Ensuring the Credibility of United States Food Aid: Proposals for Insulating the Food Security Wheat Reserve from Economic Influences

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ENSURING THE CREDIBILITY OF UNITED STATES FOOD AID: PROPOSALS FOR INSULATING THE FOOD SECURITY WHEAT RESERVE FROM ECONOMIC INFLUENCES

Food security has increasingly become a global and Congressional concern in recent decades. The concern peaked after a famine and world wide food shortage in the early 1970's. The crisis prompted a 130-nation World Food Conference in 1974. The conference declared: “Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental facilities. . . . [T]he eradication of hunger is a common objective of all the countries of the international community . . . .” The conference resolved to eradicate malnutrition caused by hunger by 1985.

The food shortage also demonstrated a potentially fatal weakness in the United States' own food aid program, commonly known as P.L. 480 or the “Food for Peace” program. A statutory provision necessitated the

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2. The conference was sponsored by the United Nations and was held in Rome.
4. H.R. REP., supra note 1, at 2. Economists and nutrition specialists differ widely on the measurement of malnutrition. C. ZUVEKAS, Jr., ECONOMIC DEVELOPMENT: AN INTRODUCTION 172 (1979). Average daily caloric intake, daily protein consumption, and body weight are commonly used indicators. Id. at 172; see also N. Crimshaw & L. Taylor, Food, reprinted in ECONOMIC DEVELOPMENT 26-36 (1980). However, it is difficult to accurately obtain these measurements for enough individuals to assess the level of malnutrition in a given population. The infant mortality rate, which is simpler to determine, has been suggested as the most accurate indicator of development. J. GRANT, THE STATE OF THE WORLD'S CHILDREN: 1984 at 6 (1984). One study found that 67% of deaths in infancy (under one year) and early childhood (one to four years of age) are associated with malnutrition or malnourishment. C. ZUVEKAS, supra, at 171.

Disagreement also exists as to the extent of malnutrition in the developing world, perhaps due to the disagreement on measurement. Id. at 173. 1970's measures of the percentage of the world population afflicted with malnutrition range from one half the population to one sixth. Id. at 173. The 1984 infant mortality rate for less developed countries excluding China was 107 per 1000, compared to 19 per 1000 for more developed countries. POPULATION REFERENCE BUREAU, INC., 1984 World Population Data Sheet (1984). Under any formula, the World Food Conference goal can hardly be considered accomplished in light of the current Ethiopian famine.
reduction of food aid shipments during the early 1970's when the aid was most needed to alleviate the famine.\textsuperscript{6} Congress responded by creating an emergency wheat reserve in order to ensure food security.\textsuperscript{7} The legislation creating the reserve strictly prohibits the use of the wheat for any purposes other than urgent humanitarian food aid under Title II of P.L. 480 ("Title II").\textsuperscript{8} This restriction was enacted not only in the interest of food security, but also to protect the American farmer from depressed prices resulting from release of large quantities of wheat onto the market.\textsuperscript{9}

However, the inadequacy of the prohibition was demonstrated when Congress enacted legislation which allowed the reserve to be used for purposes other than urgent humanitarian food aid.\textsuperscript{10} It then became clear that a legislative prohibition alone would not be sufficient to insulate the reserve from the economic influences which might pressure the government into tampering with it. Instead, Congress must create a private remedy that entitles members of the agricultural community to monetary

\textsuperscript{5} Washington Law Review Vol. 61:597, 1986


6. A protective provision cripples the food aid process when certain domestic economic conditions exist. See Walczak, supra note 5, at 567; Food Security Act of 1979, Joint Hearing on H.R. 4489 Before the House Comm. on Foreign Affairs and the House Comm. on Agriculture, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as Joint Hearing]. Under P.L. 480, grain is purchased on the domestic market and shipped overseas to less developed countries. 7 U.S.C. § 1721 (1982). Section 401(a) of P.L. 480 prohibits the disposition of grain for food aid if the Secretary of Agriculture determines that the domestic supply of grain is inadequate for domestic demand, export demand or carryover needs. 7 U.S.C. § 1731(a) (1982).

Export demand escalated during the food crisis because developed foreign countries found it increasingly difficult to meet their own domestic demand and turned to the United States to purchase grain. As this export demand increased, the domestic supply became too low under § 401(a), and food aid exports correspondingly decreased at exactly the time that they were critically needed in less developed countries. The total aid shipments dropped from 9.9 million tons in 1972 to 3.3 million tons in 1974. Wheat shipments dropped from 6.5 million tons in 1972 to 1.4 million tons in 1974. H.R. Rep. No. 966 pt. 2, 96th Cong., 2d Sess 4 (1980) [hereinafter cited as H.R. Rep. pt. 2]. See also Joint Hearing, supra, at 3–4, 42, 53–54; Walczak, supra note 5, at 567, 569–70; H.R. Rep., supra note 1, at 2–3, 5; Steiner, Foreword to P. Treazise, Rebuilding Grain Reserves at (vii) (1976).

Ironically, then, § 401(a) had the effect of extinguishing the United States’ ability to give food aid when it was most needed to save lives, and causing the United States to lose credibility with less developed countries. Joint Hearing, supra note 6, at 4; Walczak, supra note 5, at 567. See also Note, supra note 5, at 758.

7. See infra notes 16–22 and accompanying text.

8. Title II of P.L. 480 permits the shipment of food aid on a donation basis. P.L. 480 consists of three titles. Title I authorizes the United States to enter transactions with less developed countries in which the United States transfers grain to a foreign government which sells the grain and uses the proceeds for development projects. The foreign government incurs a long-term debt. Title II authorizes the donation of grain for feeding programs. Title III is the same as Title I, except that the foreign government does not incur a debt. For a clear comparison of the three titles of P.L. 480, see Walczak, supra note 5, at 547–65.

9. See infra note 22 and accompanying text.

10. See infra note 25 and accompanying text.

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relief, is constitutionally protected, and cannot be extinguished by subsequent congressional action without compensation. Such a private remedy would deter 11 the government from making a non-food aid use because it would have to pay for such a use.

This Comment proposes and evaluates two amendments to the legislation governing the emergency reserve that would help insulate the reserve from the market. 12 Insulation can be accomplished by creating and protecting certain contract rights of the farmer/vendor 13 against the United States government. The farmer could enforce those rights if the government released the reserve for purposes other than urgent humanitarian food aid. The Appendix contains proposed legislation which creates and protects such remedies. These proposals should contribute positively to public policy debate over methods of ensuring world food security. However, this Comment considers only the legal viability, not the political ramifications, of the remedies. 14 Although this Comment concludes that it is possible to create a legal scheme to effectively insulate the reserve, and recommends one proposal over the other, policy judgments are left to those in a better position to make them.

11. For the purposes of this Comment, deterrence is defined as discouraging another party from taking action by presenting the prospect of a cost or risk which outweighs prospective gain. See G. SNYDER, DETERRENCE AND DEFENSE 3 (1961). The effectiveness of deterrence depends on four factors: (1) the importance of the objectives of the party to be discouraged; (2) the cost the party expects to incur as the result of the possible responses; (3) the probability of each such response; and (4) the probability of still obtaining the objectives in light of each possible response. See id. at 12–13. At least with respect to crime, empirical studies show that changes in opportunity costs do have an impact on the effectiveness of deterrence, suggesting that Snyder's factors may be accurate. R. POSNER, ECONOMIC ANALYSIS OF LAW 164–65 (2d ed. 1977).

12. "Insulate" is used in a legal, not economic, sense. "Insulating" the reserve from the market means providing legal remedies that ensure that the reserve will not be released for purposes other than food aid. In economic terms, to "insulate" a reserve from the market would mean to ignore the reserve in the calculation of available grain supply so that it will not influence market behavior. The theory is that if no transfer occurs between the reserve and the market, the reserve cannot influence price behavior. COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, GRAIN RESERVES: A POTENTIAL U.S. FOOD POLICY TOOL 31 (1976) [hereinafter cited as GAO REPORT]. Indeed, Congress has stipulated that the reserve not be considered part of the available wheat supply for the purposes of other laws. Food Security Wheat Reserve Act of 1980, Pub. L. No. 96—494, tit. III, § 302, 94 Stat. 2578 (codified at 7 U.S.C. § 1736f-1(f) (1982)). It is impossible, however, to effectively insulate a reserve in the economic sense. All reserves release grain subject to specific operational rules which make it easy for market participants to anticipate the releases and adjust their market behavior accordingly. GAO REPORT, supra, at 31.

13. For the purposes of this Comment, "farmer" refers to any entity that sells wheat to the government for the purposes of the wheat reserve. This includes producers, since the government may also purchase grain from producers. 7 U.S.C. § 1736f-1(b)(2) (1982).

14. One political problem is the possible reluctance of Congress to tie its own hands by committing the government to pay for certain uses of the wheat, and in addition, reluctance to make appropriations to replenish the reserve where use of the grain would be restricted.
I. BACKGROUND

In 1980, Congress acted to ensure adequate food aid during future famines and grain shortages. The Food Security Wheat Reserve Act of 198015 authorized the creation of a wheat reserve of up to four million metric tons as a backstop to Title II.16 The purpose of the Act is to preserve

15. 7 U.S.C. § 1736f-1 (1982). A complete explanation of the Act may be found in H.R. REP., supra note 1, at 10-17.


Although a 500,000 ton International Emergency Food Reserve was established under the U.N. World Food Program in 1975, the negotiations for establishing an international system of reserves under the Wheat Trade Convention of the International Wheat Agreement have repeatedly failed. Coats, Gabanyu & Scommenga, *World Food Security, Bread for the World Background Paper No. 57* at 3-4 (Feb. 1982). See also Walczak, supra note 5, at 566-70. The Carter Administration's proposal for the creation of an International Emergency Wheat Reserve has also failed, Walczak, supra note 5, at 570, despite Congress' expression of intent that the President enter negotiations to create such a reserve. H.R. REP., supra note 1, at 2.


