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Christopher R. Kelley

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# RECENT DEVELOPMENTS IN FEDERAL FARM PROGRAM LITIGATION

CHRISTOPHER R. KELLEY\*

In a word, "procedure" sums up the recent developments in federal farm program litigation.<sup>1</sup> In October 1994, Congress changed the administrative appeal process for federal farm program disputes for the second time in four years by creating the USDA National Appeals Division (USDA NAD).<sup>2</sup> Less than two months later, the Tenth Circuit, in *Olenhouse v. Commodity Credit Corporation*,<sup>3</sup> ended its common practice of disposing of farm program litigation by summary judgment.<sup>4</sup> And in early 1995, the Federal Circuit, in *Doty v. United States*,<sup>5</sup> strongly criticized the Department of Agriculture for violating "fundamental principles of fairness" for basing a determination solely on evidence it was under a court order to disregard.<sup>6</sup> The latter development underscores the importance of attention to "procedure" — even though obligated to adhere to "fundamental principles of fairness," the benchmark for administrative and judicial procedures, the Department of Agriculture not infrequently fails to do so.

This article surveys each of these developments, giving the most attention to the new administrative appeal process brought about by the USDA NAD's creation. Although the new USDA NAD was mandated by Congress nearly a year before this article's preparation, the Department of Agriculture has neither promulgated final regulations nor appointed a permanent USDA NAD Director.<sup>7</sup> This article's discussion, therefore, is subject to any changes brought about by the final regulations and the appointment of a permanent USDA NAD Director.<sup>8</sup>

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\* Of Counsel, Lindquist & Vennum P.L.L.P., Minneapolis, Minnesota. B.A., 1969, Louisiana State University; J.D., 1975, Howard University; LL.M., 1986, University of Arkansas.

1. With apologies to THE GRADUATE (Embassy/Lawrence Turner, Inc., 1967), where the word whispered in Benjamin's ear (Dustin Hoffman) was "plastics."

2. See Federal Crop Insurance and Department of Agriculture Reorganization Act of 1994 (USDA Reorganization Act), Pub. L. No. 103-354, §§ 271-280, 108 Stat. 3178, 3228-35 (to be codified at 7 C.F.R. §§ 6991-7000). The Act abolished the ASCS National Appeals Division (ASCS NAD). *Id.* § 281(b), 108 Stat. at 3233, *repealing* Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1132, 104 Stat. 3359, 3512-15 (codified at 7 U.S.C. § 1433e).

3. 42 F.3d 1560 (10th Cir. 1994).

4. *Id.* at 1579-80.

5. 53 F.3d 1244 (Fed. Cir. 1995).

6. *Id.* at 1251-52.

7. Proposed regulations have been published. 60 Fed. Reg. 27,044-049 (1995) (to be codified at 7 C.F.R. pt. 11) (proposed May 22, 1995). Interim final regulations were published on Dec. 29, 1995, to be effective on Jan. 16, 1996. 60 Fed. Reg. 67,298-313 (1995) (to be codified at 7 C.F.R. pt. 11).

8. For a discussion of the pre-1994 farm program administrative appeal process, see Christopher R. Kelley & John S. Harbison, *A Guide to the ASCS Administrative Appeal Process and the Judicial Review of ASCS Decisions* (pts. 1 & 2), 36 S.D. L. REV. 14, 435 (1991). Farm program administrative appeals and litigation are also discussed in Alice Devine, *Understanding the Current Crisis with the ASCS*, 9 J. AGRIC. TAX'N & L. 195 (1987); Neil D. Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs*, 12 HAMLINE L. REV. 633 (1989); Neil D.

### *i. The USDA National Appeals Division*

#### *A. Introduction*

The USDA NAD grew out of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (USDA Reorganization Act).<sup>9</sup> Intended as an "independent" appeal authority,<sup>10</sup> the USDA NAD now hears final administrative

Hamilton, *Farmers' Rights to Appeal ASCS Decisions Denying Farm Program Benefits*, 29 S.D. L. REV. 282 (1984); Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation*, 25 U. MEMPHIS L. REV. 1107 (1995); Ralph A. Linden, *An Overview of the Commodity Credit Corporation and the Procedures and Risks of Litigating Against It*, 11 J. AGRIC. TAX'N & L. 305 (1990); Alan R. Malasky et al., *Resolving Federal Farm Program Disputes: Recent Developments*, 19 WM. MITCHELL L. REV. 283 (1993); Alan R. Malasky, *ASCS Appeals and Payment Limitation Revisions in the 1990 Farm Bill: What Did the American Farmer Really Gain (Or Lose)?*, 68 N.D. L. REV. 365 (1992); Alexander J. Pires, Jr., *Why the U.S. Claims Court Is Not a Viable Venue for Farmers: The U.S. Claims Court's Handling of Agricultural Cases, 1980-1990*, 15 U. ARK. LITTLE ROCK L. J. 223 (1993); Alexander J. Pires, Jr. & Shelley L. Bagoly, *Federal Court Jurisdiction over USDA/ASCS Cases: How and In What Courts Farmers Can Seek Review of USDA Denials of Their Farm Subsidy Payments*, 24 IND. L. REV. 1489 (1991); Karen Russo, *Farm Clients Beware of ASCS Mysteries*, 8 COMPLETE LAW. 57 (1991); see also Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659 (1994); Christopher R. Kelley & Alan R. Malasky, *Federal Farm Program Payment-Limitations Law: A Lawyer's Guide*, 17 WM. MITCHELL L. REV. 199 (1991); Christopher R. Kelley & Susan A. Schneider, *Selected Issues of Federal Farm Program Payments in Bankruptcy*, 14 J. AGRIC. TAX'N & L. 99 (1992).

9. Pub. L. No. 103-354, §§ 271-280, 108 Stat. 3178, 3228-35 (to be codified at 7 U.S.C. §§ 6991-7000). The Act was signed by President Clinton on October 13, 1994. Secretary Espy began implementing the reorganization on October 20, 1994. See generally Alan R. Malasky & William E. Penn, *USDA Reorganization — Fact or Fiction?*, 25 U. MEMPHIS L. REV. 1161 (1995).

The proposed USDA NAD regulations purport to apply to adverse agency decisions issued on or after October 20, 1994. 60 Fed. Reg. 27,044, 27,046 (1995) (to be codified at 7 C.F.R. § 11.3(b)) (proposed on May 22, 1995). By failing to make the regulations effective on October 13, 1994, the proposed regulations potentially leave some appellants without an appeal remedy. If, for example, an adverse decision was made on October 14, 1994, but the adversely affected party did not request reconsideration or an appeal until October 21, 1994, the proposed regulations would not apply. An appeal could not be taken to the ASCS NAD, the USDA NAD's predecessor, because the ASCS NAD was abolished on October 13, 1994. USDA Reorganization Act, Pub. L. No. 103-354, § 281(b), 108 Stat. 3178, 3233 (repealing 7 U.S.C. § 1433e). Whether the Act's provisions transferring the former ASCS NAD's authority to the USDA NAD closes this "gap" is uncertain. See *id.* § 274, 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6993).

The proposed USDA NAD regulations are silent on the rights of appellants who had received a hearing, but not a decision, from the ASCS NAD before it was abolished. Under the USDA Reorganization Act, those appellants are entitled to a new hearing before the USDA NAD because the USDA NAD Director is only authorized to make final determinations based on the record developed before the USDA NAD. See *id.* § 278, 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998). The USDA NAD, however, has not consistently granted a new hearing, even when requested. In general, the USDA NAD has treated ASCS NAD hearings as if they had been USDA NAD hearings, despite the material differences between the two hearing procedures discussed in the text below.

