INSIDE

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IN FUTURE ISSUES

Wetlands case granted retrial

In late 1997, the U.S. Court of Appeals for the Fourth Circuit ordered a retrial for an individual and two partnerships convicted of Clean Water Act (CWA) wetlands violations in conjunction with a Maryland residential development. *United States v. Wilson*, No. 96-4498, 1997 U.S. App. LEXIS 35971 (4th Cir. Dec. 23, 1997). The trial court convicted the defendants of felony violations of the CWA for knowingly discharging fill and excavated material into wetlands without a permit from the U.S. Army Corps of Engineers (COE). The developer was sentenced to serve twenty-one months in prison and pay a $1 million fine. The developer also held positions in two partnerships, and they were required to pay a total of $3 million, placed on probation for five years, and were ordered to restore affected areas and prepare a plan to prevent violations from recurring.

The development work at issue involved efforts to improve the drainage of land to make building feasible. From 1988 to 1993, the defendants attempted to drain at least three of the four parcels involved by digging ditches. Substantial fill was later added in an attempt to raise the ground level of the parcels. Other work involved reshoring efforts because of wetness-induced ground shifting and collapse. In addition, trial testimony revealed that despite the attempts at drying the property through ditching and draining or through the pumping off of standing water, and even after hundreds of truck loads of stone, gravel and other fill had been added to three of the parcels, wetland-loving plants continued to sprout through the fill.

On appeal, the court concluded that 33 C.F.R. section 328.3(a)(3)(1993), which defines waters of the United States to include those waters whose degradation "could affect" interstate commerce, was unauthorized by the CWA as limited by the Commerce Clause of the United States Constitution and, therefore, was invalid. Consequently, because the regulation improperly expanded the COE's jurisdiction beyond the point the Congress could have authorized in the CWA, a jury instruction cased upon the regulation was also erroneous. Likewise, the court held that a second jury instruction concerning wetlands may have caused the jury to find the defendants liable even though the wetlands on the affected property may not have been adjacent to waters over which the COE had authority. This also was a basis for a new trial according to the Fourth Circuit.

The court also concluded that "sidecasting" may not actually involve the "addition" of pollutants and therefore may not give rise to a wetland violation in every case. The

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Fifth Circuit upholds USDA Inspector General subpoenas

The Fifth Circuit has upheld the authority of the USDA Inspector General (IG) to subpoena records of selected farm program participants in connection with an audit of the participants' compliance with the program payment limitation rules when the "ultimate" purpose of the audit is to assess the effectiveness of the Consolidated Farm Service Agency's (CFSA, now FSA) procedures for detecting program fraud and abuse. *Winters Ranch Partnership v. Viadero*, 123 F.3d 327 (5th Cir. 1997). The Fifth Circuit's decision reversed a district court decision that held that the administrative subpoenas at issue were beyond the IG's subpoena authority under the Inspector General Act of 1978, 5 U.S.C. app. 3, §§ 1-12. The district court chiefly relied on the Fifth Circuit's decision in *Burlington Northern R.R. Co. v. Office of Inspector General, R.R. Retirement Bd.*, 983 F.2d 631 (5th Cir. 1993), which had construed the Act to prohibit an Inspector General from assuming, as part of a long-term continuing plan, the regulatory compliance functions delegated to the agency. The district court found that the subpoenas had been issued for the express purpose of conducting individual "payment limitation reviews" pursuant to a long-term

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court did note that while it is possible that sidecasting may result in a violation in certain cases, a jury instruction stating that sidecasting was prohibited went too far and necessitated a new trial.

