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Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs

by

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LEGAL ISSUES ARISING IN FEDERAL COURT APPEALS OF ASCS DECISIONS ADMINISTERING FEDERAL FARM PROGRAMS

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Traditionally, the role of the Agricultural Stabilization and Conservation Service (ASCS) has been to administer the distribution of farm program benefits to the nation's farmers under available price support and production control programs. While the agency is still responsible for this goal, several recent developments add a new dimension to the nature of the ASCS's role, which will place the agency in the position of policing farmer behavior, and in many situations require the agency to deny federal benefits to certain operators. For example, the conservation cross compliance provisions of the 1985 Food Security Act require farmers who are farming land defined as highly erodible land to develop by 1990 and implement by 1995 a conservation plan, in order to remain eligible to participate in the various federal farm programs.[1] For the 1989 crop year the ASCS will administer the new congressional reforms of the payment limitation on farm program benefits, designed in part to limit the ability of farm businesses to organize in ways designed to maximize the amount of federal assistance received.[2]

With the assumption of this expanded role as both banker and policeman of the nation's farm programs, the agency will undoubtedly

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1. The cross compliance provision is set out at 16 U.S.C. §§ 3811-3812 codifiying §§ 1211-1212 of the Food Security Act of 1988. The regulations for the implementation of conservation cross compliance are found at 7 C.F.R. § 12 (1989). For a discussion of this provision and other conservation related titles, see Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting and the Conservation Reserve,* 34 KAN. L. REV. 577 (1986).

2. In 1987, Congress adopted major reforms of the $50,000 payment limitation in Title I, subsection C of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 amending 7 USC § 1308. The ASCS adopted final regulations to implement the changes for the 1989 crop year. See 53 Fed. Reg. 29552 (1988), (to be codified at 7 C.F.R. § 1497 - Payment Limitation). The ASCS has issued a handbook for the administration of the payment limitation: ASCS Handbook 1-PL "Payment Limitation."

become involved in an increased number of disputes with farm program participants over the interpretation and application of the laws and regulations. Conversely, the ability of more farmers to participate in farm programs is affected by agency intrepretations of the law and the potential for lost benefits becomes economically more significant.[3] The likelihood that producers will seek legal recourse to appeal agency decisions, both administratively and through the courts, is increased. As a result, there is an enhanced need for those in the legal community who might become involved with the appeal of farm program related decisions to be aware of the current state of the jurisprudence in this area. The purpose of this article is to address a number of fundamental questions that arise in connection with the review of the ASCS administrative appeals process and with the further appeal of farm program disputes into the federal courts. The article assumes that producers have complied with the provisions of the ASCS administrative procedure, have exhausted administrative levels of review and are now in federal court or preparing to file for judicial review.[4]

Who to Sue When Appealing an Administrative Decision - The Secretary of Agriculture, the USDA or the CCC?

The answer to this question is not as simple as it would first appear. Two cases help provide guidance on the issue. In *Justice v. Lyng*,[5] the court ruled that it was appropriate to sue the Secretary of Agriculture and that the Commodity Credit Corporation (CCC) was not involved in the administrative conduct leading to the dispute, thus the action was not in reality against the CCC and there was no problem with the "anti-injunction" provision of the CCC charter. In *Westcott v. United States Dep't. of Agric.*,[6] the court held that the rule in the Fifth[7] and Ninth[8] Circuits is that the Department of Agriculture is not

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3. For a general discussion of the economic significance of federal farm program benefits, see Hamilton, *Securing Creditor Interests in Federal Farm Program Payments*, 33 S.D.L. REV. 1, 1-5 (1988). A number of significant legal issues which have arisen in connection with disputes over the receipt of payments and the resolution of competing creditor claims are discussed in the article. This subject is also addressed in Turner & Callahan, *The Nature, Treatment, and Classification of Security Interests in Governmet Farm Payment Programs and Related Issues*, 10 J. AGRIC. TAX. AND L. 195 (Fall 1988).

4. The ACSC appeals procedure is set out at 7 C.F.R. § 780 (1989). The operation of this system was discussed in Hamilton, Farmers' Rights to Appeal ASCS Decisions Denying Farm Program, 29 S.D.L. REV. 282 (1984).

5. 716 F. Supp. 1570 (D. Ariz. 1989).

6. 611 F. Supp. 351 (D. Neb. 1984), *aff'd*, 765 F.2d 121 (8th Cir. 1985).