10. *Id.* § 272(a), 108 Stat. at 3229 (to be codified at 7 U.S.C. § 6992(a)). While the USDA NAD is independent of other USDA agencies, it is not independent of the Secretary. The USDA NAD Director is subject to the Secretary's "direction and control." *Id.* § 272(c), 108 Stat. at 3229 (to be codified at 7 U.S.C. § 6992(c)).

appeals from the following USDA agencies and committees: (1) Consolidated Farm Service Agency (CFSA) (the successor to the Agricultural Stabilization and Conservation Service (ASCS), Federal Crop Insurance Corporation (FCIC), and the Farmers Home Administration (FmHA));<sup>11</sup> (2) Commodity Credit Corporation (CCC);<sup>12</sup> (3) Farmers Home Administration (FmHA); (4) Federal Crop Insurance Corporation (FCIC); (5) Rural Development Administration (RDA);<sup>13</sup> (6) Natural Resources Conservation Service (NRCS) (successor to the Soil Conservation Service (SCS));<sup>14</sup> and (7) the state, county, and area committees established under the Soil Conservation and Domestic Allotment Act.<sup>15</sup> Participants in the programs administered by these agencies and committees are now required to exhaust their administrative remedies by appealing to the USDA NAD before seeking judicial review.<sup>16</sup>

11. The CFSA's functions are set forth in the USDA Reorganization Act § 226, 108 Stat. at 3214-16 (to be codified at 7 U.S.C. § 6932). The CFSA recently has been renamed the Farm Service Agency (FSA). 60 Fed. Reg. 64,297 (1995).

12. Only appeals involving the CCC's domestic programs are within the USDA NAD's jurisdiction. USDA Reorganization Act § 271(2), 108 Stat. at 3228 (to be codified at 7 U.S.C. § 6991(2)).

13. Under the USDA Reorganization Act, rural economic development programs are now administered by the Rural Utilities Service, the Rural Housing and Community Development Service, and the Rural Business and Cooperative Development Service. *Id.* §§ 232-234, 108 Stat. at 3219-20 (to be codified at 7 U.S.C. §§ 6941-6944).

14. The USDA Reorganization Act's provisions creating the NRCS are set forth at § 246, 108 Stat. at 3223 (to be codified at 7 U.S.C. § 6962). Prior to the Act's enactment, technical determinations made by the SCS could be appealed through the SCS's administrative appeal process. In the meantime, the SCS determinations were binding on the ASCS. 7 C.F.R. § 780.17(b)(1) (1994); *see also* Kelley & Harbison, *supra* note 8, at 28-30. The Act deals with the appeal of NRCS technical determinations and the CFSA's reliance on those determinations in the following manner:

(1) IN GENERAL. — Until such time as an adverse decision described in this paragraph is referred to the National Appeals Division for consideration, the Consolidated Farm Service Agency shall have initial jurisdiction over any administrative appeal resulting from an adverse decision made under title XII of the Food Security Act of 1985 (16 U.S.C. 3801 et seq.), including an adverse decision involving technical determinations made by the Natural Resources Conservation Service.

(2) TREATMENT OF TECHNICAL DETERMINATION. — With respect to administrative appeals involving a technical determination made by the Natural Resources Conservation Service, the Consolidated Farm Service Agency, by rule with the concurrence of the Natural Resources Conservation Service, shall establish procedures for obtaining review by the Natural Resources Conservation Service of the technical determinations involved. Such rules shall ensure that technical criteria established by the Natural Resources Conservation Service shall be used by the Consolidated Farm Service Agency as the basis for any decisions regarding technical determinations. If no review is requested, the technical determination of the Natural Resources Conservation Service shall be the technical basis for any decision rendered by a county or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)(5)) . . . .

USDA Reorganization § 226(d), 108 Stat. at 3215 (to be codified at 7 U.S.C. § 6932(d)).

15. *Id.* § 271(2), 108 Stat. at 3228 (to be codified at 7 U.S.C. § 6991(2)); *see also id.* § 227, 108 Stat. at 3216-18 (amending 16 U.S.C. § 590h). These committees used to be known as the state and county ASC committees. The FmHA committees are abolished. *Id.*, 108 Stat. at 3218.

16. *Id.* § 212(e), 108 Stat. at 3211 (to be codified at 7 U.S.C. § 6912(e)). Judicial review of agency action is presumptively available under the judicial review provisions of Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1994). Interpreting APA § 704, the United States Supreme Court held in

### B. Background

As relevant to federal farm program disputes, the USDA NAD replaces the ASCS National Appeals Division (ASCS NAD).<sup>17</sup> The ASCS NAD grew out of the 1990 farm bill as the national level review authority for ASCS administrative appeals.<sup>18</sup> That function previously had been performed by the ASCS Deputy Administrator for State and County Operations (DASCO), an official whose principal responsibility was overseeing the operations of the state and county ASC committees.<sup>19</sup>

Approximately 150 farm program appeals were processed through the ASCS NAD each month. The ASCS NAD, however, fell short of providing a competent, fair, and impartial appeal process. Within two years of the ASCS NAD's creation, an internal ASCS report entitled "ASCS Appeals System: Direction and Future," prepared within the ASCS Administrator's office, identified four problems with the ASCS NAD appeals system:

1. The distinction between DASCO and NAD has been blurred giving the impression that DASCO still runs appeals.

2. ASCS appeal determinations frequently fail to explain the basis for the agency's findings, fail to address specific issues raised by producer during the appeal, and fail to identify evidence in the Administrative Record that supports the agency's findings.

3. In many cases, ASCS fails to take reasonable steps to uncover facts relevant to an appeal and, in some cases, fails to give producers access to all information used in reaching administrative determinations. For example, Office of Inspector General reports are not always provided to producers, even if these reports contain information upon which the agency is basing its determination.

4. ASCS has not provided clear guidance to producers and State and county committees regarding the applicable appeals procedures at the county, State and National levels of review.<sup>20</sup>

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*Darby v. Cisneros*, 113 S. Ct. 2539 (1993), that the federal courts could not make exhaustion of available administrative remedies a prerequisite for judicial review of otherwise final agency action unless a statute mandated exhaustion or the agency had promulgated a rule requiring exhaustion and making the adverse determination inoperative pending the administrative appeal. *Id.* at 2548. The USDA Reorganization Act's exhaustion requirement was a response to that decision. From the agency's perspective, a statutory exhaustion requirement is preferable to one imposed by regulation because the agency does not have to make its decisions inoperative pending completion of the administrative appeal process.

17. USDA Reorganization Act § 281(b), 108 Stat. at 3233 (repealing 7 U.S.C. § 1433e); *id.* § 273(1), 108 Stat. at 3230 (transfer of functions from ASCS NAD to USDA NAD) (to be codified at 7 U.S.C. § 6993).

18. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1132, 104 Stat. 3359, 3512-15 (codified at 7 U.S.C. § 1433e).

19. See Kelley & Harbison, *supra* note 8, at 27.

20. David P. Grahm, ASCS Appeal System: Direction and Future 2 (n.d.) (internal ASCS report, on file with author). At the time, Grahm was a Confidential Assistant to the ASCS Administrator. Grahm could have added to this list the long delays between the holding of ASCS NAD hearings and the rendering of a final determination, delays that commonly ranged from four to eight months.

The report concluded that "[a]s a result of these problems, producers, Congress and the courts have lost confidence in the ASCS Appeals system."<sup>21</sup>

The problems identified in the internal ASCS report could be traced to the ASCS's historical indifference and inattention to the administrative appeal process and to omissions in the ASCS NAD legislation. Prior to the 1990 farm bill, DASCO decided appeals at the national level. DASCO's primary responsibilities, however, were making and implementing program policy, and the appeal process took a lower priority. By the 1980s, as appeal volume slowly grew in rough proportion to the increasing importance of federal farm program payments to producers, DASCO began using hearing officers to hear administrative appeals. The hearing officers were typically drawn from ASCS personnel who had previously been involved in program administration. The decisions were issued by DASCO or an Assistant DASCO based on the hearing officer's recommendations.

