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INSIDE

IN FUTURE ISSUES

Payment limitations: partnerships with joint loans

The United States Claims Court recently ruled in *Stegall v. United States*, 19 Cl. Ct. 765 (1990), that a joint loan cannot serve as the basis for combining partners in two separate partnerships into one "person" for payment limitation purposes. Motions for summary judgment by both parties were denied and the matter was remanded to the ASCS for further factual findings consistent with the court's ruling.

In 1986, Stegall Brothers, a California partnership consisting of five partners, leased property from the Bank of America. Portions of the farm were subleased for the growing of rice to four other entities, including Southdown Partnership ("Southdown"), a California partnership consisting of four partners. Stegall Brothers, Southdown, and the four other sublessees all executed a contract to participate in the 1986 price support program with the Commodity Credit Corporation (CCC).

During the spring of 1986, Stegall Brothers and Southdown had sought and received advice from the county ASCS office regarding the proper form of subleasing contracts, custom farming, and financing documents. According to the plaintiffs, the County Executive Director (CED) of the county ASCS office represented to them that the proposed financing arrangement, including the obtaining of two loans secured by a joint promissory note by the two partnerships, would not limit the members of the two partnerships to a single $50,000 payment limitation.

The county ASCS Committee reviewed Stegall Brothers and Southdown's financial documents as well as the other supporting documents for the 1986 Farm Operating Plan for the respective partnerships and determined that the nine partners in the two partnerships should be considered as one person for payment

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Environmental group has standing to challenge ASCS wetland conversion exemption

In a ruling with major significance for future enforcement of the Nation's soil conservation laws, the Eighth Circuit has reversed a North Dakota Federal District Court and ruled that the National Wildlife Federation (Federation) has standing to challenge an exemption granted by a local ASCS office under the swampbuster law [16 U.S.C. § 3822]. *National Wildlife Federation v. Agricultural Stabilization and Conservation Service*, No. 89-5474, Eighth Circuit Court of Appeals, 1990 U.S. App. LEXIS 6136, filed April 19, 1990.

The lawsuit arose in September 1988, when the Bottineau County [North Dakota] ASCS committee granted the Bottineau County Water Resources District a blanket exemption for 139 square miles, finding that the conversion of the wetland had "commenced before December 23, 1985." The determination that the entire wetland was exempt from the swampbuster restrictions, as a "commenced conversion," means landowners in the wetland can initiate or continue actions draining the wetland without fear of losing federal farm program benefits.

The Federation filed suit in federal district court arguing that the exemption, which included 6500 acres of prairie wetland, violated the provisions of the swampbuster law, and requested an injunction compelling the ASCS to reverse and rescind the grant of the exemption. The district court in September 1989 dismissed the action prior to the completion of discovery and without reaching the merits of the case, holding that the association lacked standing to challenge the ASCS decision. The district court noted that section ten of the Administrative Procedures Act grants a cause of action to persons suffering a legal wrong because of agency action, but held the federation's alleged injuries were insufficient to give it standing under the test set out by the U.S. Supreme Court in *Sierra Club v. Norton*, 405 U.S. 727 (1972). The government argued both at the district court level and on appeal that as a matter of law only landowners denied benefits under the

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limitation purposes, thus limiting the nine individuals to a total of $50,000 in deficiency and other payments. The basis for this determination was that the joint note violated the provisions of 7 C.F.R. section 795.3 (1986) because the two partnerships funded their farm operations from the same financial source. The plaintiffs appealed, but the California State ASCS Committee and the Deputy Administrator of State and County Operations (DASCO) agreed with the county committee and limited the nine partners to a single payment limitation.

Plaintiffs also requested equitable relief under 7 C.F.R. section 790.2(b)(1986) (misinformation) and 7 C.F.R. section 791 (good faith effort to fully comply with program requirements). Relief under these two sections was rejected by the county committee and that decision was affirmed by the state ASCS committee and DASCO. Plaintiffs then filed a complaint with the U.S. Claims Court on all three issues asserted at the administrative level. Defendant, the U.S., filed a motion for summary judgment, and plaintiffs filed a cross motion for summary judgment on all issues.

The Claims Court found that jurisdiction was proper under 7 U.S.C. section 1385 but that review was limited to legal questions and to mixed questions of law and fact. The court then ruled that 7 C.F.R. section 795.7 was the regulation controlling Plaintiff's "person" determination, and that the ASCS should have analyzed whether each partner's contribution of land, labor, management, equipment, and capital to his respective partnership was commensurate with his claimed share of the proceeds. If the contribution of any partner consisted substantially of capital, defendants should further have inquired as to the source of such capital. Since DASCO made no finding regarding commensurate shares or whether the individual partner's contributions consisted substantially of capital, the case was remanded for further factual findings.

