United States General Accounting Office

GAO

Report to Congressional Requesters

September 2000

PORK PROMOTION PROGRAM

Petition Validation Process Needs to Be Strengthened

GAO/RCED-00-274

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Abbreviations

AMS	Agricultural Marketing Service
NPPC	National Pork Producers Council
USDA	U.S. Department of Agriculture

United States General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

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September 28, 2000

Congressional Requesters

Since its enactment in 1985, the mandatory pork promotion program has collected over $500 million from pork producers to fund advertising and research for strengthening the pork industry's position in the marketplace.[1] Under this program, more commonly known as the pork check-off program, the Secretary of Agriculture is required to hold a national referendum, or vote, on whether to continue the program when 15 percent of eligible pork producers sign a petition making such a request. On May 24, 1999, the U.S. Department of Agriculture (USDA) received a petition with about 19,000 signatures requesting a vote on whether to continue the program.[2] After 8 months of reviewing the petition, USDA had not completed its validation efforts to determine whether the 15-percent requirement had been met. On February 25, 2000, the Secretary ordered a referendum on his own authority, which was held on September 19–21, 2000, and USDA plans to use appropriated funds to pay an estimated $529,000 in referendum expenses.

Concerned about the Secretary's decision to order a referendum in the absence of a validated request from 15 percent of the eligible pork producers, you asked us to determine (1) what major problems USDA's Agricultural Marketing Service (AMS) encountered in its process to validate the pork petition and AMS' plans to improve the validation process, (2) what factors led to the Secretary's decision to order the referendum, and (3) whether the Secretary has the authority to order a referendum and whether USDA can use appropriated funds to pay its cost.

Results in Brief

AMS' process to validate the pork petition was flawed in three key areas, according to our analysis. Problems in any one of these areas would have raised questions about the integrity of the validation process. First, AMS did not accurately estimate the population of pork producers. Second, it

[1]The check-off program also applies to pork importers. For purposes of this report, we refer to both producers and importers as producers.

[2]USDA estimates that in 1998 there were about 100,000 producers.

did not develop a reliable database of petitioner information as a basis for verifying petitioners' eligibility to sign a petition. Third, it employed a flawed survey methodology to verify the eligibility of the petitioners. As a result, AMS could not determine with certainty whether 15 percent of eligible pork producers had signed the petition, which would require the Secretary to hold a referendum on whether to continue the program. Although AMS has recognized that its validation process was flawed, it has not taken substantial actions to improve its process.

Two primary factors led the Secretary of Agriculture to order a referendum. First, he concluded that AMS' validation process was flawed. Consequently, the Secretary determined that it was impossible to ascertain the number of valid petitioners and that efforts to revalidate the petition would not result in any greater certainty. Second, the Secretary based his decision on his belief that check-off programs, including pork, should be subject to periodic referendums. Furthermore, he strongly believed that pork producers should have the opportunity to vote on whether to continue the check-off program because the program is a mandatory assessment and the industry has changed dramatically since the last vote in 1988.

In our view, the Secretary has the authority to order a pork referendum, but referendum expenses must be reimbursed from pork check-off funds, and appropriated funds may not be used to pay referendum expenses. The Secretary interprets the Pork Promotion, Research, and Consumer Information Act of 1985 as granting him authority to conduct a referendum as a tool in deciding whether to terminate the pork check-off program. We find this interpretation to be a reasonable one. However, the Secretary may not pay for a referendum with appropriated funds because the act specifically states that AMS must be reimbursed for referendum expenses from pork check-off funds.

We are recommending that AMS strengthen its petition validation process and seek reimbursement from check-off funds to pay all referendum expenses.

Background

AMS is responsible for ensuring that 14 commodity check-off programs, such as pork, beef, and soybeans, comply with their authorizing legislation. Each commodity check-off program gives producers an opportunity to petition the Secretary for a national referendum on whether to continue their program. Currently, AMS is validating a petition received from beef producers calling for a referendum on the beef check-off program.

The Pork Promotion, Research, and Consumer Information Act of 1985,[3] which established the pork check-off program, requires U.S. pork producers to pay an assessment. This assessment is currently 45 cents for every $100 of hog sales.[4] In 1999, pork producers paid $41 million in assessments. The assessments are managed by the National Pork Board, which is composed of 15 pork producers nominated by producers and appointed by the Secretary of Agriculture. In addition to distributing some of the assessment funds to state pork associations, the National Pork Board contracts with the National Pork Producers Council (NPPC), a nonprofit organization, for conducting research and generic advertising and promotion to strengthen the pork industry's position in the domestic and international marketplace. One of NPPC's more visible advertising campaigns has been "Pork, the Other White Meat."

The Pork Promotion Act requires that a referendum on continuing the pork check-off program be held when the Secretary determines that 15 percent of the eligible U.S. pork producers petition for such a referendum.[5] To be eligible to sign a pork petition, a person must have owned and sold at least one hog during a defined period. The Pork Promotion Act also requires that expenses associated with a referendum be paid with check-off funds. Pork producers have not voted on whether the pork check-off should continue since 1988.

In 1997, the Campaign for Family Farms, a rural advocacy group, began an effort to collect petition signatures from producers to initiate a referendum on continuing the pork check-off program. In the opinion of this group, the program does not benefit independent pork producers. Pork producers had 13 months to sign the petition, beginning on April 24, 1998. In May 1999, the Campaign for Family Farms delivered a petition with about 19,000 signatures to AMS, and the agency began its validation process to ensure that 15 percent of the eligible program participants had signed the petition.

AMS' validation process consisted of the five major steps listed in table 1. Because AMS did not have written procedures for validating petitions prior to receiving the pork petition, it developed them as the process evolved.

[3]Pub. L. No. 99-198, sections 1611-1631, 99 Stat. 1354, 1606-22 (1985), codified at 7 U.S.C. sections 4801-4819.

[4]Importers also pay an assessment on imports of hogs, pork, and pork products.

[5]7 U.S.C. section 4812(b).

AMS discontinued its validation process on February 25, 2000, when the Secretary ordered a referendum on his own authority. (See app. I for a detailed chronology of the steps in AMS' validation process.)