By the time that the 1990 farm bill debate was underway, dissatisfaction with DASCO's handling of appeals had developed. In large part, the dissatisfaction arose from the combination of policy making, program administration, and dispute resolution in one office. The DASCO appeals system was seen as a classic example of the conflicts of interest inherent in combining disparate functions in one office. Other concerns included the inability to subpoena witnesses and the poor quality of the decisions. Most DASCO decisions summarily resolved the dispute, usually against the producer.<sup>22</sup>

The 1990 farm bill established the ASCS NAD as a separate division within the ASCS. In addition to giving the ASCS NAD Director the authority to make appeal decisions based on the recommendations of the NAD hearing officers, the legislation gave the Director other powers, most noticeably subpoena authority. On its face, the ASCS NAD legislation initially appeared to address many of the sources of dissatisfaction with the DASCO appeals system. Dramatic improvements, however, never materialized.

The ASCS NAD legislation failed for several reasons. Foremost, although the process changed, the personnel remained the same. The ASCS implemented the NAD legislation by giving the DASCO hearing officers and their supervisor new titles. The decision to continue with the same personnel perpetuated the same shortcomings in the quality of decision making that prompted the ASCS NAD legislation. Also, the 1990 ASCS NAD legislation simply fell short in its attempt to make the ASCS NAD independent from the program development and implementation functions of the agency. The conflict of interest inherent in the DASCO appeals system continued to a certain extent under the 1990 ASCS NAD legislation. The ASCS NAD was not independent of the ASCS. The regulations governing the conduct of NAD appeals

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21. *Id.* "Loss of confidence" may have understated the reaction of some courts. One federal district court characterized the ASCS's review of an appeal as "slapdash;" opined that it was "not clear that there ever was a serious examination of [the producer's] claims [by the ASCS];" and found that "the agency failed miserably in following its procedural appeal requirements." *Lucio v. Yeutter*, 798 F. Supp. 39, 43, 45 (D.D.C. 1992) (reviewing a DASCO decision).

22. In this respect, there was little change between DASCO and the ASCS NAD. Under the ASCS NAD, program participants' success rate was under fifteen percent.

were issued by the ASCS, not the ASCS NAD.<sup>23</sup> The ASCS NAD Director and the ASCS NAD hearing officers regularly consulted, *ex parte*, with program administrators at all levels of the ASCS. Finally, the ASCS Administrator had the authority to reverse or modify the ASCS NAD Director's decisions. In essence, the ASCS NAD was, by design and temperament, a close ally of program administrators.

Some improvements in the format of ASCS NAD appeal determinations and in other reforms were made in the waning months of the Bush Administration, and they remained in effect in the Clinton Administration. The Clinton Administration, however, did virtually nothing to improve the ASCS NAD system. Consequently, the continuing dissatisfaction with the ASCS appeals system and with the appeals systems of other USDA agencies prompted new proposals for legislative change. On August 6, 1993, bills designed to establish an independent USDA National Appeals Division were introduced in the Senate (Senate Bill 1425) and the House of Representatives (House Bill 2950). The bills were modeled on bills introduced in the previous session, Senate Bill 3119 and House Bill 5742, but contained a number of new provisions. Subsequently, provisions for the creation of a USDA NAD were included in the Senate bill authorizing USDA reorganization, Senate Bill 1970. That bill passed the Senate on April 13, 1994. The House version of USDA reorganization, House Bill 3171, also included authorization for a USDA NAD. The House bill, however, was considerably less prescriptive regarding the processing of appeals than the Senate bill. The legislation that ultimately emerged was based primarily on language drafted in the House, although it included some of the basic features and concepts of the Senate bill.

### *C. The Basic Structure and Operation of the USDA NAD*

#### *1. Preservation of the County and State Committee Appeal Process*

Historically, the farm program administrative appeal process has had three levels. Because most program determinations were made by a county ASC committee, the appeal process began with a request for the county committee to reconsider its initial determination.<sup>24</sup> If the county committee declined to change its initial decision, the aggrieved program participant could appeal to the state ASC committee.<sup>25</sup> Appeals from state committee determinations were taken to the ASCS NAD.<sup>26</sup>

The USDA Reorganization Act preserves the county and state committee appeal process by requiring the CFSA to hold informal hearings at the request of the participant adversely affected by a committee's or a CFSA official's determination.<sup>27</sup> The Act also directs the Secretary to "maintain the informal appeals process applicable to such programs [administered by the CFSA], as in effect on the date of the enactment of the subtitle."<sup>28</sup> The Act, however, does not expressly require participants to exhaust any available appeals to the county or state committees before appealing

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23. See 7 C.F.R. pt. 780 (1994).

24. 7 C.F.R. § 780.7 (1994).

25. *Id.*

26. 7 C.F.R. § 780.8 (1994).

27. USDA Reorganization Act § 275, 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6995).

28. *Id.*

to the USDA NAD. To the contrary, it appears to permit an appeal of any adverse decision directly to the USDA NAD.<sup>29</sup> In practical terms, while some participants

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29. *Id.* § 276(a), 108 Stat. at 3230 (providing that "a participant shall have the right to appeal an adverse decision to the Division for an evidentiary hearing") (to be codified at 7 U.S.C. § 6996(a)). An "adverse decision" is defined to include an "administrative decision made by an officer, employee, or committee of an agency that is adverse to a participant." *Id.* § 271, 108 Stat. at 3228 (to be codified at 7 U.S.C. § 6991(1)).

The proposed USDA NAD regulations purport to carve out exceptions to the definition of an "adverse decision" contained in the USDA Reorganization Act. 60 Fed. Reg. 27,044, 27,046 (1995) (to be codified at 7 C.F.R. § 11.5(a)) (proposed May 22, 1995). In essence, proposed 7 C.F.R. § 11.5(a) makes certain CFSA decisions subject to the adversely affected program participant's exhaustion of CFSA committee appeal processes before the decision becomes an "adverse decision" for which USDA NAD review is available. No such requirement is found in the Act. Under the Act all CFSA adverse decisions are appealable directly to the USDA NAD unless the appellant voluntarily elects to pursue committee review. *See* USDA Reorganization Act §§ 275, 276, 108 Stat. at 3230 (to be codified at 7 U.S.C. §§ 6995, 6996(a)). Consequently, proposed § 11.5(a) is neither authorized by, nor consistent with, the USDA NAD statute.

As noted above, the USDA Reorganization Act unambiguously defines "adverse decision" as "an administrative decision made by an *officer, employee, or committee* of an agency that is adverse to a participant." *Id.* § 271, 108 Stat. at 3228 (to be codified at 7 U.S.C. § 6991(1)) (emphasis supplied). Under proposed § 11.5(a), however, the phrase "adverse decision" is redefined to exclude "administrative decision[s] issued at the field service office level by an officer or employee of the [CFSA], or by any employee of a county or area committee established under section 8(b)(5) of the Soil Conservation and Domestic Allotment Act," unless the adversely affected program participant "has perfected an informal appeal to and received a decision thereon from the county or area committee with responsibility for the administrative decision at issue." 60 Fed. Reg. 27,044, 27,046 (1995) (proposed rule to be codified at 7 C.F.R. § 11.5(a)). If Congress had wanted to define "adverse decision" in the manner chosen by the Secretary in proposed § 11.5, it could have done so. It did not. If Congress had wanted the Secretary to define "adverse decision," it could have directed the Secretary to do so. It did not. In short, the Act's definition of "adverse decision" is unambiguous and requires no interpretation. Hence, it is binding on the Secretary.

Even if the Secretary had the option to redefine "adverse decision," proposed § 11.5(a) would not be a reasonable choice. Although neither the proposed regulations nor their preamble explain the Secretary's motivations for redefining "adverse decision," the motivations may be several. However, none that come to mind are compelling, and each can be addressed in ways short of contradicting a statutory command.

For example, the Secretary may want to avoid "unauthorized" adverse decisions being appealed to the USDA NAD. If that is the Secretary's motivation for proposed § 11.5(a), the solution is simple — if a participant appeals an "unauthorized" decision, the agency should (and must) withdraw the decision as soon as it becomes aware that an unauthorized decision has been made.

