Judicial Review of FmHA Actions[1]

by Randi Ilyse Roth

I. Introduction

A. How Judicial Review is Useful

"Judicial Review" is the process by which a federal district court reviews actions taken by an agency. The law of judicial review is set forth in the Administrative Procedure Act (APA).[2] Appendix A summarizes each relevant provision of the APA.

In the FmHA context, judicial review can be used to seek redress when the agency refuses to honor a farmer's rights. A simple example follows:

> In January 1988, an FmHA county supervisor denied a farmer's application for an operating loan. The reason for the denial was "lack of creditworthiness because he filed bankruptcy five years ago." The county supervisor's actions violated the FmHA regulations. The farmer requested an appeal hearing. At the hearing, he argued that he should have been given the loan, which would have allowed him to put in a crop, produce income, become current on his debt, and retain his land. Without taking evidence to evaluate the farmer's eligibility for the loan, the hearing officer denied the farmer's request. The farmer formally requested state director review of the hearing officer's decision. The farmer's request for the loan was denied again by the review officer. The farmer then requested a national level review. The county supervisor's decision was upheld again at the national level. At this stage, the farmer has "exhausted his administrative remedies."
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> The farmer may now hire a lawyer to file a complaint in federal district court for judicial review. In that lawsuit, the farmer can ask the judge to reverse FmHA's decision to deny the loan.

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1 This article is based in part on research done by Kurt M. Anderson of Balyk & Anderson, Ltd.

2 5 U.S.C. §§ 551-559 and 701-706.

B. The Administrative Procedure Act (APA)

The APA is found in Chapters 5 and 7 of Title V of the United States Code, which is entitled "Government Organization and Employees."

The various sections of those chapters are like interlocking pieces of a puzzle: they cross-reference each other time and time again. For example, Section 706(2)(E) applies to cases subject to Sections 556 and 557; Section 556 applies to hearings required by Section 553 or 554, etc. Therefore, it is useful to be familiar with each of the individual sections. A summary and analysis of the sections as they apply to FmHA judicial review actions is in Appendix A.

Section 701 sets forth the circumstances in which Chapter 7 (judicial review) applies. It provides that Chapter 7 applies to reviews of final FmHA actions unless *"agency action is committed to agency discretion by law."* This condition creates a difficult and important issue in many FmHA judicial review cases. See the discussion beginning on page 8 below.

Section 702 creates a private right of action to enforce federal statutes against federal agencies.

Section 703 explains the types of relief that are available in a judicial review case. They include declaratory judgments, prohibitory or mandatory injunctions, and habeas corpus.

Section 704 provides that only *final agency action* is reviewable.[3] Therefore, this section establishes the requirement of *exhaustion of administrative remedies.* See the discussion beginning on page 26 below.

Section 705 sets forth the criteria for obtaining *relief pending review.* Often, it can take in excess of one year to complete a judicial review action: without obtaining relief pending review, the client may lose his or her farm in the meantime. See the discussion beginning on page 24 below.

Section 706 provides the scope of review. The general standard is whether agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." The shorthand name for this standard is the "arbitrary and capricious" test. Usually, to apply this test, the court determines whether the agency's decision

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3 Additionally, actions made reviewable by statute are reviewable, but no FmHA actions are made reviewable by statute.

was "based upon a consideration of the relevant factors and whether there has been clear error of judgment."[4]

However, Section 706 provides that a different standard applies in cases where an agency hearing on the record is required by statute.[5] In those cases, the standard is whether the agency's action is "unsupported by substantial evidence." The shorthand name for this standard is the "substantial evidence" test.

Until December 23, 1985,[6] it was settled law that the arbitrary and capricious test applied to FmHA judicial review cases. On that date, the FmHA statute was changed in a way which gives rise to a strong argument to support the use of the substantial evidence test instead. See the discussion beginning on page 18 below.

C The FmHA Statute and Regulations

The FmHA statute[7] and regulations[8] establish criteria for farmers' entitlement to new loans, to loan servicing, and to participation in the administrative appeals process. To thoroughly evaluate a client's case, counsel must have a basic familiarity with these entitlements. For a general overview, see *Farmers' Guide to FmHA*[9] and an article by James T. Massey entitled "Farmers in Crisis."[10]

D. The Administrative Appeals Procedure

The farmer must exhaust the Administrative Appeals Procedure[11] in order to meet the "final agency action" requirement for judicial review. The appeals procedure is described in detail in the FmHA

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4 *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S. Ct. 814, 824 (1971).

5 Cases "subject to §§ 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. § 706.

6 December 23, 1985, is the date of the controlling amendment to the FmHA statute. See page 22.

7 7 U.S.C. § 1921, *et seq.*

8 7 C.F.R. § 1500-end.

9 Available from FLAG, 1301 Minnesota Building, 46 East Fourth Street, St. Paul, Minnesota, 55101.

10 *Clearinghouse Review,* Vol. 18, No. 7, November 1984. National Clearinghouse for Legal Services, Inc., 407 South Dearborn Street, Suite 400, Chicago, Illinois, 60605.

11 7 C.F.R. Part 1900, Subpart B.

regulations[12] and in Chapter 11 of *Farmers' Guide to FmHA*.[13] A brief summary of the appeals procedure follows.

A farmer has the right to appeal any action or decision of the FmHA which directly and adversely affects him or her,[14] except those that are specifically excluded in the regulations.[15]

Generally, at the beginning of the appeals process, the farmer has the opportunity to have an *"informal meeting"* with FmHA. Within seven days after the meeting, the farmer should receive a *letter from FmHA explaining the results* of the meeting. If the farmer is not satisfied with the results, the farmer must *request a formal hearing*. The request must be made within 30 days after the date of the letter which explains the results of the informal meeting. The farmer should be given a formal appeal hearing within about 45 days of his or her request.[16]

The farmer should receive a *written decision* from the hearing officer within 30 days after the hearing. It should contain *detailed reasons* for the decision.[17]

If the farmer is not satisfied with the hearing officer's decision, he or she can request a *review*. There are two levels of review: first, the state director level, and second, the national administrator level. The state director review is optional; the farmer can skip it and go directly to the national level review if that is his or her preference.[18] The national level review is an essential step in exhaustion of administrative remedies. Each request for review must be made in writing within 30 days after the adverse decision from the previous level of review.[19]

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12 53 Fed. Reg. 26400-413 (July 12, 1988) (to be codified at 7 C.F.R. Part 1900).

13 See footnote 9.

14 7 U.S.C. § 1983b(a); 53 Fed. Reg. 26408 (July 12, 1988) (to be codified at 7 C.F.R. § 1900.55(a)).

15 53 Fed. Reg. 26408-09 (July 12, 1988) (to be codified at 7 C.F.R. § 1900.55).

16 If the appeal concerns a denial of a request for income release, the hearing should be within 20 days. 53 Fed. Reg. 26409 (July 12, 1988) (to be codified at 7 C.F.R. § 1900.56(a)(4)).

17 53 Fed. Reg. 26410 (July 12, 1988) (to be codified at 7 C.F.R. § 1900.57(j)).

18 7 U.S.C. § 1983b(e)(1); 53 Fed. Reg. 26413 (July 12, 1988) (to be codified at 7 C.F.R. Part 1900, Subpart B, Exhibit D, note 5).

19 53 Fed. Reg. 26410 (July 12, 1988) (to be codified at 7 C.F.R. §§ 1900.57(k), 1900.58(d)). See the decision letter to find out when the 30-day period begins to run. (The regulations do not say whether it begins to run on the date of the letter or when the farmer receives the letter.)

The review officer must give the farmer a decision which explains his or her reasoning in writing, based on the record.[20]

When the review process is complete, the agency's action is considered "final" and the farmer has exhausted his or her administrative remedies.

II. Preliminaries

A. Forum

FmHA judicial review cases should be filed in the United States District Court. If they are filed in state court, FmHA will remove them to federal court.

B. Procedural Rules

The Federal Rules of Civil Procedure and the local rules of the court where the case is filed will govern.

C. Jurisdiction

Jurisdiction is conferred by 28 U.S.C. § 1331 (federal question jurisdiction).[21] The APA does not confer subject matter jurisdiction.[22]

D. Scope of Review

The scope of review is determined by § 706(2) of the APA. It is generally either the arbitrary and capricious test, or the substantial evidence test. See the discussion beginning on page 18 below for an analysis of this issue.

E. Statute of Limitations

The general federal statute of limitations applies because the FmHA statute does not contain a specific statute of limitations. The general federal statute of limitations is six years.[23]

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20 53 Fed. Reg. 26410 (July 12, 1988) (to be codified at 7 C.F.R. § 1900.57(j)).

21 This statute was amended in December 1980 to eliminate the $10,000 amount in controversy requirement. Section 1331 now reads, "The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

22 *Califano v. Sanders,* 430 U.S. 99, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977).

23 28 U.S.C. § 2401.

Even though the statute of limitations is six years, counsel should file APA cases promptly to avoid problems with laches.