7. *See* United States Dep't of Agric. v. Hunter, 171 F.2d 793 (5th Cir. 1949).

8. *See* North Dakota-Montana Wheat Growers' Ass'n v. United States, 66 F.2d 573 (8th

a proper party to a lawsuit because it is not a statutory entity, and therefore, has no authority to sue or be sued. Most reported cases involving farm program disputes list the lead defendant as either the individual who is Secretary "in his official capacity as Secretary, United States Department of Agriculture,"[9] or the United States.[10]

Where to Sue - Federal District Court or the U.S. Court of Claims?

Until a few years ago, the answer to this question would appear to have been the district court, at least that is the conclusion one would reach from reviewing earlier reported ASCS cases. However, after the shift in the 1983 Payment-In-Kind (PIK) program to the use of binding contracts to guarantee producer compliance with farm program commitments,[11] the USDA and the Justice Department began relying on the Tucker Act,[12] which provides that actions rooted in breach of contract which ask for money damages of more than $10,000 must be brought in the U.S. Court of Claims. Since 1984, the USDA has regularly used the Tucker Act to obtain dismissal of ASCS cases from the district courts or to require such cases to be transferred.[13]

The effect of this approach is that parties are often required to go to the Claims Court when their cases are dismissed or transferred, or at least the parties are faced with this threat. In addition, the use of the Tucker Act has required plaintiffs to craft arguments as to why the jurisdiction is not with the Claims Court. The court in *Raines v. Block*[14] noted that the effect of the Tucker Act could not be avoided by simply filing suit against individuals if the real purpose of the action was to obtain resources from the public treasury and to seek to compel the United States to act in a certain way. However, the court in that case also noted that actions seeking to correct administrative misbehavior do not fall within the limitations of the Tucker Act. Thus, an important issue that can arise is discerning legitimate challenges to agency action from mere contract claims. The court in *Raines* also

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Cir.), *cert. denied*, 291 U.S. 672 (1933).

9. *See, e.g.*, Raines v. Block, 599 F. Supp. 196 (D. Colo. 1984).

10. *See, e.g.*, Pettersen v. United States, 10 Ct. Cl. 194, *aff'd*, 807 F.2d 993 (Fed. Cir. 1986).

11. *See, e.g.*, form CCC-477 Contract to Participate in the 1988 Price Support and Production Adjustment Programs and form CCC-477 (Appendix).

12. 28 U.S.C. §§ 1346(a), 1491 (1982).

13. *E.g.*, Divine Farms, Inc. v. Block, 679 F. Supp. 868 (D. Ind. 1988); *Raines*, 599 F. Supp. 196, *dismissed*, 12 Cl. Ct. 530 (1987); Alimenta (USA), Inc. v. Block, 636 F. Supp. 850 (D. Ga. 1986); *Pettersen*, 10 Cl. Ct. 194; Gibson v. Block, 619 F. Supp. 1572 (D. Ind. 1985);

14. *Raines*, 599 F. Supp. 196 (1987).

ruled that the jurisdiction of the Claims Court cannot be evaded by simply framing the complaint to seek mandatory or injunctive relief. A similar conclusion was reached by the district court in *Gibson.*[15]

In *Robinson v. Block*[16] the plaintiff avoided the impact of the Tucker Act and transfer to the Claims Court by agreeing to relinquish any recovery greater than $10,000 and thus took advantage of the district court's concurrent jurisdiction of disputes involving less than that amount. However, the Tucker Act issue is not entirely resolved for several reasons. First, it is only in recent years that the USDA has begun to make this argument and it still is made only in certain cases. As recently as *Westcott*[17] and *Women Involved in Farm Economics v. United States Dep't of Agric.*[18] (hereinafter "WIFE"), the Tucker Act issue was not raised. Part of that explanation may be the nature of the issue involved, but it is clear that the Tucker claim is a fairly recent strategic development for the agency. Second, the Tucker argument does not work in all cases. There are several cases which exemplify this fact and show that the issue can cut both ways.

