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INSIDE

IN FUTURE ISSUES

"All men by nature desire knowledge."

— Aristotle

CFTC proposes changes in its trade timing requirements

The Commodity Futures Trading Commission (CFTC) recently published for public comment in the *Federal Register* proposed amendments to its Regulation 1.35(g) (17 CFR§ 1.35(g) (1984)), which would require floor brokers and floor traders on CFTC-regulated exchanges to record the time of trade execution to the nearest minute. 49 FR 50190 (Dec. 27, 1984). At present, Regulation 1.35(g) requires only that trade execution times be recorded within the 30-minute time period (bracket) in which they occurred.

The proposed amendments follow a Sept. 26, 1984 memorandum to the CFTC from its Division of Trading and Markets (public copies are available upon request), which found that the 30-minute bracketing systems presently employed at most commodity futures exchanges make it impossible, in many instances, to detect and prosecute trade practice abuses, such as a floor broker taking advantage of a customer by making a personal trade ahead of an executable customer order which he holds. The memorandum concluded that more precise trade time execution data is necessary for the protection of the trading public and the integrity of the marketplace.

The proposed amendments to Regulation 1.35(g) would require that each party to every transaction mechanically or electronically record the time of trade execution to the nearest minute, and that such execution time also be recorded on the exchange's "trade register," to aid in the surveillance of trading abuses.

The proposed amendments would also permit, as an interim compliance measure, that the trade execution time be recorded to the nearest minute by other than mechanical or electronic means, such as by merely manually writing the time down on the trading cards. Exchanges which elected to adopt the interim measure would still be required to install mechanical or electronic time recordation systems by a CFTC-prescribed date.

— Thomas M. McGivern

Agricultural labor - liquidated damages

In *Williams v. Tri-County Growers Inc.*, 747 F.2d 121 (3rd Cir. 1984), the court addressed liquidated damages issues under the Fair Labor Standards Act (FLSA), the now repealed Farm Labor Contractor Registration Act (FLCRA) and the West Virginia Wage Payment and Collection Act.

Tri-County, a farm labor contractor, employed plaintiffs on behalf of Porterfield Orchards, a grower. Plaintiffs had come to these jobs through the Interstate Employment Service System and pursuant to a clearance order that guaranteed $3.62 per hour, which became the applicable minimum rate rather than $3.35 as required by 29 U.S.C.§ 206(a)(5). The District Court determined that hours actually worked were estimated by the timekeeper and that no hours were recorded for training or lunch periods worked. Plaintiffs' sustained the burden of proof that they were not properly compensated and the award of unpaid wages pursuant to the FLSA was sustained on appeal.

At trial, the District Court had rejected plaintiffs' claims for FLSA liquidated damages pursuant to 29 U.S.C.§ 216(b). It was found that defendant had the defense afforded by§ 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, to the otherwise mandatory liquidated damages clause. However, on appeal, the Third Circuit concluded that the record did not support the necessary findings of "good faith" and "reasonableness," and remanded the matter to the District Court for reconsideration. The Third Circuit suggested that if Tri-County had undergone and

(continued on next page)

Recent publications

L. Busch and W. Lacy, eds., *Food Security in the United States* (Westview Press 1984)

D. Fee, A. Hoberg and L. McCormick, *Director Liability in Agricultural Cooperatives* (USDA Agricultural Cooperative Service Cooperative Information Report 34, 1984)

N. Harl, *Legal and Tax Guide for Agricultural Lenders* (Century Communications 1984)

R. Harnsberger and N. Thorson, *Nebraska Water Law and Administration* (Butterworth/Mason Division 1984)

K. Meyer, D. Pedersen, N. Thorson and J. Davidson, *Agricultural Law: Cases and Materials* (West 1985)

— *Sarah Redfield*

passed previous Department of Labor (DOL) audits and informal investigations, it then might meet the requirements of 29 U.S.C.§ 260, in spite of the inadequacies of its record-keeping under the FLSA.

