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THE PRODUCTION FLEXIBILITY CONTRACT IN THE AGRICULTURAL MARKET TRANSITION (FREEDOM TO FARM) ACT IS A BINDING GUARANTEE ON THE PART OF THE UNITED STATES

HON. PAT ROBERTS
OF KANSAS
IN THE HOUSE OF REPRESENTATIVES

Saturday, September 28, 1996

Mr. ROBERTS. Mr. Speaker, as the adjournment of the 104th Congress nears adjournment today, it is a proper time to review the changes that have been made in farm programs—I refer to it as Freedom To Farm—and what farmers and producers can expect, during the 1996 through 2002 period, in the way of guaranteed fixed—albeit declining—payments on their production flexibility contracts with the Federal Government—the Commodity Credit Corporation.

Nearly all U.S. farmers and producers have signed-up for the production flexibility contract with the USDA Consolidated Farm Service Agency, and from all reports I believe it is widely endorsed by farmers, consumers, rural communities, and rural credit providers, and many others. It reverses 60 years of over-regulation of farmers and producers by the Federal Government and gives them the flexibility to apply good financial management practices and good environmental management practices on their farms.

The reason that I make this statement today is to provide some legislative history and background for those farmers who have signed a contract with the USDA's Commodity Credit Corporation and may be aware that President Clinton released a statement on April 4, 1996 when he signed the Federal Agriculture Improvement and Reform [FAIR] Act of 1996 (Public Law 104–127) claiming he planned to submit legislation in 1997 to amend the FAIR Act.

I will review the provisions of the enactment of the Freedom to Farm Act (Public Law 104–127), its legislative history, and analyze a recent and relevant Supreme Court decision that sets forth standards for Federal Government liability under similar contracts.

Title I of the ''Agricultural Market Transition Act'' (Public Law 104–127, 110 Stat. 896, April 4, 1996) states in section 101(b), as noted in pertinent part below, part of the purpose of the Act:

(b) PURPOSE.—It is the purposes of this title—

(1) to authorize the use of binding production flexibility contracts between the United States and agricultural producers to support farming certainty and flexibility while ensuring continued compliance with farm conservation and wetland protection requirements;.

The conference report (H. Rept. 104–494, dated March 25, 1996) explains the origin of the language in section 101(b) quoted above and adoption of the House provision by the conferees:

SUBTITLE A—PURPOSE AND DEFINITIONS

(2) PURPOSE

The House bill states that it is the purpose of this title to authorize the use of binding production flexibility contracts between the United States and producers; to make nonrecourse marketing assistance loans; to improve the operation of the peanut and sugar programs and; to terminate price support authority under the Agricultural Act of 1949. (Section 101).

The Senate amendment has no comparable provision.

The Conference substitute adopts the House provision with an amendment deleting the reference to the Agriculture Act of 1949 and adding a reference to the establishment of the Commission on 21st Century Production Agriculture. (Section 101).

When the farm bill—later to become Public Law 104–127—was debated on the House floor an inquiry was made about the contractual aspects of production flexibility contract. (See CONGRESSIONAL RECORD, February 29, 1996, H. 1539):

Let me first say that it is clearly the intent of Congress that the market transition payment provided by the 7-year production flexibility contract is an express and unmistakable contract between the United States and the owner and operator of farmland. Because the market transition payment is based on the 7-year contract it is the intent of the legislation that the payment is guaranteed.

When the conference report was taken up on the House floor, the production flexibility contract was explained as follows (CONGRESSIONAL RECORD, p. H3141, March 28, 1996):

The guarantee of a fixed (albeit declining) payment for seven years will provide the predictability that farmers have wanted and provide certainty to creditors as a basis for lending. The current situation in wheat, corn and cotton under which prices are very high, but large numbers of producers have lost their crops to weather or pests would be corrected by FFA. Those producers last year could not access the high prices without crops, and instead of getting help when they need it most, the old system cuts off their deficiency payments and even demands that they repay advance deficiency payments. FFA insures that whatever government financial assistance is available will be delivered, regardless of the circumstances, because the producer signs a binding contract with the Federal Government for the next seven years.

The debate on Title I of the conference report on the FAIR bill in the House and in the Senate is replete with references to ''contract'', ''guarantee'', ''binding contract'' and similar references. The production flexibility contract (USDA—CCC Form 478) speaks in terms of contract acreage, contract crop, and the ability of CCC representatives to enter onto the producer's farm to determine ''compliance with the contract''.