16. 7 U.S.C. § 1736f-1(a) (1982). Congress chose to store wheat because it is less costly to store and acquire than other processed foods, it is easily substituted for other coarse grains, it is the most widely traded grain worldwide, and it is the largest part of P.L. 480 programming. H.R. REP., supra note 1, at 10; *International Emergency Wheat Reserve: Joint Hearings Before the House Comm. on Int'l Relations and House Comm. on Agriculture*, 95th Cong., 2d Sess. 24 (1978) [hereinafter cited as *International Emergency Wheat Reserve*]. In addition, the Secretary of Agriculture testified at the House Hearings that wheat has the highest nutritive value relative to cost. *Joint Hearing, supra note 6*, at 4. The choice of wheat was also probably influenced by the Soviet grain embargo. The Food Security Wheat Reserve proposal was part of the bill designed to alleviate adverse effects of the trade suspension with the Soviet Union, and the bill was reported in the Senate Hearings along with other bills designed to mitigate the effects of the embargo. See *Emergency Agricultural Act of 1980: Hearings on S. 2258 Before the Senate Comm. on Agriculture, Nutrition, and Forestry*, 96th Cong., 2d Sess. 174-76 (1980) [hereinafter cited as *Senate Hearings*].

Congress should reconsider the decision to store only wheat in the reserve. Although different recognized forms of starvation require different nutritive supplements, the nutrients all famine victims need most are proteins, followed by calories. Wheat and rice are excellent sources of protein and are the best for emergency feeding programs. Soy and lentils also provide satisfactory levels of protein. In
the credibility of the United States’ commitment to alleviating hunger by guaranteeing the availability of aid during times of limited domestic supply.\textsuperscript{17} The Food Security Wheat Reserve was initially established through a transfer of grain from surplus stocks of the Commodity Credit Corporation ("CCC").\textsuperscript{18} The Act contemplates replenishment of old wheat through similar CCC transfers and purchases from producers or the market.\textsuperscript{19} It also provides that the grain may be released by the President \textit{only} for Title II purposes and \textit{only} under one of two circumstances: (1) where the domestic supply of wheat is insufficient to meet domestic demand, export demand,
and carryover needs,\textsuperscript{20} or (2) to provide urgent humanitarian relief for a major disaster in a developing country, as determined by the President, without regard to the domestic supply situation.\textsuperscript{21} These limitations on use enhance food security and ensure that the reserve will not be dumped on the market and depress grain prices to the detriment of the American farmer.\textsuperscript{22} Authority to replenish the reserve will expire September 30, 1990.\textsuperscript{23}

In 1983, Congress considered two bills which would have partially released the reserve for purposes other than food aid, one onto the domestic market and the other onto export markets.\textsuperscript{24} Congress passed the

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\textsuperscript{20} 7 U.S.C. § 1736f-1(c) (1982). This subsection authorizes the President to release reserve stocks even when P.L. 480 § 401(a) is triggered. Section 401(a) ordinarily prohibits distribution when the domestic supply is insufficient to meet domestic demand, export demand, and carryover needs. 7 U.S.C. § 1731(a) (1982). Section 401(a) caused the United States' inability to provide adequate food aid during the 1970's famine. See supra note 6.

\textsuperscript{21} 7 U.S.C. § 1736f-1(c) (1982).

\textsuperscript{22} Both the Act and its legislative history make clear that the reserve is intended solely for food aid under Title II of P.L. 480. See S. Rep. No. 676, 96th Cong., 1st Sess. 12 (1980); H.R. Rep., supra note 1, at 7, 10; Joint Hearing, supra note 6, at 2, 30, 47, 63. The restriction on use was intended not only to ensure food security but also to protect the American farmer. Separate Views of Hon. Margaret Heckler, H.R. Rep. pt. 2, supra note 6, at 40. Legislators were concerned that the reserve not depress domestic prices through either release or purchase for replenishment at a time when the domestic supply of wheat is low. See id. at 6-8, 19, 20, 39; Joint Hearing, supra note 6, passim.

Perhaps the major opponents to the establishment of the reserve were the American farming organizations. Grain reserves have traditionally had the effect of dampening prices; this is a highly controversial aspect of establishing any reserve. GAO Report, supra note 12, at 26–27. A particular concern of the farmers was that the wheat might be dumped onto the market and depress prices. Another concern is that reserves can "overhang" the market by dampening prices when market behavior changes in anticipation of the release of grain. See, e.g., H.R. Rep. pt. 2, supra note 6, at 32, 39 (statements of several representatives); Joint Hearings, supra note 6, at 68 (statement of the American Farm Bureau Federation); International Emergency Wheat Reserve, supra note 16, at 91–92 (statement of the Nat'l Ass'n of Wheat Growers). This has been a deeply imbedded and long-standing concern of the farming community regarding any government-held reserve. See Walczak, supra note 5, at 570 n.83; see also 101 Farm J. 64 (Nov. 1977); 101 Farm J. 72 (Oct. 1977); 99 Farm J. 50 (April 1975).

Farmers have also been concerned that Congress can be pressured into changing the purposes for and the circumstances under which a reserve can be released. If it does, they have little protection against those managing the reserves. See, e.g., 99 Farm J., supra, at 50 (editorial reflecting farmers' concern that voters can pressure Congress into changing the release trigger point for a reserve). See also International Emergency Wheat Reserve, supra note 16, at 92 (statement of W. Wilson, Vice President, Nat'l Ass'n of Wheat Growers). These fears were realized in 1983 when Congress enacted a bill that allowed release of the reserve for purposes other than relief. See infra note 25 and accompanying text.


\textsuperscript{24} The bills were S. 17, 98th Cong., 1st Sess. (1983) (see also companion House version H.R. 1590); and S. 822, 98th Cong., 1st Sess. (1983). The first bill passed. See infra note 25 and accompanying text. The latter bill would have given portions of the reserve as pro rata bonuses to foreign countries based on the amount of grain purchased from the United States. This latter bill was rejected. See Bread for the World, col. 1 (April 1983), for a brief explanation of the bills.
Temporary Emergency Food Assistance Act of 1983, permitting use of reserve stocks for domestic nutrition projects.\(^2\) The enactment of the bill demonstrated the inadequacy of a legislative guarantee limiting the use of the reserve. It showed that Congress might be pressured at any time to amend the language restricting the use of the reserve. This angered both farmers threatened by reduced prices and citizens concerned with the credibility of United States food aid commitments, who saw the measures as weakening food security.\(^2\)

**II. PROPOSALS FOR INSULATING THE RESERVE**

Now that the threat to food security has been exposed, Congress should consider corrective amendments that would more adequately protect the reserve from non-food aid uses than would a mere legislative prohibition. This Comment proposes two alternative solutions. Both involve contracts between individual farmers or producers and the government. One, however, is founded on property principles, while the other is founded on contract rights.\(^2\)

First, the farmer could retain, pursuant to a provision in the sales contract, a possibility of reverter in wheat sold to the government that is earmarked for the reserve. The possibility of reverter would become possessory upon a non-Title II use of the grain, so that the farmer could sue to recover the value of the property. In order to make a non-Title II use, then, the government would have to pay for the same grain twice. A non-Title II use would become too costly to the government and hence deter it from such a use.

Second, the farmer could sell wheat to the government under a contract that assesses liquidated damages against the government for a non-Title II

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\(^2\) The Temporary Emergency Food Assistance Act of 1983 allowed partial release of the Food Security Wheat Reserve to supplement various domestic nutrition projects. Pub. L. No. 98-8, tit. II, 97 Stat. 35 (codified at 7 U.S.C. § 612(c) (Supp I 1983)). Although it can be argued that use of the reserve for nutrition projects is worthy and in accord with the goal of alleviating hunger, such a use of the reserve is unwise. So long as domestic supply is ample to supplement the nutrition projects, use of the reserve for this purpose sets up an unnecessary conflict between future famine victims and those who would benefit from domestic nutrition projects. The purpose of the reserve is to ensure an adequate supply of wheat during a global grain shortage. Use of that wheat for other purposes, no matter how noble, when other wheat can be easily used, threatens food security. The eventual result of the current management of the stocks could be another episode of decreased food shipments in a famine, similar to the situation in the early 1970’s. See supra note 6 and accompanying text. That is precisely the problem Congress resolved to end when it created the reserve.

\(^2\) See Bread for the World, supra note 24, at 2, col. 1, for a good statement of the anti-hunger lobby’s opposition to the two bills. The article also notes the opposition of the Community Nutrition Institute and the National Farmers Union.

\(^2\) The concepts inherent in the property proposal involve future interests and are less familiar to farmers and legislators, but this alone should not lead to a rejection of the proposal. See infra notes 106-09 and accompanying text.
use. The damages specified would equal the market price of the disbursed wheat and the government therefore would be deterred in the same way as under the first proposal. Although such damages might be invalid as a penalty under common law, statutory law could authorize them for this specific use.

Either scheme could be created in the sales contracts for the wheat when originally sold to the government for purposes of replenishing the reserve. Such a new contract scheme would require legislative authorization. The proposed legislation is contained in the Appendix.

This Comment concludes that the future interest proposal is superior because the Constitution more adequately protects it from subsequent congressional repeal of the authorizing legislation. However, an evaluation of the desirability of risking a subsequent repeal turns upon social and political factors beyond the scope of this Comment. Ultimately, then, the selection of the better proposal is left to the policymaker.

