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An Agricultural Law Research Article

**A Guide to the ASCS Administrative Appeal  
Process and to the Judicial Review of  
ASCS Decisions**

**Part I**

by

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# A GUIDE TO THE ASCS ADMINISTRATIVE APPEAL PROCESS AND TO THE JUDICIAL REVIEW OF ASCS DECISIONS†

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† This article will appear in two parts. This part, Part One, addresses the ASCS administrative appeal process, including the new producer appeal provisions of the 1990 farm bill. Part Two will appear in Vol. 36, Issue No. 3 in May, 1991. Part Two will discuss the judicial review of ASCS decisions.

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## I. INTRODUCTION

Since 1933, the federal government has supported commodity prices and farm income through various annual farm programs.<sup>1</sup> In addition to promoting the stability of commodity prices and supporting farm income,<sup>2</sup> the federal farm programs also have served to promote "reasonably priced food and fiber"<sup>3</sup> and, more recently, to achieve conservation goals.<sup>4</sup> Some of the annual federal farm programs provide for direct payments to producers;<sup>5</sup> others do not.<sup>6</sup> For their participation in the federal farm programs providing direct payments, producers receive payments in cash or in commodity certificates redeemable for commodities or transferable for cash.<sup>7</sup>

Participation in the federal farm programs is voluntary. However, in order to participate, producers must meet the applicable initial eligibility requirements and must satisfy any continuing conditions of eligibility. The eligibility requirements vary from program to program, but they are primarily designed to serve the governmental interests underlying the particular program.<sup>8</sup>

If eligible, producers usually decide whether to participate in federal farm programs for financial reasons.<sup>9</sup> If, for a given crop year or other program

1. The primary impetus for the creation of federal farm programs was the economic crisis of the 1930's. J. JUERGENSMEYER & J. WADLEY, I AGRICULTURAL LAW § 9.2 (1982) [hereinafter JUERGENSMEYER & WADLEY]. See generally ECONOMIC RESEARCH SERV., USDA, AGRIC. INFO. BULL. NO. 485, HISTORY OF AGRICULTURAL PRICE-SUPPORT AND ADJUSTMENT PROGRAMS, 1933-84 3-46 (1985) (discussing the historical development of the federal farm programs).

2. See Boxley, *Price Variability and Farm Programs*, 1989 CHOICES 22 (noting that commodity price stability and farm income support have been co-equal concerns under most federal farm program legislation).

3. J. LANGLEY, K. REICHELDERFER & J. SHARPLES, THE POLICY WEB AFFECTING AGRICULTURE: TRADEOFFS, CONFLICTS, AND PARADOXES 8 (Agric. Info. Bull. No. 524, 1987).

4. See, e.g., Malone, *The Renewed Concern Over Soil Erosion: The Current Federal Programs and Proposals*, 10 J. AGRIC. TAX'N & L. 310 (1989); Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve*, 34 U. KAN. L. REV. 577 (1986).

5. The programs that provide for direct payments to farmers are usually characterized as income support programs. For a general discussion of those programs, see *infra* note 15.

6. The subsidies provided to producers under some of the annual federal farm programs are indirect. For example, the nonrecourse loan program, a form of price support, provides an indirect subsidy to producers. The nonrecourse loan program is briefly described at *infra* note 16.

7. See generally ECONOMIC RESEARCH SERV., USDA, MISC. PUB. NO. 1479, THE BASIC MECHANISMS OF U.S. FARM POLICY: HOW THEY WORK, WITH EXAMPLES AND ILLUSTRATIONS 50 (1990) [hereinafter BASIC MECHANISMS OF U.S. FARM POLICY] (describing the uses of commodity certificates); UNITED STATES GENERAL ACCOUNTING OFFICE, PUB. NO. RCED-89-47BR, FARM PAYMENTS: EVALUATION OF CHANGES IN COUNTY LOAN RATES 9 (1990) (same).

8. For a description of the extent and nature of the continuing eligibility requirements for several farm programs, see *In re* Evatt, 112 Bankr. 405, 415-16 (Bankr. W.D. Okla. 1989), *aff'd*, *In re* Evatt, 112 Bankr. 417 (W.D. Okla. 1990).

9. See J. LOONEY, J. WILDER, S. BROWNBACK & J. WADLEY, AGRICULTURAL LAW: A LAWYER'S GUIDE TO REPRESENTING FARM CLIENTS 193 (1990) [hereinafter LOONEY, WILDER, BROWNBACK & WADLEY]. Of course, some producers may chose not to participate in the federal farm programs for philosophical or other reasons. For a summary of some of the policy arguments against federal farm programs, see D. PAARLBERG, FARM AND FOOD POLICY: ISSUES OF THE 1980s 34-42 (1980).

period, a producer believes that commodity prices will be high enough so that more income can be realized by operating outside of a program and its attendant constraints,<sup>10</sup> the producer usually will decide not to participate. On the other hand, if the producer believes that commodity prices will be low and that participation in a program will yield a greater return than would be realized without the program's support, the choice will be to participate.

Thus, by design, farm income support programs give producers an opportunity to sustain their livelihood through periods of low commodity prices.<sup>11</sup> In effect, the program payments are "an income 'safety net' for persons who depend on a profitable pursuit of agricultural product for their livelihood."<sup>12</sup> Because of its financial consequences, the decision to participate in one or more of the federal farm programs is an important one for producers. Having made the decision to participate, producers have a significant stake in being found to have satisfied the initial and continuing eligibility requirements of the program.<sup>13</sup>

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10. Most of the annual commodity programs require that a specified amount of cropland be removed from production as a condition for the receipt of maximum benefits. Thus, if a producer does not participate in a program having that requirement, the amount of cropland that would have to be "set aside" under the program is available for production. See J. LANGLEY, R. GREEN, F. NELSON & T. FULTON, *FARM PROGRAM TOOLS: TRADEOFFS AND INTERACTIONS 2* (Agric. Info. Bull. No. 521, 1987); see also CONGRESSIONAL BUDGET OFFICE, *FARM PROGRAM FLEXIBILITY: AN ANALYSIS OF THE TRIPLE BASE OPTION 10-11* (1989) (discussing producers' planting and program participation decisions). Other constraints include required conservation practices. See generally Huang, *Costs and Implications of Conservation Compliance*, 44 J. SOIL & WATER CONSERVATION 521, 522 (1989) (noting that "[f]armers may not participate in commodity programs if the compliance costs appear to be greater than the benefits that they can receive from these programs").

11. In the mid-to-late 1980s, when commodity prices were generally low, participation in the annual federal farm commodity programs increased dramatically. For example, in 1982, less than 30% of the nation's corn acreage was enrolled in a federal farm program. By 1987, that figure had increased to nearly 90%. Similar increases occurred in enrollments in the programs for rice, cotton, and wheat. As a result, in the 1980s, federal farm program payments to producers totalled \$133.5 billion, with nearly two-thirds of that total having been paid since 1985. N.Y. Times, April 25, 1990, at A12, col. 4 (nat'l ed.).

The large federal farm program expenditures in the late 1980s meant that many farmers depended heavily on farm program payments for their farm income. In 1987, for example, federal farm program payments to Indiana farmers constituted 74% of their net farm income. Wall St. J., May 24, 1990, at 1, col. 5. (s.w. ed.). See generally R. REINSEL, *BACKGROUND FOR AGRICULTURAL POLICY: THE DISTRIBUTION OF FARM PROGRAM PAYMENTS, 1987 2-10* (Agric. Info. Bull. No. 607, 1990) (noting, among other things, that in 1987 cotton and grain producers received average payments of \$29,380 and \$16,986, respectively); UNITED STATES GENERAL ACCOUNTING OFFICE, *PUB. NO. RCED-90-108BR, FARMING AND FARM PROGRAMS: IMPACT ON THE RURAL ECONOMY AND ON FARMERS* (1990) (discussing the distribution of federal farm program payments from 1985 through 1988).

12. H.R. REP. NO. 100-391(I), 100th Cong., 1st Sess. 46 reprinted in 1987 U.S. CODE CONG. & ADMIN. NEWS 2313-1, 2313-46 (accompanying the Farm Program Payments Integrity Act of 1987, enacted as part of the Omnibus Budget and Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 1301-07, 101 Stat. 1330, 1330(2)-1330(19)).

13. Anticipated farm program payments often provide the security for farm operating loans. See *In re Ferguson*, 112 Bankr. 820, 822-24 (Bankr. N.D. Texas 1990). When the payments are improperly delayed or denied, lenders who extended credit based on the expectation that the payments would be timely received also suffer from the producer's impaired ability to repay the loan.

Of course, a lender facing such a situation may begin foreclosure or other collection proceedings against the producer. In such a case, the consequences to the producer can be catastrophic. For example, in *Esch v. Lyng*, a family partnership was suspended from participation in several federal farm programs, and payments were withheld. *Esch v. Lyng*, 665 F. Supp. 6, 7-8 (D.D.C. 1987), modified *sub nom.*, *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989). As a result, the partnership's creditors repossessed most of its farm equipment and instituted foreclosure proceedings. *Id.*

As will be discussed in greater detail, the administration of the federal farm programs is primarily the responsibility of the Agricultural Stabilization and Conservation Service (ASCS). Among other things, the ASCS decides whether a producer is eligible to participate in a program and whether a participating producer is complying with program requirements. In making its determinations, the ASCS typically is required to assess whether each program applicant or participant has satisfied numerous and often complex requirements that are found in scattered sections in Titles 7 and 16 of the United States Code and Title 7 of the Code of Federal Regulations. Although the burden of establishing eligibility for program benefits is borne by the producer, the myriad and arcane program requirements leave ample room for administrative error.

Given the conditional nature of a producer's eligibility for federal farm program payments, the financial significance of the payments to the producers who receive or desire to receive them, and the complexity of the programs' requirements, disputes between producers and the ASCS are inevitable. This article is a guide to the means and procedures available for the resolution of those disputes. Because there are both administrative and judicial means and procedures for the resolution of disputes between producers and the ASCS, this article is correspondingly divided into two parts. Part One addresses the ASCS administrative appeal process. Part Two, which will appear in the next issue, discusses the judicial review of final ASCS decisions.

## II. PART ONE: THE ASCS AND THE ASCS ADMINISTRATIVE APPEAL PROCESS

### A. *The ASCS*

The ASCS is an agency created by the Secretary of Agriculture. It is not a statutory entity.<sup>14</sup> The primary function of the ASCS is the administration of the federal government's farm income support,<sup>15</sup> price support,<sup>16</sup> and pro-

14. The ASCS was created by the Secretary of Agriculture in 1961 pursuant to authority granted by 5 U.S.C. § 301 (1988) [hereinafter all citations to 5 U.S.C. will incorporate by this reference the year of 1988]; Reorganization Plan No. 2 of 1953, *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 873-76; and 16 U.S.C. § 590h(b) (1988) [hereinafter all citations to 16 U.S.C will incorporate by this reference the year of 1988]. See *Hedman v. United States*, 15 Cl. Ct. 304, 309-11 (1988); see also Linden, *An Overview of the Commodity Credit Corporation and the Procedures and Risks of Litigating Against It*, 11 J. AGRIC. TAX'N & L. 305, 310 (1990) [hereinafter Linden] (noting that the ASCS is not a statutory entity); JUERGENSMEYER & WADLEY, *supra* note 1, at § 9.6.1 n.1 (citing the Agricultural Adjustment Act of 1938, the National Wool Act of 1954, and other statutes as additional authority supporting the Secretary's creation of the ASCS). See generally N. HARL, 9 AGRICULTURAL LAW §§ 63.01-63.10 (1982 & Supp. 1989) [hereinafter Harl] (describing the overall organization of the USDA).

15. The various income support programs are designed to support producers' incomes. Deficiency payments are currently the primary mechanism for income support.

Deficiency payment programs employ the concept of "target prices." The "target price" on which a commodity's deficiency payments are based is deemed to be a fair market price for the commodity. Generally, if the market price remains at or above the "target price," no deficiency payments are made. However, if the averaged market price falls below the "target price" for a specified period, deficiency payments make up the difference. Deficiency payments are made directly to the participating producer in cash or in the form of commodity certificates. See BASIC MECHANISMS OF U.S. FARM POLICY, *supra* note 7, at 10-17; see also Coffman, *Target Prices, Deficiency Payments*,

duction adjustment<sup>17</sup> programs. The ASCS fulfills its function through the use of county and state committees and a national office. Because the ASCS is the agricultural producer's primary source of information about the various commodity and related land use programs and the arbiter of eligibility for those programs, the ASCS is, for many producers, the embodiment of the federal farm programs.

Although, from the producers' perspective, the ASCS is the entity most closely associated with the federal farm programs, the ultimate responsibility for the programs administered by the ASCS resides in the Secretary of Agriculture. However, as is explained below, the Secretary's administrative responsibilities for those programs have been delegated to the ASCS.

For the producer in a dispute with the ASCS, the Secretary's ultimate responsibility for the federal farm programs may have practical significance in at least two respects. First, it supports the naming of the Secretary as a defendant in actions seeking judicial review of final ASCS determinations.<sup>18</sup> Sec-

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*and the Agricultural and Consumer Protection Act of 1973*, 50 N.D.L. REV. 299, 305-07 (1974) (discussing the development of the "target price" concept); L. TIEGEN, *AGRICULTURAL PARITY: HISTORICAL REVIEW AND ALTERNATIVE CALCULATIONS* (Agric. Econ. Rep. No. 571, 1987) (discussing the concept of "parity" in the support of producers' income through federal farm programs).

Income support also is accomplished through direct incentive payments, disaster payments, marketing loan payments, and loan deficiency payments to qualifying producers. For general descriptions of those programs, see *BASIC MECHANISMS OF U.S. FARM POLICY*, *supra* note 7, at 9-81; G. BECKER, *FUNDAMENTALS OF DOMESTIC COMMODITY PRICE SUPPORT PROGRAMS* 9-14 (Cong. Res. Serv. No. 86-128 ENR, 1986) [hereinafter Becker]; ASCS, USDA, *AGRIC. HANDBOOK NO. 345, FARM COMMODITY AND RELATED PROGRAMS* 18-41 (1976) [hereinafter *FARM COMMODITY AND RELATED PROGRAMS*]; LOONEY, WILDER, BROWNBACK & WADLEY, *supra* note 9, at 198-200; HARL, *supra* note 14, at ch. 91.

16. Price support programs include nonrecourse loans and government purchases. See Becker, *supra* note 15, at 5-8; LOONEY, WILDER, BROWNBACK & WADLEY, *supra* note 9, at 196-98. Under the nonrecourse loan program, producers receive loans using their crop as collateral. The loan period is nine months for most crops. While a commodity is under loan, the producer is responsible for storage. The producer has the option of repaying the loan at the loan rate, a sum normally expressed in terms of dollar amount per bushel, or forfeiting the collateral.

Receipt of the forfeited crop is the government's only recourse if the loan is not repaid. Because program participants can always receive the loan price no matter how low the market price falls, the nonrecourse loan program effectively establishes the minimum price for the commodity. See *BASIC MECHANISMS OF U.S. FARM POLICY*, *supra* note 7, at 14; BECKER, *supra* note 15, at 5-6.

17. Production adjustment programs include acreage allotments, marketing quotas, cropland set-asides, acreage reductions, paid acreage diversions, farmer-owned reserves, and conservation reserves. See BECKER, *supra* note 15, at 15-24; Linden, *supra* note 14, at 312-16; LOONEY, WILDER, BROWNBACK & WADLEY, *supra* note 9, at 200-14.

The programs administered by the ASCS are listed at 7 C.F.R. § 2.65(a) (1990) [hereinafter all citations to 7 C.F.R. will incorporate by this reference the year of 1990]. See also Special Project, *Agricultural Stabilization and Conservation Service: History, Policy, and Problems*, 31 S.D.L. REV. 425 (1986) (briefly describing the programs administered by the ASCS); Linden, *supra* note 14, at 312-19 (same); Devine, *Understanding the Current Crisis with the ASCS*, 9 J. AGRIC. TAX'N & L. 195, 197-200 (1987) [hereinafter Devine] (same).

