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Farmers' Rights to Appeal ASCS Decisions Denying Farm Program Benefits

by

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FARMERS' RIGHTS TO APPEAL ASCS DECISIONS DENYING FARM PROGRAM BENEFITS

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INTRODUCTION

One of the major functions of the United States Department of Agriculture (USDA) is to implement and administer programs designed to assist in creating a sound economic environment for American agricultural producers whereby they may receive a fair price for their production and, as a result, consumers will be assured of an abundant and continuous supply of food.[1] Congress has empowered the USDA to work toward these goals by enacting a number of legislative programs which provide for price supports, acreage or production controls, grain reserves and related programs.[2] These programs, generally classified as the government's price support activities, have been the basis of U.S. agricultural policy since the 1930's and are reenacted and modified at least every four years in the "farm bill."[3] These programs are administered by the USDA through the Agricultural Stabilization and Conservation Service (ASCS) and the Commodity Credit Corporation (CCC).[4] The most recent example of a major government price support program was the 1983 payment-in-kind (PIK) program. Over eighty million acres of cropland were removed from production, wherein participating farmers received payment in the form of commodities.[5] The essence of any price support program is farmer participation—without this the programs

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1. The authority to carry out these missions is found in a number of statutes, *e.g.* The Agricultural Act of 1949, 7 U.S.C. §§ 1421-49 (1982), *as amended by* The Soil Conservation and Domestic Allotment Act, 16 U.S.C. §§ 590a-590g (1982).

See Fraas, *Federal Assistance Programs for Farmers: An Outline for Lawyers*, 1981-1982 AGRIC. L.J. 405, 432-435 (1982).

2. *See, e.g.*, 16 U.S.C. §§ 590a, 590h(b)(3) and (4) (1982); *see also* 7 U.S.C. §§ 1391, 1447-49 (1982).

3. The last farm bill, the Agriculture and Food Act of 1981 which merely amends the basic authority found in the 1949 act is found at Pub. L. No. 97-98, 95 Stat. 1213—1358 (1981). The rules for the implementation of the various price support programs authorized under that Act can be found at 48 Fed. Reg. 1679-94 (1983) (to be codified in 7 C.F.R. pts. 713, 730, 792, 794 and 795). Congress has already begun work on the 1985 farm bill.

4. The Commodity Credit Corporation is authorized at 15 U.S.C. §§ 714 (1976).

5. The use of a payment-in-kind program was never approved or acted upon by Congress. Instead the program was developed by the Department of Agriculture under the Secretary's general authority, under the Agricultural Act of 1949 as amended by the Agriculture and Food Act of 1981, to make land diversion payments to producers of wheat, feed grains, upland cotton and rice if the Secretary determines that the payments are necessary to assist in adjusting the total national acreage of the commodities to desirable goals. *See* 48 Fed. Reg. 9232 (1983) for the final rule authorizing the PIK program; *see also* 48 Fed. Reg. 1476 (1983) (to be codified at 7 C.F.R. pt. 770) for the interim PIK rules.

are certain to fail. As a result, a very important part of designing government farm programs is balancing the benefits to the farmer against the required action on their part. This must be done to insure that sufficient numbers of producers will participate in order that the program achieve its goals. Clearly, if program benefits do not attract sufficient numbers of producers to set aside production then the production goal can not be reached.

The importance of the producer-government relationship goes beyond merely dictating the success or failure of a price support program at the national level. This relationship determines the rights and obligations of the individual producer *vis-a-vis* the government under the program, *i.e.* what the producer must do to be entitled to the government benefit or payment being offered, whether it is in the form of money, a loan, surplus grain, or eligibility to participate in another program.[6] One of the most important decisions to be made by the government in this relationship is in determining whether the producer has complied with the necessary program requirements and is thus entitled to participate or to be paid. Payment is generally conditioned on the performance of a certain required activity by the producer such as withholding a certain amount of land from production or agreeing to store grain for a certain length of time.[7] Consequently, the legal technicalities of the government-producer relationship and the manner in which compliance and the right to payment are determined become very important, particularly to the individual producer whose financial success may depend on these determinations. The goals of the parties are clear. The government seeks to encourage certain behavior for which it will pay, while the producer wants to insure that he is treated fairly and shall not be denied the government benefits he has earned.

The purpose of this article is to study the producer-government relationship in agricultural price support programs administered by the ASCS for feed grains, cotton and wheat. Further, this article examines the rights of producer-participants to receive payment and to appeal agency decisions which hold that they are not entitled to government benefits or must refund those already obtained. The article will first study the nature of the relationship between the ASCS and the farmer and will discuss the administrative procedure whereby payment decisions are made. The various steps in the administrative procedure afforded to producers who challenge agency decisions will then be addressed. The discussion will then focus on the cases that have interpreted what procedural rights producers are entitled to and how the agency must proceed when denying program payments to producers. An important part of this discussion will focus on the question of finality and on judicial interpretation of the statute forbidding appeal of ASCS factual decisions. The article concludes with a discussion of how the procedural protections and the cases interpreting them would apply in an action taken by the

6. 48 Fed. Reg. 1476, 1478 (1983) (to be codified at 7 C.F.R. § 770.3).
7. 48 Fed. Reg. 1476, 1477 (1983) (to be codified at 7 C.F.R. § 770.2).

government to obtain the refund of programs payments allegedly made in error.

ROLE OF ASCS COUNTY COMMITTEES

The production control and price support programs of the ASCS are administered on a county-wide basis.[8] The programs are administered by a three member county committee that is elected by farmers. The members serve three year terms on a staggered basis.[9] The county ASCS committee has general authority to supervise the administration of programs which are carried out by the paid staff of office and professional workers. It also holds ultimate authority with regard to program eligibility and compliance.[10] The county committees represent a form of localized administration of federal programs by individuals familiar to other producers. This insures local control. As a result, it is the responsibility of these committees to make the initial decisions concerning implementation of new programs, such as PIK, to see that programs are adequately administered and that local participants are treated fairly. As part of this authority, the county committee working with the Executive Director who is the ASCS staff professional is responsible for making a number of decisions that determine a producer's eligibility to participate in a program, to receive benefits or whether he must refund benefits erroneously paid. Examples of such decisions include determining compliance with acreage reduction requirements,[11] resolving tenant complaints against landlords,[12] qualifying practices as conservation uses,[13] determining the program yield and acreage basis for a farm[14] and resolving allegations of fraud or willful misrepresentation.[15] Consequently, the county committee is responsible for making decisions that adversely affect the financial interests of participating producers.