Defendant's determination that nine partners were one person because of the joint note was held to be wrong as a matter of law. Partnerships must satisfy the requirements of section 795.7, not section 795.3. Thus, a joint note was not a rational basis for treating the nine partners as a single person.

Having decided that the ASCS had applied the wrong regulation to plaintiff's case, plaintiffs' claims for relief from defendant's ruling under 7 C.F.R. section 790 and 791 were not considered.

– Elizabeth Ufkes Olivera, Marshall, Burghardt & Kelleher, Chico, CA

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Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* from March 29 to April 30, 1990:

1. FCA; Loan policies and operations; disclosure to shareholders; accounting and reporting requirements; correction; effective date 2/23/89. 55 Fed. Reg. 12472.

2. FCA; Funding and fiscal affairs, loan policies and operations, and funding operations; correction; effective date 2/23/89. 55 Fed. Reg. 12473.

3. FCA; Semiannual regulatory agenda. 55 Fed. Reg. 17072.

4. APHIS; Intent to regulate horses and other farm animals under the Animal Welfare Act; effective date 6/4/90. 55 Fed. Reg. 12630.

5. APHIS; Animal Welfare; standards for horses and other farm animals. 55 Fed. Reg. 12667.

6. INS; Termination of temporary resident status granted to an alien as a Special Agricultural Worker; interim rule with request for comments; effective date 4/5/90. 55 Fed. Reg. 12629.

7. PSA; Surety bonds; proposed rule; comments due 6/11/90. 55 Fed. Reg. 13796.

8. Department of Labor; Determination of the shortage number under section 210A of the Immigration and Nationality Act; final rule; effective date 4/17/90. 55 Fed. Reg. 14231.

9. USDA; Semiannual regulatory agenda. 55 Fed. Reg. 15908.

10. CCC; Export Bonus Program; proposed rule; comments due 6/25/90. 55 Fed. Reg. 17443.

11. CCC; Foreign market development; proposed rule; comments due 6/25/90. 55 Fed. Reg. 17618.

– Linda Grim McCormick

State Roundup

KANSAS. *Lease or credit sale?* A recent federal district court opinion, *In re Cress*, 106 Bankr. 245 (D. Kan. 1989), considered an appeal by the debtor from a bankruptcy decision wherein an equipment transfer agreement was held to be a lease rather than a credit sale. The debtor in *Cress* had entered into an agreement with Agristor Leasing whereby the debtor would obtain a Harvestore crop storage and unloading system. In its analysis, the court applied the "economic realities" test in determining whether the transaction labeled a lease was actually a credit sale.

The court reviewed two recent Kansas Supreme Court decisions that enumerate factors leading to the identification of a purported lessor as a creditor. *Atlas Industries, Inc. v. National Cash Register Co.*, 216 Kan. 213, 531 P.2d 41 (1975); Executive Financial Services, Inc. v. Pagel, 238 Kan. 809, 715 P.2d 381 (1986).

Some factors present in *Cress* matched the criteria for finding a sale rather than a lease. However those factors were overridden by other features of the agreement as in prior cases involving Agristor Leasing, and the court found the *Cress* agreement to be a true lease, not a financing agreement. *See, Agristor Leasing v. Meuli*, 634 F. Supp. 1208 (D. Kan. 1985) and *Wight v. Agristor Leasing*, 652 F. Supp. 1000 (D. Kan. 1987). Most persuasive was the provision in the agreement with Agristor that called for a purchase option price equal to the fair market value of the equipment.

– Van Z. Hampton, Patton and Kerbs, Dodge City, KS.

swampbuster provisions have standing to challenge ASCS determinations.

On appeal the Federation argued that it had alleged sufficient injury to establish standing. It's argument was that without the financial disincentive provided by the swampbuster law, the water district and producers would convert the wetland to cropland, thereby injuring Federation members who have a significant interest in preserving the valuable wetland resource.

The Federation's argument for standing included affidavits from six members who live within the exempted area, concerning the specific injuries they would suffer unless the exemption was withdrawn. Other members work and recreate in the affected area. Activities include hunting, as well as watching, feeding, and photographing the wetland wildlife. The court agreed that Federation members also benefit from the flood control, groundwater recharge, and water purification capabilities of the wetlands. The court noted that several members rely on groundwater sources within the project area and are threatened by water shortages and pesticide contamination. On this basis, the court concluded that the drainage of the wetland as a result of the commenced conversion determination granted by the local ASCS committee "will permanently deprive Plaintiffs' members of the use and enjoyment of these natural resources."