F. Parties

(1) Plaintiffs: Standing. To have standing to sue, a person must suffer "legal wrong because of agency action, or [be] adversely affected or aggrieved by agency action within the meaning of a relevant statute . . ."[24]

(2) Defendants. The APA states that an action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.[25] "Appropriate officers" may include: Clayton Yeutter, Secretary of the United States Department of Agriculture; Neal Sox Johnson, National Administrator of the FmHA; the State Director of the FmHA in the relevant state; and the County Supervisor of the FmHA in the relevant county.

III. The Structure of a Judicial Review Case

A. The Issues in an FmHA Judicial Review Case

A complaint for a judicial review must assert (1) that the agency action is reviewable; and (2) that the agency's action should be set aside because it fails to meet the relevant criterion of § 706 of the APA; for example, it is arbitrary and capricious, or it is unsupported by substantial evidence.

FmHA judicial review cases contain at least five potentially difficult issues:

- *Reviewability* (establishing that the FmHA's action or failure to act is subject to judicial review);
- *Scope of review* (should the arbitrary and capricious test or the substantial evidence test apply?);
- *Continuing benefits* (establishing, for example, that the farmer should continue to receive necessary family living and farm operating funds, or that foreclosure should be enjoined, while the judicial review action is pending);

24 5 U.S.C. § 702.
25 5 U.S.C. § 703.

- *Exhaustion* (establishing that the plaintiff has exhausted his or her administrative remedies, or that an exception to the exhaustion requirement applies);
- *Relief* (fashioning a request for relief that will enable the plaintiff to continue farming).

B. The Process of an FmHA Judicial Review Case

Step #1: The plaintiff files a complaint and discovery (interrogatories, request to produce, requests to admit, and, if necessary, notices of depositions).

Step #2: The defendant files an answer and discovery.

Step #3: Generally, the defendant files a motion for summary judgment. The plaintiff may file a cross-motion. There will be briefs, and perhaps a hearing on summary judgment. The case is often decided at this stage.

Step #4: If the plaintiff's case survives summary judgment, and there are contested issues of fact, the case will go to trial.

IV. Analysis of Issues

A. Reviewability

Section 701(a) of the APA provides that agency actions are reviewable,[26] except to the extent that:

- Statutes preclude judicial review; or
- Agency action is committed to agency discretion by law.

The § 701(a)(1) exception is not relevant here because the FmHA statute does not preclude judicial review.[27] Therefore, the

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26 But agency actions are reviewable only if they meet the "final agency action" requirement of § 704.

27 The test for whether a statute precludes judicial review (§ 701(a)(1)) is whether there is "clear and convincing legislative intent" to preclude review. *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979). However, the "clear and convincing evidence" standard is not to be applied in a strict evidentiary sense; the standard is met whenever the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme." *Block v. Community Nutrition Inst.*, 104 S. Ct. 2450, 2457 (1984).

reviewability issue in FmHA cases centers on the § 701(a)(2) exception.[28]

The meaning of the phrase "agency action is committed to agency discretion by law," which invokes an exception to reviewability, has been developed by the United States Supreme Court in four cases. The first was the landmark case of *Citizens to Preserve Overton Park v. Volpe,* 91 S. Ct. 814, 401 U.S. 402 (1971). In that case, the court explained,

> [T]he exception for action "committed to agency discretion" . . . is a very narrow exception. . . . The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case *there is no law to apply*."[29]

In a strict sense, the test of whether there is "law to apply" is an inquiry into whether there are objective criteria against which the court can measure the agency's action. However, several courts of appeals have expanded that test to include an inquiry into "pragmatic" questions of whether the agency's action is a "suitable subject for judicial review." For example, the Court of Appeals for the District of Columbia Circuit explained,

> Whether a particular agency decision is committed to agency discretion depends, broadly speaking, on whether there is law to apply in making and reviewing the decision, *which in turn depends . . . on "pragmatic" considerations as to whether an agency determination is the proper subject of judicial review.* . . . (Citation omitted.) Among the important considerations are "the need for judicial supervision to safeguard the interests of the plaintiffs[,]

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28 The difference between the § 701(a)(1) and (a)(2) exceptions can be confusing. The Supreme Court explored the difference in *Heckler v. Chaney,* 105 S. Ct. 1649, 1655 (1985), and explained:

> The [§ (a)(1) exception] . . . applies when Congress has expressed an intent to preclude judicial review. The [§ (a)(2) exception] . . . applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have "committed" the decisionmaking to the agency's judgment absolutely.

29 *Overton Park,* 401 U.S. at 410, 91 S. Ct. at 820-21 (emphasis added).

> the impact of review on the effectiveness of the agency in carrying out a congressionally assigned role[,] and the appropriateness of the issues raised for judicial review."[30]

In Tuepker v. FmHA, the Court of Appeals for the Eighth Circuit held that FmHA's denial of an emergency loan application is not a "proper subject of judicial review."[31] The court stated that,

> [W]ere this a case presenting *issues appropriate for judicial review*, this court could find precedent to support a holding that the applicable statute and regulations comprise a sufficient body of "law" to apply within the meaning of *Overton Park*. Nevertheless, we also recognize that "[i]n practice, the determination of whether there is 'law' to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject for judicial review." *Natural Resources Defense Council v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979).[32]

A new twist to the problem of whether "agency action is committed to agency discretion by law" was raised by the second U.S. Supreme Court case in this series, *Heckler v. Chaney*.[33] In *Chaney*, the plaintiff sought review of a decision by the Food and Drug Administration (FDA) to refrain from regulating the toxic drugs used for lethal injections in death penalty cases. The court held that the FDA's decision not to commence a regulatory proceeding was analogous to a prosecutor's decision not to prosecute, which is generally beyond review. The court stated,

> [In cases of refusal] to take enforcement steps . . . we think the presumption is that judicial review is not available. This court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.

Several circuit courts have gone to great lengths to distinguish *Chaney* from other cases in which plaintiffs sought judicial review. In *State of*

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30 *Investment Co. Inst. v. FDIC*, 728 F.2d 518, 526 (D.C. Cir. 1984) (emphasis added).

31 *Tuepker v. FmHA*, 708 F.2d 1329, 1332 (8th Cir. 1983).

32 *Id.* (emphasis added). Other Supreme Court cases which addressed reviewability between the time of the *Overton Park* ruling and the next Supreme Court case, *Chaney* (see p. 10), include: *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983), and *Story v. Marsh*, 732 F.2d 1375 (8th Cir. 1984).

33 105 S. Ct. 1649 (1985).

Iowa ex rel. Miller v. Block,[34] the court distinguished *Chaney* by relying upon a 1983 Eighth Circuit case, *Allison v. Block*.[35] The *Allison* case had held that the Secretary must implement 7 U.S.C. § 1981(a) (authorizing deferral relief). The court in *Allison* stated that the Secretary

> [M]ust clearly articulate the reasons for each § 1981 decision *in a manner susceptible to judicial review* for an abuse of discretion.[36]

Miller involved the Secretary's failure to implement the Special Disaster Payments Program (SDPP). The court's reasoning in *Miller* followed its reasoning in *Allison*. The *Miller* court stated that in *Allison*,

> [W]e consider the Secretary's failure to implement a program entirely, not simply his failure to grant aid in a particular case.[37]

The court went on to explain in a footnote,

> We regard this fact as the essential point distinguishing the Supreme Court's recent decision in *Heckler* . . . from *Allison* and the case at bar. . . . We believe that *Heckler's* consideration of an agency's decision not to enforce the law in a single instance presents an issue distinguishable from the Secretary's decision not to promulgate general regulations embodying the intent of Congress.[38]

The broadest reading of this footnote would be that all instances of agency refusal to act in individual cases, including refusals to grant deferrals or other relief to borrowers, are unreviewable. However, other courts have gone even further to confine *Chaney* to its facts.[39]

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34 771 F.2d 347, 350 (8th Cir. 1985).

35 723 F.2d 631 (8th Cir. 1983).

36 *Allison*, 723 F.2d at 638 (emphasis added).

37 *Miller*, 771 F.2d at 350.

38 *Miller*, 771 F.2d at 350 n.2.

39 *See Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1549 (7th Cir. 1985) ("[W]e read *Chaney* solely as reaffirming the recognized position that § 701(a)(2) applies in certain circumstances where courts are unqualified to decide whether an agency has abused its discretion. . . . [W]hereas the *Chaney* court ruled that it would be contrary to Congressional intent to allow judicial review of agency nonenforcement decisions, . . . here a complete lack of judicial scrutiny of CFTC decisions not to review would frustrate Congressional intent."); *see also California Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1048 n.28 (D.C. Cir. 1985); *Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 767 F.2d 939, 945 (D.C. Cir. 1985) (*Chaney* "interpreted . . . § 701(a)(2) as creating only a narrow exception to the

Viewed in its most narrow sense, *Chaney 's* application can be limited to cases where an agency which serves a quasi prosecutorial or law enforcement function declines to exercise its jurisdiction in a particular case.