The District Court's holding that plaintiffs' were not entitled to liquidated damages under the West Virginia Act was reversed. W. Va. Code§ 21-5-4(e). It was noted that pertinent West Virginia cases reflect a policy of strict application of the statute, which provides for statutory liquidated damages if wages are not paid within certain times if the worker quits or is fired.

Violations of the FLCRA were found by the District Court and liquidated damages of $500 per violation (three in this case) per worker were automatically awarded to plaintiffs. However, the Third Circuit noted that in light of Seventh Circuit cases and the intervening enactment by Congress of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C.§§ 1801-1872, the court has discretion to award "up to $500" per violation to each worker, and that the District Court, on remand, must take this into consideration. The Third Circuit affirmed the District Court's finding that two additional violations of the FLCRA had not been proven.

The District Court's extremely limited award of attorneys' fees to plaintiffs' lawyers was deemed improper for various reasons, including a failure to follow *Hensley v. Eckerhart*. 461 U.S. 424 (1983), and the matter was remanded for redetermination.

— *Donald B. Pedersen*
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Amendments to the Perishable Agricultural Commodities Act

On May 7, 1984, Congress amended the Perishable Agricultural Commodities Act (PACA) to impress a statutory trust on perishable agricultural commodities received by commission merchants, dealers and brokers, for the benefit of unpaid suppliers, sellers and agents. PACA, 1930, Pub. L. No. 98-273, § 5(c)(2), 98 Stat. 165 (1984) (codified as amended at 7 U.S.C. 499(e)(c)(2)). The trust provisions became effective Dec. 20, 1984.

A *commission merchant* is any person who receives produce in commerce for sale, on commission, for or on behalf of another. 7 C.F.R. § 46.2(r). A *dealer* is one who buys or sells produce in wholesale or jobbing quantities in commerce, including jobbers, distributors, other wholesalers and growers who market produce grown by others. 7 C.F.R. § 46.2(m)(1), (3). Retailers, those who normally sell to consumers only, are also classified as dealers when the invoice cost of all their purchases of produce during a calendar year exceeds $230,000. 7 C.F.R. § 46.2(m)(2). Specific exclusions from the definition of "dealer" appear at 7 C.F.R. § 46.2(m)(4). A *broker* is any person engaged in negotiating sales and purchases of produce in commerce for or on behalf of the vendor or purchaser. An independent agent negotiating sales for or on behalf of the vendor is not a broker if the only sales so negotiated involve frozen fruits and vegetables having an invoice value not in excess of $230,000 in any calendar year. 7 C.F.R. § 46.2(n).

The problems encountered by the perishable agricultural commodities industry are similar to those faced by the livestock industry in 1976 when trust amendments were added to the Packers and Stockyards Act. *Amendments to PACA, Hearings Before the Subcommittee on Domestic Marketing, Consumer Relations and Nutrition of the House Committee on Agriculture,* 98th Cong., 1st Sess. 60, 61 (1983) (testimony of Vern F. Highley, administrator of the Agricultural Marketing Service, USDA). Because the Packers and Stockyards Act trust has operated successfully and has been upheld by the courts, the PACA trust is patterned after it.

The PACA amendments create a non-segregated "floating trust" which permits the comingling of trust assets. The trust consists of all perishable agricultural commodities received by a commission merchant, dealer or

broker, all inventories of products derived from such commodities, and any receivables or proceeds from such commodities and products. 49 Fed. Reg. 45,740 (1984) (to be codified at 7 C.F.R. § 46.46(c)). The trust comes into being at the time the buyer receives ownership, possession or control of the goods and continues until all unpaid sellers or suppliers of the commodities have received full payment. 7 U.S.C. § 499(e)(c)(2).

A buyer or receiver may grant a security interest in trust assets to other creditors. However, such a security interest is secondary and specifically avoidable in order to satisfy debts to trust claimants. Nevertheless, trust assets are available to the buyer or receiver for other uses, including the payment of other creditors. 49 Fed. Reg. 45,738 (1984).