A. Governing Law

Since the proposed schemes involve sales contracts, an initial consideration in analyzing the scheme is the law that should govern the contracts. Federal law, not state law, usually governs public contracts with the federal government. Although the *Erie* doctrine previously mandated the application of state law, an exception has been created for government contracts, especially for contracts entered into pursuant to authority conferred by federal statute. Hence, the contracts contemplated in this Comment will be interpreted according to federal common law. Although the federal common law for contracts has been developing since *Erie*, federal courts have had little occasion to develop a body of federal law dealing with the aspects of the future interest proposal. A court asked to interpret the


30. *See, e.g., cases cited supra note 29 and accompanying text; infra notes 34–37 and accompanying text.*

31. Research reveals no cases in which courts have applied federal common law on the creation of
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proposal might find it necessary to fashion new federal common law.\textsuperscript{32}

In fashioning post-\textit{Erie} federal common law, a court may rely on all source materials of common law,\textsuperscript{33} including pre-\textit{Erie} federal law,\textsuperscript{34} state law,\textsuperscript{35} and federal policy.\textsuperscript{36} Where a rule of law is nearly unanimously accepted among state jurisdictions, it is likely to be absorbed into federal common law.\textsuperscript{37} State law, which is almost unanimous in its treatment of the possibility of reverter, then, is a probable source for the courts in fashioning law for the interpretation of the contracts. This is especially so since property law is traditionally the domain of the state court and not the federal court. Hence, state law is drawn upon in the following property discussion.

\textbf{B. Future Interest Proposal}

Under one proposed alternative, in order to ensure compliance with Title II, the farmer would retain a possibility of reverter in the wheat that the farmer sells to the government.\textsuperscript{38} The government would purchase a fee

possibilities of reverter in personal property or consumable property or on the alienability of future interests.

32. For instance, a court may have to go beyond mere statutory interpretation to fashion a body of federal common law pertaining to the nature of the fee simple determinable and possibility of reverter, in the context of the reserve, to aid in the interpretation.

33. \textit{See Clearfield}, 318 U.S. at 367 (federal courts may rely on their own standards); United States v. Best, 573 F.2d 1095 (9th Cir. 1978).

34. \textit{Clearfield}, 318 U.S. at 367; \textit{see}, e.g., Priebe & Sons v. United States, 332 U.S. at 411-13 (Court relied on pre-\textit{Erie} federal law to interpret a post-\textit{Erie} government sales contract); Francis v. Southern Pac. Co., 333 U.S. 445, 449-50 (1948) (Court used pre-\textit{Erie} decision on railroad's liability to those riding with free passes to fashion a post-\textit{Erie} construction of the Hepburn Act). \textit{See also} Francis v. Southern Pac. Co., 333 U.S. at 452 (Black, J., dissenting) (federal courts should not automatically rely on a pre-\textit{Erie} rule without appraising its soundness in relation to modern policy).

35. Board of Comm'rs v. United States, 308 U.S. 343, 351-52 (1939); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957); United States v. Crain, 589 F.2d 996, 999 (9th Cir. 1979); \textit{see}, e.g., United States v. Seckinger, 397 U.S. at 211 n.15 (Court relied on state decisions in fashioning federal common law); Clem Perrin Marine Towing v. Panama Canal Co., 730 F.2d 186, 189 (8th Cir. 1984); United States v. Conrad Publishing Co., 589 F. 2d 949, 953 (8th Cir. 1978); United States v. Hext, 444 F.2d 804, 809-11 (5th Cir. 1971) (UCC as a source of federal common law).

36. Although federal policy is not generally used as a source of common law, it is relied upon in the sense that state law may not be absorbed into federal law where it is inconsistent with federal policy. Board of Comm'rs v. United States, 308 U.S. 343, 351-52 (1939); United States v. Crain, 589 F.2d 996, 999 (9th Cir. 1979); \textit{accord} Francis v. Southern Pac. Co., 333 U.S. 445, 452 (1948) (Black, J., dissenting) (federal courts should not automatically rely on a pre-\textit{Erie} rule without appraising its soundness in relation to modern policy).

37. \textit{See}, e.g., United States v. Seckinger, 397 U.S. at 211; Clem Perrin Marine Towing v. Panama Canal Co., 730 F.2d 186, 189 (8th Cir. 1984); United States v. Conrad Publishing Co., 589 F.2d 949, 953 & n.4 (8th Cir. 1978); United States v. Hext, 444 F.2d 804, 809-10 (5th Cir. 1971).

38. A possibility of reverter is a future interest which automatically becomes possessory upon the occurrence of a stated event; it is the future interest which follows the fee simple determinable. L. SIMES & A. SMITH, \textit{THE LAW OF FUTURE INTERESTS} § 281 (2d ed. 1956); \textit{RESTATEMENT OF PROPERTY} § 154 (1936).
simple determinable title in the reserve wheat rather than a fee simple absolute. To accomplish this, the sales contract would stipulate that the government holds title to the grain "so long as" it does not dispose of the wheat in a manner inconsistent with Title II or the replenishment provisions of the Food Security Wheat Reserve Act. The determinable fee would terminate, and title would revert back to the farmer, if the government used the wheat for any purposes other than Title II. The owner of the possibility of reverter, once it became possessory upon violation by the government, would have an enforceable remedy.

However, the future interest remedy could not merely be agreed upon by the farmer and the government, with the assumption that common law will recognize their agreement. Rather, the remedy would require statutory authorization for several reasons. Under common law, a possibility of reverter cannot be created in wheat. Furthermore, even if it could be created in wheat, the farmer would be forced to pursue third party donees/vendees in order to enforce the remedy. The farmer would also have little protection against government condemnation of the wheat. The proposed legislation easily resolves these common law problems.

1. Creation of the Future Interest in Wheat

The proposed legislation expressly states that a possibility of reverter may be created in the reserve wheat even though it is consumable. Although future interests may generally be created in personal property,
they may not be created in consumable goods, and an attempted transfer of a future interest in consumables is usually taken as a transfer of a fee simple absolute.\(^4\) Wheat is considered a consumable good for the purposes of this rule.\(^4\) This common law problem, however, can be overcome by legislative fiat, and hence, the proposed amendment states that a possibility or reverter can be validly created in wheat sold for the reserve.

2. \textit{Proper Defendants and Theories of Recovery}

The legislation provides that the farmer may sue the government directly to recover the value of his or her grain. This is necessary to prevent the farmer from having to identify and pursue multiple defendants.

So long as a future interest was validly created in the grain, title to the grain would revert to the farmer whenever the government used the grain for a non-Title II purpose. Non-Title II uses triggering the reverter clause would consist of sale, consumption by a party, or donation to a party other than a recipient under Title II of P.L. 480.\(^4\) All of these uses involve a transfer from the government.\(^4\)

Under common law, the owner of a possibility of reverter, once possessory, would sue the party in possession of the property in order to regain possession. Therefore, the farmer, as the injured party, would generally sue the buyers or donees rather than the government.\(^4\)

\(^{43}\) No federal law exists on this issue. However, this appears to be the majority state rule. \textit{See}, e.g., Schowalter v. Schowalter, 217 Ala. 418, 116 So. 116, 118 (1928), \textit{later app.} 128 So. 458 (1930); Hall's Adm'r v. Hall's Ex'r, 265 Ky. 528, 97 S.W.2d 23, 25 (1936); Davison's Adm'r v. Davison's Adm'x, 149 Ky. 571, 149 S.W. 982, 983 (1912); Whittemore v. Russell, 80 Me. 297, 14 A. 197, 198 (1888); Innes v. Potter, 130 Minn. 320, 153 N.W. 604, 606 (1915); Poindexter v. Wachiova Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867, 875 (1963); Willard v. Weavil, 222 N.C. 492, 23 S.E.2d 890, 892 (1943). \textit{See also} Leach v. McCreary, 183 Tenn. 128, 191 S.W.2d 176, 178 (1945)(dicta); L. Simms, \textit{supra} note 42, § 8, at 15. \textit{But see In re Marriage of Voloshin, 652 P.2d 1096, 1099 (Colo. App. 1982)} (language of written property agreement overcomes rule); Walker v. Pritchard, 121 Ill. 221, 12 N.E. 336, 337-38 (1887) (language of will controls; remaindermen whose interest follows a life-estate in consumables are entitled to that which was not consumed following the legatee's death).

\(^{44}\) Walker v. Pritchard, 121 Ill. 221, 12 N.E. 336 at 337–38; Davison's Adm'r v. Davison's Adm'x, 149 Ky. 571, 149 S.W. 982, 983 (1912); cf. Henderson v. Vaulx, 18 Tenn. (10 Yer.) 30, 34 (1836) (corn); \textit{see also} Meyer v. Martin, 351 Ill. 386, 184 N.E. 617 (1933) (chattel mortgage invalid due to consumable nature of corn, straw, hay).

\(^{45}\) For example, the Temporary Emergency Food Assistance Act of 1983, 7 U.S.C. § 612(c) (Supp. 1983), authorized release of Food Security Wheat Reserve Stocks on a donation basis to supplement domestic nutrition programs. \textit{See supra} notes 24–25 and accompanying text.

\(^{46}\) The only non-Title II use that does not clearly involve transfer is consumption. However, courts have held that giving authority to consume property is tantamount to transfer of a fee simple absolute. \textit{See} Poindexter v. Wachiova Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867, 875 (1963); Davison's Adm'r v. Davison's Adm'x, 149 Ky. 571, 149 S.W. 982, 983 (1912).

\(^{47}\) The buyer/donee's liability to the farmer may be based on more than one theory. First, one who receives chattel, with the intent to acquire ownership (the buyer/donee), from one who has no authority
property, with respect to which most future interest cases arise, it is easy to identify the property and the possessor. In the case of fungible goods like grain, however, it is very difficult to identify and locate the buyers or donees. Potential defendants could be numerous.48

More importantly, requiring the farmer to sue the third party would weaken the deterrent effect on the government, the major goal of the legislation, because the penalty to the government would never arise unless both the farmer’s suit and the buyer’s subsequent suit against the government for transfer of void title were successful. To resolve this problem, the legislation stipulates that the possibility of reverter would attach to the proceeds of the government’s sale or to CCC assets which the government would hold in trust for the farmer/vendor.49 The farmer could then pursue his or her remedy against the government directly.