Because the decisions made by the local ASCS committee determine the amount of government benefits a producer will receive, if any, it is important that the decisions are made in a fair and open manner and that procedures are available to protect producer's rights. In addition, it is very important that producers are aware of their rights and the procedures available to give them effect. The laws establishing the ASCS and price support programs also provide a series of important procedural protections to guard producer interests. These protections have been further interpreted and ex-

8. 16 U.S.C. § 590h(b) (1982).

9. *Id.*

10. 7 C.F.R. pt. 7. *See* 7 C.F.R. § 7.21 which provides that "[t]he county committee . . . shall be generally responsible for carrying out in the county the agricultural conservation program, the price support program as assigned . . . formulated pursuant to the acts of Congress . . . and any other program or functions assigned to it by the Secretary of Agriculture."

11. 7 C.F.R. § 718.6 (1983).

12. 7 C.F.R. § 713.110 and 7 C.F.R. pt. 794 (1983).

13. 7 C.F.R. §§ 713.60-.74.

14. 7 C.F.R. pts. 718, 792 (1983).

15. 7 C.F.R. § 713.22, and 7 C.F.R. pt. 714 (1983).

panded by the courts.[16]

Before studying these provisions in detail, it is important to look at the legal relationship between the producer and the government in price support programs. The recently administered PIK program provides an excellent opportunity to study this relationship. First, the program was complex partly because it was designed and implemented on a day-to-day basis during the 1983 crop year, resulting in more than the usual number of legal and administrative questions. Secondly, the PIK program involved a more formal relationship than other voluntary programs. While all price support programs involve the producer signing up for benefits at the local ASCS office, and the participation is subject to ASCS rules and regulations, the PIK program was based on a binding contract between the farm producer and the USDA.[17] Unlike other farm programs, this contract was irrevocable.[18] The contract granted the USDA substantial power to require farmers to comply with PIK program requirements, including a provision establishing liquidated damages for their failure to do so.[19]

The contract consisted of a one page work sheet determining the farmer's benefits, a six page appendix establishing the nature of the legal relationship and a two page addendum which was added shortly before the sign up period ended.[20] The contract was first issued in January, with final sign up ending on March 11th. The contract language used in PIK can only be described as complicated and difficult to follow. It is safe to conclude that only a minority of PIK participants even opted to read the PIK contract, or understood it if they did, and that even fewer chose to take the contract to their attorney. However, this conclusion is not surprising, nor is the behavior difficult to understand, given that most producers wanted to participate in PIK and that most farmers trust and respect the ASCS in the administration of price support programs. Regardless of whether producers read the PIK contract documents, once they signed up for the program they were bound by the terms of these documents, including important provisions determining payment, liquidated damages and the agency's right to request refunds of unearned payments.[21]

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16. 7 C.F.R. pt. 780 (1983). *See* discussion accompanying notes 57-66 *infra*.

17. Form CCC-477 "Contract to Participate in the 1983 Payment-In-Kind (PIK) Diversion Program," Form CCC-477 (Appendix), and Form CCC-477 (Addendum), which together totalled 9 pages of complicated contractual provisions. The contracts were so complicated they were accompanied by a form, ASCS-496 PIK, which was a three page explanation of the contract in lay terms.

18. *See* Form CCC-477 (Appendix) ¶ 18.

19. *See, e.g.*, Form CCC-477 (Appendix) ¶ 14, which is set out in note 88 *infra*.

20. Because the addendum was issued after a number of producers had signed up for the program, it was made to apply retroactively to previously signed contracts, unless those producers took action to leave the program.

21. For example, see the provision of paragraph 15 of the PIK contract appendix which provides:

> 15. REFUNDS OF UNEARNED PAYMENTS-IN-KIND
> In determining the liability of a producer who receives a quantity of a crop which is in excess of that quantity which the producer is otherwise entitled to receive under the provisions of the contract and this appendix, the producer shall agree to the following:

ADMINISTRATIVE PROCEDURE FOR DETERMINATION AND APPEAL OF ASCS COMMITTEE DECISIONS

As noted above, the price support programs are administered by the local ASCS committees who are empowered to make the initial decisions concerning producer eligibility for payment or participation. In the vast majority of cases, the committee will approve participation or eligibility for a loan or program payment. Where the committee determines that a producer does not meet the eligibility requirements to participate in a program, or that the producer's actions have not complied with the requirements of a program, the producer will have to decide whether to abide by the decision or to challenge it. Where a producer decides to challenge an adverse ASCS decision, statutory and constitutional law provide important procedural and substantive protections to insure that the producer's rights are protected.[22]

Provisions for the protection of a producer's rights to receive farm program payments are found in several places. The authorizing statute for price support programs contains such a clause,[23] as do the federal regulations implementing the program.[24] The documents that a farmer signs to participate, such as the PIK contract, contain such protections,[25] as does the Constitution as interpreted by the courts.[26] When farmers sign up for federal programs, they are usually informed of these rights. For example, the document farmers received explaining the PIK program contained a provi-

A. A producer who is determined by the County Committee or the State Committee to have erroneously represented any fact affecting a program determination under the PIK program shall not be entitled to a payment-in-kind for the farm and agrees to refund to the CCC the fair market value of any payment-in-kind for the crop that the producer has received.

B. A producer who is determined by the State Committee, or by the County Committee with the approval of the State Committee, to have knowingly (1) adopted any scheme or device which tends to defeat the purpose of the program, (2) made any fraudulent representation, or (3) misrepresented any fact affecting a program determination under the PIK program agrees to refund to CCC the fair market value of any payment-in-kind for all crops on the farm that the producer has received.

C. If neither paragraph 15 A nor 15 B of this appendix is applicable, the producer shall refund to CCC the fair market value of the quantity of the crop which is received by the producer as payment-in-kind and which is determined in excess of the producer's share of the crop which is determined in accordance with paragraph 6 of this appendix.