Table 1: Steps in AMS' Validation Process

Step	Validation process
1	Estimate the population of eligible pork producers to determine the number of petitioners required to trigger a referendum
2	Count petitioners and create a database of petitioner information
3	Review database and remove invalid petitioners—those with no signature, dates outside the representative period, and duplicates—to determine remaining potentially valid petitions
4	Verify that the producer named in the petition had actually signed it
5	Verify that the petitioner was eligible under the Pork Promotion Act to sign by asking the petitioner to provide documentation on pork sales

In step 1, AMS estimated a population of 99,909 pork producers.[6] From this, it determined that 14,986 signatures (15 percent) would be required to trigger a referendum. In step 2, AMS determined that it had received 19,043 petitioners from the Campaign for Family Farms. In step 3, AMS determined it had 17,694 potentially valid signatures. In steps 4 and 5, AMS contracted with a telephone-polling firm to conduct a survey of a random sample of 2,500 potentially valid petitions to verify signatures and determine eligibility. Because of the surprisingly large number of petitioners who said that they had not signed the petition, AMS sent a follow-up letter to verify the telephone survey results and obtain documentation proving eligibility.

On January 5, 2000, AMS briefed NPPC, the Campaign for Family Farms, and others on the status of its validation efforts. Using the results of its validation efforts as of that date, AMS estimated the number of valid petitioners, with a 95-percent confidence level, was no more than 12,428, or 2,558 less than required to trigger a referendum. In addition, at this briefing AMS stated that this estimated number could and probably would change as it continued its validation efforts.

[6]AMS estimated the number of importers to be 1,017.

On January 31, 2000, the Secretary met with both NPPC and the Campaign for Family Farms to discuss their views on the petition validation process. By that time, AMS had revised its estimate to no more than 13,696 valid petitioners. However, the AMS Administrator said that she could not tell the Secretary with certainty the number of valid pork petitioners because of problems the agency had encountered in the validation process. On February 25, 2000, the Secretary ordered a referendum without having ascertained that the 15-percent requirement for a mandatory referendum had been met, and AMS discontinued its validation process.

The Validation Process Was Flawed in Three Key Areas, Making AMS Unable to Determine Whether the Petition Should Trigger a Referendum

Because of flaws in three areas, we conclude that AMS was unable to determine whether the petition presented was signed by 15 percent of eligible pork producers, which would therefore trigger a referendum. First, AMS did not accurately estimate the population of pork producers and therefore could not accurately compute the number of producers required to meet the 15-percent requirement. Second, AMS did not create a reliable database of petitioner information, which undermined its efforts to validate the eligibility of the signatures. Finally, AMS employed a flawed survey methodology to verify petitioners' eligibility. Although AMS has acknowledged that its process was faulty, it has not yet developed and implemented improvements to ensure the successful validation of future check-off petitions. Any one of these problems calls into question the integrity of AMS' process to validate the pork producers' petition.

AMS Underestimated the Population of Pork Producers

As the first step in validating the pork petition, AMS had to determine what number of petitioners would meet the threshold of the 15 percent of eligible producers needed to trigger a referendum. Because information on the population of eligible producers is not available, AMS could not arrive at a precise number. Consequently, it attempted to estimate this population from data on the number of farms that sold hogs. AMS made some adjustments to this number. For example, it deleted from its estimate farms that raised hogs owned and sold by another producer who paid the check-off assessment. Even with such adjustments, however, the estimate was flawed because AMS counted farms, not the number of producers on those farms who pay check-off assessments. According to industry experts, it is not uncommon to have more than one producer on a farm who sells hogs, such as a family farm in which the father and daughter sell hogs individually and each pays separate check-off assessments. Consequently, AMS may have understated the eligible population and thus understated the number of petitioners required to trigger a referendum.

The Petitioner Information in the Database Is Questionable

After counting the number of petitions—19,043—AMS hired a contractor to keypunch the petition information into a database to facilitate the review of petitioner information. AMS did not follow generally accepted practice in providing instructions to the keypunch contractor. Normally, the party providing the data is responsible for reviewing and editing this information before giving it to the keypunch contractor. However, AMS instead required its keypunch contractor to make decisions about the information that should be entered into the petitioner database. Such exercise of judgment in this type of operation allows the least knowledgeable people to decide how to handle illegible data, incomplete information, and information in incorrect locations on petition cards. For example:

- The petitioner had to enter a date between April 24, 1998, and May 24, 1999, in a designated location on the petition to be considered valid. If no date was evident in this location, AMS asked the keypunch operator to examine the petition for other evidence of the date, such as a postmark, which the operator was to enter. This process is likely to result in inconsistent data entry, which makes the database information unreliable.

According to AMS, these problems were compounded by the fact that the contractor apparently did not follow AMS' requirement to reenter the data and resolve differences between the two sets of entries, which is a practice in a data entry operation to ensure quality and was required by the purchase order between AMS and the contractor.

After receiving the completed database from the contractor, AMS' internal auditors found a high rate of data entry errors—about 13 percent. Because the errors exceeded AMS' acceptable level of 5 percent, the auditors were unable to confirm the reliability of the information in the database. In addition, after AMS performed an initial analysis on the database, the auditors found that the agency had failed to follow its written guidelines on eliminating duplicate petitions and verifying the eligibility of more than one petitioner at the same address and failed to document its reasons for eliminating, or not eliminating, potential duplicates. Consequently, AMS may have inappropriately excluded or included some petitioners.

Methodology to Verify Signatures and Eligibility Was Faulty

To verify that the producer named in the petition actually signed it and was eligible to sign, AMS conducted a telephone survey of a random sample of the petitioners. However, we found that AMS did not follow professional practices for designing and administering its telephone survey. This

contributed to the lack of reliability of AMS' entire validation process. Specifically, AMS did not (1) pretest the telephone survey, (2) employ practices to encourage high response rates from surveyed petitioners, (3) consider the burden on the petitioner when choosing the method for obtaining documentation proving eligibility, and (4) conduct an analysis of petitioners who did not respond to the survey. AMS did not follow these practices principally because of inadequate planning and pressure to complete the entire validation process quickly.

AMS Did Not Pretest the Telephone Survey

AMS' failure to pretest the telephone survey meant that the agency had no assurance that the information gathered, when aggregated across all producers contacted, could be relied upon by decisionmakers. Professional practices for administering a telephone survey advocate that it be pretested on typical members of the population to determine that respondents are able to provide reliable and consistent information. If it had pretested the telephone survey, AMS could have assessed whether it was asking the right questions in the right way and whether producers were willing and able to give AMS the information it needed. Moreover, if the results of the pretest indicated a low likelihood of AMS' obtaining the data it needed, AMS could have explored other means of obtaining the data, such as a mail survey.