18. As will be discussed in Part Two of this article, judicial review of final ASCS decisions may be obtained in the United States Claims Court or in the federal district court where the claim arose or where the defendant resides. In the Claims Court, the proper defendant is the United States. However, in most district court actions, the proper defendant will be the Secretary of Agriculture. In particular, if a district court action invokes the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and any mandatory or injunctive relief is sought, any resulting decree must "specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance." 5 U.S.C. § 702. Thus, naming the Secretary may be more than proper, it may be required. Because neither the USDA nor the ASCS is a statutory entity, neither is a proper defendant. See *Westcott v. United States Dep't of Agric.*, 611 F. Supp. 351, 353-

ond, it provides a basis for avoiding the "anti-injunction" provision of 15 U.S.C. § 714b(c).<sup>19</sup> For these reasons, an understanding of the hierarchy of authority between the Secretary and the various levels of the ASCS is an essential predicate for later discussions in this article.

The ASCS derives its authority from a series of delegations and subdelegations, with all authority originating from the Secretary. First, the Secretary has delegated that office's authority for the administration of the commodity and related land use programs to the Under Secretary for International Affairs and Commodity Programs.<sup>20</sup> In turn, the Under Secretary for International Affairs and Commodity Programs has subdelegated nearly all of that authority to the ASCS.<sup>21</sup>

Through the Secretary's delegation and the subsequent subdelegations, much of the Secretary's authority for the administration of the farm commodity and related land use programs resides in the ASCS county committees, the local level of ASCS.<sup>22</sup> In effect, the Secretary acts "through" the ASCS county committees and other ASCS offices in administering the programs. The Secretary's delegation does not constitute a general abdication of his authority, however, and the ultimate authority over the implementation of the federal farm programs continues to reside in the Secretary.<sup>23</sup>

Although the ASCS has the primary administrative authority over the programs that it administers, not all determinations affecting eligibility for those programs are made by the ASCS. Most significant, the Soil Conservation Service (SCS) makes certain determinations in connection with the Conservation Reserve Program<sup>24</sup> and the "sodbuster," "swampbuster," and

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54 (D. Neb. 1984), *aff'd*, 765 F.2d 121 (8th Cir. 1985); *Fricton v. Oconto County ASCS, USDA*, 723 F. Supp. 1312, 1315 (E.D. Wis. 1989); *Linden, supra* note 14, at 329.

19. 15 U.S.C. § 714b(c) (1988). Section 714b(c) protects the Commodity Credit Corporation from injunctions. *E.g.*, *Raines v. United States*, 12 Cl. Ct. 530, 533 (1987). However, as will be discussed in Part Two of this article, that protection has not been extended to protect the Secretary of Agriculture when the Commodity Credit Corporation "was not involved in the administrative conduct" at issue. *Justice v. Lyng*, 716 F. Supp. 1567, 1569 (D. Ariz. 1988) (also holding that 15 U.S.C. § 714b(c) does not apply to actions for declaratory relief).

20. *See* 7 C.F.R. § 2.21(b). The Secretary has reserved the authority to appoint members of the state ASCS committees. 7 C.F.R. § 2.22(b). For a discussion of the responsibilities of the state committees, *see infra* note 62 and the accompanying text.

21. *See* 7 C.F.R. § 2.65(a). The Under Secretary's reserved authority is found at 7 C.F.R. § 2.65(b).

22. *See* 7 C.F.R. § 2.21(b)(18); *see also* 7 C.F.R. § 7.2 ("State, county, and community committees shall, as directed by the Secretary of [sic] a designee of the Secretary, carry out the programs and functions of the Secretary."). For a discussion of the responsibilities of the county committees, *see infra* notes 50-55 and accompanying text. *See also Hedman*, 15 Cl. Ct. at 311 n.17 (setting forth additional subdelegations by the Under Secretary to the various levels within the ASCS under the then-current regulations).

23. *See, e.g., Morrow v. Clayton*, 326 F.2d 36, 46 (10th Cir. 1963) ("it does not follow that the Secretary, by utilizing such committees, abdicates his authority in, and responsibility for, administering the [Agricultural Adjustment Act of 1938]"). For an account of the delegations and subdelegations of the Secretary's authority from the Secretary to the county committee level for a particular program, specifically, the 1983 "Payment-In-Kind" (PIK) program, *see Gibson v. United States*, 11 Cl. Ct. 6, 7-8 (1986). *See also infra* note 51 (discussing the Secretary's delegation of authority to the county committees).

24. The Conservation Reserve Program (CRP) is authorized pursuant to 16 U.S.C. §§ 3831-3836. Under the program's regulations, found at 7 C.F.R. pt. 704, the SCS makes certain technical determinations including "whether land is highly erodible and suitable for permanent vegetative

conservation compliance provisions<sup>25</sup> of the Food Security Act of 1985. These determinations may be binding on the ASCS<sup>26</sup> and may result in the producer being declared ineligible for program payments by the ASCS.

In addition to the ASCS and the SCS, the Commodity Credit Corporation (CCC) also has a role in the implementation of the federal farm programs. However, unlike the ASCS and the SCS, the CCC does not participate in the field administration of the programs. The CCC is a federally chartered corporation. Governed by the CCC Charter Act,<sup>27</sup> the CCC is "an agency and instrumentality of the United States, within the Department of Agriculture, subject to the general supervision and direction of the Secretary of Agriculture."<sup>28</sup>

The CCC is used by the Secretary to carry out the congressionally authorized farm commodity and related land use programs.<sup>29</sup> Specifically, a primary function of the CCC has been to fund the federal commodity and related land use programs. Thus, "the CCC has functioned as the fiscal agency of the U.S. government for commodity and other farm programs since its inception in 1933."<sup>30</sup> As more prosaically described by the United States Supreme Court, the CCC "is simply an administrative device established by Congress for the purpose of carrying out federal farm programs with federal funds."<sup>31</sup>

cover, and the adequacy of the planned conservation practice to achieve the necessary erosion control." 7 C.F.R. § 704.3(b).

25. See 16 U.S.C. §§ 3811-3812, 3821-3822, 3841-3845. The specific division of authority between the ASCS and the SCS for determinations under these provisions is set forth at 7 C.F.R. §§ 12.6, 12.20, 12.30. See also ASCS, DEPUTY ADMINISTRATOR FOR STATE AND COUNTY OPERATIONS, ASCS HANDBOOK FOR STATE AND COUNTY OPERATIONS (6-CP), Exhibit 3.2 (1-19-90 Amend. 19) [hereinafter ASCS HANDBOOK] (Memorandum of Understanding Between Agricultural Stabilization and Conservation Service (ASCS) and Soil Conservation Service (SCS)). For a discussion of the ASCS HANDBOOK, see *infra* notes 78-86 and accompanying text.

26. See *infra* note 71.

27. 15 U.S.C. §§ 714-714p (1988) [hereinafter all citations of 15 U.S.C. will incorporate by this reference the year of 1988]. For an account of the history and structure of the CCC, see Linden, *supra* note 14, at 306-12; JUERGENSMEYER & WADLEY, *supra* note 1, at § 1.23; see also *Rainwater v. United States*, 356 U.S. 590, 591-92 (1958) (observing that, because of the statutory restrictions to which the CCC is subject, "little more than a corporate name remains to distinguish it from the ordinary government agency" (footnote omitted)).

28. 15 U.S.C. § 714. A seven-member board, appointed by the President with the advice and consent of the Senate, manages the CCC. The board is subject to the general supervision of the Secretary of Agriculture. 15 U.S.C. § 714g; see also W. COCHRANE & M. RYAN, AMERICAN FARM POLICY, 1948-1973 121-27 (1976) [hereinafter COCHRANE & RYAN] (explaining the functions and activities of the CCC, including the functions and activities of its board); FARM COMMODITY AND RELATED PROGRAMS, *supra* note 15, at 93-101 (same). All of the officers of the CCC are employees of the USDA. See *Rainwater*, 356 U.S. at 591.

29. See H. PICKARD, *Price and Income Adjustment Programs*, I AGRICULTURAL LAW § 1.23, at 43 (J. Davidson, ed. 1981) [hereinafter PICKARD] (noting that "[t]he secretary of agriculture is required to provide the price support authorized or mandated by law through the Commodity Credit Corporation and other means available to him") (citing 7 U.S.C. § 1421(a) (1982); 7 U.S.C. § 1782(a) (1982 & Supp. 1987)); see also 7 U.S.C. § 1424 (1982) (providing that the "Secretary . . . may utilize the services and facilities of the Commodity Credit Corporation").

30. COCHRANE & RYAN, *supra* note 28, at 123. The CCC's financing of farm programs is accomplished through a combination of direct appropriations and borrowing. See 15 U.S.C. § 714b(i); Linden, *supra* note 14, at 308.

31. *Rainwater*, 356 U.S. at 592. Some might quarrel with such a summary description of the CCC's activities. For example, consider the following description:

In reality the CCC plays the role of an army general headquarters with an almost limitless budget in the operation of farm programs. It is here that information regarding new demand



In addition to its function as a fiscal agent, the CCC has been given a variety of specific powers including the authority to “[m]ake available materials and facilities required in connection with the production and marketing of agricultural commodities,”<sup>32</sup> to “[p]rocur[e] agricultural commodities for sale,”<sup>33</sup> and to “[r]emove and dispose of . . . surplus agricultural commodities.”<sup>34</sup> These powers are intended to facilitate the Secretary’s use of the CCC in carrying out the federal commodity and related land use programs.<sup>35</sup>

Because they are funded and channeled through the mechanism of the CCC, the federal farm programs sometimes are referred to as “CCC programs.” However, that characterization can be misleading in two respects. First, the Secretary bears the ultimate responsibility for the programs because they have been legislatively assigned to that office for implementation. Second, although the Secretary may use the funds and authority of the CCC in carrying out the programs, the Secretary has delegated the authority to administer the programs to the ASCS, not the CCC.<sup>36</sup> Accordingly, the ASCS administers programs that are implemented under authority legislatively granted to the Secretary and that are funded and facilitated by the CCC. For those reasons, the use of the phrase “CCC programs” is not entirely accurate.

Although the ASCS administers programs that have been funded and facilitated through the CCC, the ASCS is under “the direct supervision of the Under Secretary of Agriculture, International Affairs and Commodity Programs,” not the CCC.<sup>37</sup> However, there are links between the ASCS and the CCC. The overarching link between the ASCS and the CCC is that each is ultimately under the general supervision and direction of the Secretary, and each has differing and distinctive functions in the overall implementation of the federal farm commodity and related land use programs. The two agencies are linked in other ways as well.

For example, the two are linked through the Secretary’s appointment of the Administrator and the Associate Administrator of the ASCS as Executive

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and supply developments is received; it is here that plans are discussed and decisions made to cope with those demand-supply developments within the terms of the existing legislation; and it is here that funds are dispensed to implement the program and actions decided upon.

COCHRANE & RYAN, *supra* note 28, at 123; *see also* 15 U.S.C. § 714c (setting forth the specific powers of the CCC); PICKARD, *supra* note 29, at § 1.23 (describing the role of the CCC in the administration of federal farm programs); Linden, *supra* note 14, at 306-09 (describing the functions of the CCC); Gibson, 11 Cl. Ct. at 7 (describing the functions of the CCC under the 1983 “Payment-In-Kind” (PIK) program).

32. 15 U.S.C. § 714c(b).

33. 15 U.S.C. § 714c(c).

34. 15 U.S.C. § 714c(d).

35. *See* Gibson, 11 Cl. Ct. at 7.

36. *See* Stegall v. United States, 19 Cl. Ct. 765, 768-69 n.2 (1990) (“In practice, the CCC handles funding of the subsidy programs, while state and county ASCS committees are responsible for day-to-day administration.”). Because it has not been delegated the responsibility for the day-to-day administration of the federal farm programs, the CCC does not have any personnel with which to administer the programs. *See* Devine, *supra* note 17, at 208; *see also* Linden, *supra* note 14, at 310-12 (interchangeably using references to the federal farm programs as “CCC-administered” and “ASCS-administered” while acknowledging that the programs are administered by the ASCS).

37. Hedman, 15 Cl. Ct. at 312; 7 C.F.R. § 2.21(b)(18); *see also supra* notes 20-23 and accompanying text (explaining the delegation of authority to the ASCS).

Vice President and Vice President, respectively, of the CCC. In addition, the four deputy administrators of the ASCS hold appointments as Deputy Vice Presidents of the CCC.<sup>38</sup> The Administrator of the ASCS has been delegated the responsibility of providing a variety of services to the CCC and on its behalf.<sup>39</sup>

The ASCS and the CCC also are linked in two ways that may become relevant in actions for judicial review of final ASCS determinations or other litigation. First, in administering the commodity and related land use programs, the ASCS generally uses contract documents that bind the producer participating in the program to the CCC.<sup>40</sup> Second, the ASCS and the CCC recently have begun to promulgate jointly the regulations governing the commodity programs and to place those regulations under 7 C.F.R. chapter XIV, entitled "Commodity Credit Corporation, Department of Agriculture."<sup>41</sup>

These latter two linkages between the ASCS and the CCC may be related to a suspected, but unconfirmed, effort by the government to secure an extension of 15 U.S.C. § 714b(c), which precludes the issuance of injunctive relief against the CCC, to a greater range of activities involved in the implementation of the programs administered by the ASCS. More specifically, the linkages may represent an attempt to extend the immunity from injunction to the ASCS in all instances. The application of section 714b(c) is discussed in Part Two of this article,<sup>42</sup> but the true motivations and the full ramifications of these linkages have yet to be made clear.

The ASCS is organized in three tiers, with each tier having corresponding local, state, and national responsibilities. The key components of each tier are as follows:

- Local: County committees (COC) and a county executive director (CED);
- State: State committees (STC) and a state executive director (SED);  
and
- National: An Administrator and four deputy administrators, including the Deputy Administrator for State and County Operations (DASCO).

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38. Linden, *supra* note 14, at 310; *see also* 15 U.S.C. § 714h (authorizing the Secretary to appoint officers of the CCC).

39. *See, e.g.*, 7 C.F.R. § 2.65(a)(8), (10), (25); *see also* 15 U.S.C. § 714i (authorizing the CCC to use the services of other federal agencies). The administrative expenses of the CCC include the cost of compensating the ASCS for services rendered by the ASCS to the CCC or on its behalf. FARM COMMODITY AND RELATED PROGRAMS, *supra* note 15, at 101.

40. *See, e.g.*, Contract To Participate in The 1990 Price Support and Production Adjustment Programs, CCC-477 (reproduced at ASCS HANDBOOK (5-PA) (Rev. 8), Exhibit 110 (1-26-90 Amend. 1)). With regard to those contracts, the CCC Charter Act provides as follows:

State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements.

15 U.S.C. § 714b(g).

41. *See, e.g.*, 53 Fed. Reg. 29,552-579 (1988) (payment limitations rules, now codified at 7 C.F.R. pt. 1497, that had appeared in previous form at 7 C.F.R. pt. 795).

42. Part Two of this article will appear in Volume 36, No. 3 in May, 1991.

The ASCS's three-tiered structure underlies two aspects of the agency having particular relevance to its administrative appeal process. The first is its decentralized decision making process.<sup>43</sup> For most matters relating to program operations, the initial decisions are made by the county committees. The function of the committees and officials occupying the tiers at the state and national levels is largely one of direction and supervision of the county committees.

Second, the stages or levels of the ASCS appeals process correspond to the tiers in the ASCS's organizational structure. As a result of the new producer appeal provisions in the 1990 farm bill,<sup>44</sup> there will be a period when two administrative appeal processes are in effect.

The first process will apply to all appeals of ASCS decisions made prior to the date of enactment of the 1990 farm bill.<sup>45</sup> That process is the process that was in effect prior to the enactment of the 1990 farm bill. Under it, when the county committee or county executive director has made the initial decision,

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43. Notwithstanding the normal decentralized decision making process, the Secretary of Agriculture and the national ASCS office retain the authority to carry out the functions delegated to lower levels. 7 C.F.R. § 7.38; *see also* 7 C.F.R. § 7.1(d) (providing that the Administrator of the ASCS retains the authority to modify any decision of a county or state committee).

The 1990 farm bill, formally known as the Food, Agriculture, Conservation, and Trade Act of 1990, continues this authority. Specifically, § 1132(a) of the bill adds § 426 to Title IV of the Agricultural Act of 1949, Pub. L. No. 81-439, 63 Stat. 1051, to provide that:

Nothing contained in this section shall preclude the Secretary, the Administrator of the ASCS, or the Executive Vice-President of the Commodity Credit Corporation from determining at any time any question arising under the programs to which the provisions of this section apply or from reversing or modifying (in writing, with sufficient reason given therefor) any determination made by a county or State committee or the Director of the National Appeals Division.