Unless trust beneficiaries have been paid, trust assets are not to be distributed to other creditors or sold when a buyer or receiver declares bankruptcy, makes an assignment for the benefit of creditors, declares intention to sell under the bulk sales law, or otherwise terminates its business. *Id.*

To preserve trust benefits, suppliers, sellers and agents who have not been promptly paid must file written notice of nonpayment with the debtor and the Secretary of Agriculture. The required notice must be filed within 30 calendar days after a default in payment. 7 U.S.C. § 499(e)(c)(3). A default occurs when a buyer or receiver of perishable agricultural commodities fails to pay within the appropriate time period for the type of transaction involved. Payment for produce received on consignment must be received within 10 days after the date of final sale with respect to each shipment, or within 20 days from the date goods are accepted at destination, whichever comes first. 49 Fed. Reg. 45,737-8 (1984) (to be codified at 7 C.F.R. § 46.46(aa)(1)). The time period for payment for most other transactions is 30 days after the receipt of the goods or within five days after an agent receives payment for the goods, whichever comes first. *Id.* at 45,739 (to be codified at 7 C.F.R. § 46.46(aa)(1), (8), (9)).

The parties can elect to use different times of payment by prior written agreement. Payment within the agreed period constitutes "full payment promptly." *Id.* at 45,740 (to be codified at 7 C.F.R. § 46.2(dd)(11)). But, if an agreement calls for payment 31 days or more after receipt and acceptance of the goods, the trust provisions will not apply. *Id. at 45,741 (to be codified at 7 C.F.R.* § 46,46(f)(2)).

Default also occurs when a party learns that a payment instrument it has received has been dishonored. *Id.* at 45,738.

The required notice must contain a declaration of intent to preserve trust benefits as well as (1) names and addresses of the trust beneficiary and the debtor; (2) date of transaction, commodity contract terms, invoice price and date the payment was due; (3) (if appropriate) date of receipt of notice that a payment instrument has been dishonored; and (4) amount past due and unpaid. *Id.* at 45,741 (to be codified at 7 C.F.R. § 46.46(g)(3)).

If there are insufficient trust assets to satisfy all who have preserved their rights in the trust, a pro rata distribution is made. *Id.* at 45,735. Sellers and suppliers can elect to waive trust protection. The waiver must be in writing, be signed prior to the time affected trading contracts are negotiated, and must clearly waive the right to become a trust beneficiary in a given transaction. *Id.* at 45,740 (to be codified at 7 C.F.R. § 46.46(d)(2)). The trust provisions do not apply to transactions between a cooperative association (as defined in the Agricultural Marketing Act, 12 U.S.C. 1141j(a)) and its members. *Id.* at 45,741 (to be codified at 7 C.F.R. § 46.46(f)(3)).

Maintenance of trust assets is the responsibility of the commission merchant, dealer or broker. Acts inconsistent with this responsibility, including dissipation of trust assets, are unlawful and in violation of § 2 of the Act. *Id.* at 45,740-1 (to be codified at 7 C.F.R. § 46.46(e)(1), (2)).

Jurisdiction to entertain actions by beneficiaries to enforce payment from the trust, and by the Secretary to prevent and restrain dissipation of the trust, is vested in the United States District Courts. Pub. L. No. 98-273, § 5(c)(4).

— John D. Copeland
University of Arkansas

USDA Extends Comment Period for Proposal to Import Animal Embryos

WASHINGTON, D.C. — The public has until June 15 to comment on a U.S. Department of Agriculture (USDA) proposal to establish regulations for importing livestock embryos into the United States.

"The proposal, published Oct. 22, 1984 [49 Fed. Reg. 41257 (1984)], generated such great interest that we are extending the comment period beyond the original Dec. 21, 1984 closing date," said Bert W. Hawkins, administrator of USDA's Animal and Plant Health Inspection Service.

He said the agency also intends to hold a public hearing on the issue and will announce details at a later date.

