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INSIDE

IN FUTURE ISSUES

Fifth Amendment taking of turkey breeder flock

The Federal Circuit recently held that a turkey breeder was entitled to compensation for a Fifth Amendment "taking" because of a quarantine imposed by the USDA to control an outbreak of lethal avian influenza in 1983-84. *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. Sept. 28, 1990).

In November, 1983, the Yanceys acquired a flock of 3,000 turkey breeder hens for the purpose of selling turkey hatching eggs produced on their Virginia farm to customers outside of the state. In October, 1983, an outbreak of pathogenic avian influenza, a highly contagious viral disease affecting poultry, occurred in Pennsylvania.

The USDA quickly declared an emergency in Pennsylvania and promulgated regulations, pursuant to 21 U.S.C. § 134a (1972), that imposed a quarantine in certain areas of the state. Subsequent outbreaks of the disease in Maryland and Virginia caused USDA to amend its regulations to include certain counties in Maryland and Virginia within the quarantined area.

Caught in the quarantine area, the Yanceys were prohibited from shipping live poultry and eggs interstate. USDA published regulations authorizing payment of up to one hundred percent of the "expense of purchase, destruction and disposition of animals and materials required to be destroyed because of being contaminated by or exposed to lethal avian influenza." Although the Yanceys' flock showed no evidence of disease, they were not allowed to ship their turkeys or hatching eggs interstate, nor were they able to find buyers in Virginia.

Since it was expensive for the Yanceys to keep the flock alive for an indefinite duration, they sold their flock for meat. The USDA denied the Yanceys' $63,556 claim for indemnity pursuant to 9 C.F.R. § 53.2(b), because their turkey flock was healthy. Although the Claims Court denied the Yanceys' request for statutory relief, it granted relief on their Fifth Amendment taking claim. 10 Cl. Ct. 311 (1986).

The Federal Circuit affirmed the Claims Court's denial of statutory compensation because the Yanceys' turkeys were healthy, they were not required to destroy their flock, and they had not disposed of their flock in a manner consistent with the regulations. *Yancey*, 915 F.2d at 1538.

In *Loftin v. United States*, 6 Cl. Ct. 596 (1984), aff'd 765 F.2d 1117 (Fed. Cir. 1985), the government interpreted 21 U.S.C. § 114a to allow compensation for destruction of non-diseased animals due to their close proximity to infected animals. The Federal Circuit found that the government's actions regarding the Yanceys' claims appeared to be arbitrary and capricious. "The Government's interpretation [of 21 U.S.C. sec. 114a], as well as the Claims Court's ruling, provide those in the Yanceys' position with a perverse incentive to allow infection in their flocks in order to receive indemnities."

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Bankruptcy estate liable for tax on abandoned CCC corn proceeds

The Eighth Circuit recently considered a case involving the tax consequences of the estate's sale and eventual abandonment of the proceeds of secured property. In *In re Bentley*, 916 F.2d 431 (8th Cir. 1990), the trustee sold corn encumbered by a CCC lien. Upon discovery that the CCC lien value exceeded the value of the corn proceeds, the trustee abandoned the proceeds. When the IRS issued a notice of tax deficiency, the issue arose as to whether the estate or the debtor was liable for the taxes.

The bankruptcy trustee argued that the abandonment freed the estate from liability, basing its argument on section 554 of the Bankruptcy Code. 11 U.S.C. § 554(a). Under this section, title to abandoned property reverts to the debtor as it was held prior to the bankruptcy filing. *Id.* at 432.

The Eighth Circuit disagreed, however, and based its holding upon the provisions of both the Internal Revenue Code and the Bankruptcy Code. It reasoned that for tax purposes, the gross income of the estate includes the gross income of the debtor to which the estate is entitled. *Id.*, citing 26 U.S.C. § 1398(e)(1). Gross income is defined

(continued on next page)

Id. at 1538-39. However, the court held that Congress' failure to explicitly create a right of compensation for healthy animals precluded finding a right to statutory compensation. *Id.* at 1539.

The Federal Circuit affirmed relief for the Yanceys' Fifth Amendment claim, holding that when adverse economic impact and unanticipated deprivation of an investment-backed interest are suffered, compensation is appropriate. *Id.* at 1542. The court identified three factors of particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. *Id.* at 1539, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

First, the lower court found that the quarantine had reduced the fair market value of the Yanceys' flock from $91,616 to $20,887. Although the plaintiffs were able to mitigate their loss by slaughtering the flock, there was no alternative, economically viable use for the flock while the quarantine was in effect.