AMS' Survey Practices Did Not Encourage High Response Rates

Although the telephone pollsters introduced themselves as representing USDA, it was likely that some petitioners were reluctant to discuss their actions with an unannounced telephone caller because of controversy surrounding the pork petition. For example, according to the sponsor of the petition, producers were concerned that if the meatpacking companies learned that they had signed the petition, the companies might no longer buy their hogs. To increase the participation rate in a telephone survey, professional practices advocate sending a letter preceding the telephone call to ensure that the person surveyed knows the caller is from a legitimate research organization. In addition, the telephone survey was conducted during the harvest season for farmers, which could have reduced participation in the survey because producers may have been unavailable to answer the telephone.

AMS Did Not Consider the Burden on Surveyed Petitioners

AMS' telephone survey required producers to send in proof that they sold at least one hog between January 1, 1997, and June 1, 1999. This approach created an unnecessary burden on producers by requiring them to write down a dictated address and provide an envelope, stamp, and copy of pertinent sales records. Instead, professional practices are to avoid asking questions that require significant effort or cost on the part of those

surveyed. If documentation is required, professional practices advocate the use of a mail survey with the inclusion of a stamped, self-addressed envelope for returning the requested documentation. AMS' failure to consider the burden it was imposing on petitioners may have discouraged eligible producers from sending in documentation and ultimately could have led to incorrect conclusions about petitioners' eligibility.

AMS Did Not Determine the Characteristics of Nonresponding Petitioners

AMS did not attempt to learn more about the 42 percent of producers who could not be reached by the telephone polling contractor; nor did AMS attempt to reach these nonresponders by an alternative means, such as a letter. Professional practices suggest that lack of information on nonresponders calls into question the results of a survey because these nonresponders may differ disproportionately from those who did respond. Consequently, AMS' conclusions about the number of eligible pork producers who signed the petition could be unreliable. Because AMS did not initiate efforts to contact these petitioners, it is not possible to know how their responses would have influenced the results.

AMS Has Not Improved Its Validation Process for Check-off Petitions

Although AMS has recognized that its validation process was flawed, it has not taken substantial actions to improve the process. On December 15, 1999, a USDA task force led by the Under Secretary for Marketing and Regulatory Programs recommended, among other improvements, that AMS develop uniform petition procedures for all check-off programs and publish those procedures for public comment. The task force was established in 1998 out of concerns about how some of the check-off programs were spending producers' assessments. The task force's report stated that there are several areas in which policies and procedures could be adopted to provide consistency across check-off programs, including establishing (1) deadlines for petitions, (2) the basis for determining the number of signatures required, (3) methods for how AMS should handle petitions and verify signatures, (4) a time requirement for the collection of signatures, and (5) public notification guidelines. According to USDA officials, the Department has not yet decided if it will implement these recommended procedures because it is still in the process of analyzing public comments on the proposed changes to AMS' oversight of the check-off programs.

Secretary's Concerns About AMS' Validation Process and Support for Periodic Referendums Led to His Decision to Order a Referendum

Two principal reasons led the Secretary of Agriculture to order a referendum. First, as we also found, the Secretary believed that AMS' validation process was flawed, making it impossible to state precisely the final number of petitioners. The Secretary concluded that AMS did not develop a reliable database of petitioner information to verify petitioners' eligibility to sign a petition and thus was vulnerable to criticism in a number of respects. The development of the database of petitions was open to criticism: The data entry process was flawed, valid petitioners were deleted, duplicate entries were not removed, and AMS' judgments about individual petitioners when the form was not completed perfectly or legibly were open to challenge. In addition, regarding the telephone survey, the Secretary believed that the unannounced telephone calls by non-USDA employees to petitioners resulted in many petitioners responding that they had not signed the petition, when he believed that, in fact, they had actually signed. Thus, the Secretary concluded that any decision he made regarding the actual number of valid petitioners was likely to have little or no credibility.

At this point the Secretary considered other options and concluded that further efforts to validate the pork petition would not result in any greater certainty concerning the number of eligible pork petitioners. Therefore, completing the validation of the petition was not necessary and would have wasted check-off funds. Furthermore, starting over was not a practical solution because the process had already taken a great deal of time, and many of the signatures were nearly 2 years old. AMS had already spent 8 months working to validate the petition without success. In addition, both those in favor and those against a referendum wanted the issue to be resolved.

Second, the Secretary's decision was grounded in his belief that check-off programs, including pork, should be subject to periodic referendums. In his February 25, 2000, memorandum ordering a referendum, the Secretary stated that he strongly believed pork producers should have the opportunity to vote on the check-off program because it is a mandatory assessment and producers have not voted on its continuation since 1988. The Secretary also stated he believed the check-off program derives its legitimacy from the support of producers, and they have endured dramatic changes in their industry in recent years, including the trend toward fewer and larger pork producers. Furthermore, he believed the substantial number of petition signatures, whether or not they represented 15 percent of the eligible pork producers, indicated that the program might not have

the support of those producers who are paying for it. Thus, the Secretary stated that it was appropriate and necessary to determine through a referendum whether a majority of current pork producers do, in fact, continue to support the check-off program.

The Secretary of Agriculture Has the Authority to Order a Referendum but Must Use Pork Check-off Funds, Not Appropriated Funds

The Secretary of Agriculture has the authority to call for a pork referendum, but referendum expenses must be reimbursed from pork check-off funds. The Secretary interprets the Pork Promotion Act (7 U.S.C. section 4812(a)) as granting him the authority to conduct a discretionary referendum to be used as a tool in deciding whether to terminate or suspend the pork check-off program. We find this interpretation to be a reasonable one. However, the Secretary does not have the authority to pay for a referendum with appropriated funds because the Pork Promotion Act specifically states that referendum expenses must be reimbursed with funds collected by the National Pork Board from pork assessments. (7 U.S.C. section 4809.) (See app. II for a more detailed discussion of these issues.)

The Secretary Has the Authority to Conduct a Discretionary Referendum

The Pork Promotion Act requires the Secretary to conduct an initial referendum[7] and to conduct a subsequent referendum at the request of 15 percent of the pork producers. However, the act, as well as the legislative history, is silent on the Secretary's authority to conduct a referendum at his own discretion (a discretionary referendum). For some agricultural check-off programs, the Secretary has explicit authority stating that he "may conduct a referendum at any time." [8]

[7]The Secretary of Agriculture conducted an initial referendum on September 7-8, 1988. At that time, 77.5 percent of the pork producers and importers favored continuing the program.

[8]For example, the promotion programs for cotton, eggs, and potatoes have statutory provisions with this explicit authority. However, the programs for mushrooms, popcorn, and honey have no such authority.

