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

Part II

by

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III. PART TWO: THE JUDICIAL REVIEW OF ASCS DECISIONS

As discussed in Part I of this article,[212] the decision of DASCO[213] or,

212. Part I of this article appeared in Vol. 36, Issue No. 1, in March, 1991. It addressed the ASCS administrative appeal process. Subsequent to the publication of Part I of this article, the authors were informed that the USDA had concluded that it was barred by section 640 of the Rural Development, Agriculture, and Related Agencies Appropriation Act of 1991, Pub. L. No. 101-506, 104 Stat. 1315, 1350 from implementing the new producer appeal provisions contained in the 1990 Farm Bill. *See* The Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1132, 104 Stat. 3359, 3512-15. Section 640 provides that "[n]one of the funds in this Act may be used to establish any new office, organization or center for which funds have not been provided in advance in Appropriation Acts, except the Department [USDA] may carry out planning activities." As Part II of this article went to press, no action had been taken to provide supplemental appropriations or other authority by which the USDA could implement the producer appeal provisions of the 1990 Farm Bill. However, readers should be alert to developments that may have occurred since the preparation of this article.

213. *See supra* notes 179-207 and accompanying text (discussing administrative appeals before the Deputy Administrator for State and County Operations (DASCO) under the regulations in effect prior to the enactment of the 1990 farm bill).

beginning with the 1991 crop year, the decision of the Director of the National Appeals Division[214] normally terminates the ASCS administrative appeal process. Once the administrative appeal process has been exhausted, the producer's remaining source of relief from an adverse determination is judicial review.

Early attempts to secure judicial review of final ASCS decisions were met by the government's broad assertion that final decisions of the ASCS were not judicially reviewable, an argument that was soundly rejected.[215] However, although judicial review of final ASCS decisions is generally available, the review is limited.

Part II of this article will examine the limited availability of judicial review of final ASCS decisions. It is divided into three major components. The first two components offer threshold considerations in that they involve matters bearing on the courts' willingness or ability to entertain a review of the challenged administrative action. Those components address the exhaustion of administrative remedies requirement and the choice of forum, specifically, whether review should be sought in a federal district court or in the United States Claims Court. Included in the choice of forum discussion is an examination of the remedies available from the district courts and the Claims Court and suggestions for tailoring the request for review so as to avoid a successful motion to dismiss.

The third component examines the limitations that apply once a court has determined that the exhaustion of administrative remedies requirement has been satisfied and that it has jurisdiction to review the determination. Specifically, those limitations concern the reviewability of the determination, the scope of review, discovery, and the burden of proof.

A. *The Exhaustion of Administrative Remedies Requirement*

Judicial review of an ASCS decision that is administratively reviewable

214. *Id.* (discussing the creation of the National Appeals Division within the ASCS by the 1990 farm bill).

215. *See, e.g.*, Garvey v. Freeman, 397 F.2d 600, 604-05 (10th Cir. 1968). In *Garvey*, the government argued that the congressional failure to expressly provide for the judicial review of ASCS decisions concerning producer eligibility to participate in "voluntary" federal farm programs and the finality provisions of 7 U.S.C. § 1385 "indicate[d] a congressional intent to preclude all judicial review of administrative determinations" made in connection with all federal farm programs in which participation was not mandatory. The court rejected the argument. *Id.* at 605; *see also* King v. Bergland, 517 F. Supp. 1363, 1365 (D. Colo. 1981) (following *Garvey*).

Based on their review of the reported cases involving the review of ASCS determinations, the authors of this article have concluded that the government still would prefer to have the ASCS and the Secretary operate without scrutiny by the judiciary. Indeed, the persistence with which the government continues to assert, directly or indirectly, that the ASCS's and the Secretary's actions are completely immune from judicial review is remarkable. With equal persistence, courts have continued to reject arguments that the Secretary is immune from judicial review. Recently, one of those courts, apparently exasperated with the government's argument, straightforwardly characterized the government's claim of complete immunity as "nonsensical." Justice v. Lyng, 716 F. Supp. 1567, 1569 (D. Ariz. 1988); *see also* Justice v. Lyng, 716 F. Supp. 1570, 1579 (D. Ariz. 1989) ("Despite Defendant's arguments to the contrary, this Court is entitled to review the Agency's [ASCS] findings and order that they be reversed if found to be arbitrary and capricious.") (citing Esch v. Lyng, 665 F. Supp. 6, 23 (D.D.C. 1987), *modified sub nom.* Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989)).

under 7 C.F.R. pt. 780 is subject to the exhaustion of administrative remedies requirement.[216] Under that requirement, the party seeking judicial review must have exhausted his or her administrative remedies before the court will undertake the review. In other words, the "exhaustion of available administrative remedies is a prerequisite to judicial review."[217]

Although there are exceptions to the exhaustion of administrative remedies requirement,[218] the requirement is broadly applied. Failure to exhaust administrative remedies has been held to bar affirmative defenses and compul-

216. *See, e.g.*, Madsen v. Department 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); Federal Land Bank of Colum. v. Shepard, 646 F. Supp. 1145, 1150 (M.D. Ga. 1986). The exhaustion requirement also has been held to apply to the judicial review of other USDA administrative appeal proceedings not subject to the appeal regulations found at 7 C.F.R. pt. 780, such as the review of marketing quota determinations made by review committees established pursuant to 7 U.S.C. § 1363. *See, e.g.*, Allen v. David, 334 F.2d 592, 597-98 (5th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965); Weir v. United States, 310 F.2d 149, 157 (8th Cir. 1962); United States v. Jeffcoat, 272 F.2d 266, 271 (4th Cir. 1959); Donaldson v. United States, 264 F.2d 804, 806 (6th Cir. 1959); Thomas v. County Office Comm. of Cameron County, 327 F. Supp. 1244, 1252 (S.D. Tex. 1971); Gulley v. Hurley, 296 F. Supp. 549, 550 (E.D. Tenn. 1969); Hart v. Hassell, 250 F. Supp. 893, 896-97 (E.D.N.C. 1966).

217. *Bisson*, 646 F. Supp. at 706 (citing Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938)), *aff'd*, 839 F.2d 418 (8th Cir. 1987); *see also* SCHWARTZ, ADMINSTRATIVE LAW at § 8.30 (1984) [hereinafter SCHWARTZ] ("Judicial review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process.").

218. The exhaustion of administrative remedies may not be required when there is no adequate administrative remedy. *See generally* SCHWARTZ, *supra* note 217, at § 8.31 (discussing the exceptions to the exhaustion requirement). Nevertheless, cases excusing the requirement when review is sought for an ASCS determination are few. In *Hart v. Hassell*, the court rejected the government's assertion that the plaintiff had failed to exhaust her administrative remedies when ASCS officials "induced" her to appeal to the wrong ASCS entity. *Hassell*, 250 F. Supp. at 896. However, in *United States v. Bisson*, the court declined to excuse satisfaction of the exhaustion requirement when the producer claimed that he "misunderstood" correspondence from the ASCS advising him of his administrative appeal rights. *Bisson*, 646 F. Supp. at 706-07, *aff'd*, 839 F.2d 418 (8th Cir. 1987).

In *Morrow v. Clayton*, the decision under review was initially made by a state committee. *Morrow v. Clayton*, 326 F.2d 36, 46 (10th Cir. 1960). Because there was no procedure for administratively appealing decisions of a state committee under the procedures applicable to the allotment program at issue, the exhaustion requirement was held to be inapplicable. *See generally* Devine, *Understanding the Current Crisis with the ASCS*, 9 J. AGRIC. TAX'N & L. 195, 217-19 (1987) [hereinafter Devine] (discussing the exhaustion requirement and *Morrow v. Clayton*). For an instructive dissenting opinion arguing that the requirement should have been excused in a case involving a producer's challenge to a ASCS county committee's assignment of a wheat yield to his farm, see *Madsen*, 866 F.2d at 1037-40 (Arnold, J., dissenting) (asserting that "[t]he exhaustion decision must reflect a 'discrete analysis of the particular default in question, to see whether there is 'a governmental interest compelling enough' to justify the forfeiting of judicial review' ") (quoting McGee v. United States, 402 U.S. 479, 485 (1971)); *see also* Vculek v. Yeutter, 754 F. Supp. 154, 155 (D.N.D. 1990) (excusing compliance with the exhaustion requirement in view of the Secretary's concession "that no purpose would be served by requiring [the producer] to appeal to the national level because no facts are in dispute and a third administrative determination would be redundant").

Of all of the cases excusing the exhaustion of administrative remedies requirement, the most extraordinary is DCP Farms v. Yeutter, No. DC90-194-B-O (N.D. Miss. Feb. 4, 1991). In that case, the court found that the administrative review process had been "so impermissively tainted by Congressional interference that it renders further administrative procedures futile." *Id.* at 18. Concluding that the congressional interference and the ASCS's actions taken in response to that interference would result in a violation of the producers' rights to a fair and impartial hearing if the producers' were required to take their appeal to DASCO, the court permanently enjoined the Secretary "from allowing the national level of the USDA, including DASCO, to participate further in any determinations" regarding the producers' eligibility for program payments for the crop years in dispute. *Id.* at 16-21; Order at 1, DCP Farms v. Yeutter, No. DC90-194-B-O (N.D. Miss. Feb. 4, 1991) (order granting permanent injunction).

sory counterclaims.[219] Moreover, the requirement applies even when the regulation upon which the county committee's decision is based is alleged to be inconsistent with the statute and unconstitutional.[220]

When the exhaustion requirement acts to bar judicial review of a party's claims, it has an acknowledged "harsh impact."[221] Accordingly, completion of the administrative appeal process before seeking judicial review is always advisable. In most cases, that means that judicial review should be sought only for a decision of DASCO, the Director of the National Appeals Division, or the Administrator[222] and not from a decision of the county committee[223] or

219. *Bisson*, 646 F. Supp. at 706-07, *aff'd*, 839 F.2d 418. In *Bisson*, the government initiated the action in an attempt to recover sums due from the producer under a CCC farm storage loan. The producer affirmatively defended and counterclaimed on the ground that he was entitled to administrative "forgiveness" of his loan. Although the producer had sought the "forgiveness" in an appeal to the state committee, he had failed to appeal to DASCO. The court held that both the affirmative defense and counterclaim were barred by the exhaustion of administrative remedies doctrine. *Id.* at 707.

220. Rigby v. Rasmussen, 275 F.2d 861, 865 (10th Cir. 1960); *see also* Devine, *supra* note 218, at 217-19 (discussing the *Rigby* decision).

In *Garvey v. Freeman*, one of the grounds on which the district court dismissed the producer's complaint was the producer's failure to exhaust his administrative remedies. Garvey v. Freeman, 263 F. Supp. 579, 581 (D. Colo. 1967), *aff'd*, 397 F.2d 600 (10th Cir. 1968). The producer had argued that the exhaustion requirement should be excused because the administrative remedies were "invalid, unlawful and inadequate." *Id.* at 581. Relying on *Rigby*, the court rejected the producer's argument, noting that administrative procedures "cannot be ignored because it is alleged they are not valid." *Id.* However, a review of the Tenth Circuit's opinion affirming the district court's dismissal indicates that the producer had appealed to DASCO and DASCO had affirmed the county committee's decision. *Garvey*, 397 F.2d at 608-09. Thus, it is not altogether clear how the producer failed to exhaust his administrative remedies. Nevertheless, the Tenth Circuit found that the administrative appeal procedure afforded to the producer was proper. *Id.* at 609; *see also* Bakersfield City School Dist. of Kern County v. Boyer, 610 F.2d 621, 626 (9th Cir. 1979) ("The mere allegation that the administrative proceeding from which judicial relief is sought is void is insufficient to compel judicial intervention prior to the exhaustion of administrative remedies . . . . Judicial intervention is appropriate in such a case only when there is a clear showing of irreparable injury, and time and expenses due to litigation are not enough.") (citations omitted).

221. *Madsen*, 866 F.2d at 1039 (Arnold, J., dissenting) (citing *McGee*, 402 U.S. at 484).

222. Although, for disputes involving pre-1991 crop years, DASCO will ordinarily make the final administrative determination, the Administrator of the ASCS is also authorized to make final decisions. 7 C.F.R. § 780.12 (1990) [hereinafter all citations to 7 C.F.R. will incorporate by this reference the year 1990]. When the Administrator so acts, there is no higher level of review, and the Administrator's decision marks the end of the administrative review process. *See Morrow*, 326 F.2d at 43 (noting that where there is no administrative appeal available, there is no administrative remedy to exhaust); *see also* Devine, *supra* note 218, at 217-19 (discussing the *Morrow* decision).

Under the 1990 farm bill, the decision of the Director of the National Appeals Division will ordinarily become the final administrative determination. S. 2830, 101st Cong., 2d Sess. § 1132(a), 136 CONG. REC. H11,029, H11,073 (1990) (adding § 426(c)(7) to tit. IV of the Agricultural Act of 1949). However, the Administrator has the authority to reverse or modify any determination made by the Director of the National Appeals Division. *Id.* (adding § 426(f) to tit. IV of the Agricultural Act of 1949).

223. *See* Westcott v. United States Dep't of Agric., 611 F. Supp. 351, 359 (D. Neb. 1984) (noting that the "decisions of county committees are not final," and that, for farm reconstitution matters, "the only decision that could be subject to review is the deputy administrator's final decision affirming the State committee's determination . . . ."), *aff'd*, 765 F.2d 121 (8th Cir. 1985); *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. 319-21 (1990) [hereinafter Linden] (generally discussing the exhaustion requirement). Linden, however, makes the questionable statement that *Westcott* reversed the prior Eighth Circuit decisions of Jones v. Hughes, 400 F.2d 585 (8th Cir. 1968), and United States v. Kopf, 379 F.2d 8 (8th Cir. 1967), allowing review of county committee determinations. *Id.* at 321 n.69. *Westcott* did not overrule those cases, rather, *Jones* and *Kopf* involved a different administrative appeal process from the process at issue in *Westcott*. Further, the issue in *Jones* and *Kopf* was

the state committee.[224] To underscore the significance of the exhaustion of administrative remedies requirement, this article will use the phrase "final ASCS decision" when referring to the decision for which judicial review is sought.

B. *Selecting the Forum for Judicial Review*

Two courts may review final ASCS decisions in the first instance—the federal district courts and the United States Claims Court. The choice of court is critical for at least two reasons.

First, different relief is available from each court. Both the federal district courts and the Claims Court can award money damages, but, while the Claims Court is not subject to a dollar limitation on its jurisdiction, the district courts can only entertain claims for sums up to $10,000. The differences are more pronounced for nonmonetary relief. While the district courts can award declaratory and equitable relief, the Claims Court does not have the authority to render purely declaratory relief and its authority to award equitable relief is very limited.

Second, for most producers, the federal district courts are a more convenient forum than the Claims Court. The Claims Court sits in Washington, D.C.,[225] while the federal district courts are geographically dispersed and closer to the residences of most producers who are prospective plaintiffs. Moreover, by virtue of its remoteness from where a particular producer's claim arose, the Claims Court may not be as well suited to "understand and

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whether the Secretary had the authority to review county committee determinations, not whether judicial review was available. *See Jones*, 400 F.2d at 589-90 (also discussing the issue in *Kopf*).

224. Although the final level of review for most matters is at the national level of the ASCS, determinations of "a State committee with respect to program payment yields or crop acreage bases are not appealable." 7 C.F.R. § 780.11(b); *see also supra* note 173 (identifying other administratively unappealable state committee determinations). Hence, the state committee would be the final level of review for such a determination. *See Madsen*, 866 F.2d at 1307 (holding that the producer had failed to exhaust administrative remedies when he did not appeal a county committee yield determination to the state committee).

225. The Claims Court is not insensitive to the potential inconvenience presented by its sitting in the District of Columbia. Indeed, it is perhaps more accurate to state that the court is sensitive to criticism that its location makes it an inconvenient forum for litigants, an observation suggested by the following pronouncement of the court:

> Finally, plaintiffs make reference to the added difficulty of pursuing this litigation through the Claims Court rather than through local (district) courts . . . . While the Claims Court sits in the District of Columbia, every effort is made to accommodate the needs of complainants, often at great inconvenience to the court. Out of town counsel may participate in pretrial conferences and oral arguments telephonically and almost without exception trial[s] are held in the geographic locale which will best facilitate the attendance of plaintiff's and defendant's witnesses in local courtrooms made available to the Claims Court. The Claims Court has historically made every reasonable effort to minimize the burden upon the parties resulting from its broad geographic jurisdiction. The additional burden on plaintiffs (if any) of Claims Court jurisdiction will be negligible.

Rieschick v. United States, 21 Cl. Ct. 621, 626 (1990); *see also* Sisk, *Two Proposals to Clarify the Tucker Act Jurisdiction of the Claims Court*, 37 FED. B. NEWS & J. 47, 51 (1990) [hereinafter Sisk] (noting that "the Claims Court routinely sits throughout the country to hear cases"). *But see* Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725, 747 (1988) [hereinafter Webster I] ("Litigating in district court means a home forum for the plaintiff. Not only can the claimant save the costs of litigating in the Claims Court, but he or she can gain a judge sensitive to local conditions." (footnote omitted)).

evaluate the various factual circumstances" of the producer's claim as would be the local federal district court.[226]

The following discussion elaborates upon the jurisdictional differences between the federal district courts and the Claims Court. First, the relief available from the district courts is described. That description is followed by an explanation of the limitations on the district courts' jurisdiction. Then, the jurisdiction of the Claims Court is examined, including the limitations on that jurisdiction. Later, this article offers a practical analysis of each of the remedies available from each court.

Included in the following discussion is a brief examination of the ramifications of the United States Supreme Court's decision in *Bowen v. Massachusetts*[227] for the judicial review of final ASCS decisions. That decision and its progeny has spawned considerable confusion over the appropriateness of seeking judicial review of final ASCS decisions in the district courts where the underlying farm program payments at issue exceed the sum of $10,000, irrespective of whether the producer seeks a judgment for that sum.