"Until now," Hawkins said, "our import regulations have dealt only with live animals, animal products and semen. Because there were no provisions for embryos, they could not be imported into this country.

"Embryo transfer is growing in popularity in the livestock industry," he said. "Animal embryos can be collected and frozen in one country, shipped to another and implanted in animals there."

To bring such embryos into the United States, importers would have to obtain a permit from USDA, according to the proposal. Permits would be issued only for embryos conceived in countries that do not have foot-and-mouth disease.

Hawkins said the collection procedures would be approved and supervised by government veterinarians in the country of origin.

Comments may be sent to T.O. Gessel, Regulatory Coordination Staff, APHIS, USDA, 728 Federal Building, Hyattsville, Md. 20782.

Notice of this action was published in the Jan. 14, 1985 Federal Register [50 Fed. Reg. 1863 (1985)].

— USDA News Release

Preparing an addendum to an oil and gas lease to reflect landowner concerns

By Paul L. Wright

Landowners are acquiring a better understanding of typical oil and gas lease clauses. As a result, they have been asking for help in incorporating language into leases which address their concerns. Experience has shown that it is easier to amend a lease presented by an oil and gas company than to have an entirely new lease, a landowner lease, accepted by the company.

The addendum clauses which follow can be used in various ways. First, these clauses can be used as a check list when counseling with and reviewing the potential interests of a landowner. Secondly, landowners and their counsel should pick and choose the clauses which are most important to them and try to negotiate those amendments into the lease. There should not be an attempt to incorporate all of these clauses in an amended lease. A third use of these clauses is to gain ideas and then draft specific language which is more acceptable to the parties.

Possible Addendum Clauses

This is an addendum to the oil and gas lease executed by and between _____ (lessor) and _____ (lessee) on ___ day of ____, 19__. This addendum is to become a part of the lease, and if there should be any inconsistency between the terms and conditions set forth in the basic lease and those in this addendum, the provisions of this addendum shall prevail.

1. PROPERTY DESCRIPTION. A full legal description of the property subject to this lease shall be recorded with the lease and this addendum.

2. STRATA LEASED. This lease shall only apply to the producing zones (strata) of _____, _____ and _____. The lessor shall retain full ownership and control of other strata to be developed or leased at his discretion.

3. LATE PAYMENTS. Any delay rental, royalty, or other payment not made when due shall accrue interest compounded daily at the rate of __%.

4. NOTICE FOR NONPAYMENT OF DELAY RENTAL. Any clause within the lease which requires lessor to notify the lessee of nonpayment of delay rentals shall be null and void. If the lessor does not receive a delay rental payment by the stated due date the lessor, at his election without notice to the lessee, shall have the right to terminate this lease.

5. REMOVAL OF EQUIPMENT. All equipment, property and fixtures belonging to the lessee, his agents or to contractors shall be removed by said lessee within ____ days of the expiration of this lease. Any equipment, property or fixtures not so removed shall, at the lessor's option, become the property of said lessor. Expenses incurred by the lessor in removing such property in excess of value received shall be paid by lessee.

6. LIMITATION ON ASSIGNMENTS. Lessee shall not make an assignment of the operating responsibilities existing under this lease without first receiving written approval of the lessor.

7. DAMAGE PAYMENTS. Lessee shall pay for all damages caused by operations under this lease. Any damages not mutually agreed upon shall be determined by a board of arbitrators; one to be appointed by the lessor, one by the lessee and the third by the two so appointed. The award of such three persons shall be final and conclusive. Each party shall pay the cost of the arbitrator he selected and the cost of the third arbitrator shall be shared equally.

8. OVERRIDE. Lessor retains unto themselves ____ (fraction) of the seven-eighths share as an overriding royalty interest.

9. LESSOR PAYMENT OF CHARGES. All costs for marketing, severance or mineral taxes and transportation shall be paid by the lessee. The lessor shall receive 100% of the one-eighth royalty payment, provided a deduction shall be permitted for the lessor's share of any windfall profit taxes.