Another important aspect of the case was that the Fourth Circuit held that the trial court erred in failing to require mens rea with respect to each element of a CWA offense. In general, courts have held that the government can prove that a defendant "knowingly violated" a particular environmental standard without proving either that the defendant knew of the applicable legal standard and its violation or of all the relevant facts underlying its violation. This result is commonly justified on the basis that environmental crimes are offenses against society's public welfare. For example, in 1993, the Ninth Circuit Court of Appeals, in a case involving the CWA, limited the knowledge requirement to the defendant having an "awareness" of the defendant's actions. *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993). The court construed the CWA in such a way that it was "not apparent from the face of the statute" whether Congress required proof of criminal intent for all elements, or whether it intended for the violation to pertain to knowing conduct that happens to violate the law. Based on analogous public welfare statutes, the Ninth Circuit construed violations of the CWA's criminal provisions to be in the category of public welfare offenses that are categorized by a diminished mens rea requirement. But, in 1996, the Fifth Circuit Court of Appeals held that an individual may not be convicted under the CWA unless the government establishes that the individual had knowledge of each element of the charged offense. *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996).

Here, the Fourth Circuit held that the criminal intent element required the government to prove (1) that the defendant knew that he was discharging a substance; (2) that the defendant correctly identified the substance he was discharging; (3) that the defendant knew the method used to discharge the pollutants; (4) that the defendant knew the physical characteristics of the property into which the pollutant was discharged identified it as a wetland; (5) that the defendant was aware of facts establishing the required length between the wetland and the waters of the United States; and (6) that the defendant knew he did not have a permit. While the Fourth Circuit concluded that even though the government had not been required to show that the defendants were aware that their conduct was illegal, the lower court's jury instructions did not adequately impose on the government the burden of proving knowledge with regard to each statutory element. As such, a new trial was required on this ground.

This is an important case for farmers and ranchers whose lands exhibit the presence of isolated wetlands. For almost two decades, legislative attempts have been made to limit the government's jurisdiction over isolated wetlands, but to no avail. If this case is upheld by the United States Supreme Court, the objective of removing or limiting the federal government's jurisdiction over isolated wetlands on agricultural land may be satisfied.

—Roger McEowen, Kansas State University, Cooperative Extension Service, Manhattan, KS

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regulatory plan. Having found that purpose, the district court concluded that the IG audit that the subpoenas were intended to further amounted to the IG's improper assumption and duplication of the program operating responsibilities of the CFSA. *Winters Ranch Partnership v. Viadero*, 901 F. Supp. 237, 240-43 (W.D. Tex. 1995).

In reversing the district court, the Fifth Circuit sharply disagreed with the district court's findings as to the purpose of the subpoenas. More significant, the court appeared to narrow the scope of its earlier decision in *Burlington Northern*. For the academician, this apparent narrowing is noteworthy because the *Burlington Northern* decision introduces the law governing Inspector Generals in the leading administrative law casebook, Peter L. Strauss, et al., *Gellhorn and Byse's Administrative Law* (9th ed. 1995), and the decision has been criticized by the United States District Court for the District of Columbia. *Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1117 (D.D.C. 1994); *United States v. Hunton & Williams*, 952 F. Supp. 843, 849-51 (D.D.C. 1997). For the practitioner, any narrowing of the *Burlington Northern* decision reduces the number of the already limited grounds on which Inspector General subpoenas can be challenged. The *Burlington Northern* decision had been invoked, albeit unsuccessfully, in at least one other recent challenge to a USDA IG subpoena. *See Inspector General of the U.S. Dep't of Agric. v. Glenn*, 122 F.3d 1007 (11th Cir. 1997).

The USDA Office of Inspector General is an independent unit within the USDA, and the scope of its duties are specified in the Inspector General Act of 1978. *See also* 7 C.F.R. Part 2610 (providing for the USDA IG organization, functions, and delegations of authority). As described by the Fifth Circuit:

> An office of Inspector General is established in executive departments and executive agencies to act as an independent and objective unit "(1) to conduct and supervise audits and investigations relating to the programs and operations of [the agency]," (2) to recommend policies for "activities designed (A) to promote economy, efficiency, and effectiveness" in the agency's programs and operations, and "(B) to prevent and detect fraud and abuse" therein, and (3) to provide a means to keep the agency head and Congress informed of problems and deficiencies in the agency's programs and operations and to recommend corrective action.