3. Provision for Condemnation of the Future Interest

The proposed legislation also provides that if the possibility of reverter is condemned, it would be compensable and valued at the market price of the same grade and amount of grain. This would ensure the same degree of deterrence that the scheme provides when condemnation does not occur.

Since the farmer’s possibility of reverter is a property interest, it can be condemned.50 A taking by condemnation is usually defined by the courts as the state’s deprivation of ownership of private property without consent and for public use, with just compensation.51 Even if the amendments proposed in this Comment protected the farmer against transfers to third parties, the government could still condemn the possibility of reverter prior to any

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48. The number of defendants would depend on the number of parties to whom the government sold or donated wheat. For instance, if the government donated the wheat to domestic feeding programs, thousands of parties across the country might eventually come into possession of some of the wheat.


Although the United States can validly act as a trustee, such a trust may be difficult to enforce because of the sovereign’s immunity to suit. This can be overcome by a statute permitting the party to sue. See, e.g., United States v. Mitchell, 445 U.S. 535, 538 (1980); see also 2 A. Scott, supra, at § 95. A provision in the proposed amendments expressly permitting suit to enforce the trust should solve the problem. See supra note 18 for the nature and purpose of the Commodity Credit Corporation.

50. See generally L. Simes, supra note 42, at § 54; RESTATEMENT OF PROPERTY § 53 comments a & b (1936).

non-complying disposition of the wheat. Often, when the government contemplates taking private land for public use, it will negotiate a sale with the private party. If the private party does not accept a government offer, the government will commence condemnation proceedings in which the court determines the amount of compensation.

The deterrent value of the farmer's remedy would be lost unless the farmer could demand an amount of compensation for the taking that would be as costly to the government as purchase of the same amount and grade of wheat on the market. In order to guarantee an amount of compensation sufficient to deter the government, the legislation resolves two issues in favor of the farmer. First, the legislation stipulates that the farmer's possibility of reverter would be compensable. Second, because courts will distribute the amount of just compensation between the holder of the fee simple determinable (the government) and the holder of the possibility of reverter (the farmer), the legislation enables the farmer to claim a sufficient proportion of the award.

At common law the farmer would not always be entitled to compensation where the government condemned the wheat before converting it to a non-Title II use. According to the majority rule, the farmer would be entitled to compensation only if the occurrence of the event that would terminate the determinable fee were imminent. A minority rule uses the test of

52. J. Sackman, supra note 51, at § 5.01.
53. Id.
54. Appendix, subsection (b)(3)(C) (future interest alternative).
56. The only clear example of a situation in which the farmer would have a right to compensation under the common law is where the government used the wheat for a non-Title II purpose before condemning it. See, e.g., Stephenson v. Cavendish, 134 W. Va. 361, 59 S.E.2d 459 (1950) (where the event which terminates a fee simple determinable occurs before condemnation, the holder of the possibility of reverter, rather than the holder of the determinable fee, is entitled to compensation); see generally 27 Am. Jur. 2d Eminent Domain § 251 (1966); Annot., 81 A.L.R. 2d § 4, at 568, 578 (1962) [hereinafter cited as Annot.]. The compensation referred to here is distinct from the relief afforded by the proposed legislation upon the occurrence of a non-Title II use. The latter is based on a claim to the ownership of the wheat by reason of the future interest having become possessory. The compensation discussed here is that which the government is constitutionally required to pay a property owner upon condemnation of the property.

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imminence but would give the farmer a nominal award even if the terminating event were not imminent. 58 Very little case law exists in this area, 59 but courts, although purporting to allow compensation according to the majority rule, have shown reluctance to find that the terminating event was imminent and allow recovery. 60

In no reported case has the government-owner of a determinable fee condemned a possibility of reverter to avoid transfer of title upon the occurrence of a terminating event. 61 In such a situation, it is possible that a court would find bad faith on the part of the government and award the farmer compensation. 62 However, without a case on point it is difficult to

an easement). See generally Annot., supra note 56, § 2, at 570.

Condemnation itself could not be considered a non-Title II use. Courts hold that the mere taking of land by condemnation and the subsequent use for purposes other than those specified in the conveyance does not result in a breach converting the future interest into a present interest. Annot., supra note 56, § 2, at 571; L. SIMES, supra note 42, § 54, at 119; Restatement of Property 53 comment b (1936); Stoyles, supra note 55, at 252 n.63, 253-54; Comment, The Effect of Condemnation Proceedings by Eminent Domain Upon a Possibility of Reverter or Power of Termination, 19 VILL. L. REV. 137, 157 (1973). Federal decisions are in accord with this rule. 635.76 Acres of Land, 319 F. Supp. at 767; 16 Acres of Land, 47 F. Supp. at 604; 1119.15 Acres of Land, 44 F. Supp. at 449-50. See 726.23 Acres of Land, 746 F.2d at 1364 (imminence independent of the taking is required). See also Land Clearance v. St. Joseph, 560 S.W.2d 285, 288-89 (Mo. App. 1977); L. SIMES, supra note 42, § 54, at 119 (list of federal decisions following this rule). The owner is entitled to the value of the future interest as if eminent domain proceedings were not imminent. The value, however, is usually insignificant. L. SIMES, supra note 42, § 54, at 119. See, e.g., 635.76 Acres of Land, 319 F. Supp. at 768.

A related issue is whether the existence of the condemnation proceedings themselves may be used as evidence of imminence of a non-Title II use of the wheat. It could be argued that the government would not initiate condemnation proceedings unless a non-Title II use is contemplated and is an immediate prospect. Such contemplation, in turn, indicates the existence of necessary imminence. However, research reveals no cases addressing the use of condemnation proceedings as evidence of imminence. (This dearth of case law may be attributable to the rare instance of the federal government holding a possessory estate. When it does hold a possessory estate, the terminating event is often the cessation of a public interest use. Because the government can condemn property only for a contemplated public use, condemnation of a government held possessory estate would be even more rare.) Condemnation could only be used as evidence of imminence where the government, which holds the power to condemn, also is capable, as holder of a possessory estate, of terminating the possessory estate. This would be an issue of first impression.


59. See generally L. SIMES, supra note 42, § 54, at 119; Annot., supra note 56; 27 AM. JUR. 2D Eminent Domain § 251 (1966).

60. See generally Stoyles, supra note 55, at 247; Comment, Compensation for Possibilities of Reverter and Powers of Termination Under Condemnation Law, 20 HASTINGS L.J. 787 (1969); Annot., supra note 56, at 577.

61. Research reveals no reported case on this issue. Because the government can condemn only for public use, condemnation of the government's own determinable fee would be rare. In most cases in which the government holds a determinable fee, it is for public purposes, such as for a park, and the terminating event is the cessation of public use. See supra note 57.

guarantee that the farmer would be compensated, and it is advisable to resolve the problem with a legislative scheme which stipulates that the farmer's possibility of reverter is compensable regardless of the imminence of a non-food aid use before the taking.

Even if the farmer were entitled to compensation, the common law rules for distributing compensation between the owner of the future interest and the holder of the fee simple determinable would not guarantee the farmer an amount of compensation sufficient to deter the government from disposing of wheat for non-Title II purposes. If the farmer were entitled to compensation, the award would be distributed so as to fairly represent the proportionate value of the government's and the farmer's respective interests. Both the holder of the defeasible fee and the future interest would receive a portion of the award, and the exact division may depend on the imminence of the terminating event. For instance, the owner of the future interest is entitled to the entire award so long as the eminent domain proceedings take place after the event which terminates the defeasible fee. However, the rules for distribution are not well formulated; very little case law has emerged and the farmer would be guaranteed no more than a nominal award. The failure to guarantee adequate compensation for the farmer's future interest would undermine any common law scheme for insulating the reserve. Adequate compensation must be statutorily mandated if the reserve is to be insulated.

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63. Midwestern Developments v. Tulsa, 374 F.2d 683, 688 (10th Cir. 1967); United States v. 2,184.81 Acres of Land, 45 F. Supp. 681, 684 (W.D. Ark. 1942) (following Restatement rule); State v. Independent School District, 266 Minn. 85, 123 N.W.2d 121, 128, 129-30 (Minn. 1963) (following Restatement rule; using a well-defined formula); RESTATEMENT OF PROPERTY § 53 comment c (1936); Annot., supra note 56, § 3, at 576.

64. Again, no case law is apparent in this area. In only one case has a court even found the requisite imminence, so that the issue of how the award should be distributed was reached. In that case, the court gave the value of the land to the holder of the possibility of reverter and the value of a school building on that land to the holder of the defeasible fee. United States v. 2184.81 Acres of Land, 45 F. Supp. 681 (W.D. Ark. 1942). See also Chew v. Commonwealth, 400 Pa. 307, 161 A.2d 621 (1960) (remanded to trial court for consideration of how award should be distributed between parties). The lack of case law on this issue has also been noted in Comment, The Effect of Condemnation Proceedings by Eminent Domain Upon a Possibility of Reverter or Power of Termination, 19 Vill. L. Rev. 137, 158 (1973); and Annot., supra note 56, § 3, at 576, and § 4, at 578. The absence of any definitive law makes it difficult to predict how courts will respond in the future.