Second, the plaintiffs had the investment-backed expectation to sell the hatching eggs to customers outside of Virginia. Although a regulatory restriction is constitutionally permissible, the government's proper exercise of regulatory authority does not automatically preclude a finding that such action is a compensable taking. *Yancey*, 915 F.2d at 1340 citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985).

Finally, the Federal Circuit stated that the Yanceys' losses came about because of the government's action. "If the intent of the poultry quarantine was to benefit the public, the public should be responsible for the Yanceys' losses." *Yancey*, 915 F.2d at 1542.

The Federal Circuit also distinguished a Third Circuit case with similar facts and a contrary holding. In *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3rd Cir. 1987), the Third Circuit considered a claim arising out of the same quarantine and held that there was no compensable taking. In *Empire*, the healthy chickens could be sold within the quarantine area for the purpose for which they were raised, and, thus, the court concluded that the quarantine had less adverse economic impact on the seller. *Yancey*, 915 F.2d at 1541.

The court stated that to the extent that the *Empire* case can be "distinguished from the instant case we choose not to follow it for that reason." *Id.* To the extent that the two cases are similar, the court chose not to follow *Empire* because "we find it inconsistent with the intent of the Fifth Amendment." *Id.*

The court affirmed the lower court's damage award, rejecting the government's contention that the Yanceys received an impermissible bonus for lost profits. Compensation does not include future loss of profits. *Id.* at 1542, citing *United States v. General Motors Corp.* 323 U.S. 373, 379 (1945). Instead, fair market value defined as the price at which property would change hands between a willing buyer and a willing seller should be used to determine the amount of compensation. *Yancey*, 915 F.2d at 1542, citing *Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1054 (Fed. Cir. 1983). However, the fair market value of property under the Fifth Amendment can include an assessment for the property's capacity to produce future income if a reasonable buyer would consider that capacity in negotiating a fair price for the property. The court determined that the Claims Court's findings were sufficiently supported by the facts and not clearly erroneous.

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ABANDONED CORN PROCEEDS / CONT'D FROM PAGE 1

as "all income from whatever source derived." *Id.*, citing 26 U.S.C. § 61(a). The parties agreed that as of the filing of the bankruptcy, the corn became the property of the estate. At that time, the estate succeeded to all tax attributes and all unrealized gain to which the debtor would have been entitled. *Id.*, referencing 26 U.S.C. §§ 1398(e)(1).

When the trustee sold the corn, the proceeds also constituted property of the estate. *Id.*, citing 11 U.S.C. § 541(a)(6). This sale was a taxable event that triggered the recognition of gain and dictated tax consequences, a tax liability. 26 U.S.C. § 1001(c). The court reasoned that because the estate was entitled to the proceeds, and because the taxable event occurred while the estate held the property, the estate should be liable for the tax consequences. It held that despite the abandonment, the sale of corn was a taxable event for which the estate was liable. The court noted that a contrary result would burden the debtor's fresh start under bankruptcy law. *Id.* at 433.

The court distinguished the Ninth Circuit case of *Mason v. C.I.R.*, 646 F.2d 1309 (9th Cir. 1980) on the grounds that in *Mason*, the property itself was abandoned. As no sale occurred, no taxable event occurred. Applying this to the *Bentley* facts, it appears that the estate could have avoided the tax consequences by considering the value of the collateral as compared to the creditor's lien prior to sale, and upon finding that the lien exceeded the value of the collateral, abandoning the property itself without selling it.

The dissent argued that under the correct reading of the Bankruptcy Code provision governing abandonment, the abandoned property is viewed as if it had continuously been in the hands of the debtor. *Id.* at 433 (Webb, J., dissenting), citing *Mason*, 646 F.2d at 1309. As such, upon abandonment, both the proceeds and the tax liability associated therewith should be attributed to the debtor. According to the dissent, the general tax law principles regarding the occurrence of a taxable event should yield to this more specific bankruptcy provisions regarding abandonment. The majority of the court, however, was apparently not persuaded, and the bankruptcy estate was ordered to be liable for the consequences of its sale of the corn.

—Susan A. Schneider, Staff Attorney, NCALRI

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Tenth Circuit upholds damages against Harvestore

The Tenth Circuit has upheld a $171,091.46 compensatory and $580,000 punitive damages award against A.O. Smith Harvestore Products, Inc., the manufacturer of Harvestore silos. The award was based on a jury finding that Harvestore had fraudulently misrepresented to the plaintiffs, Robert and Minnie Korf, the ability of its silos to reduce or prevent oxygen from coming into contact with grain stored in them. *Estate of Korf v. A.O. Smith Harvestore Products, Inc.*, 917 F.2d 480 (10th Cir. Nov. 6, 1990)(1990 U.S. App. LEXIS 19568).