Or, the Secretary may want decisions delegated by a committee to an officer or employee to be considered by the committee before the decision is appealed to the USDA NAD. If that is the Secretary's motivation, the solutions are again simple — either the officer's or employee's decision should be brought to the committee before it is communicated to the participant, or, preferably, the committee should refrain from delegating to officers and employees those decisions that are likely to be so detrimental to the participant that they will be appealed if the decision is adverse. In other words, the burden should be on the Secretary to properly administer the programs through the committees, and the Secretary should not shift that burden to program participants merely because it is convenient for the Secretary to do so.

If, however, the Secretary's motivation for proposed § 11.5(a) is his displeasure over, or disagreement with, the reduced role of county and state committees in the appeal process, neither his displeasure nor his disagreement with the legislation can lawfully serve as a basis for his defiance of its commands. The USDA Reorganization Act strikes a balance. It recognizes that some program participants will not have confidence in their county or area committee's willingness to "second guess" the field office staff. Under



may prefer to continue the dispute at the committee level, others may believe that doing so could give the CFSA a better opportunity to develop its position against the participant.

Under the Act, the Secretary is required to notify affected program participants of the decision and their appeal rights within ten working days of an adverse decision.<sup>30</sup> To be entitled to a hearing before the USDA NAD, the aggrieved participant must "request the hearing not later than 30 days after the date on which the participant first received notice of the adverse decision."<sup>31</sup>

## 2. *The USDA NAD Director*

The Act mandates that the USDA NAD's Director be "appointed by the Secretary from among persons who have substantial experience in practicing administrative law."<sup>32</sup> The Secretary is also directed to consider "persons currently employed outside Government as well as Government employees."<sup>33</sup> Only the Secretary has authority over the Director, and "[t]he Secretary may not delegate to any other officer or employee of the Department, other than the Director, the authority of the Secretary with respect to the Director."<sup>34</sup> The Director will serve for a six-year term and is otherwise removable only for cause.<sup>35</sup>

the statute, these participants can avoid the delay and perceived futility of appealing to the county or area committee by appealing directly to the USDA NAD. On the other hand, some participants will have sufficient confidence in their county or area and state committees to be willing to incur the expense and to devote the time to appealing to their local and state committees. For these participants, the USDA Reorganization Act gives them that option.

30. USDA Reorganization Act § 274, 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6994).

31. *Id.* § 276(b), 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6996(b)). The phrase "first received notice" is potentially problematic since it may include oral notice of the decision or some other notice received before the written adverse decision was received. The proposed regulations do not resolve the potential uncertainties. Instead, they make matters worse with the following requirement:

In the case of the failure of an agency to act on the request or right of a recipient, a participant personally must request such hearing not later than 30 days after the participant knew or should have known that the agency had not acted within the timeframes specified by agency program regulations, or, where such regulations specify no timeframes, not later than 30 days after the participant reasonably should have known of the agency's failure to act.

60 Fed. Reg. 27,044, 27,046-47 (1995) (to be codified at 7 C.F.R. § 11.6(c)) (proposed on May 22, 1995). That proposed regulation is an invitation for confusion and needless disputes, and it is patently unfair to program participants.

32. USDA Reorganization Act § 272(b)(1), 108 Stat. at 3229 (to be codified at 7 U.S.C. § 6992(b)(1)). When this article was prepared a permanent Director had not been appointed. An unanswered question is whether the USDA reads the Act as requiring the Director to be an attorney. The Acting Director, Fred Young, is not an attorney. Another unanswered question is whether the Director will act as an administrator or as a chief judicial officer. Since the USDA NAD's inception, Young has delegated his review authority. This apparent delegation of the Director's adjudicative authority suggests that the USDA envisions the Director as serving an administrator, not as a chief judicial officer.

33. *Id.* This provision may have been a congressional response to the ASCS's decision to rearrange job titles, not personnel, when the DASCO appeal system was replaced by the ASCS NAD.

34. *Id.* § 272(c), 108 Stat. at 3229 (to be codified at 7 U.S.C. § 6992(c)). Whether this provision also constrains the Director's authority to subdelegate the Director's authority to others within the USDA NAD is a potential issue.

35. *Id.* § 272(b)(2), 108 Stat. 3229 (to be codified at 7 U.S.C. § 6992(b)(2)). The Director cannot

In addition to supervising the operation of the Division, the USDA NAD Director has two primary functions. First, the Director determines whether a matter is properly appealable to the USDA NAD. Determinations based on generally applicable program rules are not appealable.<sup>36</sup> Second, on the request of either the program participant or the agency, the Director reviews hearing officer determinations.<sup>37</sup>

### 3. USDA NAD Hearing Officers and Hearings

Evidentiary hearings before the USDA NAD are conducted by hearing officers. The hearing officers are given a right of access to the case record developed in the administrative proceedings leading to the appeal<sup>38</sup> and the authority to issue subpoenas and administer oaths and affirmations.<sup>39</sup>

When an appellant requests a hearing, it must be held within forty-five days.<sup>40</sup> The hearing is to be held in the state of the appellant's residence or at another location convenient to the appellant and the USDA NAD.<sup>41</sup> An appellant may waive the right to a personal hearing and either conduct the hearing by telephone or on the basis of the existing case file.<sup>42</sup>

Hearings before the hearing officer are probably *de novo*, at least as to the facts supporting the decision under review:

The hearing officer shall not be bound by previous findings of fact by the agency in making a determination . . . . The hearing officer shall consider information presented at the hearing without regard to whether the evidence was known to the agency officer, employee, or committee making the adverse decision at the time the adverse decision was made.<sup>43</sup>

"Probably" is the right word here because an argument can be made that any position taken by the CFSA at a hearing that is not within the scope of the "adverse decision" being appealed is improper and any evidence proffered in support of that position is inadmissible. In other words, the CFSA is not free to make a new "adverse decision" during the hearing and thereby convert the appeal into a review of the new decision.

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be a political appointee or noncareer employee. *Id.*

36. *Id.* § 272(d), 108 Stat. at 3229 (to be codified at 7 U.S.C. § 6992(d)).

37. *Id.* § 278, 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998).

38. *Id.* § 277(a)(1), 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6997(a)(1)).

39. *Id.* § 277(a)(2), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(a)(2)). The final regulations implementing the subpoena authority are likely to impose on parties to an appeal a time limit and a showing of need for requesting a subpoena. *See* 60 Fed. Reg. 27,044, 27,047 (1995) (to be codified at 7 C.F.R. § 11.7(a)(2)) (proposed May 22, 1995).

40. *Id.* § 277(b), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(b)). The statute does not specify the consequences of the failure to hold a timely hearing. "[T]he courts generally hold that such time limits are directory, not mandatory, and refuse to invalidate agency action merely because the limits have been violated." BERNARD SCHWARTZ, ADMINISTRATIVE LAW 661 (1991) (footnote omitted).

41. USDA Reorganization Act § 277(b)(1), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(c)(1)). Under the DASCO and ASCS NAD appeal systems, hearings were held in Washington, D.C., or by telephone.

42. *Id.* § 277(b)(2), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(c)(2)).

43. *Id.* § 277(c)(3), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(c)(3)).

If a new "adverse decision" emerges at the hearing and the appellant objects, the proper course is to dismiss the appeal without prejudice to the appellant's right to appeal the new "adverse decision" when it is formally made by the appropriate committee or CFSA official.

The USDA Reorganization Act expressly provides that the appellant bears the burden of "proving that the adverse decision of the agency was erroneous."<sup>44</sup> This provision, however, merely codifies what has always been the USDA's position.

More significant is a provision requiring hearing officers and the Director to base their determinations "on information from the case record, laws applicable to the matter at issue, and applicable regulations published in the Federal Register."<sup>45</sup> While it may seem unremarkable to require that determinations be based on statutory law and duly promulgated regulations, the requirement represents a departure from past ASCS NAD and DASCOS practices. Until the last several months of the ASCS NAD's existence, the ASCS NAD, as had DASCOS, made determinations based on *ad hoc* rules or *ASCS Handbook* directives without consistent regard to whether the *ad hoc* rules or directives were authorized by, or consistent with, the agency's duly promulgated regulations.<sup>46</sup> Accordingly, this provision may be among the Act's most salutary provisions.<sup>47</sup>

44. *Id.* § 277(c)(4), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(c)(4)).