D. For purposes of this paragraph, the determination of fair market value of any payment-in-kind shall be made jointly by the County Committee and the producer. However, if there is a dispute as to the fair market value of any payment-in-kind, the determination shall be made by the State ASC Committee and such determination shall be final.

E. The provisions of this paragraph shall be applicable in addition to any liability under criminal and civil fraud statutes.

Id.

22. *See, e.g.*, Prosser v. Butz, 389 F. Supp. 1002 (N.D. Iowa 1974), 7 C.F.R. § 780.8 (1983) and discussions in text accompanying notes 41, 57, *infra*.

23. 16 U.S.C. § 590h(b) (1982).

24. 7 C.F.R. pt. 780 (1983).

25. Form CCC-477 (Appendix) ¶ 13(c).

26. *See* Prosser v. Butz, 389 F. Supp. 1002 (N.D. Iowa 1974) (holding that the theory of entitlements recognized in Godberg v. Kelly, 397 U.S. 254 (1970) applies in the situation where a farmer has contracted with A.S.C.S. to receive benefits and that basic due process must be observed in the denial of such benefits).

sion which said: "Appeal rights—Producer may appeal to the County Committee for reconsideration of any decision that the committee makes concerning participation in the program. The appeal must be in writing and be filed within 15 days of the date of notification of the decision."[27]

To better understand what rights farmers have to appeal or challenge ASCS decisions, one must look to the ASCS appeal regulations, which are found in 7 C.F.R. part 780. The ASCS appeal procedures are available to any farmer whose right to participate or receive payments is affected by a determination of the county committee, state committee or Deputy Administrator of the ASCS.[28]

There are two forms of appeal available to a producer: reconsideration by the party making the initial decision,[29] and appeal of a reconsideration to the next highest reviewing authority in the agency.[30] Any producer or participant who is dissatisfied with an initial decision made by the local or state ASCS committee can ask that body to reconsider the initial decision.[31] The reconsideration procedure is very important because this is the first real opportunity for producers to present their side of the matter and it is the first stage at which due process protections apply. The decision and record made at the reconsideration level will provide the basis for subsequent administrative review and represent the agency's determinations of "facts" for matters of finality. As a result, it is important that the producer and his representative present the best version of their case possible and attempt to preserve their procedural and substantive rights at the reconsideration stage. If the producer is dissatisfied with the result of the reconsideration, he may appeal that action to the next highest level, the state committee.[32] An appeal of the state committee's decision would be made to the Deputy Administrator of the ASCS.[33] However, certain types of decisions cannot be appealed beyond the level of the state committee.[34]

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27. Form ASCS-496 PIK at 3.

28. 7 C.F.R. § 780.3 (1983). "Producer or participant" is defined in 7 C.F.R. § 780.2(b) as "any person whose right to participate or receive payments, or the amount thereof, under any of the programs covered by these regulations, is affected by a determination of the county committee. . . ." *Id.*

29. *Id.* § 780.3.

30. *Id.* §§ 780.4, .5.

31. *Id.* § 780.3.

32. *Id.* § 780.4.

33. *Id.* § 780.5.

34. *Id.* § 780.11(a), which provides that:

> (a) Determinations made by a State committee with respect to (1) the establishment of farm yields for wheat, feed grain, and cotton, (2) the establishment of wheat allotments, (3) the establishment of farm feed grain allotments, (4) the establishment of upland cotton base acreage allotments, (5) matters arising under the tobacco discount variety program, (6) eligibility provisions of the livestock feed program, (7) the disaster provisions of the wheat, feed grain, and upland cotton programs that a loss on a farm was due in whole or in part to causes other than the natural disaster or conditions beyond the control of the producer, (8) the establishment of rice allotments, and (9) crop appraisals by the Agricultural Stabilization and Conservation Service (ASCS) and by Federal Crop Insurance Corporation for ASCS are not appealable to the Deputy Administrator, State and County Operations.

Id.

A producer or participant begins either an appeal or a reconsideration by filing a written request with the county or state committee.[35] This request must be signed by the producer or participant and must be supported with facts submitted with the request or at a later time.[36] The producer or participant can choose between an informal hearing before the local committee or review without a hearing on the basis of written material submitted by the party.[37]

A request for a reconsideration or an appeal must be made within fifteen days "after the written notice of the determination is mailed to or otherwise made available to the producer or participant."[38] The reviewing authority has the power to consider a request made after fifteen days if, in its judgment, the circumstances warrant such action or if the request was delayed because it was filed with the wrong reviewing authority.[39]

As noted, the procedure gives the producer the option of choosing either an informal hearing or a decision on a written submission. Because of the importance of the initial reconsideration in establishing the record on appeal and determining the individual's rights, it is wiser to request that the reconsideration or appeal be based on a hearing. However, as noted in the regulations, this procedure will still be marked with an air of informality.[40] If a hearing is requested it will be held at a time and place designated by the reviewing authority and conducted in a "manner deemed most likely to obtain the facts relevant to the matter in issue."[41] The regulations provide that any producer or participant has a number of important procedural rights concerning the handling of the informal hearing.[42] These rights include:

(1) the right to be advised of the issues involved;

(2) the right to be given a full opportunity to present facts and information, both parol and documentary, relevant to the matter;

(3) the right to cross-examine witnesses the reviewing authority may use;

(4) the right to obtain a verbatim transcript of the hearing, but only if the producer

a) requests it prior to the hearing,

b) agrees to pay for the expenses, and

c) is able to persuade the reviewing authority that the nature of the case is such "as to make such a transcript desirable."[43]

As provided by the regulations, the producer or the committee may make a transcript of the hearing. In cases where no transcripts are made the review-

35. *Id.* § 780.6(a).
36. *Id.* § 780.7.
37. *Id.*
38. *Id.* § 780.6(a).
39. *Id.* §§ 780.6(b), (c).
40. *Id.* § 780.8.
41. *Id.* 780.8(b).
42. *Id.* §§ 780.8(b)-(e).
43. *Id.*

ing authority is required to make a record of the hearing.[44] This record must be in writing and contain "a clear, concise statement of the facts as asserted by the producer or participant and material facts found by the reviewing authority."[45] Prior to making its decision, the reviewing authority may ask the producer to present additional evidence and may develop additional evidence from other sources.[46]