The third Supreme Court case in this series, *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133 (1986), involved a challenge to regulations in the medicare program. *Michigan Academy* reiterated the strong presumption of reviewability[40] and held that the agency action at issue in that case was reviewable. The case highlighted the importance of congressional intent. The case quoted the following very strong legislative history of the APA:

> Very rarely do statutes withhold judicial review . . . [Congress'] policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.[41]

After *Michigan Academy*, at least one circuit court relied very heavily on "congressional intent" to find reviewability.[42] The most significant FmHA case after *Michigan Academy*, though, found that the challenged agency action was not reviewable. *Woodsmall v. Lyng*[43] involved FmHA's denial of a rural housing loan application. The Woodsmalls were denied for lack of creditworthiness. The court held that that decision was not reviewable, saying:

> The court is not equipped to undertake such a task, for in these matters we have neither the training nor experience of an FmHA loan officer. The agency's determination of creditworthiness is a "qualitative, subjective decision based on agency expertise," *Tuepker*, 708 F.2d at 1332 . . . Moreover, we do not find in this statutory language or in any other provision the kind of meaningful standards that would, under *Chaney*, allow us to judge the

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general rule of judicial review of agency decisions, thereby reaffirming the strong presumption in favor of review."); *Robbins v. Reagan*, 780 F.2d 37, 46-47 (D.C. Cir. 1985).

40 *Michigan Academy*, 106 S. Ct. at 2135.

41 *Michigan Academy*, 106 S. Ct. at 2136.

42 *NAACP v. Secretary of Hous. and Urban Dev.*, 817 F.2d 149, 157 (lst Cir. 1987). *See also Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 791-92 (9th Cir. 1986). *But see Woodsmall v. Lyng*, 816 F.2d 1241, 1245 (8th Cir. 1987), and *Center for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988).

43 *Woodsmall v. Lyng*, 816 F.2d 1241 (8th Cir. 1987).

> agency's exercises of discretion in denying a loan application for lack of creditworthiness.[44]

The court explained, though, that its holding that the creditworthiness determination is not reviewable does not "foreclose review of the Woodsmalls' claim that the Secretary has failed to promulgate adequate standards for evaluating creditworthiness."[45] All in all, the *Woodsmall* court embraced the tests enunciated in *Tuepker*,[46] and specifically "left for another day" the effect of *Chaney* on *Tuepker*.[47]

The fourth and, to date, final Supreme Court case in this series is *Webster v. Doe*, 108 S. Ct. 2047 (1988). *Webster v. Doe* concerned a CIA agent who was fired because of his homosexuality. The Court held that the Director of the CIA's decision to discharge the employee was not reviewable under the APA but that the discharged employee's constitutional claims were reviewable. The nonreviewability part of the decision was based on the Court's holding that:

> [T]he language and structure of the [governing statute] . . . indicate that Congress meant to commit individual employee discharges to the Director's discretion . . .[48]

Webster's focus was a "careful examination of the statute on which the claim of agency illegality is based" to see whether there was a "basis on which a reviewing court could properly assess an agency termination decision." Therefore, *Webster* did not really depart from the analysis of the previous cases.[49] Since *Webster*, the courts have continued to look to the question of whether there is "law to apply" and whether the law contains meaningful standards.[50]

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44 *Woodsmall*, 816 F.2d at 1245-46.

45 *Woodsmall*, 816 F.2d at 1246.

46 *Tuepker v. FmHA*, 708 F.2d 1329 (8th Cir. 1983).

47 *Woodsmall*, 816 F.2d at 1245.

48 *Webster*, 108 S. Ct. at 2053.

49 *Webster*, 108 S. Ct. at 2052.

50 *Massachusetts Pub. Interest Research Group, Inc. v. U.S. Nuclear Regulatory Comm'n*, 852 F.2d 9, 19 (1st Cir. 1988) (challenged action not reviewable because law did not contain sufficient standards); *Arnow v. U.S. Nuclear Regulatory Comm'n*, 868 F.2d 223, 230-34 (7th Cir. 1989) (agency action not reviewable); *Sierra Club v. Hodel*, 848 F.2d 1068, 1074-75 (10th Cir. 1988) (agency action is reviewable. "[E]ven though BLM's position . . . perhaps could be characterized as a decision not to take enforcement action, that decision is nonetheless reviewable . . . [because there is] 'law to apply.'"); *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 351-54 (10th Cir. 1989) (agency action not

Therefore, a two-part test has evolved to determine whether an agency action is "reviewable" within the meaning of § 701(a)(2):

- Whether there is "enough law to apply" (i.e., whether there are standards against which the court can evaluate the agency action); *and*
- Whether the problem raised is "suitable for judicial determination."

The best strategy to obtain review is to address both parts of the two-part test.

Part 1 can be addressed by showing the court the entire body of law which it can apply—statute, regulations, and administrative notices—to demonstrate that the agency's action should be governed by objective criteria. Several courts have held that regulations as well as statutes count as "law to apply."[51] At least one court has stated that policy statements can constitute law to apply.[52]

Part 2 can be addressed by raising all potential issues that are "suitable for judicial determination," such as "a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some other like error 'going to the heart of the administrative determination.'"[53]

The most successful strategy is to couple a claim for review of the substance of the agency's decision with, for example, a claim that the regulations upon which the decision was based are invalid,[54] or that the procedures followed by the agency were irregular.[55]

Practitioners report that FmHA hearings are commonly broad in their scope and lacking in prior notice of the particular facts which support the agency's decision. Also, FmHA's decision letters often contain references to facts that have not been previously raised. These are some of the types of procedural irregularities that could be raised in judicial

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reviewable because statute and regulations provide no "law to apply").

51 *Community Action of Laramie County, Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir. 1989); *Arnow v. U.S. Nuclear Regulatory Comm'n*, 868 F.2d 223, 234 (7th Cir. 1989); *Center for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988).

52 *Robbins v. Reagan*, 780 F.2d 37, 45-46 (D.C. Cir. 1985).

53 *Tuepker*, 708 F.2d at 1332.

54 *See Bowen, supra*, at 106 S. Ct. 2140-41. *See also Taylor*, D.C. slip op., in which the government conceded that this type of issue is reviewable.

55 *See Story*, 732 F.2d 1381; *Tuepker*, 708 F.2d at 1332; *Taylor*, D.C. slip op. at 9; *Folker*, slip op. at 5.

review cases. It is a fundamental precept of administrative law that a party's opportunity to respond to crucial facts must come "at a meaningful time and in a meaningful manner."[56] An index of major judicial review cases involving FmHA is included as Appendix B.

B. Scope of Review

If the court deems the case to be "reviewable," the court evaluates the record of the agency's decision. Review must be of the "whole record."[57]

"Scope of review" refers to the level of scrutiny with which the court will evaluate the record of the agency's substantive decision.[58] "Scope of review" is different from "standard of proof": the former refers to the court's review of the agency's action, and the latter refers to the level of proof required in the agency's adjudicatory decision.[59]

The APA sets forth two different standards of review. The "arbitrary and capricious" standard applies in most cases. But in cases that are subject to §§ 556 and 557 of the APA, or are "otherwise reviewed on the record of an agency hearing provided by statute,"[60] the "substantial evidence" standard applies instead.

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56 *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *See also Carson Prod. Co. v. Califano,* 594 F.2d 453 (5th Cir. 1979); *Zotos Int'l, Inc. v. Kennedy,* 460 F. Supp. 268 (D.D.C. 1978); *National Org. for Women v. Social Sec. Admin.,* 736 F.2d 727, 739 (D.C. Cir. 1984); and Davis, K., *Administrative Law Treatise,* § 14.11 at 50-51 (2d Ed. 1980).

57 5 U.S.C. § 706. The court should take a very skeptical view of agency attempts to construct "'post hoc' rationalizations." *Overton Park,* 401 U.S. at 419, 91 S. Ct. at 825.

58 Besides authorizing judicial review of agencies' substantive decisions, which are evaluated by the "arbitrary and capricious" or "substantial evidence" tests, the APA authorizes the reviewing court to compel agency action unlawfully withheld or unreasonably delayed [§ 706(1)], and to hold unlawful and set aside agency actions found to be: contrary to constitutional right, power, privilege, or immunity [§ 706(2)(B)]; in excess of statutory jurisdiction, authority, or limitations; or short of statutory right [§ 706(2)(C)]; or without observance of procedure required by law [§ 706(2)(D)]. Additionally, the statute authorizes *de novo* review, which is discussed below beginning at page 23.

59 In a hearing that is governed by § 556 of the APA, the agency must make its decision based upon the "preponderance of the evidence" standard of proof. *Steadman v. SEC,* 450 U.S. 91, 101 S. Ct. 999, 67 L.Ed.2d 69 (1981).

60 5 U.S.C. § 706(2)(E).

1. Arbitrary and Capricious

To determine whether an agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,"[61] the court determines,

> [W]hether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.[62]

The court explained in *Overton Park* that,

> Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[63]

2. Substantial Evidence

The substantial evidence test is more stringent than the arbitrary and capricious test; and, therefore, it is harder for the agency to meet it. In *Richardson v. Perales,*[64] the United States Supreme Court described the substantial evidence test as,

> [M]ore than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[65]

In *Bowman v. Arkansas-Best Freight System, Inc.,*[66] the court went on to state that

> The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.[67]

The court has decided that when the scope of review is "substantial evidence," the standard of proof is the traditional preponderance-of-the-evidence standard.[68]

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61 5 U.S.C. § 706(2)(A).
62 *Overton Park,* 401 U.S. at 417, 91 S. Ct. at 824.
63 *Id.*
64 402 U.S. 389, 401 (1971).
65 *Id.* The court was quoting from *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 299 (1938).
66 419 U.S. 281, 284 (1974).
67 *Bowman,* 419 U.S. at 184 n.2, quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).
68 *Steadman v. Securities and Exchange Comm'n,* 450 U.S. 91, 101 S. Ct. 999 (1981).