S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (1990) (adding § 426(f) to tit. IV of the Agricultural Act of 1949). However, that authority is limited under the 1990 farm bill by the following provision:

Decisions of the State and County Committees . . . or employees of such committees made in good faith in the absence of misrepresentation, false statement, fraud, or willful misconduct, unless otherwise appealed under this section, shall be final, *unless otherwise modified under subsection (f) within 90 days*, and no action shall be taken to recover amounts found to have been disbursed thereon in error unless the producer had reason to believe that the decision was erroneous.

S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,074 (adding § 426(g) to tit. IV of the Agricultural Act of 1949) (emphasis supplied). For an explanation of the significance of these and related provisions in the 1990 farm bill, *see infra* notes 202, 204 and accompanying text; *see also infra* note 44 (discussing the status of the 1990 farm bill at the time this article was prepared).

44. The Food, Agriculture, Conservation, and Trade Act of 1990, S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073-74 (1990) (adding § 426 to tit. IV of the Agricultural Act of 1949, Pub. L. No. 81-439, 63 Stat. 1051). This article was written before the President had signed the bill. However, the President signed the bill on November 28, 1990.

45. S. 2830, 101st Cong., 2d Sess. § 1132(b), 136 CONG. REC. H11,029, H11,074 ("The amendment made by subsection (a) [containing the new producer appeal provisions of the 1990 farm bill] shall not apply to any appeal or proceeding with respect to an adverse determination made by any State or county committee . . . by employees or agents of the committees, by other personnel of the Agricultural Stabilization and Conservation Service, or by agents of the Commodity Credit Corporation prior to the date of enactment of this Act.").

Apparently, only determinations involving the 1991 and subsequent crop years will be appealable under the producer appeal provisions of the 1990 farm bill. S. 2830, 101st Cong., 2d Sess. § 1171(a), 136 CONG. REC. H11,029, H11,075 ("Except as otherwise specifically provided in title I through this title, such titles and the amendments made by such titles shall become effective with the 1991 crop of an agricultural commodity.").

the first level of the appeal process is a reconsideration by the county committee of that decision.<sup>46</sup> If the county committee declines to change the initial decision after reconsidering it, the affected producer may appeal to the state and national levels, in that order.<sup>47</sup>

Under the appeal process to be instituted by producer appeal provisions of the 1990 farm bill, a request for reconsideration directed to the entity making the initial decision will not be necessary. Thus, if the county committee makes the initial decision, an appeal may be taken directly to the state committee. Appeals of state committee decisions will continue to be taken to the national level.<sup>48</sup>

### 1. *The County Committee (COC)*

Normally, the producer's only contact with the ASCS is at the county level. The county executive director (CED) and the county committee, assisted by community committees,<sup>49</sup> are the producer's primary source of information about the federal farm programs.<sup>50</sup> Moreover, the county committee decides whether a producer is eligible to participate in an ASCS program in the first instance. The county committee also has the power to terminate the payment of benefits if a producer fails to comply with program requirements, to seek the return of benefit payments previously made, or to take other actions adverse to a producer's interest.<sup>51</sup>

46. See 7 C.F.R. § 780.3; see also *infra* notes 95-128 and accompanying text (discussing requests for reconsideration).

47. See 7 C.F.R. §§ 780.4, 780.5; see also *infra* notes 164-207 and accompanying text (discussing appeals to the state committee and DASCO).

48. S. 2830, 101st Cong., 2d Sess., § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding §§ 426(b)(2)(A)-(C) to tit. IV of the Agricultural Act of 1949).

49. Community committees are subject to the "general direction and supervision of the county committee." 7 C.F.R. § 7.22(a). They primarily serve as advisors to the county committee and as liaisons between the ASCS and producers. See 7 C.F.R. § 7.22(b).

50. A producer's reliance on information supplied by the county committee is not always wise. A producer who does so is "at jeopardy." *Esch*, 665 F. Supp. at 21 (also noting the testimony of an ASCS official who testified that "[f]armers depend heavily on the county offices for advice, too heavily. It's a convenience; they don't have to hire a lawyer until things go bad, and then they hire lawyers."), *modified sub nom.*, *Esch*, 876 F.2d 976. As a general rule, a determination made by or advice given by a county committee that is contrary to applicable regulations does not bind the government. See, e.g., *Willson v. United States*, 14 Cl. Ct. 300, 307 (1988); *Durant v. United States*, 16 Cl. Ct. 447, 451 (1988).

51. Devine, *supra* note 17, at 209-10; Hamilton, *Farmers' Rights to Appeal ASCS Decisions Denying Farm Program Benefits*, 29 S.D.L. REV. 282, 284-86 (1984) [hereinafter Hamilton I]; see also Gibson, 11 Cl. Ct. at 8 ("The county committee administers commodities programs at the local level, e.g., entering into program-related contracts with farmers on behalf of the CCC and making determinations about participant eligibility in related programs, etc.").

This broad authority resides in the county committees because the Secretary of Agriculture has delegated the field administration of the farm commodity programs to the state and county committees. See, e.g., 7 C.F.R. § 1413.2(a) (the loan, purchases, and other programs for feed grains, rice, upland and extra long staple cotton, and wheat "shall be carried out in the field by State and county Agricultural Stabilization and Conservation committees"); see also 7 C.F.R. § 7.2 (providing that the "[s]tate, county, and community committees shall . . . carry out the programs and functions of the Secretary").

Although the field administration of the programs is carried out in the first instance by the county committees, the state committee has the authority to direct county committee actions or to act in the stead of a county committee. See, e.g., 7 C.F.R. § 1413.2(c) (feed grains, rice, upland and extra long staple cotton, and wheat loan, purchases, and other programs); see also 7 C.F.R. § 7.1(c) ("The

In essence, the county committee is “generally responsible” for carrying out the ASCS-administered programs in its respective county or, if two or more counties have been combined into a single administrative unit, in the combined counties.<sup>52</sup> It is this grant of authority to the county committees that decentralizes decision making in the ASCS’s three-tiered administrative structure.

County committees have three members, each of whom is a producer, who are elected by eligible local producers for three year terms.<sup>53</sup> The county committee selects and supervises the county executive director (CED) who oversees the daily operations of the county office.<sup>54</sup> The county ASCS office is the repository of all records relating to the farmer’s participation in ASCS programs.<sup>55</sup> The records are maintained in “farm” files which are assigned an ASCS farm serial number.<sup>56</sup> Program participants have a right to inspect the “books, records, and documents of or used by the county committee in the administration of the programs assigned to it . . . insofar as such person’s interests under the programs administered by the county committee may be

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State committees shall take any action required by these regulations which has not been taken by the county committee.”); Linden, *supra* note 14, at 311 (noting that “state offices provide relevant documents to county ASCS offices and supervise the activities of those offices”). Nevertheless, “enormous reliance” is placed on the county committees in the administration of the federal farm programs. *Esch*, 665 F. Supp. at 21, *modified sub nom.*, *Esch*, 876 F.2d 976.

52. See 16 U.S.C. § 590h(b); 7 C.F.R. § 7.21(a). Among the specific responsibilities of the county committees are the following:

[p]ursuant to official instructions, review, approve, and certify forms, reports, and documents requiring such action in accordance with such instructions;

....  
[d]irect the giving of notices in accordance with applicable regulations and official instructions; [and]

....  
[c]onduct such hearings and investigations as the State committee may request.

7 C.F.R. §§ 7.21(b)(4), (9), (11); see also Linden, *supra* note 14, at 311-12 (summarizing the duties of the county committees); Hamilton I, *supra* note 51, at 284 (same).

53. See 7 C.F.R. §§ 7.4-7.18. The county agricultural extension agent may be a non-voting, ex officio member of the committee. 7 C.F.R. § 7.11(b).

Because the county committee members are themselves producers, they have a direct interest in the operation of the federal farm programs. However, the presence of self-interested producers on county committees has been held not to deprive other producers of due process. *Garvey v. Freeman*, 397 F.2d 600, 606 (10th Cir. 1968). To the contrary, the presence of local producers on the county committees has been praised as contributing to the value of the committees in the administration of farm programs. *Esch*, 665 F. Supp. at 21 (“The very strength of such [a] committee lies in its unique knowledge of its community, its residents, its neighbors.”), *modified sub nom.*, *Esch*, 876 F.2d 976.

As might be expected, the local producer composition of the county committees occasionally has given rise to claims of bias. See, e.g., *Garvey*, 397 F.2d at 612 (noting that, in the administrative proceedings under review, “[i]t may well be that the County Committeemen and even the State Committeemen harbored a small farmer’s prejudice against a big farmer and that this was reflected in their ultimate decisions”).

Members of county committees enjoy governmental immunity. *Westcott*, 611 F. Supp. at 358-59 (citing *Gross v. Sederstrom*, 429 F.2d 96 (8th Cir. 1970)), *aff’d*, 765 F.2d 121 (8th Cir. 1985); see also Linden, *supra* note 14, at 329-30 (discussing the immunity of county and state committee members).

54. See 7 C.F.R. §§ 7.21(b)(2), 7.25; see also *Hedman*, 15 Cl. Ct. at 310-11 (discussing the employment of county executive directors and their status under federal civil service law). The county committee also selects a secretary, who may be the county executive director. 7 C.F.R. § 7.11(b).

55. See 7 C.F.R. § 7.34.

56. See Linden, *supra* note 14, at 311.

affected.”<sup>57</sup>

In addition to being the entity that makes the initial decision in most instances and the custodian of the books, records, and documents that it uses to administer the programs, the county committee is the first level in the ASCS appeal process for all appeals of decisions made prior to the enactment of the 1990 farm bill. In those instances when the county committee or county executive director makes the initial determination adversely affecting a producer, the producer may seek reconsideration of that decision by the county committee. The request for reconsideration begins the ASCS administrative appeal process for adverse determinations made prior to the date of enactment of the 1990 farm bill.<sup>58</sup>

Appeals of adverse determinations made by a county committee after the date of enactment of the 1990 farm bill may be taken directly to the state committee. A request for reconsideration is not required.<sup>59</sup>

## 2. *The State Committee (STC)*

The state committee is comprised of three to five persons, each of whom is appointed by the Secretary of Agriculture.<sup>60</sup> Each state office is managed by a state executive director (SED).<sup>61</sup> The primary role of the state committee is to oversee the actions of the county committees in the state.<sup>62</sup> Accordingly, the state committee is the second level in the ASCS appeal process under the current regulations.<sup>63</sup>

57. 7 C.F.R. §§ 7.34(a), 7.34(c)(3); *see also infra* notes 88-94 and accompanying text (discussing the right to inspect and obtain ASCS records and other documents).

58. *See* 7 C.F.R. § 780.3; *see also infra* notes 95-128 and accompanying text (discussing requests for reconsideration before the county committee).

59. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(b)(2)(A) to tit. IV of the Agricultural Act of 1949) (“if such determination was rendered by a county committee . . . the participant may appeal such determination to the applicable State committee.”).

60. *See* 7 C.F.R. § 7.4; Devine, *supra* note 17, at 209.

61. The state executive director serves at the pleasure of the Secretary. Linden, *supra* note 14, at 311.

62. *See* 7 C.F.R. § 7.20. Specifically,

[t]he State committees shall take any action required by these regulations [7 C.F.R. pt. 7] which has not been taken by the county committee. The State committee shall also:

(1) Correct, or require a county committee to correct, any action taken by such county committee which is not in accordance with this part, or

(2) Require a county committee to withhold taking any action which is not in accordance with this part.

7 C.F.R. § 7.1(c); *see also Willson*, 14 Cl. Ct. at 305 (noting that it was not improper for a state committee, on its own initiative, to review a determination made by a county committee). However, this authority is limited under the producer appeal provisions of the 1990 farm bill. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,074 (adding § 426(g) to tit. IV of the Agricultural Act of 1949) (“Decisions of the State and County Committees . . ., or employees of such committees made in good faith in the absence of misrepresentation, false statement, fraud, or wilful misconduct, unless otherwise appealed under this section, shall be final, unless otherwise modified under subsection (f) within 90 days, and no action shall be taken to recover amounts found to have been disbursed thereon in error unless the producer had reason to believe that the decision was erroneous.”).

*See infra* note 177 (discussing the “finality” of county and state committee determinations).

63. *See* 7 C.F.R. § 780.4; *see also infra* notes 164-78 and accompanying text (discussing appeals to the state committee). Under the producer appeal provisions of the 1990 farm bill, the state com-

### 3. *The Administrator and the Deputy Administrator for State and County Operations*

The Administrator of the ASCS is the agency's chief executive officer. Among the Administrator's four deputies is the Deputy Administrator for State and County Operations (DASCO).<sup>64</sup>

Regulations, contracts, and policy statements relating to the programs administered by the ASCS are developed in the DASCO office. In addition, for appeals of adverse determinations made prior to the date of enactment of the 1990 farm bill, DASCO is the final level in the ASCS administrative appeal process.<sup>65</sup> Under the 1990 farm bill, the final step in the ASCS administrative appeal process will be a hearing before a hearing officer within a newly created National Appeals Division.<sup>66</sup>

#### B. *The Administrative Appeal Process: Preparing for an Appeal*

##### 1. *Decisions That May be Appealed*

The current ASCS administrative appeal procedures are found at 7 C.F.R. pt. 780.<sup>67</sup> Presumably, because the 1990 farm bill does not substantially alter the appeal process at the county and state levels other than to remove the initial step of requesting reconsideration, the regulations found at Part 780 governing those two levels in the appeal process will largely remain in place after new regulations are promulgated pursuant to the 1990 farm bill.

The rules currently found at Part 780 govern the resolution of disputes

mittee will be the first level in the appeal of a determination made by a county committee. See *supra* note 59 and the accompanying text.

64. Linden, *supra* note 14, at 310.

65. See 7 C.F.R. § 780.5; see also *infra* notes 179-207 and accompanying text (discussing appeals to DASCO). Although, as a general rule, DASCO is the final level in the appeal process under the current regulations, the Administrator retains the authority to determine any question arising under the regulations on which an appeal is based and to reverse or modify "any determination made [by] a county or State committee or the Deputy Administrator." 7 C.F.R. § 780.12; see also *infra* notes 175-78, 201-02 and accompanying text (discussing the Administrator's authority, including under the producer appeal provisions of the 1990 farm bill).

66. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(c) to tit. IV of the Agricultural Act of 1949). For a discussion of the new National Appeals Division, see *infra* notes 181-84, 192-207 and accompanying text.

67. Most courts have concluded that procedures provided for in 7 C.F.R. pt. 780 satisfy due process requirements. Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs*, 12 *HAMLIN L. REV.* 633, 641 (1989) [hereinafter Hamilton II]. One issue has been whether a pre-determination hearing is required, something that Part 780 does not provide. Compare Prosser v. Butz, 389 F. Supp. 1002, 1005-06 (N.D. Iowa 1974) (pre-determination hearing required to satisfy due process) with *Westcott*, 611 F. Supp. at 353 (existing procedures "more than meet the minimum due process requirements of the Fifth Amendment"). Other cases concluding that the existing procedures satisfy due process requirements include *Hilburn v. Butz*, 463 F.2d 1207, 1209 (5th Cir. 1972), *cert. denied*, 410 U.S. 942 (1973); and *United States v. Batson*, 782 F.2d 1307, 1315 (5th Cir.), *cert. denied*, 477 U.S. 906 (1986). See also Devine, *supra* note 17, at 223-25 (discussing the due process issue).

Appeals of determinations concerning payment limitations under 7 C.F.R. pt. 1497 are governed by pt. 780. However, 7 C.F.R. § 1497.27 imposes certain time limitations on the ASCS for scheduling a hearing that are not found in pt. 780. See generally C. KELLEY & A. MALASKY, *A LAWYER'S GUIDE TO PAYMENT LIMITATIONS* (1990) (discussing the payment limitations rules, including the administrative appeal process for payment limitations determinations).

arising from the following determinations made by the ASCS for the programs it administers:

- (1) [d]enial of participation in such a program;
- (2) [c]ompliance with program requirements;
- (3) [t]he making of payments or other program benefits to a person who is a participant in such a program; and
- (4) [t]he making of payments or other program benefits to a person who is not a participant in such a program.<sup>68</sup>

At one time, it was appropriate to premise a discussion of the ASCS appeal process on the implicit assumption that the ASCS was invariably the authority for determining producer eligibility for commodity program benefits. Today, that is no longer an appropriate assumption. Largely as a result of the conservation provisions of the Food Security Act of 1985, a threshold inquiry has become whether the ASCS made the determination that adversely affected the producer.