1. *The Relief Available from the Federal District Courts*

In reviewing a final ASCS decision,[228] a federal district court can render a declaratory judgment;[229] issue a writ of mandamus;[230] use its general equitable powers to grant an injunction;[231] and award damages up to the sum of

226. Esch v. Yeutter, 876 F.2d at 983, 985 (quoting with approval the observation of the United States Supreme Court in Bowen v. Massachusetts, 487 U.S. 879, 908 (1988) " 'that a district court would be in a better position to understand and evaluate [local law questions that might arise] than a single tribunal headquartered in Washington . . . .' " and supplementing that observation with the statement "that district courts are better equipped to understand and evaluate the various factual circumstances of [ASCS related cases] than is the Claims Court, . . . far removed from the controversy, and inconvenient to most of those likely to become litigants"), *modifying* Esch v. Lyng, 665 F. Supp. at 6; *see also* Pires & Knishkowy, *Jurisdictional Issues in Payment Limitation Cases*, 2 MINN. FAMILY FARM L. UPDATE 3 (Nov.-Dec. 1987) [hereinafter Pires & Knishkowy] ("The district court generally is a preferable forum because of its equitable powers and the speed with which it can dispose of a case. Waiting for USDA's payment deadline to pass before suing in the Claims Court for money may be an inadequate remedy because prompt receipt of payment is often so critical to a farmer's existence."); Webster I, *supra* note 225, at 747 n.173 (noting that when litigating in the Claims Court, "[m]ost lawyers must gear up to deal with an unfamiliar court and unfamiliar procedures . . . .").

227. 487 U.S. 879 (1988).

228. Excluded from this discussion are claims alleging the commission of a tort, discrimination, or other grievance that does not concern farm program eligibility or compliance with program requirements. For examples of such litigation, see Brackin v. United States, 913 F.2d 858 (11th Cir. 1990) (claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680) (1988) [hereinafter all references to 28 U.S.C. will incorporate by this reference the year 1988]; Henderson v. ASCS, 317 F. Supp. 430 (M.D. Ala. 1970) (claim of racial discrimination).

229. *See, e.g., Justice*, 716 F. Supp. at 1568-69 (holding that a federal district court had the authority to enter a declaratory judgment in an action against the Secretary involving a challenge to a DASCO determination). The district court's authority to render declaratory judgments is derived from the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202; *see also infra* notes 347-60 and the accompanying text (discussing claims for declaratory relief in the district courts).

230. *See* Southeastern Peanut Ass'n v. Lyng, 734 F. Supp. 519, 523-24 (M.D. Ga. 1990). The district court's authority to issue writs of mandamus is found at 28 U.S.C. § 1361.

231. *See* Esch v. Lyng, 665 F. Supp. at 15 (enjoining the Secretary in a challenge to a DASCO determination), *modified sub nom.* Esch v. Yeutter, 876 F.2d 976; *see also* SCHWARTZ, *supra* note 217, at § 9.7 (discussing the use of injunctions in challenges to administrative actions and characterizing the injunction "as the general nonstatutory remedy in federal law").

Limitations to this authority arise from 15 U.S.C. § 714b(c) which bars attachment, injunction,

$10,000.[232] The underlying jurisdiction for the issuance of the first two forms of relief is provided by 28 U.S.C. § 1331, the general federal question jurisdiction statute.[233] The district court's jurisdiction for the third form of relief is provided by the Tucker Act,[234] sometimes referred to as the "Little" Tucker Act because of the monetary limits it imposes on the district court's jurisdiction.[235]

In the review of final ASCS decisions, the federal district courts may determine and remedy violations of the fifth amendment to the United States Constitution[236] and "compel agency action unlawfully withheld . . . [or] hold unlawful and set aside agency action" found to be within one of the prohibited categories of agency action specified in § 706 of the Administrative Procedure

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garnishment, or other similar process against the CCC. 15 U.S.C. § 714b(c) (1988) [hereinafter all citations of 15 U.S.C. will incorporate by this reference the year 1988]; *see, e.g.*, Central Prod. Credit Ass'n v. Raymond, 732 F. Supp. 986, 986-87 (E.D. Ark. 1990); *Justice*, 716 F. Supp. at 1569; *Westcott*, 611 F. Supp. at 354, *aff'd*, 765 F.2d 121; *see also infra* notes 361-82 and the accompanying text (discussing claims for injunctions in the district courts, including the limitations imposed by 15 U.S.C. § 714b(c)).

232. *See* Robinson v. Block, 608 F. Supp. 817, 819 (W.D. Mich. 1985). The district court's authority to award monetary damages against the United States in an amount up to $10,000 is found in the "Little" Tucker Act. Tucker Act, 28 U.S.C. § 1346(a)(2); *see also infra* notes 383-87 and the accompanying text (discussing claims for damages in the district courts).

233. The Declaratory Judgments Act, 28 U.S.C. § 2201, 2202, "does not itself confer jurisdiction on a federal court where none otherwise exits." Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 822 (10th Cir. 1981) (citations omitted). Under 28 U.S.C. § 1331, a district court "has jurisdiction over all civil actions 'arising under' the Constitution, the laws, or the treaties of the United States." Cullipher v. Lindsey Rice Mill, Inc., 706 F. Supp. 35, 36 n.1 (W.D. Ark. 1989) (citing 28 U.S.C. § 1331). Thus, "federal question jurisdiction exists when a federal law provides both a right and the remedy for that right or when a well pleaded complaint based on state law establishes that resolution of the dispute requires determination of the meaning or application of a federal law." *Id.* at 36 (citations omitted).

There is no "amount in controversy" requirement under 28 U.S.C. § 1331. *E.g.*, Beller v. Middendorf, 632 F.2d 788, 795 (9th Cir. 1980). Of course, 28 U.S.C. § 1331, while affording a jurisdictional basis for the district court to review a final ASCS decision, does not waive the sovereign immunity of the United States. In most cases where declaratory or injunctive relief is sought in a review of a final ASCS decision, the waiver of sovereign immunity will be found in the Administrative Procedure Act. Adminstrative Procedure Act, 5 U.S.C. § 702 (1988) [hereinafter all citations to 5 U.S.C. will incorporate by this reference the year 1988]; *see infra* notes 249-98 and the accompanying text (discussing the limitations of 5 U.S.C. § 702).

Jurisdiction may also be supported by 28 U.S.C. § 1337 which provides, in part, that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce . . . ." *See* Dallas City Packing, Inc. v. Butz, 411 F. Supp. 1338, 1344 (N.D. Tex. 1976). However, if anything, the coupling of § 1337 with § 1331 as the grounds for the district court's jurisdiction would be redundant.

234. 28 U.S.C. § 1346(a)(2).

235. Under the Tucker Act, the district courts and the Claims Court are given concurrent jurisdiction to award money damages against the United States arising out of certain specified claims. 28 U.S.C. § 1346(a)(2) (district courts), § 1491 (Claims Court). However, the concurrent jurisdiction extends only to claims seeking up to $10,000. 28 U.S.C. § 1346(a)(2). Where a claim seeks more than $10,000, the Claims Court has exclusive jurisdiction. 28 U.S.C. § 1491. *See* United States v. Mitchell, 463 U.S. 206, 211-12 (1983); *see also infra* notes 383-87 and the accompanying text (discussing claims for damages in the district courts). Because of the dollar limitation imposed by the Tucker Act on the jurisdiction of the district courts, 28 U.S.C. § 1346(a)(2) is sometimes referred to as the "Little" Tucker Act. "Under the Tucker Act, the United States has waived its sovereign immunity" with respect to those claims that are actionable under the Act. *Amalgamated Sugar Co.*, 664 F.2d at 823 (citations omitted).

236. *See, e.g.*, *Garvey*, 397 F.2d at 612-13 (finding no due process violation); *Westcott*, 611 F. Supp. at 359 (finding no due process violation), *aff'd*, 765 F.2d 121; Prosser v. Butz, 389 F. Supp. 1002, 1006-07 (N.D. Iowa 1974) (finding a due process violation and voiding the penalty imposed by the county committee).

Act (APA).[237] In addition, under the Tucker Act, the federal district courts may award damages against the United States on claims "founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . ."[238]

Claimants seeking money damages in the federal district courts are limited in two significant respects. First, under the Tucker Act, the federal district courts cannot award damages against the United States in excess of $10,000.[239] Claims for damages exceeding that amount brought in the district courts must be dismissed or transferred[240] to the Claims Court because the Claims Court has exclusive jurisdiction over such claims.[241]

Second, the waiver of sovereign immunity found in § 702 of the APA applies only to actions "seeking relief other than money damages."[242] Accordingly, the federal district courts may not entertain an action for judicial review of agency action under the APA's waiver of sovereign immunity if the action seeks, or can be characterized as seeking, "money damages."

As a practical matter, the costs associated with litigation mean that most actions challenging final ASCS decisions will involve disputes over farm program payments in excess of $10,000. Therefore, because of the jurisdictional limitations imposed by the Tucker Act and the "money damages" limitation on the APA's waiver of sovereign immunity, a threshold issue is likely to be whether a producer's claim arising out of a final ASCS decision is one for money damages against the United States in excess of $10,000. This issue may arise even if the producer has not prayed for a monetary judgment in his or her complaint, and the resolution of the issue hinges on two factors—the

237. 5 U.S.C. § 706; *see also infra* note 428 (setting forth the text of § 706); *see, e.g.*, Esch v. Yeutter, 876 F.2d at 983-85, *modifying* Esch v. Lyng, 665 F. Supp. 6; *Justice*, 716 F. Supp. at 1575.

238. 28 U.S.C. § 1346(a)(2); *see also supra* note 235 (the district court can entertain such claims only where the sum sought does not exceed $10,000). For other limitations on the district courts' ability to award damages under § 1346(a)(2), the Tucker Act, *see infra* notes 383-87 and the accompanying text.

239. Under 28 U.S.C. § 1346(a)(2), the federal district courts have concurrent jurisdiction with the Claims Court to award monetary damages against the United States for sums up to $10,000. In addition to being limited in monetary amount, this jurisdiction is limited to the following:

> Any other civil action or claim against the United States . . . founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

U.S.C. § 1346(a)(2); *see, e.g.*, Divine Farms, Inc. v. Block, 679 F. Supp. 867, 869-70 (S.D. Ind. 1988) (discussing the district court's Tucker Act jurisdiction).

240. District courts are authorized to transfer cases to the Claims Court "if the interest of justice so requires." *Divine Farms*, 679 F. Supp. 872 (citing 28 U.S.C. § 1406(c)). An order transferring a case from the district court to the Claims Court is not appealable under the collateral order doctrine. Alimenta, Inc. v. Lyng, 872 F.2d 382, 383-85 (11th Cir. 1989); Raines v. Block, 798 F.2d 377, 379 (10th Cir. 1986), *dismissing appeal from*, 599 F. Supp. 196 (D. Colo. 1984). The transfer of an action to the Claims Court does not vest the Claims Court with jurisdiction. The Claims Court has the authority to decide its own jurisdiction. Marvel Eng'g Co. v. United States, 14 Cl. Ct. 614, 617 (1988).

241. The Claims Court has exclusive jurisdiction for Tucker Act claims seeking damages in excess of $10,000. *See, e.g.*, *Amalgamated Sugar Co.*, 664 F.2d at 823; *Divine Farms*, 679 F. Supp. at 870.

242. 5 U.S.C. § 702.

"true" nature of the producer's claim and the meaning of the phrase "money damages."

To illustrate the two analyses that have been used to resolve this issue, assume that a producer has been found by the ASCS to be ineligible for certain program benefits. The benefits in dispute total more than $10,000. The producer claims that ASCS's final decision was arbitrary and capricious.

Now assume that there are two different complaints in district court on behalf of the producer. The first complaint invokes the court's federal question jurisdiction and premises the government's waiver of sovereign immunity on § 702 of the APA. It asks the court to determine that the producer is eligible for the program benefits or, alternatively, to award damages in a certain amount in excess of $10,000. The complaint includes a request for preliminary injunctive relief.

Does the first complaint assert a claim for money damages against the United States in excess of $10,000? Under an assessment of the "true" nature of the complaint, the answer may be yes. Thus, the district court would not have jurisdiction. Such an assessment, based on analogous facts, was made by the court in *Divine Farms, Inc. v. Block*.[243] There, the analysis turned on whether the plaintiff's request for equitable relief predominated over the claim for monetary damages.

In *Divine Farms*, a producer challenged the failure of the ASCS to adjust its milk base. During the period specified by the applicable statute for determining the milk base, the producer had suspended milk production in order to make repairs to his milking equipment and to make the equipment more efficient. The ASCS declined to adjust the base to reflect the producer's milk production prior to the producer's suspending operations on the grounds that the statute gave the Secretary that authority only for situations in which the production had been reduced or interrupted by a natural disaster or other circumstances beyond the producer's control. The milk base at issue was to be used as a point of reference for a subsidy program under which the producer would be paid for marketing reductions during a fifteen month contract period.[244]

The producer in *Divine Farms* brought a district court action seeking the adjusted milk base or, in the alternative, $90,000 in damages. Jurisdiction was founded on the court's general federal question jurisdiction, and claims were premised on both the APA and the fifth amendment to the United States Constitution. In addition, the producer sought injunctive relief.[245]

In concluding that the claim for equitable relief did not predominate and that the action essentially was one for money damages, the court was persuaded by two factors. First, the "claimed injury [could] be redressed fully by an award of damages."[246] Second, "by awarding damages . . . there would be

243. 679 F. Supp. 867 (S.D. Ind. 1988).
244. *Id.* at 867-68.
245. *Id.* at 869.
246. *Id.* at 871.

no necessity for an equitable judgment."[247] Based on these two factors, the court concluded that

> [the equitable] relief is merely incidental to the primary remedy requested which mandates compensation from the federal government . . . . Thus, Divine Farms' claim 'is essentially one against the United States for the payment of damages.' Such a claim, when in excess of $10,000, is within the exclusive jurisdiction of the U.S. Claims Court.[248]

Returning to the hypothetical, assume that the second complaint does not seek monetary damages. Instead, the request for relief is limited to "a declaration of eligibility for the subsidy programs in question."[249] More particularly, assume that the underlying issue concerns whether the original producer and eight other producers bringing the action are eligible to participate in certain farm programs as nine "persons" or whether they are to be combined into one or two "persons" for payment purposes under the federal farm program payment limitation rules.[250]

In addition, assume the second complaint adds allegations asserting that a declaration of the producers' eligibility for the program benefits as nine persons would "placate"[251] creditors of the producers who expected to receive repayment from the program benefits. It alleges that a declaration of eligibility would protect the producers' operation from detrimental actions that could be taken against it by those creditors.[252] Does the second complaint assert a

247. *Id.* In essence, the court found that the producer had failed to establish irreparable harm. *Id.* at 869.

248. *Id.* at 871 (citation omitted). The reasoning of the *Divine Farms* court is supported by the related rule that where the real effect of the complaint is to obtain money from the government, the Claims Court's jurisdiction cannot be avoided by framing the complaint to appear to seek only injunctive or declaratory relief. *See, e.g., Amalgamated Sugar Co.*, 664 F.2d at 824 ("It is well-settled that the jurisdiction of the Court of Claims cannot be evaded by framing a complaint to seek only injunctive, mandatory, or declaratory relief against government officials." (citations omitted)); Kentucky *ex. rel.* Cabinet for Human Resources v. United States, 16 Cl. Ct. 755, 761 (1989) (citing Chula Vista City School v. Bennett, 824 F.2d 1573, 1579 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 774 (1988)).

249. *See* Esch v. Lyng, 665 F. Supp. at 8, *modified sub nom.* Esch v. Yeutter, 876 F.2d 976 (As described by the court of appeals, "In the District Court, appellees [the producers] pressed for annulment of the Department's [USDA] decision to suspend $628,055.38 in program payments assertedly due them." *Esch*, 876 F.2d at 977 (footnote omitted)); *see also Justice*, 716 F. Supp. at 1568 (The producer sought "a declaratory judgment that Defendant Lyng's [the Secretary of Agriculture] administrative determination combining all plaintiffs as 'one person' under the 1986 cotton program . . . was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law under the judicial review provisions of the Administrative Procedure Act.").

250. *See* Esch v. Lyng, 665 F. Supp. at 8, 10. Most federal farm programs are subject to payment limitations. In addition to imposing monetary limits on program payments, the federal farm program payment limitations rules establish complex requirements for who may be a "separate person" for purposes of eligibility for program payments. Each "separate person" participating in a farming operation is entitled to receive payments up to the applicable payment limit. Thus, in farming operations in which more than one individual or entity participates, the qualification of each of those "persons" as "separate persons" increases the amount of farm program payments that can be received. However, in such operations, the failure of any one or more of those individuals to satisfy the separate person requirements will result in their combination into one "person" for program payment purposes. For a comprehensive explanation of the federal farm program payment limitation rules, see C. KELLEY & A. MALASKY, *A Lawyer's Guide to Payment Limitations* (1990) [hereinafter KELLEY & MALASKY].

251. *See* Esch v. Lyng, 665 F. Supp. at 12.

252. *See id.* at 14.

claim for money damages against the United States for a sum in excess of $10,000?

In *Esch v. Lyng*,[253] modified on appeal in *Esch v. Yeutter*,[254] both the district court and the court of appeals concluded that a claim similar to that posed in the second hypothetical complaint did not assert a claim for money damages against the United States for a sum in excess of $10,000. Thus, the action was properly before the district court. That conclusion was reached notwithstanding the fact that the requested declaratory relief, if granted, could "form the basis of a later money judgment."[255]

In *Esch*, the producers challenged DASCO's determination that they were not eligible to receive crop subsidy and Conservation Reserve Program (CRP) payments as a nine-person farming operation.[256] Jurisdiction was premised on the general federal question statute and the APA was asserted as the government's waiver of sovereign immunity.[257]

Initially, the producers asked the district court to award them damages allegedly owed them under the subsidy and CRP programs. However, they voluntarily relinquished that claim and instead asked only that they be declared eligible for program payments as a nine-person farm.[258] As noted by the district court, "Such a declaration would . . . have the prospective effect of entitling them to federal benefits . . . [and] would also have the immediate and undeniably valuable effect of allaying the concerns of their various creditors . . . ."[259]

In concluding that it could hear the action, the district court used an analysis that resembled the "true" nature of the action analysis used by the court in *Divine Farms*. In essence, the district court concluded

> that the primary purpose of this suit is not the recovery of money damages from defendant. Plaintiffs have eschewed any claims for compensatory damages in this court, and the declaratory relief they request clearly has both prospective and immediate value to them such that this court may entertain their suit.[260]

The court of appeals took a different approach, an approach prompted by

253. 665 F. Supp. 6 (D.D.C. 1987).