66. See supra note 64.

67. See appendix, subsection (b)(3)(C) (future interest alternative).

Several cases have held that Congress does not have the power to set the level of compensation since this is exclusively a judicial function. See, e.g., Miller v. United States, 620 F.2d 812 (Cl. Ct. 1980); United States v. Bauman, 55 F. Supp. 109 (D.C. Or. 1943). However, it appears that the purpose of this
The statute, then, remedies the uncertainties inherent in current common law regarding reverters. A common law scheme based on a farmer’s possibility of reverter alone would not be effective in providing a remedy against the government for a non-Title II disposition of the wheat. The statute would permit the creation of a possibility of reverter in the wheat, as a consumable good, and would also guarantee the farmer adequate compensation if the wheat is condemned. The statutory scheme would also make it easier for the farmer to pursue a remedy because it would allow the farmer to sue the government rather than pursue the third party recipient of the wheat.

C. Liquidated Damages Proposal

The alternative proposed legislation would require two provisions in the contract of sale. One provision would make it a breach of contract for the government to use the grain for non-Title II purposes and the other would be a liquidated damages clause making the government liable to the farmer for the market value of the dispensed grain if the contract were breached. The legislation also provides that the liquidated damages clause would not be invalid as a penalty.

Liquidated damages may be used in government contracts, but are usually assessed against the private party. Liquidated damages, however, when assessed against the government, would deter the government from selling the grain. Statutory authority would be necessary to make such a liquidated damages clause enforceable against the government. At common law, a liquidated damages clause is not valid and enforceable if it amounts to a penalty. Yet, in order for the liquidated damages clause to have any

rule is to protect condemnees from receiving less than the potential judicially determined amount of just compensation. Several cases have held that Congress is free to set a level of compensation that is higher than that which is constitutionally required. See, e.g., United States v. Fuller, 409 U.S. 488 (1973); United States ex rel. Tenn. Valley Authority v. Indian Creek Marble Co., 40 F. Supp. 811 (D.C. Tenn. 1941); Confederated Salish & Kootenai Tribes v. United States, 181 Ct. Cl. 739 (1967). Since the most the holder of a possibility of reverter can receive in a condemnation award is the market value of the property as if taken as a fee simple absolute, the proposed legislation will not deprive the farmer of his or her constitutional rights and should overcome the above constitutional barrier.


69. Research reveals no reported case in which liquidated damages were assessed against the government.


Courts use three factors in determining whether a liquidated damages clause is enforceable. See
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deterrent effect on Congress, it must provide for a significant amount of damages. Such a provision might be held a penalty.\textsuperscript{71} Where a \textit{statute} authorizes a liquidated damages clause that amounts to a penalty, however, the courts enforce the clause.\textsuperscript{72} A clause providing that the government pay the farmer the market price\textsuperscript{73} of the wheat purchased through the sales contract would effectively deter the government from disposing of the reserve grain since the government could more easily and as cheaply purchase grain off the market for a non-food aid use.

\section{III. CONSIDERATIONS RELEVANT TO BOTH PROPOSALS}

\subsection{A. Sovereign Immunity}

The efficacy of both proposals depends on the farmer's ability to contract with and sue the United States government if necessary. The sovereign immunity of the United States would frustrate the proposals if the government did not consent to contract and to be sued.

Although it would be unconstitutional for the government to commit itself not to exercise a particular sovereign power, such as its power to dispose of wheat for a non-Title II purpose, it can commit itself to pay damages resulting from that exercise.\textsuperscript{74} The government is immune from suit, however, unless a waiver of sovereign immunity is unequivocally expressed.\textsuperscript{75} The proposed legislation authorizing such damages contains

\begin{itemize}
  \item \textit{See} United Order of Am. Bricklayers & Stone Masons Union v. Thorleif Larson & Son, 519 F.2d 331, 332-33 (7th Cir. 1975). \textit{See generally} J. CALAMARI & J. PERILLO, \textit{supra}, § 14-31, at 565. First, the amount of loss resulting from breach must be difficult or impossible to estimate. Finkle v. Gulf & Western Mfg. Co., 744 F.2d 1015, 1021 (3d Cir. 1984) (Pa. law); \textit{see also} Priebel & Sons, 332 U.S. at 411 (dicta). Second, the parties must intend to provide for damages, not penalties. \textit{Id.} Third, the sum must be a reasonable estimate of the loss. Kothe v. R.C. Taylor Trust, 280 U.S. 224, 226 (1929).

  \item The injury to the farmer/vendor is the loss of profits due to the depressed prices resulting from release of the grain. \textit{See supra} notes 22, 26 and accompanying text. Although the loss incurred by the agricultural community as an interest group from the release of the reserve onto the market may be significant, the loss sustained by any one particular farmer-vendor could be minimal. Since the remedy belongs to the farmer-vendor as an individual, any liquidated damages clause requiring the government to pay the farmer the entire market price of the grain would not be considered a reasonable estimate of the loss.


  \item The market price is determined by the quoted price for the same grade of wheat on the Chicago Board of Trade, either on the date of original purchase or disposal, whichever is higher. Appendix, subsection (b)(3)(B) (liquidated damages alternative).


\end{itemize}
an unequivocal waiver and would thus overcome any sovereign immunity defense.

B. Changes in Accounting Procedures

Several aspects of the proposed schemes require specific accounting procedures to make them effective. First, the legislation stipulates that a first-in, first-out (FIFO) procedure will determine which farmers have an interest in grain which is released for non-Title II purposes. Second, the availability of CCC stocks for replenishment, although necessary to guarantee an adequate supply of wheat in the reserve, weakens the deterrent effect of the proposed scheme. If some of the wheat in the reserve were to be transferred from the CCC, the farmer would have no interest in that wheat, and the government could release it without incurring liability. Various accounting procedures would mitigate the problem.

If many farmers sold wheat for the reserve, and only a part of the reserve were released, it would be necessary to identify which farmers had an interest in the released wheat. This difficulty can be addressed by using a FIFO accounting system\(^7\) to identify which farmer would have an interest and hence could sue the government.

However, the effectiveness of the remedies and FIFO assume that the disposed wheat was originally acquired through a contract of sale with the farmer. In reality, the reserve must be replenished by transfers of wheat from CCC stocks whenever the Secretary of Agriculture determines that purchases would “unduly disrupt” the market.\(^7\) At any one time, then, the wheat in the reserve could be composed of wheat in which the farmer has an interest and wheat acquired from the CCC. Wheat from the CCC would not be subject to any of the contract provisions and the government would be free to dispose of that wheat as it wished without becoming liable to a farmer.\(^7\) This would weaken the deterrent effect of the proposed schemes.

\(^{76}\) First-in, first-out is an inventory method which assumes, for the purposes of calculating the costs of goods sold, that the goods acquired first are sold first. M. Granof, Financial Accounting: Principles and Issues 292 (2d ed. 1980); E. Faris, Accounting for Lawyers 135 (3d ed. 1975). The proposed procedure works in the same way, except that it is used to identify which vendor has an interest in the grain disposed of, not the cost of such grain.

\(^{77}\) 7 U.S.C. § 1736f-1(b)(2) (1982). See supra note 18 for the nature and purpose of the CCC.

\(^{78}\) Several alternative ways of dealing with the CCC exist but they are less desirable. The problem should not be solved by eliminating transfers from the CCC. Such a solution would frustrate the very purpose for which the reserve was created: food security. See GAO Report, supra note 12, at 8 (food supply stability is a primary objective of United States food policy); see also supra notes 15–22 and accompanying text. The Food Security Wheat Reserve Act states that the government can only replenish the reserve by making purchases on the market or from producers where the Secretary of Agriculture determines that doing so will not unduly disrupt the market. 7 U.S.C. § 1736f-1(b)(2) (1982). Otherwise, replenishment must be accompanied by transfer from the CCC because such a
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Deterrence could be strengthened if two goals were accomplished: first, the percentage of wheat in the reserve in which farmers have an interest should be increased to the greatest extent possible, and second, wheat released for Title II purposes should be considered CCC acquired wheat (to the extent that wheat acquired from the CCC was in the reserve at the time of the Title II use). An accounting procedure governing which wheat would be disposed of first and the sources from which the government must first replenish the reserve would achieve these goals.

The FIFO accounting procedure stipulates that whenever the government disposes of wheat for a non-Title II use, the wheat that was acquired through sales contracts is disposed of first, in the order that the wheat was acquired through the individual sales contracts. Wheat acquired through transfers from the CCC would be disposed of only after all the wheat in which the farmers had an interest was dispersed. Hence, if any wheat in the reserve was acquired on the market, the government would be liable for a non-Title II disposition of wheat, but the total amount of damages would transfer would not interfere with the market.

If the legislation proposed that all CCC transfers be eliminated but that the market still be protected from undue disruption, the government could only purchase wheat for the reserve at times when the Secretary of Agriculture determined the market would not be "unduly disrupted." In that case, the reserve might need to be replenished after a Title II release but the government would lack authority to acquire the needed wheat, since it would disrupt the market. Less reserve wheat would then be available for subsequent famine relief. This scenario would be very likely when wheat is released for Title II purposes. Because the wheat could only be released when the Secretary of Agriculture has determined the domestic supply is quite low, see supra note 20 and accompanying text, purchase in the market would be likely to drive up prices and "unduly disrupt" the market; therefore the Secretary would probably forbid replenishment. Such a circumstance would not be conducive to food security.

Another possible solution is to eliminate the "unduly disrupt" language, so that the reserve would never have to be replenished from the CCC. Elimination of the "unduly disrupt" language would not be wise since the restriction helps maintain both the farmer's income and reasonable prices for the consumer (both of these have been objectives of United States food policy) by regulating the supply. GAO REPORT, supra note 12, at 8. A disruption of the market could frustrate these goals. This is why insulation of the reserve must be accomplished without eliminating transfers from the CCC.