45. *Id.* § 278(c), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(c)).

46. See Christopher R. Kelley, *Recent Developments in Federal Farm Program Litigation*, 25 U. MEMPHIS L. REV. 1107, 1108-17 (1995).

47. Although the USDA Reorganization Act prescribes the USDA NAD's rules of decision by specifying that USDA NAD determinations are to be based on "laws applicable to the matter at issue, and applicable regulations published in the Federal Register," the proposed regulations eviscerate that command. Proposed 7 C.F.R. § 11.9(b) purports to add a third rule of decision by requiring USDA NAD determinations to be based on "the generally applicable interpretations of such laws and regulations." 60 Fed. Reg. 27,044, 27,049 (1995) (to be codified at 7 C.F.R. § 11.9(b) (proposed May 22, 1995)). Because the primary evidence of such interpretations for the agencies whose decisions are subject to USDA NAD review is contained in those agencies' respective internal operating manuals or "handbooks," proposed § 11.9(b) is a transparent attempt to bind the USDA NAD and the parties before it to directives contained in manuals and handbooks such as the *ASCS Handbook* (presumably now the *CFSA Handbook*).

Proposed § 11.9(b) gives agency "interpretations" the same status as agency legislative (substantive) rules without requiring the promulgation and publication of those interpretations under the Administrative Procedure Act (APA). In requiring the USDA NAD to base its decisions on agency "interpretations," proposed § 11.9(b) binds the Secretary to rules that otherwise would not be binding on either the USDA or program participants. For example, the *ASCS Handbook* heretofore has been held not to be binding on the Secretary. *E.g.*, *Hawkins v. State Agric. Stabilization & Conservation Comm.*, 149 F. Supp. 681, 686 (S.D. Tex. 1957) ("These Handbooks were not published in the Federal Register and were not intended by any officials in the Department of Agriculture to have the force and effect of regulations. They were intended only as general guides for the use of personnel in the administration of the cotton program."), *aff'd*, 252 F.2d 570 (5th Cir. 1958). In other contexts, courts such as United States Court of Appeals for the District of Columbia Circuit have held, albeit not always consistently, that an agency's interpretive rules and statements of policy are not binding on the agency. See *Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 536-37 (D.C. Cir. 1988). Proposed § 11.9(b) erases any doubt over the binding nature of agency "interpretations" — an agency's interpretations of its regulations, however tentative and irrespective of the level of their issuing authority, are binding on the USDA NAD and the parties before it. Hence, because virtually all agency internal manual or handbook directives purport to be either a restatement of governing law or an interpretation of it, these directives will have

the full force and effect of law under proposed § 11.9(b) notwithstanding the fact that they were never promulgated under the APA. In this respect, proposed § 11.9(b) promises to bring about wholesale violations of the APA.

Proposed § 11.9 also goes beyond the "deference" doctrine of *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that doctrine, deference is only given to reasonable agency interpretations when the controlling statute is ambiguous. *Id.* at 943-44; *see also, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). Proposed § 11.9, however, gives "interpretations" equal status with statutes and regulations, irrespective of whether any "interpretation" is necessary and irrespective of whether the "interpretation" is reasonable.

By making agency "interpretations" controlling, proposed § 11.9(b) converts what should be no more than an agency argument on behalf of its decision to the result. In other words, proposed § 11.9(b) places the agency's thumb on the scales and dictates that the agency's "interpretation" of its regulations always wins before the USDA NAD.

In addition to being fundamentally unfair, proposed § 11.9(b) is neither authorized by, nor consistent with, the USDA Reorganization Act. The Act's very specific language was enacted for the very specific purpose of preventing the USDA NAD from basing its decisions on rules found only in the agencies' internal operating manuals or on rules that exist only in the minds of program administrators. The reason for doing this did not emerge from thin air. The CFSA and one of its predecessor agencies, the ASCS, has a notorious and discredited practice of relying on unwritten rules or rules that appear only in the *ASCS Handbook*. *See Golightly v. Yeutter*, 780 F. Supp. 672 (D. Ariz. 1991); *Jones v. Espy*, No. 90-2831-LFO, 1993 WL 102641 (D.D.C. Mar. 17, 1993); U.S. DEP'T OF AGRIC., ASCS, REPORT OF POLICY AND REGULATORY REVIEW TASKFORCE — PHASE I (1993) (acknowledging that some *ASCS Handbook* directives were not authorized by law). As a participant in some of the Act's drafting, the author has personal knowledge that this purpose was openly and frequently discussed during the drafting of, and deliberations on, the Senate and House bills that evolved into the USDA NAD legislation.

Consistent with this purpose, the Act specifically prescribes the rules of decision applicable to USDA NAD determinations. The rules must come from two sources, and only two sources — the applicable statutes and the applicable, duly promulgated regulations. Each source will either be published in the United States Code, the Federal Register, or the Code of Federal Regulations. Thus, the Act represents a congressional decision to require USDA NAD decisions to be based on duly promulgated, officially published law. It implicitly denies the USDA NAD the authority to base its decisions on internal agency directives or agency "folklore." In essence, it is a congressional codification of the fundamental administrative principle on which the holding of *Jones v. Espy* was based — substantive agency rules must be promulgated under the APA before they can bind private parties. *See generally* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992).

Proposed § 11.9(b), however, does not require the "generally applicable interpretations" to have been published in the Federal Register as interpretive rules before they form the basis for USDA NAD determinations. Indeed, it does not even require them to exist in writing. Under proposed § 11.9(b), therefore, the unwritten "generally applicable interpretation" of the pre-1989 crop year payment limitation "financing rule" that the court rejected in *Golightly v. Yeutter* could form the basis for a USDA NAD decision. In other words, under proposed § 11.9(b) virtually any pronouncement, whether ad hoc or post hoc, written or merely oral "folklore" known only to one or few program administrators, offered as "generally applicable interpretation" can be the sole basis of a USDA NAD determination.

Proposed § 11.9(b) therefore elevates *unpublished* "generally applicable interpretations of . . . regulations" to a higher status than Congress, in both the USDA NAD statute and the APA, has given *unpublished* substantive regulations. This anomaly is extraordinary given the fact that Congress was remarkably prescriptive in drafting the Act's provisions. Had the prescription been written for an agency that had not acquired a reputation for flouting the APA's rule making requirements, an argument could be made that Congress was so indifferent to the language it crafted that the agency was free to defy it. That is not the case here, however. Congress wanted the USDA to tell the public what the rules are by publishing them in the Federal Register, not to perpetuate the CFSA's practice of making binding rules

Consistent with longstanding agency practice, the Act specifically directs hearing officers to leave the record open for a "reasonable period" after the hearing for the submission of information "to the extent necessary to respond to new facts, information, arguments, or evidence presented or raised by the agency or appellant."<sup>48</sup>

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in the *ASCS Handbook*.

The "generally applicable interpretation" language in proposed § 11.9(b) cannot be justified as merely a restatement of the general principle of administrative law that administrative agencies generally have the authority to interpret their own rules. Proposed § 11.9(b) does more than parrot that principle; it makes agency "interpretations" binding on the USDA NAD. Moreover, administrative law is

that branch of the law that controls the administrative operations of government. Its primary purpose is to keep governmental powers within their legal bounds and to protect individuals against the abuse of such powers.

BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 1 (1991). Instead of using an administrative law principle to confine an agency within its statutory mandate, proposed § 11.9(b) purports to use the principle to defeat a unique and very specific statutory command designed to keep the agency within the bounds of duly promulgated, published law. Thus, any claim that proposed § 11.9(b) merely restates an administrative law principle rings hollow.