The fact that the production flexibility contracts were intended to carry with them a guarantee of payments barring failure of the producer to comply with certain statutorily impress conditions for compliance is clearly illustrated. Given that, it should follow that these production flexibility contracts represent vested legal rights in owners or producers that could be altered by subsequent enactment, except that those legal rights could be enforceable against the Government for damages if for some reason funding were not made available during the 7-year period of the contract contemplated in the AMT Act.

The ruling of the Supreme Court in the case of *United States Winstar et al,* 116 S. Ct. 2432 (1996) should serve as a precedent and should apply in the event there is an amendment to the Agricultural Market Transition Act prior to 2002 that could have the effect of breaching the contractual obligations of the Government to fulfill the provisions of the production flexibility contract.

The Winstar case held that Federal bank regulations that implemented the 1989 Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) (Public Law 101–73, see particularly 12 U.S.C. 1464(t)) imposed new capital requirements on savings and loan associations in derogation of promises made in pre-1989 agreements that allowed financial institutions willing to take over failing institutions to use certain accounting devices to satisfy capital requirements and this constituted a breach of contract for which the Government was liable in damages.

The United States in the Winstar case raised the ''unmistakability defense'' to the effect that a ''public or general'' sovereign act such as FIRREA's alteration of capital reserve requirements (that reversed the earlier permission of certain savings and loan institutions to use certain accounting devices) could not trigger contractual liability for the Government.

However, the unmistakability defense or doctrine states that ''sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.'' *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982). The application of this doctrine turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government. U.S. versus Winstar Corp., supra.

As opposed to attempts to bind Congress from enacting regulatory measures inconsistent with the contracts, the contracts in Winstar allocate or shift the risks incurred by the parties. The plaintiff Winstar did not assert that the Government could not change the capitalization requirements applicable to the plaintiff, but that the Government assumed the risk that where subsequent changes prevented the plaintiff from performing under the agreement that the Government would be held liable for financial damages. So long as such contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it. United States versus Winstar, supra.

Under the Production Flexibility Contract, risks are allocated the parties. As opposed to prior farm programs, the producers agree to accept the risk of fixed payments unrelated to national supply or established target prices in exchange for the Government's acceptance of the risk of less control over supplies of various types of agricultural commodities. As in *Winstar*, the issue does not turn on whether the Government can subsequently change the rules under which producers operate if they elect to participate in a program, the issue is whether enforcing the risks shifted among the parties will infringe upon the sovereign jurisdiction of the United States. Where changes in the Production Flexibility Contract by the Government result in a financial liability to the producer, the Government is liable to the producer for a breach of contract and damages.

This liability does not infringe on the Government's sovereignty and does not violate the unmistakability doctrine.

The Government in *Winstar*, supra, also asserted that under the sovereign acts doctrine, "whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." The Court in the *Winstar* case held that the sovereign acts doctrine:

> * * * balances the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor. If the answer is no, the Government's defense to liability depends on the answer to the further question, whether that act would otherwise release the Government from liability under ordinary principles of contract law.

In answering the first question, the Court looked at whether the action by the Government having an impact on the public contract was merely incidental to the accomplishment of a broader government objective. The greater the Government's self-interest, the more suspect the claim that the private contractor bear the financial burden of the Government's action. In *Winstar*, the Court found that a substantial purpose of the Government's action was to eliminate the very accounting formula that the acquiring thrifts had been promised. Thus, the Government's self-interest was so substantial that the statute was not "public and general" act for purposes of the sovereign acts defense.

Any changes to the statutory authority for Production Flexibility Contracts would no doubt follow the same analysis as that relied upon by the Court in *Winstar*. To the extent that the farm programs would be altered, it would be likely that the Government would have substantial self-interest in any relief it might obtain from risks allocated it under the contract. Most likely this would result in some legislative change to reduce the amount of money paid to producers. While such change would likely be for the "public and general" benefit, it would undercut the allocation of risks between the parties to the contract and as such, would substantially be in the Government's self-interest.

Finally, the Government in *Winstar* asserted the defense of impossibility. To invoke the defense of impossibility, the Government would have to show that the nonoccurrence of regulatory amendment was a basis assumption of the contracts. That is the parties assumed that the statute on capitalization requirements would not change. As the Court notes, a change was both foreseeable and likely in that case.

The Production Flexibility Contract states in the Appendix to Form CCC–478 (the Production Flexibility Contract) that if the statute on which the contract is based is materially changed during the period of the contract, CCC may require the producer to elect between modification of the contract consistent with the new provisions and termination of the contract. This statement itself is an acknowledgement that the Congress very well may change the Agriculture Market Transition Act prior to its expiration in 2002. Further, if Congress changes the program, it is reasonable and expected that the contracts would be modified accordingly. However, as was true with the plaintiff in *Winstar* case, producers have no desire to assert that Congress cannot change the underlying statute, but instead, may pursue a claim for breach of contract and damages where any legislative change results in changes to the contract and producers incur financial damages. The acknowledgment of possible legislative change to the Production Flexibility Contract should only serve to weaken any future Government defense of impossibility.