254. 876 F.2d 976 (D.C. Cir. 1989).

255. Esch v. Lyng, 665 F. Supp. at 12 (citations omitted); Esch v. Yeutter, 876 F.2d at 984-85; *see also Justice*, 716 F. Supp. at 1568. The *Justice* court stated:

> The Tucker Act only applies to claims for money damages . . . and does not preclude review by a district court of an agency action when the relief sought is other than money damages. The Act does not limit the jurisdiction of district courts where nonmonetary relief may form the basis for a future money judgment.

Id. (citations omitted).

256. Esch v. Lyng, 665 F. Supp. at 7-10. The ASCS had determined that the producers were "one person for deficiency payment purposes and two persons for CRP purposes . . . ." *Id.* at 10. As a result, they were denied $628,000 in program payments that they would receive as a nine-person operation. *Id.* at 11.

257. Esch v. Lyng, 665 F. Supp. at 12; Esch v. Yeutter, 876 F.2d at 977 nn.6, 7.

258. Esch v. Lyng, 665 F. Supp. at 11; Esch v. Yeutter, 876 F.2d at 977 n.5.

259. Esch v. Lyng, 665 F. Supp. at 11.

260. *Id.* at 12.

the United States Supreme Court's decision in *Bowen v. Massachusetts*[261] which was rendered after the district court had entered judgment in *Esch*. For

261. 487 U.S. 879 (1988). In *Bowen*, the pivotal issue was the meaning of the phrase "money damages" in § 702 of the APA. Adminstrative Procedure Act, 5 U.S.C. § 702; *see infra* note 263 (setting forth, in part, the text of § 702). The underlying dispute involved the Commonwealth of Massachusetts's claim that the Secretary of Health and Human Services had refused to reimburse the Commonwealth for certain of its expenditures under the Medicaid program. *Bowen*, 487 U.S. at 882. Under the cooperative arrangement between Massachusetts and the federal government, the federal government reimbursed Massachusetts for certain categories of medical assistance provided by Massachusetts. *Id.* at 883. As the arrangement was described by the Court,

> Although the federal contribution to a State's Medicaid program is referred to as a 'reimbursement,' the stream of revenue is actually a series of huge quarterly advance payments that are based on the State's estimate of its anticipated future expenditures. The estimates are periodically adjusted to reflect actual experience. Overpayments may be withheld from future advances or, in the event of a dispute over a disallowance, may be retained by the State at its option pending resolution of the dispute.

Id. at 883-84 (footnotes omitted).

Massachusetts challenged the Secretary's refusal to reimburse it in federal district court invoking the court's general federal question jurisdiction under 28 U.S.C. § 1331 and alleging that the United States had waived its sovereign immunity through 5 U.S.C. § 702. *Id.* at 887. Seeking declaratory and injunctive relief, Massachusetts requested the court to "set aside" the Secretary's action. *Id.*

Before the Supreme Court, the Secretary argued that the district court was not authorized to review his decision to disallow reimbursement for the disputed expenditures to Massachusetts because Massachusetts's action was not one "seeking relief other than money damages" as specified in § 702. The Secretary also argued "that even if § 702 is satisfied, § 704 [of the APA] bars relief because the State has an adequate remedy in the Claims Court." *Id.* at 891 (citing 5 U.S.C. § 704).

The Court rejected both of the Secretary's arguments. It held that "[f]irst, insofar as the complaint sought declaratory and injunctive relief, it was certainly not an action for money damages. Second, and more importantly, even the monetary aspects of the relief that the State sought are not 'money damages' as that term is used in the law." *Id.* at 893.

It supported the second reason by distinguishing between awards of monetary relief as compensation for a suffered loss and monetary awards that are a " 'specie remedy.' " *Id.* at 895 (quoting Maryland Dep't of Human Resources v. Department of HHS, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (citing D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 135 (1973))). Based on that distinction and " 'the ordinary meaning of the words Congress employed,' " the Court implicitly joined in the conclusion of the District of Columbia Circuit that the "term 'money damages', 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief." *Id.* Having joined in that construction of the phrase "monetary damages," the Court found that the district court had the authority to review the Secretary's action under § 702:

> The State's suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary 'shall pay' certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.

Id. at 900 (emphasis in original); *see also id.* at 910 ("[S]ince the orders [of the district court] are for specific relief (they undo the Secretary's refusal to reimburse the State) rather than for money damages (they do not provide relief that substitutes for that which ought to have been done) they are within the District Court's jurisdiction under § 702's waiver of sovereign immunity.").

The Court also found that the action was not barred by 5 U.S.C. § 704 which precludes the review of agency action under the APA when there is another adequate remedy. *Id.* Noting that the Claims Court "does not have the general equitable powers of a district court to grant prospective relief," the Court found that the jurisdiction of the Claims Court to entertain the action "would be at least doubtful." *Id.* at 905 (footnote omitted). Significantly, the Court questioned whether a disallowance claim would be cognizable under the Tucker Act because the statutory mandate of federal grant-in-aid programs is not likely to be interpreted as "money mandating." *Id.* at 905 n.42. For a discussion of the "money mandating" requirement of the Tucker Act, *see infra* notes 391-412 and the accompanying text.

The *Bowen* decision has generated spirited commentary. For a particularly informative analyses of the decision, *see* Webster I, *supra* note 225; Webster, *Choice of Forum in Claims Litigation*, 37 FED. B. NEWS & J. 534 (1990) [hereinafter Webster II]; Sisk, *supra* note 225; *see also* Byse, *Recent Developments in Federal Administrative Law: Damage Actions Against the Government or Government Employees*, 4 ADMIN. L.J. 275, 276-77 (1990) (briefly discussing *Bowen*).

the court of appeals, the analysis primarily turned on the definition of the phrase "money damages." The definition of that phrase was pivotal because the producers in *Esch* had invoked § 702 of the APA,[262] which permits the district courts to review agency action only where the relief sought is "other than money damages,"[263] as the government's waiver of sovereign immunity.[264]

In *Bowen*, the Court interpreted the phrase "money damages" in § 702 of the APA to mean "monetary compensation for an injury to [one's] person, property, or reputation . . . ."[265] The court of appeals in *Esch* followed that interpretation by defining "money damages" as "monetary compensation for a legal wrong suffered."[266] In other words, "money damages," as used in § 702, was held to refer to "recompense for an injury."[267]

For the Supreme Court in *Bowen* and the court of appeals in *Esch*, the conclusion that money damages " 'are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation' "[268] distinguishes an action for "money damages" from "a suit envisioning reversal of a disallowance [of a monetary payments] decision . . . ."[269] Accordingly, the court of appeals in *Esch* concluded that "money damages" does not mean the sum involved when the government has failed to pay money as the result of an allegedly improper determination by the ASCS of a producer's entitlement to farm program payments.[270]

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262. 5 U.S.C. § 702.

263. In relevant part, § 702 states as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party . . . .

5 U.S.C. § 702 (emphasis added).

264. Esch v. Yeutter, 876 F.2d at 977.

265. Bowen v. Massachusetts, 487 U.S. 879, 893 (1988) (citation omitted).

266. Esch v. Yeutter, 876 F.2d at 981. In its analysis of the Court's reasoning in *Bowen*, the court of appeals noted that

> [t]he Court differentiated a suit envisioning reversal of a disallowance decision from one for damages as recompense for an injury. The distinguishing factor was that Massachusetts did not request monetary compensation for a legal wrong suffered; rather, it sought the very thing which it has been deprived of which happened to be the payment of money.

Id.

267. *Id.* The court of appeals based its reasoning on the Court's statement in *Bowen* that

> [our] cases have long recognized the distinction between an action at law for damages — which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation — and an equitable action for specific relief — which may include an order for the reinstatement of an employee with back pay, or for 'the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'

Id. (quoting *Bowen*, 487 U.S. at 893 (emphasis in original)).

268. *Id.* at 981 (quoting *Bowen*, 487 U.S. at 893).

269. *Id.* at 981-82 (citing *Bowen*, 487 U.S. at 895-96 (quoting *Maryland Dep't of Human Resources*, 763 F.2d at 1446)).

270. *Id.* at 984 ("[A]ppellees [the producers] contend solely for an injunction against an arbitrary or capricious administrative denial of subsidy payments to them. Their suit for the relief, in the

More specifically, the court of appeals noted that "a suit envisioning reversal of a disallowance decision" is analogous to an action for specific performance.[271] When the entitlement at issue is one for money, the effect of a disallowance decision is to deprive the intended recipient of those funds. An action to obtain the withheld funds is different from an action seeking to recover losses suffered by virtue of the withholding of the funds.[272] Accordingly, after noting that in the case before it the producers were "contend[ing] solely for an injunction against an arbitrary or capricious administrative denial of subsidy payments to them," the court of appeals summarized its reasoning by emphasizing that the

> [a]ppellee's [the producers] specific complaint is that the procedures leading up to the Department of Agriculture's decision to deprive them of payments were totally inadequate. The redress they want — a redetermination, in a fair and impartial hearing, of their status under the subsidy statutes — simply is not money damages in compensation for the legal injury they allegedly have suffered.[273]

In addition to considering whether § 702's proscription against judicial review of actions seeking "money damages" prevented the district court from hearing the producers' claims, the court of appeals in *Esch* also determined that § 704 of the APA was not an obstacle. Section 704 of the APA provides, in relevant part, that "[a]gency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court* are subject to judicial review."[274] In effect, § 704 precludes review where there is an adequate remedy in another forum, such as the Claims Court.

Several considerations moved the court of appeals to hold that the producers before it had no other adequate remedy except in the district court. The first of the considerations addressed by the court was the relief available from the Claims Court. Then, the court considered the jurisdictional requirements that must be met before an action can be heard in the Claims Court. Finally, the court compared the suitability of the district courts and the Claims Court to review final ASCS decisions.

When the court of appeals considered the relief available in the Claims

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words of the Supreme Court, is 'certainly not an action for money damages.' " (quoting *Bowen*, 487 U.S. at 893)).

271. *Id.* at 981 (citing *Bowen*, 487 U.S. at 893, and noting *Bowen's* reliance on *Maryland Dep't of Human Resources*, 763 F.2d at 1446).

272. *Id.* The court of appeals also noted that the Court in *Bowen* had found that "the distinction between 'money damages' and 'specific relief' — even where it results in the payment of money — was fully supported" in the 1970 congressional hearings on the APA. *Id.* at 982 n.50 (citing *Bowen*, 487 U.S. at 898).

273. *Id.* at 984 (footnote omitted). The court of appeals observed that "the monetary aspect of any relief appellees might be entitled to is much more of a matter of guesswork" than was the case in *Bowen*:

> In *Bowen*, reversal of the administrative decision on the merits resulted inexorably in payment of money from the federal treasury . . . . Here, in contrast, a reversal would merely invalidate the reasons proffered for the reduction of benefits, and would require no more than reexamination of the administrative decision on its merits.

Id. at 984 (footnotes omitted).

274. 5 U.S.C. § 704 (emphasis added).

Court, it concluded that "the Claims Court lacks equitable jurisdiction to award injunctive relief of the type appellees need."[275] Noting that the "appellees' circumstances were so dire that even the District Court's preliminary injunction did not allay their creditors' concerns,"[276] the court of appeals characterized this consideration as "foremost" among the considerations leading to its conclusion "that the Claims Court does not possess the kind of review procedures which would displace the District Court's APA jurisdiction over appellees' suit."[277]

Turning to the Claims Court's jurisdiction under the Tucker Act, the court of appeals found that the aggrieved producers in *Esch* had not asserted a "claim for a sum immediately due and owing by the Federal Government" as required before the Claims Court has jurisdiction under the Tucker Act.[278] Rather, the producers had alleged that the Secretary had acted arbitrarily and capriciously in determining their ineligibility for program payments. Thus, their claim was for a proper redetermination of their eligibility, not for an immediately due and payable sum.[279]

The court of appeals also concluded that "[t]he statute [relating to the payment limitations applicable to certain federal farm program payments] undergirding their [the producers] suit does not mandate compensation."[280] In order to be cognizable under the Tucker Act, a claim based on a statute or regulation must be founded on a statute or regulation that mandates the payment of money.[281] Therefore, in the absence of a claim premised on a "money mandating" statute, a noncontractual basis for Claims Court jurisdiction under the Tucker Act did not exist.[282]

As additional support for its conclusion that the producers' claim was not premised on a "money mandating" statute, the court noted that the disallowed farm program payments were not intended to be "compensation for a past wrong, but to subsidize future . . . expenditures."[283] For the court of

275. Esch v. Yeutter, 876 F.2d at 984 (footnotes omitted). For a discussion of the equitable authority of the Claims Court, *see infra* notes 329-30, 387 and the accompanying text.

276. Esch v. Yeutter, 876 F.2d at 985 n.78 (citing Esch v. Lyng, 665 F. Supp. at 14, 16 n.1).

277. Esch v. Yeutter, 876 F.2d at 984, 985.

278. *Id.* at 985 (footnote omitted). The Tucker Act requires that claims brought pursuant to it be for sums immediately due and payable by the federal government. *See infra* notes 325-26 and the accompanying text.

279. As the court of appeals noted,

> This case cries out for the application of the common law doctrine that specific relief is available when money damages are inadequate. Considering the speculative nature of the value to appellees [the producers] of proper administrative hearing procedures, appellees hardly could expect to recover in money damages more than the expenses incurred in attacking the inadequacy of the agency's procedures. They would not be entitled to any of the money they hope to ultimately receive.

Esch v. Yeutter, 876 F.2d at 985 n.79.

280. *Id.* at 985.

281. *See infra* notes 323-28, 391-412 and the accompanying text.

282. *See* Esch v. Yeutter, 876 F.2d at 983 n.61.

283. *Id.* at 985 (footnote omitted). The deficiency and CRP payments at issue in *Esch v. Yuetter* were indisputably subsidy payments. For a discussion of the general nature of deficiency payments, see *supra* note 15. Under the CRP, "[i]n exchange for placing cropland fields with highly erodible soil into [the Program] for 10 years, the USDA pays participating farm owners or operators an annual per-acre rent and one-half of the cost of establishing conservation practices and a permanent

appeals, that distinction was significant because of the Supreme Court's observation in *Bowen* that the type of "money mandating" statutes upon which noncontractual Tucker Act claims must be based[284] "attempt to compensate a particular class of persons for past injuries or labors" rather than provide subsidies.[285]

In addressing the contractual jurisdiction of the Claims Court under the Tucker Act, the court of appeals observed that the producers in *Esch* were not seeking relief based on "the provisions of a contract they have negotiated with the Department of Agriculture."[286] Thus, Tucker Act jurisdiction based on an express or implied contract with the federal government was not present.[287]

Finally, the court of appeals assessed the suitability of review in the district courts compared to review in the Claims Court. It concluded that the "district courts are better equipped to understand and evaluate the various factual circumstances of these cases than is the Claims Court, headquartered in Washington, [D.C.,] far removed from the controversy, and inconvenient to most of those likely to become litigants."[288]

The analysis employed by the court of appeals in *Esch* has potentially profound significance to producers seeking the review of final ASCS decisions in the federal district courts. Perhaps the best illustration of its significance is the case of *Justice v. Lyng*.[289] In *Justice*, the producers sought a declaratory judgment that a determination of the Secretary, acting through the ASCS, combining thirty-one general partners as one "person" under the 1986 cotton program "was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law under the judicial review provisions of the Administrative Procedure Act."[290] No monetary relief was sought.[291] Nevertheless, over

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land cover." C. YOUNG & C. OSBORN, THE CONSERVATION RESERVE PROGRAM: AN ECONOMIC ASSESSMENT 1 (Agric. Econ. Rep. No. 626, 1990).

284. *See infra* notes 286-87 and the accompanying text.

285. *Bowen*, 487 U.S. at 907 n.42 (cited by Esch v. Yeutter, 876 F.2d at 985 n.81).

286. Esch v. Yeutter, 876 F.2d at 985 (footnote omitted). The court noted that

> [i]f appellees' suit is not based on a contract with the Federal Government, it cannot lie within the Claims Court's contractual jurisdiction . . . . Although appellees signed 'contracts' with the Federal Government, and although the Department's regulations denominate the documents executed by the Federal Government and program participants as 'contracts', . . .
>
> > we see no reason to assume that what is involved here is a contract within the meaning of the Tucker Act. As the Supreme Court recently noted, 'Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.' [Appellees'] claims arise under a federal grant program and turn on the interpretation of statutes and regulations rather than on the interpretation of an agreement negotiated by the parties. It seems to us, then, that [appellees'] claims are not contract claims for Tucker Act purposes.

Id. at 978 n.13 (quoting *Maryland Dep't of Human Resources*, 763 F.2d at 1449 (citations omitted)). *But see* Webster I, *supra* note 225, at 753-54 (criticizing the conclusion in *Maryland Dep't of Human Resources* that a grant-in-aid agreement is not a contract for Tucker Act purposes).

287. *See infra* notes 388-90, 413-16 and the accompanying text.

288. Esch v. Yeutter, 876 F.2d at 985.

289. 716 F. Supp. 1567 (D. Ariz. 1988); 716 F. Supp. 1570 (D. Ariz. 1989).

290. *Id.* at 1568.