Winters Ranch Partnership, 123 F.3d at 330 (citing 5 U.S.C. app. 3, § 2). To assist Inspector Generals in the performance of

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State agricultural pesticide disposal programs

By Terence J. Centner

The disposal of hazardous waste is a subject that draws public attention. Firms seeking sites for the manufacture or disposal of hazardous materials may be met by local citizen opposition referred to as NIMBY, Not in My Backyard. Inequities concerning the location of locally undesirable land uses (LULUs) have been the subject of considerable research. An environmental justice movement has exposed practices that might constitute environmental racism.

While many agricultural producers may feel that NIMBY, LULUs, and environmental justice are environmental issues that generally do not affect agriculture, it is becoming increasingly clear that the countryside has its own hazardous waste problem. Millions of tons of unwanted agricultural pesticides have accumulated over the past sixty years in thousands of barns throughout rural America.[1]

As agricultural producers and persons inheriting property from former pesticide users are storing unwanted pesticides rather than disposing of them, governments have become concerned about the environmental threat posed by these materials. The EPA adopted and revised the federal Universal Waste Rule.[2] State legislative and administrative actions have been enacted to address the disposal of unwanted pesticides.[3] Forty-six states have engaged in agricultural pesticide collection efforts to help owners of unwanted pesticides with disposing of them safely.[4]

The disposal of unwanted pesticides presents agricultural producers a challenge. Many producers are not aware of the legal requirements for disposal, and often, a convenient method for safely disposing pesticides is not readily available. Survey results of farmers from Iowa,[5] Minnesota,[6] and Vermont[7] suggest that most persons with quantities of unwanted pesticides continue to store them because of the absence of a viable disposal option. Usually, producers also are unwilling to incur the full cost of legal disposal.

Despite collection efforts in most states, producers in many areas have not had an opportunity to dispose of unwanted pesticides because of the localized and targeted nature of many collection programs. In addition, the lack of details of legal requirements and the new options available under the Universal Waste Rule have impeded more comprehensive efforts. To afford all agricultural producers possessing unwanted pesticides a disposal option, states may need to revise their programs to cut costs and increase their efforts to provide a more convenient disposal outlet.

Terence J. Centner, Professor, The University of Georgia. A more in depth analysis of these provisions may be found in volume 17:2 of the Stanford Environmental Law Journal.

Federal regulatory mandates

Federal hazardous waste regulations apply to agricultural pesticides in certain situations.[8] Hazardous wastes are solid wastes with characteristics that cause them to present special dangers or potential hazards to human health or the environment.[9] A solid waste includes discarded materials that are in a liquid or semisolid form.[10] Discarded materials include those that are abandoned, considered inherently waste-like, or qualifying recycled materials.[11] A material abandoned, by being disposed of, is a waste.

Pesticide collection programs operate within the federal statutory framework for addressing hazardous waste management. Under Subtitle C of the Resource Conservation and Recovery Act (RCRA), the EPA has promulgated regulations that identify hazardous wastes and has prescribed regulations that champion human and environmental safety. Pesticides may be disposed of pursuant to general hazardous waste regulations[12] or the special regulations for universal waste management set forth in Part 273.[13] The Universal Waste Rule of Part 273 relaxes federal law involving three categories of widely generated wastes known as universal wastes: batteries, pesticides, and thermostats.

For unwanted pesticides, the Universal Waste Rule applies to state collection programs.[14] This enables individual states to adopt state universal waste provisions to remove some barriers and expenses associated with the safe disposal of unwanted pesticides. The adoption of state universal waste provisions should expedite current efforts of providing for the safe disposal of stored unwanted pesticides.

Because of new regulations in 1995, the application of the federal universal waste regulations to pesticides is expansive.[15] Besides pesticides that have been recalled and meet qualifications as stocks of suspended and canceled pesticides, universal waste includes unused pesticide products collected and managed as part of a waste pesticide collection program. These are materials that are no longer useful for their intended purpose, including agricultural pesticides banned for use on crops or are obsolete and replaced by newer products. Unused pesticides also include damaged pesticides.

The significance of Part 273 is relaxed rules for the managing of universal wastes whereby persons, including agricultural producers taking pesticides to a collection program, do not have to meet the paper work normally required of generators disposing of hazardous waste.