The Korfs purchased their Harvestore silo in 1979 after being provided with promotional materials, including a film, prepared by Harvestore that represented that Harvestore silos reduced or prevented stored grain from coming into contact with oxygen. When moist grain is exposed to oxygen, it spoils. The represented ability of the Harvestore silo to reduce or prevent oxygen exposure induced the Korfs to purchase the $125,000 Harvestore silo instead of a $30,000 conventional silo having the same storage space.

When the Korfs stored their 1979 fall corn crop in the Harvestore silo, the crop suffered serious spoilage as a result of oxygen exposure, forcing its sale at prices significantly below the market price. Subsequently, the Harvestore dealer attempted to remedy the oxygen influx by resealing the silo. However, when the Korfs placed a portion of the 1982 corn crop in the resealed silo, it also spoiled and was unfit for sale. In 1984, the Korfs stopped using the silo.

At trial, the Korfs' experts testified that, rather than decreasing the amount of oxygen in stored grain, the Harvestore silo increases it. There was also testimony that Harvestore had recognized this problem and its cause as early as 1946. The defect was described by the court:

> [a]pparently, when the unloader door at the bottom of the silo is opened to remove feed, breather bags in the structure collapse, causing air to rush into the silo. This process pumps oxygen into the feed mass itself instead of merely exposing the surface grain to air, as would be the case in a conventional silo.
>
> Further,... because of its dark color, the Harvestore silo becomes hotter on its sunny side, creating moisture movement through the feed mass.

Slip op. at 4-5.

Harvestore's long-standing knowledge of the oxygen problem in its silos contributed to the court's affirmance of the punitive damages award against the company. In addition to challenging the jury instructions on which the award was based and asserting that the award violated its due process rights, Harvestore contended that the punitive damages award was excessive. In response to that claim, the court bluntly stated that the evidence revealing Harvestore's long-standing knowledge of the defective silos "betrays [Harvestor's] blatant disregard for the potentially devastating effect to farmers such as the Korfs, who, after incurring the substantial cost for the Harvestore, lose both the use of the silo and the stored crop inside." Slip op. at 14.

—*Christopher R. Kelley*

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California's recreational use statute applied

Two recent articles in *Agricultural Law Update* have dealt with the application of statutory limitations on tort liability for injuries done to members of the public who enter private property for recreational purposes. *See* Becker, April 1990, at 4; Becker, August 1990, at 6. As the author of those articles rightly notes, consequential interpretations of recreational use statues are now being made by state courts throughout the country.

The California Supreme Court, in a six-to-one decision, has held that the California recreational use statute— section 846 of the Civil Code— immunized the holder of a permit to graze livestock on federal land from liability for negligence that injured a recreational user of the property.

The plaintiff in *Hubbard v. Brown*, 50 Cal. 3d 189, 785 P.2d 1183, 266 Cal. Rptr. 491 (1990), was injured when his off-road motorcycle struck an unmarked barbed wire gate that had been strung across a U.S. Forest Service road by the defendant. For an annual grazing fee of approximately $1,000, the defendant occupied some 40,000 acres in the El Dorado National Forest. The defendant was responsible for the maintenance of all fences in the permit area. The motorcyclist and his wife brought suit on a negligence theory, seeking damages for personal injury and loss of consortium.

Section 846 provides in part that "[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give warning of hazardous... structures on such premises to persons entering for such purpose...."

According to the California Supreme Court, section 846 was intended to encourage landowners to allow public recreation free of charge on their property. The salient question before the court was whether the defendant, as a permittee on federal land, was "[a]n owner of any estate or any other interest in real property" as contemplated by the statute.

A majority of the court concluded that a federal grazing permit is an interest in real property qualifying its holder for immunity. The majority likened the grazing permit to a license or easement to engage in activities on private property. These nonpossessory interests have previously been held to be covered by section 846. The majority brushed aside, however, the fact that the land in the permit area is public property already open to members of the public for recreational purposes. The lone dissenter, Justice Mosk, took the position that the phrase "interest in real property, whether possessory or nonpossessory" should have been narrowly construed by the Court as a technical term of the law of property. Noting that 36 C.F.R. section 222.3(b) states that "[g]razing permits and livestock use permits convey no right, title, or interest held by the United States in any land or resources," Justice Mosk concluded that the defendant had not purchased an interest in land, but had obtained instead a personal, contractual right to graze his cattle on public property. Therefore, he would have held that the defendant was not immunized by section 846.