10. PIPELINE CROSSING PUBLIC HIGHWAYS. All costs and assessments for the installation and removal of pipelines which cross public roadways placed there by operations permitted by this lease shall be the responsibility of the lessee even if any of such costs are incurred after the termination of this lease.

11. LOCATING WELLS AND ASSOCIATED ACTIVITIES. The final location of well sites, tank batteries, meters, separator sites, access roads and pipelines shall be approved by the lessor in writing before drilling is started, equipment is set and operations begin. All sites shall be kept to a mutually agreeable size set forth in a separate writing signed by the parties hereto.

12. PLAT MAP. The lessee shall provide the lessor a plat map showing the location and depth of all buried pipelines and utility lines.

13. FENCING. All well sites and tank batteries shall be fenced by the lessee and if livestock are run in the field adjacent to a well site or tank battery, a fence adequate to turn such livestock shall be constructed and maintained.

14. ABANDONMENT OF LEASE ROADS. All roadways installed by lessee shall be restored to facilitate normal surface operations of the lessor within ____ (days or months) of abandonment of the operations which required such roadway. The lessor may elect by written request to lessee to have specified roadways or portions thereof remain.

15. REMOVAL OF MARKETABLE TIMBER. After locating a proposed site for well(s) and other associated operations, a written notice shall be given to the lessor setting forth the proposed location(s). The lessor shall have ____ days after receipt of notice to remove marketable timber from the identified area. After the specified number

of days has passed, the lessee shall have the right to develop the well site and associated operations.

16. NO FACILITIES SERVING OTHER PROPERTIES. Only pipelines, tanks, equipment, roadways and other operations servicing the wells on the lands covered by this lease shall be installed.

17. BURYING OF PIPELINES. All pipelines shall be buried at a depth specified in writing by lessor, which shall always be below water drainage tile depth.

18. RECORDING & CERTIFIED COPIES OF DOCUMENTS. The lessee shall be solely responsible for the recording of pertinent documents under and related to this agreement. The lessee shall provide lessor with a certified copy of the recorded lease and addendum thereto.

19. LEASE SUBJECT TO EASEMENTS AND OTHER LEASES. This lease is made and accepted subject to all easements, rights of way, oil and gas leases, and other mineral leases recorded prior to the recording of this lease. The lessee shall have no right to indemnification from lessor for costs incurred as a result of such prior recordings.

20. PURCHASE OF ABANDONED WELL BY LESSOR. Should lessee decide to abandon any existing well or wells on subject land, lessor shall have the option to purchase any of the wells at the salvage value thereof minus cost of removal and cost of plugging. Lessee shall give written notice to lessor of the intent to abandon and lessor shall have a period of ____ days after the receipt of such notice to elect to purchase. Notice of said election shall be given to lessee in writing.

21. CANCELLATION OF RECORDED LEASE. Upon the termination of this lease, lessee agrees to cancel the same of record and provide a certified copy of such cancellation to lessor. In the event that lessee fails to cancel this lease upon its termination, then lessor may proceed to quiet title as to said lease and shall recover all the costs, including attorney fees, incurred in such action from lessee.

22. BURYING OF UTILITY LINES. Any utility lines used by lessee in the conduct of its operations shall be buried upon the written request of lessor. All said utility lines shall be removed by lessee upon termination of this lease unless lessor elects (in a writing delivered to the lessee) to have such kept in place.

23. FUTURE LAWS AND REGULATIONS. Notwithstanding anything to the contrary herein contained or implied by law, all present and future rules and regulations of any governmental agency pertaining remotely or directly to any portion of this agreement shall be binding on the parties hereto with like effect as though incorporated herein at length, provided, however, any provisions contained herein which set forth stricter requirements than present or future rules and regulations shall remain in effect.

24. DRY HOLE. In the event a well hereunder is a dry hole, this lease shall terminate unless within 12 months from the date of discovery of the dry hole lessee shall commence another well in which case if a second dry hole is discovered then production shall be considered ended and the lease terminated after restoration has been completed.