With the adoption of universal waste provisions, current efforts of providing for the safe disposal of stored unwanted pesticides should be accelerated. Up to 5,000 kilograms of pesticides may be collected and transported to a destination facility without notifying the EPA, without the expense of a hazardous waste transporter, and without detailed records of the wastes.[16] Moreover, small collections of up to 5,000 kilograms may be repeated so long as there is never an accumulation of more than this amount. Thus, a program can probably provide for the collection of thousands of pounds of pesticides under the relaxed provisions of the Universal Waste Rule if there is never an accumulation above this amount.

State regulatory oversight

State pesticide collection programs for unwanted pesticides consist of household and agricultural programs. Household pesticide collection programs have defined hazardous wastes to include pesticides normally used in a household and thereby provide a means for homeowners to dispose of pesticides. An agricultural pesticide collection and disposal program is directed at unwanted agricultural pesticides. Some of these programs limit participation to farmers or others who use pesticides while other programs are not so restrictive. At least two programs accept pesticides from non-agricultural commercial businesses.

The differentiation of the types of collection programs may be significant because of the ability to exclude some unwanted pesticides. This may occur under programs in each of the two categories. The household programs may exclude agricultural producers who have large quantities of unwanted pesticides. Some agricultural collection programs exclude persons who have pesticides but are not agricultural producers.

Notable provisions of state collection programs

Governmental involvement with the disposal of pesticides is troublesome. Given the dangers associated with such materials and the potential liability if there is an accident, state pesticide collection programs operate under an extensive array of regulatory provisions. Registration, appointments, site visits, and on-site collections are key provisions that assist in facilitating the safe disposal of unwanted pesticides.

Many pesticide collection programs have required the registration of each pesticide that a person would like to have collected for disposal. Registration serves as an application procedure whereby the necessary information is made available to facilitate the orderly collection and legal disposal of unwanted pesticides. Registration generates information on the types of pesticides that need to be collected and the quantities of pesticides that end users would like to have collected. With this information, the state can determine what should be collected, given available financial resources. Registration offers an opportunity to secure additional information on the condition of containers, location of pesticides, and whether the applicant or material qualifies under the state program. Registration also provides information for the development of bid specifications for use in contracting for the disposal of the pesticides.

A variation of registration is to schedule an appointment over the phone for the delivery of an unwanted pesticide. Iowa has adopted an appointment directive as part of its Toxic Cleanup Days for the collection of pesticides and other toxic wastes.[17] During a two-week period preceding the collection, persons with unwanted pesticides call and book an appointment for the delivery of their materials. Participants deliver their materials pursuant to their appointment. The appointment means participants may be met at the collection site entrance to confirm their scheduled appointment, and directed to the appropriate collection stations or locations at the site. An appointment procedure is helpful in organizing personnel and in determining the approximate costs of each scheduled collection.

A few state pesticide collection programs have incorporated site visits and other safety features to help guarantee that the collection process does not entail a spill or an accident. Colorado included a visit to each site to determine the weight of the pesticides, the conditions of their containers, and to tag the containers for pickup.[18] With the more compete information that accompanies a program with a site visit, there should be fewer possibilities for a mishap.

Another safety measure involves on-site pesticide collection. The physical collection of accepted preregistered pesticides from their sites minimizes the chance that an accident might occur on the way to the collection site. On-site collection may also encourage participation by eligible persons due to the increased safety and security of such a program. A variation of this requirement is to make on-site collection available if needed. Most pesticide collection programs do not involve site collection because of the additional expenses of such programs.

Moving toward a permanent program

Through a survey of state pesticide collection efforts in 1996, information was gathered on the status and results of state endeavors of disposing of unwanted pesticides. The states have treated stored pesticides as a major concern and have worked hard to develop appropriate strategies to respond to this environmental issue. Simultaneously, the absence of any meaningful type of permanent legislation, funding, or program in most states exposes a major weakness. Thirty states lack statutory or administrative provisions that would establish a permanent initiative for collecting unwanted agricultural pesticides. This situation suggests that the issue of how a state might move from a temporary or targeted program to a reliable program that truly removes most accumulated pesticides is important.