In *Pope v. United States*[19] the Claims Court held that it lacked subject matter jurisdiction over the farmer's suit for benefits under the 1982 wheat acreage reduction program because his claim was discretionary with the Secretary and not based on contract. In this case it was the plaintiff farmer who had originated jurisdiction in the Claims Court rather than the USDA requesting a transfer. In another recent case, *Morgan v. United States*[20] the court granted the department's motion to dismiss, ruling that it did not have jurisdiction of the case because the plaintiff had applied only for a milk diversion program and there was insufficient ground to create an implied-in-fact contract which would entitle the party to benefits, and therefore, Claims Court jurisdiction. The court went on to hold that due process and equal protection claims under the Fifth Amendment do not provide a basis for recovery of money damages in the Claims Court.

A more recent case, however, indicates that the USDA's requests for transfer to the Claims Court will not always be granted. In *Justice v. Lyng*[21] the department argued that what the plaintiffs ultimately

15. *Gibson*, 619 F. Supp. 1572 (1985).
16. 608 F. Supp. 817 (D. Mich. 1985).
17. 611 F. Supp. 351 (D. Neb. 1984), *aff'd*, 765 F.2d 121 (8th Cir. 1985).
18. 682 F. Supp. 599 (D.D.C. 1988).
19. 9 Cl. Ct. 479 (1986).
20. 12 Cl. Ct. 248 (1987).
21. 716 F. Supp. 1570 (D. Ariz. 1989).

wanted was to receive money damages in excess of $10,000 in their action for a declaratory judgment of eligibility to participate in a government program; therefore, the Tucker Act should apply. The court ruled, however, that this was not an action for money damages which are "actual and presently due" from the United States. Instead, this was an action for a determination that the paties were eligible to participate in a program under which benefits could be earned. While the court noted that such a declaratory judgment could be used in the future to serve as the basis for a monetary judgment, the action at hand was simply a review of an administrative decison pursuant to the judicial review provisions of the Administrative Procedures Act. The court noted that the Claims Court does not have authority to issue a declaratory judgment. Additionally, the effect of the administrative decision that the plaintiffs were ineligible for benefits meant that there was no money presently due or owed. The court concluded that for the Claims Court to have jurisdiction, the plaintiffs would need a declaratory ruling; thus, the district court was the appropriate forum for the plaintiff's action.

A similar outcome occurred in *Esch v. Lyng*[22] involving the plaintiff's claim for declaratory relief concerning their eligibility to participate in the Conservation Reserve Program. The court concluded that the primary purpose of the action was not the recovery of money damages, but instead was a request for declaratory relief, and on that basis rejected the USDA's challenge to the court's jurisdiction.

When to Sue - How Long Does One Have to File an Action Challenging a Final ASCS Administrative Determination?

The ASCS appeal procedure provides that a party has fifteen days in which to request the next step in the administrative review process, either reconsideration or appeal.[23] When the administrative process is over, there is some uncertainty as to the time allowed to file an appeal in either the claims court or the district court. The charter of the CCC provides that actions brought by or against the CCC must be brought within six years after the right has accrued.[24] This period has been cited as the statute of limitations in materials prepared by attorneys working in the USDA Office of General Counsel. Actions under specific statutes may contain other statutes of limitation. Because the na-

22. 665 F. Supp. 6 (D.D.C. 1987).
23. 7 C.F.R. § 780.6(a) (1988).
24. 15 U.S.C. § 714(b)(c) (1988).

ture of most ASCS disputes involves an immediate question of eligibility for annual payments, there is usually little delay in seeking judicial review after the final agency action.

As noted, the ASCS regulations concerning appeals provide that a party has fifteen days to file a request for a reconsideration or appeal. The issue of whether a request for an appeal was filed in a timely fashion was considered in *Gibson v. United States*[25] where the court held that the appeal request was filed within the fifteen day time period. The court noted further that under C.F.R. section 780.6(c), a reviewing authority is authorized to accept an appeal that is not timely filed if, in the judgment of the reviewing authority, the "circumstances warrant such action." There is no case law to show that delay in requesting an administrative appeal will result in the USDA refusing to hear a claim, and discussions with attorneys from the USDA Office of General Counsel reveal they do not know of an instance when that issue has been raised. However, there is case law to support the requirement that individuals exhaust the available administrative remedies prior to appealing in federal court.[26]

What Issues are Reviewable and Which are Subject to the Finality Provision of 7 U.S.C. Section 1385?