If the substantial evidence test applies, the arbitrary and capricious test applies as well.[69] In an unusual case, an agency decision may be supported by substantial evidence but something in the record may nonetheless indicate that the decision was arbitrary and capricious.[70]

3. Which Standard of Review Applies?

As explained above,[71] until December 23, 1985, it was settled law that the arbitrary and capricious test applied in FmHA judicial review cases. (See the discussion beginning on page 22.) On that date, the 1985 Food Security Act became effective, thereby amending the FmHA statute to make appeal hearings mandatory.[72] The relevant statutory language now reads:

> The Secretary *shall provide* . . . [applicants and borrowers who have been] directly and adversely affected by a decision of the Secretary . . . with written notice of the decision, an opportunity for an informal meeting, and *an opportunity for hearing* with respect to such decision . . .[73]

Because appeal hearings are now required by statute, there is a new, strong argument that the substantial evidence standard should apply instead of the arbitrary and capricious standard.

Section 706(2) governs which standard applies. Section 706(2)(A) provides that the arbitrary and capricious standard has general applicability. Section 706(2)(E) provides that the substantial evidence standard applies instead in cases "subject to § 556 and 557 . . . or otherwise reviewed on the record of an agency hearing provided by statute."[74]

The new statutory hearing requirement arguably makes § 706(2)(E) applicable to FmHA hearings. The first part of § 706(2)(E), the phrase "subject to § 556 and 557," refers to cases in which hearings are required by § 554. Section 554 requires a hearing:

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69 Additionally, § 706(2)(B)-(D) apply in all judicial review cases.

70 *Bowman,* 419 U.S. at 284; *American Tunaboat Ass'n v. Baldridge,* 738 F.2d 1013, 1016 (9th Cir. 1984).

71 See the discussion beginning on page 3.

72 7 U.S.C. § 1983b(a) (emphasis added).

73 *Id.*

74 5 U.S.C. § 706(2)(E).

> [I]n every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .[75]

Therefore, the substantial evidence standard applies if the FmHA hearing requirement meets the § 554 criteria quoted in boldface above, or meets the language of the second phrase of § 706(2)(E),

> [O]r otherwise reviewed on the record of an agency hearing provided by statute.[76]

It is clear that in the FmHA context, there is now a "hearing provided by statute." The remaining question is the meaning of the phrase "on the record."

It is settled law that the § 554(a) requirement can be met in cases where the words "on the record" do not appear in the statute.[77] The *Marathon Oil* case is often quoted for the proposition that:

> [W]hether the formal adjudicatory hearing provision of the APA applies to specific administrative processes does not rest on the presence or absence or the magical phrase "on the record." Absent congressional intent to the contrary, it rests on the substantive nature of the proceedings involved.[78]

"The substantive nature of the proceeding" refers to whether the hearing is a "quasi judicial proceeding" which determines the specific rights of particular individuals or entities.[79] The *Marathon Oil* case explains this concept, invoking language that is ominous in this context.

> Congress inserted § 554's prefatory language . . . to exclude from the residual definition of adjudication "governmental functions, such as the *administration of loan programs*," which traditionally have never been regarded as adjudicative in nature and as a rule

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75 There are exceptions to this statement of the applicability of § 554, but they are not relevant in this context.

76 However, FmHA contends that its entire appeal process is exempt from the APA. 53 Fed. Reg. 26407 (July 12, 1988) (to be codified at 7 C.F.R. § 1900.51(d)).

77 *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245, 93 S. Ct. 810, 35 L.Ed.2d 223 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757, 92 S. Ct. 1941, 32 L.Ed.2d 453 (1972).

78 *Marathon Oil v. EPA*, 564 F.2d 1253, 1263 (1st Cir. 1977).

79 *Marathon*, 564 F.2d at 1261.

have never been exercised through other than business procedures.[80]

However, the Attorney General's manual[81] goes on to explain,

> It is believed that with respect to adjudication, the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing. With respect to rule making, it was concluded, *supra,* that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record," but rather as merely requiring an opportunity for the expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale applies to administrative adjudication. In fact, it is assumed that where a statute specifically provides for administrative adjudication (such as the suspension or revocation of a license) after opportunity for an agency hearing, *such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with the evidence adduced at the hearing.* Of course, the foregoing discussion is inapplicable to any situation in which the legislative history or the content of the pertinent statute indicates a contrary congressional intent.[82]

The Seacoast court adopted the manual's position for the First Circuit:

> We are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record.[83]

Therefore, a strong argument can be made that FmHA hearings must be on the record because they are required by statute, and that therefore the substantial evidence standard applies. However, counsel

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80 *Marathon,* 564 F.2d at 1263 (emphasis added), quoting The Attorney General's Manual on the Administrative Procedure Act 40 (1947) ("the Attorney General's Manual"). The same language is quoted in *Seacoast Anti-Pollution League v. Costle,* 572 F.2d 872, 877 (1st Cir. 1978).

81 See previous footnote.

82 *Seacoast,* 572 F.2d at 877-78, quoting Attorney General's Manual at 42-43 (emphasis in *Seacoast* but not in Attorney General's Manual).

83 *Seacoast,* 572 F.2d at 877.

should be aware that language in a pre-1985 Coleman opinion may seriously damage that argument. That opinion dealt with three arguments which the plaintiffs used to support their argument that the APA (§ 554) should apply to FmHA appeal hearings. The plaintiffs lost all three arguments. The court's reasoning regarding the first two, based upon statutory language and legislative intent, would no longer apply because the statute has been amended. The court's reasoning regarding the third argument, though, is troubling. The plaintiffs argued that the APA must apply to hearings that are constitutionally required. In rejecting that argument, the court held that although "the APA language 'required by statute' includes hearings held by constitutional compulsion[,]" that expansion

> [D]oes not alter the primary limiting requirement that the adjudication must be "determined on the record" before the APA provisions apply, and under the ruling of *Matthews v. Eldrich,* a constitutionally mandated hearing may be held without requiring the formality of making a record of the proceedings. Unless the constitutionally required adjudication must be determined on the record, the APA does not apply.[84]

This language can be distinguished by arguing that it is the new statutory mandate, not the constitutional mandate, that requires that the hearing be on the record.[85]

4. De Novo Trials

"*De novo* review" means that the court takes evidence and develops a record that is independent of the agency's record. *De novo* review is rarely used. It is authorized by § 706, which states that the reviewing court may hold unlawful and set aside agency action, findings, and conclusions found to be *unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.*

Overton Park held that § 706(2)(F) authorizes *de novo* review only: (1) when the agency action is adjudicatory in nature and the agency

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84 *Coleman v. Block,* 580 F. Supp. 194, 202 (D.N.D. 1984).

85 *See also Community Hosp. of Indianapolis, Inc. v. Schrieber,* 717 F.2d 372, 374 (7th Cir. 1983) (the statutory mandate of a hearing, by itself, is a basis for applying the substantial evidence standard); *United States v. An Article of Device [. . .] Diapulse,* 768 F.2d 826 (7th Cir. 1985); *Bradley v. Bureau of Alcohol, Tobacco and Firearms,* 736 F.2d 1238 (8th Cir. 1984); *Danks v. Fields,* 696 F.2d 572 (8th Cir. 1982); *Suntex Dairy v. Block,* 666 F.2d 158 (5th Cir. 1982); *McMullan v. Immigration and Naturalization Serv.,* 658 F.2d 1312 (9th Cir. 1981).

factfinding procedures are inadequate; or (2) when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.[86] This holding was reaffirmed by the Supreme Court in *Camp v. Pitts.*[87]

An agency's record may provide an inadequate basis for review without the agency's *factfinding procedures* being inadequate. In those cases, the court may remand the case to the agency,[88] or obtain additional explanation of the decision from the agency, either through affidavits or testimony.[89]

De novo review is used only in narrow circumstances. One court explained that the inquiry is whether "the procedures employed by . . . [the agency] to adduce the determinable evidence were inadequate *as a matter of law.*"[90] The mere fact that a hearing was informal is insufficient to meet this test.[91]

C. Continuing Benefits: Relief Pending Review

Section 705 provides that the agency may postpone the effective date of an action pending review when "justice so requires." It further provides that the *court* may

> [I]ssue all necessary and appropriate process to postpone the effective date of an agency action or to *preserve status or rights* pending conclusion of the review proceedings.[92]

The statute empowers the court to take this action,

> [O]n such conditions as may be required and to the extent necessary to prevent irreparable injury.[93]

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86 *Overton Park,* 401 U.S. at 415, 91 S. Ct. at 823.

87 411 U.S. 138, 93 S. Ct. 1241, 36 L.Ed.2d 106 (1973).