The pesticide collection efforts of several states have simply consisted of targeted accumulations of unwanted pesticides, while others have scheduled collection programs based upon the availability of funding. These efforts are a reasonable beginning and may markedly reduce the potential contamination problems posed by accumulated pesticides. However, targeted programs cannot be expected to collect all on the accumulated pesticides because participation is voluntary and some people will not participate.

Moreover, targeted programs do not achieve a long-term solution for the disposal of unwanted pesticides because they do not address the continued generation of unwanted pesticides. Unused pesticides continue to accumulate whenever a producer buys more pesticides than are he or she uses. The dangers posed by unwanted pesticides cannot be completely addressed until an ongoing long-term solution is in place with regulatory guidelines and a permanent source of funding.

Concluding comments

The storage of significant quantities of unwanted pesticides has been noted as a situation that poses risks. The experiences of forty states in operating pesticide collection programs show that state programs can effectively provide for the safe removal of accumulated pesticides. At the same time, a few targeted efforts cannot be expected to eliminate the dangers of stored pesticides. The continued generation of new unwanted pesticides together with accumulated stocks that have not been collected means that a long-term approach is needed.

The analysis of the provisions of state pesticide collection programs leads to four observations. First, a temporary or targeted collection program may be appropriate to remove accumulated quantities of unwanted pesticides. Second, a state wanting to have a pesticide collection program should adopt the Universal Waste Rule. Next, given the importance of public safety, special safety features might be recognized for incorporation into a recommended response. Fourth, the institution of a long-term solution should be encouraged due to the storage of unwanted pesticides by producers who have not participated in available collection efforts and the continued generation of unwanted pesticides. As individual states gain experience and adopt implementing provisions for the Universal Waste Rule, they should contemplate instituting a permanent infrastructure to provide for the disposal of unwanted pesticides.

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[1]Margaret Jones, U.S. EPA Region 5, Agricultural Clean Sweep: Waste Pesticide Removals 1988-1992.

[2]40 C.F.R. pt. 273 (1996); 60 Fed. Reg. 25,492, 25,505-06 (1995).

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Subpoenas/*Continued from page 2*

these functions, the Act provides for broad subpoena authority. 5 U.S.C. app. 3, § 6(a)(4).

The authority conveyed to Inspector Generals under the Act is not unlimited, however. The Act expressly provides that an agency may not transfer "program operating responsibilities" to an Inspector General. *Id*. § 9(2). As explained by the Fifth Circuit, "[t]he transfer of such responsibility would not be properly related to or compatible with the function of the IG as an independent objective inspector of the agency's operations; and such a transfer would thwart, not further, the statutory design to establish the IG as a separate, independent, and objective auditor and investigator of agency operations." *Winters Ranch Partnership*, 123 F.3d at 334 (citing *Burlington Northern*, 983 F.2d at 642).

Prior to its decision in *Winters Ranch Partnership*, the Fifth Circuit had rebuffed an attempt by the Inspector General of the Railroad Retirement Board to use the subpoena authority granted by the Inspector General Act to audit the Burlington Northern Railroad. The audit was intended to determine if the railroad was properly paying the taxes it was required to pay to fund employee benefit programs administered by the Railroad Retirement Board. *Burlington Northern*, 983 F.2d at 631. Though the Railroad Retirement Board had the authority to investigate whether railroads were properly paying their taxes, the Board had never done so. Instead, the Board had relied on audits conducted by the Internal Revenue Service. *Id*., 983 F.2d 633-34.

Concerned about the adequacy of the Board's reliance on IRS audits to ensure tax payment compliance, the Board's Inspector General began auditing the railroads. When the Inspector General subpoenaed the records of Burlington Northern, the railroad challenged the Inspector General's authority on the grounds that the audit was an improper exercise of regulatory authority rather than a proper exercise of oversight authority under the Inspector General Act. *Id*., 983 F.2d at 636. The Inspector General subsequently claimed that he was only exercising oversight authority, but the district court agreed with Burlington Northern.