291. *Id.*

$1,000,000 of farm program payments were in dispute.[292]

The court rejected the government's argument that exclusive jurisdiction over the producers' action resided in the Claims Court for many of the reasons that persuaded the court of appeals in *Esch* to hold that the district court had jurisdiction over the producers' claims in that action.[293] However, *Justice* differed sharply from *Esch* with respect to the relief awarded to the respective producers in each case. In *Esch* the procedural infirmities in the administrative proceedings before the ASCS were so pronounced that the court of appeals reversed the district court's substantive findings.[294] However, in *Justice*, the district court held that

> [t]he facts before this Court . . . clearly establish the Plaintiffs [sic] entitlement and support a determination that the Secretary's decision was arbitrary and capricious in every respect. Had all of the 'failures' . . . not occurred, the Secretary would have been required to grant the requested separate person status to all of the thirty-three general partners.[295]

Based on that holding, the *Justice* court remanded the matter to the Secretary for further proceedings to "revise the findings and find that the general partners . . . are 'separate persons' for purposes of the 1986 program year."[296] The effect of the remand was characterized by the government as requiring "the Defendant [to] pay over $1,000,000 to the Plaintiffs."[297] Nevertheless, the court ruled that it was "empowered to rule that the Secretary's decision was incorrect and order that the Plaintiffs be awarded their separate person determinations . . . ."[298] Thus, as a practical matter, the producers in *Justice*

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292. *Id.* at 1578. Under the federal farm program payment limitations, combining the 33 partners into one "person" meant that the program payments would be limited to $50,000. *See* 7 U.S.C. § 1308(a) (1988). However, if each of the 33 partners was entitled to be a "separate person" for payment limitations purposes, the 33 partners would collectively be entitled to $1,650,000 in program payments. For a detailed discussion of the federal farm program payment limitation rules, see KELLEY & MALASKY, *supra* note 250.

293. Among other reasons for holding that it had subject matter jurisdiction, the court concluded that

> [t]he Tucker Act only applies to claims for money damages . . . and does not preclude review by a district court of an agency action when the relief sought is other than money damages. The Act does not limit the jurisdiction of district courts where nonmonetary relief may form the basis for a future money judgment.
>
> . . . .
>
> The plaintiffs have filed a declaratory judgment action. While it may, in the future, serve as the basis for a monetary judgment, this action is simply a review of an administrative decision pursuant to the judicial review provisions of the Administrative Procedure Act . . . . The Claims Court does not have the authority to issue a declaratory judgment, and due to the administrative decision [of the ASCS combining the partners into one "person"] there is not an actual, presently due, amount owed. Thus, the plaintiffs need a declaratory judgment before the Claims Court would have jurisdiction. Therefore, this Court is the appropriate forum for the plaintiff's [sic] action.

Id. at 1568-69 (citations omitted); *see also id.* at 1579 ("[T]his Court is entitled to review the Agency's findings and order that they be reversed if found to be arbitrary and capricious.") (citing Esch v. Lyng, 665 F. Supp. at 23, *modified sub nom.* Esch v. Yeutter, 876 F.2d 976).

294. Esch v. Yeutter, 876 F.2d at 993.

295. *Justice*, 716 F. Supp. at 1580.

296. *Id.*

297. *Id.* at 1578.

298. *Id.* at 1579 (citations omitted). The court bolstered its position by noting that it "may re-

obtained over $1,000,000 in relief through an action for declaratory relief under the APA in the district court.

Because the decisions in *Bowen*, *Esch*, and *Justice* are recent, their full impact cannot be assessed. However, the Claims Court has been quick to narrowly construe *Bowen*.[299] To a certain extent, that reaction may be a recognition that *Bowen* has the potential of "leaving the Claims Court without a docket."[300]

To date, no reported Claims Court decision since *Bowen* has squarely addressed claims similar to those made in *Esch* and *Justice*. More specifically, the Claims Court has not yet confronted a case transferred to it by a district court in which the producer sought only declaratory or injunctive relief under the APA in a challenge to a final ASCS decision involving a determination made under the federal farm program payment limitation rules.[301]

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mand to the Agency with explicit instructions." *Id.* (citing Donovan v. Adams Steel Erection, Inc., 766 F.2d 804 (3d Cir. 1985)).

299. An exhaustive analysis of *Bowen* by the Claims Court can be found in *Kentucky ex. rel. Cabinet for Human Resources*, 16 Cl. Ct. at 759-62; *see also Rieschick*, 21 Cl. Ct. at 625-26 (discussing *Bowen*); Stevens v. United States, 21 Cl. Ct. 195, 201 (1990) (same); City of Wheeling v. United States, 20 Cl. Ct. 659, 663-65 (1990) (same); Marathon Oil Co. v. United States, 16 Cl. Ct. 332, 340-44 (1989) (same); Garrett v. United States, 15 Cl. Ct. 204, 207 (1988) (same).

300. *Bowen*, 487 U.S. at 921 (Scalia, J., dissenting). In his dissenting opinion in *Bowen*, Justice Scalia minced few words in his denunciation of the majority's decision:

> Nothing is more wasteful than litigation about where to litigate . . . . Today's decision is a potential cornucopia of waste. Since its reasoning cannot possibly be followed where it leads, the jurisdiction of the Claims Court has been thrown into chaos. On the other hand, perhaps this is the opinion's greatest strength. Since it cannot possibly be followed where it leads, the lower courts may have the sense to conclude that it leads nowhere, and to limit it to the single type of suit before us.

Id. at 930; *see also* Sisk, *supra* note 225, at 48-52 (echoing many of the points made by Justice Scalia in his dissent in *Bowen*).

301. However, the Claims Court has addressed *Bowen* in an action brought by the producers in the Claims Court in which the payment limitation rules were at issue. Specifically, in *Stevens v. United States*, a partnership, on the partnership's behalf, and an individual member of a partnership, in his individual capacity, challenged the ASCS's denial of the partnership's application to participate in the 1986 wheat program. Stevens v. United States, 21 Cl. Ct. 195 (1990). In essence, the final ASCS decision denied the application because the application did not satisfy regulatory requirements under the federal farm program payment limitation statutes. *Id.* at 197 (citing 7 C.F.R. § 795.14). The plaintiffs, including the partnership, sought damages of "not less than $350,000," and they alleged that the Claims Court had jurisdiction under several of the bases afforded by the Tucker Act. *Id.* at 198, 200, 200 n.4.

The government, relying on *Bowen*, moved to dismiss the partnership's claim on the grounds that the Claims Court lacked subject matter jurisdiction. The Claims Court rejected the argument: "Defendant misreads *Bowen*. In that case, the claim brought originally had been filed in the district court; thus, whether the Claims Court might also have jurisdiction over such a claim never was examined by the Supreme Court, because the issue was not squarely before it." *Id.* at 201.

The Claims Court held that it had subject matter jurisdiction because the statute on which the plaintiffs' claims were based, the statute authorizing the wheat program, "appear[ed] to be a money mandating statute." *Id.* at 200 (citing 7 U.S.C. § 1445b-3(c)(1988)); *see infra* notes 391-412 and the accompanying text (discussing the Claims Court's jurisdiction to hear claims based on money mandating federal statutes). However, in so holding, the Claims Court failed to take into account the fact that the regulations at issue were based on the payment limitations statute which was found by the court of appeals in *Esch* not to be money mandating. Esch v. Yeutter, 876 F.2d at 985, *modifying* Esch v. Lyng, 665 F. Supp. 6; *see also* Stegall v. United States, 19 Cl. Ct. 765 (1990) (assuming jurisdiction over a payment limitations claim without any mention of whether the payment limitations statute was money mandating); Knaub v. United States, 22 Cl. Ct. 268 (1991) (same). Moreover, in *Stevens*, the Claims Court made no reference to *Esch*, thus suggesting that the court may avoid the issue of whether the payment limitations statute is money mandating by focusing on the programs to which the payment limitations statute applies, rather than the payment limitations stat-

The closest the Claims Court has come to addressing such a case is *Rieschick v. United States*.[302] In *Rieschick*, the producers originally brought their action in federal district court. The underlying dispute concerned the producers' participation in the Dairy Termination Program (DTP). Under the DTP, producers bid to enter into contracts with the Commodity Credit Corporation (CCC) in which they "agreed to cease milk production for five years by: (1) slaughtering or exporting their herds, and (2) not having any interest in milk or dairy cattle for five years."[303] In return, the producers received monetary reimbursements "determined by multiplying the producer's prior milk production base by their respective bid per hundredweight of milk."[304]

One of the provisions of the DTP program required that the reimbursement to producers under the program would be reduced by a certain amount for each head of dairy cattle transferred on or after January 1, 1986. The producers in *Reischick* had sold ten heifers in an attempt to reduce their debts on January 24, 1986. In April, 1986, the producers' bid to participate in the DTP was accepted by the ASCS, acting on behalf of the CCC. Subsequently, the producers sought to take advantage of an informal policy that allowed DTP participants to avoid the reduction in reimbursement resulting from their sale of the dairy cattle after the January 1, 1986, deadline by repurchasing them. However, the producers were unsuccessful in locating the purchasers of the ten heifers that they had sold on January 24, 1986. Ultimately, the producers' reimbursement under the DTP was reduced because of the sale of the ten heifers. The producers brought their action in federal district court after exhausting their administrative appeal of the reduction determination.

In the district court, the producers requested declaratory and injunctive relief under the review provisions of the APA and appear to have also requested damages in excess of $10,000.[305] The district court transferred the case to the Claims Court on the grounds that it "was essentially a contract dispute for a sum in excess of $10,000 and that the United States Claims Court

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ute itself, whenever the issue involves a payment limitations rule. If the court chooses to adhere to a practice of failing to examine whether the statute at issue is money mandating or to ignore the statute at issue in favor of another, underlying statute not directly at issue, it could reduce the "money mandating" requirement for its noncontractual jurisdiction to a mere shibboleth. For a brief discussion of the strict test that the United States Supreme Court has found in the "money mandating" requirement, see *infra* notes 411-12 and the accompanying text.

302. 21 Cl. Ct. 621 (1990).

303. *Id.* at 623 (citing 7 U.S.C. § 1446(d)(3)(A)(ii), (iv) (1988)).

304. *Id.* (citing 7 C.F.R. § 1430.455(a)).

305. *Id.* at 622-25. The Claims Court's opinion does not definitively state that the producers sought money damages in the district court. However, the opinion states that the district court transferred the action to the Claims Court because it found that the action "was essentially a contract dispute for a sum in excess of $10,000." *Id.* at 622. In addition, the opinion states that, in their motion to transfer their action from the Claims Court back to the district court, the producers also prayed for " 'indirect' damages against the United States for $45,000 plus interest and cost *which arise out of their claim for injunctive relief*." *Id.* at 625 (emphasis added); *see also id.* at 623 ("Plaintiffs' pray for damages in the amount of $45,000 plus interest and costs."). The two statements in the court's opinion and the analysis used by the court to deny the motion to transfer the case back to the district court strongly suggest that the producers had requested damages in excess of $10,000 in the district court.

. . . had exclusive jurisdiction . . . ."[306]

The Claims Court rejected the producers' motion to transfer their action back to the district court. In its initial analysis of the appropriateness to the transfer of the action to it, the Claims Court followed essentially the same reasoning of the district court in *Divine Farms*:[307]

> In determining the nature of this action it is necessary to evaluate plaintiffs' equitable claims. The jurisdiction of a claim is determined by the factual allegations, not the framing of the complaint. While plaintiffs may allege that their suit is a challenge to a federal regulation, the court must determine the true nature of the claim . . . . Based upon a review of plaintiffs' complaint . . ., it is evident that this action is a contract action.[308]

Then, the Claims Court addressed the producers' contention that *Bowen* supported their motion to transfer the case back to the district court. It dismissed the contention by reasoning that

> *Bowen* does not apply in the instant case. *Bowen* concerned a declaration of entitlement to *prospective* entitlements under a money-mandating statute where plaintiff sought to enforce that statute. In *Bowen*, plaintiff's relationship with defendant was open and ongoing. Here, plaintiffs' claim is for purely retroactive relief, not based upon a money-mandating statute, but rather a contract. There is no continuing relationship between the parties. 'Under the *Bowen* analysis a claim for money based on a past wrong or past labor does not seek to enforce a statutory mandate . . . . Additionally, *Bowen* principally concerned the effect of §§ 702 and 704 of the APA on the jurisdiction of the federal district courts, and is of limited application to the Claims Court. Claims Court jurisdiction is not governed by the APA . . . .[309]

The district court's transfer of the producers' action in *Rieschick* to the Claims Court and the Claims Court's decision to retain jurisdiction do not significantly undermine the force of the reasoning of *Esch* and *Justice* for at least two reasons. First and foremost, assuming that the producers in *Rieschick* sought money damages in their district court action as they appear to have done, that fact alone takes their action outside the reasoning of *Bowen*, *Esch*, and *Justice*. As noted by one commentator, the one unequivocal ruling in *Bowen* was "that requests for nondamage relief should be taken at face value, rather than reconstrued as damages."[310] The converse of that statement is nearly as certain. When a producer couples a claim for nondamages

306. *Id.* at 622; *see also id.* at 625 ("Defendant contends plaintiffs' claim is a contract action to recover damages in excess of $10,000 over which [the Claims Court] has exclusive jurisdiction.").

307. *See supra* notes 243-48 and the accompanying text.

308. *Rieschick*, 21 Cl. Ct. at 625 (citations omitted).

309. *Id.* at 626 (footnote omitted) (citations omitted) (emphasis in original).

310. Webster I, *supra* note 225, at 755; *see also* Zellious v. Broadhead Assocs., 906 F.2d 94, 96 n.3 (3rd Cir. 1990) (The court in *Zellious* construed *Bowen* to mean "the fact that purely monetary aspects of [the] case could have been decided in Claims Court is not sufficient reason to bar [the] district court from awarding monetary relief other than money damages."); Rochester Pure Waters Dist. v. EPA, 724 F. Supp. 1038, 1044 (D.D.C. 1989) (citing *Bowen* for the proposition "[the fact that] money is involved does not change the character of this case from equitable to legal in nature").

relief with a claim for damages in excess of $10,000 cognizable under the Tucker Act, the producer incurs the risk that the district court and, after the action's transfer, the Claims Court, will treat the damages claim as predominating over the nondamages claims.

Second, putting aside the fact that the producers in *Rieschick* did not appear to have sought only declaratory and injunctive relief in the district court, the Claims Court's decision does little to undermine the force of the analysis in *Esch* and *Justice*. This is because it did not specifically address the reasons offered in those cases for finding that the district courts have jurisdiction over claims seeking only declaratory and injunctive relief in the review of final ASCS decisions under the APA. Indeed, the court did not even mention either *Esch* or *Justice*.[311]

Moreover, the court's opinion is more conclusory than analytical. For example, it stated that, unlike the situation presented in *Bowen* where the plaintiff, the Commonwealth of Massachusetts, and the defendant, the Secretary of Health and Human Services, were parties to a cooperative arrangement under the Medicaid program, the parties before it did not have a "continuing relationship."[312] However, the court failed to explain why there was no "continuing relationship" between the producers and the CCC, or why that fact was in any way significant. Assuming that a continuing relationship between the parties is significant, the parties in *Rieschick*, as the court recognized in its description of the DTP, had entered into an arrangement whereby the producers had agreed to cease milk production for five years.[313] Thus, for a continuous five-year period, the parties were bound to a contractual relationship. Moreover, the court did not suggest, much less consider, whether a continuous relationship would have been present if, prior to entering the DTP, the producers had received milk price support payments from the CCC under the milk price support program.[314]

The practical implications of the respective analyses of *Divine Farms*, *Esch*, *Justice*, and *Rieshick* may be summarized as follows:

1. Tucker Act claims for damages against the federal government in excess of $10,000 should not be brought in federal district court. One should not expect that the joining of claims for equitable relief with such an action will result in the district court retaining jurisdiction.[315]

311. *See* Malasky, *Claims Ct. Asserts Exclusive Jurisdiction, Ignoring Justice and Esch*, 8 AGRIC. L. UPDATE 1, 2 (1990) (Malasky notes that "the decision in *Rieschick* does not mention, let alone seek to distinguish, the D.C. Circuit's decision in *Esch* or the Arizona district court's opinion in *Justice*.").

312. *Rieschick*, 21 Cl. Ct. at 626.

313. *Id.* at 623.

314. *See* 7 U.S.C. § 1446(a) (1988).

315. In *Ulmet v. United States*, the court construed *Bowen* and other unidentified decisions "[to] recognize that a purely equitable district court action could be brought in tandem with a Claims Court proceeding for damages." Ulmet v. United States, 888 F.2d 1028, 1031 (4th Cir. 1989). *But see* Sisk, *supra* note 225, at 50. This commentator noted:

> If separate legal issues are raised that would not be addressed in the context of a claim for monetary relief, a claim for prospective relief premised upon those legal issues may legitimately be pursued under the APA separately from any money claim. But, ordinarily, the

2. If the amount in dispute exceeds $10,000 and Tucker Act jurisdiction exists,[316] claims for damages must be brought in the Claims Court. Such an action should be commenced only after careful consideration of the limits of the Claims Court's jurisdiction.[317]

3. If Tucker Act jurisdiction exists and the producer desires to bring a claim for damages in the district court, but the total amount of the potentially recoverable damages exceeds $10,000, it may be possible to obtain district court jurisdiction by waiving the right to seek the amount exceeding $10,000.[318]

4. By seeking only equitable and declaratory relief, a producer should be able to secure district court review of a final ASCS decision even if the payments underlying the dispute exceed $10,000. Under the judicial review provisions of the APA,[319] the district court may direct the Secretary to make a redetermination of the disputed matter. Moreover, a district court's order directing the Secretary to redetermine the matter may be coupled with instructions that effectively require the Secretary to find in favor of the producer. Thus, careful consideration should be given to the advantages of pursuing relief in the district court rather than the Claims Court.

2. The Relief Available from the Claims Court

In reviewing final ASCS decisions, the Claims Court can award monetary[320] damages pursuant to the Tucker Act.[321] There is no jurisdictional

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mere desire of a litigant to obtain an injunction as well as monetary relief would not properly be viewed as raising a separate legal issue justifying bifurcation of the action between the district court and the Claims Court. An exception might lie in that rare case where a litigant could prove that the government would act in bad faith and refuse to adhere in the future to the principles of law established in the decision on the money claim. Such an unusual contention would raise a separate legal issue and would justify a separate APA claim for injunctive relief.

Id.

316. *See infra* notes 388-416 and the accompanying text.

317. *See infra* notes 320-21, 388-416 and the accompanying text.

318. This strategy was successfully followed in *Robinson v. Block*. *Robinson*, 608 F. Supp. at 819; *see also* Hahn v. United States, 757 F.2d 581, 587 (3rd Cir. 1985) (noting that a claim for damages in excess of $10,000 may be waived); Marshall Leasing, Inc. v. United States, 893 F.2d 1096, 1100 (9th Cir. 1990) (permitting, in view of *Bowen*, the plaintiff to amend its complaint to waive claim for damages).

