



**U.S. OFFICE OF SPECIAL COUNSEL**

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**The Special Counsel**

October 17, 2018

The Honorable Sonny Perdue  
Secretary  
U.S. Department of Agriculture  
1400 Independence Avenue, S.W.  
Washington, D.C. 20250

Re: OSC File No. DI-17-1096

Dear Secretary Perdue:

Pursuant to my responsibilities as Special Counsel, I am referring to you for investigation a whistleblower disclosure regarding the U.S. Department of Agriculture (USDA) New Mexico Farm Service Agency (FSA). I have determined that there is a substantial likelihood that the whistleblower's allegations disclose a violation of law, rule, or regulation and gross mismanagement. A report of your investigation, including remedial actions if warranted, is due to the U.S. Office of Special Counsel (OSC) by December 17, 2018.

The whistleblower, who chose to remain anonymous, alleged that the New Mexico FSA improperly denied cattle producers in three counties an estimated half-million dollars in crop loss compensation under the Noninsured Crop Disaster Assistance Program (NAP). Allegations to be investigated include:

- Because mechanical harvest data was unavailable, the New Mexico FSA State Committee (State Committee) should have considered independent assessments of grazed forage acreage losses in the New Mexico counties of Chaves, Lincoln, and Otero when determining whether to reimburse producers in those counties (producers) for native grass crops lost due to drought in 2015;<sup>1</sup>
- The State Committee knew that mechanical harvest data was unavailable for affected producers but requested that data anyway and relied on this data for measuring losses; and
- Based on available information, including the independent assessments, the State Committee should have reimbursed approximately 40 producers in the three counties for their native grass crop losses.

Under the NAP, FSA State and County Committees reimburse producers of certain uninsurable commercial crops for production losses due to natural disasters.<sup>2</sup> Eligible producers are entitled to compensation when their crop yield losses exceed 50 percent of the

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<sup>1</sup> The grazing year ended February 28, 2016.

<sup>2</sup> See 7 C.F.R. § 1437.1, *et seq.*

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approved yield for a given year.<sup>3</sup> The NAP outlines several methods determining crop losses, depending on how the crop is meant to be harvested.

According to the whistleblower,<sup>4</sup> these producers' native grass crops were intended to be consumed by grazing cattle (grazed forage), rather than mechanically harvested for later use. FSA has two options available for measuring losses of grazed forage. The primary method, which is required to be used unless data is unavailable, is based on the loss of similar mechanically-harvested forage acreage on the relevant farm or similar nearby farms where approved yields have been calculated to determine loss (mechanical harvest data).<sup>5</sup> When mechanical harvest data is unavailable to measure losses, losses must be based on at least two independent assessments of grazed forage acreage conditions (independent assessments).<sup>6</sup>

According to the whistleblower, FSA has consistently adhered to the latter method, i.e. relied on independent assessments, to determine these producers' native grass crop losses under the NAP because mechanical harvest data is unavailable. The whistleblower stated that, for 2015, as in other years, FSA contracted with independent assessors who surveyed affected areas; met with range staff and producers; and relied on the U.S. Drought Monitor to produce reports on the producers' 2015 crop yield losses as required by the FSA Handbook.<sup>7</sup> FSA county committees for Chaves, Lincoln, and Otero oversaw this process, according to the whistleblower, again consistent with other years.

Unlike the years before and after 2015, however, the State Committee declined to accept the 2015 independent assessments. Initially, and without appropriate justification, according to the whistleblower, the State Committee requested grass clippings from impacted areas, pictures from the U.S. Drought Monitor on certain dates, and other information it had not requested from assessors in prior years.<sup>8</sup> The State Committee then declared the assessments deficient. In December 2016, New Mexico FSA County Executive Director [REDACTED] issued a letter to producers stating (inaccurately, according to the whistleblower) that no independent assessments had been obtained and so producers needed to produce mechanically-harvested forage data to prove crop losses. The whistleblower alleged that [REDACTED] issued the letter at the State Committee's direction.

The whistleblower further alleged that [REDACTED] and the State Committee knew, at the time they requested the records, that the producers could not provide them because the 2015 National Crop Table<sup>9</sup> made clear that producers in nearly every county in New Mexico grazed their forage rather than mechanically harvesting it, so there were no nearby similarly

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<sup>3</sup> 7 C.F.R. § 1437.3(2)(ii) and § 1437.5(c)(1).

<sup>4</sup> See also 2015 National Crop Table, NAP Approved Crop Records Report, New Mexico State.

<sup>5</sup> See 7 C.F.R. § 1437.401(b),(f).

<sup>6</sup> *Id.*

<sup>7</sup> 1-NAP (Rev. 2) Amend. 1, Par. 804-J (February 20, 2015).

<sup>8</sup> The whistleblower provided a State Committee memorandum dated April 7, 2014, stating that FSA State and County Committees cannot set losses or tell independent forage specialists how to complete the assessments.

<sup>9</sup> See footnote 4.

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mechanically harvested crops. The producers were unable to produce the data and so did not receive reimbursement under the NAP. The whistleblower provided documentation in which the State Committee faulted the county committees for a failure to properly oversee the independent assessment process that year, evidencing that any alleged deficiencies were attributable to FSA and not to the producers who were affected.<sup>10</sup>

According to the whistleblower, the 2015 grazing year is the only year FSA has not relied on independent assessments to measure producers' losses under the NAP. After 2015, the FSA returned to reliance on these independent assessments, which the whistleblower believes evidences the general reliability and acceptance of the independent assessments as an appropriate way to measure losses under the NAP.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation and gross mismanagement. Please note that specific allegations and references to specific violations of law, rule, or regulation are not intended to be exclusive. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the report, along with the whistleblower's comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the Appendix, which can also be accessed online at <https://osc.gov/Pages/DOW.aspx>. If your investigators have questions regarding the statutory process or the report required under section 1213, please contact Elizabeth McMurray, Chief of the Retaliation and Disclosure Unit, at (202) 804-7089 for assistance. I am also available for any questions you may have.

As discussed above, your investigative report, including any remedial actions if warranted, is due to OSC by December 17, 2018.

Sincerely,



Henry J. Kerner  
*Special Counsel*

Enclosure

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<sup>10</sup> See also 7 C.F.R. § 1437.2(c) ("The State Committee will take any action required . . . that the county committee has not taken [and] will also: [c]orrect, or require a county committee to correct, any action taken by such county committee that is not in accordance with the regulations . . . .")

## APPENDIX

### AGENCY REPORTS UNDER 5 U.S.C. § 1213

#### GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

#### RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

#### EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

#### EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).