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**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-114860

DATE: December 19, 1979

MATTER OF: Farmers Home Administration Authority to  
Purchase Surety Bonds ]

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DIGEST: Colorado law prevents holders of trust deeds from releasing them to borrowers unless original promissory note is delivered to them or, if note cannot be produced, unless (1) a Government agency agrees to indemnify trustee or (2) a corporate surety bond to protect trustee is provided. Farmers Home Administration (FmHA) may purchase surety bonds in order to obtain release of deeds of trust for Colorado borrowers whose promissory notes have been lost while in custody of FmHA. However, FmHA may not agree to indemnify trustee unless its liability is limited by agreement with trustee to a fixed amount such as the original principal amount of the trust deed.

The Administrator of the Farmers Home Administration (FmHA) has asked whether FmHA has authority to purchase surety bonds in order to obtain release of deeds of trust for Colorado borrowers whose promissory notes have been lost, while in the custody of FmHA.

Under Colorado law, the trustee under a deed of trust is a public official designated as the public trustee. The public trustee is the only person authorized to release a deed of trust when the obligation underlying it has been satisfied. A Colorado statute provides that the original cancelled promissory note be delivered to the public trustee in order for a deed of trust to be released. If the original note cannot be produced, the statute provides two alternatives which the public trustee may accept in lieu thereof. One is the provision of a corporate surety bond conditioned against the delivery of the note to the damage of the trustee and in a sum equal to the original principal amount recited in the trust deed. The other alternative is for the agency of the Federal Government which originated the loan to agree to indemnify the public trustee for damages as a result of releasing the trust deed. The normal FmHA procedure for handling lost note situations (7 C.F.R. § 1866.2(b)) is not consistent with either alternative and is said to be unacceptable to public trustees in Colorado.

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There are currently three former FmHA borrowers in Colorado whose obligations to FmHA were evidenced by promissory notes secured by deeds of trust to FmHA. Although their loans have been paid in full, the deeds of trust on their properties have not been released because FmHA cannot find their original promissory notes. FmHA wants to know if it may obtain release of these deeds of trust either by purchasing surety bonds or by agreeing to indemnify the Colorado public trustees directly for any liability they might incur incident to releasing such deeds of trust.

FmHA regulations, authorized under 7 U.S.C. § 1989, provide that FmHA will deliver the deed of trust to the borrower when he has made final payment on his loan. 7 C.F.R. § 1866.3(c)(1). Thus, securing release of deeds of trust is part of FmHA's responsibility under its loan programs.

It is not clear under what circumstances the public trustee would incur some liability as a result of releasing the trust deed, particularly where the lender--FmHA in this case--would not be in a position to object to the trustee's action (and presumably will not be injured) since it is FmHA which had custody of the notes when they were lost and which now seeks release of the trust deeds. Moreover, if there were any potential liability, it is difficult to see how it could exceed the original principal amount of the trust deed. The provision for a surety bond, is in fact limited in the State statute to an amount equal to the original principal amount in the trust deed (although in theory the trustee, after recovering that amount from the surety, could look to the provider of the bond for any additional damages he might have sustained).

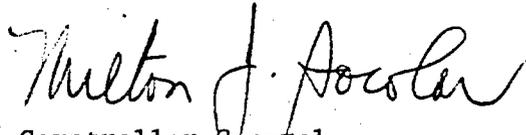
Agreements to indemnify which would subject the United States to a contingent liability in an indeterminate amount which could exceed available appropriations are not authorized. 54 Comp. Gen. 824, 826 (1975). Thus, FmHA may not secure release of the deeds of trust by agreement to indemnify in an unlimited amount. However, if it would be acceptable to the public trustees, FmHA may agree to indemnify them in an amount not to exceed the original principal amount of the trust deed. FmHA, if it does this, should reserve from available funds amounts sufficient to pay any such indemnities, in order to avoid violation of the Anti-deficiency Act, 31 U.S.C. § 665 (1976).

With regard to the other alternative, purchase of surety bonds, the loans at issue here were made from the Agricultural Credit Insurance Fund. The statute governing the Fund authorizes

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its use "to pay the Secretary's costs of administration necessary to \* \* \* service, and otherwise carry out" programs for which the Fund is available. 7 U.S.C. § 1929(f)(6). Thus, the Fund may be used to pay for surety bonds necessary to effect release of these deeds of trust.

FmHA also wants to know if it would be authorized to purchase surety bonds in Colorado where loans are made from the Rural Housing Insurance Fund. The statute governing that Fund authorizes its use for "servicing of loans, and other related program services and expenses." Thus the Fund also could be used to purchase surety bonds in a situation where promissory notes were lost. 42 U.S.C. § 1487 (j)(3).



For the Comptroller General  
of the United States