntary services for the United States, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342. During a lapse in appropriations, the Antideficiency Act generally bars an agency from incurring obligations and the agency must commence an orderly shutdown of affected functions unless it has available budget authority or where an exception to the Antideficiency Act allows the agency to do so. B-331132, Dec. 19, 2019.

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<sup>7</sup> On January 25, 2019, the continuing resolution was extended through February 15, 2019. Pub. L. No. 116-5, 133 Stat. 10 (Jan. 25, 2019). Full-year appropriations for FSA's operations were enacted on February 15, 2019. Pub. L. No. 116-6, div. B, title II, 133 Stat. 13, 45, 54–55 (Feb. 15, 2019).

<sup>8</sup> USDA, *USDA to Reopen FSA Offices for Limited Services During Government Shutdown*, Press Release No. 0004.19 (Jan. 16, 2019), available at <https://www.usda.gov/media/press-releases/2019/01/16/usda-reopen-fsa-offices-limited-services-during-government-shutdown> (last visited Apr. 10, 2020).

<sup>9</sup> Press Release No. 0005.19.

One key exception is provided explicitly in the text of the Antideficiency Act itself. The Act permits agencies to incur obligations in advance of appropriations “for emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. In 1990, Congress amended this section to add: “As used in this section, the term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, title XIII, § 13213(b), 104 Stat. 1388, 1388-621 (Nov. 5, 1990), *codified at* 31 U.S.C. § 1342 (emphasis added).

Consistent with the text and purpose of the Antideficiency Act, an exception to the Act exists only where established by a narrowly tailored application of the statutory framework to the facts and circumstances at hand. B-331132, Dec. 19, 2019; B-331093, Oct. 22, 2019. Where appropriations are not available to satisfy an agency’s obligations for a given activity, we look to the relevant statutes for express authority for the activity to continue notwithstanding the absence of appropriations.<sup>10</sup> B-331132, Dec. 19, 2019; B-331093, Oct. 22, 2019.

During the lapse in appropriations from December 22, 2018, through January 25, 2019, FSA continued various activities, ultimately recalling all of its employees back to work. USDA asserts that all of FSA’s activities during the lapse complied with the Antideficiency Act. USDA Response, at 9. Below, we address FSA’s compliance with the Antideficiency Act with regard to the various activities performed during the fiscal year 2019 lapse in appropriations.

#### Application of the Antideficiency Act to obligations incurred to prevent imminent threat to the federal government’s security interests

##### Filing continuances of financing statements

When FSA makes a loan, it takes a security interest in the borrower’s property to protect the government should the borrower fail to repay the loan. To perfect the government’s security interest, FSA must publicly file a document called a “financing statement.”<sup>11</sup> Generally, a financing statement is effective for five years, after which it expires, unless extended through the filing of a continuance. USDA Response, at

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<sup>10</sup> When an agency validly asserts an exception to the Act and incurs obligations to perform a given activity, those obligations become legal liabilities of the United States government that Congress must cover by enacting appropriations. B-331093, Oct. 22, 2019.

<sup>11</sup> Typically FSA files these documents with state governments, as would any other similarly-situated private lender. See FSA, USDA, *Your FSA Farm Loan Compass*, available at [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/loan-servicing/fsa\\_farm\\_%20loan\\_compass.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/Farm-Loan-Programs/pdfs/loan-servicing/fsa_farm_%20loan_compass.pdf) (last visited Apr. 10, 2020), at 64 (definition of financing statement) (*FSA Farm Loan Compass*).

7; see also Uniform Commercial Code 9-310(a). USDA asserts that during the lapse in appropriations, its January 17, 2019, recall of FSA employees to file continuances of existing financing statements was permissible pursuant to the Antideficiency Act's exception for "emergencies involving . . . the protection of property." 31 U.S.C. § 1342; USDA Response, at 5, 7. USDA explains that had FSA not filed continuances, some existing financing statements would have expired, and the government's interests under the terms of its loans would have been compromised. USDA Response, at 7.