319. 5 U.S.C. § 706.

320. Except in very limited circumstances, the Claims Court may only award monetary relief. *See, e.g.*, Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967) ("The claim [under the Tucker Act] must, of course, be for money."); Raines v. United States, 12 Cl. Ct. 530, 535 (1987) (declining to entertain a claim for wheat allegedly due under a PIK contract "since that remedy . . . cannot be construed as a claim for money judgment"). The exceptions are found in 28 U.S.C. § 1491(a)(2) ("To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States.") and § 1491(a)(3) ("To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief."). For a discussion of the equitable powers of the Claims Court, see *infra* notes 330-31 and the accompanying text.

28 U.S.C. § 1491(a)(2) also provides that "[i]n any case within its jurisdiction, the [Claims

limit on the amount of damages that the Claims Court can award. However, in order for the Claims Court to acquire jurisdiction, the claim must be "against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[322] In addition, to the extent that the claim is founded on an act of Congress or regulation, the act or regulation must mandate[323] the payment of money.[324] The same is true for claims arising out of contracts with the United States.[325]

Finally, the money damages claimed in an action in the Claims Court must be for "actual" damages that are "presently due."[326] The Claims Court

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Court] shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may seem proper and just." For a discussion of the application of the court's authority to remand in the review of a decision of the Secretary of Agriculture, see Julius Goldman's Egg City v. United States, 556 F.2d 1096, 1101 (Ct. Cl. 1977) (stating that "if the administrative record is overturned, the matter [must] be remanded to the Secretary for a proper award — unless the record made here mandates only one acceptable determination"), *cert. denied*, 464 U.S. 814 (1983).

321. 28 U.S.C. § 1491(a)(1). The Tucker Act applies only to claims against the United States for damages. *E.g.*, North Side Lumber Co. v. Block, 753 F.2d 1482, 1484-85 (9th Cir. 1985), *cert. denied*, 474 U.S. 919 (1985).

322. 28 U.S.C. § 1491(a)(1). Section 1491(a)(1) is occasionally referred to as the "Big" Tucker Act. *See Zellious*, 906 F.2d at 36. For what it is worth, in addition to the "Little" Tucker Act (28 U.S.C. § 1346(a)(2)) and the "Big" Tucker Act, there is also the "Indian Tucker Act." *See Mitchell*, 463 U.S. at 212 (citing 28 U.S.C. § 1505).

323. "Mandate" means more than permissive. If the payment of money is permissive, that is, within the government's discretion, "the legal source of the authority to pay is not 'money mandating,' it is 'money permitting,' " and the Claims Court is without jurisdiction. Grav v. United States, 886 F.2d 1305, 1309 (Fed. Cir. 1989) (Mayer, J., dissenting), *aff'g* 14 Cl. Ct. 390 (1988); *see also, e.g.*, Franco v. United States, 15 Cl. Ct. 283, 285 (1988) ("It is fundamental to this court's jurisdiction that, in order to sue here for money, the law, statute or regulation on which the demand is based must unequivocally demonstrate the Government's intention to provide a monetary benefit or to allow a monetary remedy in redress of an injury to a protected right." (citations omitted)), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 538 (1989); Morgan v. United States, 12 Cl. Ct. 247, 253 (1987) ("Plaintiff must show that either money was 'improperly exacted or retained' by the government or that there is some aspect of law which *commands* the payment of money." (emphasis added) (citation omitted)).

324. *See, e.g.*, United States v. Testan, 424 U.S. 392, 401-02 (1976) ("Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim — whether it be the Constitution, a statute, or a regulation — does not create a cause of action for money damages unless . . . that basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " (quoting *Eastport Steamship Corp.*, 372 F.2d at 1008-09); Grav v. United States, 14 Cl. Ct. 390, 391 (1988) ("The Tucker Act has long been construed to provide jurisdiction only over those Acts of Congress which mandate payments." (citation omitted)), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989); Petterson v. United States, 10 Cl. Ct. 194, 197 (1986) ("This court [Claims Court] has jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to render judgment on claims for money arising . . . under a statute or regulation requiring, or fairly interpreted to require, the payment of money." (citations omitted)), *aff'd*, 807 F.2d 993 (Fed. Cir. 1986).

325. *See, e.g.*, Doko Farms v. United States, 13 Cl. Ct. 48, 56 (1987) (For a claim to be cognizable in the Claims Court, "it must rest on a contract or relevant statute or regulation which can 'fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.' " (citations omitted)).

326. *Justice*, 716 F. Supp. at 1568 ("The Claims Court is limited to hearing claims for 'actual, presently due money damages from the United States.' " (citations omitted)).

This limitation is one of the reasons why it is generally preferable to bring the action in the district court on a claim other than one based on the Tucker Act. *See* Pires & Knishkowy, *supra* note 226, at 3 ("Waiting for USDA's payment deadline to pass before suing in the Claims Court for money

"lacks jurisdiction to review 'claims for money, the allowance of which are wholly discretionary with an executive official.' "[327] Moreover, the Claims Court cannot award damages based on a denial of due process or equal protection as secured by the fifth amendment to the United States Constitution.[328]

Significantly, the Claims Court lacks the authority to issue writs of mandamus and to grant purely declaratory relief.[329] In addition, with very limited exceptions, it also lacks the authority to award prospective injunctive relief. The Claims Court cannot award prospective injunctive relief because it "lacks the general equitable powers of the district courts . . . ."[330] It can only issue equitable relief if that relief "is associated with and *subordinate* to a claim for money judgment."[331]

C. *Obtaining Relief: Choosing and Pursuing the Most Appropriate Remedy*

Most actions seeking review of a final ASCS decision concerning a producer's eligibility for program benefits begin shortly after the final administrative determination has been made.[332] However, the six-year statute of limitations applicable to actions by and against the CCC arguably governs actions for the review of final ASCS decisions.[333]

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may be an inadequate remedy because prompt receipt of payment is often so critical to a farmer's existence.").

327. *Morgan*, 12 Cl. Ct. at 254 (citations omitted).

328. *See, e.g., Morgan*, 12 Cl. Ct. at 253-54 ("The due process clause of the Fifth Amendment does not provide a basis for recovery of money damages in the Claims Court." (citations omitted)); Carruth v. United States, 627 F.2d 1068, 1081 (Ct. Cl. 1980) ("This court [Court of Claims] has no jurisdiction over claims based upon the Due Process and Equal Protection guarantees of the Fifth Amendment, because these constitutional provisions do not obligate the Federal Government to pay money damages." (citations omitted)); Haberman v. United States, 18 Cl. Ct. 302, 308 (1989). However, "[u]nder the Tucker Act, . . . the Claims Court does have jurisdiction over Fifth Amendment claims when a taking without just compensation is involved." *Id.* (citing Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl. Ct. 329 (1985)); *see also* Shelleman v. United States, 9 Cl. Ct. 452, 455-56 (1986) (noting that a claim alleging violation of the first amendment does not support Tucker Act jurisdiction).

329. *See, e.g, Doko Farms*, 13 Cl. Ct. at 60 ("[T]his Court is without jurisdiction to issue an order of mandamus . . . . Likewise, this Court is not empowered to grant declaratory relief pursuant to the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202." (citations omitted)); *Garrett*, 15 Cl. Ct. at 207 ("This court has no jurisdiction to grant . . . purely declaratory relief." (footnote omitted) (citations omitted)). However, the Claims Court has the authority to award declaratory relief "[t]o afford complete relief on any contract claim before the contract is awarded . . . ." 28 U.S.C. § 1491(a)(3). Nevertheless, it is unlikely that this exception would ever apply in the review of a final ASCS decision. *See* Esch v. Yeutter, 876 F.2d at 984 n.76 (discussing the inadequacy of that provision in a case seeking review of a DASCO decision), *modifying* Esch v. Lyng, 665 F. Supp. 6. For a discussion of the equitable powers of the Claims Court in pre-contract award cases, see Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052, 1057-58 (1st Cir. 1987).

330. Esch v. Yeutter, 876 F.2d at 982 (citation omitted), *modifying* Esch v. Lyng, 665 F. Supp. 6.

331. *Doko Farms*, 13 Cl. Ct. at 56 (emphasis in original).

332. Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Adminstering Federal Farm Programs*, 12 HAMLINE L. REV. 633, 637-38 (1989) [hereinafter Hamilton II].

333. *Id.* at 637 (noting that there is "some uncertainty as to the time allowed to file an appeal" and that the six year statute of limitations applicable to the CCC (15 U.S.C. § 714b(c)) has been cited as governing appeals of ASCS decisions "in materials prepared by attorneys working in the USDA Office of General Counsel"); *accord* Conway, *ASCS Appeal Process*, 1988 AGRIC. L. INST. B-33 [hereinafter Conway] (Mr. Conway is Associate General Counsel for the Office of General Counsel, USDA); *see also* United States v. Batson, 706 F.2d 657, 671-77 (5th Cir. 1983) (applying 15 U.S.C. § 714b(c) to a claim by the United States for the recovery of overpayments under the upland cotton price support program), *aff'd*, 782 F.2d 1307 (5th Cir. 1986), *cert. denied*, 477 U.S. 906 (1986).

In the Claims Court, the defendant is the United States.[334] In the federal district court, it may be advisable to name the Secretary of Agriculture, acting in his official capacity, as the only defendant.[335] There are several reasons for bringing the action only against the Secretary. First, the Secretary is the official ultimately responsible for the ASCS's administration of the federal farm programs.[336] As such, the Secretary is unquestionably a proper defendant.[337]

Second, although the CCC may be sued,[338] it is protected by an "anti-injunction" provision in its organic act providing that "no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property."[339] Accordingly, "courts have held without qualification that the CCC is immune from injunctions."[340] However, that immunity does not extend to requests for declaratory judgments.[341]

If the CCC were named as a defendant, the "anti-injunction" statute would certainly prompt the government to move to dismiss any request for injunctive relief. Although a request for injunctive relief against the Secretary could prompt the same motion, it is less likely to be successful.[342] Moreover, in cases where the rule making authority of the Secretary has been challenged as arbitrary and capricious or a final ASCS decision has been challenged on similar grounds, courts have declined to find that the CCC is an indispensable

334. *See* 28 U.S.C. § 1491(a)(1) ("The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States . . . .").

335. If the action seeks review pursuant to the limited waiver of sovereign immunity afforded by the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the United States may be named as a defendant. 5 U.S.C. § 702; *see also infra* note 337 (discussing when it may be mandatory to name the Secretary as a defendant).

336. *See supra* notes 20-23, 28-29 and the accompanying text.

337. *See, e.g.*, *Justice*, 716 F. Supp. at 1571 ("Defendant Lyng, as Secretary of the United States Department of Agriculture is the official ultimately responsible for administering all regulations relevant to this case."). If the action invokes the judicial review provisions of the APA, 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.

338. *See* Fricton v. Oconto County ASCS, USDA, 723 F. Supp. 1312, 1315 (E.D. Wisc. 1989) (finding the CCC to be amenable to suit in an action alleging the breach of a Dairy Termination Program contract based on the "sue and be sued" clause in 15 U.S.C. § 714b(c)); *see also* Gulf Coast Rice Producers Ass'n v. Block, 617 F. Supp. 229, 231 (S.D. Tex. 1985) (noting that "[a]lthough Section 714b(c) vests the federal district courts with exclusive jurisdiction of all suits brought by or against [the CCC], regardless of amount in controversy, this broad grant is circumscribed where suit is brought by or against the United States as the real party in interest . . . [and] this exception serves to limit the federal district court's jurisdiction by incorporating the amount-in-controversy requirement of the Tucker Act" (citations omitted)).

339. 15 U.S.C. § 714b(c).

340. *Raines*, 12 Ct. Cl. at 533 (citations omitted).

341. *Justice*, 716 F. Supp. at 1569 (citing Hall v. Lyng, 828 F.2d 428, 463 n.10 (8th Cir. 1987)); *see also infra* notes 346-60 and the accompanying text (discussing claims for declaratory relief in the review of final ASCS actions).

342. For a more detailed discussion of the availability of injunctive relief against the Secretary, see *infra* notes 361-82 and the accompanying text. *Compare* Mitchell v. Block, 551 F. Supp. 1011, 1015-16 (W.D. Va. 1982) (declining to extend the CCC's immunity to the Secretary where the claim alleged that the Secretary had been arbitrary and capricious in rule making) *with* Iowa *ex rel.* Miller v. Block, 771 F.2d 347, 348 n.1 (8th Cir. 1985) (declining to entertain request for injunction against the Secretary where the desired benefits would be administered through the CCC), *cert. denied*, 478 U.S. 1012 (1986).

party.[343] Because the United States Department of Agriculture (USDA) is not a statutory entity, it is not a proper defendant.[344] The same is true for the ASCS.[345]

Generally, it is neither necessary nor appropriate to name individual ASCS employees as defendants when review is sought of final ASCS decisions. They enjoy the immunity of other governmental officials,[346] and, because they are subject to the general direction and supervision of the Secretary, relief obtained against the Secretary will operate against them as well.

1. *Drafting the Complaint to Avoid a Motion to Dismiss*

As discussed above, the two forums available for judicial review are the federal district courts and the Claims Court. Avoiding motions to dismiss or prevailing on such motions is largely dependent on two considerations. First, the request for relief must be properly tailored. Second, the issues presented for review must be within the permissible scope of review. The discussion that follows addresses both matters for each court.

a. *Requests for Declaratory Relief in the District Courts*

The "cleanest" case that can be brought in district court is one that seeks only declaratory relief against the Secretary.[347] Such a case would be pre-

343. *See Justice*, 716 F. Supp. at 1569 (noting that the CCC was not "involved" in an ASCS determination of several producers' eligibility for separate payments under the wheat, cotton, and barley price support programs, and that a challenge to that determination under the APA did "not run against the CCC"); *Mitchell*, 551 F. Supp. at 1015 (declining to find that the CCC was an indispensable party in an action challenging as arbitrary and capricious regulations under the tobacco price support program).

344. *See* Linden, *supra* note 223, at 329; Hamilton II, *supra* note 332, at 634-35; *Westcott*, 611 F. Supp. at 353-54 (dismissing the USDA as a party on the authority of United States Dep't of Agric. v. Hunter, 171 F.2d 793 (5th Cir. 1949) and North Dakota-Montana Wheat Growers' Ass'n v. United States, 66 F.2d 573 (8th Cir. 1933), *cert. denied*, 291 U.S. 672 (1933)), *aff'd*, 765 F.2d 121 (8th Cir. 1985); *Fricton*, 723 F. Supp. at 1315 ("[B]ecause there is no explicit congressional authority permitting a party to sue the USDA, Fricton's claim against the USDA is dismissed." (citation omitted)); *see also* Cordes v. United States Dep't of Agric., Civ. No. 4-89-732, slip op. at 2 (D. Minn. Oct. 30, 1990) (1990 WestLaw 182336) (treating a suit against the USDA as a suit against the Secretary).

345. Linden, *supra* note 223, at 329.

346. *See id.* at 329-30; *see also Westcott*, 611 F. Supp. at 358-59, *aff'd*, 765 F.2d 121 (citing Gross v. Sederstrom, 429 F.2d 96 (8th Cir. 1970), for the proposition that members of ASCS county committees enjoy governmental immunity).

347. In the typical action seeking review of a final ASCS decision, when the Secretary is named as the defendant, venue is proper in the United States District Court for the District of Columbia, the district where the cause of action arose, or, the district where the producer resides. *See* 28 U.S.C. § 1391(e) ("A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action . . . ."). Choosing between bringing the action in the District of Columbia or in the district where the producer resides involves a variety of factors, most of which will be unique to each case.

In general, a reason for bringing the action in the District of Columbia is the precedential value of *Esch v. Lyng*. Esch v. Lyng, 665 F. Supp. 6, *modified sub nom.* Esch v. Yeutter, 876 F.2d 976 (discussed in detail at *supra* notes 249-88 and in the accompanying text). However, bringing the action in the District of Columbia may be more inconvenient and costly than bringing it in the district where the plaintiff resides. In addition, the United States Attorney's office in the District of

mised on the district court's general federal question jurisdiction[348] and would seek review pursuant to the judicial review provisions of the APA.[349] In addition, the action would invoke the district court's authority to issue a declaratory judgment pursuant to the Declaratory Judgment Act.[350]

The requested relief would seek a declaration that the ASCS's final decision or the underlying proceedings leading to it were unlawful on one of the grounds specified in the judicial review provisions of the APA.[351] Ultimately, such a declaration would result in a redetermination of the disputed issue through a remand of the matter to the Secretary.

In *Justice v. Lyng*[352] the producers adopted this approach, and the district court's order for remand was accompanied by directions to the Secretary to "pay over $1,000,000 to the Plaintiffs."[353] The court concluded that it "was empowered to rule that the Secretary's decision was incorrect and order that the Plaintiffs be awarded their [desired determination of eligibility for program benefits]."[354]

As it did in *Justice*, this approach may encounter resistance. First, as previously discussed, if the amount in dispute exceeds $10,000, the government may claim that jurisdiction resides exclusively in the Claims Court pursuant to the Tucker Act.[355] That argument was made in *Justice*, notwithstanding the absence of a request for money damages in the producers' prayer for relief. The court rejected the government's argument on the grounds that the Tucker Act "does not preclude review by a district court of an agency action when the relief sought is other than money damages."[356]

The second argument made by the government in *Justice* was that declaratory relief against the Secretary was barred by the "anti-injunction" provision[357] of the CCC's enabling legislation. The government's argument was premised on the assertion that the challenged action by the ASCS was done on

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Columbia has the advantage of close proximity to the USDA and is often regarded as one of the best United States Attorney's offices in the country. Moreover, the local district court is likely to be more familiar with local or regional agricultural practices and circumstances, and, for that reason, it may have a better understanding of the action's factual setting.

348. 28 U.S.C. § 1331.

349. 5 U.S.C. §§ 701-706. The APA does not confer jurisdiction; instead, it serves as a limited waiver of the government's sovereign immunity. Califano v. Sanders, 430 U.S. 99, 105-06 (1977).

350. 28 U.S.C. §§ 2201, 2202.