A third alternative would be to require all CCC acquisitions to conform to the amendments proposed by the Comment, so that the farmers have an interest in wheat sold to the CCC and then transferred to the reserve from the CCC. This method would be effective but probably amounts to too great an overhaul of the CCC's normal methods of procurement to be attractive to Congress. Congress would probably consider the administrative costs of overhauling the procurement process and the implementation of accompanying accounting procedures too cumbersome. The accounting problem is compounded by the fact that not all grain held by the CCC is acquired through sales contracts, so that it would be impossible to subject all the CCC acquisitions to the proposals in this Comment. Some of the CCC stocks are obtained as collateral when a farmer defaults on a loan. 7 U.S.C. § 1425 (1982). See also 7 C.F.R. § 1421.1 & 1421.17(a)(1) (1983); UNITED STATES DEP'T OF AGRICULTURE, REPORT OF THE FINANCIAL CONDITION AND OPERATIONS OF THE COMMODITY CREDIT CORPORATION 6 (September 30, 1983). The government has title to such grain free from any restriction or encumbrance and could dispose of it without creating liability to the farmer. The CCC's own accounting procedure would have to require that such grain is transferred to the reserve last.
depend on the amount of wheat released and the percentage that was acquired on the market.

If this method were used, the effectiveness of the insulation would depend on the percentage of wheat in the emergency reserve that was originally acquired through purchase. The deterrent effect on the government would increase proportionately as the percentage of such wheat increased. If the percentage of wheat acquired by purchase is small, the government could dispose of it without incurring much cost, but if the percentage is high, a non-Title II disposal would be costly.

In order to increase its deterrent effect, the legislation proposes that the above accounting procedure be coupled with a statutory requirement that the government maximize the percentage of purchased wheat in the reserve and minimize the percentage of wheat transferred from the CCC. The government would be required to seek wheat for replenishment in the market before turning to the CCC. The statute also stipulates that whenever the government purchases wheat off the market, the wheat purchased first shall be earmarked for the Food Security Wheat Reserve, to the extent needed for replenishment. Once enough wheat were purchased to replenish the reserve, wheat could be acquired for other purposes.79

C. The Farmer's Ability to Sue

The proposed legislation does not contain any provision that makes it easier for the farmer to sue the government. Effective insulation of the Food Security Wheat Reserve would be achieved in large part by making the government vulnerable to suit by the agricultural community for a non-food aid use of the reserve. Insulation would be most effective when the threat of a lawsuit were greatest. Several methods of enhancing the farmer's ability to sue are possible, including allowing assignment of the farmer's claim to an entity more able to sue, awarding attorney's fees, and giving the farmer who prevails a tax credit. However, since the selection of the best of these suggested solutions requires balancing of competing social, economic, and political factors, policymakers must decide which is most appropriate, most feasible, and most acceptable.

Normally, there should be no serious impediment to a farmer's ability to enforce his rights. Rarely would an issue of fact arise in a farmer's cause of action. The major factual element would be the government's release of grain, and this is unlikely to be contested. Hence, the filing of a claim or a

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79. The government regularly acquires grain for CCC stockpiles. See supra note 18. The Secretary of Agriculture has authority to purchase wheat for price support programs, 7 U.S.C. § 1445b-1 (Supp. 1984); and for the Producer Reserve Program. Id. § 1445e(h).
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...summary judgment motion would often be the only action necessary for the farmer to obtain settlement or judgment.

Should the government contest issues of fact and law, however, resolution out of court would be far less likely. Litigation would then be necessary. Unless provisions are made to make it easier for the farmer to sue, the expense and trouble of litigation could exceed the personal value of a favorable judgment and deter the farmer from pursuing a lawsuit. For this reason, it is important to have a provision in the proposed legislation enabling the farmer to easily pursue litigation. Attorney’s fees or a tax credit would be effective because they would reduce the the farmer’s costs.

The other suggestion is to allow the farmer to assign the claim to an organization more able to bring suit, even though such assignments otherwise would be void under current statutory and common law. Class action suits would also enhance the farmer’s ability to sue.

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80. For instance, the government might contest the constitutionality of a provision in the legislation.

81. One possible organization is the Family Farm Legal Defense Fund. It was organized to pursue litigation of interest to the agricultural community and would accept the assignment of a claim from an individual farmer in the right circumstances. Telephone interview with DeVon Woodland, Director of the Family Farm Legal Defense Fund (Jan. 10, 1986) (notes on file with the Washington Law Review).

82. No federal case law is available on the alienability of future interests. Although future interests were once considered non-alienable under common law, the modern trend is to allow alienability. See Krick v. Klockenbrink, 242 N.E.2d 848, 852 (Ind. App. 1968). See generally RESTATEMENT OF PROPERTY § 159 (1936); Note, Future Interests: Alienability of Possibility of Reverter, 45 CORNELL L.Q. 373, 377 (1960). Some states have made the change by statute and others by judicial decision. A compilation of such decisions and statutes may be found in 53 A.L.R. 2d 224, 234 (1957).

Assignment of the contract under the liquidated damages proposal requires further analysis. Although contract rights are generally assignable, Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 210 (9th Cir. 1957); see generally J. CALAMARI & J. PERILLO, supra note 70, § 18-7, at 640, assignments are subject to restrictions. Contract rights are not assignable if the assignment would: (1) materially alter the duty of the other party, (2) increase materially the burden or risk borne by the other party, or (3) materially impair the other party’s chances of obtaining return performance. See generally J. CALAMARI & J. PERILLO, supra note 70, § 18-7, at 640; RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(a) (1981); U.C.C. § 2-210(2). These exceptions would not apply to the sales contracts contemplated in this Comment: because the farmer has already performed, the government’s duty, risk, and chance of obtaining return performance could not be affected.

However, government contracts are subject to special limitations. A federal anti-assignment statute voids any attempted assignment of certain claims against the government. The Assignment of Claims Act, 31 U.S.C. § 3727 (1982); and 41 U.S.C. § 15 (1982). This Act was held to prohibit the assignment of claims against the United States government based on breach of contract in Bolivar Cotton Oil Co. v. United States, 95 Ct. Cl. 182 (1941). See generally J. CALAMARI & J. PERILLO, supra note 70, § 18-13, at 646; 4 A. CORBIN, CONTRACTS § 857, at 410 (1951). In order to resolve any doubt that the contracts are assignable, the proposed amendments specifically provide that the contract may be assigned at the farmer’s option.
D. Effect of Subsequent Repeal or Amendment of the Act

Just as the reserve requires insulation from non-food aid uses, the rights created under the proposed legislation would require constitutional protection from subsequent legislative abrogation. Parties to contracts based on either the property proposal or the liquidated damages proposal would depend on the ability of the legislation to make remedies legally enforceable where they would not be under common law. However, the danger in creating enforceability by statute lies in the possibility that Congress might subsequently repeal the legislation or retroactively change the sections validating the remedies. With such changes, the remedies would no longer be recognized and deterrence from making a non-Title II use would be lost. However, the fifth amendment determines the constitutionality of retroactive changes and might require the government to compensate individuals whose rights have been abrogated by changes in legislation; the Constitution would probably require the government to compensate the farmer for the extinguished possibility of reverter, but the case for compensation of the contract remedy is not as strong. To the extent that the fifth amendment does mandate compensation, it would deter the government from making retroactive changes, especially if those changes were made to avoid liability for an anticipated non-Title II use.

The due process clause of the fifth amendment determines the constitutionality of legislation that retroactively abrogates a contract or property right. Although a variety of tests under the due process clause have been suggested, most commentators agree that the test varies according to the

83. See supra notes 38-73 and accompanying text.


For contract rights, see, e.g., Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571 (1934).


85. The traditional test is whether the legislation extinguishes a "vested right," but the test begs the
category of retroactive legislation. For instance, courts are likely to uphold the constitutionality of retroactive legislation related to an emergency, taxation, or legislation that is curative. If the legislation has only a general retroactive effect, and the public interest served is not great, the court is more likely to find it unconstitutional. Underlying the tests and the courts’ reaction to the various categories is a balance between the interests of the party whose rights have been abrogated and the public interest served by the retroactive legislation. A court is much more likely question since the definition of a “vested right” is a right that cannot be taken away by statute. See Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist., 739 F.2d 1472, 1477 (10th Cir. 1984); Adams Nursing Home v. Mathews, 548 F.2d 1077, 1081 (1st Cir. 1977). See also Hochman, supra note 84, at 696. Hochman notes two other proposed tests: whether the party had relied to his detriment upon the asserted right, and whether the legislation gives effect to the parties’ reasonable expectation. Hochman, supra note 84, at 696. See also Slawson, Constitutional & Legislative Considerations in Retroactive Lawmaking, 48 Cal. L. Rev. 216, 225–33 (1960). Hochman suggests that these tests do not sufficiently explain the Court’s decisions and posits that, in fact, the Court weights three factors: the nature and strength of the public interest in the statute, the extent to which the asserted right is affected, and the nature and strength of the asserted right. Hochman, supra note 84, at 697. This test was employed in Hiddleston v. Nebraska Jewish Educ. Soc’y, 186 Neb. 786, 186 N.W.2d 904, 906 (1971).
to uphold retroactive legislation when the private party's interests are not great or when the private party has not detrimentally relied upon the grant of the extinguished right. 92

The public interest served by a retroactive abolition of the farmer's contract rights would simply be the savings from avoiding liability for a non-Title II use of the grain. This interest is distinct from the public interest served by the non-Title II use, such as increasing export sales or improving domestic nutrition programs. The public interest in saving money should not be strong enough to outweigh the interests of the private party who relied on the abrogated right. 93