The court then turned to an analysis of the traditional tests applied when standing to sue is challenged. The court reviewed the U.S. Supreme Court's ruling on standing, noting the four factors that must be considered. The first three, established to satisfy constitutional requirements for standing, are: 1) the party must show he "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct," 2) the injury must be "fairly" traceable "to the challenged action," and 3) it must be likely the injury will be "redressed by a favorable decision." In addition, the courts apply a fourth prudential requirement that "the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated'" by the law in question, here, the swampbuster provisions.

On the question of actual or threatened injury, the court noted that it is not the magnitude of the injury that determines standing; "an identifiable trifle is enough." In considering the range of potential injuries Federation members would suffer from the ASCS decision, the court said these might include "a decrease in water supplies and of soil moisture for growing crops, a decrease in purity of water they use for domestic needs, a decrease in wetlands and wetland wildlife available to them for aesthetic purposes." The court concluded these were "more than an identifiable trifle;" they were statements of specific injury experienced by ascertainable individuals who live in the area sufficient to meet the tests set by the Supreme Court in *Morton* and *U.S. v. SCRAP,* 412 U.S. 669 (1973).

On the question of traceability and redressability, the Federation argued these issues were satisfied by asserting that with the exemption some of the landowners in the district will convert wetland to cropland, which will then cause them the injuries identified. Because the case was disposed of on a motion to dismiss, the court ruled it must accept the allegations as true unless they were "incapable of proof at trial." The court said "[T]here is nothing in the record which establishes that the appellants are incapable of establishing that some landowners will convert wetland if they are protected from the economic penalties of the Swampbuster provisions." Similarly the court felt the alleged link between the destruction of wetland and the asserted injuries was not so speculative that it was incapable of proof.

The court also specifically rejected the government's argument that redressability was impossible because substantial wetlands had already been converted during the pendency of the lawsuit. Because the injuries being suffered are cumulative, the court ruled it would be error to hold the Federation lacked standing simply because they may have already suffered some injury, saying that "[R]edress from additional future injury is sufficient to support standing."

On the fourth issue, the question of whether the plaintiff's interests were within the zone of interests to be protected by the statute, the court rejected the government's argument that the only parties with an interest in swampbuster determinations are the affected landowners. The court cited several statements from the swampbuster provisions that establish the goal of decreasing the conversion of private wetland into cropland in order to preserve for the Nation and its citizens, the beneficial attributes of wetlands. The court concluded that the interests of the federation members as landowners and inhabitants of the affected area fit within the zone of interest to be protected. The court said, "[I]f their allegations are true they will suffer a loss of aesthetic pleasures associated with wetlands and wetland wildlife, increased contamination of their drinking water, and decreased supplies of ground water and soil moisture for farming purposes. These are among the injuries the bill seeks to avoid."

– Neil D. Hamilton, Director, Agricultural Law Center, Drake University.

AG LAW CONFERENCE CALENDAR

Moving the West's Water to New Uses: Winners and Losers
June 6-8, 1990, Fleming Law Building, Boulder, CO.

Topics include: Sources of water – agriculture (the deep pool?); update on market strategies for protection of Western instream flows and wetlands; economic and social impacts of agriculture-to-urban water transfers.

Sponsored by the Natural Resources Law Center, University of Colorado School of Law.

For more information, call 303-492-1288.

EC'92: A New Relationship for the States
June 7-9, 1990, Hotel Washington, Washington, D.C.

Topics include: Agriculture – global talks remain vital to keep open transatlantic relationship; Eastern Europe – what does it mean for EC'92 and beyond.

Sponsored by the National Conference of State Legislatures.

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Environmental Litigation
June 25-29, 1990, University of Colorado, Boulder, CO.

Topics include: trial of RCRA/CERCLA case; state and private claims for relief under CERCLA; and Clean Air Act and Clean Water Act administrative and judicial proceedings.

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For more information, call 1-800-CLE-NEWS.

1990 Agriculture and Environmental Law Update: Iowa and Federal Developments
June 4: Ft. Dodge; June 5: Clear Lake; June 6: Cedar Falls; June 7: Iowa City; June 8: Ottumwa.

Topics include: 1990 Iowa legislation; federal environmental law affecting farmers.

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1990 Drake University Summer Agricultural Law Institute
June 4-7, June 11-14, June 18-21, June 25-28, July 9-12, July 16-19

Sessions schedule: Agricultural taxation and business planning by Professor James Monroe (6/4-7); Agriculture and the environment by Professor Gerald Torres (6/11-14); Analysis of the farmer's comprehensive liability insurance policy by Professor John D. Copeland (6/18-21); International agricultural trade law by Professor Robert L. McGeorge (6/25-28); The 1990 Farm Bill and federal farm programs by Professor Neil D. Hamilton (7/9-12); Legal aspects of biotechnology and agriculture by Dean J.W. "Jake" Looney (7/16-19).