After the reviewing authority has made a determination it must notify the producer or participant, in writing, of the decision and the basis for it.[47] Regulations require that the notification must clearly set forth the basis for the determination.[48] The reviewing authority's decision can be to affirm, modify, or reverse, any determination made by it initially or by a lower body, or the decision can be to send the matter back to the lower body for reconsideration.[49] If a party is dissatisfied with the determination it can ask the reviewing authority to reopen the hearing, for any reason it deems appropriate, so long as the matter has not been appealed to or considered by a higher body.[50] The reviewing authority can also reopen a matter on its own motion.[51]

If the producer is appealing the decision of the local committee it appears that there are three levels of appeal available:

(1) reconsideration of the initial decision by the local committee;
(2) appeal of that reconsideration to the state committee;
(3) appeal of the state committee decision to the Deputy Administrator.

A decision of the Deputy Administrator is not appealable within the agency.[52] However, senior officials in the USDA, such as the Secretary or Administrator of the ASCS, can reverse or modify any determination made by a state or county committee or the Deputy Administrator.[53] From the agency's viewpoint, this authority provides a mechanism whereby the agency can identify issues at the local level which need uniformity of treatment and elevate these decisions to the national level so as to provide uniform guidance to county committees. However, this procedure also raises a question about the actual finality of the appeals procedure.

Of course, there is one final appeal right that a producer may have and that is to appeal the ASCS final determination in federal court. When a producer decides to appeal an ASCS decision in the courts there are two

44. *Id.* § 780.8(d).
45. *Id.* The record must also contain the names of the interested parties appearing at the hearing, and the identity of the documents presented into evidence. *Id.*
46. *Id.* § 780.9(a).
47. *Id.*
48. *Id.* Thus, the notification should contain findings of fact that constitute the basis of the decision which will then be subject to finality on later appeals. *See* the discussion in text following note 68 *infra*.
49. *Id.*
50. *Id.* § 780.10.
51. *Id.*
52. *Id.* § 780.9.
53. *Id.* § 780.12.

important legal considerations that will come into play: first, the producer must have exhausted all his administrative remedies; and secondly, certain agency determinations of factual questions are final and not reviewable upon appeal.[54] These matters, particularly the second, have been the subject of court decisions that help clarify and interpret the producer's right to appeal an ASCS decision. This paper will now consider those cases.

CASES INTERPRETING ASCS ADMINISTRATIVE PROCEDURES

A. *Due Process Requirements*

One of the basic questions faced by the courts concerns the due process rights of participants in ASCS programs. In *Prosser v. Butz*,[55] a farmer was assessed a penalty by the local ASCS committee for allegedly allowing cattle to graze on set-aside land.[56] The penalty was assessed after a local committee proceeding which the farmer attended; however, the farmer had not had notice of the charges, was without counsel, had no opportunity to present evidence except for his contemporaneous statements and was denied access to the names and statements of the farmers who had accused him.[57] The court held, under the theory of *Goldberg v. Kelly*,[58] (concerning the necessity of satisfying due process procedural protection before a government benefit could be denied,) that a farmer who contracted with the ASCS for certain benefits, in return for withholding land from production, is entitled to an adjudicatory hearing prior to denial of the benefits for which he contracted.[59] In *Prosser* 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) right to retain private counsel and be represented by such counsel at the hearing;
(3) right to present a reasonable quantum of argument and evidence at a hearing on the charges;
(4) 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;
(6) an impartial adjudicative body.[60]

The court said, "[r]eview however often repeated, of a determination arrived at by unconstitutional procedure cannot correct the defect unless the review itself includes the requisite procedural safeguards."[61]

Thus, the court noted that the existence of administrative appeal rights

54. 7 U.S.C. § 1385 (1982).
55. 389 F. Supp. 1002 (N.D. Iowa 1974).
56. *Id.* at 1004.
57. *Id.*
58. 397 U.S. 254 (1970).
59. *Prosser*, 389 F. Supp. at 1005-06.
60. *Id.* at 1006.
61. *Id.*

would not remedy a due process deficiency stemming from the failure to satisfy these elements. For while appeal may be possible, it is not de novo and the due process deficiency in the original hearing would merely be perpetuated. The result in *Prosser* means that the initial hearing or administrative action in which the participant's rights are determined acquires significant due process aspects. For ASCS determinations, this proceeding would generally be the reconsideration provided for in 7 C.F.R. section 780.[62] While the regulations give this proceeding an informal nature, the regulations do set out basic due process steps designed to satisfy the *Prosser* holding.

As the court in *Prosser* noted, due process requires that the party be informed of the basis for the agency determination. Because any subsequent appeals, either administrative or judicial, that the producer may take will be determined on the basis of the record, it is therefore very important that the record be complete. In *King v. Bergland*,[63] the court said that since its review was based solely on the record, "the inquiry, grounds and analysis upon which the agency acted must be clearly disclosed therein."[64]

In *King*, the plaintiff, who was primarily a wheat farmer but who had planted grain sorghum in the past, applied to the ASCS for prevented plantings payments for a wheat crop he had not planted due to drought conditions. The ASCS denied the request and ruled that his failure to purchase seed or fertilizer, or otherwise adequately prepare his farm for planting of a secondary crop meant that payments were unavailable.[65] The district court upheld the agency's interpretation of the prevented planting regulations, but reviewed the record of the agency decision to determine if the agency had considered all the relevant facts and whether the decision had a rational basis.[66]

B. *Finality*

In *King*, the USDA raised the issue of finality in an attempt to block the court's review of the ASCS decision.[67] This issue has consistently been raised by the USDA in actions challenging its decisions. The finality issue centers around the interpretation of 7 U.S.C. section 1385 which provides that:

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62. 7 C.F.R. § 780.3 (1983) provides that:

> Any producer or participant who is dissatisfied with any determination initially made by the county committee or office, State committee, or Deputy Administrator, may obtain a reconsideration of such determination and an informal hearing in connection therewith by filing a request for reconsideration with the county committee. If the initial determination was made by the State committee or the Deputy Administrator, the county committee shall forward the request for reconsideration to the authority initially making the determination.