One argument that the USDA regularly uses to block or limit judicial review of ASCS decisions is that under federal law factual determinations made by the agency are not reviewable. The authority for this position is the language found in 7 U.S.C. section 1385 which provides that

> [t]he facts constituting the basis for any . . . payment under the . . . feed grain set-aside program, . . . or the amount thereof, when officially determined in conformity with the applicable regulations prescribed by the Secretary or the Commodity Credit Corporation, shall be final and conclusive and shall not be reviewable by any other officer or agency of the Government.[27]

The courts have interpreted the application of this finality provision in numerous cases.[28] The federal courts, which are somewhat dubi-

25. 11 Cl. Ct. 6, 13 (1986).

26. *See* United States v. Bisson, 646 F. Supp. 701 (D. S.D. 1986).

27. 7 U.S.C. § 1385 (1986).

28. *E.g.*, Gross v. United States, 505 F.2d 1271 (Ct. Cl. 1974) (finality argument accepted by court); United States v. Gomes, 323 F. Supp. 1319 (E.D. Cal. 1971) (same); United States v. Moore, 298 F. Supp. 199 (D. Ohio 1969) (same); Mario Mercado E Hijos v. Benson, 231 F.2d 251 (D.C. Cir. 1956) (same).

ous of restraints on review, have in a number of these cases noted the rather broad exceptions to the finality provision. For example, in the 1948 case of *Aycock-Lindsey Corp. v. United States*[29] the court held that section 1385 did not prevent judicial review of legal questions with respect to subsidy payments. A similar outcome was reached in *Boyd v. Secretary of Agric.*[30] where the court ruled that, while section 1385 might prevent review of factual determinations, it did not prevent review of whether the findings of fact were in conformity with the agency's regulations. The courts in *Garvey v. Freeman*[31] and *King v. Bergland*[32] reached similar results. Other recent cases have also held that ASCS actions are reviewable under certain arguments. In *Gray v. United States*[33] the court, in reviewing a denial of milk diversion benefits, held that the finality provision did not preclude review of the Secretary of Agriculture's definition of the word "transfer" as that was a question of statutory construction. In *Raines*[34] the court noted that while factual determinations are not reviewable, legal questions are subject to review.

In addition to the finality provision found in 7 U.S.C. section 1385 for factual determinations made by the department, there is another finality provision in 7 U.S.C. section 1429. This provision was considered in *Haupricht Bros., Inc. v. United States*,[35] where the court, in reviewing the USDA's decision to deny a producer benefits under the 1983 Payment in Kind (PIK) program, ruled that the provision does not preclude judicial review of whether the Secretary of Agriculture acted beyond his statutory authority, or whether the plaintiff's procedural rights were violated. The finality provision does maintain vitality where the issue being appealed is a factual determination made by the ASCS.[36]

Another interesting approach to the finality issue is the argument that it precludes the agency from reversing decisions of eligibility made by the ASCS county committees. The Claims Court in *Willson v. United States*[37] rejected that argument and held that the state ASCS

29. 171 F.2d 518 (5th Cir. 1948).
30. 459 F. Supp. 418 (D. S.C. 1978).
31. 397 F.2d 600 (10th Cir. 1968).
32. 517 F. Supp. 1363 (D. Colo. 1981).
33. 14 Cl. Ct. 390 (1988).
34. 12 Cl. Ct. 530, 537 (1987). *See supra* note 9.
35. 11 Cl. Ct. 369 (1986).
36. *See, e.g.*, Morgan v. United States, 12 Cl. Ct. 247 (1987) and Pettersen v. United States, 10 Cl. Ct. 194, *aff'd*, 807 F.2d 993 (Fed. Cir. 1986).
37. 14 Cl. Ct. 300 (1988).

Committee or the Secretary of Agriculture had the authority to reverse a decision made by the county committee where the committee's determination was in contravention of the federal regulations which were part of the participation contract. The court also held that there was no equitable estoppel against the state committee and that it could, on its own initiative, review a county determination. The court in *Raines* held that equitable estoppel was not available to prevent the ASCS from reviewing and revising downward the PIK benefits the participant was to receive.[38] In at least one other case, however, a court has held that the doctrine of equitable estoppel is available against the government to prevent an action to recover payments.[39]

There is one earlier decision, made on the grounds of fairness, which held that the Secretary of Agriculture could not at a later date reverse a factual determination of a county committee.[40] The case is of interest due to the district court's characterization of participation contracts as unilateral contracts that are binding on the government once a participant begins performance. The decision has been distinguished, for example, in *Robinson v. Block*[41] where the court noted that the appendix to the 1983 PIK contract provided that farm yields could be adjusted as a result of the appeals process. Thus, the agency was not prevented from lowering the benefits the farmer was to receive when they had been calculated incorrectly by the county committee. The court in *Willson* also distinguished *Kopf* on the facts, noting that the time interval before the review was much shorter here and that the county committee had incorrectly applied the regulations.[42]