25. SHUT-IN WELLS. If a well shall be shut-in, the lessee shall, from date of shutting-in until date production is started, restarted or until date of termination of lease, whichever shall occur first, pay lessor an amount equal to the delay rental. The payment amount and schedule for a shut-in well shall be the same as the one for delay rental payments.

26. FREE GAS. The gas allocated to the lessor under the free gas clause shall become the sole property of the lessor to be used by him in any manner so desired. Should lessor use more than the yearly allotment, he shall pay lessee the wholesale wellhead price for seven-eighths of the excess amount. Should lessor not use the entire yearly allotment, lessee shall purchase the seven-eighths share of the unused free natural gas allotted to lessor at the wholesale wellhead price. Any payments required by this paragraph shall be made within ____ days of the close of the calendar year.

27. TERMINATION OF LEASE. If this lease has not terminated within ____ (days, months, years) from the signing, then it shall terminate unless a well/wells is currently producing in paying quantities or there is no shut-in well on subject property. Once a well stops producing in paying quantities and stays below that level for ____ months and there is no shut-in well, the lessee shall have ____ (days or months) to plug the well and remove all equipment.

28. TIME OF DELAY RENTAL PAYMENT. Delay rental shall become payable quarterly, in advance, from the date of signing this lease and addendum until production begins.

29. RECORD OF PRODUCTION. The lessee shall provide the lessor a monthly record of the quantities of oil and gas produced on subject property at the time royalty payments are made.

30. PREVENTION OF UNREASONABLE DAMAGE. Drilling operations under this lease shall be performed only during the months of ____, ____, ____, ____, ____ and ____. In no event, even during these stated months, shall ingress and egress by lessor or his agents be attempted if unreasonable damage will result to the property.

31. STORAGE OF GAS OR BRINE. The provision(s) in the lease permitting the subject property to be used for storage of gas or brine shall be null and void and the property shall only be used for storage of gas or brine upon execution of a separate written agreement between the parties hereto.

32. UNITIZATION OR POOLING. The provision(s) in the lease permitting unitization or pooling of subject property with any other property shall be null and void and the property shall only be unitized or pooled upon execution of a separate written agreement with the lessor.

33. SEVERANCE OF LAND NOT UNITIZED OR POOLED. Upon the

unitization or pooling of less than all of the leased land, this lease shall be severed and considered a separate and distinct lease. The lease term and all the rights and obligations of the lessee under this instrument shall apply separately to the pooled and unpooled acreage.

34. DEVELOPMENT OF PROPERTY AFTER COMPLETION OF WELL. If within ____ (days, months, years) after completion of a well the lessee does not commence a new well, the lease on the undeveloped land shall be terminated and lessor shall have the right to release the undeveloped land or to hold it free of lease. The lessee shall be entitled to continue the lease on so much of subject property as required to support a well of the actual depth as specified under the rules and regulations of ____ state law.

35. METHODS OF GIVING NOTICE. All notices provided for herein are to be delivered either personally or by certified U.S. mail.

36. COPY OF DOCUMENTS TO LESSOR. A copy of all documents filed with ____ state oil and gas administrators pertaining to this lease shall be delivered to the lessor within 10 days of filing.

37. MECHANICS LIEN. The lessee shall have no authority to create any lien for labor or material upon the lessor's interest in the demised premises, and neither the lessee nor anyone claiming by, through or under the lessee shall have any right to file and place any labor or material lien of any kind or character whatsoever upon the demised premises, and the buildings and improvements thereon located so as to encumber or affect the title of the lessors in said land and the buildings and improvements, and all persons contracting with the lessee, directly or indirectly, or with any person who in turn is contracting with the lessee, for the creation, construction, installation, alteration or repair of any improvements or for the destruction or removal of any leasehold improvement upon the demised premises, including furnishing and fixtures, and all materialmen, contractors, mechanics and laborers, as heretofore stated, are hereby charged with notice that as and from the date of this instrument they must look to the lessee and the lessee's interest only in and to the demised premise to secure the payment of any bill for work done or materials furnished or performed during the term hereby granted.