While the Secretary does not have this explicit authority to conduct a discretionary referendum in the pork check-off program, he does have implied authority under a provision in the Pork Promotion Act—section 4812(a)—that allows him to terminate the pork check-off program if he determines it is no longer meeting its policy goals.[9] The Pork Promotion Act does not explicitly set out the declared policy, and the Secretary has discretion in determining whether the program is effectuating the policy. Under the Department's interpretation of the termination provision, the Secretary's authority to conduct a referendum can be inferred because a referendum may help inform his decision on whether to terminate the pork check-off program.

The Supreme Court has held that in cases where the Congress has not explicitly addressed an issue, an agency's interpretation of a statute prevails so long as it is reasonable.[10] We find that the Department's interpretation of the Pork Promotion Act is reasonable. A referendum is potentially valuable as input to a decision on whether to terminate a commodity promotion program.[11] Moreover, the pork check-off program is funded by participant assessments, and it is reasonable that participants have a voice in determining the effectiveness of the program. The referendum may help the Secretary determine whether the pork check-off program is meeting its policy goals. Thus, in our view, the Secretary has the authority to conduct this discretionary referendum.

The Secretary May Not Use Appropriated Funds to Pay Referendum Expenses

The Secretary stated he will use AMS-appropriated funds to pay for referendum expenses, which AMS estimates to be $529,000. USDA broadly interprets the permissible use of these appropriated funds to include anything that promotes farm income and farm marketing, including, in this case, the referendum expenses. However, the Pork Promotion Act specifies that referendum expenses must be reimbursed from check-off funds.

[9]Specifically, the section states, "If, after the initial referendum…the Secretary determines that an order, or a provision of the order, obstructs or does not tend to effectuate the declared policy of [the Pork Promotion Act], the Secretary shall terminate or suspend the operation of such order or provision." 7 U.S.C. section 4812(a).

[10]*FDA v. Brown & Williamson Tobacco Corp.*, __U.S.__, 120 S. Ct. 1291 (2000); *Chevron, U.S.A., Inc. v. Natural Resources Defense, Inc.*, 467 U.S. 837 (1984).

[11]The Secretary has stated that he will terminate the pork check-off program if the majority of voters do not favor its continuation.

USDA stated that it is conducting the referendum on the basis of the Secretary's authority to terminate the check-off program under section 4812(a). Expenses for a referendum conducted under this section, however, are explicitly provided for in the act under another provision. (7 U.S.C. section 4811(c).) Section 4811(c) specifically requires that a referendum conducted under section 4812 be reimbursed from assessments collected by the National Pork Board. While an agency has reasonable discretion in carrying out an appropriation, and it is not necessary to specify every expenditure in an appropriation, the expenditure must not be an item that falls within the scope of some other appropriation or statutory funding scheme.[12] Moreover, the Congress only authorized the appropriation of the funds necessary for the Secretary to carry out the pork check-off program, subject to reimbursement from pork assessments. (7 U.S.C. section 4819.)

These statutory provisions cannot be overcome by the more general appropriation to AMS.[13] Accordingly, the Secretary must not use appropriated funds but must follow the provisions of the Pork Promotion Act and be reimbursed from pork assessments to pay referendum expenses.

Conclusions

Because commodity check-off programs require mandatory assessments, one of the key provisions of every program is that producers have the right to petition to vote on whether to continue the program. In the Pork Promotion Act, it is clear that a referendum must be held when 15 percent of the eligible producers request a vote. AMS has known about this requirement since 1985 but did little to prepare for the challenging task it presents. Furthermore, the procedures the agency developed in response to the petition were not based on professional standards. Therefore, the validation process it employed was not defensible. As a result, AMS was not able to successfully fulfill its responsibilities for determining if the 15-percent requirement had been met. Nonetheless, in deciding to go ahead with a referendum, the Secretary acted under legal authority. However, when the Secretary decided to use appropriated funds to pay referendum expenses, he was not following the Pork Promotion Act. The act requires that referendum expenses be reimbursed from pork check-off funds.

[12] 63 Comp. Gen. 422, 427-28 (1984); B-230304, March 18, 1988.

[13] *See, e.g.*, 62 Comp. Gen. 617 (1983).

As recommended by the Secretary's task force, a uniform petition and validation process that is based on professional standards would increase AMS' ability to successfully validate future petitions. AMS will need to obtain technical advice from experienced methodologists when developing a validation process to ensure that it is sound. Furthermore, a publicized uniform process will improve interested parties' understanding of AMS' petition process. These actions will enhance AMS' credibility in validating future petitions. Without improvements to its validation process, AMS will likely experience similar problems as it validates the beef petition and other future petitions.

Recommendations for Executive Action

To strengthen AMS' petition validation process, we recommend that the Secretary of Agriculture direct the Administrator of AMS to develop a uniform petition validation process for pork and all other check-off programs that is based on standard professional practices.

Furthermore, to ensure compliance with the Pork Promotion Act, we recommend that the Secretary direct the Administrator of AMS to obtain reimbursement from pork check-off funds to pay all referendum expenses.

Agency Comments

We provided a draft of this report to USDA officials for their review and comment. We met with the AMS Administrator and Associate Administrator. These officials agreed with the report's findings and provided us with technical comments, which we incorporated as appropriate. The officials also agreed with the conclusions and recommendations.

Scope and Methodology

To identify and assess the major problems AMS encountered in validating the pork petition and corrective actions, we reviewed AMS' approach for validating the petition and compared this approach with professional practices. We also interviewed officials from USDA's Office of the Secretary and AMS and reviewed relevant documents.

To determine the key factors leading to the Secretary's decision to order a referendum, we submitted questions and obtained a written response from the Secretary of Agriculture on the basis for his decision. We also interviewed officials with USDA's Office of the Secretary, Office of General

Counsel, and AMS, as well as leaders of NPPC and the Campaign for Family Farms.

To examine the authority of the Secretary of Agriculture to order a referendum on the pork check-off program and to use appropriated funds to pay its costs, we conducted a statutory review and legal analysis of relevant laws, including the (1) Pork Promotion Act and related legislative history, (2) appropriations law and principles, and (3) other relevant laws and cases. In addition, as part of our legal analysis, we interviewed officials from USDA's Office of the Secretary, Office of General Counsel, and AMS. We also collected and analyzed relevant documentation.

We conducted our review from June through August 2000 in accordance with generally accepted government auditing standards.

We are sending copies of this report to the Honorable Richard G. Lugar, Chairman, and the Honorable Tom Harkin, Ranking Minority Member, Senate Committee on Agriculture, Nutrition, and Forestry; the Honorable Larry Combest, Chairman, and the Honorable Charles W. Stenholm, Ranking Minority Member, House Committee on Agriculture; the Honorable Dan Glickman, Secretary of Agriculture; the Honorable Jacob J. Lew, Director of Office of Management and Budget; and other interested parties. We will also make copies available to others upon request.