One other important consideration in the application of the finality theory is that a party must be able to show which facts have been finally determined. The court in *United States v. Batson*[43] noted that it was often difficult to identify what facts were determined in ASCS decisions. In a similar vein, the court in *King v. Bergland*[44] noted that because its review was based on the record, "the inquiry, grounds and analysis upon which the agency acted must be clearly disclosed therein."[45]

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38. 12 Cl. Ct. at 539. A similar result was recently reached in Durant v. United States, 16 Cl. Ct. 443 (1988).

39. *See* United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973).

40. *See* United States v. Kopf, 379 F.2d 8 (8th Cir. 1967).

41. 608 F. Supp. 817 (S.D. Mich. 1985).

42. 14 Cl. Ct. 300, 306-07 (1988).

43. 706 F.2d 657 (5th Cir. 1983).

44. 517 F. Supp. 1363, 1366 (D. Colo. 1981).

45. *Id.* For a discussion of the finality issue, see Hamilton, *supra* note 4, at 291-96.

Does the Procedure Available Under the ASCS Appeals Process Satisfy Constitutional Due Process Requirements?

The easiest answer to this question is that most courts are of the opinion that 7 C.F.R. Part 780 satisfies due process requirements. For example, in *Hillburn v. Butz*[46] the Fifth Circuit Court of Appeals rejected a farmer's challenge that the ASCS appeals procedure was constitutionally deficient, concluding that the regulations provide that any right to a hearing is "completely discretionary with the Secretary." As a result, because there was no requirement that a hearing be held, the Administrative Procedures Act did not apply to require one. The court went on to note that any concern the parties had about due process deficiencies would be corrected during their jury trial on the government's counterclaim. The court noted, in considering the impact of the then recently decided *Goldberg v. Kelly*[47] decision, that there was no showing that this class of farmers would be so adversely impacted by the administrative decision as to be unable to seek redress, and thus, the case did not apply.

The answer to this issue, however, needs more discussion. Perhaps the most significant case decided directly on the issue is *Prosser v. Butz*,[48] in which the court held that the ASCS procedure offered to the plaintiff farm program participant did not comply with the minimum required under the Fifth Amendment. To satisfy due process, the court held that the producer was entitled to:

> 1) notice of the specific charges or allegations at a time reasonably prior to the hearing in order to allow preparation of a defense;
> 2) the right to retain private counsel and be represented by such counsel at the hearing;
> 3) the right to present a reasonable quantum of argument and evidence at a hearing on the charges;
> 4) the right to confront and cross-examine adverse witnesses at the hearing;
> 5) a brief written statement of reasons and evidence relied upon to support the determination; and
> 6) an impartial adjudicative body.[49]

The most interesting aspect of the decision is the court's conclusion that the availability of subsequent opportunities to appeal the orig-

46. 463 F.2d 1207 (5th Cir. 1972).
47. 397 U.S. 254 (1970).
48. 389 F. Supp. 1002 (N.D. Iowa 1974).
49. *Id.* at 1006.

inal decision did not correct the deficiencies in the procedure under which the county committee made its first determination.

The only problem with understanding the effect of this ruing is that the procedure used was that set out in Part 780, which is the procedure still used by the ASCS. The issued raised is whether there must be a pre-determination hearing to which due process rights attach. The court in *Prosser* concluded that *Goldberg* would require an adjudicatory hearing prior the imposition of the heavy penalty, in the form of denial of benefits that was imposed here.[50] The ASCS appeal procedures, however, do not involve a pre-determination hearing. Instead, the appeal process is only triggered when producers have been notified of an adverse decision made against them and are then allowed to ask the decision-maker to reconsider the decision. While there may be practical and administrative reasons why the ASCS operates in this manner, there would appear to be significant due process questions left unanswered.