The fifth amendment requires the payment of just compensation for the extinction of a property interest by unconstitutional retroactive legislation. 94 Under this analysis, any such action by the legislature that would destroy the future interest would require the government to pay the farmer. However, the state courts are split over whether the interest in a possibility of reverter is great enough to entitle the holder to compensation when the interest is abrogated by subsequent legislation. 95 In Mercado v. Feliciano, the only federal case dealing with the retroactive abolition of a possibility of reverter, the First Circuit held that the holder of the possibility of reverter was not entitled to compensation. 96 Mercado involved an act of the Puerto Rico legislature which abolished an old Spanish statute that was in effect before the island became a United States possession. The court held that the act retroactively extinguished possibilities of reverter created under the Spanish statute and that the holders' future interests were too speculative to entitle them to compensation. 97


92 See Hochman, supra note 84; supra note 90.


95 Several states courts have had the occasion to consider the effect of legislation that limits the life of a possibility of reverter to a specified number of years from the date of its creation. Some states found the retroactive legislation validly extinguished reverters which had been in existence longer than the given number of years even as against claims under the due process clause of the fourteenth amendment. See, e.g., Hiddleston v. Nebraska Jewish Educ. Soc'y, 186 Neb. 786, 186 N.W.2d 904, 907 (1971) (statute limiting validity of possibilities of reverter to 30 years after creation validly extinguished reverters more than 30 years old); Trustees of Schools v. Bardorf, 6 Ill. 2d 486, 130 N.E.2d 111, 115 (1955) (same, with respect to a 50-year statue). Other state courts found similar statutes invalid. See, e.g., Board of Educ. v. Miles, 15 N.Y.2d 364, 372, 207 N.E.2d 181, 186 (1965); Biltmore Village, Inc. v. Royal Biltmore Village, Inc., 71 So.2d 727, 728–29 (Fla. 1954).

96 260 F.2d 500 (1st Cir. 1958).

97 Id. at 504.
However, it is likely that a court would compensate the farmer for a congressional abolition of the farmer's possibility of reverter. First, unlike the reverters considered in Mercado and the state cases, the farmer's possibility of reverter would be relatively new. Second, the court would also be likely to find the terminating event imminent since it is implausible that Congress would consider retroactive legislation unless it was also considering a nonfood aid use of the reserve. The farmer's interest in the possibility of reverter would then not be merely speculative; courts could find that such an interest outweighs the public interest in savings served by the retroactive legislation. Third, courts are particularly reluctant to allow alteration of the rights of a private party in a government contract. Mercado and the state cases, then, are also distinguishable because they did not involve government contracts. Finally, some state courts have even held that retroactive abrogation of a possibility of reverter is always unconstitutional, requiring the government to pay compensation. This constitutional uncertainty, coupled with the likelihood that courts would require compensation, and the hostility that retroactive legislation would foster in

98. The farmer's possibility of reverter could never have a longer life than the storage life of wheat. Because old wheat is removed from the reserve and new wheat added to replace it, 7 U.S.C. § 1736f-l(e) (1982), any particular farmer's wheat will be removed before the storage life of that wheat expires. Such removal will not terminate the fee simple determinable and trigger the remedy; the proposed legislation provides for such removal. Only unauthorized release from the reserve will make the reverter possessory, so that once the wheat is released through § 1736f-l(e), a non-Title II use is impossible. See Appendix, subsection (b)(3)(A) (future interest alternative).

99. Congress would probably be reluctant to pass retroactive legislation for reasons less pressing than an imminent nonfood aid use since such legislation would provoke a hostile reaction from the agricultural community.

100. Courts are particularly sensitive about allowing Congress to alter contracts to which the government is a party because of the private party's detrimental reliance. Hochman, supra note 84, at 722-23; Slawson, supra note 85, at 243-44. See generally S. NOWAK, R. ROTUNDA & J. YOUNG, supra note 86, at 476-77. The leading case in this area is Lynch v. United States, 292 U.S. 571 (1934). Lynch involved legislation which terminated life insurance proceeds owed to World War I veterans under a federal program. The Court held that the legislation abolished a contract right and was unconstitutional; the beneficiary was entitled to compensation for the extinguished property right even though the detrimental reliance in Lynch was not significant, the premiums were small, and the Court characterized the program as "benevolent." Lynch, 292 U.S. at 576. Lynch cannot be distinguished from the farmer's case on the grounds that the reliance in Lynch was greater. For more recent cases, see Larionoff v. United States, 533 F.2d 1167, 1179-80 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977); Delaware River Port Authority v. Tiemann, 403 F. Supp. 1117, 1138 n.63 (D.N.J. 1975).

This line of cases should be distinguished from those cases in which a gratuity or right to proceeds from a penalty was granted the nongovernment party. See supra note 90. In those cases, the parties, unlike the farmers, neither gave adequate consideration in return for nor relied upon the asserted right.

Under the proposed contracts, the government can be found to have induced the farmer's reliance several ways. The government guarantee may induce the farmer to enter the contract. Because the agricultural community is anxious about releases of the reserve, it may be more likely to sell wheat when a right to compensation is offered for unauthorized release. Furthermore, once the contract is entered into, the farmer may sell the possibility of reverter in reliance upon the proposed legislation.

101. See supra note 95.
the agricultural community, would probably be enough to deter Congress from repealing the future interest proposal.102

The liquidated damages proposal would have less constitutional protection from subsequent repeal or amendment than would the future interest proposal. Although courts would give much weight to the fact that the liquidated damages proposal was part of a government contract with a private party,103 one factor alters the analysis in favor of the retroactive legislation. Since the farmer’s right to receive the liquidated damages would not have accrued at the time that Congress passes the retroactive legislation, the court would be likely to hold that the retroactive legislation is valid.104 The farmer’s interest in the possibility of reverter, on the other hand, would have already “accrued” when retroactive legislation is passed—the farmer retained a reversionary ownership at the time of the sale, whereas the right to the liquidated damages would accrue only when the contract is breached by reason of a non-Title II use. In addition, a possibility of reverter does not become more valuable only at the occurrence of the terminating event. It can also increase in value when the terminating event becomes imminent.105 The only event that could quicken the farmer’s right under the liquidated damages proposal is the government’s breach. The imminence of a breach cannot create the right to receive even a portion of liquidated damages. This factor alone may not be enough to persuade a court that retroactive legislation would be constitutional, especially when that legislation alters rights in government contracts. However, a court balancing the public interest served by the retroactive legislation against the farmer’s un accrued right would be more likely to find the public interest to prevail than in the case where the right had some present value.

102. The reasons for the agricultural community’s hostility are discussed supra in notes 22, 26 and accompanying text.

103. Courts are particularly reluctant to allow retrospective alterations of contracts between the government and a private party. See supra note 100.

104. See Hochman, supra note 84, at 717. See also Lynch v. United States, 292 U.S. 571 (1934) (discussed supra note 100). In Lynch, the beneficiary’s right to the insurance benefits had accrued before passage of the retroactive legislation and was protected. 292 U.S. at 575. See also White v. United States, 270 U.S. 175 (1926) (where right to receive benefits had not accrued, legislation allowing another named beneficiary to take was valid). But see Mercado v. Feliciano, 260 F.2d 500 (1st Cir. 1958) (possibility of reverter may be too speculative to warrant constitutional protection).

Hochman argues that although the Court has often validated legislation affecting accrued rights (an exception is made for rights in government contracts; Hochman, supra note 84, at 722–24), the Court may see no impediment to legislative abolition in cases where rights have not accrued. Hochman at 717.

105. See supra notes 56–58 and accompanying text. Courts finding legislation which abolishes reverters to be constitutional have relied on the fact that the reverters were a mere expectant interest and of no present value. See, e.g., Hiddleston v. Nebraska Jewish Educ. Soc’y, 186 Neb. 786, 186 N.W.2d 904, 908 (1971).
IV. COMPARISON OF PROPOSALS

The strength of the future interest proposal is its more certain constitutional protection from subsequent congressional repeal. A subsequent repeal would not necessarily extinguish the farmer's property interest. Even if it did extinguish the future interest, the repeal might amount to a taking and the farmer could invoke the constitutional protections of the fifth amendment, requiring the government to compensate him.106

The strength of the liquidated damages proposal is that the courts' interpretation of the liquidated damages language in the contracts is more predictable than its interpretation of the future interest language. A federal common law of contracts has been developing for some time.107 In contrast, property law, especially in the area of future interests, is almost exclusively handled by state courts. A federal court would have little federal precedent to rely on and could be forced to fashion new common law in order to interpret the statute.108

The strength of the future interest proposal outweighs the strength of the liquidated damages proposal. First, a subsequent repeal of the liquidated damages legislation is potentially more dangerous than an unanticipated interpretation of the property proposal. Subsequent legislation might completely extinguish the farmer's rights unless they were constitutionally protected. Second, a subsequent repeal of legislation governing the liquidated damages proposal is more likely than an interpretation of the future interest proposal that is inconsistent with the concepts outlined in this Comment. An inconsistent interpretation is only possible where the statutory language is not clear. So long as the statute itself is clear and precise, the courts would have little occasion to turn to other law in order to interpret it. However, should questions of interpretation arise, federal borrowing of state property law should result in sufficiently predictable federal decisions involving the future interest proposal.109 The future interest proposal, then, is superior in terms of enduring success.

V. CONCLUSION

It is possible, under the American legal system, to provide a scheme for insulating the Food Security Wheat Reserve from uses which would threaten global food security. The best method would be to amend the Food Security Wheat Reserve Act of 1980 to allow farmers to sell under contract

106. See supra notes 94–102 and accompanying text.
107. See supra note 30 and accompanying text.
108. See supra notes 30–37 and accompanying text.
109. See supra notes 33–37 and accompanying text.
to the government a fee simple determinable title to grain intended for the reserve. The farmer would retain a future interest which would become possessory once the government used the grain for purposes other than food aid or disposal pursuant to the normal replenishment procedures. The farmer would still be entitled to compensation even if the government condemned the future interest or the statute was subsequently amended or repealed.