Please contact me at (202) 512-5138 if you or your staff have any questions about this report. Key contributors to this report are listed in appendix III.

Lawrence J. Dyckman
Director, Food and
Agriculture Issues

List of Congressional Requesters

The Honorable Thomas W. Ewing
The Honorable James A. Barcia
The Honorable J. Dennis Hastert
The Honorable Roy Blunt

The Honorable Bill Barrett
The Honorable John A. Boehner
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The Honorable Steve Buyer
The Honorable Ken Calvert
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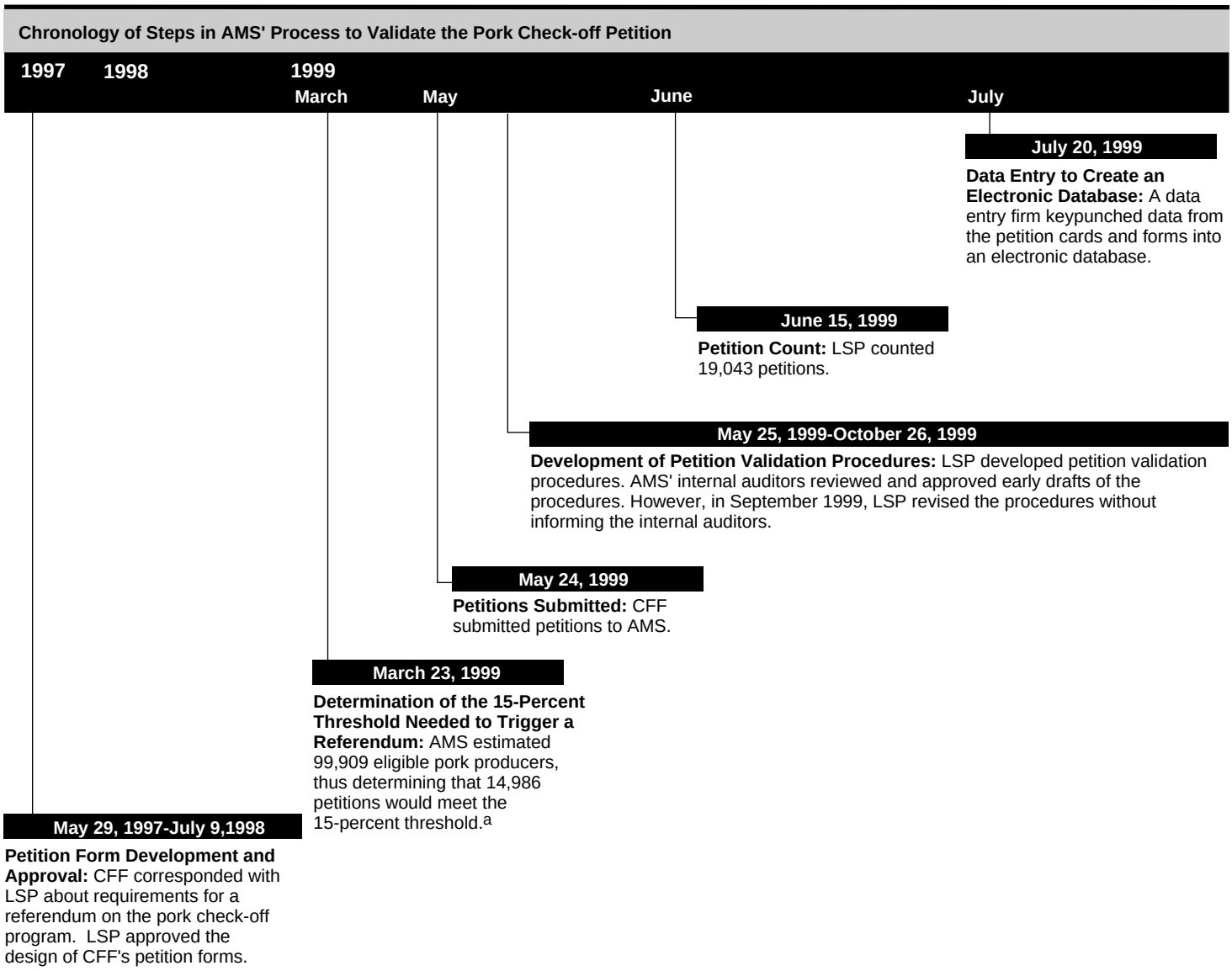
The Honorable Donald A. Manzullo
The Honorable Jim Nussle
The Honorable Michael G. Oxley
The Honorable Bob Schaffer
The Honorable John Shimkus
The Honorable Debbie Stabenow
The Honorable Lee Terry
The Honorable Fred Upton
The Honorable Ed Whitfield
House of Representatives

Chronology of Steps in AMS' Process to Validate the Pork Check-off Petition



AMS Agricultural Marketing Service
CFF Campaign for Family Farms
LSP Livestock and Seed Programs (a division within AMS)
NPPC National Pork Producers Council

Chronology of Steps in AMS' Process to Validate the Pork Check-off Petition *(continued)*

1999 *continued*

September | **October** | **November** | **December**

September 9, 1999

Data Entry Verification: In comparing a sample from the database to the petition cards and forms, LSP found a data entry error rate of about 2 percent, which was within AMS' established standard of 95-percent accuracy.[b]

September - October 1999

Database Review to Remove Invalid Petitioners: LSP identified duplicates, unsigned petitions, and petitions not signed during the 13-month representative period that began on April 24, 1998, thus eliminating 1,349 petitions. 17,694 petitions remained.[c]

October 15, 1999 - November 3, 1999

Telephone Survey to Verify Signatures and Eligibility: To confirm that the person listed signed the petition and was a hog producer and seller during the representative period, LSP contracted with a telephone polling firm to conduct a telephone survey of a random sample of 2,500 petitioners. Of 1,339 respondents, 911 answered "yes" to all questions and 428 answered "no" or gave a non positive response to having signed or answered "no" to being a hog producer and seller during the period. 122 additional individuals refused to answer the questions. The polling firm was unable to contact the other 1,039 petitioners.

Some AMS officials became concerned about the high number of negative responses. Explanations included the timing of the calls during harvest season and the possibility that those being surveyed did not believe the polling firm was acting under USDA's authority.[d]

November - December 1999

Attempt to Resolve Data Entry and Database Review Problems: On Nov. 5, AMS' internal auditors notified LSP that they intended to suspend temporarily their verification of LSP's work due to their findings of a high data entry error rate and insufficient documentation for decisions made in the database review phase.