The majority of other courts considering the issue have ruled that ASCS actions do not require pre-determination hearings. For example, the district court in *Westcott*[51] summarily concluded that, in making the determination, the county and state ASCS committees and the deputy administrator "more than meet the minimum due process requirements of the Fifth Amendment." The Eighth Circuit Court of Appeals affirmed this decision but did not speak directly of the due process issue. The court noted, however, that the opinion was "thorough and comprehensive" and affirmed it as a "well-reasoned opinion."[52] The Fifth Circuit Court of Appeals has held that due process does not require a pre-determination hearing and characterized the argument as "make-weight," ruling that all that due process requires is that at some stage in the proceeding there be a hearing and in this case there had been hearings at the county, state and national levels.[53]

At least one district court held that although the procedure may comply with due process requirements, the method in which the agency carries out the administrative appeals procedure may be unconstitutional. In *Esch v. Lyng*[54] the court reviewed an agency decision to treat

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50. *Id.* at 1005-06.

51. 611 F. Supp. at 353 (D. Neb. 1984), *aff'd*, 765 F.2d 121 (8th Cir. 1985).

52. 765 F.2d 121, 122 (8th Cir. 1985).

53. *See* United States v. Batson, 782 F.2d 1307, 1315 (5th Cir. 1986), *cert. denied*, 477 U.S. 906 (1986). A recent Claims Court decision in a case arising in Minnesota reached a similar result. *See* Frank's Livestock and Poultry Farm, Inc. v. United States, 17 Cl. Ct. 601 (1989).

54. 665 F. Supp. 6 (D.D.C. 1987).

a nine-person family partnership as one person for purposes of the payment limitation and participation in the Conservation Reserve Program. The local county committee had approved the family's participation as nine persons, but the record indicated that after the Inspector General's Office review, the agency reached the internal conclusion that the parties were attempting to manipulate the program to obtain excessive benefits and the agency subsequently reduced their status. On appeal, the district court, after a lengthy reviewed of the administrative appeal record, noted that the USDA "acted arbitrarily, capriciously, without substantial evidence and in the absence of due process in reaching its decision . . . ."[55] Another case which considered the question of due process is *Batson*[56] in which the court held that the ASCS rules concerning refunds and participation in a "scheme or device" to defeat the purposes of the program were not unconstitutionally vague.

What Are the Effects of Agency Regulations and the Manuals Used by Local Offices to Administer Programs?

In administering the various price support and production control programs, the local ASCS offices must make a number of technical and administrative decisions in handling a participant's application. To assist agency personnel in carrying out the programs, the agency relies on a series of manuals which contain instructions and internal guidelines for administering programs. These manuals set forth general rules regarding how different types of questions are to be resolved. In past years, these manuals have been particularly important in making person determinations under the payment limitation because they provide examples of how different forms of business arrangements will be treated. Any attorney attempting to work with ASCS matters would be greatly benefitted by having access to these manuals to insure that agency personnel apply them properly.

ASCS internal rules[57] provide that the local office is to supply any program participant with a copy of any handbook or notice that applies to their operation. Handbook 5-CM, which provides common rules applicable to many programs, is particularly valuable.[58] In at least one

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55. *Id.* at 23. This part of the decision was upheld on appeal, but the D.C. Circuit Court of Appeals reversed the ruling ordering the USDA to make payments to the plaintiffs. *See* Esch v. Yuetter, 876 F.2d 976 (D.C. Cir. 1989).

56. 706 F.2d 657 (5th Cir. 1983).

57. Paragraph 47 C of USDA 12-DS Handbook.

58. If the local office does not have the manuals or cannot provide them, they can be ordered by writing the following: USDA, Management Service Division, P.O. Box 2415, Washing-

case, a producer challenged the agency's ability to rely on these internal manuals, arguing that the handbook guidelines were regulations subject to the notice and comment rule making requirements of the APA. In *Westcott*[59] the producer challenged the application of a "rule" preventing the reconstitution of farms combining dryland and irrigated crop land. The rule would prevent such recombinations because of the ability of the producer to obtain the higher average yield and the ability to increase actual yield by concentrating any land diversion requirements on the lower yielding dryland. The court held that the manuals were "merely interpretive rules" of the appropriately promulgated program regulations found in the C.F.R., and thus, were exempt from notice and comment requirements.[60]

While the case may be correct on the APA issue, it does not fully account for the heavy reliance that agency personnel make on the handbooks and their essential role in implementing programs. Congress recently recognized the significance of the interpretive rules when it amended the law on the payment limitation and person determinations effective for the 1989 crop year.[61] The 1987 amendments provide that any field instructions relating to the payment limitation, "shall not be used in resolving issues involved in the application of payment limitations or restrictions under such sections or regulations to individuals, other entities, or farming operations until copies of the publication are made available to the public."[62]

A somewhat related question is the effect of the various regulations that have been promulgated under the price support loans and the duty of the participant to be aware of these provisions. The appendix to the price support participation contract includes a provision that incorporates most of one volume of the C.F.R. into the contract. Several cases have addressed the question of the farmers' duty to be aware of and bound by such provisions. In *Willson*[63] the court noted the provision allowing the agency to review any action for compliance taken by a state or county committee was incorporated into the contract and thus the agency had authority to review the plaintiff's farming operation and reduce it to one person status.