88 The theory allowing this is that the record does not support the agency's action and, therefore, the action is arbitrary and capricious. *See Presbyterian Hosp. of Dallas v. Harris,* 638 F.2d 1381, 1389 (5th Cir. 1981), *reh'g* and *reh'g en banc denied,* May 11, 1981.

89 *Camp v. Pitts,* 411 U.S. at 142-43, 93 S. Ct. at 1244.

90 *NAACP v. Wilmington Medical Center, Inc.,* 453 F. Supp. 280, 304 (D. Del. 1978) (emphasis added).

91 *See Montgomery Improvement Ass'n v. HUD,* 543 F. Supp. 603, 605 n.4 (M.D. Ala. 1982), citing *Camp v. Pitts,* 411 U.S. at 138.

92 5 U.S.C. § 705 (emphasis added).

93 5 U.S.C. § 705.

Practically, the courts have interpreted the § 705 relief standard as being identical to a preliminary injunction standard.[94] This generally means that the plaintiff must plead and prove (1) substantial likelihood of success on the merits,[95] (2) irreparable injury if the preliminary injunction does not issue,[96] (3) no irreparable injury to the opposition if the preliminary injunction does issue,[97] and (4) that the issuance of the preliminary injunction would serve the public interest.[98]

A detailed explanation of how the tests have been applied in the different circuits can be found in the Federal Litigation Manual, which is an invaluable research tool.[99] Counsel should be aware that several of the circuit courts of appeal have somewhat modified the "four-factor test."[100]

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94 *See Corning Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 562 F. Supp. 279 (E.D. Ark. 1983).

95 *See Hamlin Testing Laboratories, Inc. v. U.S. Atomic Energy Comm'n*, 337 F.2d 221 (6th Cir. 1964); *Unglesby v. Zimny*, 250 F. Supp. 714 (N.D. Cal. 1965).

96 *See Hamlin*, 337 F.2d 221, and *Associated Sec. Corp. v. Securities & Exch. Comm'n*, 283 F.2d 773 (10th Cir. 1960).

97 *See Corning*, 562 F. Supp. 279, and *Erie-Lackawanna R.R. Co. v. U.S.*, 259 F. Supp. 964 (S.D.N.Y. 1966), appeal dismissed in part, 385 U.S. 914, 87 S. Ct. 224, 17 L.Ed.2d 539, reversed on other grounds, 386 U.S. 372, 87 S. Ct. 1100, 18 L.Ed.2d 159, on remand, 279 F. Supp. 316.

98 *See Hamlin*, 337 F.2d 221; *Unglesby*, 250 F. Supp. 714; *Covington v. Schwartz*, 230 F. Supp. 249 (N.D. Cal. 1964), modified on other grounds, 341 F.2d 537; *Continental Group, Inc. v. Amoco Chem. Corp.*, 614 F.2d 351, 356-60 (3d Cir. 1980); *Roberts v. Van Buren Pub. Schools*, 731 F.2d 523 (8th Cir. 1984); *LeBeau v. Spirito*, 703 F.2d 639 (1st Cir. 1983); *Technical Publishing Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136 (7th Cir. 1984); *American Motor Sales Corp. v. Runke*, 708 F.2d 202 (6th Cir. 1983); *Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774 (11th Cir. 1984); *Apple Barrel Prod., Inc. v. Beard*, 730 F.2d 384 (5th Cir. 1984).

99 *Federal Litigation: A Legal Services Practice Manual*, Stanley E. Levin, Editor. Office of Program Support, Legal Services Corporation, 733 Fifteenth Street N.W., Washington, DC, 20005. September 1980, and Supplement, September 1985, pp. 60-61. (Hereinafter "Federal Litigation Manual.")

100 These citations are taken from the Federal Litigation Manual, pp. 60-61. *Second Circuit: Guinness & Sons v. Sterling Publishing Co.*, 732 F.2d 1095 (2d Cir. 1984); *Bell v. Secretary of Dep't of Health and Human Serv.*, 732 F.2d 308 (2d Cir. 1984). *Ninth Circuit: Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984); *Beltran v. Meyers*, 677 F.2d 1317 (9th Cir. 1982). *D.C. Circuit: Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C.

Some courts have held that threatened financial injury can form the basis for a preliminary injunction, even though the traditional monetary loss does not constitute irreparable injury.[101] These cases may be useful precedent in FmHA cases involving release of income.

Cir. 1977); *see also McSurley v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *West Virginia Ass'n of Community Health Centers*, 734 F.2d 1570 (D.C. Cir. 1984); *National Ass'n of Farm Workers Org. v. Marshall*, 628 F.2d 604, 616 (D.C. Cir. 1980). *Fourth Circuit: Blackwelder Furniture Co. of Statesville v. Selig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977); *Kruse v. Snowshoe Co.*, 715 F.2d 120 (4th Cir. 1983); *Jones v. Board of Governors of Univ. of North Carolina*, 704 F.2d 713 (4th Cir. 1983).

See also 1 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice para. 65.04(1) at 65-41 n.7b (main volume and 1984-85 Cumulative Supplement), and cases cited therein; *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107, 1120 (5th Cir. 1984), and cases cited therein; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S. Ct. 1798, 72 L.Ed.2d 91 (1982).

101 These citations are taken from the Federal Litigation Manuel, pp. 60-61. *See, e.g., United Steel Workers of Am. v. Ft. Pitt Steel Casting*, 598 F.2d 1273, 1280 (3d Cir. 1979); *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 305 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074, 103 S. Ct. 1020 (1980); *Stenberg v. Checker Oil Co.*, 573 F.2d 921, 924 (6th Cir. 1978); *but cf. Equal Employment Opportunity Comm'n v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980) (holding, in an action in which the chief of police contended his mandatory retirement violated the federal age discrimination statute and sought a preliminary injunction for reinstatement, that loss of income, inability to find other employment, and financial distress do not constitute irreparable injury).

See also Johnson v. USDA, 734 F.2d 774 (11th Cir. 1984) (holding that the loss of one's home is irreparable injury, and that saving money is not the only public interest—implementing a statutory purpose being an important public interest, too); *Boles v. Earl*, 601 F. Supp. 737 (W.D. Wis. 1985) (energy assistance); *Smith v. Heckler*, 595 F. Supp. 1173 (E.D. Cal. 1984); *Nelson v. Likins*, 389 F. Supp. 1234, 1237 (D. Minn. 1974), *aff'd*, 510 F.2d 414 (8th Cir. 1975). ("This court finds that in this particular situation the loss of money to these AFDC families is immediate and irreparable harm. While the loss of money is normally not considered irreparable, this Court must point out that in this case those affected are not the average citizen but rather those who are in the grip of poverty. The loss to them of the certain sum of money each month is much more of an injury than it is to the average individual. And it is this average individual who is the basis for the rule that the loss of money is not considered irreparable harm.")

D. Exhaustion of Administrative Remedies[102]

Generally, in the FmHA context, "exhaustion" means that the plaintiff must use the FmHA Administrative Appeal Procedure "exhaustively" before filing suit for judicial review. Section 704 of the APA is the source of the exhaustion requirement.

> *[F]inal agency action* for which there is no other adequate remedy in a court [is] . . . subject to judicial review.

An FmHA borrower is deemed to have exhausted his/her administrative remedies after having had an *appeal hearing* and at least a *national level review* of the hearing officer's decision.[103]

Exhaustion is not always required. The Federal Litigation Manual explains,

> While it is often stated that a litigant must normally exhaust available administrative remedies, because of the numerous exceptions, this is not very accurate and does not help decide many cases. Instead it is more accurate to state that when a federal administrative remedy is available, it is necessary on a case-by-case basis to balance various factors and interests to determine whether it should be exhausted before proceeding in federal court.[104]

In performing this balancing, the court must take into account the purpose of the exhaustion doctrine.[105] Its purpose is

> [T]o allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its own expertise, and to correct its own error so as to moot judicial controversies.[106]

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102 The analysis and case citations in the "Exhaustion of Administrative Remedies" section of this paper are largely based on the materials contained in the *Federal Litigation Manual, supra,* note 99, and its 1985 supplement.

103 A borrower is entitled to two levels of review: state and national. The borrower is allowed to skip the state level. See the discussion beginning on page 4 for an explanation of FmHA's Administrative Appeals process.

104 Federal Litigation Manuel, at 3/18.

105 Regarding the balancing, *see McKart v. United States*, 395 U.S. 185, 193-95, 89 S. Ct. 1657, 1662-63 (1969).

106 *Parisi v. Davidson*, 405 U.S. 34, 37, 92 S. Ct. 815, 818 (1972).

It is implicit in the exhaustion requirement that the administrative remedies must be adequate and meaningful.[107] Therefore, it follows that inadequacies in the available administrative remedies which negate their purpose usually relieve the litigant of the burden of exhausting them.[108] When administrative remedies are inadequate, it is said that exhaustion would be *futile*.

When the substantive issue in a case is whether the administrative remedy is adequate, exhaustion may not be required.[109] Accordingly, plaintiffs who raise constitutional issues concerning the lack of procedural safeguards, such as the right to cross-examine witnesses, have been excused from the exhaustion requirement.[110]

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107 *Carter v. Signode Industries, Inc.*, 688 F. Supp. 1283 (N.D. Ill. 1988) (exhaustion not required where meaningfulness to administrative procedures was denied).