38. RECLAMATION/RESTORATION. In addition to the provisions of the state law and regulations, the reclamation and restoration practices to be utilized on any well sites, access roads and other disturbed areas shall be as follows: During the drilling period and any time prior to completed reclamation, erosion shall be controlled by the lessee through temporary or permanent measures. The drill site shall be restored to the slope not to exceed ____%. A drill site shall be seeded with a mixture of ____, ____ and ____ at a rate of ____ pounds per acre. The lessee shall be responsible for establishing a seeding and controlling erosion on a drill site for a period of four years after the spud date unless the lessor assumes control of reclaimed area prior to that time. If lessor assumes control of a portion of the reclaimed area, the lessee's responsibilities shall end as to that portion. During the reclamation, the lessee shall obtain a soil test analysis through a soil test laboratory mutually agreeable to both parties and shall fertilize and lime the site to be reclaimed as indicated on the analysis. As a well site is prepared, top soil to a depth of ____ inches shall be stockpiled, then as reclamation is performed, said top soil shall be placed on top of the reclaimed area. Any site reclamation plans to be submitted to state oil and gas administrators shall be approved and initialed by the lessor prior to being submitted. All restoration and reclamation plans shall be approved by the local Soil and Water Conservation District Office.

39. ARBITRATION. The parties hereto agree to submit to arbitration all differences which may arise under this agreement which they cannot resolve themselves. Such arbitration shall be by a board consisting of one chosen by the lessor, one chosen by lessee and a third chosen by the arbitrators which were selected by the parties. The decision of a majority of the arbitrators shall be final and binding upon all parties to this lease and addendum except if a question of law. Each party shall pay the cost of the arbitrator he/she selected and the cost of the third arbitrator shall be shared equally between the parties.

40. TIME IS OF THE ESSENCE. Time shall be of the essence in the conducting of all activities and meeting all the terms related to this lease and addendum.

41. DUTY OF EXTRAORDINARY CARE. The lessee shall exercise extraordinary care and precaution in conducting all operations related to this lease.

42. DEFINITIONS. The following definitions shall control the term of the lease and this addendum thereto:

Commencement — commencement of a well shall be considered to have been achieved the instant actual drilling begins and is diligently pursued to completion.

Operations — only activities which are in active pursuit of developing a new well or continuing production from existing wells shall be regarded as operations.

Paying Quantities — a well shall be considered to be producing in paying quantities only if the income from the well exceeds the cost of operating the well and marketing the product and shall be considered to be producing in paying quantities only if the royalties received by the lessor exceeds the delay rental provided for in the lease. The royalties received by the lessor shall be permitted to drop below the delay rental for a period of ____ (days, months, years) before the well shall be declared not to be producing in paying quantities, except that a shut-in well shall permit the lease to continue for a period of up to ____ (days, months, years).

Paul L. Wright is an extension economist, agricultural law at Ohio State University.

Installment Payment of Federal Estate Tax

Selling Property to Pay Down on Mortgages

The mounting level of debtor distress in agriculture has created problems for some taxpayers holding property under an election to pay federal estate tax in installments over a period of 15 years. Major questions relate to the placement of mortgages on such property and the effect of exercise of creditor remedies on continuation of installment payment of the deferred tax.

A recent letter ruling, Ltr. Rul. 8441029, July 10, 1984, involved a situation where a mortgage foreclosure was imminent. The mortgage was on the property at the time of death. The question was whether the sale of land to other heirs and a non-heir would constitute a disposition of the property. Disposition or withdrawal of 50% or more of the land terminates the installment payment election.