The first question is whether FSA's security interests, such as its interest in loan collateral, constitute property within the meaning of the Antideficiency Act. Under the Act, "the property must be either government-owned property or property for which the government has a responsibility." B-331093, Oct. 22, 2019, at 6; 9 Comp. Dec. 182, 185 (1902). Here, when FSA obtains a security interest as part of the terms of a loan it makes, the government has a responsibility over the security interest. The security interest represents the government's rights with regards to loan collateral in the case that the loan is not repaid. The government's security interests have value both financially, and in terms of their role in the agreement between the government and a borrower.<sup>12</sup> We conclude that FSA's security interests constitute property within the meaning of the Antideficiency Act.

The next question is whether the Antideficiency Act's exception for emergencies involving the protection of property provides authority for FSA to incur obligations to file continuances of financing statements during a lapse in appropriations. The Antideficiency Act provides that an emergency involving the protection of property does not include functions that, if suspended, would not imminently threaten the protection of property. 31 U.S.C. § 1342. Because the Act is central to Congress's constitutional power of the purse, we interpret exceptions narrowly and in a manner to protect congressional prerogative, applying a case-by-case analysis. B-331093, Oct. 22, 2019.

Here, without a valid financing statement on file, FSA's ability to enforce its security interests against borrowers or third parties would be at risk. In other words, if FSA failed to file a continuation, and a financing statement expired, the government's security interests would be immediately damaged.

Activities that protect property, where suspension of the activity would imminently threaten property, fall within Congress's explicit authorization in the Antideficiency Act, and obligations for those activities may continue during a lapse in appropriations. See, e.g., 3 Comp. Gen. 979 (1924) (where firefighters from a local municipality fought a fire on federal property and the fire would have almost certainly

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<sup>12</sup> See *FSA Farm Loan Compass*, at 16, 28, 64 (FSA has a lien on items used to secure the loan (collateral) and if the borrower defaults on the loan, FSA can take the collateral).

destroyed most of the property had they not responded, we decided that the activity was authorized under the Antideficiency Act's exception for emergencies involving the protection of property).

Applying the exception to the Antideficiency Act in a narrowly tailored manner to the facts and circumstances here, we conclude that FSA was permitted to take the limited actions necessary to protect its security interests during the lapse in appropriations. FSA's security interests constitute property under the Act, and FSA may take necessary action to protect that property during a lapse, to include filing continuances, which FSA undertook as the limited action necessary to maintain the government's interests.

#### Opening mail to identify bankruptcy notices and third party actions

USDA states that during the lapse in appropriations, its January 17, 2019, recall of FSA employees to open the mail in order to identify bankruptcy notices and third party actions affecting FSA's security interests was permitted pursuant to the Antideficiency Act's exception for "emergencies involving . . . the protection of property." 31 U.S.C. § 1342; USDA Response, at 7. We agree. As previously discussed, FSA's security interests constitute property within the meaning of the Antideficiency Act, since the government has a responsibility over its security interests. In a lapse in appropriations, the Antideficiency Act permits the agency to take the limited actions necessary in order to protect its security interests. Where a bankruptcy notice or third party action notice requires FSA to take time sensitive action in order to protect the government's security interests, then the Antideficiency Act's exception for emergencies to protect property allows obligations for this activity during a lapse in appropriations.

However, FSA must ensure it only takes those actions necessary to avoid imminent threat to its security interests so that it minimizes obligations incurred. B-331093, Oct. 22, 2019. When FSA incurs obligations during a lapse in appropriations in order to carry out its responsibility to prevent imminent threat to its security interests, it must do so in a manner that respects congressional funding prerogatives. See B-331093, Oct. 22, 2019.

FSA's security interests constitute property under the Antideficiency Act and Congress has carved out an explicit exception to permit activities necessary to avoid imminent threat to property, but the exception is narrow. FSA may incur obligations during a lapse for those select activities necessary to protect property from imminent threat.

