

*Welcome to the Swamp:
Fighting the Alligators
using the
National Appeals Division and FSA Committees*

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I. Overview: In dealing with USDA, Farmers have rights !!!

- A. FSA (Farm Service Agency), RMA (Risk Management Agency), NRCS (Natural Resources Conservation Service), and other USDA agencies lead have a strong voice in running their own programs. But in dealing with individual farmers-participants, they do not have the last word.
1. Legally, USDA is an Executive Branch Agency, subject to Administrative Procedures Act standards (5 USC 553 et seq.);
 2. Politically, USDA answers to three other powers within the government:
 - a. The White House/ OMB (Office of Management and Budget);
 - b. Congress, and
 - c. The Federal Courts.
 3. USDA programs generally are “mandatory”;
 - a. Eligibility and payments are defined by statute. Once farmers qualify, they are entitled to payment as a legal right;
 - b. Funding is provided automatically by the Commodity Credit Corporation (CCC) or Federal Crop Insurance Corporation (FCIC). No need for annual appropriations by Congress;
 4. Within each agency, decisions are rule-based. Beyond statutes and regs, each agency has its own procedures and guidelines, all enjoying legal status:

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- a. FSA Handbooks:
<https://www.fsa.usda.gov/FSA/webapp?area=home&subject=empl&topic=hbk>
 - b. RMA Handbooks, Managers Bulletins, Standard Reinsurance Agreement, and Policy terms;
<https://www.rma.usda.gov/Policy-and-Procedure/Bulletins-and-Memos>
<https://www.rma.usda.gov/Policy-and-Procedure/Coverage-Plans---18000>
 - c. NRCS Manuals and Technical Guides:
<https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/people/outreach/tribal/?cid=stelprdb1047110>
- B. For decisions affecting individuals, USDA also provides formal avenues of appeal:
- 1. For FSA, appeals to semi-independent State and County Committees;
 - 2. For RMA, appeals to private arbitration panels (for disputes with participating insurance companies);
 - 3. For contractors, appeals to the Civilian Board of Contract Appeals (shared by multiple Departments);
 - 4. For most USDA agencies, the National Appeals Division.
- C. Decisions of “general applicability” generally are excluded from these appeal procedures but are subject to full APA standards, including OMB review and court challenge;
- D. Finally, if they fail internally, farmers can appeal their cases to Federal Court, but-
- 1. Courts generally require prior exhaustion administrative remedies;
 - 2. Court appeals can be limited in scope, and
 - 3. Court litigation can be expensive and high risk.
- E. For this presentation, I will focus on
- 1. FSA’s State and County Committees (Part 780 Rules),
 - 2. The National Appeals Division (Part 11 Rules).

II. The FSA Committee system – 7 CFR 780 Rules

- A. First, some history-
 - 1. Congress created FSA in 1994 combining three agencies, the old Agricultural Stabilization and Conservation Service (ASCS), Farmers Home Administration, and FCIC (though FCIC split away in 1997 along with the creation of the new Risk Management Agency), aiming to provide “one stop shopping” for farmers – a concept extended with modern USDA “County Service Centers” adding NRCS to the mix.
 - 2. But the structure dates back to the New Deal Era. Farm programs - the Commodity Credit Corporation (CCC) and Agricultural Adjustment Act (AAA) -

were among the very first achievements of FDR's "100 days" in early 1933. These evolved over decades into today's Farm Bill "Title I" programs;

3. Today's FSA also provides Farm Credit loans, programs like NAP (Non-Insured Assistance) and MFP (Market Facilitation), aerial photography, and it plays a key role in wetland and conservation compliance (linked to participation in most farm programs).
- B. FSA State and County Committees also were created in the 1930s to build political support, win farmer acceptance, and provide local expertise. (See 16 USC 590(h)(b) and 7 CFR Part 780)). These are rooted in 2,465 LAAs (Local Administrative Areas), generally counties or county combinations. For individual farmers, their main point of contact with FSA is their local FSA County Office (USDA Service Center), whose staffs often include county employees;
- a. County Committees are elected by participating farmers, totaling over 1.8 million, of whom 171,588 (9.3%) actually cast ballots in 2014. County committee members can serve up to three three-year terms, three-to-eleven members per committee;
 - b. State Committees are appointed by the Secretary. Yes, politics sometimes plays a role.
- C. When a farmer-specific dispute arises involving an FSA program – usually an “adverse decision” from a County office – FSA must inform the farmer of the decision and of their rights to appeal, which include-
1. Mediation (if the agency agrees);
 2. Appeal to their local County Committee from actions of subordinates;
 3. Reconsideration by the County Committee;
 4. Appeal to the State Committee;
 5. Reconsideration by the State Committee;
 6. Appeal to NAD
- D. Process-
1. Generally, the farmer must appeal within 30 days of receiving the adverse action (or learning of the agency's failure to act). Each subsequent step generally has a 30-day deadline as well;
 2. At the local level, farmers can meet with the County Committee and interact directly with the County Executive Director (CED). County Committees usually meet informally every month depending on workload;
 3. If it denies the farmer's request, it must inform the farmer of appeal rights to the State Committee;
 4. State Committee meetings are usually more formal, but farmers can still ask to attend and present their cases.
 5. At the State level, FSA (or the Secretary) often can apply “equitable relief” in certain situations-