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ASCS appeals: an observation and a suggestion*

by Christopher R. Kelley

Although the Agricultural Stabilization and Conservation Service (ASCS) has been responsible for the field administration of the federal farm commodity and related land use programs for nearly three decades, relatively little attention has been paid to the administrative and judicial review of its decisions. To date, only four law review articles have focused on the review of ASCS determinations. Hamilton, *Farmers' Rights to Appeal ASCS Decisions Denying Farm Program Benefits*, 29 S.D.L. Rev. 282 (1984); Devine, *Understanding the Current Crisis With the ASCS*, 9 J. Agric. Tax'n & L. 195 (1987); Hamilton, *Legal Issues Arising in Federal Court Appeals of ASCS Decisions Administering Federal Farm Programs*, 12 Hamline L. Rev. 633 (1989)(hereinafter "Hamilton II"); Linden, *An Overview of the Commodity Credit Corporation and the Procedures and Risks of Litigating Against It*, 11 J. Agric. Tax'n & L. 305 (1990).

There are two reasons for devoting greater attention to the ASCS appeal process and to the judicial review of ASCS determinations. First, the role of the ASCS is changing. Once thought of only as the farmers' "banker" by virtue of its administration of the farm price and income support programs, the ASCS is now also becoming a "policeman" as it assumes a share of the responsibility for implementing the conservation provisions of the Food Security Act of 1985. Hamilton II, *supra* at 633-34.

The ASCS's new role as a co-enforcer of conservation requirements may cast it into a more adversarial relationship with farm program participants. In addition, because the conservation provisions of the Food Security Act of 1985 effectively require the ASCS to share the responsibility for determining eligibility for farm program benefits with other agencies, most notably the Soil Conservation Service (SCS), there is room for confusion and uncertainty as the agencies work to coordinate their efforts.

A second reason for greater scrutiny of the review process is the increasing maturation of the law governing the judicial review of ASCS decisions. Although not every issue has been definitively resolved, the case law has evolved to the point where certain approaches for obtaining judicial relief can be compared with others. Thus, understanding the administrative and judicial review processes can significantly increase the producer's likelihood for success in challenging an ASCS determination.

This article makes an observation and a suggestion. The observation arises from the potential for uncertainty and confusion inherent in the sharing of responsibility by the ASCS and the SCS for the implementation of the conservation compliance provisions of the Food Security Act of 1985. The observation is intended to alert practitioners to an emerging issue in this area. The suggestion concerns the choice of remedy in the judicial review of ASCS determinations. The suggestion offers a recently successful strategy for pursuing judicial review of an ASCS determination.

A comprehensive practitioner's guide to the administrative and judicial review of ASCS decisions will be published this summer by the Agricultural Law Committee of the General Practice Section of the American Bar Association in cooperation with the National Center for Agricultural Law Research and Information. Using a question and answer format, that guide attempts to answer most of the questions that a practitioner handling an ASCS appeal is likely to have. This article is partially based on the contents of that guide.**

An observation on the administrative review of conservation compliance determinations

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

Not all determinations affecting eligibility for ASCS administered programs are made by the ASCS. Most significant, the SCS makes certain determinations in connection with the Conservation Reserve Program (16 U.S.C. §§ 3831-36) and the "sodbuster," "swampbuster," and conservation compliance provisions (16 U.S.C. §§ 3811-12, 3821-22, 3841-45) of the Food Security Act of 1985. Moreover, these determinations may be binding on the ASCS. 7 C.F.R. § 780.11(a). An adverse determination by the SCS may result in the program participant being declared ineligible by the ASCS for program benefits.

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

The specific division of authority for the highly erodible land and wetland conservation requirements is set forth at 7 C.F.R. sections 12.6, 12.20, and 12.30. *See also ASCS Handbook* (6-CP), Exhibit 3.2 (1-19-90 Amend. 14) (Memorandum of Understanding Between Agricultural Stabilization and Conservation Service (ASCS) and Soil Conservation Service (SCS)). One of the responsibilities given to the SCS is the authority to determine whether a producer is "actively applying" an approved conservation plan for the use of highly erodible land. 7 C.F.R. § 12.6(c)(2)(iii); *ASCS Handbook* (6-CP), at 12, para. 16(E) (1-19-90 Amend. 14) (The Memorandum of Understanding Between ASCS and SCS and the provisions of the *ASCS Handbook* (6-CP) state the agencies' respective responsibilities more clearly than do the regulations.)

A producer who is determined by the SCS not to be "actively applying" an approved conservation plan for the use of highly erodible land is ineligible for the benefits of the commodity programs administered by the ASCS. *See generally*, Malone, *In Depth: Swampbuster, Sodbuster, and Conservation Compliance Programs – Final Regulations*, 5 Agric. L. Update 4 (Jan. 1988). However, the ultimate determination of ineligibility is made by the ASCS based on the determination made by the SCS. *See* 7 C.F.R. § 12.6(a); *ASCS Handbook* 6-CP), at 21, para. 22(E)(1-5-90 Amend. 13).