In affirming the district court, the Fifth Circuit agreed with the district court's finding that the Inspector General's plan "was not to conduct 'spot checks' of railroads like Burlington Northern, but rather, to assume a regular auditing function to detect tax noncompliance and to perhaps assume a tax collecting function." *Id*., 983 F.2d at 640. The Fifth Circuit then held the Inspector General Act did not authorize the Inspector General "to issue a subpoena in aid of a regularly scheduled tax compliance audit of a railroad company" because such "regulatory compliance investigations or audits" are solely within the province of the agency and are not to be carried out directly by the agency's Inspector General. *Id*. 983 F.2d at 640-41.

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[3]Fla. Stat. Ann. § 403.7264 (1996); Hawaii Rev. Stat. § 149A-13.5 (Supp. 1996); Idaho Code § 22-3423 (1996); Idaho Admin. Procedures Act, rule 02.03.03.850 (1994); 415 Ill. Comp. Stat. Ann. §§ 60/19.1 (1997); Iowa Code Ann. §§ 455B.488, 455F.8 (1990); Ky. Rev. Stat. Ann. § 224.10-610 (1996); Md. Code Ann., Env. §§ 9-1801, 9-1802 (1996); Mich. Com. Laws Ann. §§ 324.8307, 324.8715, 324.8716 (1996); Minn. Stat. Ann. §§ 18B.065, 18B.26 (1996); Minn. R. 1509.0020 (1997); Miss. Code Ann. §§ 69-23-301 to -313 (1996); Mont. Code Ann. §§ 80-8-111 to -213 (1995); 1997 Mont. Laws 42; Nev Rev. Stat. § 586.270 (1995); Nev. Admin. Code § 586.011 (1993); N.D. Century Code § 19-18-04 (1995); 1997 N.D. S.B. 2083; N.C. Gen. Stat. § 143-468(b) (1996); 1997 N.C. Sess. Laws 261; Or. Admin. R. 340-113-070 (1991); Pa. Code, tit. 7, §§ 128b.1 to .18 (1993); S.D. Codified Laws §§ 38-20A-54 to -55 (Michie 1996); Vt. Stat. Ann. tit. 6, §§ 918, 1103, 1104 (1996); Wash. Rev. Code Ann. § 15.58.045 (1993); Wash. Admin. Code §§ 16-228-157 to -160 (1996); Wis. Admin. Code ATCP 34.01 to .09 (1992).

[4]See Charles P. Cubbage, Mich. Dep t of Agric., State Agricultural Pesticide Collections Survey 1 (1996).

[5]Roy D. DeWitt, Iowa Dept. of Nat. Resources, Household Hazardous Materials Toxic Cleanup Days 26 (January 1997).

[6]Joseph Spitzmueller, Minn. Dept. of Agric., 1994 Report of Waste Pesticide Collection in Minnesota 31 (January 1995).

[7]Allen Karnatz, Vt. Dept. of Agric., Food & Markets, Obsolete Pesticide Disposal Project 18 (October 1991).

[8]E.g., 40 C.F.R. pt. 273 (1996).

[9]42 U.S.C. § 6903(5) (1994).

[10]42 U.S.C.A. § 6903(5) (1995 & Supp. 1997).

[11]40 C.F.R. § 261.2(a) (1996).

[12]Id. pts. 260 279.

[13]Id. pt. 273.

[14]Id. § 273.3(a)(2).

[15]60 Fed. Reg. 25,492, 25,505-06 (1995).

[16]See 40 C.F.R. § 273.6 (1996).

[17]DeWitt, supra note 5, at 5.

[18]Karen L. Panter, Colo. State Univ. Coop. Extension, Northern Colorado Front Range Pesticide Recovery Program, Project Final Report 1 (June 28, 1996).

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Uniform Commercial Code—Article Seven

Kershen, *Article 7: Documents of Title —1996 Developments*, 52 The Bus. Law. 1565-1573 (1997).

General

Murray, *Liability of the State and Its Employees in the Mishandling of Security Interests Under Commercial Codes and Motor Vehicle Laws*, 51 U. Miami L. Rev. 1109-1154 (1997).

