Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

Attorney fees awarded from PACA trust

The Ninth Circuit has held that the attorneys responsible for establishing the validity of a statutory trust under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. §§ 499a - 499t, are entitled to an award of attorneys' fees from the trust fund. *In re Milton Poulos, Inc.*, No. 90-55474 (9th Cir. Oct. 29, 1991) (per curiam) (1991 WL 216490). The decision reversed the Ninth Circuit Bankruptcy Appellate Panel's affirmance of the bankruptcy court's denial of attorneys' fees. *See In re Milton Poulos, Inc.*, 107 B.R. 716 (Bankr. 9th Cir. 1989); 94 B.R. 648 (Bankr. C.D. Cal. 1988). *See generally* J.W. Looney, *Protection for Sellers of Perishable Agricultural Commodities: Reparation Proceedings and the Statutory Trust Under the Perishable Agricultural Commodities Act*, 23 U.C. Davis L. Rev. 675, 692-93 (1990) (discussing the bankruptcy court's and the Ninth Circuit Appellate Panel's decisions).

Under PACA, a nonsegregated trust automatically arises in favor of sellers and suppliers of perishable agricultural commodities. 7 U.S.C. § 499e(c)(2). The perishable agricultural commodities received by produce dealers, commission merchants, and brokers, together with "all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products . . .," are held in trust for the benefit of all unpaid sellers and suppliers involved in the transaction until the sellers and suppliers are paid for the commodities sold. *Id.* To preserve the benefits of the trust, an unpaid seller or supplier must give timely, written notice to the purchaser of the commodities and the Secretary of Agriculture. 7 U.S.C. § 499e(c)(3).

In *In re Milton Poulos*, the bankruptcy court had declined to award fees to the attorneys who had represented the majority of the trust beneficiaries in establishing the validity of the trust. The court initially noted that courts have "consistently held PACA trust assets are not part of the bankruptcy estate." 94 Bankr. at 653 (citations omitted). Nevertheless, the court reasoned that if it had the equitable power to award attorneys' fees, such an award would "unfairly deplete the bankruptcy estate at the expense of all other creditors." *Id.*

The Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's denial of attorneys' fees on the grounds that PACA's statutory trust provisions contain "no express statutory right to such an award," whereas the reparations provisions of PACA authorizes an award of fees to the prevailing party. 107 Bankr. at 719 (citations omitted). The Panel concluded that "[t]he inconsistent provisions for an award of attorney's fees within PACA itself demonstrate Congress' intent that attorney's fees not be automatically considered part of a beneficiary's share under § 499." *Id.*

In its reversal of the Panel's decision to deny attorneys' fees, the Ninth Circuit

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Equitable estoppel against the ASCS revisited

In the recent consolidated action of *Rivercrest, A Partnership, and Petro-Resources, Inc. v. United States*, Nos. 90-158C, 90-160C (Cl. Ct. Nov. 12, 1991) (1991 WL 236402), the United States Claims Court held that certain deficiency program regulations precluded the plaintiffs from equitably estopping the federal government through their reliance on the advice and action of an ASCS county director and county committee. If read as expansively as its reasoning may permit, a portion of the court's decision appears to extend the government's protection against equitable estoppel claims beyond the boundaries established by the United States Supreme Court. Indeed, in a subsequent unpublished order denying the plaintiffs' motion for reconsideration, the court implicitly retreats from that portion of its opinion. *Id.*, No. 190-158C (Cl. Ct. Dec. 6, 1991) (Order Denying Motion for Reconsideration) [hereinafter Order].

The United States Supreme Court has consistently declined to equitably estop the

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applied the "common fund" doctrine to hold that fees were recoverable from the trust fund. In doing so, the court observed "that it is well-settled 'that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" Slip op. at 2 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

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EQUITABLE ESTOPPEL/cont. from p.1

federal government when the claimant has relied on federal agency advice or information that was contrary to the applicable statute or regulations. *See, e.g., Office of Personnel Management v. Richmond*, 110 S. Ct. 2465 (1990); *Schweiker v. Hanson*, 450 U.S. 785 (1981); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385-86 (1947). The Court has offered two principal reasons for declining to estop the government. First, employing a separation of powers rationale, the Court has construed the Appropriations Clause as imposing a "duty [on] all courts to observe the conditions defined by Congress for charging the public treasury." *Richmond*, 110 S. Ct. at 2469 (citing *Merrill*, 332 U.S. at 385-86).

Second, the Court has reasoned that "[a]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Merrill*, 332 U.S. at 384. In essence, the Court has ascribed to all who deal with the government constructive notice of the law, including legislative rules published in the Federal Register. *See* Bernard Schwartz, *Administrative Law* § 3.18 (3rd ed. 1991); Peter Raven-Hanson, *Regulatory Estoppel: When Agencies Break Their Own Laws*, 64 Texas L. Rev. 1, 29-30 (1985).