Pursuant to 7 C.F.R. section 12.12, any person who has been denied benefits as a result of "any determination" made under the highly erodible land conservation compliance requirements has the right to administratively appeal the de-

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termination. Section 12.12 is consistent with the provisions of the Food Security Act of 1985 imposing the conservation compliance requirements. *See* 7 U.S.C. § 3843(a) ("The Secretary shall establish, by regulation, an appeal procedure under which a person who is adversely affected by any determination made under this chapter may seek review of such determination."). Under section 12.12, determinations made by the ASCS are to be appealed under 7 C.F.R. pt. 780, and determinations made by the SCS are to be appealed under 7 C.F.R. pt. 614.

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

Turning first to Part 614, 7 C.F.R. section 614.1(b)(1) purports to limit the right to appeal decisions of the SCS to certain specified determinations. A determination that a producer was not "actively applying" an approved conservation plan is not among the specified determinations for which an appeal is permitted. Thus, sections 12.12 and 614.1(b)(1) are at odds. *See generally* Hamilton, *Legal Issues Arising in the Enforcement of Federal Soil Conservation Programs: An Introduction and Preliminary Review*, 23 U.C.D. L. Rev. 639 (1990) (discussing the conflict between sections 12.12 and 614(b)(1) and other related issues).

Part 780 is limited in a different way. Arguably, an appeal under Part 780 of the ASCS's ultimate determination of ineligibility might be appropriate because 7 C.F.R. section 780.1(1) permits the appeal under that Part of any determination by the ASCS that denies a producer the right to participate in a program administered by the ASCS. *Accord ASCS Handbook* (3-CP)(Rev. 2), at 1-2, para. 2 (6-6-86 Amend. 1) (stating that the ASCS appeal procedures apply to "sodbuster and swampbuster"). However, even if permissible, such an appeal would be frustrated by the provisions of 7 C.F.R. section 780.11(a) that make determinations made "under a conservation program involving a finding or certification by a technician of the Soil Conservation Service . . . binding on the reviewing authority" within the ASCS. Thus, if an SCS determination that a producer is not "actively applying" an approved conservation plan is construed to be "a finding or certification by a technician of the Soil Conservation Service," which it would appear to be, it is binding on the ASCS.

Accordingly, the producer seeking to appeal an ASCS determination of ineligibility for program benefits based on a determination by the SCS that he or she was not "actively applying" an approved conservation plan faces a dilemma. Although section 12.12 states that "any determination" resulting in ineligibility for benefits is appealable, neither agencies' appeal procedures afford that opportunity. Unless clarification or changes are forthcoming from the ASCS or the SCS, the resolution of that dilemma will be a matter for the federal district courts.

A suggested strategy for obtaining judicial review of ASCS determinations

A producer who desires to obtain judicial review of a final adverse ASCS determination faces two threshold issues. Respectively, they can be characterized as the "choice of forum" and the "choice of remedy" issues.

In this context, the choice of forum involves the selection of either the appropriate federal district court or the United States Claims Court to hear the appeal. The choice of remedy is directly related to the choice of forum because the choice of remedy largely dictates the choice of forum. Overly simplified, that choice primarily is whether to seek money damages, injunctive relief, a declaratory judgment, or some combination of the three. *See generally*, C. Kelley & J. Harbison, *A Lawyer's Guide to the ASCS Administrative Appeals Process and the Judicial Review of ASCS Decisions.***

Here is a suggestion: the best choice may be to seek only declaratory relief in an action brought in the appropriate federal district court, naming the Secretary of Agriculture as the defendant. To explain why this may be the best choice, the following discussion summarizes the merits of the alternative choices.

The Claims Court:

Relief in the Claims Court is limited to money damages. The Claims Court can not grant declaratory relief. *See, e.g., Doko Farms v. United States*, 13 Cl. Ct. 48, 60 (1987). Moreover, except in very limited circumstances that are not likely to arise in appeals from final determinations made by the ASCS, the Claims Court cannot award equitable relief. *Id.* at 56; *Esch v. Yeutter*, 876 F.2d 976, 982, 984 n. 76 (D.C. Cir. 1989), *modifying Esch v. Lyng*, 665 F. Supp. 6 (D. D.C. 1987).

