

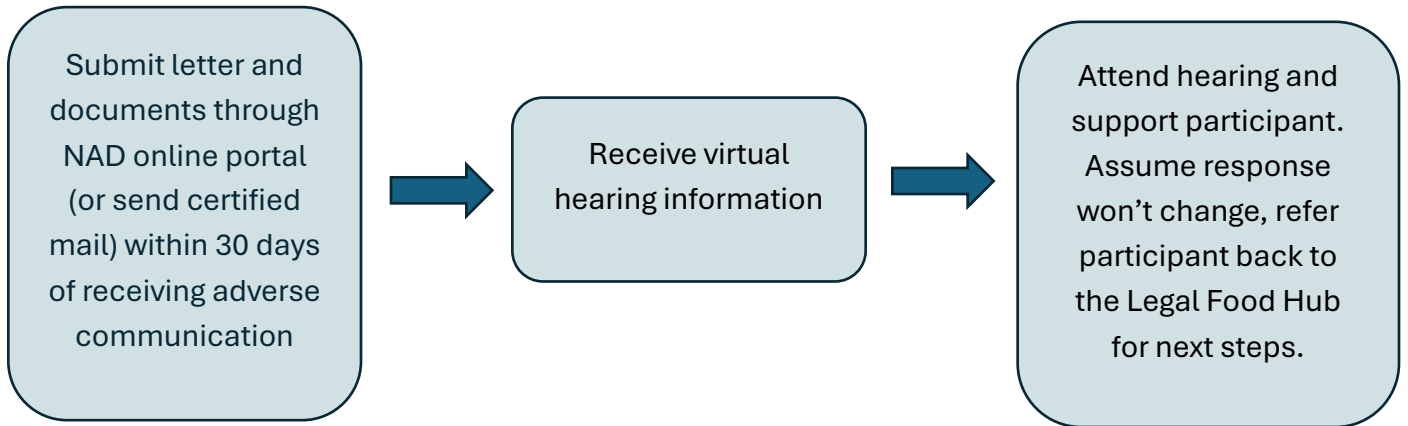


**March 27, 2025**

**NAD Resources for Attorneys:**

- Legal webinar, "[Practice Before the National Appeals Division](#)," offered by Amanda Urbanek, J.D., L.L.M. She discusses jurisdiction, including exhaustion of administrative remedies, the 30-day trigger, when no action is action, and what to expect at a hearing, etc.
- USDA short video (9 minutes): [USDA's National Appeals Division - Face to Face Fairness](#). This walks through the basics, including a rudimentary "sample hearing."
- USDA's [National Appeals Division Guide](#). It includes thorough sections on "Preparing for a Hearing" and "The Hearing" (pages 21-46).
- USDA Office of Hearings and Appeals keeps a [data base of cases and decisions](#)
- Farm Commons produced: [USDA Contract Freezes and Terminations: Legal Action Steps for Farmers with Signed Contracts Version 2](#). This resource is written for farmers and ranchers nationwide who have a signed contract with the USDA but have concerns that their contract is frozen, under review, or terminated, and who are uncertain of their rights to receive reimbursement.
- Farm Commons produced: [USDA Contract Freezes: Filing an NAD Appeal or Inquiry Letter Version 2](#). This resource includes sample letters that farmers can use to file their own appeal with NAD around the funding freeze.
- Farm Commons produced: [USDA Contract Freezes and Terminations: Legal Action Steps for Nonprofits with Signed Grant Agreements Version 1](#). This one is written for nonprofits and entities nationwide who have a signed grant award with RMA, RBCS, NRCS, FSA, NIFA, or AMS, and have received a written notification terminating or freezing grant funds.

## NAD FlowChart:



**Summary of webinar transcript: "[Practice Before the National Appeals Division](#)," offered by Amanda Urbanek, J.D., L.L.M.**

### **Jurisdiction of NAD:**

- NAD has jurisdiction to hear appeals of decisions that are **adverse to a participant** and issued by
  - Farm Service Agency (FSA),
  - Risk Management Agency (RMA) or Federal Crop Insurance Corporation (FCIC),
  - Natural Resources Conservation Service (NRCS), and
  - Rural Development
- A participant is an individual or entity whose right to participate in or receive a payment, loan, loan guarantee, or other benefit in accordance with any program of these agencies is affected by a decision.
- An adverse decision is an administrative decision made by these agencies that is adverse to a participant
- Agencies NOT under NAD Jurisdiction: Several agencies within the USDA have their own appeals processes that do not involve NAD. These include:
  - Animal and Plant Health Inspection Service (APHIS)

- Agricultural Marketing Service (AMS)
- Grain Inspectors, Packers and Stockyards Administration (GIPSA)
- Food and Nutrition Service (FNS)
- Food Safety and Inspection Service (FSIS)
- Foreign Agricultural Service (FAS)

**General Applicability vs. Appealability:**

- Even if an adverse decision is issued by an agency under NAD jurisdiction, it may not be appealable if it is a matter of general applicability.
- However, the NAD Director makes the final determination on appealability.
- If an agency states a decision is not appealable due to general applicability, the participant should still appeal or request an appealability review by NAD.
- NAD's determination of general applicability may differ from the agency's

**Exhaustion of Administrative Remedies:**

- Generally, participants must exhaust their administrative remedies by appealing to NAD before going to court against the USDA
- However, in the 5th, 8th, 9th, and DC Circuits, this exhaustion requirement (7 USC 6912(e)) is considered jurisprudential and not jurisdictional. In these circuits, a participant may be able to skip NAD appeal if they can show that the exhaustion requirement should be waived. There are four grounds for a waiver:
  - The administrative remedies are plainly inadequate.
  - A constitutional challenge would remain standing after exhaustion.
  - The adequacy of administrative remedies is coextensive with the merits of the claim (the administrative appeals process itself is unlawful).
  - Exhaustion is futile because the administrative agency will clearly reject the claim.
- It is generally difficult to show these grounds
- In the Second Circuit, there is no waiver option under 7 USC 6912(e), as it is considered jurisdictional

- The Tenth Circuit has determined that section 6912(e) is mandatory but not jurisdictional.