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59. 622 F. Supp. 351 (D.C. Neb. 1984).

60. *Id.* at 358.

61. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 amending 7 USC § 1308.

62. 7 U.S.C § 1308 (1987) (regulations to carry out 1987 Amendments).

63. 14 Cl. Ct. 300, 305 (1988). *See supra* note 37.

In *Robinson v. Block*[64] the court took the issue one step further and held that program participants are charged with constructive notice of the regulations for the programs in which they participate. In this case, that notice would include the understanding and knowledge of the regulations such that the producer would recognize that the local official's initial determination of his benefits was beyond the allowable limits and thus without authorization. In *Batson*[65] the court charged the farmers participating in the upland cotton program with knowledge of the program's basic regulations to support its finding that they knowingly participated in a scheme or device which would tend to defeat the purpose of the program.

Are There Cases Interpreting the Tenant Landlord Rules Found in Price Support Contracts and in the Rules on Division of Payment?

Federal price support statutes[66] and ASCS rules[67] contain provisions designed to insure that price support and production control programs do not operate to cause tenants to lose their property or allow landlords to capture more than their share of benefits. The basic rule is that if a farm is participating in a program, all tenants and sharecroppers must be given the opportunity to participate, and a producer is ineligible to participate if the number of tenants has been reduced in anticipation or because of the program or a new rental agreement or arrangement has been required, the effect of which is to increase the landlord's share of the benefits. A prime example of the operation of these rules is *Gibson v. Block*[68] where the Claims Court upheld an agency decision that a landowner was ineligible to participate in the 1983 PIK program due to a violation of the tenant and sharecropper protections, by displacing a tenant to take advantage of the program. Another lengthy series of cases has stemmed from a decision that the tenant rules had been violated.[69]

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64. 608 F. Supp. 817 (D.C. Mich. 1985).

65. 706 F.2d 657 (5th Cir. 1983). *See supra* note 56.

66. 16 U.S.C. § 590h(f) (1982).

67. 7 C.F.R. § 713.150 (1988).

68. 11 Cl. Ct. 6 (1987).

69. *See, e.g.*, Gross v. United States, 505 F.2d 1271 (Ct. Cl. 1974). Tenants may not have the right to challenge certain types of farm program related decisions. For example, in Kennel v. Torry, 685 F. Supp. 184 (S.D. Ill. 1988), the court held the tenant had no private right of action under the federal soil conservation laws to challenge the rejection of a contract to enter the Conservation Reserve Program.

Can the Agency Provide Equitable Relief When a Producer has Acted in Good Faith or in Reliance on the Advice of Agency Employees?

There are two rules that are important in this regard. First, under 7 C.F.R. section 791.2, where there has been a failure to comply, the Deputy Administrator, State and County Operations (DASCO), has the power to authorize the making of loans, purchases and payments "in such amounts as determined to be equitable in relation to the seriousness of the failure."[70] This relief is to be made applicable only to producers "who made a good faith effort to comply fully with the terms and conditions of the program and rendered substantial performance."[71] Parties who feel they are entitled to such relief may file a request for it with the county committee. DASCO often uses this authority in connection with administrative actions where the decision will have the effect of substantially reducing the benefits received by an individual, in order to lessen the monetary impact.[72]

The second rule that is important in this regard is found at 7 C.F.R. section 790.2 (a) which provides that the ASCS may accept "performance rendered in good faith in reliance upon action or advice of any authorized representative of a county committee or state committee" if national ASCS officials feel that such action is "deemed desirable in order to provide fair and equitable treatment."[73] It is this provision that participants often cite when arguing that DASCO should be equitably estopped from reviewing favorable, but incorrect, local decisions. The provision is discretionary with the agency. Further, the rule contains a somewhat surprising provision that it is only available when a producer relied upon the action and advice of the county or State committee in rendering performance which the producer believed in good faith met the applicable regulations. The rule provides that if the producer "knew or had sufficient reason to know that the action or advice of the committee of [sic] its authorized representative upon which he relied was improper or erroneous or where the producer acted in reliance on his own misunderstanding or misinterpretation of program provisions, notices or advice."[74] In other words, the producer participant can be held to a higher level of understanding than the parties

70. 7 C.F.R. § 791.2 (1988).