Id.

63. 517 F. Supp. 1363 (D. Colo. 1981).
64. *Id.* at 1366 (citation omitted).
65. *Id.* at 1366-67.
66. *Id.* at 1367.
67. *Id.* at 1368.

> The facts constituting the basis for any [Soil Conservation Act] payment, any payment under the wheat, feed grain, upland cotton, and rice programs authorized by [the Agricultural Act of 1949] and this chapter, any loan, or price support, operation, or the amount thereof, when officially determined in conformity with the applicable regulations prescribed by the Secretary or by the Commodity Credit Corporation, shall be final and conclusive and shall not be reviewable by any other officer or agency of the Government. . . .[68]

The meaning and effect of this provision has been the subject of a number of cases, resulting in an interpretation that has expanded through the years. In the earlier cases interpreting the provision, the decisions focused on the review of factual determinations and interpreted the provisions broadly, as a limitation of review of USDA actions. For example in *Mario Mercado y Hijos v. Benson*,[69] a producer-processor of sugar sought declaratory and injunctive relief against the Secretary of Agriculture who denied the producer-processor payments under the Sugar Act of 1948.[70] The producer asserted that in fixing the rates the Secretary had held a constitutionally inadequate hearing and had fixed confiscatory rates. The federal district court dismissed the complaint for failure to state a cause of action upon which relief could be granted.[71] The court of appeals vacated that judgment, ruling that the complaint should have been dismissed for lack of jurisdiction on the grounds that judicial review of the Secretary's findings of fact was statutorily precluded.[72]

In *United States v. Gomes*,[73] the government brought an action to recover payments made to a farmer under the Feed Grain Program.[74] The government alleged that the farmer had fraudulently claimed to have planted more acres in grain in the base years than he actually had. The district court granted the government's motion for summary judgment, ruling that the administrative determination of the facts constituting the basis of the government's claim for recovery, was conclusive and not subject to judicial review.[75]

However, other early cases began to develop exceptions to the finality provision. For example, in *Aycock-Lindsey Corporation v. United States*,[76] the Fifth Circuit Court of Appeals held that while section 1385 did prevent review of factual determinations, it did not prevent judicial review of legal questions with respect to subsidy payments.[77] *Aycock* involved a corpora-

68. 7 U.S.C. § 1385 (1982).
69. 231 F.2d 251 (D.C. Cir. 1956).
70. *Id.* at 252.
71. *Id.* at 253.
72. *Id.*
73. 323 F. Supp. 1319 (E.D. Cal. 1971).
74. *Id.* at 1320.
75. *Id.* at 1321. *See also*, United States v. Moore, 298 F. Supp. 199 (S.D. Ohio 1969); Gregory v. Freeman, 261 F. Supp. 362 (N.D. N.Y. 1966); and Elliott v. United States, 179 F. Supp. 758 (D. Neb. 1959).
76. 171 F.2d 518 (5th Cir. 1948).
77. *Id.* at 525.

tion which carried on naval store operations in two Florida counties. Because the lease in one county contained specific minimum requirements for working timber, the corporation was unable to comply with a USDA production curtailment program until it created a separate corporation in the second county, a procedure approved by the department. A year after the program was changed to one which paid for increased production, the department determined that the two operations were to be treated as one, and required that the excess amount paid in the previous year be deducted from the current year's payment. The corporation brought an action in district court to recover the difference between the amount to be paid to the company if it was treated as two separate entities rather than as a single enterprise. The district court sustained the government's motion to dismiss but the Court of Appeals reversed, holding that section 1385 did not prevent review of the legal question of whether or not the two operations should be treated as one.[78]

Another case which expanded the interpretation of the gaps in section 1385 finality was *Boyd v. Secretary of Agriculture*.[79] *Boyd* involved a class action filed by cotton farmers who were denied relief for the loss of their crop due to a drought. The farmers alleged that they would have received low yield disaster payments had their crops been inspected in a timely fashion as in surrounding counties, before a beneficial rainfall. The farmers alleged that the agency's decision which reduced or denied their disaster payments was arbitrary, capricious and a deprivation of due process. The Secretary defended by alleging that section 1385 precluded judicial review of its determinations. The court said it was apparent that the statute precludes a review of the facts underlying the Secretary's decision; however, the court rejected that defense in a broad holding, stating that "[a] 'finality provision' does not preclude judicial review of the question whether findings of fact were in conformity with the regulations. This is a question of law reviewable under the Administrative Procedure Act, 5 U.S.C. § 704. Therefore, the court can review legal questions."[80] The court went on to rule that it also had the authority to review claims that agency action was arbitrary and capricious, not in compliance with due process of law and whether agency officials' status to render an official decision was questionable.[81] In this case the court commented on the inadequate nature of the record before it on review, stating: "The court has no indication of how this decision was made, or whether there was any hearing or administrative appeal therefrom."[82] Due to the lack of record before it, the court remanded the case to the Secretary for a full hearing on the merits and stated if a fair and impartial administrative proceeding is not held, it would reserve the right to have

78. *Id.*
79. 459 F. Supp. 418 (D. S.C. 1978).
80. *Id.* at 424 (citations omitted).
81. *Id.*
82. *Id.* at 424-25.

a full hearing on the merits itself.[83]

Another case holding that section 1385 does not preclude judicial review of the question whether ASCS findings of fact were in conformity with the regulations is *Garvey v. Freeman*.[84] In *Garvey* a wheat farmer brought an action for judicial review of the wheat yields the USDA established for his farm under a voluntary certification program. The decisions were made after numerous local meetings, two informal hearings and trips by members of the State Committee to the farmer's operation. The Deputy Administrator affirmed the local committee's appraisal noting that there had been a severe conflict as to the participant's farming practices. After limiting the effect of the finality provision, the court ruled that the evidence sustained the county committee's appraisal and showed that the determination was not arbitrary, capricious or the result of bias or prejudice.[85]

The various cases interpreting section 1385 clarify that while the section may shield the agency's action from review as to its factual judgments, the courts are hesitant to expand such protection to other areas of review, such as procedural questions. Therefore, in a case in which a participant is attempting to obtain judicial review of an agency determination, the focus should be placed on questions such as:

1) whether due process was granted in making the determination and that agency action was not arbitrary and capricious;
2) the nature of the record developed in the proceedings and relied on by the agency so that the court can examine the thoroughness of the agency's determination, the rationality of its decision, and whether any facts were actually determined;
3) the legal questions involved in the agency's action;
4) the conformity of the agency decision with its regulations; and
5) the status of agency officials making the decision and whether the action was of the nature to which finality would apply.