The unusual aspect of the *Rivercrest* decision is that part of the court's reasoning appears to sanction ascribing to federal farm program participants constructive notice of a program requirement that is neither in a statute nor a published legislative rule. If that is what the court intended, its decision appears to be at odds with the notion that only where federal agency advice is contrary to published statutes or regulations will reliance on that advice be at one's peril. *See United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973) (estoppel upheld in part because the ASCS's advice at issue concerned an arrangement that was not precluded by a regulation).

At issue in *Rivercrest* was whether the plaintiffs had been properly denied failed acreage credits for their 1987 wheat crop. Under the then-applicable regulations, eligiblity was dependent on the ASCS county committee's determination that the acreage "was planted to the crop with the reasonable expectation of producing a crop and was damaged or destroyed by a natural disaster or other condition beyond the producer's control such that harvesting the crop is not feasible or economical." 7 C.F.R. § 713.105(c) (1988). The regulations did not specify any criteria by which planting activities were to be assessed.

For the 1987 crop year, the end planting date applicable to the plaintiffs' wheat crop was November 30, 1986. However, that date was not published in the regulations; instead, the regulations contemplated that it would be determined by the ASCS Deputy Administrator, State and County Operations (DASCO). *See* 7 C.F.R. § 713.4 (1988). Presumably, DASCO then advised the appropriate county offices of the date through the *ASCS Handbook for State and County Offices*, the agency's internal operating manual. *See* 7 C.F.R. § 7.36 (1988) (authorizing the *Handbook's* issuance). Because it consists of instructions and interpretations, not legislative rules, the contents of the *ASCS Handbook* are not published in the Federal Register. *See* 5 U.S.C. §§ 552(a)(1), 553(b)(A), (d)(2).

Although it is not clear from the court's opinion whether the plaintiffs had actual knowledge of the end planting date, the plaintiffs planted their wheat crop six days after the end planting date in reliance on the ASCS county executive director's assurance that they "would remain eligible to participate in the program." *Rivercrest*, slip op. at 4. Subsequently, the wheat crop failed.

The plaintiffs' application for disaster credit for the failed crop was initially approved by the ASCS county committee on the grounds that "regardless of the method of planting, given the conditions that existed on these particular farms this year, the wheat would have failed." *Id.* However, after the state committee recommended that the county committee reconsider its decision, the county committee reversed itself. On appeal, both the state committee and DASCO sustained the denial of benefits.

DASCO found that "(1) the land seeded with wheat was in a high risk area for crop insurance; (2) only late spring seeded crops are usually produced [in that general location]; and (3) the wheat was not planted timely, and the wheat was seeded after the leaves from the previous soybean crop had dropped to the ground." *Id.*, slip op. at 5. On that basis, DASCO concluded that the plantings were not "reasonably calculated to produce a normal crop." *Id.*, slip op. at 7.

The Claims Court denied the plaintiffs' equitable estoppel claim on two grounds. First, the court reasoned that the "plaintiffs could not have reasonably relied upon any action by either the ASCS county director or the county committee . . . [because] 'state and county committees, and representatives and employees thereof, do not have authority to modify or waive any of the provisions of the *regulations* of this part....'" *Id.*, slip op. at 8 (citing 7 C.F.R. § 713.2(b)) (emphasis supplied). However, the court did not cite any regulation that the county director or the county committee might have waived.

If the court considered the county director's assurances of eligibility to be a waiver of the end planting date, no regulation was waived because the end planting date was not contained in a regulation. Presumably, it only appeared in the *ASCS Handbook*.

Subsequent to its decision, the court denied the plaintiffs' motion for reconsideration. In doing so, the court stated that "[i]t is immaterial that the [*ASCS Handbook*], which is promulgated pursuant to regulations, is not in fact a set of regulations." Order, at 1. It coupled that assertion with a repetition of its second ground for denying the estoppel, implicitly favor-

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ing that ground over the first.

In its second ground for denying the estoppel, the court noted that the regulations provided that the state committee and DASCO could review or modify county committee action. *Rivercrest*, slip op. at 8 (citing 7 C.F.R. § 713.2(c), (d)). From that premise, the court reasoned that "because both the plaintiffs and the county committee and its director were aware that the state committee and DASCO had a right to review the county committee's determinations, plaintiffs cannot argue that the county committee or the director intended the plaintiffs to act upon the county committee's initial determination or upon the director's advice." *Id.*, slip op. at 9. In essence, the court held that the plaintiffs were "charged with knowledge" that the regulations did not accord finality to county determinations. *Id.*, slip op. at 9 (citing *United States v. Batson*, 706 F.2d 657, 681 (5th Cir. 1983). *But see* 56 Fed. Reg. 59,210 (1991) (to be codified at 7 C.F.R. § 780.17(c)) (according finality to certain county and state committee determinations made after November 25, 1991).