#### Excepted activities performed intermittently with non-excepted activities

The FSA employees USDA recalled to perform functions USDA considered excepted under the Antideficiency Act also performed non-excepted functions—providing loan payoff information to program participants—during the lapse in

appropriations. USDA Response, at 5, 8. USDA asserts that it was appropriate for the employees to engage in non-excepted work when the intervals between excepted activities were too short to enable the employee to be furloughed. USDA Response, at 9. The issue is whether an employee is permitted to perform other, non-excepted functions while the employee is required to remain at work but is not performing, and is not expected to perform, the excepted function.

For excepted work that is ongoing and occurs intermittently throughout the day, it may be reasonable for an agency to designate an employee to remain at work to be immediately available to perform the excepted function. In these circumstances, it is the employee's readiness that is critical to performance of the excepted function. In that situation, the agency incurs obligations for the entire period of time the employee must maintain readiness. In those limited circumstances, we would not object to an agency's decision to permit the employee to perform a non-excepted activity, so long as that activity does not interfere with the proper execution of, or readiness to perform, an excepted activity.

Nevertheless, we emphasize that the permissibility of the excepted activity and the requirement that the employee remain at work to be immediately available to perform the excepted function are necessary prerequisites to the permissibility of the non-excepted activity. Further, the excepted work takes priority: the non-excepted work may be performed only during intervals of time that the employee is not performing, and is not expected to perform, excepted work.

Here, we have concluded that FSA may incur obligations during the lapse in appropriations for certain activities, such as filing continuances of financing statements and opening mail to identify notices affecting FSA's security interests, because the activities fall under the Antideficiency Act's exception for emergencies involving the protection of property. Further, USDA indicated that performance of these excepted functions resulted in intervals of time where the employees had to remain at work ready to perform, but were not actively performing, nor were they expected to perform, the excepted functions. See USDA Response, at 8–9. It was only during those periods of time that the employees performed non-excepted work. Under these circumstances we do not object to USDA's decision to allow properly excepted FSA employees to perform non-excepted functions.

#### Application of the Antideficiency Act to obligations incurred in keeping FSA county offices open during the first week of the lapse in appropriations

USDA asserts that FSA had available carryover balances from FSA's salaries and expenses appropriation to cover the costs of operating all county offices through December 28, 2018—the first week of the lapse in FSA's fiscal year 2019 appropriations—and therefore it was not required to furlough any employees. USDA Response, at 5. USDA points to a proviso in the appropriation for fiscal year 2018 which states that funding for county committees "shall remain available until

expended,” making those funds available for obligation without fiscal year limitation. Pub. L. No. 115-141, 132 Stat. at 361; 31 U.S.C. § 1301(c).

We agree with USDA that notwithstanding the expiration of the continuing resolution on December 21, 2018, any remaining balances made available to county committees under the proviso did not expire at that time. The question, however, is whether it was permissible for FSA to use funds available for county committees for the purposes of operating its county offices.

The purpose statute, 31 U.S.C. § 1301(a), provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made. . . .” Application of the purpose statute involves a three-step analysis, known as the necessary expense rule: (1) the expenditure must bear a reasonable, logical relationship to the appropriation; (2) the expenditure must not be prohibited by other law; and (3) the expenditure must not be otherwise provided for. See, e.g., B-330862, Sept. 5, 2019; B-303170, Apr. 22, 2005. At issue in this decision is step one, which is whether there is a logical relationship between expenditures for FSA county offices and the appropriation for county committees.