108 *West v. Bergland*, 611 F.2d 710, 714-20 (8th Cir. 1979); *United States v. Newman*, 478 F.2d 829, 831-32 (8th Cir. 1973); *Grace v. Burger*, 665 F.2d 1193, 1195-97 (D.C. Cir. 1981), *aff'd*, 461 U.S. 171, 103 S. Ct. 1702 (1983); *Silverman v. Barry*, 727 F.2d 1121, 1123 (D.C. Cir. 1984); *Swan v. Stoneman*, 635 F.2d 97, 103 (2d Cir. 1980); *Jose P. v. Ambach*, 669 F.2d 865, 868-70 (2d Cir. 1981); *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903, 907-08 (3d Cir. 1982); *Republic Indus. v. Central Pa. Teamsters*, 693 F.2d 290, 293 (3d Cir. 1982); *Muhammad v. Carlson*, 739 F.2d 122 (3d Cir. 1984); *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096, 101 S. Ct. 893 (1981); *Lewis v. Reagan*, 660 F.2d 124, 127 (5th Cir. 1981); *Ramirez-Osorio v. INS*, 745 F.2d 937 (5th Cir. 1984); *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981); *Wilkerson v. Johnson*, 669 F.2d 325, 329 (6th Cir. 1983); *Frock v. U.S. R.R. Retirement Bd.*, 685 F.2d 1041, 1044-45 (7th Cir. 1982); *Darr v. Carter*, 640 F.2d 163, 165-66 (8th Cir. 1981); *United Farm Workers of Am. v. Arizona Agricultural Employment Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982); *Alekangik Natives, Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980); *Dutcher v. Smith*, 693 F.2d 79, 80 (9th Cir. 1982); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375 (9th Cir. 1983); *New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 850-51 (10th Cir. 1982); *Linfors v. United States*, 673 F.2d 332, 334 (11th Cir. 1982); *Deltona Corp. v. Alexander*, 682 F.2d 888 (11th Cir. 1982); *Porter v. Schweiker*, 692 F.2d 740, 743 (11th Cir. 1982).

109 *See Gibson v. Berryhill*, 411 U.S. 564, 575, 93 S. Ct. 1689, 1696 (1973), where plaintiffs sought an injunction to halt administrative proceedings that were being conducted by an allegedly biased board. *See also Barry v. Barchi*, 443 U.S. 55, 63 (1979), n.10.

110 *Gonzales v. Chanker*, 553 F.2d 832, 838 (2d Cir. 1976); *American Fed'n of Gov't Employees v. Acree*, 475 F.2d 1289, 1292 (D.C. Cir. 1973).

Unreasonable delay in the administrative process can be used in support of an inadequacy or futility argument.[111]

When a case raises only legal issues, particularly constitutional ones, the plaintiff can argue that exhaustion should not be required because such issues are better suited for a judicial forum.[112] Many courts have refused to require exhaustion on the grounds that constitutional issues lie within their expertise.[113] In *Weinberger v. Salfi*, the court explains,

> Exhaustion is generally required as a manner of treating premature interference with agency process, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of experience and expertise, and to compile a record which is adequate for judicial review. Plainly these purposes have been served once the secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is

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111 *Cannon v. University of Chicago*, 441 U.S. 677, 706-07 n.41 (1979); *Jose P. v. Ambach*, 669 F.2d 865, 869 (2d Cir. 1982); *New Mexico Ass'n for Retarded Citizens*, 678 F.2d at 85; *Bartlett v. Schweiker*, 719 F.2d 1059 (10th Cir. 1983).

An agency admission that a backlog exists helps in making this argument. *Whitaker v. Board of Higher Educ.*, 461 F. Supp. 99, 108 (E.D.N.Y. 1978) (HEW admitted a backlog in the processing of complaints under § 504 of the Rehabilitation Act of 1973). Numerous cases have mentioned delay as a factor in holding that exhaustion was not required. *See, e.g., Green v. Ten Eyck*, 572 F.2d 1233, 1240 (8th Cir. 1978); *Fuentes v. Roher*, 519 F.2d 379, 387 (2d Cir. 1975); *United States ex rel. Marrero v. Warden, Lewisburg Penitentiary*, 483 F.2d 656, 659 (3d Cir. 1973), *reversed on other grounds*, 417 U.S. 653 (1974); *Martinez v. Richardson*, 472 F.2d 1121, 1125 n.10 (10th Cir. 1973); *Fort Sumter Tours, Inc. v. Andrus*, 440 F. Supp. 914, 920 (D.S.C. 1977), *aff'd*, 564 F.2d 1119 (4th Cir. 1977); *Cofone v. Manson*, 409 F. Supp. 1033, 1037 (D. Conn. 1976); *Miner v. Missouri*, 673 F.2d 969, 978 n.10 (8th Cir. 1982) (HEW argued as amicus curiae that exhaustion should not be required); *Jose P.*, 669 F.2d at 869 (counsel for the defendant conceded at hearing that the Commissioner would be unable to process the appeals expeditiously if class members were to pursue administrative proceedings).

112 *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973); *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903, 907 (3d Cir. 1982).

113 *Glines v. Wade*, 586 F.2d 675, 678 (9th Cir. 1978), *reversed*, 100 S. Ct. 594 (1980); *Green v. Ten Eyck*, 572 F.2d 1233, 1240 (8th Cir. 1978); *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974); *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir. 1974).

beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act.[114]

When a case raises only legal issues which center on statutory interpretation, there would seem to be less justification for excusing exhaustion. One of the reasons for requiring exhaustion is to allow agencies to apply "a statute in the first instance."[115] Nevertheless, some courts have not required exhaustion where the sole question was one of statutory interpretation.[116]

Exhaustion is usually found to be futile if the agency has previously taken a definitive position on the issue to be decided. *But see Schick*, 611 F. Supp. at 263. Such an agency position could be established by any of the following: the agency has regularly followed a regulation so as to make its view virtually immutable;[117] the unlikelihood that the agency would declare its own rule invalid;[118] and indication by letter from the agency head that the agency supports a particular position.[119]

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114 422 U.S. 749, 765, 95 S. Ct. 2457, 2466-67 (1975) (citation omitted).

115 *McKart*, 395 U.S. at 185.

116 Federal Litigation Manual, p. 3/20, which cites *McKart*, 395 U.S. at 197-98; *Diapulse Corp. of Am. v. Food and Drug Admin.*, 500 F.2d 75, 77-78 (2d Cir. 1974); *Marrero v. Warden, Lewisburg Penitentiary*, 483 F.2d 656, 659 (3d Cir. 1973).

117 *Touche Ross & Co. v. SEC*, 609 F.2d 570, 577 (2d Cir. 1979).

118 *Diapulse*, 500 F.2d at 77-78.

119 *Armstrong v. Kline*, 476 F. Supp. 583, 601-02 (E.D. Pa. 1979) (an instruction from the agency head that hearing officers could not require special education in excess of 180 days per year); *Greater New York Hosp. Ass'n v. Blum*, 476 F. Supp. 234, 240 (E.D.N.Y. 1979) (the refusal of other similar requests for exemptions); *Porter County Chapter of Izaak Walton League v. Costle*, 571 F.2d 359, 363-64 (7th Cir. 1978), *cert. denied*, 439 U.S. 834 (1978) (the granting of a permit by the administrator requires a ruling on the issue, particularly where the agency agrees there is no need to further exhaust); *Hark v. Dragon*, 611 F.2d 11, 14 (2d Cir. 1979) (those who would ultimately rule on an administrative appeal were responsible for the adoption of the policy at issue); *United Farm Workers of Am. v. Arizona Agricultural Employment Bd.*, 669 F.2d 1249, 1253-54 (9th Cir. 1982) (the fact that the hearing officer has already made his position clear did not excuse exhaustion because the UFW could have sought administrative review of the hearing officer's decision); Aleknagik Natives, Ltd. v. Andrus, 648 F.2d 496, 500-01 (9th Cir. 1980) (Secretary's established position concerning the meaning of a term rendered administrative review meaningless as a practical matter); Frock v. United States R.R. Retirement Bd., 685 F.2d 1041, 1044-45 (7th

In limited circumstances, an individual can successfully argue that irreparable injury will be caused by the denial of immediate judicial review.[120]

Congressional intent is an important factor in determining whether exhaustion is required.[121]

E. Framing the Prayer for Relief

What should the plaintiff ask the court to grant him/her in a judicial review case? Section 703 of the APA in relevant part provides that,

> The form of proceeding for judicial review is . . . any applicable legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

As discussed above, § 702 of the APA waives sovereign immunity in judicial review actions[122] that seek relief other than money damages.

Cir. 1982) (exhaustion would have been a futile gesture in view of a letter in which the Board stated it did not consider anyone in petitioner's position to be entitled to benefits which petitioner claimed).