The second ground for denying the plaintiffs' equitable estoppel claim is more consistent with precedent than the first. *See, e.g., Willson v. United States*, 14 Cl. Ct. 300, 307 (1988); *Durant v. United States*, 16 Cl. Ct. 447, 451 (1988). In any case, the *Rivercrest* decision underscores the importance of the administrative equitable relief provisions found at 7 C.F.R. pts. 790 and 791 because it illustrates the difficulty of judicially estopping the government. *See generally* Christopher R. Kelley, *In Depth: ASCS Appeals: The Equitable Authority of DASCO*, 7 Agric. L. Update 4 (June 1990) (discussing 7 C.F.R. pts. 790 & 791); Alan R. Malasky, *A Gem for Tiffany in Arizona Payment Limitation Decision*, 8 Agric. L. Update 1 (Sept. 1991) (discussing the review of the denial of administrative equitable relief in *Golightly v. Yeutter*, No. CIV 90-1272 PHX RCB (D. Ariz. Aug. 23, 1991) (1991 U.S. Dist. LEXIS 12206)).

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FmHA offset regulations upheld

The Eighth Circuit has rejected a challenge to the 1990 FmHA administrative offset regulations, 7 C.F.R. §§ 1951.103 - 1951.105 (1991), concluding that the rules did not violate the Debt Collection Act, 31 U.S.C. § 3716 (1988); that the guidelines and standards provided to FmHA county supervisors were neither arbitrary, capricious, nor lacking of sufficient specificity to properly channel discretion; and that the use of case-by-case reviews of offsets taken under the pre-1990 regulations, instead of wholesale reversals of those offsets, was neither arbitrary nor capricious. *Allison v. Madigan*, No. 90-5565 (8th Cir. Dec. 6, 1991) (1991 U.S. App. LEXIS 28662). In so holding, the Eighth Circuit relied extensively on

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No implied cause of action under Ag Credit Act of 1987

The Seventh Circuit has joined the Eighth, Ninth, and Tenth Circuits in declining to find an implied private right of action under the Agricultural Credit Act of 1987, 12 U.S.C. §§ 2001 - 2279aa-14 (1988). *Saltzman v. Farm Credit Services of Mid-America*, No. 90-3542 (7th Cir. Dec. 9, 1991) (1991 U.S. App. LEXIS 28749). *See also Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990) (en banc); *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990); *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 867 (1990).

In a brief opinion, the Seventh Circuit concluded that the Act's legislative history did not reveal a congressional intent to create an implied private right of action. *Saltzman*, slip op. at 4-6. In addition, noting the Act's grant of enforcement powers to the Farm Credit Administration, the court reasoned that the Act's "administrative regime" demonstrated that "Congress developed a comprehensive [administrative] remedial scheme" in lieu of a private right of action. *Id.*, slip op. at 7 (citations omitted). *See generally* James T. Massey & Susan A. Schneider, *Title I of the Agricultural Credit Act of 1987: "A Law in Search of Enforcement,"* 23 U.C. Davis L. Rev. 589 (1990); Christopher R. Kelley & Barbara J. Hoekstra, *A Guide to Borrower Litigation Against the Farm Credit System and the Rights of Farm Credit System Borrowers*, 66 N.D.L. Rev. 127 (1990).

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AG LAW CONFERENCE CALENDAR

Penn State 1992 Area Tax Meetings

January 7-Wellsboro; January 8-Tunkhannock; January 9-Lewisburg; January 10-Lewisburg; January 14-Hazleton; January 15-Franconia; January 16-Lancaster; January 17-Chambersburg; January 21-Edinboro; January 22-Butler; January 23-DuBois.

Topics include: what's new for '92; preparing the farm tax return; making it easy with a computer; car and light truck expense.

Sponsored by Penn State Department of Agricultural Economics Cooperative Extension Service.

For more information, call 814-863-4580.

Environmental law

February 13-15, 1992; Hyatt Regency, Washington, D.C.

Topics include: Superfund Amendments and Reauthorization Act of 1986; RCRA, TSCA, and other hazardous waste and toxic tort developments; Clean Water Act and wetland developments.

Sponsored by ALI-ABA.

For more information, call 800-CLE-NEWS.

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* during the month of November, 1991. (Tuesday, November 12, #218 was missing.)

1. FmHA; Establishment of wetland conservation easements on FmHA inventory property; proposed rule; 56 Fed. Reg. 56474.

2. Commodity Futures Trading Commission; Proposed amendments to commission regulations on arbitration at self-regulatory organizations under petition of the National Futures Association; 56 Fed. Reg. 56482.

3. FCIC; Sales closing, cancellation, termination of indebtedness, and contract change dates; proposed rule; 56 Fed. Reg. 56605.