The internal auditors were asked to redo their data entry review. The second review found 119 errors in a random sample of 400 petitions.

The internal auditors sent a December 1 draft memo to the Administrator stating that the high data entry error rate tainted the subsequent database review and might have adversely affected the telephone survey. They also outlined their concerns about the database review, including inconsistent decisions by LSP and a lack of procedural documentation. The memo included three options available to AMS: (1) start over using the same process; (2) start over with a new process; or (3) work with existing data while recognizing the flaws. AMS chose the third option.

AMS Agricultural Marketing Service
CFF Campaign for Family Farms
LSP Livestock and Seed Programs (a division within AMS)
NPPC National Pork Producers Council

Chronology of Steps in AMS' Process to Validate the Pork Check-off Petition *(continued)*

1999 *continued* | **2000** | **January** | **February**

December 10, 1999 - January 10, 2000

Letter to the Telephone Survey's "No" Respondents: Due to AMS' concerns that a substantial number of hog producers, 428, answered "no" or gave a non positive response to the telephone polling firm, it sent letters to these 428 individuals that asked the telephone survey questions and requested documentation for proof of being a hog producer and seller. AMS received 96 "yes" responses to bring the total number of sampled producers who said they signed the petiiton and were a producer to 1,007.[e]

January 5, 2000

AMS Meeting With CFF and NPPC: AMS met with CFF and NPPC to share information about the validation procedures.

January 31, 2000

Secretary's Meetings With CFF and NPPC: The Secretary met separately with CFF and NPPC. He asked them to prepare written criticisms of LSP's validation process.

January 31, 2000

Preliminary Telephone and Letter Survey Results: Based on the survey results, AMS statisticians projected with 95-percent confidence that the number of validated petitions was no larger than 13,696—1,290 less than the required 14,986. However, these results were preliminary as AMS had not completed the validation process.

February 2, 2000 and February 16, 2000

NPPC's Letters to the Secretary: NPPC's February 2 letter outlined inconsistencies in AMS' practices and decision-making. It stressed that the Secretary can only call a referendum if 15 percent of *bona fide* hog producers sign the petition. NPPC supported the validity of the telephone survey.

NPPC's February 16 follow-up letter presented five key points: (1) a statistically valid survey had determined that the petition fell short of the required 14,986 signatures; (2) USDA's process was open and transparent; (3) USDA made accommodations to the referendum proponents; (4) the petition fell short of the required number of signatures even without verifying documentation; and (5) the Secretary does not have authority to hold a referendum without a 15-percent threshold.

AMS Agricultural Marketing Service
CFF Campaign for Family Farms
LSP Livestock and Seed Programs (a division within AMS)
NPPC National Pork Producers Council

Chronology of Steps in AMS' Process to Validate the Pork Check-off Petition *(continued)*

2000 *continued*

February

February 18, 2000

CFF's Letter to the Secretary: CFF presented arguments for holding a referendum, offering process flaws and criticisms of the telephone survey. Appendixes included complaints from recipients of the telephone survey and four analyses of AMS' methodology from social scientists, each of whom criticized the telephone survey.

February 23, 2000

AMS Administrator's Meeting With Internal Auditors: The internal auditors briefed the Administrator on their findings, which included faulty data entry and inconsistencies in handling duplicates.

February 24, 2000

Secretary's Meeting With AMS Administrator: The Secretary informed the Administrator that he intended to call for a referendum.

February 25, 2000

Secretary's Decision Memo: The memo announced his decision to call for a referendum.

February 28, 2000

Secretary's Decision Announcement: The Secretary formally announced his decision at the annual meeting of the National Farmers Union in Salt Lake City, Utah.

April

April 21, 2000

Internal Auditors' Memo to LSP: The memo concluded that AMS could not conclusively determine the number of valid petitions and officially ended their review.

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[a]The Agricultural Marketing Service (AMS) based its estimate of the number of eligible pork producers and importers on the U.S. Department of Agriculture's (USDA) National Agricultural Statistical Service's 1998 estimate of farms with hogs or pigs, adjusted to remove farms that did not sell hogs or pigs, as well as Customs Service information on hog, pig, and pork importers.

[b]AMS' internal auditors subsequently found much higher data entry error rates in samples examined in October 1999 (8 errors in a sample of 60 petitions) and November 1999 (119 errors in a sample of 400 petitions).

[c]In November 1999, internal auditors found that LSP—in conducting its database review—had not followed written guidelines and not documented why it had eliminated, or not eliminated, potential duplicates or other invalid petitions.

[d]The internal auditors reviewed the polling firm's calling methods and found them adequate. They also found no pattern of fraud among the 428 “no” respondents.

[e]AMS did not contact the 1,039 individuals who did not respond to the telephone survey.

The Secretary of Agriculture's Authority to Order a Referendum and Use Appropriated Funds

The Pork Promotion, Research, and Consumer Information Act of 1985[1] (the Pork Promotion Act), which authorizes the pork check-off program, requires the Secretary of Agriculture to conduct a referendum when requested by 15 percent of program participants, but it does not address whether the Secretary has the authority to conduct a referendum at his own discretion (a discretionary referendum). Program participants requested a referendum, but USDA could not be certain that those requesting the referendum represented 15 percent of program participants. However, in February 2000, the Secretary called for a discretionary referendum to determine whether program participants favor the continuation of the pork check-off program. This referendum was held on September 19-21, 2000. USDA plans to use appropriated funds to pay the referendum costs.

Members of the House of Representatives requested us to examine: (1) whether the Secretary has the legal authority to call for a discretionary referendum to determine whether a majority of participants wish to continue the program and (2) whether USDA can use taxpayer funds to pay the referendum costs.

In our view, the Secretary has implied authority, based on his authority to terminate the pork check-off program, to conduct a discretionary referendum under the Pork Promotion Act. We also find that the Secretary must use assessments collected by the National Pork Board under the Pork Promotion Act for referendum expenses.

Background

The Pork Promotion Act authorizes the Secretary to issue and amend, as well as suspend or terminate, orders implementing a pork promotion and research program. This program, commonly referred to as the pork check-off program, is financed by an assessment paid by the pork producers and importers who are participants in the program. The order implementing the pork check-off program was effective September 5, 1986, and assessments were collected beginning November 1, 1986. The Secretary conducted the required initial referendum[2] on September 7-8, 1988. At that time, 77.5 percent of voting producers and importers favored continuing the program.