Water rights: agriculturally related

Rivera, *Irrigation Communities of the Upper Rio Grande Bioregion: Sustainable Resource Use in the Global Context*, 36 Nat. Resources J. 491-520 (1996).

Stephenson, Groundwater Management in Nebraska: Governing the Commons Through Local Resource Districts, 36 Nat. Resources J. 521-538 (1996).

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—Drew L. Kershen, Prof. of Law, The Univ. of Okla., Norman, OK

Federal Register *in brief*

The following selection of items were published in the *Federal Register* from December 23, 1997-January 20, 1998.

1. Farm Service Agency; Dairy Indemnity Program; final rule; effective date 12/31/97. 63 Fed. Reg. 68142.

2. IRS; Estate and gift tax; disclaimer of interests and powers; final regs.; effective date 12/31/97. 63 Fed. Reg. 68183.

—Linda Grim McCormick, Alvin, TX

SUBPOENAS / C*ontinued from page 6*

For the district court in *Winters Ranch Partnership*, the subpoenas issued by the USDA IG to the members of the Winters Ranch Partnership squarely fell within the scope of Fifth Circuit's decision in *Burlington Northern*. The partners had participated in the wool and mohair program in the 1991-93 marketing years. In 1994, the IG requested various records relating to the partners' participation in the program. The request followed notification by the IG to the partners that their farming operation was being audited. The audit was expressly characterized as a "'payment limitation review'" to determine whether their farming operation was carried out as represented to the predecessor agency of the CFSA, the ASCS. *Winters Ranch Partnership*, 901 F. Supp. at 238-39.

Shortly after the IG initiated its audit of the partners, the CFSA requested most of the same records in connection with an end-of-year payment limitation review it was conducting. Such payment limitation reviews were regularly conducted by the CFSA and its predecessor, the ASCS, as part of their farm program administration responsibilities. *Id*.

After providing some of the requested records to the IG, the partners refused to cooperate further. The IG then issued administrative subpoenas. The members of the partnership brought an action seeking to have the subpoenas declared unlawful. *Id*.

The IG defended the subpoenas by arguing that the audit was an "oversight" audit and by pointing to "boiler-plate" recitations in the subpoenas asserting that they were issued to further the functions given to the IG in the Inspector General Act. The district court, however, dismissed these contentions as post hoc rationalizations. It found that the "undisputed evidence" established that IG's audit was of a "regulatory, rather than oversight, nature," and was thus analogous to the audit in *Burlington Northern*. *Id*., 901 F. Supp. at 242. The district court also concluded that the IG's review was being conducted pursuant to "long-term regulatory plan," which also brought it within the scope of *Burlington Northern*. *Id*. On these grounds, the district court refused to enforce the subpoenas.

The IG appealed to the Fifth Circuit, which found the facts in the record before it were distinguishable from the facts of *Burlington Northern*. Indeed, the Fifth Circuit's findings as to the material facts differed sharply from those of the district court.

According to the Fifth Circuit, the IG was only conducting a "'spot check'" of the partners' payment limitation compliance. The IG was not implementing a "'long-term regulatory plan,'" as the district court had found. *Winters Ranch Partnership*, 123 F.3d at 335-36. As explained by the Fifth Circuit, the IG had selected six wool and mohair producers for an audit to determine to what extent, if any, the six producers had defrauded or abused the program. As to this and other purposes of this "spot check," the Fifth Circuit's view of the facts again differed from the findings of the district court. The district court had found that the audit's purpose was limited to the producers' compliance with the payment limitation rules. It had rejected the IG's claim that the ultimate purpose of the audit was to assess the agency's performance as a post hoc rationalization. The Fifth Circuit, on the other hand, found that the purpose of the IG's audit was not limited to determining whether the producers had complied with the payment limitation rules. It concluded that oversight of the agency was, in fact, the audit's ultimate purpose. *Id*., 123 F.3d at 333.