4. FCIC; General Crop Insurance regulations; ASCS Farm Program payment yield option; proposed rule; 56 Fed. Reg. 57296.

5. FCIC; Request for comments on methodology for yield determinations; comments due April 1, 1992; 56 Fed. Reg. 57311.

6. PSA; Amendment to certification of central filing system; Oklahoma; 56 Fed. Reg. 57314.

7. CCC; Bylaws of Corporation; amended October 22, 1991; 56 Fed. Reg. 57314.

8 ASCS; National Appeals Division; interim rules; effective date 11/25/91; 56 Fed. Reg. 59207. *See accompanying in-depth article in this issue.*

—Linda Grim McCormick, Toney, AL

The new ASCS National Appeals Division

By Alan R. Malasky and David P. Grahn

During its consideration of the Food, Agriculture, Conservation and Trade Act of 1990 (hereinafter "the 1990 Farm Bill") (Pub. L. No. 101-624, 104 Stat. 3359), Congress made it clear that it was not satisfied with the current administrative appeals system in which Agricultural Stabilization and Conservation Service ("ASCS") officials responsible for the administration of and policy-making for the federal farm programs, are also responsible for adjudicating administrative appeals. As a result, the 1990 Farm Bill contains a provision requiring the establishment of a new "National Appeals Division" within ASCS. *See* Pub. L. No. 101-624, § 1132, 104 Stat. 3359, 3512-14 (codified at 7 U.S.C. § 1433e).

On November 25, 1991, the ASCS promulgated an interim rule creating the National Appeals Division and amending the ASCS administrative appeal regulations. 56 Fed. Reg. 59,207 (1991). This article will examine the provisions of the National Appeals Division regulations and how they will affect ASCS administrative adjudications. Specifically, this article will review the overall structure of the ASCS administrative appeals system and the background regarding the enactment of the National Appeals Division legislation. It will also summarize the ASCS regulations creating the National Appeals Division, compare the National Appeals Division regulations with the administrative appeals system it replaced, and provide some practitioner's tips.

The structure of the ASCS administrative appeals system

The National Appeals Division regulations do not change the basic three-level structure of the ASCS administrative appeal process. Under the new regulations, as under the superseded regulations, an administrative appeal is initiated by a farmer's request that the County ASC Committee (hereinafter "County Committee") reconsider an adverse determination. For example, the farmer might be dissatisfied with a County Committee's determination of the number of payment limitation "persons" for his or her farming operation. A farmer can request that the County Committee hold an informal hearing in order to discuss the adverse decision.

The County Committee is composed of farmers who reside in the county and who are elected by the farmers of the county. The County Committee acts as the representative of the ASCS for the administration of the federal farm programs in the county. The County Committee, however, meets only several days a month. The rest of the time, the ASCS County Office is run by the County Executive Director ("CED"), who works for the County Committee. CEDs are very important because in most cases County Committees rely heavily upon the advice of their CED.

If the farmer is dissatisfied with the reconsideration determination of the County Committee, the farmer has the right to appeal the determination to the State ASC Committee (hereafter "State Committee"). The State Committee is composed of farmers (usually 3 or 5) appointed by the Secretary of Agriculture.

If the farmer is dissatisfied with the State Committee's determination, the farmer can appeal to the ASCS National Office in Washington, D.C. Until the creation of the National Appeals Division, all Washington level ASCS administrative appeals were decided by the Deputy Administrator, State and County Operations ("DASCO"), who is also responsible for oversight and administration of the federal farm programs.

These administrative appeals were rarely heard by DASCO personally. Rather, they were usually heard by the ASCS Appeals Staff, who prepared the administrative record and issued a recommended determination to DASCO.

Several general points apply to ASCS administrative appeals at all levels. First, the farmer has the option of presenting the case personally or retaining counsel. The farmer also has the right to have a "personal" hearing where he or she can present the case in person before the reviewing body. In addition, the farmer has the right to request that a verbatim transcript be made of the hearing, provided the farmer is willing to pay for this service.

It is important to keep in mind that, in addition to convincing the ASCS reviewing body of the merits of the farmer's case, an administrative record is also being created. ASCS must render its determination based solely upon this administrative record. *Franks Livestock and Poultry Farm v. United States*, 17 Cl. Ct. 601, 606 n.1, *aff'd*, 905 F.2d 1515 (Fed. Cir. 1990); *Raines v. United States*, 12 Cl. Ct. 530, 536 (1987). Therefore, it is essential that a farmer take all necessary steps to ensure that all evidence that supports the farmer's position on appeal is included in the administrative record.