Not all determinations affecting eligibility for programs administered by the ASCS are made by the ASCS. Most significant, the SCS makes certain determinations in connection with the Conservation Reserve Program<sup>69</sup> and the "sodbuster," "swampbuster," and conservation compliance provisions<sup>70</sup> of the Food Security Act of 1985. SCS determinations may be binding on the ASCS.<sup>71</sup>

The sharing of authority between the ASCS and the SCS for making determinations under the conservation provisions of the Food Security Act of 1985 raises at least two concerns for the producer. First, it has become essential to understand the respective authority of the ASCS and the SCS to make determinations under the highly erodible land ("sodbuster") and wetland ("swampbuster") conservation requirements. Second, an uncertainty exists over the appeal of an important determination that may be made under the highly erodible land conservation compliance provisions.

The specific division of authority for the highly erodible land and wetland conservation requirements is set forth at 7 C.F.R. §§ 12.6, 12.20, 12.30.<sup>72</sup> One of the responsibilities given to the SCS is the authority to determine whether a producer is "actively applying" an approved conservation plan for the use of

68. 7 C.F.R. § 780.1(a).

69. 16 U.S.C. §§ 3831-3836.

70. 16 U.S.C. §§ 3811-3812, 3821-3822, 3841-3845.

71. Specifically,

determinations . . . [m]ade under a conservation program involving a finding or certification by a technician of the Soil Conservation Service or Forest Service, or determinations of a technical nature by any Federal agency, other than a determination made by ASCS, shall be binding on the reviewing authority . . . .

7 C.F.R. § 780.11(a).

72. See also ASCS HANDBOOK (6-CP), Exhibit 3.2 (1-19-90 Amend. 14) (containing a "Memorandum of Understanding Between Agricultural Stabilization and Conservation Service (ASCS) and Soil Conservation Service (SCS)" that delineates the agencies' respective responsibilities in more detail than is contained in the regulations). For a discussion of the ASCS HANDBOOK, see *infra* notes 78-86 and accompanying text.



highly erodible land.<sup>73</sup> A producer who is determined by the SCS not to be “actively applying” an approved conservation plan for the use of highly erodible land may be ineligible for the benefits of the commodity programs administered by the ASCS or subject to other penalties.<sup>74</sup> However, the ultimate determination of ineligibility is made by the ASCS based on the determination made by the SCS.<sup>75</sup>

Pursuant to 7 C.F.R. § 12.12, any person who has been denied benefits as a result of “any determination” made under the highly erodible land conservation compliance requirements has the right to administratively appeal the determination. Section 12.12 is consistent with the provisions of the Food Security Act of 1985 imposing the conservation compliance requirements.<sup>76</sup> Under section 12.12, determinations made by the ASCS are to be appealed under 7 C.F.R. pt. 780, and determinations made by the SCS are to be appealed under 7 C.F.R. pt. 614.

If the ASCS determines that a producer is ineligible for program benefits based on a determination by the SCS that a producer was not “actively applying” an approved conservation plan, two determinations have been made under the highly erodible land conservation compliance provisions. Thus, by virtue of section 12.12, the SCS’s determination should be appealable under Part 614, and the ASCS’s determination should be appealable under Part 780. However, Part 614 does not appear to permit such an appeal, and Part 780, while permitting an appeal, does not appear to authorize meaningful relief.

Turning first to Part 614, section 614.1(b)(1) purports to limit the right to appeal decisions of the SCS to certain specified determinations. A determination that a producer was not “actively applying” an approved conservation plan is not among the specified determinations for which an appeal is permitted. Thus, sections 12.12 and 614.1(b)(1) are at odds.

Part 780 is limited in a different way. Arguably, an appeal under Part 780 of the ASCS’s ultimate determination of ineligibility might be appropriate because 7 C.F.R. § 780.1(1) permits the appeal under that part of any determination by the ASCS that denies a producer the right to participate in a program administered by the ASCS.<sup>77</sup>

However, even if permissible, such an appeal would be frustrated by the

73. 7 C.F.R. § 12.6(c)(2)(iii); ASCS HANDBOOK (6-CP) 12-13, ¶ 16(E) (1-19-90 Amend. 14).

74. See generally Hamilton, *Legal Issues Arising in the Enforcement of Federal Soil Conservation Programs: An Introduction and Preliminary Review*, 23 U.C. DAVIS L. REV. 639 (1990); Malone, *In Depth: Swampbuster, Sodbuster, and Conservation Compliance Programs—Final Regulations*, 5 AGRIC. L. UPDATE 12 (1988).

Under the 1990 farm bill, provision is made for penalties other than ineligibility for program benefits. S. 2830, 101st Cong., 2d Sess. §§ 1412, 1422, 136 CONG. REC. H11,029, H11,089-91 (amending §§ 1212, 1222 of the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, 1504-1518 (codified at 16 U.S.C. §§ 3801-3845)).

75. See 7 C.F.R. § 12.6(a); ASCS HANDBOOK (6-CP) 21, ¶ 22(E) (1-5-90 Amend. 13).

76. See 7 U.S.C. § 3843(a) (“The Secretary shall establish, by regulation, an appeal procedure under which a person who is adversely affected by any determination made under this chapter may seek review of such determination.”).

77. See ASCS HANDBOOK 3-CP (Rev. 2) 1-2, ¶ 2 (6-6-86 Amend. 1) (stating that the ASCS appeal procedures apply to “[s]odbuster and swampbuster”).

provisions of section 780.11(a) that make determinations made "under a conservation program involving a finding or certification by a technician of the Soil Conservation Service . . . binding on the reviewing authority" within the ASCS. Thus, if a SCS determination that a producer is not "actively applying" an approved conservation plan is construed to be "a finding or certification by a technician of the Soil Conservation Service," which it would appear to be, it is binding on the ASCS. Accordingly, the producer seeking to appeal an ASCS determination of ineligibility for program benefits based on a determination by the SCS that he or she was not "actively applying" an approved conservation plan faces a dilemma. Although section 12.12 states that "any determination" resulting in ineligibility for benefits is appealable, neither agencies' appeal procedures affords that opportunity. Unless clarification or changes are forthcoming from the ASCS or the SCS, the resolution of that dilemma will be a matter for the federal district courts.

## 2. *The ASCS Handbook*

The ASCS has issued instructions for handling appeals to its county and state committees and employees. Those instructions are a part of the *ASCS Handbook for State and County Operations (ASCS Handbook)*.<sup>78</sup> The *ASCS Handbook* consists of looseleaf materials. It is divided into units or volumes by subject matter. Although each volume is titled with a description of its contents, each is usually referred to by its "short reference," often a combination of numbers and letters abbreviating, in an arcane way, its subject. For example, the *ASCS Handbook* volume on appeals is entitled "Appeals" and is frequently referred to by its "short reference," 3-CP (Rev. 2). Thus, references to that volume in this article will contain the short reference 3-CP (Rev. 2).

The *ASCS Handbook* can be inspected at any county ASCS office,<sup>79</sup> and producers are entitled to a free copy of all or any portion of it.<sup>80</sup> However, the *ASCS Handbook* is amended at irregular intervals, with some volumes being amended more frequently than others. Often, instructions that will later appear as an amendment will be issued first as a "Notice." Thus, when either requesting or consulting the *ASCS Handbook*, one should be sure that all of the current amendments are included.<sup>81</sup> In addition, requests for or references to the *ASCS Handbook* should include any related "Notices."

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78. The authority for the issuance of the ASCS HANDBOOK is found at 7 C.F.R. § 7.36. For a discussion of the legal significance of the ASCS HANDBOOK, see *infra* notes 82-86 and accompanying text.

79. See 7 C.F.R. § 7.34(c)(3).

80. A copy of the ASCS HANDBOOK or any volume included in it may be obtained by writing the Information Division, ASCS/DASCO, Room 3702-S, South Agriculture Building, P.O. Box 2415, Washington, D.C. 20250.

81. This article will make reference to the contents of the ASCS HANDBOOK 3-CP (Rev. 2). At the time that this article was prepared, the most recent amendment was Amendment 3, dated September 16, 1987. With regard to amendments, the ASCS will not provide amendments to the ASCS HANDBOOK on a subscription basis. Thus, maintaining a current version will require periodic requests for the most recent amendments. A good practice is to establish a system for such requests.

The *ASCS Handbook* is not promulgated under the Administrative Procedure Act,<sup>82</sup> and it has been characterized as not being binding on either the producer or the ASCS.<sup>83</sup> Rather, the *Handbook* merely is intended to provide instructions to the county and state committees.<sup>84</sup> Thus, it is not recognized as having the same force and effect as the statutes and regulations governing federal farm programs.

Although the *ASCS Handbook* has not been recognized as having the same force and effect as the statutes and regulations governing federal farm programs, it is important for several reasons. Its importance makes it imperative that persons working with federal farm programs consult it. First, the *ASCS Handbook* reflects the ASCS's current interpretation of the statutes and regulations. Accordingly, the *Handbook* provides an accessible statement of the ASCS's policy on specific aspects of federal farm program law.

Second, because the *Handbook* reflects the ASCS's "expertise" in interpreting the statutes and the regulations, the courts may give it some weight when the interpretation of the statutes or regulations is an issue.<sup>85</sup> Should judicial review ultimately become necessary, one can reasonably expect that the government will argue that the *Handbook's* interpretation of the law is correct.<sup>86</sup> If the *Handbook* appears to be inconsistent with the statutes or regulations, being familiar with the *Handbook's* interpretation prior to pursuing an administrative appeal allows one to attempt to develop the administrative record in the way most favorable to a challenge to the *Handbook's* interpretation.

Third, the *Handbook* can be very useful in its detailed explanations of the

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82. See *Hawkins v. State Agriculture Stabilization and Conservation Committee*, 149 F. Supp. 681, 686 (S.D. Tex. 1957) ("These Handbooks were not published in the Federal Register and were not intended by any officials in the Department of Agriculture to have the force or effect of regulations. They were intended only as general guides for the use of personnel in the administration of the cotton program."), *aff'd*, 252 F.2d 570 (5th Cir. 1958); *Graham v. Lawrimore*, 185 F. Supp. 761, 764 (E.D.S.C. 1960) (same, citing *Hawkins*, *aff'd*, 287 F.2d 207 (4th Cir. 1961); *Westcott*, 611 F. Supp. at 356-58 (holding that two chapters of the ASCS HANDBOOK, chapters CM-7 and CM-10 dealing with the reconstitution of farms, "are merely interpretive rules of regulations contained in the Code of Federal Regulations and as such are exempt from the notice and comment provisions of the Administrative Procedure Act") (citation omitted), *aff'd*, 765 F.2d 121; see also *Hamilton II*, *supra* note 67, at 643-45 (discussing the *Westcott* decision); 5 U.S.C. § 552(a)(1) (containing the Administrative Procedure Act's notice and comment requirements for rule making).

83. See *Thomas v. County Office Committee of Cameron County*, 327 F. Supp. 1244, 1253 (S.D. Tex. 1971) (noting that the ASCS HANDBOOK "cannot be accorded the dignity of a regulation having in substance the dignity of legislation," and that "it is not binding upon the parties" (the producers and the ASCS) to the action) (citations omitted).

84. See 7 C.F.R. § 7.36 (authorizing DASCO to issue "instructions and procedures" to implement the functions of the ASCS); see also *Hedman*, 15 Cl. Ct. at 315 (holding that the chapter in the ASCS HANDBOOK addressing office administration did not establish the terms and conditions of employment of a county executive director because the chapter "was promulgated merely to 'instruct' State and County offices on the appropriate procedures to be followed in office administration").

85. See *Thomas*, 327 F. Supp. at 1253-54 ("The guidelines set out in the handbook are, however, to be accorded considerable weight by the Court in interpreting the meaning of . . . [the statute at issue].") (citation omitted).

86. Of course, the ASCS is free to change its interpretation of the statutes governing federal farm programs. See *Chisholm v. FCC*, 538 F.2d 349, 364 (D.C. Cir. 1976) ("[A]n administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding."), *cert. denied sub nom.*, *Democratic Nat'l Comm. v. FCC*, 429 U.S. 890 (1976).

requirements of the various programs. In some instances, it may clarify the regulations or provide missing detail. In addition, the *Handbook* contains copies of the forms, contracts, and other documents that producers are required to complete and sign in order to participate in a program.

Fourth, because the basic source of program information for the county and state committees is the *Handbook*, references to it are more likely to be recognized by the county and state committee members than references solely to the regulations. Therefore, in dealings with those committees, a working knowledge of the *Handbook* can be critical.

The role and importance of the *ASCS Handbook* raises some concerns. Foremost is the fact that it, rather than the regulations, is the guiding document for the ASCS county and state committees. Accordingly, administrative decisions are based on a document that lacks the force and effect of regulations. More significant, because the contents of the *Handbook* are not subject to the notice and comment provisions of the Administrative Procedure Act, there is no opportunity for public notice, scrutiny, or comment as the *Handbook's* contents are issued, revised, or otherwise amended. The absence of that opportunity means that there is no forewarning of changes in the ASCS's interpretation of the law. Moreover, where the *Handbook* fills in gaps in the regulations, there is no check on the consistency of the *Handbook's* contents with the provisions of the statute or regulations being supplemented.

### 3. *Preparing for an Appeal: Obtaining Records and Other Documents*

Producers who participate in programs administered by the ASCS must submit information of various kinds in documentary form. The documentation usually will contain all or most of the information on which the county committee bases its decision. On occasion, third parties will provide or ASCS employees will obtain the information on which the county committee acts.<sup>87</sup> Accordingly, obtaining copies of the ASCS's files relating to a producer is an important initial step in preparing an appeal.

In some instances, the producer already will have copies of the relevant documents. However, in other instances, those documents will be in the sole possession of the ASCS. In the latter instances, a request should be made for the needed material.

There are at least two regulations directing the release of documentary information to program participants or to persons appealing county committee decisions. First, as a generally applicable rule, a person whose interests under a program administered by the ASCS "may be affected" by the actions of the county committee has the right to inspect, at any reasonable time, "[a]ll books, records, and documents of or used by the county committee" in the administration of the program, "subject to instructions issued by the Deputy

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87. For example, in *Prosser*, 389 F. Supp. at 1004, some of the information on which the county committee acted came from the producer's neighbors. In *Pettersen v. United States*, 10 Cl. Ct. 194, 196 (1986), *aff'd*, 807 F.2d 993 (Fed. Cir. 1986) the information available to the county committee included the results of an aerial inspection of the producer's farm.

Administrator.”<sup>88</sup> That rule applies irrespective of whether the person is an appellant in the ASCS appeals process, but it is limited to the inspection of materials that bear on that person’s interests under a program.

Second, the appeal regulations specifically provide:

When a producer requests copies of documents, information, or evidence upon which a determination is made or which will form the basis of the determination, copies of such documents, information or evidence shall be made available as provided in Part 798 of this chapter.<sup>89</sup>

The reference to Part 798 in the preceding regulation is to the rules adopted by the ASCS to implement the requirements of the Freedom of Information Act.<sup>90</sup>

Because the two regulations favor the release of documentary materials, obtaining documents relevant to an appeal usually will not be difficult.<sup>91</sup> However, requests for information should describe the material being sought with enough specificity to allow the ASCS to locate it.<sup>92</sup> If the request is made pursuant to the Freedom of Information Act regulations found at 7 C.F.R. pt. 798, the ASCS must respond to the request within ten working days from its receipt of the request.<sup>93</sup> If a request is denied, provision is made for an appeal of the denial.<sup>94</sup>

### C. *The Steps in the ASCS Administrative Appeal Process*

#### 1. *The Request for Reconsideration*

The initial determination affecting a farmer’s interests in a program ad-

88. 7 C.F.R. § 7.34(c)(3).

89. 7 C.F.R. § 780.9(b); *see also Esch*, 876 F.2d 987 (referencing § 780.9(b)), *modifying Esch*, 665 F. Supp. 6.