In sum and substance, proposed § 11.9(b) is nothing more than a thumb on the agency's side of the scale to the extent that it makes agency "interpretations" the controlling rule of decision. *Instead of placing the thumb on the scale, the proposed regulations should recognize that the proper role for agency interpretations is in arguments to the USDA NAD for a particular result. Such arguments should not be elevated to the status of controlling law.* If the Secretary does not have sufficient confidence in his agency's interpretations or if the Secretary does not trust the USDA NAD to properly decide what the law is, then there is no reason why participants should have any greater trust and confidence in the USDA NAD process. In other words, the Secretary's commitment to a fair and equitable USDA NAD is poorly served by stacking the deck against participants. To do so would merely be a return to the discredited DASCO/ASCS NAD system where appeals were simply another tool of program administration.

If the concern underlying proposed § 11.9(b) is that the USDA NAD will not always adopt the agencies' "interpretations" of their regulations, that concern is overdrawn. There will be times when the agency loses its argument for a particular interpretation of an ambiguous regulation. Those situations will be rare, however, if the "interpretation" is a reasonable one. If anything, proposed § 11.9(b) is no more than a vote of no confidence in the ability of USDA agencies to persuasively explain what their regulations mean or an expression of a lack of confidence in the USDA NAD. Again, if the Secretary is asking program participants to assume that the USDA NAD will make fair and just decisions based on duly promulgated law, the Secretary should make the same assumption.

Moreover, there are at least two solutions to protect the USDA's interests short of prescribing a regulation that dictates that the agency must always win whenever one of its "interpretations" is offered as the rule of decision. First, the agency can accept the result in that case and redraft the regulation to avoid the ambiguity in future cases. Unlike program participants, agencies have the authority and the theoretical ability to write unambiguous regulations. In that sense, the USDA NAD can exercise the Secretary's fundamental responsibility of ensuring that the USDA's regulations are drafted in clear and unambiguous manner or that the agency's interpretations of ambiguous regulations are reasonable. The burden of an agency's failure in either respect should fall on the agency, not on the program participant.

Second, if the agency is content to rely on its interpretation of an ambiguous regulation instead of making the regulation clear and unambiguous or if the regulation cannot be changed soon enough to deal with exigent circumstances, the Secretary can direct the USDA NAD to note an agency's objection to the USDA NAD's rejection of one of its "interpretations" so as to diminish or defeat the determination's precedential value in other USDA NAD proceedings. In most instances, the participant will have little interest in creating precedent, and an agency is always free to withdraw or settle an indefensible decision before it becomes a final USDA NAD determination. Although they may have lost the authority to review their own determinations, agencies are hardly helpless pawns in the USDA NAD process.

48. USDA Reorganization Act § 277(c)(3), 108 Stat. at 3231 (to be codified at 7 U.S.C. §

The USDA NAD's current practice is to hold pre-hearing conferences by telephone, a practice that facilitates the presentation of all relevant information and arguments at the hearing.

#### 4. Prohibition Against Ex Parte Communications

One of the most significant provisions of the USDA Reorganization Act's specifications for a USDA NAD is a prohibition against *ex parte* communications:

Except to the extent required for the disposition of *ex parte* matters as authorized by law —

(A) an interested person outside the Division shall not make or knowingly cause to be made to the Director or a hearing officer who is or may reasonably be expected to be involved in the evidentiary hearing or review of an adverse decision, an *ex parte* communication (as defined in section 551(14) of title 5, United States Code) relevant to the merits of the proceeding;

(B) the Director and such hearing officer shall not make or knowingly cause to be made to any interested person outside the Division an *ex parte* communication relevant to the merits of the proceeding.<sup>49</sup>

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6997(c)(3)).

49. *Id.* § 277(a)(2), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(a)(2)). Section 551(14) of the APA defines an "ex parte communication" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter." 5 U.S.C. § 551(14) (DATE). Section 557 of the APA provides as follows:

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such times as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

5 U.S.C. § 557(d)(C)-(E) (1994). Although § 557 of the APA does not apply to USDA NAD hearings because such hearings are not formal adjudications within the contemplation of APA § 554(a), the final USDA NAD regulations are likely to impose requirements similar to those found in § 557(C)-(E). *See* 60 Fed. Reg. 27,044, 27,047 (1995) (to be codified at 7 C.F.R. § 11.7(a)(4) (proposed on May 22, 1995)). Incidentally, because USDA NAD proceedings are not formal adjudications, attorneys fees may

This provision apparently was a response to the ASCS NAD's practice of engaging in *ex parte* discussions about the merits of pending appeals with ASCS personnel outside of the ASCS NAD without so informing the program participant. Such *ex parte* communications contributed to the ASCS NAD's serving more as integrated agent of program administration than as an impartial adjudicator.

#### 5. Director Review of Hearing Officer Decisions

Hearing officers are to render their decisions within thirty days after the hearing, although the Director may establish an earlier or later deadline.<sup>50</sup> Hearing officer decisions are appealable to the Director; otherwise, they are administratively final.<sup>51</sup>

Program participants have thirty days within which to appeal a hearing officer's decision to the Director.<sup>52</sup> Agency heads may also appeal, and they are subject to a fifteen-business day limit.<sup>53</sup>

The author is aware of an appeal in which the USDA NAD failed to inform a program participant who had prevailed before a hearing officer of the grounds asserted by the CFSA when the CFSA appealed.<sup>54</sup> The CFSA also failed to provide the program participant with a copy of its multi-page grounds for its appeal. The USDA NAD merely informed the program participant that the CFSA had appealed, and it did not provide the program participant with a copy of the CFSA's grounds until requested to do so by the participant's attorney. On the basis of the CFSA's communication, the hearing officer's determination was reversed. The CFSA's lodging of an appeal supported by a statement of grounds without notice to the program participant puts the participant at an extraordinary disadvantage, particularly in view of the requirement that the Director has only ten business days to decide an agency appeal. Nonetheless, the USDA NAD apparently has not taken any measures to deal with this problem. A simple solution would be to forbid any party lodging an appeal from including any arguments or evidence with the document requesting Director review.

When a program participant appeals a hearing officer's decision to the Director, the Director must either decide the matter or remand it to complete the record or for new hearing within 30 business days.<sup>55</sup> As noted above, when an agency appeals, that limit is shortened to 10 business days.<sup>56</sup> The Director's review is based on the record developed before the hearing officer, "the request for review, and such other arguments or information as may be accepted by the Director."<sup>57</sup>

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not be awarded to a prevailing appellant under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994).

50. USDA Reorganization Act § 277(d), 108 Stat. at 3231 (to be codified at 7 U.S.C. § 6997(d)).

51. *Id.*

52. *Id.* § 278(a)(1), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(a)(1)).

53. *Id.* § 278(a)(2), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(a)(2)).

54. *In re Darwin West*, USDA NAD (Feb. 27, 1995).

55. USDA Reorganization Act § 278(b), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(b)).

56. *Id.*

57. *Id.* The author has received one unconfirmed report that the Acting USDA NAD Director was taking the position that only the appellant could submit information in connection with an appeal. The USDA Reorganization Act does not support that position.

### 6. Equitable Relief

Many, if not most, federal farm program administrative appeals involve requests for administrative equitable relief under 7 C.F.R. Parts 790 or 791 or comparable regulations.<sup>58</sup> Because the statutory authority for administrative equitable relief vests the power to grant it in the Secretary, there was some debate within the ASCS over whether the ASCS NAD Director could grant equitable relief. In practice, the ASCS NAD Director granted equitable relief, albeit sparingly. The USDA Reorganization Act removes any possibility for such a debate with regard to the USDA NAD's authority to grant equitable relief by expressly giving the USDA NAD Director the same authority enjoyed by the Secretary.<sup>59</sup> Significantly, the Act also provides that:

Notwithstanding the administrative finality of a final determination of an appeal by the Division, the Secretary shall have the authority to grant equitable or other types of relief to the appellant after an administratively final determination is issued by the Division.<sup>60</sup>

Under this provision, agencies appear to be free to settle disputes with program participants.