For our necessary expense analysis, the text of the appropriation is of paramount importance, and we give ordinary meaning to statutory terms unless otherwise defined. B-330776, Sept. 5, 2019 (citing *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013)). We construe statutory terms in the context of the whole statute. B-330776, Sept. 5, 2019 (citing 2A Sutherland, *Statutes and Statutory Construction* § 46:5 at 204 (7th ed. 2014)). Here, amounts are appropriated for county committees. FSA’s county committees are advisory boards comprised of local farmers and ranchers who receive a stipend from FSA for their time.<sup>13</sup> By contrast, FSA county offices are agency field offices where employees work to implement farm programs.<sup>14</sup> Since a county office is not a county committee, the use of amounts appropriated for county committees for the purpose of the county offices was inconsistent with the plain meaning of the appropriation.

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<sup>13</sup> FSA, USDA, *Farm Service Agency County Committee (COC) Frequently Asked Questions for Stakeholders*, at 1–2, available at [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/2019-COC\\_Stakeholder\\_FAQs.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/NewsRoom/County-Committee-Elections/pdf/2019-COC_Stakeholder_FAQs.pdf) (last visited Apr. 10, 2020) (COC FAQs); 7 U.S.C. § 6932(e) (authorizing FSA to use federal employees and non-federal employees of county committees to implement programs and activities). County committee members are elected by their peers and help make determinations on FSA programs including the equitable administration of programs in their counties. COC FAQs, at 1.

<sup>14</sup> FSA, USDA, *Structure and Organization*, available at <https://www.fsa.usda.gov/about-fsa/structure-and-organization/index> (last visited Apr. 10, 2020); USDA, *Service Center Locator*, available at <https://offices.sc.egov.usda.gov/locator/app> (last visited Apr. 10, 2020).

Further, other parts of FSA's salaries and expenses appropriation specifically discuss FSA county offices. Pub. L. No. 115-141, 132 Stat. at 361 (“[N]one of the funds available to the Farm Service Agency shall be used to close Farm Service Agency *county offices* . . .”) (emphasis added). Therefore, in the context of the statute as a whole, it is clear that county committees are distinguishable from county offices, and a county office does not fall within the plain meaning of a county committee.

We conclude that FSA violated the purpose statute when it used the appropriation for county committees in order to operate FSA's county offices. The expenditure in question, operation of FSA county offices, does not have a reasonable, logical relationship to the appropriation for county committees. While both county committees and county offices are funded from FSA's salaries and expenses appropriation account,<sup>15</sup> only the funds available to county committees are available without a time limitation. Amounts for functions such as operation of FSA county offices are available only for a fixed period of time, and here the continuing resolution providing these funds expired at midnight on December 21, 2018. Having no budget authority for its county offices, FSA could incur obligations for this purpose only if it properly relied on an exception to the Antideficiency Act. FSA did not indicate that such an exception applied. Therefore, FSA violated the Antideficiency Act when it incurred obligations during the first week of the lapse in appropriations to operate its county offices.

#### Application of the Antideficiency Act to obligations incurred to provide other services to borrowers

FSA provides several services to borrowers in loan programs that the agency contends constitute actions protecting property in an emergency. These services include providing warehouse receipts to cotton producers; processing payments in order to provide reports to IRS for tax filing season; and signing checks received as payment for sales. We analyze each of these actions in turn.

#### Provision of warehouse receipts to cotton producers

Under USDA's marketing assistance loan program, cotton producers pledge their commodity—cotton—as collateral, and the cotton is placed in an approved warehouse until the terms of the loan have been satisfied.<sup>16</sup> FSA provides a

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<sup>15</sup> The President's Budget for Fiscal Year 2018 states that FSA's salaries and expenses appropriation account is used for its county offices, among other things. *FY2018 Budget Appendix*, at 92–93.

<sup>16</sup> See generally 7 C.F.R. pt. 1421, subpt. B (regulations on marketing assistance loans); FSA, USDA, *Commodity Loans, Non-Recourse Marketing Assistance Loan*, available at <https://www.fsa.usda.gov/programs-and-services/price->

warehouse receipt to a cotton producer after confirming that the terms of the producer's loan have been satisfied, and the receipt allows the producer to remove cotton from the respective warehouse. USDA Response, at 6. USDA asserts that the provision of warehouse receipts to cotton producers during the lapse in appropriations was permitted under the Antideficiency Act's exception for "emergencies involving . . . the protection of property." 31 U.S.C. § 1342; USDA Response, at 6.