By focusing the question on appeal away from a review of the facts, the reviewing court will have available extensive precedent for limiting the impact of section 1385 on the scope of its review.

The scope of the finality provision can also be an issue in situations where it is the agency rather than the farmer that wishes to review an earlier factual decision. In *Gross v. United States*,[86] one of several related decisions dealing with a farmer's allegations that the local ASCS committee had illegally discriminated against him, the Court of Claims held that section 1385 does not prohibit an agency from reviewing its own decisions.[87] The court noted the language of the section is a prohibition against a review by "any *other* officer or agency of the government."[88] The court said the agency

83. *Id.* at 425 n.12.
84. 397 F.2d 600 (10th Cir. 1968).
85. *Id.* at 613-14.
86. 505 F.2d 1271 (Ct. Cl. 1974).
87. *Id.* at 1276.
88. *Id.* (emphasis in original).

clearly had the right to review its own decisions regarding payments, and after a proper investigation, require a refund if the facts warrant it.[89]

As noted above, agency regulations provide a mechanism whereby senior agency officials can review decisions made by local or state committees. The operation of this provision may itself create some question of finality. In particular, the later agency review of a local determination may adversely affect a program participant who had acted in reliance on the original decision of the local committee. At least one court has prevented the Secretary from altering the finding of a local committee, on the theory that in fairness a decision of an administrative agency which is final as to one party should also be final as the other, absent clear statutory authority to the contrary. In the case of *Kopf v. United States*,[90] the county committee determined a fact constituting part of the basis for a payment upon a producer's application for reconsideration of an initial determination *and* after a full evidentiary hearing pursuant to the regulations of the Secretary. On review, the court held that a determination by the county committee was final as to the Secretary and could not be altered by him after substantial participation and compliance by the producer in a program.[91] In that case, the plaintiffs were informed by their local committee that their 1962 and 1963 yields for the feed grain program had been re-set to a lower amount and that the resulting excess payment for 1962 would be offset against the 1963 payment which was also readjusted. In an action against the government, the plaintiffs relied on their substantial compliance with the program to attack the Secretary's subsequent charge. The Eighth Circuit Court of Appeals affirmed the district court, ruling that the offers on the program forms were unilateral contracts which were binding on the government once a participant began performance. Moreover, the agency could not retroactively reverse allotments without a Congressional grant of such power.[92] The agency's ability to alter or amend local determinations, or local interpretations of program requirements, which have subsequently been relied upon by producers could become an important issue in any actions the USDA might bring to obtain refunds of PIK payments.

ASCS regulations recognize that there may be difficulties in local interpretation and administration of programs like PIK. As a result, they provide some protection for producers who relied on a local interpretation of a rule that was later found to be inaccurate and which placed the producer in jeopardy of noncompliance.[93] The regulations provide that notwithstanding other provisions of the law, "performance rendered in good faith in reliance upon action or advice of any authorized representative of a county committee or State committee" may be accepted by the department "as meeting the

89. *Id.*
90. 379 F.2d 8 (8th Cir. 1967).
91. *Id.* at 14.
92. *Id.*
93. 7 C.F.R. pt. 790 (1983).

requirements of the applicable program."[94] This regulation was expressly made applicable to the PIK program in the contract producers signed.[95] However, this exception does not extend to situations where the producer knew or had sufficient reason to know the advice was erroneous.[96] It seems somewhat questionable to expect producer participants to have a higher level of understanding of the programs than those responsible for administering them.

ADMINISTRATIVE ACTION BY THE ASCS TO OBTAIN REFUNDS OF PIK OVERPAYMENTS

One of the important post-PIK actions that will take place is the government's analysis of producer compliance with the requirements of the program. The Inspector General's report is expected to be completed by the end of 1983. Initial preliminary information released concerning reviews done for two states, Texas and Georgia, indicate that in as many as ten percent of the cases there was a failure to comply fully with the terms of the program. Of course, the nature of such noncompliance will vary depending on the facts and in many cases may be nothing more than producer misunderstanding caused by the local ASCS office's administration of the program. The unique and complex nature of the PIK program and the manner in which it was developed and administered created great potential for misunderstanding to arise. In light of these factors one might assume that the USDA/ASCS attitude in terms of strict post performance application of program provisions will be lenient. However, if the Inspector General's work should indicate, or local investigation show, that there were organized, intentional attempts to subvert the program's requirements and goals, the USDA has legal authority to require return of the unearned payments.

Primary authority for such refunds is found in paragraph fifteen of the PIK contract (CCC-477 Appendix) which provides:

> REFUNDS OF UNEARNED PAYMENTS-IN-KIND
>
> In determining the liability of a producer who receives a quantity of a crop which is in excess of that quantity which the producer is otherwise entitled to receive under the provisions of the contract and this appendix, the producer shall agree to the following:
>
> A. A producer who is determined by the County Committee or the State Committee to have erroneously represented any fact affecting a program determination under the PIK program shall not be entitled to a payment-in-kind for the farm and agrees to refund to the CCC the fair market value of any payment-in-kind for the crop that the producer has received.
>
> B. A producer who is determined by the State Committee, or by the County Committee with the approval of the State Committee, to have knowingly (1) adopted any scheme or device which tends to

94. *Id.* § 790.2(a).
95. PIK Contract, Form CCC-477 (Appendix ¶ 13D.)
96. 7 C.F.R. § 790.2(b) (1983).

defeat the purpose of the program, (2) made any fraudulent representation, or (3) misrepresented any fact affecting a program determination under the PIK program agrees to refund to CCC the fair market value of any payment-in-kind for all crops on the farm that the producer has received.