Background of the National Appeals Division legislation

Over the past several years, concerns have been expressed in Congress regarding the fairness of this appeals process. Specifically, Congress felt that it was not appropriate for ASCS officials responsible for the administration of the ASCS federal farm programs policy to be in charge of administrative adjudications relating to these same programs. Senator Pryor expressed this concern in the following statement, made when he introduced the amendment to the 1990 Farm Bill that authorized the creation of the National Appeals Division:

> The purpose of this bill is to assure producers who participate in ASCS price support and production programs are given the opportunity to seek an appeals process which is administratively independent from the program side of ASCS. Currently, when a farmer finds that he must appeal a decision rendered by the county committee or the State office, he finds that his case will be heard on the Federal level by ASCS employees who more than likely have offered input on his case while it was being reviewed on the State level. This is not the most comforting thought. Given the fact that we on the Agriculture Committee often seek active participation from the Department while we craft legislation, and after a bill is passed, some of these same people then make interpretations of the hill before issuing the regulations that will guide the enactment of the law. After all of this participation, some of these very same people will then exercise judgement on cases brought before them by producers. This is simply too much involvement from ASCS for anyone's good.

136 Cong. Rec. S10704 (July 26, 1990). In response, ASCS expressed its concerns that a completely independent administrative adjudicatory system would make it impossible for ASCS policy-makers to control the direction of the federal farm programs that they are responsible for administering.

The provisions in the 1990 Farm Bill authorizing the creation of the National Appeals Division represent a compro-

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mise between these two perspectives. Administrative adjudications are removed from DASCO and placed in a new, free-standing division within ASCS. The creation of the National Appeals Division effectively separates administrative adjudications from the office most directly responsible for the administration of federal farm programs policy. Conversely, Congress did not totally separate the National Appeals Division from the policy-making activities of ASCS; it inserted a provision in the law allowing the ASCS Administrator to amend or overturn, presumably with input from DASCO, any determination issued by the National Appeals Division. 7 U.S.C. § 1433e(f).

In structuring the National Appeals Division, Congress provided the Director of the National Appeals Division with the power to:

1. examine all records and documents relating to an appeal;
2. request the assistance of any Federal, State or local governmental agency or body;
3. require the attendance of witnesses, and the production of documents, if necessary via subpoena;
4. administer oaths;
5. enter into contracts with reporting and other services;
6. issue procedural rules;
7. make all determinations with respect to appeals before the National Appeals Division;
8. order further proceedings for the purposes of hearing new or additional evidence; and
9. delegate powers 1 through 6 to hearing officers as the Secretary deems appropriate.

See 7 U.S.C. § 1433e(c)(3). The legislation also envisions that individual appeals will be heard by "hearing officers." 7 U.S.C. § 1433e(c)(2). Congress gave ASCS the option of defining the role of the "hearing officers" in this process, a role that could range from being merely responsible for the compilation of the administrative record, to being independent investigators with the power to compel the production of documents and the appearance of witnesses.

National Appeals Division regulations

On November 25, 1991, nearly one year after the enactment of the 1990 Farm Bill, ASCS promulgated interim regulations establishing the National Appeals Division. These regulations amended the preexisting procedures to be followed by all review authorities conducting administrative adjudications of federal farm programs, and also added specific procedures relating to the National Appeals Division.

The first issue the regulations address is the categories of administrative appeals to be covered by them. The general administrative appeal procedures are applicable to appeals of adverse determinations issued by all reviewing authorities—i.e. County Committees, State Committees and the National Appeals Division—regarding programs administered by ASCS as well as programs ASCS administers on behalf of the Commodity Credit Corporation ("CCC"). The regulations do not specifically list these programs, but rather generally describe them as programs "set forth in Chapters VII and XIV of this title (Title Seven of the Code of Federal Regulations)." *See* 7 C.F.R. § 780.1. This reference can be interpreted to mean that these regulations are applicable to the federal farm programs administered by ASCS, including the Price Support and Production Adjustment Programs, the Conservation Reserve Program, and the Dairy Programs.

These regulations, however, apply only to adverse determinations issued after November 28, 1990, the date of enactment of the 1990 Farm Bill, that have not been otherwise finally decided by the agency as of November 25, 1991. For example, if a farmer were appealing an adverse State Committee determination dated November 27, 1990, the appeal would be decided under the old Part 780 rules by DASCO, not by the Director of the National Appeals Division. *See* C.F.R. § 780.1.

Conversely, if the same farmer were appealing an adverse State Committee determination dated November 29, 1990 that, as of November 25, 1991, had not been decided by DASCO, the appeal would now be decided by the Director of the National Appeals Division. ASCS apparently is taking the position that with respect to any appeal that has been finally decided, i.e. decided by DASCO, prior to November 25, 1991, the farmer does not have the right to have the appeal re-heard by the National Appeals Division, unless the farmer is able to convince ASCS to exercise its discretion to reopen the appeal.