- a. For most programs, where the farmer acted in “good faith” or on the advice of FSA staff (7 USC 7996) or
 - b. Under NRCS rules, where the farmer acted in “good faith” (7 CFR 12.12.5(a)(5) and (b)(5)).
- 6. But one key limitation: Ultimate authority for FSA remains with the Secretary, the Administrator, and their designees, who “reserve” power for-
 - a. Determining “at any time” any question arising under programs under their authority their programs and
 - b. “Reserving or modifying” any decision by any FSA employee, State or county Committee, or the CCC (7 CFR 780.3(b))
- E. General point: FSA County and State committees often provide the best forum for a farmers. They are cheap, relatively informal, do not require a lawyer, and, by keeping the issue local and low-key, they theoretically allow a farmer to be judged by peers and fellow producers who best understand local issues, and have some flexibility in applying rules.

III. National Appeals Division – 7 CFR Part 11

- A. Congress created NAD in the same 1994 Reorganization Act that created FSA. Its purpose was to provide an independent check on USDA agencies in dealings with individual farmers, in an environment less restrictive and intimidating than Federal Court where farmers can speak for themselves without a lawyer;
- B. As a result, NAD is independent within USDA, answering directly to the Secretary;
 - 1. It keeps separate offices, usually at neutral sites;
 - 2. Unlike FSA committees, the Secretary and agency heads can appear before NAD but cannot interfere in its decision-making; and
 - 3. NAD hearings are conducted by Administrative Judges or Hearing Officers, often recruited from outside USDA.
- C. NAD’s mandate reflects its neutral purpose;
 - 1. NAD ‘s authority is limited to determining whether the agency erred in its decision. To trigger an appeal, the farmer must show an “adverse action” by the agency, and the farmer bears the burden of proof to show agency error;
 - 2. NAD decisions must be “consistent with the laws and regulations of the agency, and with the generally applicable interpretations of such laws and regulations.” (7 CFR 11.10(b)). NAD can neither make new rules nor question the validity or logic of existing agency rules (as tempting as that might sometimes be).
 - 3. In making determinations, NAD is not limited to prior agency findings or fact, though I can require a farmer to first go through FSA’s internal committee review system;

4. NAD's jurisdiction covers FSA, RMA, FCIC, NRCS, RBS, RD, RHS, and RUS and its ruling are binding on the agencies as "final determinations of USDA."

D. Process

1. NAD provides three main types of reviews:
 - a. Appealability Review –
 - a. By the Director, to determine whether appeal rights apply;
 - b. Administrative Hearings -
 - a. By an Administrative Judge or Hearing Officer, to determine the merits of the agency's adverse action; and
 - c. National Director Review –
 - a. By the Director, to review the initial determination.
2. An appeal to NAD must be-
 - a. Filed by the farmer within 30 days of learning of the "adverse action";
 - b. Personally signed by the farmer (along with a signed special form for a representative if need be); and
 - c. Include a "brief" statement why agency is wrong. (Fortunately for long-winded lawyers, the NAD rules don't define the meaning of "brief.")
3. Once an appeal is accepted, NAD must provide the farmer a hearing within 45 days unless the farmers agrees to a delay-
 - a. The farmer can choose between an (a) in-person hearing, (b) hearing by phone, or (c) paper review. Hearings are formal and on the record (recorded), though Federal rules of evidence do not apply,
 - b. The agency must provide the farmer a full agency record, including all documents related to the adverse action, prior to the hearing. The farmer also must provide in advance all documents they intend to produce. The Administrative Judge can also ask for arguments on legal issues that come up along the way;
 - c. Either side can call witnesses, and witness subpoenas can be granted in some cases;
 - d. Decisions must be based on the hearing record, oral plus documents, so it's vital for all sides make sure they're presented all the facts;
 - e. Equitable relief: NAD can provide this only on Director Review and only to the same extent as the agency;
4. Court Review-
 - a. NAD decisions are considered "final determinations" that can be directly appeals to a Federal District Court under Title 5, USC. Conversely, failure to obtain a NAD outcome on a USDA "adverse action" can block a farmer from seeking judicial review.
5. General Point: Farmers can get a fair shake at NAD, but the process is more formal than an FSA State or County Committee and, in complex cases, farmers are well served by the assistance of a lawyer. Also, farmers cannot rely on a sympathetic sad story. NAD is careful to make its decisions "by the book," and

the farmer must be able to point to a specific rule or procedure the agency violated for any chance of success.

IV. Two final thoughts:

A. When to go political?

1. Yes, farmers can also visit your Congressmen or the agency Administrator and ask them to intervene, but this often backfires. Politicians resist getting involved in individual cases, and the agency staff react defensively, assuming you're compensating for a weak case.
2. Unless there's a large group involved, it's best to focus lobbying on changing the rules for the future;

B. Self-help:

1. Keep good records, keep good relationships, follow deadlines, and try to solve problems before they grow out of control.