Although the Claims Court can award money damages, it cannot award damages based on a denial of due process or equal protection as secured by the Fifth Amendment of the U.S. Constitution. *See, e.g., Morgan v. United States*, 12 Cl. Ct. 247, 253 (1987); *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980). In addition, under the Tucker Act, 28 U.S.C. § 1491(a)(1), claims for money damages based on an Act of Congress or a regulation must demonstrate that the statute or regulation mandates the payment of money. In other words, the "[p]laintiff 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." *Morgan, supra*, at 253. If, under the statute or regulation, the payment of money is permissive, that is, within the government's discretion, the authority is not "money mandating," and the Claims Court does not have jurisdiction. *Grav v. United States*, 886 F.2d 1305, 1309 (Fed. Cir. 1989)(Mayer, J., dissenting). *See also United States v. Mitchell*, 463 U.S. 206, 216-28 (1983)(discussing the "money mandating" requirement). Finally, the money damages sought must be actual and presently due. *See, e.g., Justice v. Lyng*, 716 F. Supp. 1567, 1568 (D. Ariz. 1988).

The Claims Court also has jurisdiction over contract claims against the government under the Tucker Act. However, the typical action for review of an ASCS determination alleges a violation of a statute or regulation. Thus, the "money mandating" requirement looms as a significant obstacle because many, if not most, of the statutes or regulations allegedly breached can not be interpreted as mandating compensation by the government for the damages sustained. (In some cases where the Claims Court has assumed jurisdiction, it is questionable whether jurisdiction actually existed, but that is beyond the scope of this article.)

(Continued on next page)

The Claims Court sits in Washington, D.C. Consequently, in most cases, it will be "far removed from the controversy . . . and inconvenient to most of those likely to become litigants." *Esch v. Yeutter, supra,* at 985. Unlike the Claims Court, "a district court would be in a better position to understand and evaluate [local law questions that might arise] . . ." *Id.* at 983 (quoting with approval *Bowen v. Massachusetts,* 108 S. Ct. 2722, 2739 (1988)). *See also* Pires & Knishkowy, *Jurisdictional Issues In Payment Limitation Cases,* Minn. Family Farm L. Update, Nov.-Dec. 1987, at 3 (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.").

The district courts

In addition to being a more convenient forum than the Claims Court, the federal district court can grant more forms of relief. However, actions for damages and injunctive relief in the district court may not be as desirable from the producer's perspective as an action for declaratory relief only.

1. *Actions for damages in the district courts*

Under the "little" Tucker Act, 28 U.S.C. section 1346(a)(2), the district court has concurrent jurisdiction with the Claims Court to award damages against the United States. However, that concurrent jurisdiction extends only to claims up to the sum of $10,000. In addition, under the "little" Tucker Act, a claim premised on an Act of Congress or a regulation must demonstrate that the statute or regulation is "money mandating" just as must be done under the Tucker Act. In addition, the "little" 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." *Price v. U.S. General Services Admin.,* 894 F.2d 323, 324 (9th Cir. 1990) (citations omitted).

2. *Actions for injunctive relief in the district courts*

Although the district court has general equitable powers when the claim before it is not premised on the "little" Tucker Act, a request to enjoin the Secretary of Agriculture, the ASCS, or the CCC faces the obstacle of 7 U.S.C. section 714b(c). That statute immunizes the CCC from injunctions.

The Secretary of Agriculture is vested with the authority to implement the programs administered by the ASCS. However, the Secretary uses the CCC as the "administrative device" to finance those programs and to facilitate their operation. *Rainwater v. United States,* 356 U.S. 590, 592 (1958). *See also Stegall v. United States,* 19 Cl. Ct. 765 (1990) ("the CCC handles funding of the subsidy programs, while state and county ASCS committees are responsible for day-to-day administration").

If the requested injunctive relief is to be directed against the CCC, the injunction is clearly barred by section 714b(c). However, the government frequently maintains that injunctions directed against the Secretary and the ASCS are also barred if the administration of a CCC-funded program is at issue. *E.g., State of Iowa ex rel. Miller v. Block,* 771 F.2d 347, 348 n. 1 (8th Cir. 1985), *cert. denied,* 478 U.S. 1012 (1986); *Westcott v. United States Dep't of Agric.,* 611 F. Supp. 351, 354-58 (D. Neb. 1984), *aff'd,* 765 F.2d 121 (8th Cir. 1985); *Mitchell v. Block,* 551 F. Supp. 1011, 1015-16 (W.D. Va. 1982).

The government's argument has been rejected when the injunctive relief was sought against the Secretary, and the CCC was neither a party nor an indispensable party to the action. *Mitchell v. Block, supra,* at 1015-16 (not involving the review of an ASCS determination). However, the argument was successful in at least one attempt to obtain relief from an ASCS determination. *Baker v. Lyng,* No. 87-1643 (D. D.C. Aug. 4, 1987); *see also* Pires and Knishkowy, *supra,* at 3 (discussing *Baker). But see Esch v. Lyng,* 665 F. Supp. 6 (D. D.C. 1987), *modified sub nom., Esch v. Yeutter,* 876 F.2d 976 (D.C. Cir. 1989) (granting an injunction in a challenge to an ASCS determination without addressing section 714b(c)). Thus, requests for injunctive relief in actions seeking the review of an ASCS determination face the hurdle of section 714b(c).