### 7. Effective Date and Implementation of Decisions

The Act provides that the effective date of a USDA NAD final determination is "as of the date of [the] filing of an application, the date of the transaction or event in question, or the date of the original adverse decision, whichever is applicable."<sup>61</sup> In addition, the Act requires agency heads to implement "the final determination not later than 30 days after the effective date of the notice of the final determination."<sup>62</sup> Whether these provisions enlarge the right of farm program participants whose appeals are successful to recover interest due on payments withheld during the appeal process is uncertain. Prior to the USDA Reorganization Act's enactment, the ASCS took the position that the Prompt Payment Act, 31 U.S.C. §§ 3901-3907, limits the recovery of interest to a one-year period,<sup>63</sup> and it declined to pay interest to program participants who were granted administrative equitable relief.

### 8. Judicial Review

The USDA Reorganization Act provides that final determinations of the USDA NAD are reviewable in the federal district courts under the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.<sup>64</sup>

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58. See Kelley & Harbison, *supra* note 8, at 52-53.

59. USDA Reorganization Act § 278(d), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(d)).

60. *Id.*

61. *Id.* § 278(e), 108 Stat. at 3232 (to be codified at 7 U.S.C. § 6998(e)).

62. *Id.* § 280, 108 Stat. at 3233 (to be codified at 7 U.S.C. § 7000).

63. See Doane v. Espy, 873 F. Supp. 1277 (W.D. Wis. 1995).

64. USDA Reorganization Act § 279, 108 Stat. at 3233 (to be codified at 7 U.S.C. § 6999). For resources on the judicial review of farm program determinations see *supra* note 8.



### D. Extension of Mediation to Farm Program Disputes

The Act also includes farm program compliance disputes under the certified state mediation programs.<sup>65</sup> If mediation is available, program participants must be offered the right to chose mediation.<sup>66</sup> How mediation rights will be coordinated with appeal rights, and whether mediation will prove to be an effective and efficient way to resolve farm program disputes are questions that must at least await the promulgation of implementing regulations.<sup>67</sup>

### E. Preservation of the "90-Day Finality Rule"

The USDA Reorganization Act preserves the so-called "90-day finality rule" that was enacted in the 1990 farm bill.<sup>68</sup> The rule now provides as follows:

(2) FINALITY. — Each decision of a State, county, or area committee (or an employee of such a committee) . . . that is made in good faith in the absence of misrepresentation, false statement, fraud, or wilful misconduct shall be final not later than 90 days after the date of filing of the application for benefits, unless the decision is —

(A) appealed under this subtitle [USDA NAD];

(B) modified by the Administrator of the Consolidated Farm Service Agency or the Executive Vice President of the Commodity Credit Corporation.

(3) RECOVERY OF AMOUNTS. — If the decision of the State, county, or area committee has become final under paragraph (2), no action may be taken by the Consolidated Farm Service Agency, of the Commodity Credit Corporation, or a State, county, or area committee to recover amounts found to have been disbursed as a result of a decision in error unless the participant had reason to believe that the decision was erroneous.<sup>69</sup>

## II. Tenth Circuit Sets Guidelines for Judicial Review of Farm Program Determinations

In a decision favoring a class of Kansas farmers challenging the ASCS's temporary reduction of their yields, the Tenth Circuit, in *Olenhouse v. Commodity Credit Corporation*,<sup>70</sup> established guidelines for federal district court review of federal farm

65. *Id.* § 282, 108 Stat. at 3233-35 (to be codified at 7 U.S.C. § 5101(c)).

66. *Id.* § 275, 108 Stat. at 3230 (to be codified at 7 U.S.C. § 6995).

67. The proposed regulations provide that participants have the right "to utilize any available alternative dispute resolution or mediation program . . . prior to any appeal . . . to the Division [USDA NAD]." 60 Fed. Reg. 27,044, 27,046 (1995) (to be codified at 7 C.F.R. § 11.5(b)) (proposed May 22, 1995).

68. Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, § 1132(g), 104 Stat. 3359, 3514 (formerly codified at 7 U.S.C. § 1433e(g)).

69. USDA Reorganization Act § 281, 108 Stat. at 3233 (to be codified at 7 U.S.C. § 7001).

70. 42 F.3d 1560 (10th Cir. 1994).

program determinations and other federal agency action within the Circuit. In essence, the guidelines preclude the use of summary judgment in the judicial review of federal agency action, a dispositive procedure the court perceived as placing the nongovernmental litigants at a disadvantage.<sup>71</sup>

*Olenhouse* involved a certified class action brought by Kansas farmers who alleged that the ASCS had acted arbitrarily and capriciously in reducing their 1987 wheat program yields. Because of unfavorable weather the farmers had planted their 1987 crop late.<sup>72</sup> Although the farmers had been told by their county ASC committee that their yields would not be reduced and they had received disaster credit, the state ASCS office directed the county committee to impose temporary yield reductions on the grounds that the late planting was a change in farming practices.<sup>73</sup> Contending their late planting was not within their control and was not a change in their farming practices, the farmers unsuccessfully appealed the reductions through the ASCS administrative appeal process.<sup>74</sup>

The district court upheld the ASCS's determination based on cross motions for summary judgment.<sup>75</sup> In its decision reversing the district court, the Tenth Circuit criticized the use of the summary judgment in reviewing ASCS and other administrative agency actions and prohibited its future use.

Under Rule 56 of the Federal Rules of Civil Procedure, a federal district court may grant summary judgment when no material facts are disputed and the moving party is entitled to judgment as a matter of law.<sup>76</sup> The summary judgment procedure is commonly used in the review of ASCS and other administrative agency actions because the court usually can only consider whether the agency acted properly based on the information contained in the record made before the agency.<sup>77</sup>

The Tenth Circuit criticized the use of summary judgment motions because they allow the government's attorneys to define the issues, distracting the court from its proper task of evaluating how the agency defined and decided the issues.<sup>78</sup> Also, because affidavits can be submitted to support or oppose summary judgment motions, summary judgment motions invite or require the district court to rely on evidence outside the administrative record.<sup>79</sup> The Tenth Circuit viewed each of these

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71. *Id.* at 1579-80.

72. *Id.* at 1564-65.

73. *Id.* at 1569-71.

74. *Id.* at 1571.

75. *Olenhouse v. Commodity Credit Corp.*, 807 F. Supp. 688 (D. Kan. 1992).

76. FED. R. CIV. P. 56(c).

77. *See, e.g.*, *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). In general, the court's proper function is to review the administrative record and then decide whether the agency acted reasonably and in accordance with the Constitution and the applicable statutes and regulations. *See* 5 U.S.C. § 706 (1994). *Olenhouse* offers an exceptionally good statement of the applicable standards of review. *Olenhouse*, 42 F.3d at 1572-76. Nonetheless, to the extent that it imposed a duty on the agency to provide findings and conclusions in support of the agency's determination, the *Olenhouse* decision has been criticized. Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 8.5, at 117 (3d Supp. 1995).

78. *Olenhouse*, 42 F.3d at 1579-80.

79. *Id.*

"impermissible devices" as giving the government an undue advantage.<sup>80</sup> More fundamental, however, was the Tenth Circuit's perception that the summary judgment "process, at its core, is inconsistent with the standards for judicial review of agency action under the [Administrative Procedure Act]."<sup>81</sup> Viewing such a review as requiring the district courts to act as an appellate court, the court asserted that "[m]otions to affirm and motions for summary judgment are conceptually incompatible with the very nature and purpose of an appeal."<sup>82</sup>

The Tenth Circuit instructed the district courts in the Circuit to review ASCS and other agency action as an appellate court:

A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district courts must be processed *as appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure.<sup>83</sup>

While placing part of the blame on the district court's disposition of the case on cross-motions for summary judgment, the Tenth Circuit determined that the district court had misapplied the Administrative Procedure Act's (APA) "arbitrary or capricious" standard of review.<sup>84</sup> Specifically, the district court

failed to engage in a substantive review the [administrative] record to determine if the agency considered relevant factors or articulated a reasoned basis for its conclusions. Instead, it relied on the *post hoc* rationalizations of counsel or attempted itself to supply a reasoned basis for agency action without regard to the contents of the administrative record.<sup>85</sup>

The Tenth Circuit equated review under the "arbitrary and capricious" standard with review of the record for "substantial evidence."<sup>86</sup> Having conducted the required

80. *Id.*

81. *Id.* at 1579.