351. The grounds are set forth at 5 U.S.C. § 706(2). Commonly asserted grounds are that the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law," or that it was "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (2)(B). For a complete listing of the grounds, see *infra* note 428.

352. 716 F. Supp. 1567; 716 F. Supp. 1570.

353. *Id.* at 1578 (on motion for clarification). The "pay over" characterization was the government's. *Id.*

354. *Id.* at 1579-80 (citing 5 U.S.C. § 706; Hoska v. United States Dep't of Army, 677 F.2d 131, 145 (D.C. Cir. 1982); Brick v. Andrus, 628 F.2d 213 (D.C. Cir. 1980); Wilkett v. United States, 710 F.2d 861 (D.C. Cir. 1983)).

355. *See supra* notes 320-21, *infra* notes 388-416, and the accompanying text.

356. *Justice*, 716 F. Supp. at 1568 (citations omitted).

357. 15 U.S.C. § 714b(c) (1988) (providing that the CCC "[m]ay sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property").

the CCC's behalf.[358]

The district court rejected the government's argument on two grounds. First, the district court noted that the action was against the Secretary, not the CCC, and that the "CCC was not involved in the administrative conduct that led to this action."[359] Second, the court noted that the producers were not seeking injunctive relief. Rather, their claim was for declaratory relief. The court ruled that declaratory relief is not barred by the immunity from injunctions given to the CCC by its organic act.[360]

b. *Requests for Injunctive Relief in the District Courts*

Requests for injunctive relief in the district courts are likely to encounter more difficulty than requests for declaratory relief. The source of the difficulty is the immunity from injunctions given to the CCC by 15 U.S.C. § 714b(c).

Section 714b(c) provides, in relevant part, as follows: "The Corporation [CCC]—May sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property." The "anti-injunction" provisions of 15 U.S.C. § 714b(c) are similar to provisions contained in the enabling legislation for a number of agencies, including the Small Business Administration and the Federal Crop Insurance Corporation.[361] This "boilerplate language" was included in the enabling statutes "to bar the attachment of agency funds and other interference with agency functioning."[362]

When confronted with requests for injunctive relief in district court actions for review of final ASCS decisions, the government has asserted that § 714b(c) operates as a bar.[363] In addition, § 714b(c) has been asserted as a bar to district court review of regulations promulgated by the Secretary[364] and to judicial direction to the Secretary to implement legislatively authorized

358. *Justice*, 716 F. Supp. at 1569. For a discussion of the relationship between the CCC and the ASCS, see *supra* notes 27-42 and the accompanying text.

359. *Justice*, 716 F. Supp. at 1569; *accord* DCP Farms v. Yeutter, No. DC90-194-B-O, slip op. at 10-12 (N.D. Miss. Feb. 4, 1991).

360. *Justice*, 716 F. Supp. at 1569 (citing *Hall*, 828 F.2d at 463 n.10; *see also Ulstein Maritime, Ltd.*, 833 F.2d at 1055 (noting that a similar "anti-injunction" statute, 15 U.S.C. § 634(b)(1), protecting the Small Business Administration has been held not to preclude declaratory relief).

361. *Ulstein Maritime, Ltd.*, 833 F.2d at 1053-54 (citing 15 U.S.C. § 634(b)(1) (SBA); 7 U.S.C. § 1506(d) (FCIC); 15 U.S.C. § 3211(11) (Secretary of Commerce)).

362. *Id.* at 1056 (citing Cavalier Clothes v. United States, 810 F.2d 1108, 1108 (Fed. Cir. 1987), and Related Indus. v. United States, 2 Cl. Ct. 517, 522 (1983), as its sources for the history of "anti-injunction" statutes); *see also* Central Prod. Credit Ass'n v. Raymond, 732 F. Supp. 986, 986-88 (E.D. Ark. 1990) (discussing the purposes behind the CCC's and other government agencies' protection from garnishment).

363. *See Westcott*, 611 F. Supp. at 354-58, *aff'd*, 765 F.2d 121. In *Esch v. Lyng*, the district court granted an injunction in a challenge to a final ASCS decision without addressing § 714b(c). Esch v. Lyng, 665 F. Supp. 6, *modified sub nom.* Esch v. Yeutter, 876 F.2d 976. It is not clear from either the district court's opinion or the opinion of the court of appeals whether the statute was invoked by the government. However, in a later unreported opinion by the same court in a different case, *Baker v. Lyng*, the court ordered a complaint seeking injunctive relief in the review of a final ASCS decision dismissed, partially on the basis of the statute. Baker v. Lyng, No. 87-1643 (D.D.C. Aug. 4, 1987); *see* Pires & Knishkowy, *supra* note 226, at 1-3 (discussing the district court decisions in *Esch* and *Baker*).

364. *Mitchell*, 551 F. Supp. at 1015-16; *see also Westcott*, 611 F. Supp. at 354-58, *aff'd*, 765 F.2d

farm programs.[365] Moreover, the statute has been asserted as a bar to relief even when injunctive relief has not been sought.[366]

The ultimate issue of whether § 714b(c) bars requests for injunctive relief in the district courts presents several subsidiary issues. The first is whether the injunction would be directed toward the CCC. In other words, was the CCC a party to the challenged action or would the injunction interfere with its functioning?

In at least two cases, only one of which involved the review of a DASCO decision, the district court avoided the application of § 714b(c) by finding that the CCC was either not an indispensable party to the action or was not involved in the challenged action. In *Mitchell v. Block*,[367] tobacco producers challenged rule making and other actions by the Secretary on the grounds that they were arbitrary and capricious. A successful challenge would have made the producers eligible for tobacco price support payments under the CCC's burley tobacco program.[368] In response to the producers' request for injunctive relief against the Secretary, the government asserted that the CCC was an indispensable party, and that § 714b(c) barred the granting of injunctive relief against the Secretary because it could not be issued against the CCC.[369]

The court in *Mitchell* rejected the government's argument on the grounds that the CCC was neither a party nor an indispensable party to the action. In that regard, the court noted that it would not be "enjoining the Commodity Credit Corporation to do or to refrain from doing an act, but . . . directing the Secretary of Agriculture and those acting under him from alleged arbitrary or capricious conduct . . . ."[370] After also noting it had the authority under the

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121 (15 U.S.C. § 714b(c) was raised as a bar to a claim that portions of the ASCS HANDBOOK were subject to the notice and comment provisions of the APA).

365. *Iowa ex rel. Miller*, 771 F.2d at 348 n.1, *cert. denied*, 478 U.S. 1012.

366. In *Justice v. Lyng*, the government unsuccessfully asserted the statute as a bar to the producers' request for declaratory relief. *Justice*, 716 F. Supp. at 1569. *But see Ulstein Marine, Ltd.*, 833 F.2d at 1055 ("Courts have on occasion refused to grant declaratory relief in cases where the effect would be identical to a legally impermissible injunction." (citations omitted)).

367. 551 F. Supp. 1011.

368. Although, under the Program, the "farmers underwrite the program themselves," the CCC repurchases unsold tobacco and is then reimbursed through the fund established by the farmers. *Id.* at 1013; *see also* N. HARL, 9 AGRICULTURAL LAW, § 91.04[2] (1982 & Supp. 1989) [hereinafter HARL] (describing the CCC's role in the Program).

369. *Mitchell*, 551 F. Supp. at 1015.

370. *Id.* at 1015 (citing Price v. Block, 535 F. Supp. 1239 (E.D.N.C. 1982), *aff'd*, 685 F.2d 431 (4th Cir. 1982); Warr v. Butz, 379 F. Supp. 268 (D.S.C. 1974); Lazar v. Benson, 156 F. Supp. 259 (E.D.S.C. 1957), for the proposition that "[c]ourts have universally assumed jurisdiction for injunctions against the Secretary of Agriculture").

In *Humane Society v. Lyng*, the government argued that § 714b(c) prohibited the issuance of an injunction in a dispute against the Secretary and the ASCS over the implementation of the branding regulation under the Dairy Termination Program (DTP). *Humane Soc'y*, 633 F. Supp. 480 (W.D.N.Y. 1986). The government asserted that the CCC had "delegated" to the ASCS the "responsibility for the development of the branding regulations." *Id.* at 485. However, the court noted that the ASCS did not operate under the "auspices" of the CCC and declined to accept the government's argument. *Id.* (citing 16 U.S.C. § 590h(b) (1988) [hereinafter all citations to 16 U.S.C. will incorporate by this reference the year 1988]).

After that argument failed, the government asserted that "the ASCS is under the control of the CCC in implementing the branding regulations, and that an injunction against the branding regulations will effectively amount to an injunction against the CCC's DTP program." *Id.* The court rejected that argument as well by noting that the "injunction is designed only to prevent the imple-

APA to set aside agency action found to be arbitrary and capricious, the court concluded that

> [t]he mere fact that the plaintiffs would be entitled to price support vis-a-vis the Commodity Credit Corporation should they prevail in their quest for injunctive relief . . . does not clothe the Secretary with the Corporation's immunity from injunction. Therefore, the court is in no way estopped by 15 U.S.C. § 714b(c) from issuing an injunction against the Secretary.[371]

Unlike *Mitchell v. Block*, the case of *Justice v. Lyng*[372] involved review of a final ASCS decision. However, like the court in *Mitchell*, the court in *Justice* also found that § 714b(c) did not bar the producers' claim for relief. In *Justice*, thirty-three producers challenged a decision by DASCO to combine them into one "person" for farm program payment purposes. As a result, the producers were ineligible for price support payments under the wheat, barley, and cotton price support programs funded by the CCC. Although the producers brought their action against only the Secretary and sought only declaratory relief, the government asserted § 714b(c) as a bar to judicial review. The court rejected the government's argument on the grounds that the statute did not bar the issuance of the declaratory relief sought by the producers. In addition, the court found that the statute was inapplicable because "[t]he CCC was not involved in the administrative conduct that led to this action."[373]

The *Mitchell* and *Justice* decisions suggest that courts will narrowly construe the reach of § 714b(c). In each case, although the administration of one or more CCC price support programs was at issue, the absence of the direct involvement of the CCC in the challenged action and its absence as a named defendant allowed the courts to conclude that the relief was not directed to the CCC.

Two factors appear to underlie the district courts' reluctance to extend the reach of § 714b(c) to preclude injunctive relief against the Secretary. The first is the recognition that the CCC is subject to the general supervision and

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mentation of [the regulation] as it now stands. The injunction need have no effect on the CCC's DTP program." *Id.*

371. *Mitchell*, 551 F. Supp. at 1016 (citing 5 U.S.C. § 706 for its authority under the APA).

372. *Justice*, 716 F. Supp. 1567; 716 F. Supp. 1570.

373. *Id.* at 1569 (also stating that "the action does not run against the CCC but rather runs against the named defendant [the Secretary]"); *accord* DCP Farms v. Yeutter, No. DC90-194-B-O, slip op. at 10-12 (N.D. Miss. Feb. 4, 1991). In DCP Farms, the CCC sought to intervene in an action brought by producers against the Secretary, the USDA, and the ASCS. The action challenged a DASCO determination on the grounds that the determination was the result of improper congressional interference. The CCC asserted that it was a real party in interest because the farm programs at issue were funded by the CCC. *Id.* at 10.

Relying on *Justice*, the court denied the CCC's motion to intervene. In doing so, the court implicitly recognized that the CCC's motivation for seeking to intervene was to invoke § 714b(c). The court observed that the action was

> not against the CCC, but rather the Secretary of Agriculture, the USDA, and the ASCS, as the CCC was not involved in the legislative and administrative conduct which is the cause of this litigation. To find otherwise would be a grant of immunity to the USDA and its administration in matters involving injunctive relief merely because it is funded through the CCC. That, this court likewise finds 'nonsensical.'

Id. at 11-12 (citing *Justice*, 716 F. Supp. at 1569).

direction of the Secretary.[374] The administration of the CCC's programs has been legislatively granted to the Secretary, who, through a series of delegations and subdelegations, has vested that authority in the ASCS, not the CCC.[375] Accordingly, if the reach of § 714b(c) was extended to the Secretary, virtually all aspects of the administration of CCC programs would be immune from remedial injunctive relief.[376]

The second factor is the concern that an expansive application of the statute could effectively preclude judicial review of the actions of the Secretary and his delegated authority. Indeed, that is probably the intent of the government's assertion of § 714b(c).[377] However, rather than invariably finding that the statute confers absolute immunity, recent decisions appear to acknowledge implicitly or explicitly that "the modern trend is to recognize injunctive relief in some situations."[378] For example, although it is unclear from the reported opinions whether § 714b(c) was pressed by the government,[379] in the recently decided case of *Esch v. Lyng*[380] the producers were able to obtain an injunction against the Secretary in their appeal of a DASCO decision. In addition, the declaratory relief awarded to the producers in *Justice v. Lyng*[381] arguably was equivalent to injunctive relief.[382]

Judicial trends notwithstanding, requests for injunctive relief in district court actions seeking review of DASCO decisions are likely to encounter difficulty. If such a claim is asserted, the requested injunction should not be directed to the CCC. Instead, the Secretary should be the party against whom the injunction is sought.

c. *Claims for Damages in the District Courts*

The district courts have jurisdiction to consider claims for damages in actions against the United States arising out of final ASCS decisions under 28 U.S.C. § 1346(a)(2), a provision of the Tucker Act. However, there are three significant limitations on that jurisdiction.

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374. 15 U.S.C. § 714; *see also* 15 U.S.C. § 714g (providing that the actions of the CCC board are also subject to the general supervision of the Secretary).

375. *See supra* notes 20-23 and the accompanying text.

376. *See also supra* notes 40-42 and the accompanying text (discussing apparent efforts by the CCC to expand the reach of the anti-injunction statute).

377. *See* Linden, *supra* note 223, at 319-25. Although Mr. Linden, an attorney with the USDA's Office of General Counsel, asserts that the views expressed in his article are solely his own, the article's implicit criticism of "judicial activism" in the review of agency actions is reflected in the litigation posture of the government in the recently reported cases involving review of ASCS decisions. *See* Hamilton II, *supra* note 332, at 638.

378. *Ulstein Maritime, Ltd.*, 833 F.2d at 1057 (citing *Iowa ex rel. Miller*, 771 F.2d 347, *cert. denied*, 478 U.S. 1012; *Hall*, 828 F.2d 428; *Mitchell*, 551 F. Supp. 1011; Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) as representative of the "modern trend," and Stroud v. Benson, 254 F.2d 448 (4th Cir. 1958), *cert. denied*, 358 U.S. 817 (1958); Moon v. Freeman, 245 F. Supp. 837 (E.D. Wash. 1965), as representative of former judicial attitudes).

379. *See supra* note 363.

380. 665 F. Supp. 6, *modified sub nom.* Esch v. Yeutter, 876 F.2d 976.

381. 716 F. Supp. 1570.

382. The district court's order remanding the matter to the Secretary effectively directed the Secretary to make the payments that DASCO had denied to the producers. *Id.* at 1578-80.

First, jurisdiction extends only to claims that do not exceed $10,000.[383] Thus, the jurisdiction of the district court can be obtained only if the producer relinquishes any claim to damages exceeding $10,000.[384]

Second, the district court's jurisdiction to award damages against the United States under 28 U.S.C. § 1346(a)(2) is also limited to claims "founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . ."[385] Those claims are essentially the same as the claims authorized under the Tucker Act to be heard exclusively in the Claims Court when the damages sought exceed $10,000. For that reason, they are discussed in the portions of this article addressing the jurisdiction of the Claims Court.[386]

Finally, the Tucker Act "does not . . . authorize the district courts to grant declaratory or equitable relief against the United States . . . even when such relief is requested in an action brought pursuant to section 702 of the Administrative Procedure Act, 5 U.S.C. § 702."[387] Thus, premising jurisdiction on the Tucker Act not only limits the amount of monetary relief that may be sought, but limits all available relief to money damages.

d. *Requests for Damages in the Claims Court*

Under the provisions of the Tucker Act applicable to the Claims Court,[388] the Claims Court has exclusive jurisdiction over claims for money damages[389] against the United States in excess of $10,000 when such claims are founded on one or more of the following:

1. the United States Constitution;
2. an act of Congress;
3. a regulation of an executive department;
4. an express or implied contract with the United States; or
5. other basis not sounding in tort.[390]

There are two potential difficulties in obtaining Claims Court jurisdiction: determining when a claim can be considered founded on the Constitution, an act of Congress, or a regulation of an executive department and when an express

383. 28 U.S.C. § 1346(a)(2).

384. *See Robinson*, 608 F. Supp. at 819.

385. 28 U.S.C. § 1346(a)(2).

386. *See supra* notes 320-31, *infra* notes 388-416, and the accompanying text.

387. Price v. U.S. General Servs. Admin., 894 F.2d 323, 324 (9th Cir. 1990) (citations omitted); *accord* Wabash Valley Power v. Rural Electrification Admin., 713 F. Supp. 1260, 1263-64 (S.D. Ind. 1989), *aff'd*, 903 F.2d 445 (7th Cir. 1990). Section 702 of the APA does not confer jurisdiction on a court not otherwise possessing it. *See, e.g.*, Pope v. United States, 9 Cl. Ct. 479, 487 (1986).

388. 28 U.S.C. § 1491(a)(1).

389. Consequential damages are not recoverable under the Tucker Act. *See, e.g.*, O'Connell v. United States, 14 Cl. Ct. 309, 312 n.2 (1988); Nutt v. United States, 12 Cl. Ct. 345, 353 n.3 (1987), *aff'd sub nom.* Smithson v. United States, 847 F.2d 791 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989).

390. 28 U.S.C. § 1491(a)(1). In addition to lacking jurisdiction over common law torts, "the Claims Court lacks jurisdiction over a '*Bivens*' [Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)] claim . . . ." Frank's Livestock & Poultry Farm, Inc. v. United States, 17 Cl. Ct. 601, 607 (1980), *aff'd*, 905 F.2d 1515 (Fed. Cir. 1990) (citations omitted).

or implied contract with the United States exists. The discussion that follows highlights the nature of these difficulties.