3. *Actions for declaratory relief in the district courts*

The "anti-injunction" provisions of 7 U.S.C. section 714b(c) do not apply to actions for declaratory relief. *Justice v. Lyng,* 716 F. Supp. 1567, 1569 (D. Ariz. 1988). More significant, the relief that may be obtained in a declaratory judgment action may be the functional equivalent of a money judgment in excess of the district court's jurisdictional limits under the "little" Tucker Act.

Jurisdiction for such an action is found in the district court's general federal question jurisdiction, 28 U.S.C. § 1331. The district court's authority to grant declaratory relief is found at 28 U.S.C. sections 2201, 2202, and the court's authority to review final administrative decisions of the ASCS is derived from the Administrative Procedure Act, specifically, 5 U.S.C. section 702.

The declaration sought typically would be that the final ASCS determination, generally one made by the Deputy Administrator for State and County Operations (DASCO), or the proceedings underlying that determination, were unlawful on one of the grounds specified in the Administrative Procedure Act. *See* 5 U.S.C. § 706. If the court finds in favor of the producer, it has the authority to order a redetermination by the Secretary of the disputed issue through a remand of the matter to the Secretary. For example, in a case that adopted this approach, *Justice v. Lyng,* 761 F. Supp. 1567 (D. Ariz. 1988); 716 F. Supp. 1570 (D. Ariz. 1989), the district court's order for remand was accompanied by directions to the Secretary that, according to the government's brief, "would require that the . . . [Secretary] pay over $1,000,000 to the Plaintiffs." *Id.* at 1578.

This choice of forum and remedy is not without obstacles. Notwithstanding the fact that such an action would not ask for an award of money damages, the government may assert that if the amount in dispute exceeds $10,000, the action belongs in the Claims Court. However, such an assertion was rejected in *Esch v. Lyng,* 665 F. Supp. 6, 11-12 (D. D.C. 1987), *modified sub nom., Esch v. Yeutter,* 876 F.2d 976, 977-85 (D.C. Cir. 1989) and *Justice v. Lyng, supra,* 716 F. Supp. at 1568-69.

Clearly more could be said about the choice of forum and choice of remedies issues. There are also numerous other considerations that must be appreciated before one undertakes either an administrative or judicial appeal of an ASCS determination. Many of those considerations are discussed in the law review articles mentioned at the beginning of this article. In addition, the forthcoming ABA publication will add to that literature. Undoubtedly, as the 1990s bring new responsibilities to the ASCS, renewed attention will be given to ASCS appeals.

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** This publication, C. Kelley & J. Harbison, *A Lawyer's Guide to the ASCS Administrative Appeals Process and the Judicial Review of ASCS Decisions,* can be obtained directly from the National Center for Agricultural Law Research and Information, University of Arkansas School of Law, Fayetteville, AR 72701, June 1, 1990.

AWPA preempts exclusive remedy provisions of state workers' comp. laws

The United States Supreme Court has recently decided that migrant and seasonal agricultural workers who are injured on the job are not precluded by the exclusive remedy provisions of state workers' compensation laws from availing themselves of a private right of action under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). *Adams Fruit Company, Inc. v. Barrett*, 110 S. Ct. 1384, 58 U.S.L.W. 4367 (1990). This decision resolves a dispute on the issue between the Fourth and Eleventh Circuits. In an unanimous opinion, the Supreme Court agreed with the Eleventh Circuit and held that AWPA preempts state law to the limited extent that it does not permit states to supplant, rather than supplement, the AWPA remedial scheme.

The conflict between the circuits began with *Roman v. Sunny Slope Farms, Inc.*, 817 F.2d 1116 (4th Cir. 1987), *cert. denied*, U.S. , 108 S. Ct. 163, 98 L.Ed. 2d 117 (1987), in which the Fourth Circuit held that the South Carolina workers' compensation insurance program was the exclusive remedy for injured workers and barred recovery under the AWPA.

The court in *Roman* reasoned that AWPA was intended to supplement state law rather than preempt it. The court quoted 29 U.S.C. § 1871, which states: "This chapter is intended to supplement state law, and compliance with this chapter shall not excuse any person from compliance with the appropriate state law or regulation." *Roman*, 817 F.2d at 1118.