[1]Pub. L. No. 99-198, sections 1611-1631, 99 Stat. 1354, 1606-22 (1985), codified at 7 U.S.C. sections 4801-4819.

[2]*See* 7 U.S.C. section 4811(a).

This initial referendum is the only pork referendum USDA has conducted to date.

In May 1999, USDA's Agricultural Marketing Service (AMS) received a request for a referendum with 19,043 signatures on it. Under the Pork Promotion Act, the Secretary is required to conduct a referendum if he receives a request from at least 15 percent of eligible participants. 7 U.S.C. section 4812(b). USDA later concluded that it could not be certain of the exact number of valid signatures. In late February 2000, the Secretary called for a referendum at the Department's expense "in the interest of fairness," because "many thousands of valid signatures were received."[3]

Secretary Has the Legal Authority to Conduct a Referendum

The first issue for consideration is whether the Secretary has the legal authority to call for a discretionary referendum. The Pork Promotion Act requires the Secretary to conduct certain referendums, including the initial referendum, to determine if participants wish to continue the program and subsequent referendums when 15 percent of program participants request it.[4] However, the act is silent regarding the Secretary's authority to conduct a discretionary referendum. The legislative history of the Pork Promotion Act is also silent and provides no insight on this matter.

According to USDA, the Secretary's legal authority to conduct a discretionary referendum stems from 7 U.S.C. section 4812(a). This section of the Pork Promotion Act provides that if "the Secretary determines that an order, or a provision of the order, obstructs or does not tend to effectuate the declared policy of this chapter, the Secretary shall terminate or suspend the operation of such order or provision." 7 U.S.C. section 4812(a). USDA believes this provision gives the Secretary implied authority to call for a discretionary referendum, since it may help inform his decision whether to terminate the program.

[3]Pork Promotion, Research, and Consumer Information Program: Procedures for the Conduct of Referendum, 65 *Fed. Reg.* 43,498, 43,501 (2000) (to be codified at 7 C.F.R. pt. 1230).

[4]7 U.S.C. sections 4811(a), 4812(b).

There is no indication that the Congress either granted or denied authority to conduct a discretionary referendum in the pork check-off program. The Congress passed the Pork Promotion Act as part of the Food Security Act of 1985,[5] which also included the Watermelon Research and Promotion Act of 1985[6] and the Beef Promotion and Research Act of 1985.[7] The Watermelon Act contains explicit language authorizing the Secretary to conduct discretionary referendums: "[t]he Secretary may conduct a referendum at any time." 7 U.S.C. section 4913. The Beef Promotion and Research Act amended the Beef Research and Information Act, eliminating language that explicitly granted the Secretary authority to conduct discretionary referendums as well as a termination provision similar to that in the pork check-off program. The Congress enacted these varying referendum provisions in the same public law, which could arguably indicate a congressional intent to deny the Secretary this authority in the pork check-off program.

However, the agricultural promotion programs enacted by the Congress are distinct programs with many varying provisions, making it difficult to analogize from one program to another. Some agricultural promotion acts provide explicit authority to conduct discretionary referendums, while others do not.[8] Neither the acts nor legislative history provide information or a basis for distinguishing why referendums are explicitly provided for in some promotion programs and not in others. None of the statutes authorizing agricultural promotion programs prohibit the Secretary from conducting a discretionary referendum, nor do they clarify the precise topic at hand—whether the Secretary's termination authority in the pork check-off program provides the Secretary with the authority to conduct a discretionary referendum.

Focusing on the statutory provision at issue, we note that the Secretary has explicit authority to suspend or terminate the pork check-off program

[5]Pub. L. No. 99-198, sections 1611-1631, 99 Stat. 1354, 1606-22 (1985).

[6]*Id.*, sections 1641-1657, 99 Stat. at 1622-30.

[7]*Id.*, section 1601, 99 Stat. at 1597-1606.

[8]For example, the Secretary "may conduct a referendum at any time" under the cotton (7 U.S.C. section 2108(b)), eggs (7 U.S.C. section 2709), and potatoes (7 U.S.C. section 2624) promotion programs. Other programs, including mushrooms (7 U.S.C. sections 7481-7491), popcorn (7 U.S.C. sections 6301-6311), and honey (7 U.S.C. sections 6101-6112) do not have this language.

when he determines that it is not effectuating declared policy. 7 U.S.C. section 4812(a). The Secretary's ultimate power to terminate necessitates the authority to inform his decision. To make such a decision, the Secretary has the authority to gather the information he needs. The Pork Promotion Act, however, does not explicitly state how the Secretary should determine whether the program is effectuating the underlying policy, nor does it have a declared policy section.

Although the Pork Promotion Act lacks a statement of declared policy, it does have a section outlining the purpose of the act.[9] Section 4801(b) states that the purpose of the pork check-off program is

> "to authorize the establishment of an orderly procedure for financing, through adequate assessments, and carrying out an effective and coordinated program of promotion, research, and consumer information designed to—
>
> (A) strengthen the position of the pork industry in the marketplace; and (B) maintain, develop, and expand markets for pork and pork products."

7 U.S.C. section 4801(b)(1). This purpose section addresses the effectiveness of the program. It is reasonable for the Secretary to consider the program participants' view of whether the program is effective in attaining the goals, for example, of strengthening the position of the pork industry and maintaining markets. From a statutory analysis perspective, there is little difference between the Secretary's obtaining this information by referendum or another method, such as sending letters to participants requesting their input.

The support of program participants could also be considered one of the policy goals of the pork check-off program. Participant support is fundamental to agricultural promotion programs. Participants' assessments pay for the program, not federal funds. Participants nominate and elect the delegate body, which, in turn, nominates the National Pork Board. Participants first show their support via an initial referendum and show their continued support through subsequent referendums. Moreover, the concept that participant support is essential to an agricultural

[9]The "purposes" section appears in the same place as did the declared policy in the dairy promotion act. *See* 7 U.S.C. section 602. The pork check-off program was crafted using the language of the dairy promotion program. H.R. Rep. No. 271, 99th Cong., 1st Sess., pt.1, at 1561-62 (1985). Arguably then, what the Congress intended as the "declared policy" of the Pork Promotion Act is reflected in the stated purpose of the pork check-off program.

promotion program's effectiveness has been cited before. In the final rule terminating the Tokay grapes promotion program, USDA stated, "The Secretary of Agriculture has determined that the marketing order no longer tends to effectuate the declared policy of the Act because continuance of the program is no longer supported by growers." 60 *Fed. Reg.* 33679, 33679 (June 29, 1995). A referendum is a reasonable method to use in determining participant support. Thus, a referendum is one way the Secretary could determine if the pork check-off program effectuates the policy of the act.