According to the majority, 365 C.F.R. section 222.3(b) "merely ensures that the holder of a grazing permit does not acquire rights in federal land which are compensable in a Fifth Amendment 'taking' context." The majority held that for other purposes, the federal government may have conveyed a property interest, and it found that Forest Service grazing permits were such a conveyance. It is far from obvious that the Forest Service in fact intended to limit the application of 36 C.F.R. section 222.3(b) to "takings" cases. Neither of the cases cited by the majority in support of this limiting construction actually substantiates it. *See United States v. Cox*, 190 F.2d 293 (10th Cir. 1951); *Placer County Water Agency v. Jonas*, 275 Cal. App. 2d 691, 80 Cal. Rptr. 252 (1969. Furthermore, the regulatory history of 36 C.F.R. section 222.3(b) is silent on the subject. *See* 42 Fed. Reg. 33,470 (1977); 42 Fed. Reg. 56,730 (1977).

—*John Harbison*, San Diego, CA.

The Food, Agriculture, Conservation, and Trade Act of 1990

by Chuck Culver

Destined to become one of the least embraced farm bills ever, the Food, Agriculture, Conservation, and Trade Act of 1990, commonly known as the 1990 farm bill or the FACT Act, began life under the belief that debate on commodity programs would take backseat to ancillary agricultural issues like the environment and food safety, only to end with a more traditional, albeit strictly budget driven, debate centered on commodity programs. But as the final legislative touches were being adopted it became clear that the 1990 farm bill heralded the beginning of the end of farm bills as we have come to know them.

In part, I predict that the 1990 farm bill will begin a long decline of protective legislation for farmers because establishing sound policy was clearly secondary to budget considerations, and because agriculture was forced in the budget reconciliation process to take cuts far out of proportion to the size of farm program expenditures relative to the size of the federal budget. Supporters of agriculture programs in Congress either lacked the clout to protect these programs, or the desire, and neither bodes well for those who depend on such programs.

Because of limited space, this piece on the commodity provisions in the farm bill will be necessarily brief, more a checklist than an in-depth discussion. Those desiring additional information are referred to the reporting of the bill text and the surrounding conference report in the October 22, 1990 *Congressional Record*, beginning on page H11029, and the *Comparison of Commodity and Conservation Provisions For the 1985 and 1990 Farm Bills, Titles I-XI, XIV*, available through the State Office of ASCS. Also, readers should be warned that final interpretations of the Act must await the publication of regulations.

Major farm bill commodity provisions

1) *Target Prices.* The farm bill freezes income supports at the 1990 level for the life of the bill, 1991-95. For wheat, the target price is $4/bu; for corn - $2.75/bu; cotton - 72.9 cents/lb; rice - $10.71/cwt.; oats - $1.45/bu; barley - $2.36/bu; and milo - $2.61/bu. The milk support rate has a new minimum of $10.10/cwt., subject to a refundable assessment mandated by the Budget Reconciliation Act.

2) *Price support loan rates.* For wheat and feed grains, the basic loan rates will be 85% of the five-year average, throwing out the high and low years, but not less than 95% of the previous year's rates. Depending on the stocks-in-use ratio, the Secretary may cut the rates up to 10%, plus another 10% to help maintain competitiveness. For rice and cotton, marketing loans are still mandated. No loan rate can be less than 95% of the previous year's level, with the absolute minimums being 50 cents per pound for cotton and $6.50/cwt. for rice. A new marketing loan is mandated for soybeans and other oilseeds. The loan rate for soybeans is $5.02/bu., minus a 2% "origination fee." For cane sugar the loan rate is maintained at 18 cents per pound; for honey the rate is frozen at the 1990 level of 53.8 cents per pound.

3) *Base acres.* For wheat and feed grains the base acres will be the 5-year average of land planted or considered planted; for rice and cotton a three-year average will be used. Also for rice and cotton, those who did not participate in the program for 1989 and 1990 can elect to build base for 1991 using the 1985 farm bill base regulations, but in no event can the established base exceed the immediate past two-year average planted or considered planted. The same is true for 1992, except that the period for calculating will advance one year.

4) *Considered planted acreage.* The 1990 farm bill expands the considered planted acreage definition and now includes a) diverted acres, b) prevented planted acres, c) acreage in flexibility programs, d) acreage in 50/92 or 0/92, e) permitted acreage in a conserving use, f) acreage declared zero-planted because of an occurrence beyond the control of the producer.