The first question is whether there is property within the meaning of the Antideficiency Act. To constitute property under the Act, "the property must be either government-owned property or property for which the government has a responsibility." B-331093, Oct. 22, 2019, at 6 (tax remittances constitute property within the meaning of the Antideficiency Act because the government has an interest in collecting balances due and a responsibility over remittances submitted); 9 Comp. Dec. 182 (1902).

Here, the government has an interest in, and responsibility for, cotton that is pledged as collateral for a marketing assistance loan until the terms of the loan have been satisfied and the warehouse receipt issued. Therefore, we conclude that cotton used as collateral under this USDA loan program constitutes property within the meaning of the Antideficiency Act.

The next question is whether the issuance of warehouse receipts to cotton producers is an activity involving the protection of cotton (property) used as collateral. As we have previously noted, the Antideficiency Act's exception for emergencies involving the protection of property does not apply to the ongoing, regular functions of government unless suspension of the activity would pose an imminent threat to the protection of property. 31 U.S.C. § 1342. We recognize that a suspension in FSA's provision of warehouse receipts may be an inconvenience to cotton producers. We also recognize that a delay in issuance of warehouse receipts may result in untimely movement of cotton between warehouses or to the market, which could potentially reduce the market value for the cotton. However, neither an inconvenience to cotton producers nor a possible decline in the value of the cotton results in immediate damage to the cotton. Since suspension of the provision of warehouse receipts would not imminently threaten the cotton, this activity was not authorized under the Antideficiency Act's exception for emergencies involving the protection of property.

USDA's position is that FSA's issuance of warehouse receipts was necessary to protect the full faith and credit of the United States government. USDA Response, at 6. USDA states that issuance of warehouse receipts preserves the orderly

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[support/commodity-loans/index](#) (last visited Apr. 10, 2020); USDA Response, at 6; 7 C.F.R. § 1421.106(a); *see also* 7 C.F.R. pt. 1423 (regulations on approved warehouses).

marketing of cotton and prevents takings claims<sup>17</sup> against the federal government, and thereby protects full faith and credit. *Id.* However, as USDA has not proven how a disruption to the cotton market or the initiation of takings claims against the federal government would cause immediate damage to full faith and credit, we need not consider whether the Antideficiency Act exception for the protection of property is applicable under FSA's rationale.

We conclude that FSA violated the Antideficiency Act when it incurred obligations to provide cotton warehouse receipts during the lapse in appropriations because FSA lacked available budget authority and the exception to the Act for emergencies to protect property does not apply to the facts and circumstances here. Issuance of warehouse receipts does not protect the government's property from imminent threat within the meaning of the Antideficiency Act and, therefore, FSA was not permitted to incur obligations for this activity during the lapse.

#### Processing payments in order to provide reports to IRS for tax filing season

USDA states that during the lapse in appropriations, the processing of loan payments in order to provide reports regarding loan interest to IRS for tax filing season was permitted under the Antideficiency Act's exception for "emergencies involving . . . the protection of property." 31 U.S.C. § 1342; USDA Response, at 5, 7. IRS had announced that tax returns would be processed as scheduled<sup>18</sup> and USDA notes that taxpayers needed certain reports from the department in order to meet filing deadlines. USDA Response, at 6–8. However, USDA does not explain how processing payments or providing reports for tax season is an emergency involving the protection of property within the meaning of the Antideficiency Act.