With respect to the first potential difficulty, a claim can be considered founded on the Constitution, an act of Congress, or a regulation of an executive department only when the law affording the foundation can be "fairly construed as mandating recovery of compensation from the United States, thereby waiving sovereign immunity."[391] In other words, the recovery of damages "is available when the cited regulation or legislation mandates 'compensation by the Federal Government for the damage sustained.' "[392] Application of this "money mandating" requirement to claims of constitutional violations and to alleged breaches of the statutes and regulations underlying the programs administered by the ASCS has produced mixed results.

For example, the "money mandating" requirement has been held to preclude claims based on alleged violations of the fifth amendment by the ASCS.[393] Although takings claims under the fifth amendment are within the purview of the Tucker Act,[394] "[t]he due process clause of the Fifth Amendment does not provide a basis of recovery of money damages in the Claims Court."[395]

The "Payment-In-Kind" (PIK) regulations,[396] however, have been determined to support Tucker Act jurisdiction,[397] as has the statutory authorization[398] for the 1984-86 farm stored grain reserve program,[399] the Peanut Warehouse Storage Loans and Handler Operations regulations,[400] and the 1986-90 wheat price support program.[401] With respect to the Milk Diversion Program,[402] the results have not been consistent. On the one hand, it has been held that

> [w]ith respect to an arbitrary or capricious action or abuse of discretion, there is absolutely nothing in the statutory and regulatory scheme underlying the program that could be construed as conferring upon a disappointed applicant the right to bring suit to obtain the monetary

391. *Morgan*, 12 Cl. Ct. at 253 (citation omitted).

392. *Id.* (citing *Eastport Steamship Corp.*, 372 F.2d at 1008-09); *see also* Halbert v. United States, 17 Cl. Ct. 596, 599 (1989) ("[M]ere allegations that the Government has violated an Act of Congress do not establish Tucker Act jurisdiction . . . . Rather, the allegation must include a showing that violation of the statute entitles the victim to receive a monetary recovery." (citations omitted)).

393. *Morgan*, 12 Cl. Ct. at 253 (citing Muehlen v. United States, 529 F.2d 533 (Ct. Cl. 1976)).

394. *Frank's Livestock & Poultry Farm, Inc.*, 17 Cl. Ct. at 607, *aff'd*, 905 F.2d 1515.

395. *Morgan*, 12 Cl. Ct. at 253.

396. 7 C.F.R. pt. 770.

397. Haupricht Bros. v. United States, 11 Cl. Ct. 369, 373 (1986); *see also Grav*, 14 Cl. Ct. at 393, *aff'd*, 886 F.2d 1305 (citing *Haupricht Bros.* with approval).

398. 7 U.S.C. §§ 1444d, 1444e, 1446 (1988).

399. Frank's Livestock & Poultry Farm, Inc. v. United States, 905 F.2d 1515, 1517 n.2 (Fed. Cir. 1990), *aff'g* 17 Cl. Ct. 601 (1989) (citing 7 C.F.R. § 1421.748(d)).

400. Pender Peanut Corp. v. United States, 20 Cl. Ct. 447, 451 (1990) (citing 7 U.S.C. § 1281 (1988); 7 C.F.R. pt. 1446); *see also* Pender Peanut Corp. v. United States, 21 Cl. Ct. 95, 96-97 (1990) (denying a claim for interest on a repayment of a monetary penalty imposed by the USDA because of the absence of contractual or statutory basis for the payment of interest under the peanut program).

401. *Stevens*, 21 Cl. Ct. at 200 (citing 7 U.S.C. § 1445b-3(c)); *see also supra* note 301 (discussing *Stevens*).

402. 7 U.S.C. § 1446(d).

> benefits he would have received had his application been accepted, much less the right to seek recovery of consequential damages arguably arising from the rejection of his application.[403]

On the other hand, based on the conclusion that the Secretary had not been granted the discretion to refuse participation by any qualified applicant, the same statute has been held to be "a money mandating statute that triggers Tucker Act jurisdiction in the Claims Court."[404]

A matter of uncertainty under the "money mandating" requirement is whether the payment limitation statutes and regulations are "money mandating."[405] At least one court of appeals has concluded that the payment limitation statutes do "not mandate compensation."[406] However, the Claims Court continues to hear claims based on violations of the payment limitation statutes and regulations.[407]

Guidance for determining whether a statute or regulation is "money mandating" can be found in the United States Supreme Court's opinion in *United States v. Mitchell*[408] and the lower court cases interpreting that decision.[409] In *Mitchell*, the Court employed a three-step analysis. First, the Court reviewed the statute for an express right to money damages. Finding no express right on the face of the statute, it then examined the statute's legislative history to assess the nature of the duties imposed on the agency by the statute and the rights arising from the statutory relationship between the parties. Finally, the Court considered the purposes served by the statute and the responsibilities created by the regulations promulgated under that statute.[410]

More recently, the Supreme Court has suggested that the question of

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403. *Morgan*, 12 Cl. Ct. at 253; *see also Halbert*, 17 Cl. Ct. at 599-600 (following *Morgan*). *But see Grav*, 14 Cl. Ct. at 391-93, *aff'd*, 886 F.2d at 1307-08 (distinguishing *Morgan* and arguably overruling it).

404. *Grav*, 886 F.2d at 1307 n.2, *aff'g* 14 Cl. Ct. 390 (The court distinguished *Morgan* on the grounds that the applicant in *Morgan* did not meet the eligibility requirements, while the applicant in the case before it did. The decision arguably overrules *Morgan*.); *see also Rieshick*, 21 Cl. Ct. at 626 n.4 (concluding that the Dairy Termination Program's statutory authorization, 7 U.S.C. § 1446(d)(3)(A)(i), is not money mandating and, relying on *Grav*, distinguishing the DTP from the Milk Diversion Program); *accord* Alta Verde Indus., Inc. v. United States, 18 Cl. Ct. 595, 599-600 (1989), *aff'd*, 907 F.2d 158 (Fed. Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3295 (Oct. 4, 1990) (No. 90-578).

405. 7 U.S.C. §§ 1308—1308-2 (1988); 7 C.F.R. pts. 795, 1497 (pt. 795 is applicable to the crop years preceding the 1988 crop year). *See generally* KELLEY & MALASKY, *supra* note 250 (discussing the payment limitations rules in detail).

406. Esch v. Yeutter, 876 F.2d at 985, *modifying* Esch v. Lyng, 665 F. Supp. 6.

407. *See Stevens*, 21 Cl. Ct. 195; *Stegall*, 19 Cl. Ct. 765; *see also supra* note 301 (discussing *Stevens* and *Stegall*).

In *Stegall*, in addition to considering a payment limitations issue without questioning whether the payment limitations statutes or regulations were money mandating, the Claims Court also considered, without deciding, claims brought under the equitable relief authority of DASCO found in 7 C.F.R. pts. 790 and 791. *Stegall*, 19 Cl. Ct. at 772-73. However, the Claims Court has previously held that those regulations are not money mandating. *Pope*, 9 Cl. Ct. at 485.

408. 463 U.S. at 218-24.

409. *See, e.g.*, Hanson v. United States, 13 Cl. Ct. 519, 526-33 (1987), *aff'd*, 861 F.2d 728 (Fed. Cir. 1988).

410. *Id.* at 527; *see also Alta Verde Indus.*, 18 Cl. Ct. at 599-600 (applying the *Mitchell* analysis to hold that the statute creating the Dairy Termination Program, 7 U.S.C. § 1446(d)(3), was not money mandating), *aff'd*, 907 F.2d 158 (Fed. Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3295 (Oct. 4, 1990) (No. 90-578).

whether a statute is money mandating is to be resolved by determining whether the statute at issue expressly or impliedly creates a cause of action.[411] If this test prevails, one commentator has suggested that

> much of [the] Tucker Act docket of the Claims Court docket would disappear. Indeed, if another statute can be interpreted to include its own implied cause of action, then such an action can be maintained directly under that statute without any reliance on the Tucker Act. The Tucker Act would become superfluous.[412]

Similar difficulties exist in determining whether there is an express or implied-in-fact contract between the producer and the United States.[413] Of the two forms of contract, the implied-in-fact contract is the more difficult to establish:

> A contract implied-in-fact requires a showing of the same mutual intent to contract as that required for an express contract. The fact that an instrument was not executed is not essential to consummation of the agreement. It is essential, however, that the acceptance of an offer be manifested by conduct that indicates assent to the proposed bargain. The requirements of mutuality of intent, and the lack of ambiguity in offer and acceptance, are the same for an implied-in-fact contract as for an express contract; only the nature of the evidence differs. The officer whose conduct is relied upon must have had actual authority to bind the Government in contract.[414]

Although express contracts, in general, are more easily established than implied-in-fact contracts, an uncertainty still exists. That uncertainty is reflected in dicta in *Esch v. Yeutter*.[415] In that case, the producers challenged in

411. *Bowen*, 487 U.S. at 907 n.42 (The Court noted that, in the absence of a congressional creation of an express cause of action, "to construe statutes . . . as 'mandating compensation by the Federal Government for the damage sustained,' . . . one must imply from the language of such statutes a cause of action." (citations omitted)). As the Court in *Bowen* noted, the standards for determining whether a federal statute implies a cause of action are found in Thompson v. Thompson, 484 U.S. 174, 179-87 (1988), and Cort v. Ash, 422 U.S. 66, 78 (1975). *Id.*

412. Sisk, *supra* note 225, at 49 (also noting that "the Supreme Court has developed a rather strict approach to the question of implied rights of action" (footnote omitted)). *But see* Webster II, *supra* note 261, at 536 ("[T]he Court's speculative limitations on Claims Court jurisdiction (that seem to imply a requirement for an express statutory private cause of action as a prerequisite to a Tucker Act suit) appeared only in dicta. Resolution of those issues clearly should be left for another day and another decision, when the issue is presented squarely."); *see also* Aycock-Lindsey Corp. v. United States, 171 F.2d 518, 520-21 (5th Cir. 1948) ("The Tucker Act does not provide that a statute of Congress on which a claim is founded shall also provide that suit may be maintained against the United States for claims arising under such statute.").

413. *Compare Morgan*, 12 Cl. Ct. at 251-52 (no implied-in-fact contract under Milk Diversion Program) *with Grav*, 14 Cl. Ct. at 393 (an implied-in-fact contract existed under the Milk Diversion Program), *aff'd*, 886 F.2d 1305.

414. *Pope*, 9 Cl. Ct. at 485-86 (quoting ATL, Inc. v. United States, 4 Cl. Ct. 672 (1983), *aff'd*, 735 F.2d 1343 (Fed. Cir. 1984)); *see also* Eliel v. United States, 18 Cl. Ct. 461, 466-69 (1989) (discussing the requirements for an implied-in-fact contract and distinguishing implied contracts from equitable estoppel), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990); Chavez v. United States, 18 Cl. Ct. 540, 544-48 (1989) (same). On a related note, the Claims Court does not have jurisdiction over contract claims "founded on a theory of promissory estoppel." *Raines*, 12 Cl. Ct. at 534 (citations omitted). For discussions of the application of the doctrine of equitable estoppel against the United States, see Willson v. United States, 14 Cl. Ct. 300, 305-07 (1988); Durant v. United States, 16 Cl. Ct. 447, 449-51 (1988).

415. 876 F.2d 976, *modifying* Esch v. Lyng, 665 F. Supp. 6.

the district court the ASCS's denial of their eligibility to participate in a price support program and in the CRP. In holding that the district court had jurisdiction to hear the challenge, the court noted:

> If appellees' [the producers'] suit is not based on a contract with the Federal Government, it cannot lie within the Claims Court's contractual jurisdiction . . . . Although appellees signed 'contracts' with the Federal Government, and although the Department's [USDA] regulations denominate the documents executed by the Federal Government and program participants as 'contracts', . . .
>
> > we see no reason to assume that what is involved here is a contract within the meaning of the Tucker Act. As the Supreme Court recently noted, '[u]nlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.' [Appellees'] claims arise under a federal grant program and turn on the interpretation of statutes and regulations rather than on the interpretation of an agreement negotiated by the parties. It seems to us, then, that [appellees'] claims are not contract claims for Tucker Act purposes.[416]

This observation suggests that the statutory and regulatory aspects of the programs administered by the ASCS may predominate over any aspects of a contractual nature that may be present when the issue is whether Tucker Act jurisdiction exists. Thus, the existence of a "contract" between the producer and the CCC or the USDA should not be assumed to support Tucker Act jurisdiction.

2. *Reviewability, the Scope of Review, Discovery, and the Burden of Proof*

a. *Reviewability*

In non-Tucker Act actions seeking review of final ASCS decisions, the basis for the government's waiver of sovereign immunity is the APA.[417] In Tucker Act actions, although the Tucker Act serves as the waiver of sovereign

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416. *Id.* at 978 n.13 (citations omitted) (quoting *Maryland Dep't of Human Resources*, 763 F.2d at 1449). *But see* Webster I, *supra* note 225, at 753 n.207 (criticizing *Maryland Dep't of Human Resources* and citing Massachusetts v. Departmental Grant Appeal Bd., 815 F.2d 778, 786 (1st Cir. 1987), for the proposition that the government grants-in-aid are contracts for Tucker Act purposes).

417. 5 U.S.C. §§ 701-706. Section 702 of the APA provides, in part, that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Section 702 is not a jurisdictional statute. It does not confer jurisdiction on a court not already possessing jurisdiction. Califano v. Sanders, 430 U.S. 99, 105-06 (1977). Rather, it serves as a limited waiver of the government's sovereign immunity. *See, e.g.*, *Pope*, 9 Cl. Ct. at 487. That waiver is subordinate to statutes that preclude judicial review and is also inapplicable where "agency action is committed to agency discretion by law." 5 U.S.C. § 701; *see also* 7 U.S.C. § 702 ("Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.").

immunity,[418] the APA "provides the framework for determining when a court may review an agency's determination."[419]

A threshold issue under the APA is whether the final decision of the ASCS is reviewable. Recently, the Eighth Circuit held that an ASCS determination not to waive the three-year ownership requirement under the CRP was not judicially reviewable.[420]

The issue before the court arose when the Secretary, acting through the ASCS, determined that land owned by the plaintiff was not eligible for enrollment in the CRP. Eligibility was denied because the plaintiff had not owned the land for the requisite three-year period prior to the plaintiff's bid to enroll the land, and because the Secretary had determined that the plaintiff had not met one of the statutory exceptions to the three-year ownership requirement, specifically, "that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the CRP."[421] Although the court acknowledged that "[t]here is a strong presumption that agency actions are reviewable under the APA,"[422] it accepted the government's argument that the Secretary's determination that the exception to the three-year ownership had not been satisfied by the plaintiff was "agency action . . . committed to agency discretion by law" and, accordingly, not judicially reviewable under the APA.[423]

In so holding, the court applied the test for determining whether agency action is committed to agency discretion by law articulated by the United States Supreme Court in *Webster v. Doe*.[424] Under that test, agency action is not reviewable " 'if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.' "[425] When it measured the Secretary's authority to assess the appropriateness of granting the exception to the three-year ownership requirement against that standard, the Court found that the statute

> gives the Secretary extremely broad discretion and supplies no objective criteria for determining the existence of adequate assurance. We are simply unable to discern from the language of the statute any meaningful standard against which a court could judge the Secretary's exercise of his discretion to determine whether adequate assurance exits.[426]

Thus, in essence, agency action is unreviewable if the statute authorizing the action is " 'drawn in such broad terms that in a given case there is no law

418. *See, e.g.*, Laguna Hermosa Corp. v. Martin, 643 F.2d 1376, 1379 (9th Cir. 1981) ("The Tucker Act . . . is a waiver of sovereign immunity antedating the APA.").

419. *Stegall*, 19 Cl. Ct. at 769; Brahms v. United States, 18 Cl. Ct. 471, 475 (1989).

420. North Dakota *ex rel.* Bd. of Univ. & School Lands v. Yeutter, 914 F.2d 1031 (8th Cir. 1990).

421. *Id.* at 1032 (quoting 16 U.S.C. § 1385(a)(1)(C)).

422. *Id.* at 1033 (citing Woodsmall v. Lyng, 816 F.2d 1241, 1243 (8th Cir. 1987)).

423. *Id.* at 1033-35 (quoting 5 U.S.C. § 701(a)(2)).

424. 486 U.S. 592 (1988).

425. *North Dakota ex rel. Bd. of Univ. & School Lands*, 914 F.2d at 1034 (quoting *Webster*, 486 U.S. at 599-600).

426. *Id.* at 1035.

to apply.' "[427] Because this standard applies in both the district courts and the Claims Court, it presents a consideration in every case seeking review of a final ASCS decision based on a statute or regulation.

b. *Scope of Review*

Because the scope of judicial review under the APA is well-established and generally familiar to practitioners, it is not treated in detail in this article.[428] Less familiar are two statutes that apply to judicial review of final ASCS decisions and serve to restrict the scope of judicial review. Those statutes are 7 U.S.C. § 1385 and 7 U.S.C. § 1429. They apply independently of the APA,[429] and they also apply in both the district courts and the Claims Court, including actions brought under the contractual jurisdiction of the Tucker Act.[430]

The first statute which applies to judicial review of final ASCS decisions is 7 U.S.C. § 1385 which provides, in part, that

> [t]he facts constituting the basis for . . . any payment under the wheat, feed grain, upland cotton, extra long staple cotton, and rice programs [or] . . . 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.[431]

Although the government often asserts § 1385 operates as a total preclusion of

427. *Id.* at 1033 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)). In *Madsen v. Dep't of Agric.*, the Eighth Circuit found that "[b]ecause Congress has directed that crop yields be calculated according to a specific statutory formula and because the agency has adopted regulations for this calculation, there is 'law to apply.' " *Madsen*, 866 F.2d at 1037.

428. Section 706(2) of the APA sets forth the following six standards on which a reviewing court may assess the lawfulness of an agency action:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, and privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 [rule making hearings] and 557 [decisions pursuant to rule making hearings] of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

See also Linden, *supra* note 223, at 319-25 (discussing the application of the APA to judicial review of final ASCS decisions); SCHWARTZ, *supra* note 217, at ch. 10 (discussing in detail the scope of review under the APA).

429. In *Raines v. United States*, the court noted:

> As 5 U.S.C. § 701(a) (1982) of the Administrative Procedure Act provides, judicial review is exempted when either a statute precludes judicial review or when agency action is committed to agency discretion by law. In this situation, sections 1429 and 1385 limit, but do not preclude judicial review, and therefore we find defendant's [the government] argument for denying judicial review unavailing.