Farmers are required to request the County Committee to reconsider its initial adverse determination before appealing the matter to the State Committee. 56 Fed. Reg. 59,209 (November 25, 1991); 7 C.F.R. § 780.7(a),(b). On the other hand, the farmer has the option of requesting that the State Committee reconsider an adverse determination before appealing the matter to the National Appeals Division. 56 Fed. Reg. 59,209 (November 25, 1991); 7 C.F.R. § 780.7(c). All such reconsideration requests must be filed "within 15 days after written notice of the determination which is the subject of such request . . . is mailed to or otherwise made available to the participant." 56 Fed. Reg. 59,210 (November 25, 1991); 7 C.F.R. § 780.15(a).

Apart from filing a request for reconsideration, a farmer may, in the alternative, seek to have a hearing reopened in order to receive new information. 56 Fed. Reg. 59,210 (November 25, 1991); 7 C.F.R. § 780.18. Unlike a request for reconsideration, a request for a reopening can be filed at any time, provided the case has not been appealed to a higher reviewing authority. There is no specific provision authorizing the granting of a request for reconsideration by the National Appeals Division. Thus, it would appear that if a farmer is dissatisfied with a National Appeals Division determination, the farmer is faced with the choice of requesting that the case be reopened or filing a lawsuit.

The second issue addressed by these regulations concerns the creation of the National Appeals Division. In this regard ASCS has adopted a minimalist approach. The regulations confer the same powers upon the Director of the National Appeals Division that the 1990 Farm Bill conferred upon the Director. *See* 56 Fed. Reg. 59,210 (November 25, 1991); 7 C.F.R. § 780.19 and 7 U.S.C. § 1433e(c)(3).

Neither the 1990 Farm Bill nor the regulations directly give "hearing officers" much power. The Director of the National Appeals Division has the authority to determine which of the powers granted to the Director may be delegated to hearing officers. However, unless the "hearing officers" are delegated some authority from the Director, it would appear that they will only have the power to hear farmers' presentations, and compile an administrative record, while the Director has the power to order and conduct additional hearings as well as issue the final determination.

The regulations also give the public only a little more detail regarding the issuance of administrative subpoenas by the National Appeals Division. It appears that the Director has full authority to issue administrative subpoenas anytime. *See* 56 Fed. Reg. 59,210 (November 25, 1991); 7 C.F.R. § 780.19(a)(4). The

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regulations also indicate that farmers can request that the Director issue an administrative subpoena in a particular case. *See* 56 Fed. Reg. 59,211 (November 25, 1991); 7 C.F.R. § 780.20. However, the regulations do not give any details regarding how an farmer can make such a request. These procedures will have to be worked out as time progresses.

Changes to the ASCS Administrative National Review Process

There are several major changes between the National Appeals Division regulations from the prior ASCS appeal regulations. First, ASCS, through the Director of the National Appeals Division, has the authority to issue administrative subpoenas. The significance of this change will depend upon the number of such subpoenas that will be issued, and whether subpoenas will be issued at the request of appealing farmers to the same extent as the National Appeals Division issues them on the request of the agency itself. In addition, such power could enable the National Appeals Division to take a more aggressive role in the investigation of particular farming operations. Under the previous administrative appeal system, if ASCS believed that it needed to subpoena certain records, it was required to seek the assistance of the Office of the Inspector General which, depending upon the case and its own workload, may not have been willing to assist ASCS in securing certain records. One area in which ASCS may attempt to use this new power is to obtain financial records of farmers, especially in cases involving payment limitation issues. ASCS has, for several years, routinely requested financial records during administrative reviews. It would be logical to assume that, with this power to issue subpoenas, ASCS will attempt to get more financial records.

The second major change contained in these regulations is the separation of DASCO from the appeals process. This separation will, at least in theory, force all coordination between the policy-makers and the National Appeals Division to be conducted through the ASCS Administrator's Office. Given the number of appeals that will be processed through the National Appeals Division, it is unlikely that the Administrator will be able to personally monitor each case. Therefore, even with the review powers given the Administrator, the Director of the National Appeals Division should have more authority to make independent decisions in individual cases than the Director of the Appeals Staff previously had. As a result, it will be interesting to see if a more independent administrative appeals system will change the way administrative appeals will be conducted.

The third major change is that these new regulations give the Director of the National Appeals Division the option to significantly increase the powers of the individual "hearing officers." Under the previous administrative appeals system, "hearing officers" were given very little power to control their administrative hearings. They could only request that the farmer provide information. They could not require the production of documents; they could not require the attendance of witnesses; and they could not place witnesses under oath.

Under the new regulations, the Director of the National Appeals Division could delegate all of these powers to the individual "hearing officers." This could transform the hearing officer into taking a more active role in the development of the investigation of an appeal.