71. *Id.*

72. *E.g.*, Gibson v. United States, 11 Cl. Ct. 6, 10-11 (1986); Esch v. Lyng, 665 F. Supp. 6, 10 (D.D.C. 1987).

73. 7 C.F.R. § 790.2 (1988).

74. 7 C.F.R. § 790.2 (b) (1988).

charged with administering the programs. While this seems somewhat unfair, the effect of this language is seen in *Robinson v. Block*.[75]

Have There Been Any Cases Concerning the Interpretation of ASCS Rules on the Payment Limitation and Person Determinations?

The application of the $50,000 payment limitation on the receipt of farm benefits has been one of the most highly charged legal issues involving the ASCS in recent years. To date, however, the issue has resulted in little reported litigation. The court's decision in *Esch v. Lyng*[76] resulted from a dispute over the application of the payment limitation rules but did not involve an interpretation of the rules, instead focusing on the due process issues. In *Willson v. United States*[77] the producers challenged the authority of the ASCS to review a county committee determination concerning eligibility for payments, the effect of which was to collapse a multi-party custom farming arrangement into one person for purposes of farm program payments. The court upheld the State ASCS Committee's determination, finding that it was a reasonable interpretation of federal regulations and was supported by the administrative record.

The most recent case on the interpretation of the payment limitation rules is *WIFE*.[78] In this case the plaintiffs challenged a USDA rule that presumptively concluded that all husbands and wives must be treated as one person for purposes of farm program payment limitations, regardless of whether they had separate farms before marriage and maintained the farms separately after marriage. The district court held that the USDA's interpretation was unconstitutional because it discriminated against persons on the basis of marital status. The court considered the statute under a rational basis of analysis and found that there was no rational basis for the rule, that it in fact worked contrary to the purpose of farm programs and that it was promulgated in excess of the USDA's statutory authority. The court also rejected the theory that the issue was moot either because of 1987 Congressional action that would change the rule for the 1989 crop year or the USDA's threatened appeal of an adverse decision would delay its impact until 1989. The court noted that the rule was unconstitutional and should be changed for the 1988 crop year. However, on appeal, the D.C. Circuit

75. 608 F. Supp. 817, 821 (W.D. Mich. 1985).
76. 665 F. Supp. 6 (D.D.C. 1988).
77. 14 Cl. Ct. 301 (1988).
78. 682 F. Supp. 599 (D.D.C. 1988).

Court of Appeals reversed the district court ruling on all grounds and upheld the husband and wife rule, concluding that there was a rational basis for the Congressional action and that the rule was not unconsitutional.[79]

In 1987, Congress enacted the Agricultural Reconciliation Act[80] which contains a major reform and revision of the law on payment limitations and person determinations. The USDA recently promulgated final regulations to carry out the changes, which are effective for the 1989 crop.[81] The new provisions make major changes in the number of entities under which a person can qualify for benefits and in the manner in which business entities can be organized and operated for purposes of such payments.[82] The new provisions will undoubtedly result in additional litigation as farm operations make the transition to the new regime.

In conclusion, the procedural issues associated with the administration of federal farm programs are an important component of agricultural law. New enforcement mechanisms such as payment limitations and conservation cross compliance can play a significant role in determining the economic fortunes of a farm operation. The important legal questions associated with the enforcement of such provisions, for example, due process concerns and the enforcement of penalty provisions for program violations, mean that lawyers must pay special attention to developments within the law of federal farm programs if they are to successfully represent their farm clients.

79. WIFE v. United States Dept. of Agric., 876 F.2d 994 (D.C. Cir. 1989). The court of appeals' decision was in accord with an earlier 10th Circuit opinion of the rule. Martin v. Bergland, 639 F.2d 647 (10th Cir. 1981).

80. Agricultural Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (codified as amended in scattered sections of 7 U.S.C.).

81. 53 Fed. Reg. 29552-29579 (1988) (to be codified at 7 C.F.R. § 1497).

82. *Id.*