90. 5 U.S.C. § 552. The regulations are found at 7 C.F.R. pt. 798. Those regulations incorporate by reference the general USDA rules concerning official records found at 7 C.F.R. §§ 1.1-1.23.

The instructions provided in the ASCS HANDBOOK state as follows: “Any information upon which a determination is based must be made available to the appellant or an authorized representative upon request unless prohibited under program procedure.” ASCS HANDBOOK 3-CP (Rev. 2) 15, ¶ 23(A) (6-6-86 Amend. 1); *see also id.* at 27, ¶ 37 (6-6-86 Amend. 1) (instructing that if a producer files an appeal, the producer is to be given the opportunity to review the file).

For a discussion of the Freedom of Information Act [hereinafter FOIA] as it applies to the USDA, see HARL, *supra* note 14, at § 64.04[1]. Among other things, Professor Harl notes that the USDA is “clearly” an agency as that term is defined under the FOIA. *Id.* at § 64.04[1][b]. He also notes, without specific reference to the ASCS, that “[g]iven the broad interpretation mandated, subordinate boards and offices have been held to be ‘agencies’ within the meaning of the section.” *Id.* (citations omitted). *See generally* COMMITTEE ON GOVERNMENT OPERATIONS, A CITIZEN’S GUIDE ON USING THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT OF 1974 TO REQUEST GOVERNMENT RECORDS (Comm. Print 1989) (a guide to the use of the FOIA).

91. *But see Garvey*, 397 F.2d at 607-13. In that case, the producer claimed that the administrative decision had been based on “secret evidence.” Although the material sought by the producer was ultimately provided to him by the ASCS, the court’s account of the proceedings reveals that some of the material was not released promptly.

92. *See* 7 C.F.R. § 1.6(b) (“A request must reasonably describe the records to enable agency personnel to locate them with reasonable effort.”). In addition to providing the producer’s name and other personal identification, it is advisable to provide the ASCS with the ASCS farm serial number for the farms involved when requesting information.

93. *See* 7 C.F.R. § 1.8(a).

94. *See* 7 C.F.R. § 1.8.

ministered by the ASCS usually will be made by the county committee.<sup>95</sup> Accordingly, under the current regulations, the initial step in the appeal process is to request the county committee to reconsider its decision.<sup>96</sup>

Under the producer appeal provisions of the 1990 farm bill, there is no requirement that a request for reconsideration be made. Adverse decisions of a county committee may be appealed directly to the state committee.<sup>97</sup> Similarly, adverse determinations of the state committee may be appealed directly to the National Appeals Division,<sup>98</sup> a new entity within the ASCS created by the 1990 legislation.<sup>99</sup> Adverse determinations of other ASCS employees or agents may be appealed directly to the National Appeals Division.<sup>100</sup>

Under the current regulations, there may be circumstances in which a producer might want to bypass the initial step of making a request for reconsideration and to appeal directly to the state committee. For example, the producer may have had extensive discussions with the county committee prior to the county committee making its determination. During those discussions, the producer may have become exasperated with the committee. As a result, after the committee has made its decision, the producer believes that it would be a waste of time to ask it to reconsider. Thus, the question arises as to whether an appeal may be taken to the state committee without first requesting the county committee to reconsider its decision.

Under the current regulations, the answer to that question is no; an appeal to the state committee is to be taken from the county committee's decision made in its reconsideration of its initial determination. In other words, the state committee is authorized to review the determination made on reconsideration, not the initial determination.<sup>101</sup> An attempt to bypass the request

95. The state committee and DASCO have the authority to act in the stead of the county committee, but the exercise of that authority is under extraordinary circumstances. See 7 C.F.R. §§ 7.1, 7.38. In at least one instance, however, DASCO has suspended all the members of a county committee and assumed the county committee's responsibilities. See *United States v. O'Neil*, 709 F.2d 361, 364-65 (5th Cir. 1983); *Doko Farms v. United States*, 13 Cl. Ct. 48, 49-50 (1987) (same instance, citing *O'Neil*).

96. 7 C.F.R. § 780.4, 780.5. If the state committee or DASCO made the initial determination, the reconsideration is directed to the state committee or DASCO, respectively. *Id.*

A request for reconsideration precedes an appeal. An "appeal" is taken from an unfavorable reconsideration. 7 C.F.R. §§ 780.3, 780.4; see also *Hamilton I*, *supra* note 51, at 287-89 (discussing the reconsideration and appeal process).

97. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(b)(2)(A) to tit. IV of the Agricultural Act of 1949).

98. *Id.* (adding § 426(b)(2)(B) to tit. IV of the Agricultural Act of 1949).

99. *Id.* (adding § 426(c) to tit. IV of the Agricultural Act of 1949).

100. *Id.* (adding § 426(b)(2)(C) to tit. IV of the Agricultural Act of 1949). Presumably, the legislation contemplates that decisions made by the Administrator are to be appealed to the National Appeals Division. However, such an appeal ultimately could result in the Administrator reaffirming his original determination, because the legislation gives the Administrator the authority to reverse or modify decisions of the Director of the National Appeals Division. *Id.* (adding § 426(f) to tit. IV of the Agricultural Act of 1949) ("Nothing contained in this section [the producer appeal provisions] shall preclude the Secretary, the Administrator of the ASCS, or the Executive Vice President of the Commodity Credit Corporation from determining at any time any question arising under the programs to which the provisions of this section apply or from reversing or modifying (in writing, with sufficient reason given therefor) any determination made by a county or State committee or the director of the National Appeals Division.").

101. See 7 C.F.R. § 780.4.

for reconsideration step in the appeal process is most likely to result in the state committee remanding the matter to the county committee or, worse, in the loss of the right to request reconsideration because of the passage of the fifteen-day time period within which to request reconsideration.<sup>102</sup>

Notwithstanding the frustration that a producer might feel over revisiting the dispute with the county committee, the request for reconsideration stage of the appeal process should not be taken lightly. Most ASCS administrative appeals do not proceed past the initial request for reconsideration stage before the county committee. For example, during fiscal year 1987, "ASCS county offices processed 4,037 administrative appeals involving payment limitation issues<sup>103</sup> (payment limitation appeals), ASCS State offices processed 729 payment limitation appeals, and the ASCS National Office processed 211 payment limitation appeals."<sup>104</sup> This means that, in most instances, either the producer was successful before the county committee or that the producer decided not to appeal an adverse determination made by the county committee in its reconsideration. Assuming that most of the producers were successful, it also underscores the importance of the proceedings on the request for reconsideration.

The right to request reconsideration and, hence, to initiate the appeal process, is limited. Only determinations concerning or bearing on the following matters may be the subject of a request for reconsideration or an appeal:

- (1) denial of participation in a program administered by the ASCS;
- (2) compliance with such a program's requirements;
- (3) the making of payments or other program benefits to a person who is a participant in such a program; and
- (4) the making of payments or other program benefits to a person who is not a participant in such a program.<sup>105</sup>

Because only the determinations listed above may be the subject of a request for reconsideration, "there is no review under . . . [7 C.F.R. pt. 780] with respect to general program requirements that are applicable to all program participants."<sup>106</sup> Thus, for example, a producer may not appeal "the level at which loans and purchases are established or the type of conservation uses that are suitable for use on acreage that is required to be removed from production in order for a person to be eligible for program benefits."<sup>107</sup>

A person who requests reconsideration must be one who was affected by

102. For a discussion of the time limitation for making a request for reconsideration, see *infra* notes 111-13 and accompanying text.

103. Payment limitations restrict the amount of payments that a producer can receive during a crop year and impose certain eligibility requirements for the receipt of many farm program benefits. See 7 U.S.C. § 1308-1308(2) (1982 & Supp. 1987); 7 C.F.R. pt. 1497.

104. Declaration of Thomas A. Von Garlem, Assistant Deputy Administrator, State and County Operations, April 20, 1988, at ¶ 3, submitted on behalf of the defendant in *Justice v. Lyng*, 716 F. Supp. 1567 (D. Ariz. 1988), 716 F. Supp. 1570 (D. Ariz. 1989).

105. 7 C.F.R. § 780.1(a).

106. 7 C.F.R. § 780.1(b).

107. 53 Fed. Reg. 45,073-45,074 (1988) (explanatory comments to final rules under 7 C.F.R. pt. 780).

the determination.<sup>108</sup> A producer who is a program participant and whose right to participate in the program was denied by the determination obviously would be "affected" by that determination. However, the right to appeal also extends to "any person who is not a program participant[,] but [who] receives a payment or other benefit . . . , such as an assignee . . . ."<sup>109</sup> In the typical case, entitlement to request reconsideration will not be in doubt, because the producer affected by an initial determination will have received written notification of that determination containing a notice of appeal rights.<sup>110</sup>

A request for reconsideration must be made "within 15 days after written notice of the determination is mailed to or otherwise made available to the participant."<sup>111</sup> A request is deemed to be "filed" when it is "personally delivered to the appropriate office or when postmarked."<sup>112</sup> The "appropriate office" is the office of the entity or individual who made the initial determination.<sup>113</sup> In most instances, that will be the office of the county

108. See 7 C.F.R. §§ 780.1(b), 780.2(a) (As used in pt. 780, a "[p]articipant" means any person whose right to participate in, or receive payments or other benefits in accordance with, any of the programs to which these regulations apply who is affected by a determination of the county committee, State committee, or the Deputy Administrator."); ASCS HANDBOOK 3-CP (Rev. 2) 13, ¶ 17 (6-6-86 Amend. 1) (defining "persons eligible to appeal" as "[a]ny affected person who is not satisfied with a determination"). See generally B. SCHWARTZ, ADMINISTRATIVE LAW 273 (1984) [hereinafter SCHWARTZ] (characterizing, for purposes of the judicial "standing" requirement, the person who is directly affected by an agency determination as the "obvious party"). Under the producer appeal provisions of the 1990 farm bill, a "participant" is defined in essentially the same manner that it is defined under the current regulations. See S. 2830, 101st Cong., 2d Sess., § 1132, 136 CONG. REC. H11,029, H11,073 (adding § 426(e) to tit. IV of the Agricultural Act of 1949).

109. 53 Fed. Reg. 45,073 to 45,073-74 (1988) (explanatory comments to final rules under 7 C.F.R. pt. 780).

110. ASCS HANDBOOK 3-CP (Rev. 2) 13, ¶ 16 (6-6-86 Amend. 1).

111. 7 C.F.R. § 780.6(a); ASCS HANDBOOK 3-CP (Rev. 2) 14, ¶ 19 (6-6-86 Amend. 1) (emphasis supplied).

Although the fifteen-day period begins when the "written notice of the determination is mailed or otherwise made available to the participant," the regulations do not define what constitutes a "determination." In *Gibson*, a case presenting what one must assume to be atypical circumstances, a landlord challenged the timeliness of the filing of his tenant's request for reconsideration in a dispute over the landlord's eligibility for the "PIK" program. *Gibson*, 11 Cl. Ct. at 6. Inexplicably (and improperly), none of the correspondence received by the tenant stated that a determination had been made. The correspondence simply notified the tenant of the right to request reconsideration. Thus, the omission of any express reference to the making of a determination caused the court to believe that it was required to ascertain when the "determination" at issue had been made.

Noting that the term "determination" is not defined in the regulations, the court concluded that the date of the determination in the case before it was the date of the county committee meeting for which the minutes of the meeting reflected that a determination had been made. In addition, the court concluded that "[i]t is also at least implicit in the county committee's actions that it viewed the June 7th decision [the date on which the minutes reflected that a determination had been made] to be a 'determination' because it was on that date that it notified . . . [the landlord] and . . . [the tenant] about their right to request reconsideration of such determination." *Id.* at 12. Moreover, the court concluded that, even if the tenant's request was not timely, the county committee had the discretion to entertain an untimely request. *Id.* at 13; see also *infra* notes 115-16 and accompanying text (discussing the county committee's authority to consider untimely requests); *Jones v. Hughes*, 400 F.2d 585, 589-90 (8th Cir. 1968) (addressing the issue of when a "determination" had been made under the then-existing cotton allotment regulations).

112. 7 C.F.R. § 780.6(a); ASCS HANDBOOK 3-CP (Rev. 2) 14, ¶ 19 (6-6-86 Amend. 1).

If the request is made by mail, a good practice is to use certified mail with a return receipt requested. If the request is hand delivered, it is advisable to obtain a receipt acknowledging the time and date of delivery and stating the identity of the recipient.

113. If a request for reconsideration is filed with the wrong office, the request is to be acknowledged by the recipient and referred to the proper office. Requests are not to be denied because of



committee.

If the final date for filing the request falls on a day on which the ASCS office is not open for business during normal working hours, the filing deadline is extended to the close of business on the next working day.<sup>114</sup> If the filing deadline has been missed, the producer has lost the right to an appeal. Reconsideration still may be obtained, but only by persuading the members of the county committee that the circumstances warrant waiver of the time limitation.<sup>115</sup> Generally, the circumstances justifying a waiver of the time limitation must be such that the failure to meet the deadline was “for reasons beyond the person’s control.”<sup>116</sup>

The request for reconsideration must be in writing, and it must be signed by the producer or an authorized representative.<sup>117</sup> The regulations do not define “authorized representative.” The request must be accompanied by, or later supplemented with, a supporting written statement of facts.<sup>118</sup> If the request for consideration is not accompanied by a supporting written statement of facts, that statement must be submitted prior to the hearing on the matter.<sup>119</sup>

The ASCS has prepared an optional form that may be used in making a request for reconsideration.<sup>120</sup> The form states that the undersigned producer requests reconsideration and leaves space for the producer to describe the action on which reconsideration is requested. Irrespective of whether the form is used, the request of reconsideration must make the request and describe the determination or other action that is its subject.

The supporting statement of facts should include the following: “(1) the reasons why the determination was improper; and (2) the relief sought.”<sup>121</sup> Accordingly, the optional ASCS form for requesting reconsideration has a space for the producer to list the reasons why the producer believes that the determination is incorrect and to describe the action that the producer believes should be taken.<sup>122</sup>

Although the supporting statement is not required to be submitted with the request,<sup>123</sup> reconsideration might be expedited by simultaneous submission. Moreover, the preparation of a written statement tends to focus one’s

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misdirection or because of delay caused by misdirection. See ASCS HANDBOOK 3-CP (Rev. 2) 14, ¶ 20 (6-6-86 Amend. 1).

114. 7 C.F.R. § 780.6(b).

115. 7 C.F.R. § 780.6(c). A county committee’s acceptance or rejection of an untimely request for reconsideration can be set aside only where the committee clearly has abused its discretion. *Gibson* 11 Cl. Ct. at 12-13 (finding no abuse of discretion where the county committee exercised its discretion to entertain a request for reconsideration that was arguably “tardy”); see *supra* note 111 (discussing *Gibson*).

116. ASCS HANDBOOK 3-CP (Rev. 2) 14, ¶ 19(C) (6-6-86 Amend. 1).

117. 7 C.F.R. § 780.7.

118. *Id.*

119. *Id.*

120. See ASCS HANDBOOK 3-CP (Rev. 2), Exhibit 5, at 1 (6-6-86 Amend. 1).

121. See ASCS HANDBOOK 3-CP (Rev. 2) 13, ¶ 18 (6-6-86 Amend. 1).

122. See ASCS HANDBOOK 3-CP (Rev. 2), Exhibit 5, at 1 (6-6-86 Amend. 1).

123. The supporting statement may be submitted with the request for reconsideration or “at any time prior to the hearing.” 7 C.F.R. § 780.7.

research and fact gathering and may contribute to an early assessment of the merits of a request.<sup>124</sup> However, the timeliness of the request is critical, and if there is any chance that the preparation of the supporting statement will delay the mailing or delivery of the request for reconsideration to the appropriate office, the supporting statement should be submitted later, but prior to the hearing, as a separate document.

All pertinent facts should be included in the statement, particularly those facts that may not have been known to the county committee when it made its initial determination or that may not have been completely evaluated in the initial decision. It is not necessary to submit the statement in the form of a sworn affidavit,<sup>125</sup> and many attorneys are reluctant to commit their clients to sworn testimony unless it is necessary or there is a good reason for doing so.

A request for reconsideration should indicate whether the producer wants the county committee to conduct an informal hearing. If a hearing is *not* requested, the reconsideration decision will be based solely on "the material that was made available in making the prior determination and the material submitted by the participant" in the statement of facts.<sup>126</sup> Unless there is a good reason for not requesting an informal hearing, the hearing should be requested.