Practitioner's tips

In order to ensure that the administrative record includes all relevant evidence, a practitioner representing a farmer should take the following steps during the ASCS administrative appeal process:

1) Always ask for a "personal hearing" before the ASCS reviewing body. A "personal hearing" is preferred because it gives the farmer a better opportunity to ask the reviewing body questions that could give insight into the manner in which this body is approaching the appeal;

2) Obtain a copy of the relevant portion of the ASCS Handbook relating to the appeal. While the ASCS Handbook does not contain the "published" regulations of the agency pursuant to the provisions of the Administrative Procedure Act (5 U.S.C. § 552), it does contain the agency's interpretations of its regulations. Furthermore, the County and State Committees will base their determinations on the provisions of the ASCS Handbook. Frequently it contains interpretations that are helpful to an farmer's appeal. Copies of the ASCS Handbook are usually available from the ASCS County Office or from the Information Division, ASCS, Room 3702-S, USDA, Washington, D.C. 20250;

3) Request that a verbatim transcript be made of all hearings. During an administrative hearing, a reviewing body may make statements that help the farmer's case. The transcript may be the only way for the farmer to make sure that these statements become a part of the permanent record of appeal should the appeal be reviewed by a higher ASCS reviewing body or by a federal court; and

4) Before each administrative hearing, request a copy of the administrative record. Only by examining ASCS's version of the administrative record at each appeal stage can the practitioner ensure that all evidence that supports the farmer's appeal is included. Furthermore, ASCS will also add information to the administrative record during the appeal process that the practitioner should examine.

5) Become familiar with the general requirements relating to the issuance and enforcement of administrative subpoenas.

Conclusion

The current interim rules establishing the National Appeals Division do not give the public a clear picture of how ASCS administrative appeals will be conducted in the future. Questions remain in several areas, including the following: 1) the power individual hearing officers will have to conduct administrative hearings; 2) the extent to which ASCS will exercise its administrative subpoena power for its own investigations, as well as for the benefit of farmers; and 3) the control policy-makers will maintain over the determinations issued by the National Appeals Division. Until these questions are answered, it is difficult to predict how, if at all, the creation of the National Appeals Division will change the manner in which ASCS conducts its administrative appeals. This picture will become clear only when ASCS implements these new regulations.

As an interim rule, the National Appeals Division regulations are still subject to change. ASCS accepted comments from the public regarding this regulation until December 26, 1991. Now that the comment period has closed, it is possible that, based on the comments received, ASCS could make changes to this regulation when it is published in its final form. Thus, anyone involved with the ASCS administrative appeals process should watch for publication of the final regulations regarding the National Appeals Division and carefully note any changes.

—Alan R. Malasky, David P. Grahn, Arent Fox Kintner Plotkin & Kahn, Washington, D.C.

FmHA OFFSET REGS/cont. from p. 3

Moseanko v. Yeutter, Nos. 90-5341, 90-5546 (8th Cir. Sept. 10, 1991) (1991 WL 173032). *See generally* Lowell P. Bottrell & Susan A. Schneider, *Eighth Circuit Awards EAJA Attorney's Fees in FmHA Offset Challenge*, 9 Agric. L. Update 1 (Oct. 1991) (discussing the *Moseanko* decision).

—Christopher R. Kelley, Visiting Asst. Professor, UND School of Law

State Roundup

NORTH DAKOTA. *Crop ownership determination in criminal prosecution.* In *State v. Brakke*, 474 N.W.2d 878 (N.D. 1991), the North Dakota Supreme Court considered whether a cotenant who planted a crop on farmland that was later lost through partition was properly subjected to criminal prosecution for harvesting the crop.

Brakke's parents had owned certain farmland as tenants in common. In the early 1980's, Brakke defaulted on agricultural loans that were guaranteed in part by Brakke's father. Following default, the Dakota Bank and Trust Company (Bank) obtained judgments and pursued collection efforts against Brakke and his father. Eventually, the Bank obtained a sheriff's deed and succeeded to the father's undivided one-half interest in the farmland. Brakke's mother continued to hold the other one-half interest.

The Bank then brought an action for partition. Meanwhile, in the spring of 1989, Brakke planted the farmland to spring wheat. On July 13, 1989, a partition judgment was entered. *See Dakota Bank & Trust v. Federal Land Bank of St. Paul*, 453 N.W.2d 610 (N.D. 1989) (affirming the partition judgment), *cert. denied*, 111 S. Ct. 188 (1990). The partition judgment did not mention the disposition of the growing wheat crop, part of which was now on the Bank's property.

The Bank arranged to harvest the spring wheat on its portion of the property. However, before the Bank could do so, Brakke, on behalf of his mother, began combining the crop. Brakke was arrested at the field and charged with theft and attempted theft of property. N.D. Cent. Code §§ 12.1-23-02 and 12.1-06-01. Brakke was convicted on both charges following a jury trial.

On appeal, the State relied on North Dakota case law for the general proposition that a transfer of ownership of property includes any growing crops. The State cited *Calhoun v. Curtis*, 45 Mass. 413 (1842), *cited in* 21 Am. Jur. 2d *Crops* § 8 (1981), for authority that a crop planted prior to partition follows the soil. The court could find, no case law addressing that issue in a criminal context.