120 For example, cases where extraordinary expense would be incurred in complying with "plainly invalid" orders of the agency, Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456, 469, 63 S. Ct. 369, 376 (1943), or where loss of First Amendment freedom is at issue, Wolff v. Selective Serv. Local Bd. Member 16, 372 F.2d 817, 825 (2d Cir. 1967). See also Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 591 46 S. Ct. 408, 409-10 (1926); McKart v. United States, 395 U.S. 185, 203, 89 S. Ct. 1657, 1667-68 (1969); Utah Fuel Co. v. National Bituminous Coal Comm., 306 U.S. 56, 59-60, 59 S. Ct. 409, 410-11 (1939); Central States v. T.I.M.E.-DC, 639 F. Supp. 1468 (N.D. Tex. 1986).

121 *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 501 n.4, 102 S. Ct. 2557, 2560 n.4 (1982).
Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme. In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress.

122 Provided that the action states a claim that "an agency or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 702.

Because of this limit, counsel cannot rely upon a judicial review cause of action to support a prayer for money damages.

Strategically, it is probably advisable to be very optimistic and comprehensive in framing prayers for relief. It is generally best to ask for everything that the plaintiff is arguably entitled to receive. The following list of types of relief is intended to give a brief overview of some of the possible outcomes of judicial review cases. Counsel can use the list to draft prayers for relief.

1. Remand

This is probably the most common outcome in successful judicial review cases. The judge finds that the agency action was improper (for example, because it was arbitrary and capricious), and remands the matter for proper consideration by the agency.

2. Reversal

A judge should reverse the agency's action if it is clear from the record that the agency's decision was wrong. For example, consider a situation where the record contains comprehensive evidence regarding the farmer's eligibility for a deferral. Final agency action was to deny the deferral, and the farmer filed a complaint for judicial review. The court considers the record and finds that the agency's decision is not supported by the record. Although the court could remand this case, it could alternatively simply reverse the agency's decision if it finds that the evidence established the farmer's eligibility. (Such reversals are common in social security cases where the issue is whether the petitioner is "disabled" within the meaning of the Social Security Act.)

3. Trial De Novo

If the agency's factfinding procedures are inadequate, the judge may grant a trial *de novo*. See the discussion beginning at page 23 above.

4. Relief Pending Review

The prayer for relief may include a request pursuant to § 705 to "preserve status or rights pending conclusion of the review proceedings." Specifically, the request will probably be for the court to enjoin FmHA from cutting off the plaintiff's living and operating expenses or to enjoin foreclosure pending the outcome of the case. See the discussion beginning at page 24 above.

5. Other Injunctive Relief

The plaintiff may be interested in injunctive relief which is different from that discussed in paragraph (4) above. For example, the plaintiff may want the court to order that a contract between the plaintiff and FmHA be reformed.

It may be helpful to phrase the request for injunctive relief in a *prohibatory* style (seeking to preserve the status quo), rather than in a mandatory style (seeking to change the status quo).[123]

123 Federal Litigation Manual, p. 6/21. *See, e.g., Cole v. Lynn*, 389 F. Supp. 99 (D.D.C. 1975).

Appendix A

Summary of Relevant Sections of the Administrative Procedure Act

Note: This summary contains paraphrased highlights of the portions of the APA which are relevant to FmHA judicial review cases. This summary is merely a starting point and a reference tool; counsel should be sure to research the statute itself before filing litigation or giving legal advice to clients.

Chapter 5: Administrative Procedure

Section 551. Definition.

This section defines the terms "agency," "person," "party," "rule," "rule making," "order," "adjudication," "license," "licensing," "sanction," "relief," "agency proceeding," "agency action," and "*ex parte* communication."

"Agency action" includes partial actions and includes failures to act.

Section 552. Public Information, Agency Rules, Opinions, Orders, Records, and Proceedings.

This section is the Freedom of Information Act.

Section 552a. Records Maintained on Individuals.

This section is the Privacy Act of 1974.

Section 552b. Open Meetings.

This section is the Government in the Sunshine Act.

Section 553. Rule Making.

This section prescribes when and how agencies must publish notice of proposed of rules. It also requires agencies to consider the comments they receive regarding proposed rules.

Section 554. Adjudications.

Part (a) states that *Section 554 applies when adjudication is "required by statute to be determined on the record after opportunity for an agency hearing,"*[1] with some specified exceptions.[2]

Part (b) prescribes the contents of the notice of the hearing.

Part (c) requires that all interested parties have an opportunity to submit facts, arguments, offers of settlement, etc., when time, the nature of the proceeding, and the public interests permit. It also requires that when the parties are unable to settle the matter by consent, the agency must provide a hearing and decision in accordance with Sections 556 and 557.

Part (d) requires that the hearing officer make a recommended or initial decision as required by Section 557. It also sets forth the *prohibition against ex parte communication, and sets limits on when persons previously involved in the case may be hearing officers,* with some specified exceptions.

Part (e) empowers the agency to issue declaratory orders.

Section 555. Ancillary Matters.

Part (a) states that this section applies unless otherwise provided.

Part (b) states that a person compelled to appear in person before an agency is entitled to be accompanied, represented, or advised by counsel (or, if permitted by the agency, other qualified representative). It also states that the *agency shall conclude a matter within a matter within a reasonable time,* with due regard for the convenience and necessity of the parties.

Part (c) addresses the agency's right to compel a person to submit data or evidence.

Part (d) addresses agency subpoenas.

Part (e) requires that agencies give prompt notice of the denial of a written application, petition, or other request made in connection with any agency proceeding. The notice must be accompanied by a brief statement of the grounds for the denial.[3]

---

1 5 U.S.C. § 554(a).

2 Section 554 applies except to the extent that there is involved (1) a matter subject to a subsequent trial of the law and facts de novo in court; (2) the selection or tenure of an employee, except an ALJ; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which the agency is acting as an agent for the court; and (6) the certification of work representatives.

3 However, the statement of grounds is not required when the agency is affirming a prior denial or when the denial is self-explanatory.

Section 556. Hearings; Presiding Employees; Powers and Duties; Burden of Proof; Evidence; Record as Basis of Decision.

Part (a) states that this section applies to hearings required by Section 553 or 554 which are to be conducted in accordance with Section 556 [see Section 554(c)].

Part (b) explains who should preside at the hearing.

Part (c) delineates the powers of the presiding employees, including the power to administrate oaths, issue subpoenas, and take depositions.

Part (d) lists many seemingly unrelated rules. It states that, except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof.* It also addresses the exclusion of irrelevant, immaterial, or unduly repetitious evidence. It states that an agency may not issue a rule or order or impose a sanction except on consideration of the whole record[4] and supported by reliable, probative, and substantial evidence. It provides that *a knowing violation of Section 557(d) (ex parte communications) may be grounds for a decision adverse to the violating party.* It states that a party is entitled to present oral or documentary evidence, submit rebuttal evidence, and conduct cross-examination.

Part (e) explains the documents that comprise the record of the hearing.

Section 557. Initial Decisions; Conclusiveness; Review of Agency; Submission by Party; Contents of Decision; Record.

Part (a) provides that Section 557 applies when a hearing is required in accordance with Section 556.

Part (b) provides that after the hearing, the hearing officer shall make an initial decision (unless the agency requires that the record be certified to it for a decision). That decision becomes the decision of the agency unless there is a timely appeal or motion for review.

Part (c) states that before a decision is made (either initial or on review), the parties are entitled to submit proposed findings and supporting reasons. The record shall show the ruling on each finding.

Part (d) sets forth in detail the *prohibition against ex parte communications.*

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4 Or the part cited by a party.

Section 558. Imposition of Sanction; Determination of Application for Licensing; Suspension, Revocation, and Expiration of Licenses.

This section primarily addresses licensure and, therefore, is not relevant to FmHA cases.

Section 559. Effect on Other Laws; Effect of Subsequent Statute.

This section provides that the APA does not limit or repeal additional requirements imposed by statute or otherwise recognized by law. It states that subsequent statutes do not supersede or modify the APA, except to the extent that they do so expressly.

Chapter 7: Judicial Review

Section 701. Application; Definitions.

Part (a) states that:

> *This chapter applies, according to the provisions thereof, except to the extent that—*
>
> (1) statutes preclude judicial review;[5] or
>
> (2) *agency action is committed to agency discretion by law.*

This language is the key to determining whether a particular agency action is reviewable.

Part (b) contains definitions of "agency," "person," "rule," "order," "license," "sanction," "relief," and "agency action."

Section 702. Right of Review.

This sections establishes the APA *standing* requirement:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

It also contains a *waiver of sovereign immunity in federal judicial review cases that seek "relief other than money damages,"* provided that the mandatory or injunctive decree specifies the federal officer(s) (by name or by title), and their successors in office, personally responsible for compliance.

Additionally, it states that:

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5 The FmHA statute does not preclude judicial review.

> Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which it sought.

Section 703. Form and Venue of Proceeding.

This section provides that when there is no adequate special review proceeding specified by statute,[6] a judicial review action may take the form of:

> Any applicable . . . legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

Such action may be brought against the United States, the agency by its official title, or the appropriate officer.

Section 704. Actions Reviewable.

Agency action is subject to judicial review if:

> (1) It is *made reviewable by statute,* or
>
> (2) It is a *final agency action* for which there is no other adequate remedy in a court.