The optional form used by the ASCS for requests for reconsideration neither asks if a hearing is requested nor does it have a space for requesting an informal hearing.<sup>127</sup> If a producer has completed that form without asking for an informal hearing, it may still be requested. However, a written request for the hearing should be made promptly.<sup>128</sup>

## 2. *The Informal Hearing*

An informal hearing is a hearing conducted by the person or entity to whom the request for reconsideration was directed. For purposes here, it will

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124. One should be aware that false statements to officials of the ASCS constitute a criminal offense. 18 U.S.C. § 1001 (1988).

125. Witnesses appearing before the county committee are not sworn. *See Garvey*, 397 F.2d at 612.

126. 7 C.F.R. § 780.7.

127. *See* ASCS HANDBOOK 3-CP (Rev. 2), Exhibit 5, at 1 (6-6-86 Amend. 1).

128. The recipient of the request for reconsideration is instructed to acknowledge the appeal and to inform the appellant of the right to a hearing. ASCS HANDBOOK 3-CP (Rev. 2) 28, ¶ 39 (6-6-86 Amend. 1). Responding to the letter of acknowledgement with a request for a hearing should be adequate.

The following is a request for reconsideration checklist:

1. Is the ASCS determination one that may be reconsidered?
2. Has the request for reconsideration been made in writing, signed by the producer or the producer's authorized representative?
3. Does the request for reconsideration state the reasons why the determination was improper and the relief sought? If not, has a separate statement of facts containing that information been submitted?
4. If an informal hearing is desired, has a request for a hearing been made in the request for reconsideration or in a separate writing?
5. Has the request for reconsideration been postmarked or personally delivered to the appropriate office within 15 days after the written notice of determination was mailed or otherwise made available to the producer?

be assumed that the county committee is the recipient of the request. An informal hearing will only be held if it is requested by the producer. Generally, the producer will be given at least ten days notice of the time and place for the hearing.<sup>129</sup>

“Reasonable” efforts are to be made to accommodate requests for rescheduling.<sup>130</sup> However, if the producer or his or her representative cannot attend a hearing, a written submission may be made before the scheduled hearing date.<sup>131</sup> Because it is usually advantageous to the producer to present his or her case through a hearing and to use written submissions to complement and support the testimony offered at the hearing rather than to present the case solely through written submissions, every effort should be made to attend.

If an informal hearing is requested, it will be conducted “in the manner deemed [by the reviewing authority] most likely to obtain the facts relevant to the matter in issue.”<sup>132</sup> Usually, the setting is informal.<sup>133</sup> The hearing will begin with the county committee advising the producer of the specific issues before it.<sup>134</sup> The producer or his or her authorized representative then will be given the opportunity to present any facts or information relevant to the issues.<sup>135</sup>

The producer may present witnesses on his or her behalf.<sup>136</sup> The county committee must give the producer “a full opportunity to present facts and information relevant to the matter in issue and [the producer] may present oral or documentary evidence.”<sup>137</sup> However, the county committee has the discretion to exclude testimony or other information that is “irrelevant, immaterial, or unduly repetitious.”<sup>138</sup> The county committee also has the discretion to permit persons other than those appearing on behalf of the producer to appear and provide information.<sup>139</sup> In that event, those persons may be questioned by the producer.<sup>140</sup>

In recognition of the discretion of the county committee and as a matter

129. ASCS HANDBOOK 3-CP (Rev. 2) 28, ¶ 39 (6-6-86 Amend. 1). The time and place for the hearing are established by the reviewing authority. 7 C.F.R. § 780.8(a).

130. ASCS HANDBOOK 3-CP (Rev. 2) 28, ¶ 39 (6-6-86 Amend. 1).

131. *Id.*

132. 7 C.F.R. § 780.8(b).

133. In *Garvey*, the court described the informal hearing as follows:

These farmer-commissioners do not sit as a judicial or even a quasi-judicial tribunal where witnesses are sworn and evidence taken. They sit informally to appraise and assess relative rights of their neighbors and themselves in the administration of a program by and for farmers. Their judgment in the first instance is essentially based upon observations and considerations within their peculiar knowledge unaided and unimpeded by traditional notions of evidence. Rules of procedure and evidence are inapplicable and inappropriate.

*Garvey*, 397 F.2d at 612.

134. 7 C.F.R. § 780.8(b).

135. 7 C.F.R. § 780.8(c) provides that the producer “shall be given a full opportunity to present facts and information relevant to the matter in issue and may present oral or documentary evidence.”

136. 7 C.F.R. § 780.8(c).

137. *Id.*

138. 7 C.F.R. § 780.8(b).

139. *Id.*

140. *Id.*

of courtesy in the scheduling of hearings, it is a good practice to inform the county committee prior to the hearing of the producer's desire to present witnesses. The request should briefly explain the nature of the information that the witnesses are expected to provide and should explain the relevance of that information. It also may be advisable to state the amount of time that the producer's presentation can be expected to take. In addition, it may be advisable to inquire prior to the hearing whether the county committee intends to permit persons other than the producer's witnesses to present information and the nature of their expected testimony. However, there is no requirement that the county committee respond to such a request.

Although 7 C.F.R. pt. 780 refers to the presentation of "evidence,"<sup>141</sup> neither the Federal Rules of Evidence nor any other rules of evidence have been adopted for use in the informal hearings of the ASCS under the current regulations.<sup>142</sup> However, as noted above, the county committee has the discretion to exclude evidence that is "irrelevant, immaterial, or unduly repetitious."<sup>143</sup> This language simply repeats section 556(d) of the Administrative Procedure Act.<sup>144</sup> It can be read broadly to mean even evidence that has very little probative value or that is patently unreliable, including hearsay, should not be excluded.<sup>145</sup>

There may be instances when the presentation of evidence is not confined to the evidence presented by the producer. As noted above, the county committee has the discretion to permit persons other than those appearing on behalf of the producer to appear and provide information. In such a case, the committee's discretion to exclude evidence is governed by the same "irrelevant, immaterial, or unduly repetitious" standard that applies to evidence offered on the producer's behalf. This means that hearsay evidence adverse to the producer may be considered and relied on by the committee.<sup>146</sup>

141. See 7 C.F.R. §§ 780.8(b), (c), (e); 7 C.F.R. §§ 780.9(a), (b).

142. Telephone interview with Carolyn Burchett, Director, ASCS Appeals Staff (Feb. 6, 1990).

Notwithstanding the absence of formal rules of evidence governing the presentation of evidence, care should be taken to present the most reliable and persuasive forms of evidence. In that regard, the Federal Rules of Evidence may serve as a guide.

143. See *supra* note 138 and accompanying text.

144. 5 U.S.C. § 556(d) ("Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.").

145. Administrative agencies may rely on evidence that would be inadmissible under the Federal Rules of Evidence. See, e.g., *Richardson v. Perales*, 402 U.S. 389, 410 (1971). Such reliance is sanctioned by § 556(d) of the Administrative Procedure Act. 5 U.S.C. § 556(d).

146. An informal hearing is not an adjudication subject to the substantial evidence rule of the Administrative Procedure Act. See 5 U.S.C. § 544 (adjudications), § 702(2)(E) (substantial evidence standard); see also *Garvey*, 397 F.2d at 611-12 (determining that appeals before the ASCS were "more legislative in nature than judicial"). Moreover, even in formal adjudications, hearsay evidence may, in certain circumstances, satisfy the substantial evidence standard. See SCHWARTZ, *supra* note 108, at § 7.6 (discussing *Richardson*, 402 U.S. 389).

It is unlikely that hearsay evidence alone will be the basis for a final ASCS determination. In most instances, other evidence, including adverse evidence obtained from the producer, will be before the county or state committee or DASCO. For example, even in *Prosser*, 389 F. Supp. 1002, where the evidence included "oral statements of the plaintiff's [the producer] unnamed neighbor made in the [county] Committee office and . . . [a] petition signed by this and six other unnamed individuals underlying the penalty determination," the producer's own statement was relied upon by the commit-

Ultimately, the producer will need to present to the committee every fact necessary to support his or her claim for relief. For that reason, it is imperative that counsel for the producer understands each of the requirements for entitlement for the program benefits that the producer is seeking. Those requirements should form the checklist guiding the presentation of evidence at the hearing.

As an aid in the preparation and presentation of the producer's case, it may be helpful to prepare a hearing memorandum for the committee's use during the hearing and in the committee's deliberations. The memorandum would outline the expected testimony and would show, by reference to the applicable statutes, regulations, and *ASCS Handbook* instructions, that the facts before the committee warrant a decision in favor of the producer. If either time constraints or other circumstances make the preparation of a pre-hearing memorandum impossible or inappropriate, consider providing the committee with a summary, perhaps in checklist form, of the producer's contentions. The facts in such a checklist could be cross-referenced to their source. In addition, the checklist could be accompanied by a corresponding listing of the factual elements of the program requirements that, when satisfied, make the producer eligible for the program. Such a document would be less formal than a hearing memorandum, but it could serve the same function if properly done.

In addition to a pre-hearing memorandum, consideration should be given to the preparation of proposed findings of fact and conclusions of law. Whether included in the memorandum or prepared as a separate document, such a listing of facts and conclusions may contribute to the committee's understanding of the producer's case and, more important, to the rendering of a decision in the producer's favor. At a minimum, a post-hearing memorandum, summarizing the testimony and the producer's position, should be prepared. While the submission of hearing memoranda and related documents such as proposed findings of fact and conclusions of law may facilitate the committee's understanding of the producer's case, the preparation of those documents most certainly will be an aid in insuring that the producer's case is developed in an orderly and comprehensive manner. That reason alone commends their preparation.

In assembling the evidence and planning the presentation of it, consideration should be given to developing any basis for equitable relief that may later be available from DASCO, the final level in the current administrative appeal

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tee. *Id.* at 1006. Although the court in *Prosser* found that the producer's inability to confront either the maker of the statements or the signers of the petition violated due process, the *Prosser* decision is inconsistent with the other cases addressing due process under pt. 780. See *supra* note 67. Moreover, at least one of the premises for the court's holding, that "none of the appellate determinations are [sic] de novo," is wrong. *Prosser*, 389 F. Supp. at 1006. The proceedings before the state committee and DASCO are *de novo*. *Garvey*, 397 F.2d at 611-12. But see *Esch*, 876 F.2d at 992-93 n.179 (criticizing as "[o]bviously troublesome" a state committee's apparent sole reliance upon "the summary of . . . [an] Inspector General's audit when it made its determination"), *modifying Esch*, 665 F. Supp. 6.

process. DASCO has authority to grant equitable relief in certain circumstances.<sup>147</sup> It is advisable to develop the basis for that relief as early as possible. Moreover, in certain circumstances, a request for equitable relief must be directed initially to the county committee.<sup>148</sup>

Because of the importance of the factual development of the producer's case in the administrative proceedings, it is generally advisable to obtain an official verbatim transcript of the hearing in order to insure an accurate and complete record of the proceedings. Among other things, a verbatim transcript enables one to make specific references to proffered facts in any memoranda that may be submitted prior to an informal hearing at the next level of administrative appeal. It also allows one to be certain that testimony has been proffered as intended, and it is certainly the most efficient way to note what occurred at the hearing. Of particular importance, it provides a means for resolving disputes over the testimony given at the county committee hearing that may arise at subsequent levels in the administrative appeal process.

Although it may arrange for a verbatim transcript for its own purposes,<sup>149</sup> the county committee is under no obligation to prepare a verbatim transcript unless the producer has made a request for such a transcript. Therefore, if the producer desires a transcript, the burden is on the producer to request it. To obtain a verbatim transcript, the producer must request that the county committee make a transcript "at a reasonable period prior to the time the hearing begins" and promise to pay the cost of creating it.<sup>150</sup> It is a good practice to make such a request, coupled with an offer to pay for services of the court reporter and the transcript's cost, when the informal hearing is requested.<sup>151</sup>

Irrespective of whether a verbatim transcript has been prepared, the county committee is required to prepare a written record containing a statement of the facts as asserted by the producer. In this record, the county committee must also set forth the facts found to be material to its decision.<sup>152</sup> At every level in the appeal process, the record of decision is important. However, it assumes the greatest importance at the final level, currently, the proceedings before DASCO. As a general rule, once the facts are determined by DASCO, they are not subject to a redetermination by any person or entity,

147. For a discussion of DASCO's equitable authority, see *infra* notes 208-11 and accompanying text.

148. Requests for equitable relief should be directed in the first instance to the county committee. See 7 C.F.R. §§ 790.4, 791.2; see also *infra* notes 208-11 and accompanying text (discussing the availability of equitable relief).

149. 7 C.F.R. § 780.8(d)(2).

150. 7 C.F.R. § 780.8(d)(1).

151. It is also a good practice to be certain that the court reporter who is present at the hearing is able to identify the participants as they speak. In *Garvey*, the court, after reviewing the transcript, noted as follows: "Identification of those making comments is difficult since the reporter hired by . . . [the appellant] became confused and was able to refer to a number of the participants only as 'voices'; the office manager is, however, identified by name and does often speak for the Committee." *Garvey*, 397 F.2d at 608 n.4.

It is also a good practice to mark documentary evidence for identification purposes.

152. 7 C.F.R. § 780.8(d); ASCS HANDBOOK 3-CP (Rev. 2) 30, ¶ 41 (6-6-86 Amend. 1).

including the courts, other than the Secretary or his delegate.<sup>153</sup>

Notwithstanding the greater importance of the record of decision at the DASCO level for purposes of judicial review, the county committee's decision should be carefully analyzed, particularly its factual conclusions. If appeals to the state committee and DASCO follow, those facts may be redetermined. An analysis of the county committee's record of decision may provide insight into why some or all of the facts were determined adversely to the producer. That insight may provide a basis for determining a more effective way to present the producer's case in the subsequent administrative appeals.

The county committee has the discretion to hold the record open at the conclusion of the hearing. This can be done if additional information or a field review is needed.<sup>154</sup> At the close of the informal hearing, the county committee may affirm, modify, or reverse the initial determination.<sup>155</sup> The county committee is required to notify the producer in writing of its decision and, in doing so, must "clearly set forth the basis for the determination."<sup>156</sup> The pro-

153. 7 U.S.C. § 1385 provides in relevant part:

The facts constituting the basis for any chapter 3B of Title 16 [conservation] payment, any payment under the wheat, feed grain, upland cotton, extra long staple cotton, and rice programs . . . 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. . . .

7 U.S.C. § 1385 (1982 & Supp. 1987) (emphasis supplied). Section 1385 has been held not to preclude a redetermination of the facts by the Secretary. *Gross v. United States*, 505 F.2d 1271, 1276 (Ct. Cl. 1974) ("[§] 1385 does not prohibit the Department of Agriculture from reviewing its own decisions"). However, it is an obstacle to fact-finding by the courts. *See, e.g., Stegall*, 19 Cl. Ct. at 767 n.1 ("The court has no authority to make independent findings of fact; Congress vested the Secretary of Agriculture . . . with final and conclusive authority to establish facts.") (citing 7 U.S.C. § 1385). *See generally infra* notes 188-91, 196-98 and accompanying text (explaining the record prepared by DASCO). In Part Two of this article, addressing the judicial review of final ASCS decisions, the effect of 7 U.S.C. § 1385 on judicial review will be discussed in detail.

154. Specifically, "[t]he reviewing authority prior to making a determination may request the producer or participant to produce additional evidence which it may deem relevant or may develop additional evidence from other sources." 7 C.F.R. § 780.9(a); *see also* ASCS HANDBOOK 3-CP (Rev. 2) 31, ¶ 42 (6-6-86 Amend. 1) (same).

Inspection tours sometimes are part of the review process. For example, in *Garvey*, 397 F.2d at 608, members of both the state and county committees inspected the producer's farming operation.

155. 7 C.F.R. § 780.9(a).

156. *Id.* If the request for reconsideration is partially or wholly denied, the decision must do the following:

1. Answer important points raised by the appellant, whether written or oral . . . [; and]
2. Include:
  - a. The basis for the decision . . . [; and]
  - b. A full disclosure of the pertinent facts considered so that the appellant will have an opportunity to rebut them if the appellant later appeals to STC [the state committee].