5) *Acreage Reduction Program (ARP).* For wheat and feed grains the ARPs will depend on the stocks-in-use ratio with the allowed ARP range for both being from zero to 20%. The maximum ARP for rice is 35%, for cotton 25%, and for oats zero. For 1991, minimum ARPs are set for wheat and corn - 15% and 7.5% respectively. The Secretary has the option to offer a target option payment (TOP). The option allows producers to reduce their ARP up to 1/2 the announced ARP by reducing their target price by not less than .5% nor more than 1% for each percent the ARP is reduced. Inversely, a producer can increase the announced ARP by no more than 25% and receive an increase of the target price between .5% and 1% for each percent the ARP is increased.

6) *Triple base.* Otherwise known as the 15% normal flex acres, triple base is simply a budget reduction device forced by the budget reconciliation action. On 15% of a producer's base, no payments will be made, although any program crop or oilseed can be planted. Such crops are eligible for price support loans. Non-program crops, excepting fruits and vegetables, can also be planted. If an approved crop is planted, it will be considered as though the original program crop was planted.

7) *10% flex acres.* This optional flexibility on 10% of a producer's base acres will operate the same as the mandated triple base with deficiency payments to be sacrificed on program crops, other than the original crop, "flexed" on the optional acreage. Non-program crops, other than fruits and vegetables, can also be produced, but soybeans may not be planted if the USDA estimates that the average price will be less than 105% of the loan.

8) *0/92.* For wheat and feed grains, the 0/92 option of planting from zero to 92% of the maximum eligible payment acres (base minus ARP and triple base) is still available. Those taking the option and who plant between 0 and 92% of the payment acres to a conserving crop qualify for the projected deficiency payment on the acreage as though the whole was planted to the original program crop.

9) *50/92.* As in the 1985 farm bill, the 50-92 option for rice and cotton is available. The provision works in a similar manner to 0/92.

10) *Paid land diversion.* A paid diver-

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sion may be offered on wheat, feed grains, cotton, and rice. A paid diversion shall be offered on cotton if the projected carryover equals or exceeds 8 million bales. The payment rate in such a case shall not be less than 35 cents per pound times the payment yield. Diverted acres may not exceed 15% of the cotton acreage base.

11) *Deficiency payments.* The payment rate is the difference between the target price and the higher of the loan rate or the average market price, times the payment acreage, times the program yield. Advance payments shall be paid at the rate of between 40% and 50% of the projected deficiency for wheat and feed grains and between 30% and 50% for rice and cotton. For the 1994 and 1995 crops, 75% of the final projected deficiency, less any advance, shall be paid after the first five months of the marketing year, the remainder to be paid after the twelve-month marketing year.

12) *Loan deficiency payments.* Loan deficiency payments shall be available for rice, soybeans, and cotton when the average world price is lower than the loan rate. For producers willing to forego putting either rice, soybeans, or cotton into loan, even though eligible, loan deficiency payments equal to the difference of the average world price and the loan level will be paid.

13) *Findley payments (emergency compensation payments).* If the loan rate for wheat and/or feed grains is reduced because of the stocks-in-use situation and/or to enhance competitiveness, the Secretary shall make emergency payments (by increasing the deficiency payment) to provide producers with the same total return as if the loan rates had not been adjusted.

14) *Payment limitations.* The limit is $50,000 per person on deficiency and diversion payments. There is a combined $75,000 limit on marketing loan gains, loan deficiency payments (except for honey), and wheat and feed grains Findley payments. There is a combined $250,000 for all of the above as well as disaster payments. Disaster payments cannot exceed $100,000.

15) *Payment yields.* The FACT of 1990 freezes program yields for the 1991-95 crops at the 1990 level. For farms in which no program yield was established, one may be established using the average program yield for similar farms in the area.

16) *Farmers-Owned Reserve (FOR).* If the average market price for wheat is below 120% of the price support loan rate for 90 days preceding December 15 in the year the wheat crop is harvested, and the projected stocks-in-use ratio is more than 37.5%, or in the case of corn, if the average market price is below 120% of the loan rate for 90 days preceding March 15 in the year the corn crop is harvested and the projected stocks-in-use ratio is more than 22.5%, then entering into the FOR shall be permitted to a maximum of between 300 and 450 million bushels for wheat and between 600 and 900 million bushels of corn. Loans must be repaid no later than 27 months from the date the original loan expired (unless extended six months), but may be repaid any time in between. Storage payments will be paid to producers quarterly. Payments will stop for 90 days if the price of either wheat or corn exceeds 95% of the target price.