Preliminary, procedural, or intermediate agency actions or rulings not directly reviewable are subject to review on the review of the final agency action.

Section 705. Relief Pending Review.

This section provides two ways in which a plaintiff seeking judicial review may obtain relief pending that review:

> (1) *When the agency finds that "justice so requires,"* the agency may postpone the effective date of action taken by it, pending judicial review.
>
> (2) *On "such conditions as may be required" and to the extent necessary to prevent irreparable injury,* the *reviewing court*[7] may postpone the effective date of an agency action or preserve the status quo pending conclusion of the review proceeding.

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6 The FmHA statute contains no special review proceeding.

7 Including the court to which a case may be taken on appeal or on application for certiorari or other writ to a reviewing court.

Section 706. Scope of Review.

This section provides that the reviewing court has the power to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.[8]

Part (1) provides that the court shall compel agency action unlawfully withheld or unreasonably delayed.

Part (2) provides that the court shall hold unlawful and set aside agency actions, findings, and conclusions found to be:

(a) *Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;*

(b) Contrary to constitutional right, power, privilege or immunity;

(c) In excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(d) Without observance of procedure required by law;

(e) *Unsupported by substantial evidence* in a case subject to §§ 556 and 557[9] of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(f) Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making these determinations, the court must review the whole record (or those parts cited by a party), and "due account shall be taken of the rule of prejudicial error."

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8 The court may decide these questions to the extent necessary to a decision and when presented.

9 This reference is to cases where adjudication is required by statute to be determined on the record after opportunity for an agency hearing.

Appendix B

Index of FmHA Judicial Review Cases*

1) *Allison v. Block,* 723 F.2d 631 (8th Cir. 1983). Judge Heaney's opinion held that FmHA was required to promulgate regulations to implement 7 U.S.C. § 1981a, and foreclosures were enjoined until regulations could be published and proper notice of the program could be given. The court also held that:

> [E]ven if the Secretary does not publish formal findings of fact and conclusions of law in each case, he must clearly articulate the reasons for each section 1981a decision in a manner susceptible to judicial review for an abuse of discretion.

723 F.2d at 638.

2) *Berends v. Butz,* 357 F. Supp. 143 (D. Minn. 1973). Judge Miles Lord held that FmHA's decision to terminate an emergency loan program was reviewable and was in violation of the applicable statute, regulations, and due process of law.

3) *Gamradt v. Block,* 581 F. Supp. 122 (D. Minn. 1983). Judge Alsop entered a preliminary injunction which provided that FmHA must: formulate standards for loan deferral relief; give notice of the deferral program before any action is taken against security property; accept applications for deferrals and base decisions on relevant statutory and agency specified standards; and render written decisions showing proper application of those standards.

4) *Green v. FmHA,* 643 F. Supp. 1056 (N.D. Miss. 1986). Judge Biggers held that FmHA's finding of nonfeasibility with respect to a rural rental housing loan was not arbitrary or capricious.

5) *Jacoby v. Schuman,* 568 F. Supp. 843 (E.D. Mo. 1983). Judge Cahill held that FmHA abused its discretion in failing to fully consider plaintiffs for deferrals and held that foreclosure was enjoined until FmHA promulgated regulations implementing the deferral program (including regulations regarding eligibility criteria, notice, and hearing).

6) *Schick v. FmHA,* 611 F. Supp. 260 (D. Mass. 1985). Judge Caffrey held that the plaintiffs had failed to exhaust their administrative remedies as to some claims; that the failure to exhaust was not excused by allegation of FmHA's "illegal

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* An extensive listing of all lawsuits involving the FmHA deferral statute (7 U.S.C. § 1981(a)) is found in *FmHA Farm Loan Handbook* (revised edition) at 66-67, published by and available from the Center for Rural Affairs, P.O. Box 405, Walthill, NE 68067.

practice and policy" of failing to implement moratorium provision; and that there was no requirement of exhaustion with respect to constitutional claim.

7) *Stengrim v. Block*, Civ. No. 6-86-73 (D. Minn., Unpublished Memorandum and Opinion of April 7, 1987).

The plaintiffs challenged FmHA's denial of their loan application due to inadequate management ability, inadequate repayment ability, and other reasons. Judge Murphy held that the case was reviewable. She wrote that:

> The instant case surely involves some technical questions, but also challenges FmHA's decision-making process as procedurally defective and relevant regulations as invalid. Such questions are the traditional work of courts, "suitable for judicial determination." *Tuepker* . . .

Stengrim, slip op. at 8. Judge Murphy then found for FmHA on the merits.

8) *Taylor v. Block*, (Dist. Minn. Civ. No. 4-84-1229, Order of May 14, 1985, *affirmed per curiam* by the Eighth Circuit, No. 85-5235, order of March 20, 1986, *reh'g denied*) held that, according to the *Tuepker* test, FmHA's decision to deny an operating loan due to "lack of management ability" is reviewable by the court.

The plaintiff in *Taylor* addressed both parts of the Tuepker test (see case #9 on this list). First, he claimed that the eligibility criteria contained in the statute and regulations for operating loans are more specific than the language in the statute at issue in *Tuepker*. The court held that the statute and regulations taken together provide "sufficient standards by which a court may review FmHA's decisions with respect to loans."

Second, he addressed the *Tuepker* "suitability" test. Besides claiming that FmHA's conclusion that he lacked "management ability" was an error, the plaintiff in *Taylor* claimed that the relevant FmHA regulation was invalid and that there were procedural defects in the decision-making process. Therefore, the court held that the problem raised in *Taylor* was suitable for judicial review, noting that the case "raises the kinds of procedural and statutory claims mentioned . . . in *Tuepker*."

After finding that the problem raised in *Taylor* was reviewable, however, the court ruled for the FmHA on the merits of the farmer's claims, stating that it could not conclude that FmHA abused its discretion by making a "clear error of judgment."

The evidentiary standard for review was "clear error of judgment" because the plaintiff alleged that the agency action was in violation of § 706(2)(A) of the APA (arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law). Since the current appeals statute, 7 U.S.C. § 1983b, includes a mandatory hearing requirement, there is now a strong argument that

10) *United States v. Wiley's Cove Ranch,* 295 F.2d 436 (8th Cir. 1961). Judge Vogel's opinion held that FmHA county committee decision regarding eligibility was not reviewable under 5 U.S.C. § 701(a)(2).

11) *Woodsmall v. Lyng,* 816 F.2d 1241 (8th Cir. 1987). Judge Wollman's opinion held that FmHA's denial of a rural housing loan for lack of creditworthiness was not reviewable. *See* detailed explanation in the text at page 14.

Note: *See also* the following unpublished cases: *Folker v. Block,* No. 84-4110-CV-C5 (W.D. Mo. May 31, 1984); *Nihart v. Block,* No. 6-83-826 (D. Minn. August 5, 1983), *aff'd (per curiam)* on other grounds, No. 83-2135 (8th Cir. Nov. 8, 1983); *Pedigo v. FmHA,* Civ. No. 82-5375 (S.D. Ill., Magistrate's recommendation filed May 6, 1983); and *Smith v. United States,* No. 4-84-87 (D. Minn. April 16, 1986).

judicial review should be in accordance with § 706(2)(E) of the APA, which would mean that the evidentiary standard for review would be "unsupported by substantial evidence" instead of "clear error of judgment."

9) *Tuepker v. FmHA*, 708 F.2d 1329 (8th Cir. 1983). The *Tuepker* decision held that, according to the APA, agency decisions are presumed to be reviewable by the court unless they are "committed to agency discretion by law." The court explained that decisions are "committed to agency discretion" when the court has "no law to apply" to evaluate whether the decision was proper. Therefore, in situations where the governing statutes and regulations do not give guidance about how the agency should make the decision, the decision is not reviewable.

   Tuepker involved a decision by FmHA to deny a farmer's application for an emergency loan. The reasons given for the denial were that the farmer had (1) insufficient collateral and (2) insufficient repayment ability.

   The federal statute which governs the loan program provides:

   > Loans shall be . . . secured by such collateral as is available that, together with the confidence of the Secretary . . . in the repayment ability of the loan applicant, is deemed adequate by the secretary to protect the government's interest.

   The decision noted that the loan program was also governed by regulations, but it did not cite them.

   The *Tuepker* court refused to review FmHA's decision. First, the court held that the statute and regulations did not provide enough "law" to apply to evaluate the agency decision.

   Second, the court held that FmHA's decision was not the *type* of decision that is "suitable for judicial determination." The court explained that it was unsuitable because it was a "qualitative, subjective decision based on agency expertise within the bounds of statutory directive." The court noted that Tuepker did not claim any procedural error, misconstruction of law, or FmHA abuse of specific directives. The "suitability" test was very important to the *Tuepker* court. The decision noted that if FmHA's decision had been a type which is "suitable for judicial determination," the court could have found that there was "enough law to apply."

   The test for reviewability that developed from *Tuepker,* then, has two parts:

   a) Whether the challenged decision is the type Congress intended to be left to agency discretion (whether there is "enough law to apply"); and

   b) Whether the problem raised is suitable for judicial determination.