C. If neither paragraph 15 A nor 15 B of this appendix is applicable, the producer shall refund to CCC the fair market value of the quantity of the crop which is received by the producer as payment-in-kind and which is determined in excess of the producer's share of the crop which is determined in accordance with paragraph 6 of this appendix.

D. For purposes of this paragraph, the determination of fair market value of any payment-in-kind shall be made jointly by the County Committee and the producer. However, if there is a dispute as to the fair market value of any payment-in-kind, the determination shall be made by the State ASC Committee and such determination shall be final.

D. The provisions of this paragraph shall be applicable in addition to any liability under criminal and civil fraud statutes.

This provision is in addition to the authority of the CCC to assess liquidated damages pursuant to paragraph fourteen of the PIK contract.[97]

Several important legal issues arise in connection with the application and interpretation of the language authorizing the ASCS to require refunds of program payments. These questions, several of which have been touched on in cases discussed above, focus on the procedure to be followed in such an action, the finality of ASCS determinations, the applicable statute of lim-

97. Form CCC-477 (Appendix) ¶ 14 provides:

It is agreed that the failure to carry out the terms and conditions specified in the contract and this appendix will cause serious and substantial damages to CCC and the Payment-in-Kind Program. It is further agreed that it will be difficult, if not impossible, to determine the amount of these damages. Accordingly:

A. In the event that there is a violation of any of the provisions of paragraph 1 of the contract, the operator and all producers shall agree to pay liquidated damages to CCC which are calculated in accordance with paragraph 14 E of this appendix. The liquidated damages shall be divided according to shares shown in paragraph 5 of the contract.

B. In the event that there is violation of any of the provisions of paragraph 2 of the contract, the operator shall agree to pay liquidated damages to CCC which are calculated in accordance with paragraph 14E of this appendix.

C. In the event that there is a violation by a producer of any of the other terms and conditions which are specified in the contract or this appendix, such producer shall agree to pay liquidated damages to CCC which are calculated by multiplying the rates in paragraph 14 E of this appendix times the producer's share of the quantity determined in accordance with paragraph 3 of the contract.

D. However, a producer shall not be liable for liquidated damages in accordance with the provisions of more than one of paragraphs 14 A, 14 B, and 14 C.

E. Liquidated damages shall be calculated by multiplying the quantity determined in accordance with paragraph 3 of the contract times the following rate for each crop:

(1) Corn. $0.572/bushel.
(2) Grain sorghum. $0.544/bushel.
(3) Rice. $0.0228/pound.
(4) Upland cotton. $0.152/pound.
(5) Wheat. $0.86/bushel.

itations in recovery proceedings and the potential vagueness of the provisions under which refunds could be sought.

An action to require a refund of PIK payments would proceed under the provisions of 7 C.F.R. part 780. Such proceeding would be subject to the types of claims and interpretations that would arise in any ASCS administrative action, for example, the impartiality of the reviewing official or the sufficiency of due process. One important question upon a review of such an administrative action would be the finality of the ASCS factual determinations pursuant to 7 U.S.C. section 1385, as discussed above. In a recent case involving ASCS actions to recover payments made under the cotton program, the Fourth Circuit Court of Appeals discussed the nature of section 1385 and its applicability in payment refund proceedings. *United States v. Batson*[98] involved a government action against forty-six producers who allegedly took part in an extensive scheme to take advantage of the provisions allowing for the transfer and reconstitution of cotton allotments.[99] The court observed that section 1385 affects factual review but stated:

> [W]e do not determine whether 7 U.S.C. § 1385 precludes *all* factual review, or whether some character of limited "arbitrary and capricious" type review is nonetheless available (citations omitted). The distinction may, in any event, prove to be immaterial. The government does not contend that issues of law or due process are not reviewable; and it claims the administrative determinations are in any event not arbitrary or capricious.[100]

However, the court did make note of a problem that may be present with ASCS administrative determinations in general—the failure to indicate just what facts were determined.

The court found that "there may be a further potential problem related to application of section 1385. In portions of at least some of the ASCS 'final determinations' relied on by the government it appears rather difficult to identify or understand just what 'facts' were determined thereby."[101] The court said that this may be due to a generality of wording or an elliptical form of expression, and upon further reading it may become clearer. However, it did note that a reviewing district court may need to determine whether there is such a lack of clarity in a "final determination" that section 1385 can not apply.

The *Batson* court made one other reference to the application of section 1385, concerning the government's attempt to obtain refunds from producers who had not received government payments directly but rather indirectly in the form of lease payments. The court noted that section 1385 applies only to a final ASCS factual determination and that in this situation the judicial inquiry should focus on whether these producers were "properly subject to

98. 706 F.2d 657 (5th Cir. 1983).
99. *Id.* at 659.
100. *Id.* at 685 n.41.
101. *Id.*

the authority of the ASCS compliance review process and thus to the application of section 1385."[102] If they were found not to be, the court indicated that the producers should receive de novo review on the question of whether they received such payments.

One question faced by any producer in an action to recover program payments would be how long they might be subject to government actions to obtain refunds of payments alleged to have been wrongfully received. *Batson* provides insight on this question which in part focuses on the nature of the government's action. In the PIK situation an action to recover would be based on the language of paragraph fifteen of the PIK contract which reflects the language of the regulations, although none of the PIK rules or other documents appears to incorporate this provision.[103] In *Batson* the government's recovery action was based on the $55,000 payment limitation provision which is somewhat similar in nature to what a PIK recovery would be. Specifically, the action rested on two authorities which provided for payment refunds upon a finding that a producer "erroneously represented any fact affecting a program determination" or participated in any "scheme or devise which tends to defeat the purpose of the program."[104]

After full administrative proceedings and appeals, the parties were found to have violated the provisions and were ordered to refund over two million dollars. The producers appealed to the district court. The district court granted the producers motion for a summary judgment and held that the government's suits were barred for two reasons: first, the six year statute of limitations had run and secondly, the section dealing with "a scheme or device"[105] was unconstitutionally vague and therefore invalid.[106] The district court did not reach the issues concerning adequacy of due process in administrative proceedings. These other issues, which are perhaps equally as important, are similar to some of those discussed in other cases and include: 1) bias and prejudgment of the hearing officer, 2) denial of due process due to the delay in holding the hearings, 3) lack of procedural due process, as relates to denial of discovery, failure to provide adequate notice and refusal as to cross examinations.[107] On appeal the Fourth Circuit reversed and remanded the case holding that the six year statute of limitations did apply but did not bar this action and that the refund provisions were not unconstitutionally vague.