ASCS HANDBOOK 3-CP (Rev. 2) 31, ¶ 43(B) (6-6-86 Amend. 1).

This requirement apparently is not always followed. *See Esch*, 665 F. Supp. at 8 (although the plaintiffs pursued their claim through the county and state committees, they "were not apprised of the official reasons for their suspension until they reached the national office"), *modified sub nom., Esch*, 876 F.2d at 988 (noting that the written decision of DASCO "marked the first time that appellées [the producers] were informed of the basis of the decision to deny benefits to them").

As noted later in this article, the ASCS takes the position that because the hearings before the state committee and DASCO are *de novo*, each of those entities is free to base an adverse determination on reasons not previously relied on by either the county or the state committees. *See infra* notes 169, 186-91 and accompanying text. Therefore, one should not assume that the reasons given by the

ducer may request copies of any documents forming the basis of the decision.<sup>157</sup>

A producer who wishes to offer additional evidence after the close of the informal hearing, including after the rendering of a decision, may request that the proceeding be reopened.<sup>158</sup> However, such a request cannot be made if the producer has appealed the decision nor can the request be made if a higher authority has considered the matter.<sup>159</sup> The reopening of a hearing is within the discretion of the county committee.<sup>160</sup> However, if the matter is under consideration by a higher authority, the higher authority must agree to the reopening.<sup>161</sup>

As will be discussed in greater detail in Part Two of this article, a prerequisite to obtaining judicial review of an ASCS determination is the producer's exhaustion of the available administrative remedies.<sup>162</sup> The completion of the proceedings initiated by a request for reconsideration directed to the county committee does *not* exhaust the producer's administrative remedies. Thus, if the county committee's decision is adverse to the producer and the producer desires to seek relief from it, the producer should appeal to the state committee and should not attempt to secure judicial review of the county committee's determination.<sup>163</sup>

### 3. *The Appeal to the State Committee*

A producer who is not satisfied with the county committee's reconsideration may obtain a review of the decision by the state committee.<sup>164</sup> Procedurally, appeals to the state committee are treated exactly like requests for reconsideration directed to the county committee or any other initial decision-maker. Although an "appeal" is a request for review directed to a higher level of authority and a "request for reconsideration" is directed to an entity that has already made a decision, for procedural purposes, an "appeal" and a "re-

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county committee for an adverse determination will be adopted by either the state committee or DASCO should those entities also decide against the producer.

157. 7 C.F.R. § 780.9(b).

158. 7 C.F.R. § 780.10.

159. *Id.*

160. The county committee also may reopen a hearing on its own motion. 7 C.F.R. § 780.10.

161. ASCS HANDBOOK 3-CP (Rev. 2) 15, ¶ 21 (6-6-86 Amend. 1).

162. *See, e.g., Madsen v. Dep't of Agric.*, 866 F.2d 1035, 1037 (8th Cir. 1989); *United States v. Bisson*, 646 F. Supp. 701, 706 (D.S.D. 1986), *aff'd*, 839 F.2d 418 (8th Cir. 1988).

163. A checklist for requesting and preparing for an informal hearing is as follows:

1. Has a written request been made for an informal hearing?
2. If a verbatim transcript is desired, has a written request been made accompanied by a statement that the producer is willing to pay for the transcript's cost?
3. Has consideration been given to preparing a pre- or post-hearing memorandum for the county committee setting forth the facts and the law supporting the producer's entitlement to relief?
4. Has consideration been given to preparing for the county committee a statement containing the findings of fact and conclusions of law necessary to entitle the producer to relief?
5. Has consideration been given to the use of demonstrative evidence, the necessity for visual inspection of the producer's operations, and other matters that will aid in the presentation of the producer's case before the committee?

164. 7 C.F.R. § 780.4.



quest for reconsideration" are interchangeable terms.<sup>165</sup> Hence, this article's discussion of the initial two steps in the ASCS administrative appeal process applies to appeals to the state committee as well.

An appeal to the state committee must be made within fifteen days after written notice of the county committee's determination on reconsideration "is mailed to or otherwise made available to the participant."<sup>166</sup> As with a request for reconsideration, the request for review on appeal must be in writing and must be signed by the producer or the producer's authorized representative. It should describe the determination being appealed, be supported by a statement of facts, and contain a specific request for relief.<sup>167</sup>

The producer appealing to the state committee should indicate whether an informal hearing is desired. If an informal hearing is requested, the state committee will hold such a hearing. If a hearing by the state committee is not requested, the state committee will act on the basis of the record transmitted to it by the county committee and on the written submissions of the producer.<sup>168</sup> As a general rule, a hearing should always be requested. If a verbatim transcript of the hearing is desired, the request for the transcript, together with an offer to pay for the preparation of the transcript, should be made with the request for the informal hearing. The better practice is to always request the preparation of a verbatim transcript.

Review on appeal by the state committee is *de novo*.<sup>169</sup> Accordingly, the hearing conducted by the state committee will proceed in the same manner as a hearing before the county committee on a request for reconsideration.<sup>170</sup> At the conclusion of the hearing, the state committee will render its decision.<sup>171</sup> Because the review by the state committee is *de novo*, the state committee is not bound by the findings of fact or the conclusions reached by the county committee.<sup>172</sup> Thus, the state committee is free to decide that the county com-

165. The ASCS HANDBOOK defines an "appeal" as a "request for . . . [r]econsideration by the authority making the initial determination . . . [and a] review by the next higher reviewing authority." ASCS HANDBOOK 3-CP (Rev. 2), Exhibit 2, at 1 (6-6-86 Amend. 1).

166. 7 C.F.R. § 780.6(a). Under the producer appeal provisions of the 1990 farm bill, appeals to the state committee from county committee determinations must be filed within a "reasonable time." S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(b)(3) to tit. IV of the Agricultural Act of 1949). Presumably, new regulations promulgated under the legislation will establish what is a "reasonable time." See *id.* (adding § 426(h) to tit. IV of the Agricultural Act of 1949) (granting the Secretary the authority to promulgate regulations to implement the new producer appeal provisions). Most likely, the time period will remain 15 days.

167. See 7 C.F.R. § 780.7.

168. 7 C.F.R. § 780.7; ASCS HANDBOOK 3-CP (Rev. 2) 32, ¶ 44 (6-6-86 Amend. 1).

169. See *Garvey*, 397 F.2d at 611-12.

170. See 7 C.F.R. § 780.8; ASCS HANDBOOK 3-CP (Rev. 2) 44-46, ¶ 60 (6-6-86 Amend. 1).

171. The state committee has the authority to remand the matter to the county committee. 7 C.F.R. § 780.9.

172. This concept is basic to administrative appeals. For example, § 557(b) of the Administrative Procedure Act provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. . . ." 5 U.S.C. § 557(b). However, in a review of a DASCO decision where neither the county nor the state committee provided the producers with reasons for their decisions, the court sharply criticized the ASCS and remanded the matter to the Secretary for a redetermination. *Esch*, 876 F.2d at 993, *modifying Esch*, 665 F. Supp. 6.

There is an obvious distinction between the failure to follow procedural regulations requiring the reviewing authority to provide reasons for its decision and the disregard of the reasons previously

mittee made the correct decision, but for the wrong reasons.

The state committee's authority to make the same determination as the county committee, but for different reasons, means that the producer can not treat the appeal to the state committee as simply a review of the record and decision of the county committee. In other words, if the county committee had available to it two bases for determining that the producer was ineligible for a particular program, but it only chose the weaker of the two grounds, the producer's presentation to the state committee should not focus only on the ground relied on by the county committee. Thus, when appealing to the state committee, the producer must assume that all possible reasons for determining the producer ineligible are in issue.

The completion of the appeal to the state committee does *not* exhaust the producer's administrative remedies except when one or more of the following five determinations are in dispute:

1. determinations under the tobacco discount variety program;
2. determinations made for disaster credit;
3. determinations relating to acreage, production, or production appraisals;
4. peanut farm poundage quota determinations; and
5. 1988 and subsequent crop base and yield determinations.<sup>173</sup>

If the producer is disputing a determination other than one in one of these five categories of determinations, the producer must appeal an adverse determination by the state committee to DASCO in order to exhaust his or her administrative remedies. If the determination in dispute involves one of the five categories of determinations, the state committee's decision is not appealable to DASCO, and the state committee's determination is final. Because the state committee's action is final when the determination falls within one of these five categories, producers seeking the state committee's review of one of those determinations should devote extra care and attention to the preparation of the state committee appeal.<sup>174</sup>

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offered for a decision by a lower reviewing body, but there are substantial difficulties presented to the aggrieved producer in each situation. In the former situation, the producer "shoots in the dark"; in the latter situation, the producer "shoots at a moving target." The "moving target" analogy was suggested to one of the authors of this article by Alan R. Malasky, Esq., Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C. Mr. Malasky was counsel for the producers in *Justice*, 716 F. Supp. 1567.

173. 7 C.F.R. § 780.11(b); ASCS HANDBOOK 3-CP (Rev. 2) 47, ¶ 63 (9-16-87 Amend. 3).

174. The following is a checklist for appeals to the state committee:

1. Has the appeal been made in writing, signed by the producer or the producer's authorized representative?
2. Has the appeal described the determination made by the county committee and stated the facts showing why the producer is entitled to the specific relief sought?
3. Has the appeal been postmarked or otherwise delivered to the appropriate office within 15 days of the date on which the county committee's decision was mailed or otherwise made available to the producer?
4. Have an informal hearing and a verbatim transcript of the hearing been requested?
5. Hearings before the state committee are *de novo*. Has consideration been given to the use of a pre- or post-hearing memorandum, proposed findings of fact and conclusions of law, demonstrative evidence, and similar methods for presenting the producer's case? Remember, the state committee has the authority to find that the county committee made the correct decision, but for the

The next, and final, step in the ASCS administrative appeal process occurs at the national level in the ASCS's organizational hierarchy. That step is addressed in the next section of this article. However, before considering that step, assume that the producer has been successful at the state level or earlier, before the county committee on a request for reconsideration. If the producer has been successful, can the Administrator of the ASCS or the Deputy Administrator for State and County Operations, DASCO, undo that victory?

Under the current regulations, the answer is yes.<sup>175</sup> However, under a provision of the 1990 farm bill, the answer is still yes, *but* only if the Administrator or DASCO acts within ninety days. The time limitation does not apply if the producer had reason to believe that the decision was incorrect or if the decision was procured through certain, specified, improper conduct. In relevant part, that provision states:

Decisions of the State and County Committees . . . or employees of such committees made in good faith in the absence of misrepresentation, false statement, fraud, or wilful misconduct, unless otherwise appealed under this section, shall be final, unless otherwise modified under subsection (f)<sup>176</sup> within 90 days, and no action shall be taken to recover amounts found to have been disbursed thereon in error unless the producer has reason to believe that the decision was erroneous.<sup>177</sup>

Notwithstanding its limitations, the new provision is significant. In many cases, it will protect producers from having favorable decisions of county and state committees reversed or modified years after the decisions were made.<sup>178</sup>

#### 4. *The Appeal to DASCO*

Under the current regulations, the next level of authority above the state committee in the administrative appeal process is the Deputy Administrator for State and County Operations, commonly referred to as DASCO. Most, but not all, determinations of the state committee may be appealed to

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wrong reasons. This means that all possible bases for the county committee's decision may be considered by the state committee, irrespective of whether any or all of those bases were relied on by the county committee.

175. 7 C.F.R. § 780.12.

176. For the text of subsection (f), see *infra* notes 202, 204.

177. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,074 (adding § 426(g) to tit. IV of the Agricultural Act of 1949). Presumably, the burden will be on the ASCS or the Secretary to show that there was wilful misconduct or that the producer had reason to believe that the decision was erroneous.

It also appears that this provision could be applied to favorable determinations made by a county or state committee made prior to the date of enactment of the 1990 farm bill. The provision in the legislation making the new producer appeal provisions inapplicable to "any appeal or proceeding with respect to any adverse determination . . . prior to the date of enactment of this Act" does not extend, by its terms, to § 426(g). *Id.* at § 1132(b). However, the government likely will take the position that only determinations affecting a producer's participation in a program for the 1991 and subsequent crop years are subject to the provision. That provision would be based on the general effective date provisions of Title I of the bill, the title containing the producer appeal provisions, including § 420(g). *Id.* at § 1171(a), 136 CONG. REC. H11,029, H11,075 ("Except as otherwise specifically provided in title I through this title, such titles and the amendments made by such titles shall become effective beginning with the 1991 crop of an agricultural commodity.").

178. A six year statute of limitations applies. 15 U.S.C. § 714b(c).

DASCO.<sup>179</sup> Only determinations by the state committee "with respect to program payment yields or crop acreage bases are not appealable."<sup>180</sup>

Under the producer appeal provisions of the 1990 farm bill, appeals to DASCO will be replaced by appeals to a new entity within the ASCS, the National Appeals Division.<sup>181</sup> The National Appeals Division will be supervised by a Director and will employ hearing officers and other personnel, and its sole function will be to determine "formal appeals" of decisions made by the ASCS in the programs the ASCS administers.<sup>182</sup> Regulations governing the time for the filing of appeals before the National Appeals Division and the manner of making the appeal have not yet been promulgated. However, the producer appeal provisions of the 1990 farm bill provide that a "reasonable time after . . . [the receipt of] notice of the adverse determination" is to be provided to producers,<sup>183</sup> and the Secretary of Agriculture is authorized by the legislation to issue regulations governing the conduct of appeals to the National Appeals Division.<sup>184</sup>

Under the current regulations, appeals to DASCO must be made within the same fifteen-day time limitation that applies to requests for reconsideration and appeals to the state committee. In addition, the same requirements for the form of the appeal apply to appeals to DASCO as apply to requests for reconsideration directed to the county committee and appeals to the state committee.<sup>185</sup>

As with appeals to the state committee, the procedural rules that apply to requests for reconsideration apply to appeals to DASCO under the current regulations. If requested by the producer, an informal hearing will be held. An informal hearing should be requested. The hearing will be held in Washington, D.C., or, at the producer's request, by telephone,<sup>186</sup> and it will be conducted by a hearing officer who is not supervised by DASCO. However, the decision rendered by the hearing officer is rendered on behalf of DASCO.

179. 7 C.F.R. § 780.5.

180. 7 C.F.R. § 780.11(b); *see also supra* note 173 and accompanying text (listing determinations that are not appealable to DASCO).

181. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(c) to tit. IV of the Agricultural Act of 1949).

182. *Id.* The legislation provides that the hearing officers employed by the National Appeals Division are to report to the "principal officers of the division and shall not be under the control of . . . offices other than the National Appeals Division." *Id.*

183. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(b)(3) to tit. IV of the Agricultural Act of 1949).

184. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. at H11,074 (adding § 426(h) to tit. IV of the Agricultural Act of 1949).

185. 7 C.F.R. § 780.7.

186. A telephone hearing places the producer at a significant disadvantage, one partially derived from the perception that the producer is not interested enough in the outcome to appear in person. Generally, if an appeal is worth pursuing, it should be pursued to the fullest extent available, including requesting and attending informal hearings at all levels of the appeal process.

However, if the producer has requested an informal hearing by telephone, the producer or the producer's representative should be prepared to deal with initial questions that are general in nature. For example, the hearing officer may begin the hearing with the question "tell me the reasons why you think that the state committee's decision was wrong?". At that point, the producer or the producer's representative should be prepared to state the factual and legal basis for the appeal in an organized, comprehensive fashion.

Thus, the hearing may be considered as one before DASCO.<sup>187</sup>

Like the state committee hearing, the hearing before DASCO is *de novo*. Among other things, a *de novo* hearing means that DASCO may make the same determination as was made by the state committee, but for different reasons. At the hearing, DASCO may have before it the complete case file reflecting the proceedings at the county and state level.<sup>188</sup> As the final administrative appeal authority, DASCO compiles the administrative record that will form the basis for judicial review if the producer seeks such a review.<sup>189</sup>

Because findings of fact made by DASCO, acting on behalf of the Secretary, are generally unassailable on judicial review,<sup>190</sup> it is extremely important that the producer's presentation of the facts before DASCO be as complete and comprehensible as possible.<sup>191</sup> Therefore, consideration should be given to supplementing the factual record made below and, to the extent that the evidence below is not supplemented or presented again, the producer should emphasize in the submissions made to DASCO those facts in the record below that support the producer's claim.