The court in *Roman* also relied upon 29 U.S.C. § 1841, the AWPA's provision regarding motor vehicle safety, in support of its conclusion. Section 1841 establishes standards for the vehicles used to transport migrant workers and imposes the requirement that employers have a liability insurance policy or a bond to cover that vehicle's operation. However, the section also provides that an insurance policy or bond is not required of the employer if those workers are transported only under circumstances for which there is coverage under state workers' compensation law. *Roman*. at 1118.

However, the Supreme Court affirmed the opposite result which was reached by the Eleventh Circuit in *Barrett v. Adams Fruit Co., Inc.*, 867 F.2d 1305 (11th Cir. 1989). The plaintiff farmworkers were injured in an accident while being transported in their employer's van. They received workers' compensation benefits for their injuries pursuant to Florida law. They also alleged that their employer violated AWPA's motor vehicle safety provisions and that they were thus entitled to damages under AWPA.

The Eleventh Circuit held that AWPA preempted the exclusive remedy provisions of Florida's workers' compensation law. The court found that the receipt of those benefits did not bar a private suit for actual or statutory damages under the AWPA. The court examined the legislative history of the AWPA and noted that it provides two separate protections relating to transportation: safety standards and insurance requirements. The court stated that the private right of action is central to the Act's enforcement. Therefore, barring suit under the Act for safety violations once an employer had obtained workers' compensation coverage would eliminate the incentive to comply with the Act. *Id.* at 1310.

In affirming the Eleventh Circuit, the Supreme Court first considered whether the Act permitted migrant workers to pursue federal remedies in such circumstances. The court noted that the enforcement provisions of the Act, which establish a private right of action for persons, in no way intimate that the right is affected by a state's workers' compensation law. The court noted that only one limitation on relief is found in the enforcement provisions of the AWPA. That provision states that courts, in determining statutory damages, should consider whether an attempt to resolve the issue was made prior to litigation.

The Supreme Court was unpersuaded by the argument that the Act's waiver of the insurance coverage requirement found in the motor vehicle safety provisions indicated Congressional intent to bar recovery under AWPA. The waiver is available to employers who are covered by state workers' compensation law. The court stated:

> Adams Fruit's argument is unpersuasive because it rests on the extraordinary and unjustified proposition that congressional intent regarding private enforcement of the AWPA is best discerned through a meaning alleged to be implicit in AWPA's motor vehicle safety provisions rather than the explicit language of the AWPA's enforcement provisions.

Adams Fruit Company, Inc., 58 U.S.L.W. at 4368. Therefore, the court concluded that the plain meaning of the statute's language indicates that the Act's private right of action is unaffected by the availability of remedies under state workers' compensation law.

The second consideration addressed by the Supreme Court was whether, under preemption principles, the Act precludes giving effect to state exclusivity provisions that purport to withdraw federal remedies. The court found no intent in Florida's statute to preclude federal remedies. *Id.* at 4369. However, the court found that even if Florida's exclusivity provision was directed at the federal remedy, AWPA does not mandate displacement of the federal remedy. Although section 1861 permits "states to supplement AWPA's remedial scheme, it cannot be viewed as authorizing States to replace or supersede its remedies." *Id.*

Adams Fruit also argued that absent an explicit statement of congressional intent, the court should defer to the Department of Labor's regulation regarding the Act's relationship to state workers' compensation law. The regulation provides that: "Where a State workers' compensation law is applicable and coverage is provided for a migrant or seasonal agricultural worker by the employer, the workers' compensation benefits are the exclusive remedy for loss under this Act in the case of bodily injury or death. *Id., citing*, 29 C.F.R. § 500.122(b)(1989).

The Supreme Court found that there was no need to defer to the Department of Labor's view since Congress had expressly established the judiciary and not the agency as the adjudicator of private rights of action arising under AWPA. In affirming the Eleventh Circuit, the court held that a precondition to deference is a delegation of administrative authority. *Id.* at 4370, *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

The decision in *Adams Fruit* will prevent employers with workers' compensation coverage from violating the AWPA with impunity. In addition, injured migrant and seasonal agricultural workers may find recovery under the AWPA to be a welcome supplement to their workers' compensation award.

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Seventh Annual Writing Competition. The AALA is sponsoring its seventh annual Student Writing Competition. This year, the AALA will award two cash prizes in the amount of $500 and $250. Papers must be submitted by June 30, 1990, to Ann Stevens, University of Wyoming College of Law, Box 3035, University Station, Laramie, WY 82071. For further information, contact Ann Stevens at 307-766-2182.

AALA Distinguished Service Award. The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration, or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information of no more than four pages in support of the nominee. The nominee must be a current member of the AALA and must have been a member for at least the preceding three years. Nominations should be sent to Ann Stevens, University of Wyoming College of Law, Box 3035, University Station, Laramie, WY 82071.