ELECTRIC UTILITY DEREGULATION WILL SAVE AMERICAN FAMILIES BILLIONS OF DOLLARS A YEAR

HON. TOM DeLAY

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Saturday, September 28, 1996

Mr. DELAY. Mr. Speaker, I rise today, the last day of the historic 104th Congress, to introduce legislation that I believe will bring about a historic change in the way American families think about electricity. Now I know that electricity service isn't necessarily an exciting issue to most Americans, but I think when they learn about the hundreds of dollars a year they stand to save, they will sit up and pay attention.

What most American families don't realize when they get their electricity bill every month is that they could be paying a lot less. There are companies that are ready, willing, and able to sell them electricity for a lot less money, but are prevented from doing that by outdated laws. In the vast majority of cases, the current system forces consumers to buy electricity from only one company, and actually encourages those companies to charge consumers for services they don't need, want or use.

There are no logistical barriers preventing Americans from buying electricity for their homes and businesses in a competitive marketplace. The obstacles are political and legal, and it is our historic opportunity as legislators to remove these barriers for the common good. Electricity service in the United States is a $200 billion a year industry, and deregulation can save $60 to $80 billion a year, much of which will end up in the pockets of my constituents in Texas and families throughout America.

The bill that I am introducing today, the Consumers Electric Power Act, will put an end to the archaic electricity delivery system in the United States and will allow American families to purchase their electricity from any electric service provider in the country. The competition that this legislation will introduce to the electricity market will cause prices to plummet, improve the reliability of electricity service, and spur innovation in the electric service industry.

I know that deregulation is happening on a piecemeal basis at the State level, and that is good. But there is no reason that American families in one State, city, town or neighborhood should be forced to pay more of their hard-earned money than families in the next town over or down the street who have the ability to choose their electric service provider. The Federal interest in free and open competition requires that jurisdiction over the terms and conditions of access to the customer be Federal and not State—it is the only way that every American will see the benefits of competition in the electric service industry. The free market is a national system, one that will benefit every American family, no matter where they live.

Specifically Mr. Speaker, the Consumers Electric Power Act will guarantee that every customer has the right to choose their electricity service provider by January 1, 1998; ensure that electric service providers are allowed access to compete on a level playing field; preserve and strengthen the State authority with regard to universal service for consumers, universal access for electric service providers, and the promotion of conservation and economic development programs; outline the performance objectives of competitive transmission and distribution systems; and prospectively repeal the Public Utility Holding Company Act of 1935 and section 210 of the Public Utility Regulatory Policies Act 1978 after competition is affirmatively achieved.

This bill very clearly shows the direction that I believe deregulation of the electricity industry should take. I realize that this bill I am dropping today is by no means the last word on this subject. An issue this complex and important must harness the experience and expertise of those individuals who have spent years studying this issue and working in this industry—and who realized years ago that we must deregulate the electricity industry because it is the right thing to do for American families. Input from those Members of Congress who realize the importance of this subject is both expected and welcome.

Mr. Speaker, this Commerce Committee will be the forum for shaping this legislation and I look forward to working with Members of the Committee over the next year to shape a bill that will provide the maximum benefits for consumers. In particular, I want to recognize the importance of two Members of the House of Representatives who have opened the way for electricity deregulation. The Honorable DAN SCHAEFER, my colleague from Colorado, and the Chairman of the Energy and Power Subcommittee, has already introduced an excellent electricity deregulation bill, and I look forward to working with him on behalf of American families. His knowledge of this subject will be invaluable to Members of Congress as they craft electricity deregulation legislation. In addition, the Honorable TOM BLILEY of Virginia, the Chairman of the Commerce Committee, and the Member who will be responsible for bringing this legislation to the floor of the House, has already made this issue his highest priority for the 105th Congress. His determination and ability are sure to serve American families well in the coming years.

Mr. Speaker, by opening this industry to competition, we will not only implement the economic equivalent of a major tax cut, we will unleash a new era of productivity and creativity in this huge and vital industry to lead America into the new millennium.

At this time Mr. Speaker, I would like to submit the text of the Consumers Electric Power Act for inclusion in the RECORD. I hope that my colleagues will study the legislation in the coming months as they prepare to address this important issue in the next Congress.

H.R. —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,