Alternatively, the statute could be amended to require a liquidated damages contract clause which would penalize the government for a non-food aid disposal of the grain. This method, however, would not provide as much security against non-food aid use of the wheat as the future interest proposal since the contract remedy does not have as much constitutional protection from subsequent repeal of the statute.

The United States has a unique responsibility to ensure food security for the rest of the world. The amendments proposed in this Comment would enhance food security and would result in cost to the United States only in situations where it reneged on its commitment to hold the Food Security Wheat Reserve solely for purposes of urgent humanitarian relief. The legislation would also protect the American farmer from losses caused by illegitimate uses of the reserve. In the interest of global food security and the American farmer, Congress is urged to consider these proposals.

Ann Marie Neugebauer

110. The United States’ role as breadbasket of the world has grown increasingly important. The United States produces a significant portion of the world’s grain supply, Note, supra note 5, at 742–46, and hence has an obligation to distribute that grain to help feed the rest of the world. See Walczak, supra note 5, at 544.

(a) ESTABLISHMENT BY PRESIDENT

To provide for a wheat reserve solely for emergency humanitarian food needs in developing countries, the President shall establish a reserve stock of wheat of up to four million metric tons for use for the purposes specified in subsection (c) of this section.

(b) INITIAL ESTABLISHMENT BY DESIGNATION OF WHEAT OWNED BY COMMODITY CREDIT CORPORATION; REPLENISHMENT BY PURCHASE OR BY DESIGNATION OF WHEAT ACQUIRED BY CORPORATION

(1) The reserve stock of wheat under this section shall be established initially by designation for that purpose by the Secretary of Agriculture of wheat owned by the Commodity Credit Corporation.

(2) Subject to the provisions of subsection (i) of this section, stocks of wheat to replenish the reserve may be acquired (A) through purchases from producers or in the market if the Secretary of Agriculture determines that such purchases will not unduly disrupt the market, and (B) by designation by the Secretary of stocks of wheat otherwise acquired by the Commodity Credit Corporation. The sales contracts for wheat purchased from producers or in the market must conform with the provisions of subsection (b)(3) of this section. Whenever the government makes purchases of wheat from producers or in the market, it shall first purchase for the reserve, if a need for replenishment exists at that time, except if the Secretary of Agriculture determines such purchases would unduly disrupt the market. Any use of funds to acquire wheat through purchases from producers or in the market to replenish the reserve must be authorized in appropriation Acts. Notwithstanding any other provision of law, the federal government shall be liable in accordance with the provisions in such contracts.
[FUTURE INTEREST ALTERNATIVE]

(3) Sales contracts for wheat, as required by subsection (b)(2) of this section, shall:

(A) convey title to the wheat in fee simple determinable to the government, which title is possessory so long as the wheat is not released from the reserve for purposes other than management of stocks under subsection (e) of this section or donation under Title II of the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C. § 1721 et seq.] in subsections (c) and (d) of this section, but which title shall revert to the vendor automatically if the wheat is used for purposes other than those mentioned above; and

(B) provide that the value of the possibility of reverter, upon breach of the condition in subsection (3)(A) of this section, shall be equal to the market value of the wheat disposed of, determined by the quoted price of that grade of wheat on the Chicago Board of Trade on the date of original purchase or the date of disposition, whichever is higher; and

(C) provide that if the government both condemns the possibility of reverter and breaches the condition in subsection (3)(A) of this section, the vendor shall be entitled to compensation, the value of which shall be equal to the market value of the disposed wheat, determined by the quoted price of that grade of wheat on the Chicago Board of Trade on the date of original purchase, condemnation, or disposition, whichever is higher.

(4) Notwithstanding any other provision of law:

(A) a future interest can be validly created in wheat for the purposes of such contracts; and

(B) the possibilities of reverter shall attach to the proceeds of any sale and not to the wheat disbursed, but if there exist no proceeds, it shall attach to Commodity Credit Corporation assets; and

(C) for the purposes of identifying interest in the wheat, wheat acquired through the sales contracts shall be disposed of in a first-in, first-out basis, except that where the release is in accordance with subsection (c) or (e) of this section, wheat acquired from the Commodity Credit Corporation shall be deemed to be released first. Wheat in the reserve which was acquired from the Commodity Credit Corporation shall be disposed of last where the disposal is a breach of the condition in subsection (b)(3)(A) of this section.

[LIQUIDATED DAMAGES ALTERNATIVE]

(3) Sales contracts for wheat, as required by subsection (B)(2) of this section, shall:
(A) provide that the government shall have breached the contract by releasing the wheat for purposes other than management of stocks under subsection (e) of this section or donation under title II of the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C. § 1721 et seq.] as provided in subsections (c) and (d) of this section; and

(B) provide for liquidated damages amounting to the market value of the wheat disposed of to be paid to the vendor upon such breach, which value shall be equal to the market value of the disposed wheat, determined by the quoted price of that grade of wheat on the Chicago Board of Trade on the date of original purchase, condemnation, or disposition, whichever is higher; and

(4) Notwithstanding any other provision of law, (A) the liquidated damages in subsection (b)(3)(A) of this section are enforceable; and (B) the vendor may assign his contract rights; and (C) for the purposes of identifying interest in the wheat, wheat acquired through such contracts shall be disposed of in a first-in, first-out basis, except that where the release is in accordance with subsection (c) or (e) of this section, wheat acquired from the Commodity Credit Corporation shall be deemed to be released first. Wheat in the reserve which was acquired from the Commodity Credit Corporation shall be disposed of last where the disposal is a breach of the condition in subsection (b)(3)(A) of this section.

(c) RELEASE OF WHEAT STOCKS BY PRESIDENT FOR EMERGENCY FOOD ASSISTANCE TO DEVELOPING COUNTRIES

Notwithstanding any other provision of law, stocks of wheat designated or acquired for the reserve under this section may be released by the President to provide, on a donation or sale basis, emergency food assistance to developing countries at any time that the domestic supply of wheat is so limited that quantities of wheat cannot be made available for disposition under the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1691 et seq.], except for urgent humanitarian purposes, under the criteria of section 401(a) of that Act [7 U.S.C.A. § 1731(a)]. Notwithstanding the provisions of the preceding sentence, up to three hundred thousand metric tons of wheat may be released from the reserve under this section in any fiscal year, without regard to the domestic supply situation, for use under Title II of the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1721 et seq.] in providing urgent humanitarian relief in any developing country suffering a major
disaster, as determined by the President, whenever the wheat needed for relief cannot be programed for such purpose in a timely manner under the normal means of obtaining commodities for food assistance due to circumstances of unanticipated and exceptional need. Wheat released from the reserve may be processed in the United States and shipped to a developing country in the form of flour when conditions in the recipient country require such processing in the United States.

(d) RELEASE OF WHEAT TO MEET FAMINE OR OTHER RELIEF REQUIREMENTS

Wheat released from the reserve for the purposes of subsection (c) of this section shall be made available under the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1691 et seq.] to meet famine or other urgent or extraordinary relief requirements, except that section 401(a) of that Act [7 U.S.C.A. § 1731(a)], with respect to determinations of availability, shall not be applicable thereto.

(e) MANAGEMENT OF WHEAT IN RESERVE TO AVOID SPOILAGE

The Secretary of Agriculture shall provide for the management of stocks of wheat in the reserve as to location and class of wheat needed to meet emergency situations and for the periodic rotation of stocks of wheat in the reserve to avoid spoilage and deterioration of such stocks, using programs authorized by the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C. § 1691 et seq.] and any other provision of law, but any quantity of wheat removed from the reserve for the purposes of this subsection shall be promptly replaced with an equivalent quantity of wheat, subject to the provisions of subsection (b)(2) of this section.

(f) WHEAT IN RESERVE AS PART OF TOTAL DOMESTIC SUPPLY FOR PURPOSES OF OTHER LAWS

Stocks of wheat in the reserve shall not be considered a part of the total domestic supply (including carryover) for the purposes of subsection (c) of this section or for the purposes of administering the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1691 et seq.] and shall not be subject to any quantitative limitations on exports that may be imposed under section 2406 of the Appendix to Title 50.
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(g) **USE OF COMMODITY CREDIT CORPORATION FUNDS, FACILITIES, AND AUTHORITIES; REIMBURSEMENT OF CORPORATION**

(1) The funds, facilities, and authorities of the Commodity Credit Corporation shall be used by the Secretary of Agriculture in carrying out this section, except that any restriction applicable to the acquisition, storage, or disposition of Commodity Credit Corporation owned or controlled commodities shall not apply with respect to the acquisition, storage, or disposal of wheat for or in the reserve.

(2) Effective beginning October 1, 1981, the Commodity Credit Corporation shall be reimbursed from funds made available for carrying out the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1691 et seq.] for wheat released from the reserve that is made available under such Act, such reimbursement to be made on the basis of actual costs incurred by the Commodity Credit Corporation with respect to such wheat or the export market price of wheat (as determined by the Secretary) as of the time the wheat is released from the reserve for such purpose, whichever is lower. Such reimbursement may be made from funds appropriated for that purpose in subsequent years.

(h) **FINALITY OF DETERMINATIONS BY PRESIDENT OR SECRETARY**

Any determination by the President or the Secretary of Agriculture under this section shall be final.

(i) **EXPIRATION OF AUTHORITY TO REPLENISH STOCKS OF WHEAT; DISPOSAL OF REMAINING STOCKS**

The authority to replace stocks of wheat to maintain the reserve under this section shall expire September 30, 1990, after which stocks released from the reserve may not be replenished. Stocks of wheat remaining in the reserve after September 30, 1990, shall be disposed of by release for use in providing for emergency food needs in developing countries as provided in this section.