### **Administrative Procedures Act (APA) and NAD Appeals (burden of proof, EAJA, etc).**

- The Administrative Procedures Act (APA) applies to NAD hearings and appeals.
- Because the APA applies, the standard of proof in NAD appeals is a preponderance of the evidence.
- The burden of proof is on the appellant to show that there is an error in the agency decision
- The Equal Access to Justice Act (EAJA) also applies because the APA applies. EAJA allows for the awarding of attorneys' fees to a prevailing party unless the agency's position was substantially justified. "Substantially justified" is a significant hurdle.
- NAD decisions must be based on the case record, laws, and regulations applicable to the matter at issue.
- The Federal Rules of Evidence do not apply to NAD hearings.

### **Filing an Appeal:**

- The appeal request must be in writing and **personally signed by the participant**. Note, that the attorney may NOT sign the appeal letter on behalf of the client.
- It must be submitted no later than **30 days** after the date the participant first received notice of the adverse decision.
- If the date of receipt is unknown (e.g., certified mail receipt is unavailable), NAD's practice is to add seven days to the date the notice was sent. Participants can also state when they received the notice.
- The appeal request can be mailed, faxed, or e-filed through NAD's website. E-filing is likely the fastest option
- In failure to act cases, where the agency has not made a decision, an appeal must be filed no later than 30 days after the date the participant knew or reasonably should have known the agency had not acted within the specified timeframe or a reasonable time.
  - A verbal response from the agency is usually treated as a regular appeal (potentially without a written decision), not a failure to act.

- If no written response follows a request, it can be considered a failure to act, requiring the agency to put it in writing.
- Filing a failure to act appeal often prompts the agency to act.

### **Equitable Relief:**

- The NAD Director has the same authority to grant equitable relief as the Secretary of Agriculture under section 7996.
- Equitable relief is limited to participants not in compliance with a covered program who:
  - Acted in good faith
  - Relied on the action or advice of an authorized agency representative to their detriment.
  - Failed to comply fully but made a good faith effort to comply.
- Covered programs include those providing price or income support, production or market loss assistance to producers, and conservation programs
- An administrative judge cannot grant or deny equitable relief; a Director review is required to seek it.

### **The Hearing Process:**

- At the hearing, the administrative judge will put parties under oath, review evidence, allow testimony and additional evidence, and permit questioning of witnesses.
- The administrative judge is not bound by previous findings of fact by the agency. Appellants can bring new information.
- Appellants can waive their right to a hearing in their state of residence and request it be held elsewhere, such as the state where the land in question is located.
- Each of NAD's three regions (eastern, western, southern) has hearing sites in each state.
- The location of the hearing (state and city) is typically discussed at the pre-hearing conference.
- The administrative judge will consider information presented at the hearing without regard to whether the agency knew of the evidence at the time of the adverse decision.

- The NAD hearing guide is available online.

#### **Determinations and Director Review:**

- The administrative judge will typically issue a decision within 30 days of the record closing date. The record may close at the hearing or later if additional evidence is submitted.
- The administrative judge's determination is administratively final if neither party requests a review by the NAD Director.
- Either side can request a Director review: the agency has 15 days, and the appellant has 30 days. If a Director review is requested, the administrative judge's determination is not final until the Director issues a decision.
- The NAD Director can uphold, reverse, vacate, or modify an administrative judge's decision.
- The Director also grants or denies equitable relief.
- The Director can remand the matter to the administrative judge for additional proceedings
- The Director can even rescind a decision without new information.

#### **Rescission by the Agency After NAD Appeal:**

- If new information is brought to a NAD appeal that the agency has not reviewed, the agency **can rescind its original adverse decision**, review the new information, and issue another adverse decision.
- If the agency concludes that the new evidence did not change its original determination, it can issue the **same adverse decision (or one with the same outcome)**.
- This is considered a **new adverse decision**
- This new adverse decision **starts the whole process over** for NAD appeal purposes, including timeframes. The participant can also provide additional information at this stage.
- The agency **should attach review rights** (reconsideration, mediation, and appeal) to the new adverse decision.
- The participant has the **choice** of going through reconsideration with the agency first and then appealing, or appealing directly to NAD.

### **Agency Record at NAD:**

- The NAD hearing officer requires the agency to file the **agency record**, which should contain everything the agency utilized when making the adverse decision.
- The agency **is permitted to add evidence** to the agency record between the issuance of the adverse decision and the NAD appeal.
- This often happens when the administrative judge asks for documents not initially included
- While agencies usually believe their initial record is complete, administrative judges can request additional relevant documents based on testimony and questioning.

### **Informal Review of FSA Adverse Decisions:**

- NAD regulations (7 CFR 11.5) generally require a participant to seek an informal review of an adverse decision issued at the field service office level by an officer or employee of FSA or by a county or area committee before NAD will accept the appeal.
- An exception exists for Farm Credit programs where the County Executive Director (CED) can issue letters directly.
- Most FSA decisions are supposed to be made at the county committee level. If a decision signed by the CED clearly indicates it did not go through the county committee, NAD will likely require the issue to be submitted to the county committee for a decision before NAD will take the appeal.
- However, sometimes, CEDs have indicated that an issue would not go before the county committee. If that's the case, NAD may take the appeal.
- NAD may also consider such situations as a failure to act by the county committee.