We held in our decision on the processing of tax payments (remittances) by IRS during a lapse in appropriations that tax remittances constitute property under the Antideficiency Act, but that processing remittances is not an excepted function under the Act. B-331093, Oct. 22, 2019. Processing tax remittances is a regular function that, if suspended, would not imminently threaten the remittances. *Id.* However, we concluded that IRS can and should take those limited actions necessary to ensure the physical security of the remittances. *Id.*

Similarly, FSA should protect the payments it receives during a lapse in appropriations by, for example, storing them securely. However, the agency may only take those actions that minimize obligations necessary to avoid imminent threat to the payments. USDA has offered no reason to suggest that FSA must process the payments in order to protect them or ensure their security.

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<sup>17</sup> The Fifth Amendment to the United States Constitution prohibits private property from being taken for public use, without just compensation. U.S. Const., Amend. V.

<sup>18</sup> IRS, *IRS Confirms Tax Filing Season to Begin January 28*, IR-2019-01 (Jan. 7, 2019), available at <https://www.irs.gov/newsroom/irs-confirms-tax-filing-season-to-begin-january-28> (last visited May 1, 2020).

We conclude that FSA violated the Antideficiency Act when it incurred obligations to process payments to provide tax reports during the lapse in appropriations. FSA lacked available budget authority and the exception to the Act for emergencies to protect property does not allow FSA to incur obligations to process payments for tax reporting purposes, as these are ongoing regular functions of government the suspension of which would not imminently threaten property under the Act.

### Signing checks

USDA states that under FSA's requirements, when a borrower sells livestock or commodities that are used as collateral for an FSA loan, then FSA is required to sign the check received as payment from the sale before the borrower may cash the check (referred to by USDA as two-party checks). USDA Response, at 7. USDA asserts that signing two-party checks during the lapse in appropriations was permitted under the Antideficiency Act's exception for "emergencies involving . . . the protection of property." 31 U.S.C. § 1342; USDA Response, at 7.

We consider first whether there is property within the meaning of the Antideficiency Act. As previously discussed, FSA's security interests (interest in loan collateral under its loan programs) is property under the Antideficiency Act since FSA has a responsibility for its security interests. Two-party checks may also constitute property under the Act, since they pertain to loan collateral. However, activities are permitted to continue under the Antideficiency Act's exception for emergencies involving protection of property only when suspension of the activity would result in imminent threat to the property. 31 U.S.C. § 1342. USDA did not show that signing two-party checks is necessary to protect property from imminent threat.

USDA asserts a number of reasons why FSA staff were made available during the lapse in appropriations to sign two-party checks: borrowers were able to cash checks and repay FSA loans; the government avoided the possibility that borrowers would initiate takings claims against the federal government for detaining proceeds provided under these checks;<sup>19</sup> and it ensured that borrowers did not take unilateral

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<sup>19</sup> With regard to takings claims under the Fifth Amendment to the United States Constitution (Takings Clause), U.S. Const., Amend. V, which prohibits private property from being taken for public use without just compensation, USDA cites to *Horne v. Dept. of Agriculture*, \_\_\_ U.S. \_\_\_ 135 S.Ct. 2419 (2015) as support. The issue in *Horne* was USDA's requirement for raisin growers to give a certain percentage of their crop to the federal government, free of charge, that the government would then decide how to dispense with, providing growers a contingent interest in a portion of the value, if any. The Court concluded that the Takings Clause applies to personal property, not just real property, and that USDA's requirements violated the Takings Clause. *Horne*, 135 S.Ct. at 2425, 2428. It is clear that the facts in *Horne* are quite different from the facts here. *Horne* addresses

action with regards to loan collateral. USDA Response, at 7–8. But signing two-party checks is a regular, ongoing function of government, the suspension of which would not pose imminent threat to property under the Antideficiency Act.

If two-party checks are in FSA's physical possession, then, much like FSA's responsibility to ensure the physical security of payments it receives as discussed above, the agency should ensure the physical security of two-party checks during a lapse in appropriations by, for example, placing them in safe storage. See B-331093, Oct. 22, 2019. USDA has offered nothing to suggest that FSA must sign two-party checks in order to ensure the security of two-party checks or to ensure the protection of FSA's security interests.