17) *Miscellaneous commodity provisions.*

a) Cross compliance and limited cross compliance have been eliminated.

b) Offsetting compliance has been eliminated.

c) If crop insurance is available in a county, producers in the county are not eligible to receive regular disaster payments.

d) Land devoted for water storage uses shall be eligible for the ARP if the land was planted to a program crop or oilseeds three of the most immediate five years and if the water storage use does not include uses such as aquaculture.

e) Prevented planting is the same as in the 1985 farm bill.

f) The cotton loan may be extended for eight months following the original ten-month loan if the average spot price for cotton in the preceding month does not exceed the average spot price for the preceding 36 months by 130%.

18) *Additional honey provisions.* Both marketing loans and loan deficiency payments shall be offered, and new payment limits have been set for combined marketing loan gains and loan deficiency payments at $200,000 for 1991, $175,000 for 1992, $150,000 for 1993, and $125,000 for 1994. These limits will also serve as separate limits for honey loan forfeitures.

19) *Additional dairy provisions.* The support price shall be increased at least 25 cents for cwt. each January 1 that the dairy surplus is projected to be less than 3.5 billion lbs. for the coming year, and shall be decreased from between 25 and 50 cents if purchases are projected to exceed 5 billion lbs., but in no event below the $10.10/cwt. minimum. If in 1992-95 purchases should be estimated to exceed 7 billion lbs., then the support price will be reduced to reimburse the cost of the additional purchases. Also, the Omnibus Budget Reconciliation Act of 1990 requires a refundable 5 cents/cwt. assessment in 1991 and 11.25 cents/cwt. in 1992-95.

20) *Additional peanut provisions.* The new minimum national quota is 1.35 million tons, and producers may grow additional peanuts above the quota (same as set in 1985 farm bill) under grower-handler contracts signed by September 15. Price supports will be the same as the previous year's level, adjusted to reflect increases in production costs, but not to exceed 5% annually.

21) *Additional wool/mohair provisions.* Separate payments for wool and mohair for the years 1991-1994 shall be set at the same limit levels as set for honey.

22) *Additional sugar provisions.* The loan rate for beet sugar shall be based on the weighted averages of producer returns for sugar beets relative to sugar cane for the immediate past 5 years, plus the addition of fixed marketing costs for beet producers. The Secretary shall establish marketing allotments for domestically produced sugar to insure imports of not less than 1.25 million short tons per year. Also, budget reconciliation forced the establishment of an .18 cent/lb. assessment on cane sugar and .193 cent/lb. assessment on beet sugar for 1991-95 to be remitted to the CCC by the first processor.

(continued on page 6)

The following example table appeared in the Agricultural Council of Arkansas *Bulletin*:

CROP	COTTON	CORN	RICE	WHEAT
(100 base acres are used so that % will be equivalent to acres.)				
Base acres	100	100	100	100
ARP	5%	10%	17%	15%
Permitted acreage	95%	90%	83%	85%
Triple base	15%	15%	15%	15%
Payment acres	80%	75%	68%	70%
Voluntary flexible acres	10%	10%	10%	10%
Flexed to cotton		25%	25%	25%
Planted acres	170%	65%	58%	60%

A maximum of 170 acres can be planted to cotton in this example, the maximum permitted acres for cotton plus the maximum flex acres from the other crop acreage bases (95 cotton permitted acres + 25 feed grain acres + 25 rice acres + 25 wheat acres). To plant more cotton acres on the farm would make the cotton program ineligible for benefits. Also, in this example, to exceed the payment acres less the 10 percent voluntary flexible acres of 65 acres of feed grains, 58 acres of rice, or 60 acres of wheat would eliminate any of these crops from program benefits.

AG LAW CONFERENCE CALENDAR

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17th annual seminar on bankruptcy law and rules
Apr. 11-13, 1991; Marriott Marquis Hotel, Atlanta, GA.
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Lender liability: defense and prevention
Feb. 28-Mar. 2, 1991, Buena Vista Palace, Orlando, FL.
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Federal Register *in brief*

The following is a selection of matters published in the Federal Register in December, 1990.

1. EPA; Procedures to establish, modify or revoke food additive regulations; final rule; effective date 1/5/91; 55 Fed. Reg. 50282.

2. FCA; Agricultural Credit Act; implementation; correction; 55 Fed. Reg. 50544.

3. IRS; Proposed regulations under section 108; discharge of indebtedness; proposed rule; comments due Feb. 4, 1991; 55 Fed. Reg. 50568.

4. IRS; Proposed regulations under section 108; discharge of indebtedness; public hearing Mar. 8, 1991; comments due Feb. 22, 1991; 55 Fed. Reg. 53005.

5. USDA; Agricultural Marketing Service; milk in the New England, New York-New Jersey and Middle Atlantic marketing areas; decision on proposed amendments to marketing agreements and to orders; proposed rule; 55 Fed. Reg. 50934.