While the court agreed with the general rule of *Calhoun*, it also recognized that there are equitable exceptions; one being where the holder of a sheriff's deed permits an occupant to remain in uninterrupted possession and to harvest crops previously planted. 474 N.S.2d at 882 (citing *Zeigler v. Blecha*, 229 N.W. 365, 366 (1930)). Here, since Brakke remained in uninterrupted possession of the partitioned property, he at least had a "colorable claim" to the crop.

Given the legitimate dispute as to the ownership of the crop, the court reversed Brakke's convictions, observing that a criminal theft trial was not the proper procedure to resolve crop ownership issues "which have never been decided by this court and which have only rarely been touched upon by courts in other jurisdictions." 474 N.W.2d at 882.

—Scott D. Wegner, federal judicial law clerk, Bismarck, ND

ILLINOIS. *Crop lender prevails over supplier.* The Third District Appellate Court has ruled that the statute giving priority to a perfected crop security interest for new value enabling the debtor to produce crops should be narrowly construed *vis a vis* a general previously perfected security interest. *First National Bank of Joliet v. Associated Stockdale Companies*, 577 N.E.2d 574 (3rd Dist. Ill. 1991).

Section 9-312(2) of the Illinois U.C.C. provides:

> A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

In this case the plaintiff bank had properly perfected a blanket security interest on June 29, 1983, and had properly continued the financing statement on March 4, 1988. The bank's security interest was securing the payment of two notes, both of which were due and payable on February 22, 1986.

The defendant, a farm supplier, sold the debtors fertilizer and other supplies needed for production of the 1986 crops. The debtors in turn gave the defendant a security interest in the 1986 crops to secure payment of the indebtedness for the supplies. The defendant properly perfected its security interest in October of 1986. The debtors planted their crops between April 25 and May 19, 1986.

The general rule is that conflicting security interests in the same collateral rank according to priorty in time of filing or perfection.

One of the several exceptions to this rule is found in section 9-312(2) of the Code. A subsequently perfected security interest takes priority over an earlier perfected interest in the same collateral, provided that the following criteria are met:

1. the security interest is in crops;
2. the security interest is given to secure new value given to enable the debtor to produce the crops during the production season;
3. the new value is given to the debtor not more than three months before the crops become growing crops; and
4. the earlier interest secures obligations **due** more than six months before the growing crops become growing crops.

The appellate court analyzed section 9-312(2) of the Code, and determined that the defendant had, indeed, perfected a security interest in crops for new value, by supplying fertilizer and other supplies to enable the debtors to produce the crops for the 1986 season. The fertilizer and other supplies were given within three months before the crops were planted, thus satisfying the third requirement of that subsection. When the bank and the defendant both vied for the proceeds of the 1986 crops, the issue became whether the bank's earlier perfected security interest was securing "obligations due more than six months before the crops become growing crops."

If "due" meant "due and owing," the bank's security interest would be inferior to the interest of the crop supplier, since the bank's notes were "due and owing" from the time they were signed, which was more than six months before the crops became growing crops. (The promissory notes were signed and dated August 22, 1985.) On the other hand, if "due" meant "overdue," that would be a reference to the maturity date of the debtors' obligations to the bank. Since both notes were "due and payable" on February 22, 1986, that was not more than six months before the crops became growing crops.

Finding no Illinois cases dealing with this issue, the appellate court analyzed how federal and other states' courts have treated this issue. Acknowledging that if "due" means "overdue," i.e. when the obligations mature, the court found this to be a restrictive view that could have a dampening effect on those otherwise willing to advance crop supplies. On the other hand, if "due" means "due and owing," i.e. when the obligations were made, general lenders (banks) would be disadvantaged.

Citing cases in support of the plaintiff bank's argument, the appellate court concluded that the term "due" should mean "overdue," i.e. the focus should be on the maturity date of the obligations. *See, Decatur Production Credit Association v. Murphy*, 119 Ill.App.3d 277, 456 N.E.2d 267, 74 Ill. Dec. 765, 773 (1983). Since the maturity date of the bank's obligations was within six months from the time the crops became growing crops, the defendant crop supplier's security interest did not fit the strict requirements of section 9312(2) of the U.C.C. Therefore, the bank prevailed against the crop supplier.

—Gary R. Gehlbach, Ehrmann, Gehlbach & Beckman, Dixon, IL.

ADDRESS
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Agriculture Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1992 American Agricultural Law Association membership renewal notice

Membership dues for 1992 are due February 1, 1992. For the 1992 calendar year, dues are as follows: regular membership, $50; student membership, $20; sustaining membership, $75; institutional membership, $125; and foreign membership (outside U.S. and Canada), $65.

Dues should be sent to:

William P. Babione
Office of the Executive Director
Robert A. Leflar Law Center
University of Arkansas
Fayetteville, AR 72701

Statements will be mailed to the membership in the near future.