A lapse in appropriations does not absolve borrowers from following other applicable federal regulations and laws, and otherwise abiding by the terms of federal loan agreements with regard to repaying FSA loans and sale of loan collateral. To suggest that FSA employees must be available during a lapse in appropriations to sign two-party checks ignores that there is a legal framework governing federal loans,<sup>20</sup> and disregards the Antideficiency Act's explicit direction that the exception not apply to ongoing, regular functions of government.

We conclude that FSA violated the Antideficiency Act when it incurred obligations to sign two-party checks during the lapse in appropriations. FSA lacked available budget authority to sign two-party checks and the exception to the Antideficiency Act for emergencies to protect property does not apply to the facts and circumstances here.

Application of the Antideficiency Act to obligations incurred for salaries of employees implementing FSA programs funded by CCC borrowing authority

Costs incurred by some FSA programs<sup>21</sup> are funded by borrowing authority Congress made available to the CCC, rather than by annual appropriations. See Office of Management and Budget, *Appendix, Budget of the United States Government for Fiscal Year 2018*, (May 2017), at 100, 101–104, available at <https://www.govinfo.gov/app/details/BUDGET-2018-APP> (last visited Apr. 10, 2020).

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an affirmative requirement imposed by the federal government regarding personal property, while, in the context of a lapse in appropriations, at issue is inaction on the part of the federal government, stemming from the lack of budget authority being enacted into law.

<sup>20</sup> See *FSA Farm Loan Compass*, at 16, for a general description of borrower responsibilities.

<sup>21</sup> The Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (Dec. 20, 2018) (referred to by USDA as the Farm Bill) authorized many FSA programs.

For example, under the price loss coverage program, FSA issues payments to commodity producers when the effective price of a commodity is less than a certain amount. *Id.* at 102. The costs incurred for these program payments are funded by CCC borrowing authority. *Id.* However, the costs incurred for the salaries and expenses of FSA employees who issue the payments and perform other functions to administer the program are funded by FSA's appropriations. *Id.* at 93.

When FSA's appropriation lapsed at midnight on December 21, 2018, FSA no longer had budget authority to cover the costs of the salaries and expenses of FSA employees. However, the lapse in appropriations did not impact the availability of the CCC borrowing authority and, consequently, budget authority was still available to fund payments under some FSA programs.<sup>22</sup> In justifying the recall of FSA employees to implement FSA programs, USDA asserts that this was permissible based on the continued availability of budget authority for the FSA programs themselves. The issue is whether an exception to the Antideficiency Act provided FSA with authority to incur obligations for this activity. We found no applicable exception in this case.

USDA asserts that the availability of budget authority for FSA programs supports a necessary implication that Congress intended program implementation to continue notwithstanding a lapse in the annual appropriations that cover these costs. USDA Response, at 8–9. In support of its position, USDA refers to an August 1995 opinion of the Attorney General. *Id.* at 2. There, the Attorney General relied on a 1981 opinion of the Attorney General in concluding that “a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well.” Memorandum for the Director, Office of Management and Budget, *Government Operations in the Event of a Lapse in Appropriations*, OLC Opinion, Aug. 16, 1995, at 4. We addressed the 1981 opinion recently in B-331132, Dec. 19, 2019, and B-331093, Oct. 22, 2019. While we accepted the Attorney General's statement in the 1981 opinion that Social Security payments could continue even though the appropriations for the salaries of those who made the payments had lapsed, we declined to extend it more widely.<sup>23</sup>

The Antideficiency Act is one of the fundamental statutes by which Congress exercises its constitutional power of the purse and Congress enacted it to keep agencies within the limits of appropriations enacted into law. B-331093, Oct. 22,

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<sup>22</sup> USDA Response, at 9 (farm programs are implemented by FSA staff who are funded by annual appropriations, which had lapsed); *FY2018 Budget Appendix*, at 92–93 (FSA's salaries and expenses appropriation is used for the administrative expenses of FSA programs).