6. USDA; Agricultural Marketing Service; milk in the Middle Atlantic and other marketing areas; order amending orders; final rule; effective date Dec. 28, 1990; 55 Fed. Reg. 53277.

7. USDA; Agricultural Marketing Service; milk in the South West Plains Marketing area; notice of proposed suspension of certain provisions of the order; 55 Fed. Reg. 53309.

8. FCIC; General crop insurance regulations; final rule; effective date Jan. 10, 1991; 55 Fed. Reg. 50811.

9. PSA; Amendment to certification of central filing system— Louisiana; 55 Fed. Reg. 51306.

10. FmHA; IRS offset; final rule; effective date Dec. 19, 1990; 55 Fed. Reg. 52037.

11. FDIC; Notification of termination of the Standard Reinsurance Agreement; 55 Fed. Reg. 52286.

—Linda Grim McCormick

Damages awarded against PCA

In an action against the Sierra-Bay Production Credit Association, two other Farm Credit institutions, and unnamed individuals, a jury has awarded California pear farmers and their farm corporations over $2.5 million in damages and over $500,000 in costs and attorneys fees in a lender liability action. *McClain v. Sierra-Bay Production Credit Association*, No. 506198 (Sacramento County, Cal. Aug. 21, 1990)(Judgment on Verdict and Judgment on Equitable and Other Matters). Only the Sierra-Bay Production Credit Association was adjudged responsible for the plaintiffs' damages as settlements had been reached with the two other Farm Credit System institutions prior to trial.

The plaintiffs asserted a variety of claims, including breach of fiduciary duty, "concealment and suppression of truth," "promise without intent to perform," negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. In essence, the plaintiffs contended that the PCA had failed to make certain promised loans, had improperly administered its loans to the plaintiffs, and had failed to properly consider the plaintiffs' loans for restructuring. The plaintiffs alleged that, as a consequence of the PCA's actions, they were forced to cease their farming operations.

In addition to the jury's award of damages to the plaintiffs, the court voided all of the loan agreements and other instruments between the plaintiffs and the PCA and barred the PCA from obtaining any relief against the plaintiffs based on those agreements and instruments. The PCA has appealed.

—Christopher R. Kelley, NCALRI

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State Roundup

IOWA. *Farmer liable for damages caused by altering surface draining.* In *O'Tool v. Hathaway*, 461 N.W.2d 161 (1990), the Iowa Supreme Court affirmed a district court ruling that the defendant farmer was liable for damages caused to the plaintiff's home when a recently constructed terrace broke during a heavy rain, flooding the basement and collapsing a wall. The Soil Conservation Division of the Iowa Department of Agriculture and Land Stewardship filed an amicus because of concerns an adverse ruling would make farmers strictly liable for constructing terraces and thus chill the promotion of soil conservation in the state. The defendant appealed both the legal and factual basis for imposing liability. On appeal, the court rejected these concerns.

The court reviewed Iowa rules of surface drainage, including the "natural flow" doctrine, which prevents liability unless the amount of water discharged increases or the manner of discharge is changed, and the "overriding requirement" to exercise ordinary care in using property so as not to injure the rights of neighboring landowners. In applying those standards, the court rejected the defendant's claim that no liability could be imposed under the natural flow doctrine because the terraces were not designed to divert or increase the flow of water.

The court said liability can also be imposed if the method or manner of drainage is substantially changed and actual damage results. The court found both criteria were met in this case. The defendant's own expert from the Soil Conservation Service (SCS) testified that the terraces substantially changed the manner and method of surface drainage.

The second issue was what caused the damage to the plaintiffs' home. The defendant argued that it was the break in the terrace and resulting flooding, not the pooling of water behind the terrace that resulted in the liability. But the court determined under the "overriding requirement" of ordinary care that (1) defendants had knowingly constructed a terrace which was not designed to hold a rain as large as the one experienced, (2) terrace breaks were foreseeable, and (3) the terrace was constructed solely for the defendant's benefit. Even though the court agreed that no negligence was proved in the actual construction or maintenance of the terrace, it held "it was not reasonable for the Hathaways to alter the natural drainage this way. By doing so they breached their duty of care to their neighboring landowners. We find no error in the district court's conclusion that it was negligent to construct a terrace of this kind on a dominant estate when harm to this servient estate was foreseeable."