On the statute of limitations, the court noted that the case was not an action in fraud or contract, nor did it impose a criminal or civil penalty. Rather, it was an action based on the government's statutory right found in the two "scheme and device" provisions of the ASCS regulations "to a *re-*

102. *Id.* at 684.
103. 7 C.F.R. pt. 713.22 (1983).
104. *Id.* §§ 722.715 795.17.
105. *Id.* § 722.715(b)(1).
106. *Batson*, 706 F.2d at 678.
107. *Id.* at 671.

fund of payments made to a producer but to which a producer is not entitled."[108] The proper statute of limitations is found at 15 U.S.C. section 714b(c) which applies a six year statute of limitations to actions by or against the Commodity Credit Corporation. The court noted that because a right to refund cannot exist until a payment is made, the proper date for tolling the six year limitation was the date of payment.[109]

The Fourth Circuit distinguished two earlier cases, *United States v. Templeton*[110] and *United States v. Rolenc*,[111] wherein the CCC's administrative actions to recover fraudulently obtained crop loans had been started after the section 714b(c) statute had run. The court noted that the determination that the action was not based on fraud was more than just nomenclature.[112] Here the government's cause of action was expressly pled as one to enforce the *administrative* determination that the refunds were due and, as a result, the statute had not run.

The final ground used by the district court to strike down the ASCS action was a finding that the language of the regulation relied on by the agency was unconstitutionally vague because the phrase "scheme or device which tends to defeat the purpose of the program" was not defined in the regulations.[113] The district court held that a "man of ordinary intelligence would not glean from the language of the regulation what acts would be considered wrongful or defeat the unknown purpose of the program."[114]

The appeals court held that it could not agree with the district court that the provision is too vague to be used as a standard for a refund, "at least where, as here, there is no suggestion that it was applied on the basis of improper, ulterior or invidiously discriminatory considerations."[115] The court expressed concern about the generality and imprecision of the regulation's language, but after reviewing the purpose of the cotton program and the nature of the producers' conduct the court concluded that the vagueness of the statute was within the degree tolerated by the Constitution. The court looked specifically at the terms "scheme or device" and "purpose of the program" and found that both terms were understandable. The court in this exercise found specifically that it would "charge participants in the upland cotton program with the basic knowledge of the subsidy, loan, set aside, reconstitution, and payment limitation regulations."[116] Further, the court reviewed the nature of the producers' conduct and found it to be "carefully thought out, planned and executed" and the type of conduct that a reasonable person would be able to understand as a "scheme or device" which

108. *Id.* at 672 (emphasis in original).
109. *Id.*
110. 199 F. Supp. 179 (E.D. Tenn. 1961).
111. 345 F. Supp. 1260 (D. Neb. 1972).
112. *Batson*, 706 F.2d at 677.
113. 7 C.F.R. § 722.715(b)(1) (1983).
114. *Batson* 706 F.2d at 678 (quoting district court opinion).
115. *Id.*
116. *Id.* at 681.

defeats the "purpose of the program."[117]

The *Batson* court's holding on the vagueness issue is an important one for PIK participants who may be subject to ASCS refund actions. Although the payment limitations of 7 C.F.R. part 795 did not apply to PIK, the language of that section, with respect to refunds for payments resulting from the use of a "scheme or device," is similar to that used in paragraph fifteen of the PIK contract. The court's interpretation of the refund language, and the producer's obligation to know that the program regulations would be applicable in an action by the ASCS was grounded on a theory that producers made a knowing attempt to subvert the provisions of PIK, (through some form of farm reconstitution scheme, for example.) The final result of *Batson*, reversal and remand to the district court for resolution of the other procedural questions, leaves unanswered questions about the nature of ASCS proceedings and the scope of judicial review. However, the case adds a great deal to the limited body of authority. When considered in connection with other decisions discussed above dealing with ASCS refund actions, the case sheds light on the agency's authority to seek refunds and the legal issues that may arise in such actions.

CONCLUSION

The farm programs that are administered by the ASCS are an important element of the overall health of the farm community in the United States. The administration of these programs, such as PIK, is especially important to the individual producers who participate in such programs and act in reliance on the promise of obtaining economic benefits for such conduct. Denial of benefits to producers, or actions to require the refund of payments already made, are events that can cause serious injury to a producer's economic situation. Because of the prejudicial nature of such agency actions, these events bring into play certain basic rights and procedural protections which are at the very heart of farm programs. These rights and protections find their origin in the Constitution and the authorizing statutes, as well as the regulations and the contracts used to implement the programs. The procedures and rights serve as an important guard to protect farmers' interests in farm program benefits and to insure that programs are properly and fairly implemented and administered.

This article has reviewed the nature and content of these protections and demonstrated the manner in which they are implemented. The article has reviewed the court decisions which have interpreted these protections as applied in individual cases. This review has identified the nature of the due process procedural requirements that must be followed in the denial of farm program benefits. The review has also identified certain legal questions, such as the finality of ASCS factual decisions which have not been fully addressed by the Courts. The analysis of these cases has demonstrated that

117. *Id.* at 682.

there are a number of methods in which the review of ASCS decisions can be focused to avoid the possible application of finality. In addition, the analysis of cases, in particular the recent *Batson* decision, shows that a number of significant legal questions relating to ASCS authority to obtain refunds of payments have not been fully addressed by the courts. In this manner, the article has attempted to present an accurate picture of the current state of the law, limited as it may be, concerning the appeal of ASCS decisions on farm program payments, and in so doing, will hopefully provide a service to producers and their attorneys who may be involved in the disputes that could further clarify this area of agricultural law.