<sup>23</sup> In accepting the Attorney General's position on Social Security payments during a lapse in appropriations, we noted that this position has become entrenched in practice for almost 40 years and Congress is aware of this position. B-331132, Dec. 19, 2019; B-331093, Oct. 22, 2019. To revisit it now would be tumultuous.

2019. Therefore, we cannot infer a broad exception to the Antideficiency Act for activities that lack budget authority. *Id.* (despite having a permanent, indefinite appropriation for tax refund payments, IRS could not incur obligations for the costs of administering the payments when budget authority for those costs had lapsed because there was no statutory indication that tax refund payments were to continue notwithstanding a lapse in annual appropriations).

To determine whether it was permissible for FSA to incur obligations to implement FSA programs during the lapse in appropriations, we look for specific congressional intent in the relevant statutes evidencing that program implementation is to continue when appropriations are not available to cover obligations for these costs. B-331132, Dec. 19, 2019. There is no indication in the statutes establishing the CCC—which provides budget authority for programs—or in the Agriculture Improvement Act of 2018—which authorizes USDA to carry out the programs—that Congress intended for FSA to incur obligations to administer these programs notwithstanding a lapse in appropriations to cover these costs. Therefore, we conclude that FSA violated the Antideficiency Act when it incurred obligations to implement FSA programs during the lapse in appropriations because FSA lacked budget authority for this activity and no exception to the Antideficiency Act permitted FSA to incur these obligations.

## CONCLUSION

FSA did not have appropriations available for the purpose of operating its county offices through December 28, 2018. Therefore, USDA violated the Antideficiency Act when it incurred these obligations. An agency is generally expected to correct Antideficiency Act violations by adjusting its accounts to charge the proper appropriation. B-330776, Sept. 5, 2019. Here, USDA should deobligate amounts charged to its appropriation for FSA county committees, and record the obligations against the proper appropriations that Congress subsequently made for FSA's fiscal year 2019 expenses (FSA received appropriations with the enactment on January 25, 2019, of a continuing resolution available through February 15, 2019, Pub. L. No. 116-5, 133 Stat. at 10, and a full-year appropriation enacted on February 15, 2019, Pub. L. No. 116-6, 133 Stat. at 54–55).

FSA lacked available budget authority for the obligations it incurred to provide warehouse receipts, process payments, sign two-party checks, and implement farm programs during the lapse in appropriations. No exception to the Antideficiency Act permitted these activities to continue during the lapse in appropriations. Therefore, USDA violated the Antideficiency Act when it incurred these obligations. To correct the violation, USDA should record these obligations against the proper appropriations that Congress subsequently made for FSA's fiscal year 2019 expenses.

Though FSA lacked budget authority to incur obligations for regular, ongoing activities for its loan programs, FSA could incur limited obligations necessary to

protect the government's security interests from imminent threat during the lapse in appropriations. Those limited actions were permitted as an exception to the Antideficiency Act for emergencies involving the protection of property. These obligations are legal liabilities of the United States government. USDA must record these obligations against the proper appropriations that Congress enacted for fiscal year 2019.

With this decision, we will consider any future obligations of this nature in similar circumstances to be a knowing and willful violation of the Antideficiency Act. The Act provides, in that event, that officials responsible for obligations in violation of the Act shall be "fined not more than \$5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. § 1350.

USDA must report its Antideficiency Act violation as required by 31 U.S.C. § 1351, and correctly record the obligations and explain actions taken to preclude such violations in the future. When USDA submits its Antideficiency Act report to Congress, it should describe actions taken to prevent recurring violations in similar circumstances in the future.

A handwritten signature in cursive script, reading "Thomas H. Armstrong".

Thomas H. Armstrong  
General Counsel