The Congress gave the Secretary broad discretion in how to determine whether the pork check-off program is effectuating its declared policy. The Congress did not specify when the program would not be effectuating the declared policy, nor did it state what constituted the declared policy. Moreover, the decision is not of such great economic magnitude that the Congress would be unlikely to delegate it to the Secretary.[10] The annual impact of the entire pork check-off program is less than $100 million.[11] According to the final rule ordering the pork referendum, the economic costs were not major.[12]

[10]In determining whether the Congress has addressed an issue, e.g., discretionary referendums, one of the considerations is the economic and political magnitude of the decision and the manner in which the Congress would likely delegate such a decision. According to the Supreme Court, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." *FDA v. Brown & Williamson Tobacco Corp.*, __U.S.__, 120 S. Ct. 1291, 1314 (2000).

[11]Pork Promotion, Research, and Consumer Information Order, 51 *Fed. Reg.* 31898, 31898 (1986) (codified at 7 C.F.R. pt. 1230).

[12]65 *Fed. Reg.* 43498, 43499 (2000).

USDA's interpretation of the Secretary's termination authority as including the authority to conduct a discretionary referendum is not new. The 1986 rule establishing the pork check-off program states, "The Secretary is also authorized to conduct periodic referenda to determine whether a termination or suspension of the order is warranted."[13] The Secretary called for this referendum "in the interest of fairness," because "many thousands of valid signatures were received" from pork producers and importers requesting a referendum.[14] The final rule for the pork referendum states that "[s]upport of the program by a majority of persons who pay assessments is essential to both the establishment and the continuation of this program."[15] The referendum outcome provides a way for the Secretary to determine if the pork check-off program is meeting its policy goals. If a majority of the referendum voters favor termination, the Secretary stated that the pork assessment collections would end no later than 30 days after that determination and the check-off program would be terminated as soon as practical.[16]

The Supreme Court has established that when the Congress has not specifically addressed an issue, then the implementing agency's interpretation should prevail so long as it is reasonable.[17] The Congress did not address discretionary referendums. Nor did it specify how the Secretary should determine whether the pork check-off program was effectuating its declared policy or even what constitutes that declared policy. However, the Congress recognized the importance of having the support of program participants by requiring an initial referendum. 7 U.S.C. section 4811(a). The pork check-off program is supported by participant assessments, so it is reasonable that participants have a voice in determining the program's effectiveness. The program may not be effective, and may not be effectuating its policy, if it does not have the support of a majority of participants. The Secretary's decision to conduct a referendum to inform his decision on whether to terminate the pork check-off program

[13] 51 *Fed. Reg.* 31898, 31898 (1986).

[14] 65 *Fed. Reg.* 43,498, 43,501 (2000).

[15] *Id.*

[16] *Id.*

[17] *FDA v. Brown & Williamson Tobacco Corp.*, __U.S.__, 120 S. Ct. 1291 (2000*); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

is a reasonable one. Thus the Secretary, in our view, has implied authority to conduct this referendum.

Secretary Must Use Pork Check-off Funds to Pay Referendum Expenses

USDA has stated that it will use its section 32 appropriation to cover referendum expenses. Section 32 of the Act of August 24, 1935 (7 U.S.C. section 612c) appropriates funds to encourage exportation and domestic consumption of agricultural products.[18] Under AMS' annual appropriation, "Funds for Strengthening Markets, Income and Supply," AMS may use the section 32 appropriation "for commodity program expenses as authorized therein, and other related operating expenses." Pub. L. No. 106-78, 113 Stat. 1135, 1144 (1999). USDA broadly interprets the permissible use of these funds for "other related operating expenses" to include anything that promotes farm income and farm marketing, including, in this case, the referendum expenses.

While an agency has reasonable discretion in carrying out an appropriation, the expenditure must not fall within the scope of some other appropriation or statutory funding scheme. *See* 63 Comp. Gen. 422, 427-28 (1984); B-230304, March 18, 1988. Under this principle, the Secretary may not use the section 32 appropriation for referendum expenses. USDA states that it is conducting the referendum based on its authority to terminate the program in section 4812(a). Expenses for a referendum conducted under section 4812, however, are explicitly provided for in another statutory funding scheme. The Pork Promotion Act specifically requires that a referendum conducted by the National Pork Board. 7 U.S.C. section 4811(c).

[18]The Secretary may use these funds to "(1) encourage the exportation of agricultural commodities and products thereof by the payment of benefits in connection with the exportation thereof or of indemnities for losses incurred in connection with such exportation or by payments to producers in connection with the production of that part of any agricultural commodity required for domestic consumption; (2) encourage the domestic consumption of such commodities or products by diverting them, by the payment of benefits or indemnities or by other means, from the normal channels of trade and commerce or by increasing their utilization through benefits, indemnities, donations or by other means, among persons in low income groups as determined by the Secretary of Agriculture; and (3) reestablish farmers' purchasing power by making payments in connection with the normal production of any agricultural commodity for domestic consumption. Determinations by the Secretary as to what constitutes diversion and what constitutes normal channels of trade and commerce and what constitutes normal production for domestic consumption shall be final." 7 U.S.C. section 612c.

Moreover, all pork check-off program expenses are to be paid from assessments. The Pork Promotion Act states that the pork check-off program "shall be conducted, at no cost to the Federal Government." 7 U.S.C. section 4801(b)(2). When the Congress authorized the appropriation of funds for the Secretary to carry out the pork check-off program, it made the appropriation "subject to reimbursement from the National Pork Board under section 4809(c)(3)(B)(iv)." 7 U.S.C. section 4819. Section 4809(c)(3)(B)(iv) requires that the National Pork Board use assessment funds for "administrative costs incurred by the Secretary to carry out [the Pork Promotion Act], including any expenses incurred for the conduct of a referendum." Thus, not only does the Pork Promotion Act require all program expenses to be paid from pork check-off funds, but it also specifically mentions in two separate sections that referendum expenses should be paid from pork check-off funds.

These specific statutory provisions cannot be overcome by the more general section 32 appropriation. *See, e.g.*, 62 Comp. Gen. 617, 617 (1983). Referendum expenses are not explicitly mentioned in the general appropriation but are provided for under the provisions of the Pork Promotion Act. Accordingly, the Secretary must not use the section 32 appropriation, but must follow the statutory funding scheme and be reimbursed from pork assessments to pay referendum expenses.

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