Raines, 12 Cl. Ct. at 536 (footnote omitted).

430. In *Raines v. United States*, the producer argued that §§ 1385 and 1429 did not apply to an action arising out of an alleged breach of contract. *Raines*, 12 Cl. Ct. 530. The Claims Court implicitly rejected the argument, but held that it was not precluded by 7 U.S.C. § 1385 from determining the legal issue of whether a contract was breached. *Id.* at 537.

431. 7 U.S.C. § 1385.

judicial review,[432] the courts have declined to agree. Instead, the courts have consistently held that § 1385 limits judicial review but does not preclude it.[433]

Perhaps the most succinct and easily understood explanation of the effect of § 1385 is the following:

> Section 1385 does not, however, accord finality to the administrative determination as a whole. Rather, finality attaches in these cases only to those findings of facts that constitute the basis for program payments. A reviewing court thus finds itself in a position analogous to that of a court confronting a properly presented motion for summary judgment where the facts — determined by administrators in this case — are not in dispute. Only the legal questions remain for review. Of course, the statute does not preclude review of those facts that do not constitute the basis for program payments, such as those underlying alleged constitutional violations.[434]

This explanation underscores two important points. First, § 1385 only operates to accord finality to the findings of facts constituting the basis for program payments. Second, it does not preclude the determination of legal questions.

The statute itself, however, adds a third element not noted in the quoted explanation. Specifically, the "facts constituting the basis" for program payments are only those facts that are "officially determined in accordance with the applicable regulations prescribed by the Secretary."[435] Accordingly, it has been held that "the validity of the procedures utilized in reaching a determination, including consistency of those procedures with agency regulations, are open to judicial exploration."[436]

In summary, § 1385 does not preclude the determination of legal questions. This means that judicial review may encompass the issues of

1. whether the agency acted arbitrarily and capriciously;[437]

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432. *See* Linden, *supra* note 223, at 323-25; Hamilton II, *supra* note 332, at 638-40.

433. *See, e.g., Madsen*, 866 F.2d at 1036 ("Section 1385, however, is not a complete bar to judicial review of agency action related to farm program payments." (citation omitted)); *Garvey*, 397 F.2d at 605 ("We find no implication of congressional intent to preclude [complete] review in . . . the finality provision [§ 1385] . . . ."); *King*, 517 F. Supp. at 1365 ("[I]t is clear that § 1385 does not preclude judicial review in this case.") (relying on *Garvey*); *see also* Hamilton II, *supra* note 332, at 638-40 (discussing some of the cases that have addressed the effect of 7 U.S.C. § 1385).

434. *Batson*, 782 F.2d at 1311-12, *cert. denied*, 477 U.S. 906. For a recent description of the purposes of § 1385, see Brundidge Banking Co. v. Pike County ASCS, 899 F.2d 1154, 1163 n.9 (11th Cir. 1990) ("The finality provision of section 1385 has the salutary effect of eliminating collateral issues in payment challenges, such as the validity of a quota allocation. These collateral issues may have been subject to appeal at an earlier time, and the finality provision ensures that the matters that should have been raised earlier are not bootstrapped into subsequent litigation.").

435. *See* Esch v. Yeutter, 876 F.2d at 991, *modifying* Esch v. Lyng, 665 F. Supp. 6.

436. *Id.* (footnotes omitted).

437. *Madsen*, 866 F.2d at 1036-37 ("Although factual determinations of an agency are not subject to judicial review under section 1385, we are free under the APA to review legal questions or agency action asserted to be arbitrary and capricious." (citations omitted)); Esch v. Lyng, 665 F. Supp. at 12-13 (holding that 7 U.S.C. § 1385 did not preclude it from inquiring, under the standards of the APA, whether the ASCS " 'considered all relevant factors' and had a rational basis for its decision." (citation omitted)), *modified sub nom.* Esch v. Yeutter, 876 F.2d 976; *Frank's Livestock & Poultry Farm, Inc.*, 17 Cl. Ct. at 606 ("[T]he issue open for resolution, on review of the administrative record, is whether the officials acted rationally and within statutory authority." (citations omitted)), *aff'd*, 905 F.2d 1515; *Justice*, 716 F. Supp. at 1579 (holding that the court was entitled to determine whether the Secretary's legal conclusions were arbitrary and capricious); *Willson*, 14 Cl. Ct. at 304

2. whether the agency acted in violation of due process rights;[438]

3. whether the agency made its findings of fact in conformity with the regulations;[439]

4. whether the Secretary's definition of a word in a regulation is consistent with the statute;[440] and

5. whether a breach of contract has occurred.[441]

Section 1385, however, does preclude a redetermination of the facts constituting the basis for program payments when those facts have been officially determined[442] in conformance with the regulations of the Secretary.[443]

("The court's function . . . is to review the facts as determined by the Secretary of Agriculture, per his authorized designee, and to ascertain whether a rational basis in the administrative record underlies the decision reached." (citations omitted)); Gibson v. United States, 11 Cl. Ct. 6, 11 (1986) ("Section 1385 does not prevent judicial review of questions of law or allegations and proof by plaintiff that an agency decision is arbitrary or capricious." (citation omitted)); Boyd v. Secretary of Agric., 459 F. Supp. 418, 424-25 (D.S.C. 1978) ("A 'finality provision' does not preclude judicial review of the question whether findings of fact were in conformity with the regulations." (citations omitted)); *see also* Hamilton, *Farmers' Rights to Appeal ASCS Decisions Denying Farm Program Benefits*, 29 S.D.L. REV. 291-96 (1984) [hereinafter Hamilton III] (discussing some of the earliest cases addressing 7 U.S.C. § 1385); Hamilton II, *supra* note 332, at 638-40 (discussing some of the more recent cases addressing 7 U.S.C. § 1385); Devine, *supra* note 218, at 219-22 (same).

438. *Prosser*, 389 F. Supp. at 1005 ("[S]tatutory language [which makes] administrative action 'final and conclusive' cannot preclude judicial review where such action is alleged to infringe constitutional rights." (citation omitted)); *Westcott*, 611 F. Supp. at 353, *aff'd*, 765 F.2d 121. *See generally* Hamilton II, *supra* note 332, at 641-43 (discussing the cases addressing due process claims arising out of ASCS decisions); Devine, *supra* note 218, at 223-25 (same).

439. *Garvey*, 397 F.2d at 605 ("It must be obvious that the so-called finality provision [§ 1385] making findings of fact 'final and conclusive when made in conformity with the regulations' does not preclude judicial review of the question whether the findings of fact were in conformity with the regulations."); Esch v. Yeutter, 876 F.2d at 991 ("Section 1385 poses no obstacle to decision[s] of legal questions. Consequently, the validity of the procedures utilized in reaching a determination, including the consistency of those procedures with agency regulations, are open to judicial exploration."), *modifying* Esch v. Lyng, 665 F. Supp. 6.

440. *Grav*, 14 Cl. Ct. at 394 (holding that issues of statutory construction are not precluded from judicial review by 7 U.S.C. § 1385), *aff'd*, 886 F.2d 1305; *see also O'Connell*, 14 Cl. Ct. at 314-17 (addressing the issue of whether the ASCS's definition of the term "unit" was consistent with the Milk Diversion Program statute at issue).

Section 1385 "only limits . . . [the] review of facts, not the resolution of legal questions or mixed questions of fact and law." *Stegall*, 19 Cl. Ct. at 770. When the issue involves a question of mixed fact and law, the general rule is that the reviewing court must not disturb the agency's finding if it "is reasonable in the circumstances of the case." SCHWARTZ, *supra* note 217, at 654 (citing Powell v. Gray, 114 F.2d 752, 756 (9th Cir. 1940)). For an illustrative application of that rule in a case involving the issue of whether certain handlers of milk met a statutory definition of "producers," see Cosgrove v. Wickard, 49 F. Supp. 232 (D. Mass. 1943).

441. *Raines*, 12 Cl. Ct. at 537 ("Thus, even accepting the factual findings of the administrative bodies as conclusive, the court may determine whether denying plaintiffs the benefit of higher PIK compensation gives rise to a breach of contract, which is a legal, not a factual, determination." (citation omitted)); *Pettersen*, 10 Cl. Ct. at 197 ("Furthermore, even accepting all factual findings as conclusive, the court may determine whether a denial of benefits on such facts gives rise to a breach of contract, which is a legal, not a factual, determination."), *aff'd*, 807 F.2d 993 (Fed. Cir. 1986).

As a corollary principle, the courts also have jurisdiction to determine whether a contract was formed. *See, e.g.*, *Grav*, 14 Cl. Ct. at 391-94, *aff'd*, 886 F.2d at 1307-08. For a discussion of some of the issues of contract formation that have arisen under programs administered by the ASCS, see *supra* notes 413-16 and the accompanying text.

For a listing of issues subject to judicial review under 7 U.S.C. § 1385 that is similar to the preceding listing in the text, see Hamilton III, *supra* note 437, at 294. That listing is based on pre-1984 decisions, but the basic principles remain unchanged.

442. For a discussion of the potential problem under 7 U.S.C. § 1385 of ascertaining what "facts" were "determined" by the Secretary, see *Batson*, 706 F.2d at 685 n.41 (suggesting that a potential threshold issue, one for the courts to decide, is "whether a given level of lack of clarity in a portion of

The second provision which relates to judicial review of final ASCS decisions is 7 U.S.C. § 1429 which provides as follows: "Determinations made by the Secretary under this Act shall be final and conclusive: *Provided*, [t]hat the scope and nature of such determinations shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act."[444] As with § 1385, § 1429 does not preclude judicial review, it only limits it.[445]

Section 1429 limits judicial review to an inquiry as to whether the Secretary acted rationally and within his statutory authority in making the determination at issue.[446] Judicial review also extends to the issue of whether the Secretary acted in accordance with required procedures.[447] In that review, however, the court may not second guess the wisdom of the Secretary.[448]

c. *Discovery*

As a general rule, judicial review of an administrative agency's action is confined to a review of the record.[449] The rule, however, is not absolute. Ex-

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a 'final determination' prevents that determination (or portion thereof) from enjoying section 1385 'conclusive' factual effect where the facts so determined cannot be reliably identified"), *aff'd*, 782 F.2d 1307, *cert. denied*, 477 U.S. 906 (1986).

443. *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)); *Pope*, 9 Cl. Ct. at 485 (holding that, under § 1385, determinations that involve a weighing of the facts are not reviewable); Gross v. United States, 505 F.2d 1271, 1279 (Ct. Cl. 1974) ("It is concluded that the factual determinations made by the . . . [ASCS] are entitled to finality under 7 U.S.C. § 1385 and are not subject to review by this court . . . ."); United States v. Gomes, 323 F. Supp. 1319, 1321 (E.D. Cal. 1971) ("It is the court's conclusion that the weight of authority requires the view that the official determinations of program administrators are final and conclusive, and not reviewable by the court."); United States v. Moore, 298 F. Supp. 199, 200 (S.D. Ohio 1969) ("Under § 1385 . . . the determination of the State ASC Committee that [the producer] had harvested corn in excess of the permitted acreage is final and conclusive.").

444. 7 U.S.C. § 1429 (1988) (emphasis in original).

445. As was noted in *Gonzalez*, the statute authorizes, not precludes, judicial review. *Gonzales*, 334 F.2d at 575. In the words of the court, "Congress must have contemplated that a claim of 'inconsistency' in the Secretary's action was to be resolved by judicial review. In short, far from precluding judicial review, the statute authorizes it . . . ." *Id.*

446. *E.g., Frank's Livestock & Poultry Farm, Inc.*, 905 F.2d at 1517 (" '[O]ur examination of the Secretary's action is very limited. We do not sit to consider the wisdom of the Secretary's decisions, but only to determine that he has acted rationally and within his statutory authority.' " (quoting *Carruth*, 627 F.2d at 1076 and *Gross*, 505 F.2d at 1279), *aff'g* 17 Cl. Ct. 601; Swartz v. United States, 14 Cl. Ct. 570, 577-78 (1988) (The court held that "judicial review is generally available under § 1429 'to determine that [the Secretary] has acted rationally and within his statutory authority.' " (quoting *Carruth*, 627 F.2d at 1076); *Haupricht Bros.*, 11 Cl. Ct. at 373-74 ("Cases interpreting this statutory provision [§ 1429] have held that it does not preclude judicial review to determine whether the Secretary (or his delegate) acted beyond the Secretary's statutory authority . . . or whether he acted irrationally . . . ." (citations omitted)).

447. Arlington Oil Mills, Inc. v. Knebel, 543 F.2d 1092, 1098-1102 (5th Cir. 1976).

448. *Carruth*, 627 F.2d at 1076 (citing Hiatt Grain & Feed, Inc. v. Bergland, 446 F. Supp. 457, 469-77 (D. Kan. 1978), *aff'd*, 602 F.2d 929 (10th Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980), and other cases); *see also Gibson*, 11 Cl. Ct. at 15 ("The agency decision need only have a rational basis. It does not have to be the same one the court would have made." (citation omitted)); *Justice*, 716 F. Supp. at 1575 ("[A]n agency's decision need only be reasonable, not the best decision." (citing National Wildlife Fed'n v. Burford, 871 F.2d 849 (9th Cir. 1989)).

449. *E.g.*, Esch v. Yeutter, 876 F.2d at 991, *modifying* Esch v. Lyng, 665 F. Supp. 6; *Justice*, 716 F. Supp. at 1575. *See generally* SCHWARTZ, *supra* note 217, at § 10.2 (discussing review on the administrative record). Because review is generally limited to the administrative record, making a complete record during the administrative appeal process is critically important. *See supra* notes 188-93 (discussing hearings before DASCO and the Director of the National Appeals Division of the ASCS and the preparation of the record of those proceedings).

tra-record evidence has been considered in the following circumstances:

> (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.[450]

If one of these circumstances is shown to exist, discovery should be permitted.[451] However, as with the substantive claims of the producer's case, the burden of proof for showing such circumstances will rest with the producer.[452]

d. *The Burden of Proof*

The producer seeking review and relief bears the burden of proof.[453] Moreover, "[t]he general rule when reviewing a record in which conflicting evidence exists is for . . . [the] court to defer to the administrative finding."[454]

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450. Esch v. Yeutter, 876 F.2d at 991-92, *modifying* Esch v. Lyng, 665 F. Supp. 6 (citing Stark & Weld, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 345 (1984) and cases supporting "these applications"). In *Esch*, the court also noted that reliance on extra-record evidence may sometimes be "appropriate" when the "procedural validity" of the Secretary's action is in dispute. *Id.* at 991; *see also Justice*, 716 F. Supp. at 1575 (citing ASARCO v. United States Envtl. Protection Agency, 616 F.2d 1153, 1160 (9th Cir. 1980), for the proposition that a "Court may go outside [the] record if necessary, and shall consider this evidence relevant to the substantive merits of the matter only for background information or to determine whether the agency considered all relevant factors in its decision").

451. In *Frank's Livestock & Poultry Farm, Inc.*, discovery was denied on the grounds that it would be inappropriate where, as in that case, the proceedings were limited to a review of the administrative record. *Frank's Livestock & Poultry Farm, Inc.*, 17 Cl. Ct. at 606 n.1, *aff'd*, 905 F.2d 1515. However, discovery was permitted in *Justice v. Lyng. Justice,* 716 F. Supp. 1567; 716 F. Supp. 1570; Justice v. Lyng, No. CIV 87-1569-PHX-WPC (D. Ariz. filed Aug. 10, 1988) (order compelling discovery). In that action, the producers successfully argued that

> while the focal point for judicial review of an agency's decision should be the administrative record, it is both common and entirely proper for that record to be expanded through discovery where, as here, such expansion is necessary to explain the agency's action, to determine whether the agency considered all relevant factors or fully explicated its grounds for decision, to determine the agency's contemporaneous construction of the regulations at issue, or to supplement the administrative record filed by the agency where that record is incomplete or requires expansion to permit explanation or clarification of technical terms. *See, e.g.*, Camp v. Pitts, 411 U.S. 138, 143 (1973); Arizona Past & Future Found., Inc. v. Lewis, 722 F.2d 1423, 1426 n.5 (9th Cir. 1983); Public Power Council v. Johnson, 674 F.2d 791, 793-94 (9th Cir. 1982); Asarco, Inc. v. EPA, 616 F.2d 1153, 1159 (9th Cir. 1980); Bunker Hill Co. v. EPA, 572 F.2d 1286, 1292 (9th Cir. 1977); Exxon Corp. v. Department of Energy, 91 F.R.D. 26, 40-43 (N.D. Tex. 1981); Tenneco Oil Co. v. Department of Energy, 475 F. Supp 299, 318 (D. Del. 1979); Petrolane, Inc. v. Department of Energy, 79 F.R.D. 115, 119 (C.D. Cal. 1978).

Plaintiffs' Reply Memorandum in Support of Renewed Motion to Compel Discovery at 6, Justice v. Lyng, No. Civ. 87-1569 PHX-WPC (D. Ariz. filed July 15, 1988).

Consideration should also be given to using the Freedom of Information Act as a discovery tool. *See supra* note 90 and the accompanying text.

452. *See Gibson*, 11 Cl. Ct. at 16 (burden of proof in showing that the Secretary's action was arbitrary and capricious is on the plaintiff (citing *Gross*, 505 F.2d at 1279)).

453. *Id.*

454. *Id.* at 16 (citing Burke v. United States, 230 Ct. Cl. 853, 856-57 (1982)).

IV. CONCLUSION

Representing producers in administrative appeals before the ASCS or in the judicial review of final ASCS determinations presents several unique challenges. First, for many producers, the decisions rendered will be of critical importance to their livelihood. Second, many of the requirements of the federal farm commodity and related land use programs are complicated, even arcane, and there is relatively little detailed guidance for practitioners on the procedural and substantive aspects of federal farm program law. Third, judicial review of final ASCS decisions is limited and complicated by a choice of forum issue.

For practitioners who are new to administrative and judicial review of ASCS decisions, these three challenges may require some extra effort and some adjustments in the usual ways of preparing a case. Nevertheless, what ultimately is required is good lawyering, and there are plenty of opportunities to apply that skill in the law of federal farm programs.