The ruling holds that sale of property to pay off mortgages is not a disposition or withdrawal if the proceeds are applied on the mortgage. The ruling cautions that proceeds received from the sale in excess of the mortgage would be considered a disposition. The ruling notes that the mortgage amount was deductible in the original installment payment calculations, so disposition of that amount of assets would be counted against the 50% limit.

Material Participation Needed?

Since publication of the Rev. Rul. 75-366, 1975-2 C.B. 472, an issue has been the level of management activity needed to make farmland (under a crop share or livestock share lease) eligible for 15-year installment payments of federal estate tax. A series of letter rulings beginning in 1981 made it clear that the necessary involvement in management could come from the property owner or from agents or employees. But the *amount* of management needed was unclear. Specifically, it was not known whether material participation was needed on the part of whomever was providing the management under the lease.

Failure to Pay Self-Employment Tax

A recent letter ruling, Ltr. Rul. 8432007, April 9, 1984, takes the position that failure to pay self-employment tax appears to be no bar to eligibility for installment payments of federal estate tax. The ruling states:

> "As a matter of law there is no requirement that self-employment tax be paid or payable in order for a decedent's activities to be considered a 'trade or business'... In this case, the decedent's rental was based on farm production rather than a fixed rental, decedent was required to pay one-fifth of the fertilizer cost and the decedent was involved in the management of the farming operations... [T]here were areas in which major management decisions were subject to the decedent's influence as well as an indication that the decedent was regularly advised and consulted on the operation of the farm and that she participated in a substantial number of management decisions each year."

— Neil E. Harl

Award upheld for commodities losses

The Georgia Court of Appeals upheld a jury verdict in the amount of $31,238.50 awarded to a farmer against a brokerage firm for losses sustained from commodities trading. *Shearson/American Express Inc. v. Hardy*, 171 Ga. App. 471, 329 S.E.2d 257 (1984).

The brokerage firm had initiated the legal action to recover an alleged deficit in the defendant farmer's commodity trading account. The farmer counterclaimed and presented evidence that he had a low level of knowledge and expertise as to commodities trading and that the broker led him to make speculative investments rather than hedging transactions. There was also evidence of churning and unauthorized trades by the broker.

The appellate court found the evidence was sufficient for the jury to infer that the broker and the brokerage firm acted with reckless disregard for the defendant's investment concerns.

— Terence J. Centner

Zoning changes held to be void

The Georgia Supreme Court found that a hastily enacted county environmental review ordinance and a zoning change were void because they were arbitrarily enacted and discriminatorily applied. *Shoemake v. Woodland Equities*, 252 Ga. 389, 313 S.E. 2d 689 (1984).

Three county commissioners had testified that the environmental review ordinance and the zoning change, which removed mining operations from uses permitted in agriculturally zoned districts, were adopted to stop the appellee from developing a stone quarry. Thus, the trial court did not err in its conclusion that the content of the ordinances and circumstances surrounding their adoption together with the county's denial of the application for a building permit constituted discriminatory enactment as a matter of law.

— Terence J. Centner

CCC Grain Storage Payments Subject to Lien

A bankruptcy court in Minnesota has recently held that grain storage payments received by the debtors from Commodity Credit Corporation (CCC) under the wheat reserve program constitute accounts or general intangibles under the Uniform Commercial Code. In *In Re Connelly*, 41 B.R. 217 (Bkrtcy. Minn. 1984), the court, relying upon *In Re Sundberg*, 729 F. 2d 561 (8th Cir., 1984), held that the grain storage checks received by a debtor who had filed a Chapter 11 bankruptcy were subject to a lender's pre-petition security agreement, notwithstanding the execution by the lender of a lien waiver by which the lender released any claim it might have had to the wheat itself. The court held that the storage payments were not proceeds of the storage crop, but rather, were independent of the crop.

— Phillip L. Kunkel

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA request nominees

The AALA Nominating Committee requests your candidate suggestions and selection comments for the 1985-86 Office of the President-Elect and *two* new members of the Board of Directors for the three-year term of 1985-88. Please communicate your nominations and comments to:

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