The Fifth Circuit also found no legal significance in the fact that both the IG and the CFSA were contemporaneously seeking virtually the same records. It characterized the IG's actions as duplicating no more than the investigatory techniques of the CFSA and found that neither the Inspector General Act nor *Burlington Northern* barred the IG from "emulating" the investigatory techniques of the CFSA. *Id.*, 123 F.3d at 334-35.

As to whether an impermissible transfer of functions had occurred from the agency to the IG, the Fifth Circuit opined that "no transfer of function can occur simply because the IG emulates a function normally performed by the agency as part of the IG's own independent investigation." *Id.*, 123 F.3d at 334. As explained by the Fifth Circuit, for a transfer of function to occur, "the agency would have to relinquish its own performance of that function." *Id*. (citing *Burlington Northern*, 983 F.2d at 642). Here, according to the Fifth Circuit, "the IG did not assume, and the CFSA did not cede, any of the agency's program operating responsibilities." Rather, in the court's words, the IG was conducting a "'spot check'" of six producers; the IG was not filling a "void left by the CFSA in primary agency program administration"; and the "purpose of the IG's investigation was to test the effectiveness of the agency's discharge of program operating responsibility as the Act authorizes and as this court clearly indicated an IG may do in *Burlington Northern*!" *Id*., 123 F.3d at 335. Summing up its assessment of the facts, the Fifth Circuit concluded that "[t]he record does not support the district court's inferences that the IG's investigation usurped the agency's program operating responsibilities, was long-term, or was not being conducted for legitimate purposes under the Act as represented by the IG." *Id*., 123 F.3d at 335.

In *Winters Ranch Partnership*, the Fifth Circuit clearly limited the rule of *Burlington Northern* to its facts, facts that it found were "crucially different" from those before it. *Id*. Nonetheless, in their Suggestion For Rehearing En Banc, the Winters Ranch Partnership argued that the Fifth Circuit's decision "eviscerated" its holding in *Burlington Northern*, noting that "it is difficult to imagine any case in which an IG could not justify the duplication of *any* agency function by simply stating that the overall purpose of taking on the agency's responsibility was to perfect the IG's oversight of the agency." Suggestion for Rehearing En Banc, at 8. The court, however, was not persuaded. It denied the Partnership's Suggestion For Rehearing En Banc and Petition For Panel Rehearing on December 2, 1997.

— *Christopher R. Kelley, Hastings, MN*

1998 Ag Outlook Forum dates

Agriculture Secretary Dan Glickman announced Agricultural Outlook Forum 98 will take place Feb. 23 and 24, 1998, at the Omni Shoreham Hotel in Washington, D.C.

The forum will open Monday, Feb. 23, with addresses by senior Agriculture Department officials and an overview of global agricultural prospects and major issues facing U.S. agriculture. Government and industry analysts will forecast 1998 commodity prospects and USDA will release new long-term commodity projections to the year 2007.

Focus sessions planned for the two-day meeting include risk management, food safety, acceptance of genetically modified products, and conservation programs. Market-expanding techniques such as niche and direct marketing, winning export strategies, and opportunities for small farms also will be featured.

Preregistration is required to attend. To request program and registration details, call 202-720-3050, send e-mail to agforum@OCE.USDA.gov, or write to Outlook Forum 97, Room 5143 South Building, USDA, Washington, D.C. 20250-3812. Complete details area also available on the World Wide Web at <http://www.usda.gov/oce/waob/agforum.htm>.

The Omni Shoreham Hotel is located at 2500 Calvert St., N.W., Washington, D.C. Call 202-234-0700 for room reservations.

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Pat, The Fireside is on for Friday! 7 P.M. at my house. The only thing I want to include in your presentation is the video on the Indian House of Worship. I would like to use it as an example of how the principles of the Faith in application can unite divergent faiths. Beyond that, the only thing I can tell you is that the people Jim has invited have some apparently genuine curiousity about all religions. Please call me and let me know what direction you want to take so I can be thinking along those lines too. Will Randy be able to come? What about the kids?? We could have the kids attend or they could go out to the camper and play games or watch TV.

Fax me back when you can. This is our most efficient way of communicating, isn't it.

Love,
Linda

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