The court addressed the amicus' concern that the district court be reversed and a rule to "immunize farmers from liability under any circumstances for beneficial soil conservation practices" should be adopted. The court rejected this request, saying: "[W]e are not persuaded to do so principally because we do not think the risk of liability is ordinarily great. The record does not reveal that terraces like this one often break." The court noted the terrace had been constructed directly above the plaintiffs' home. Had it been constructed so as to discharge the pooled water over the defendant's farmland in case of a break or even over a neighbor's field, the court said "the reasonableness of the terracing would probably not be in issue." It concluded, "we do not view conservation terraces as an inherently dangerous activity that in all circumstances would subject the user to liability without fault."

—Neil D. Hamilton, Drake University Agricultural Law Center

WISCONSIN. *Failure to comply with safety manual did not constitute negligence as a matter of law.* In the case of *Bauer v. Piper Indus., Inc.*, 454 N.W. 2d 28 (Wis. Ct. App. 1990), Bauer was injured by the blades of a clogged forage harvester. He sued the manufacturer, and a jury found in his favor.

Defendant asserted on appeal that plaintiff had ignored an instruction in the harvester's maintenance manual to turn off the tractor motor before trying to clear clogs and had thus been negligent as a matter of law.

The Wisconsin Court of Appeals affirmed the verdict. It stated that to hold failure to comply with an operator's manual to be negligence as a matter of law would elevate the manual to the status of a safety statute. Because the instructions contained in a manual are controlled solely by the manufacturer, the court said, it would not grant the manual the same authority as enacted legislation.

—Peter C. Quinn, Editor, Products Liability Law Reporter, Washington, D.C.

IOWA. *The cutting edge of the law.* The Iowa Supreme Court in *Bangert v. Osceola County*, 456 N.W.2d 183 (Iowa 1990) held that courts may consider the intrinsic value to the owner of trees that have been wrongfully destroyed when computing damages under the Iowa treble damages statute.

Plaintiffs reside in rural Osceola County, Iowa, on property homesteaded by their pioneer ancestors. A county road runs along one edge of their property, and twenty-eight ancient cottonwood trees grew on a half-mile stretch of this road. Plaintiffs' ancestors planted the trees over one hundred years ago. Osceola County proposed to remove the trees, allegedly to facilitate road improvements.

Plaintiffs attempted to prevent the destruction of the century-old trees by requesting the Iowa State Historical Department Office of Historical Preservation to declare the trees "historically significant." These efforts were underway when a county engineer recommended that the trees be cut down. The county hired a contractor to remove the trees while the plaintiffs were vacationing.

Plaintiffs commenced an action against Osceola County for wrongful destruction of the twenty-eight trees. Applying the Iowa statute, the trial court awarded the plaintiffs treble damages, basing its award on the trees' commercial value as lumber. Plaintiffs' expert used the Guide for Establishing Value of Trees and Other Plants and arrived at a value of $150,411.92. Plaintiffs' expert also testified that the cost of replacing the trees with six-inch diameter ash trees would be $46,824.96. Trebled, this is $140,474.88.

Defendant's expert testified that the cottonwood had minimal lumber value and that each tree should be valued at $100.00. In adopting defendant's valuation, the trial court considered only the tradition methods of valuation in Iowa, diminution in property value or commercial value, which was recently affirmed in *Laube v. Estate of Thomas*, 376 N.W.2d 108 (Iowa App. 1985).

Both parties appealed. Plaintiffs based their appeal solely on the contention that the trial court should have considered the inherent value of the trees rather than limit damages to the lumber value.

On appeal, the Iowa Supreme Court remanded the case and instructed the trial court to reconsider the damage evidence and determine if there had been an intrinsic loss that exceeded the trees' lumber value. The supreme court noted that plaintiffs had "special purposes" for maintaining the trees. Further, the difficulty in ascertaining the amount of damages is no reason for substituting an inappropriate method. The court further noted that the plaintiffs suggested several methods of determining damages which were approved in other jurisdictions, including the value of each tree, cost of replacement, and "special value" to the owner. Whatever method is selected, the award must render "substantial justice."

—Sandra Pochop, Law Student, The University of South Dakota School of Law

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Nominating Committee

The nominating committee invites the general membership of AALA to submit suggestions as to members who should be considered to stand for 1991 election to the Board of Directors (2 positions) and to the post of President-Elect. Any member may offer his or her own name or that of another member. Please contact Donald B. Pedersen, University of Arkansas School of Law, Fayetteville, AR 72701, chair of the committee.

In Memoriam

It is with regret that we report the death on November 6, 1990 of Anthony Ferrise. Professor Ferrise was a long-standing, active member of the American Agricultural Law Association. He had been a faculty member at West Virginia University since 1970, where he was responsible for statewide extension education programs in rural development. Besides his association with the AALA, he was active in the AAEA, the NA, and REA as well.