82. *Id.* at 1580.

83. *Id.* In *Logan Farms v. Espy*, Nos. 93-4256-SAC, 94-4012-SAC, 1995 WL 316334 (D. Kan. Apr. 14, 1995), the district court declined to require the parties to convert their summary judgment briefs filed prior to the *Olenhouse* decision into appellate briefs, reasoning that "[r]equiring the parties to invest the time, money and resources to file new briefs, briefs which essentially advance the same legal and factual points without summary judgment nomenclature, would serve little or no purpose." *Id.*, 1995 WL 316334 at \*2.

84. *Id.*

85. *Id.*

86. *Olenhouse*, 42 F.3d at 1575 (noting that review for "substantial evidence" under the "arbitrary or capricious" standard simply acknowledges that "[w]hen the arbitrary or capricious standard is performing that function of assuring factual support, there is not substantive difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense.") (quoting *Association of Data Processing v. Board of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984)).

plenary review of the entire 1,600 page administrative record itself in this case,<sup>87</sup> the Tenth Circuit ultimately found that the ASCS's decisions to give the farmer's disaster credit based on weather-induced late planting while subsequently imposing yield reductions for changed farming practices could not be reconciled.<sup>88</sup> That inconsistency, coupled with other procedural and substantive deficiencies in the ASCS's decision making, prompted the Tenth Circuit to hold the ASCS's was "arbitrary or capricious."<sup>89</sup>

### *III. Federal Circuit Rules ASCS Violated "Fundamental Principles of Fairness"*

The Tenth Circuit was not the only federal appellate court to overturn a farm program case during the past year. The Federal Circuit also did so in *Doty v. United States*<sup>90</sup> after concluding that "[t]he totality of the agency's actions leave us with the unavoidable conclusion that there has been a violation of the fundamental principles of fairness."<sup>91</sup>

*Doty* involved the Dairy Termination Program (DTP) under which eligible dairy farmers were paid to slaughter or to permanently export their dairy herds.<sup>92</sup> James and Susan Doty, Minnesota dairy farmers, participated in the DTP, becoming eligible for nearly \$100,000 for disposing of their dairy herd.<sup>93</sup> After the Dotys had entered into their DTP contract and certified to the ASCS that all their cattle had been disposed, one of their former employees told the ASCS that not all of the herd had been disposed.<sup>94</sup>

In the investigation that followed, the Dotys disputed their former employee's claim. Subsequently, the former employee told the Dotys' county ASC committee that he had lied. He then, however, made new accusations against the Dotys, again claiming that not all of the herd had been disposed. After being informed by the committee of the apparent DTP contract violation, the Dotys went before the committee and denied their former employee's accusations. The county committee then referred the matter to the Minnesota State ASC Committee which, after consulting with the ASCS national office, recommended that the Dotys forfeit their contract payments and be assessed a penalty of \$5,000 for each of the six cattle allegedly not destroyed. The county committee adopted this recommendation after again meeting with the former employee.<sup>95</sup>

The Dotys then began the ASCS's administrative appeal process. Despite repeated requests, including a request under the Freedom of Information Act, the Dotys did not

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87. *Olenhouse*, 42 F.3d at 1564.

88. *Id.* at 1580-84.

89. *Id.* at 1582-84. At the outset of its opinion, the court observed: "Despite our thorough review of the administrative record, we find it difficult to ascertain *exactly* what the agency did or did not do in this case." *Id.* at 1565.

90. 53 F.3d 1244 (Fed. Cir. 1995).

91. *Id.* at 1251.

92. *Id.* at 1245.

93. *Id.*

94. *Id.* at 1247.

95. *Id.* at 1246-47.

receive any information about the accusations made against them until nine days before their appeal hearing before the state committee. Included in the documents they received was an undated, unsigned statement by the former employee which admitted he had lied on a second occasion in connection with his accusations against the Dotys. Although the Dotys presented sworn testimony to the state committee contradicting their former employee, including a sworn statement by an ASCS employee who had inspected the herd, the committee refused to permit the ASCS employee and the Dotys' former employee to appear, and it denied the Dotys' appeal.<sup>96</sup>

The Dotys appealed to DASCO in Washington, D.C. Again, the Dotys contradicted the undated, unsigned statement of their former employee with their own sworn statement and the sworn statements of others, including the ASCS employee. DASCO, however, refused the Dotys' request to depose any ASCS employees, and it ruled against the Dotys.<sup>97</sup>

The Dotys filed suit in the Court of Federal Claims. The court ordered the ASCS to give the Dotys a new hearing.<sup>98</sup> Without holding the ordered hearing, the ASCS reported to the court new findings against the Dotys based solely on the Doty's former employee's undated, unsigned statement. Subsequently, over the Dotys' objections, the ASCS held a telephone hearing and affirmed its earlier decision. The ASCS offered no evidence to corroborate the Dotys' former employee's accusations.<sup>99</sup>

The Court of Federal Claims declared the telephone hearing a nullity and ordered the ASCS to make a new determination not based on the former employee's statement.<sup>100</sup> The ASCS did so, but again ruled against the Dotys.<sup>101</sup> The Court of Federal Claims upheld this ruling,<sup>102</sup> and the Dotys appealed.

On appeal, the Federal Circuit ruled that the ASCS's conduct was an egregious violation of the Dotys' right to a fair hearing,<sup>103</sup> and the Court of Federal Claims had acted improperly in ruling in the ASCS's favor.<sup>104</sup> The court also concluded that the ASCS had been properly instructed by the Court of Federal Claims to disregard the only evidence against the Dotys, the unsigned statement of their former employee. Yet, even when it was told to disregard that evidence, the ASCS persisted in ruling against the Dotys.<sup>105</sup> In response to the ASCS's claim that it was entitled to draw all inferences against the Dotys, the court pointedly stated:

[I]nferences must have an evidentiary basis. On the record as a whole, the agency's conclusion that Doty acted in bad faith was arbitrary and

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96. *Id.* at 1247.

97. *Id.* at 1247-48.

98. *Doty v. United States*, 24 Cl. Ct. 615 (1991).

99. *Doty*, 53 F.3d at 1249.

100. *Id.*

101. *Id.* at 1249-50.

102. *Id.* at 1250.

103. *Id.* at 1251.

104. *Id.* at 1252.

105. *Id.*

capricious, in that the only evidence on which the agency relied was not properly before it.<sup>106</sup>

#### *Conclusion*

The USDA won some farm program litigation in the past year.<sup>107</sup> This, however, has been happening since *Wickard v. Filburn*,<sup>108</sup> so while USDA victories may be "recent," they are hardly a "development." Accordingly, this is where this article must end.

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106. *Id.* (citations omitted).

107. *Downer v. United States*, No. Civ. 93-1005, 1995 WL 455815 (D.S.D. Apr. 11, 1995) (upholding "swampbuster" determination); *Von Eye v. United States*, No. Crim. 94-4020, 1995 WL 353670 (D.S.D. May 25, 1995) (same); *Logan Farms, Inc. v. Espy*, Nos. 93-4256-SAC, 94-4012-SAC, 1995 WL 316334 (D. Kan. Apr. 14, 1995) (upholding 1985-88 crop years "person" determinations). The USDA, however, took some lumps on some procedural issues. *Brock v. United States*, No. 94-1338-PFK, 1995 WL 144763 (D. Kan. Mar. 30, 1995) (Memorandum and Order) (denying government's motion to transfer action to Court of Federal Claims based on plaintiff's voluntary limitation of his request for damages to \$9,500.00); *Logan Farms, Inc. v. Espy*, Nos. 93-4256-SAC, 94-4012-SAC, 1994 WL 732672 (D. Kan. Nov. 25, 1994) (Memorandum and Order) (directing the government to show cause why its counterclaim alleging a "scheme or device" to evade the payment limitation rules should not be dismissed on the grounds that the counterclaim was, in effect, an improper appeal of its own determination).

108. 317 U.S. 111 (1942).