Again, as in the proceedings at the county and state level, a hearing memorandum and proposed findings of fact and conclusions of law may contribute to either a favorable ruling or a favorable record. In any event, the proceedings before DASCO should not be approached on the assumption that a reviewing court can redetermine the facts.

Under the producer appeal provisions of the 1990 farm bill, proceedings before the National Appeals Division will bear some similarity to the current proceedings before DASCO, but those proceedings also will be substantially different in several significant respects. The similarities include the right of the producer to have "a full opportunity to present facts and information relevant

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187. Rather than being accountable to DASCO, the hearing officer will be under the supervision of the Deputy Administrator for Program Planning and Development (DAPPD). T. Conway, *ASCS Appeal Process*, 1988 AGRIC. L. INST. B-1, B-30 [hereinafter Conway]. However, the hearing officer's decision is merely a recommendation to DASCO, and it is DASCO that issues the determination. In addition, representatives of DASCO may be present at the hearing and, although they may not formally cross-examine the producer, they may ask questions for "informational" purposes.

To the disadvantage of producers and their attorneys, the ASCS does not publish the determinations of DASCO, known as DASCO Letters of Decision. Nevertheless, the Letters of Decision can be obtained under the Freedom of Information Act. See *supra* note 90 (discussing Freedom of Information Act requests). The Letters of Decision for 1989 are also available commercially. DECISIONS OF THE DEPARTMENT OF AGRICULTURE — ASCS (K. Russo ed. 1990).

188. The ASCS HANDBOOK instructs the state committee to send to DASCO "the complete case file, including the verbatim transcript, if one was made . . . [and] all related correspondence and program documents" on DASCO's request. ASCS HANDBOOK 3-CP (Rev. 2) 47, ¶ 64 (9-16-87 Amend. 3). A good practice is to confirm that DASCO has made such a request.

189. Linden, *supra* note 14, at 321.

190. See *supra* note 153 and accompanying text (discussing 7 U.S.C. § 1385 which serves to limit the scope of the judicial review of final ASCS decisions). The scope of judicial review of final ASCS decisions will be discussed in detail in Part Two of this article, to appear in Vol. 36, No. 3 in May, 1991.

191. Of course, the presentation of the issues should be comprehensive as well. As a rule, judicial review is restricted to the issues raised before the agency. See, e.g., *SEC v. Chenery*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that [the agency's] action was based.").

to the matter in issue and . . . [to] present evidence."<sup>192</sup> In addition, the hearing officer conducting the hearing is to "have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available that relate to programs and operations with respect to which an appeal has been taken."<sup>193</sup>

The differences between the current proceedings before DASCO and the contemplated proceedings under the producer appeal provisions of the 1990 farm bill are more extensive than the similarities between the two proceedings. Those differences include the 1990 legislation's grant of authority to the Director of the National Appeals Division to issue subpoenas<sup>194</sup> and to take testimony under oath.<sup>195</sup> In particular, the subpoena authority may make it easier to obtain needed testimony from county committee members, county executive directors, and other ASCS officials.

The producer appeal provisions of the 1990 farm bill will also make it easier for producers to obtain a verbatim record of the proceedings. The legislation directs the Director of the National Appeals Division to make verbatim transcripts available to a producer at the producer's request "if the decision of the hearing officer is appealed," presumably a reference to judicial review.<sup>196</sup> Moreover, the producer apparently will not be required to pay for the recording and transcription of the proceedings,<sup>197</sup> and all hearings will be recorded if the producer so requests.<sup>198</sup>

Under the current regulations, DASCO is the final level in the ASCS appeal process.<sup>199</sup> Under the producer appeal provisions of the 1990 farm bill, the determination of the Director of the National Appeals Division terminates

192. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(c)(4)(B)(ii) to tit. IV of the Agricultural Act of 1949). Significantly, the new appeal provisions require that the producer "shall be advised of the issues involved." *Id.* (adding § 426(c)(4)(B)(i) to tit. IV of the Agricultural Act of 1949). As is the case under the current regulations, "the hearing officer may confine the presentation of facts and evidence to pertinent matters and may exclude irrelevant, immaterial, or unduly repetitious evidence, information, or questions." *Id.* (adding § 426(c)(4)(B)(iii) to tit. IV of the Agricultural Act of 1949).

193. *Id.* (adding § 426(c)(3)(A) to tit. IV of the Agricultural Act of 1949). This provision may be broader than the transmission of the record contemplated under the current regulations and instructions. *See supra* notes 188-89 and accompanying text.

194. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(c)(3)(D) to tit. IV of the Agricultural Act of 1949) (providing that the Director "may, if appropriate, require the attendance of witnesses and production of documentary evidence by subpoena, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court").

195. *Id.* (adding § 426(c)(3)(E) to tit. IV of the Agricultural Act of 1949) (providing that the Director "may administer oaths and affirmations, whenever necessary in the process of hearing appeals").

196. *Id.* (adding § 426(c)(4)(C) to tit. IV of the Agricultural Act of 1949). The appeals presented to the hearing officers employed by the National Appeals Division are determined by the Director. There is no administrative appeal available to producers following the determination by the Director. Hence, the legislation's reference to an "appeal" apparently refers to judicial review. Judicial review is authorized by the legislation. *Id.* (adding § 426(d) to tit. IV of the Agricultural Act of 1949).

197. *Id.* (adding § 426(c)(3)(F) to tit. IV of the Agricultural Act of 1949) (providing that the Director "may enter into contracts and other arrangements for reporting and other services and make such payments as may be necessary to carry out the provisions of this section").

198. *Id.* (adding § 426(c)(4)(C) to tit. IV of the Agricultural Act of 1949) ("At the request of the participant, each hearing before a hearing officer . . . shall be recorded verbatim . . .").

199. 7 C.F.R. § 780.9.

the administrative appeal process.<sup>200</sup> Nevertheless, under the current regulations, the Administrator of the ASCS has the authority to reverse or modify any determination by DASCO.<sup>201</sup> The same is true under the producer appeal provisions of the 1990 farm bill.<sup>202</sup>

However, because the producer does not have the right to appeal to the Administrator, obtaining a decision by DASCO exhausts the producer's administrative remedies for purposes of the exhaustion of administrative remedies doctrine.<sup>203</sup> The determination of the Director of the National Appeals Division will be the final step in the ASCS administrative appeal process under the producer appeal provisions of the 1990 farm bill.<sup>204</sup>

Under the current regulations, a producer may obtain reconsideration by DASCO for the purposes of introducing new evidence if the producer can satisfy DASCO that the failure to present the evidence earlier was excusable.<sup>205</sup> In the 1990 farm bill, the Director of the National Appeals Division is given the authority "to issue procedural rules for the conduct of appeals," and, when issued, those rules may provide similar relief.<sup>206</sup> In addition, after a hearing conducted by a hearing officer, the Director of the National Appeals Division "may order that further proceedings be had in order that the record presented for review by the National Appeals Division may be complete or in

200. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(c)(7) to tit. IV of the Agricultural Act of 1949).

201. 7 C.F.R. § 780.12; *see also* Hamilton I, *supra* note 51, at 289 ("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.").

202. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(f) to tit. IV of the Agricultural Act of 1949) ("Nothing contained in this section shall preclude the Secretary, the Administrator of the ASCS, or the Executive Vice President of the Commodity Credit Corporation from determining at any time any question arising under the programs to which the provisions of this section apply or from reversing or modifying (in writing, with sufficient reason given therefor) any determination made by a county or State committee or the *director of the National Appeals Division*." (emphasis supplied)).

203. *See Morrow*, 26 F.2d at 46; Linden, *supra* note 14, at 321; Hamilton I, *supra* note 51, at 289. The exhaustion of the administrative remedies requirement as it applies to the judicial review of ASCS decisions will be discussed in detail in Part Two of this article.

204. The provision in the 1990 farm bill making decisions of the Director of the National Appeals Division final contains an obvious error. The provision reads as follows: "Except as provided in subsection (e), determinations of the director of the National Appeals Division shall be final, conclusive, and binding on the Department of Agriculture, including the Commodity Credit Corporation, and any agency thereof." S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(c)(7) to tit. IV of the Agricultural Act of 1949). The provision's reference to subsection (e) is to the definition of the term "participant." That reference is inappropriate.

The reference obviously should have been to subsection (f). That subsection provides:

Nothing contained in this section shall preclude the Secretary, the Administrator of the ASCS, or the Executive Vice President of the Commodity Credit Corporation from determining at any time any question arising under the programs to which the provisions of this section apply or from revising or modifying (in writing, with sufficient reason given therefor) any determination made by a county or State committee or the director of the National Appeals Division.

*Id.* (adding § 426(f) to tit. IV of the Agricultural Act of 1949).

205. Conway, *supra* note 187, at B-30 to B-31.

206. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (adding § 426(c)(3)(G) to tit. IV of the Agricultural Act of 1949).

order to hear new or additional evidence.”<sup>207</sup>

### 5. *Administrative Equitable Relief*

In certain circumstances, DASCO has the authority to provide equitable relief. Employing the language of the regulations authorizing equitable relief, those circumstances can be broadly defined as follows:

#### *Good Faith Reliance on ASCS Advice*

Notwithstanding any other provision of 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 Administrator . . . or . . . [DASCO] as meeting the requirements of the applicable program, and price support may be extended or payment made therefor in accordance with such action or advice to the extent it is deemed desirable in order to provide fair and equitable treatment.<sup>208</sup>

#### *Failure to Comply With Program Requirements Where There Has Been a Good Faith Effort to Comply*

In any case in which the failure of a producer to comply fully with the terms and conditions of any program to which this part is applicable precludes the making of loans, purchases, or payments, . . . [DASCO] may, nevertheless, authorize the making of such loans, purchases or payments in such amounts as determined to be equitable in relation to the seriousness of the failure. . . . [This relief is available] only to producers who made a good faith effort to comply fully with the terms and condi-

207. *Id.* (adding § 426(c)(5)(C) to tit. IV of the Agricultural Act of 1949).

208. 7 C.F.R. § 790.2(a). The equitable authority under 7 C.F.R. pt. 790 extends “to all programs . . . in . . . Title 7, administered by . . . ASCS, under which price support is extended or payments are made to farmers.” 7 C.F.R. § 790.1. The initial request for relief should be directed to the county committee. 7 C.F.R. § 790.4.

Equitable relief is authorized only where the reliance of the producer was based on a good faith belief that he or she met the requirements of the applicable program. It is *not* authorized where the producer knew or had sufficient reason to know that the action or advice of the committee or 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.

7 C.F.R. § 790.2(b). Similar authority exists under the payment limitations regulations. *See* 7 C.F.R. § 1497.26(a).

The limitation in the regulation concerning the producer’s knowledge that the advice received was erroneous should not be read to encompass constructive knowledge. *See* Hamilton II, *supra* note 67, at 643-45 (discussing a producer’s duty to be aware of the program regulations and citing Robinson v. Block, 608 F. Supp. 817, 821-22 (W.D. Mich. 1985) for the proposition that “program participants are charged with constructive notice of the regulations for the programs in which they participate”). Charging producers with constructive notice of the regulations is analogous to imposing the rule that “ignorance of the law excuses no one.” However, that rule is premised on considerations of public policy and necessity, not on the particular circumstances of any individual. *See, e.g.,* Atlas Realty v. House, 192 A. 564, 567 (Conn. 1937). To the contrary, the phrase “reason to know,” such as is used in the regulation, contemplates a discrete and particularized basis for ascribing knowledge. Moreover, if all producers were presumed to know the regulations in the application of 7 C.F.R. § 790.2(a), the result would be to render the regulation a nullity.

Thus, administrative equitable relief is different than judicial equitable relief. With respect to judicial equitable relief, it has been held that the government is not estopped by a determination by a county committee that is contrary to the regulations. *Willson*, 14 Cl. Ct. at 307 (citing Federal Crop Ins. Corp. v. Merrill, 382 U.S. 380, 384 (1947); *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1153-54 (Fed. Cir. 1983)); *Durant*, 16 Cl. Ct. at 451 (also citing *Merrill*). The same is true for the unauthorized representations of the county executive director. *Raines*, 12 Cl. Ct. at 538-39.



tions of the program and rendered substantial performance.<sup>209</sup>

The decision to grant equitable relief is discretionary.<sup>210</sup> Nevertheless, its availability can be very significant, and an attempt to obtain equitable relief may be a predominant or sole reason for appealing a decision.<sup>211</sup>

*The judicial review discussion of this Article will appear in Volume 36, Issue 3 of the South Dakota Law Review.*

209. 7 C.F.R. § 791.2. This authority extends "to the wheat, feed grain, upland cotton, and rice programs, and to all other programs to which this part is made applicable by individual program regulations." 7 C.F.R. § 791.1. If a person believes that he or she is entitled to this relief, a request may be made for it to the county committee. 7 C.F.R. § 791.2.

Persons desiring to seek equitable relief under 7 C.F.R. pt. 791 should consult ASCS HANDBOOK 4-CP (Rev. 2) entitled "Failure To Fully Comply." Among other things, that volume of the HANDBOOK instructs the county and state committee on how to handle requests for equitable relief under pt. 791.

See generally Kelley, *In Depth: ASCS Appeals: The Equitable Authority of DASCO*, 7 AGRIC. L. UPDATE 4 (1990) (discussing requests for administrative equitable relief under 7 C.F.R. pts. 790, 791).

210. See *Pope v. United States*, 9 Cl. Ct. 479, 485 n.3 (1986) ("That the Secretary's action was discretionary is apparent from the fact that the statute [7 U.S.C. § 1444b-1(f) (1982), the authority on which 7 C.F.R. § 791.2 is based] sets forth no objective standards for determining what is 'equitable in relation to the seriousness of the failure' and no procedural requirements for determining it, and there is no established case law on the phrase." (citations omitted)). The discretionary nature of the grant or denial of equitable relief raises the question of whether the decision to deny equitable relief would be judicially reviewable.

Under the Administrative Procedure Act, specifically, 5 U.S.C. § 706(2)(A), a reviewing court may assess whether an agency has abused its discretion. However, the Act's waiver of sovereign immunity does not apply when the challenged agency action is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); see *Webster v. Doe*, 486 U.S. 592, 599-600 (1988) ("under § 701(a)(2), even when Congress has not affirmatively precluded judicial oversight, 'review' is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion") (citation omitted). Thus, some doubt exists concerning the reviewability of the Secretary's or DASCO's denial of equitable relief. See also *Brundidge Banking Co. v. Pike County Agricultural Stabilization and Conservation Comm.*, 899 F.2d 1154, 1163 (11th Cir. 1990) (declining to review a claim under § 790.2 on the ground of ripeness); *Stegall*, 19 Cl. Ct. at 772-73 (declining, on the ground of ripeness, to review a claim that the Secretary had improperly denied a claim for equitable relief under §§ 790.2 and 791.2); *United States v. Kopf*, 379 F.2d 8, 14 (8th Cir. 1967) (declining to review a claim under § 790.2(a) on the ground that it applies only where relief would not otherwise be available under the statutes and regulations applicable to the program at issue).

211. The 1990 farm bill adds authorization for equitable relief in the administration of the conservation provisions of the Food Security Act of 1985, as amended. See *supra* notes 69-77 and accompanying text (discussing the conservation provisions of the Food Security Act of 1985, as amended). It provides:

[n]otwithstanding any other provision of law, to the extent the Secretary of Agriculture considers it desirable in order to provide fair and equitable treatment, the Secretary may make price support or other payments available to farmers who have, in attempting to comply with the requirements of any price support or other program administered by the Secretary or any other requirements in law affecting such person's eligibility under such programs, taken actions in good faith in reliance on the action or advice of an authorized representative of the Secretary. The Secretary may provide such price support or other payments to the extent the Secretary determines such farmer has been injured by such good faith reliance and may require such farmer to take necessary actions designed to remedy any failure to comply with such programs.

S. 2830, 101st Cong., 2d Sess. § 1132(c), 136 CONG. REC. H11,029, H11,074 (amending § 326 of the Food and Agriculture Act of 1962, Pub. L. No. 87-703, 76 Stat. 607). This provision is more restrictive than the provisions currently found at 7 C.F.R. § 790.2(a). It expressly limits the payment of program benefits to the amount of loss that the producer can demonstrate was suffered by the finding of ineligibility, and it gives the Secretary the authority to require the producer to comply with the program requirements.