Agricultural Law Update

VOLUME 3, NUMBER 6, WHOLE NUMBER 30 MARCH 1986

Official publication of the American Agricultural Law Association

INSIDE

IN FUTURE ISSUES

Laws too gentle are seldom obeyed; too severe, seldom executed.

— *Benjamin Franklin*

FmHA impacted by 1985 Farm Bill

The Food Security Act of 1985, Public Law 99-198, contains a number of sections that impact the Farmers Home Administration's (FmHA) lending and loan servicing practices. Certain key sections are summarized in this article.

Financially distressed FmHA borrowers will be particularly interested in certain new relief measures. Section 1318 provides that the Secretary of Agriculture may acquire from a FmHA borrower an easement for conservation, recreational and wildlife purposes over wetland, upland or highly erodible land.

The term of the easement must be for not less than 50 years, and the purchase price is to be applied to reduce the grantor's FmHA loan. This program cannot be made available for loans made after enactment of § 1318.

Section 1315 largely resolves a problem that emerged with the injunction in *Coleman v. Block*. The FmHA has taken the position that the injunction does not impact cutoffs of releases of normal income security where the borrower's Farm and Home Plan has expired. Section 1315 indicates that until acceleration of a loan, the Secretary *shall* release from normal income security an amount sufficient to pay the essential household and farm operating expenses of the borrower "as determined by the Secretary."

At § 1254, the Secretary is given discretion to establish a program that would allow "distressed" FmHA borrowers to convert to a softwood timber crop not less than 50 acres of "marginal" land previously used for crops or pasture.

FmHA loans secured by such land (not to exceed $1,000 per acre) may be deferred until the timber crop produces revenue or for a term of 45 years — whichever comes first. Total repayment must be completed not later than 50 years after reamortization.

Section 1320 establishes an interest rate reduction program for FmHA guaranteed loans (contrast direct and insured loans). Lenders who agree to reduce the interest rate on a guaranteed loan will be entitled to a limited reimbursement from the Agricultural Credit Insurance Fund. In a related matter, § 1319 provides for partial loss claim payments to guaranteed lenders prior to the completion of the liquidation process.

(continued on next page)

PCAs and other chameleons

Two recent federal cases illustrate the special status of Farm Credit System institutions as federal instrumentalities. Production Credit Associations (PCA) and Federal Land Bank Associations (FLBA) have sought characterization as private institutions to free themselves from the restraints on the exercise of administrative discretion imposed on federal agencies.

As federal instrumentalities, however, PCAs and FLBAs have also enjoyed immunity from punitive damages.

In *U.S. v. Haynes*, 620 F.Supp. 474 (D.C. Tenn. 1985), defendant, president of the Springfield, Tenn. PCA, sought dismissal of indictments on mail fraud, conspiracy to commit mail fraud, and criminal conflict of interest arising from an alleged scheme to defraud farmers who had guaranteed the repayment of funds borrowed by the Blanton Smith Corp.

The court dismissed the criminal conflict of interest indictment brought under 18 U.S.C. § 208. This provision imposes penalties on employees of the executive branch, independent federal agencies and officers, and directors and employees of the Federal Reserve Bank if they participate in a government decision in which they have a present or prospective financial interest.

Haynes argued, and the court agreed, that PCAs were *not* independent agencies of the federal government. The court noted conflicting case law on this issue. *Schlake v. Beatrice Production Credit Association*, 596 F.2d 278 (8th Cir. 1979), finding a pervasive federal involvement in the creation and operation of PCAs; *Matter of Sparkman*, 703 F.2d 1097 (9th Cir. 1983), PCAs are federal instrumentalities immune from punitive damages; *Birbeck v. Southern New England Production Credit Association*, 606 F.Supp. 1030 (D. Conn. 1985), system institutions are privately owned entities subject to state law; *Bowling v. Block*, 602 F.Supp. 667 (S.D. Ohio 1985), PCA as non-federal defendant.

(continued on next page)

1985 FARM BILL

CONTINUED FROM PAGE 1

For distressed borrowers who are unable to salvage their situation using existing servicing devices (coupled with the new measures described above), the Food Security Act of 1985 does add several measures of final relief.

Section 1321 allows a FmHA borrower undergoing voluntary or involuntary liquidation to apply to retain possession and occupancy of the principal residence and a reasonable amount of the adjoining land for family living purposes. Certain eligibility requirements must be met, but if homestead protection is forthcoming, it can extend for up to five years, and during that time, rent must be paid.

In the end, the former borrower has the right of first refusal to reacquire the homestead, possibly on an installment land contract. It is important to emphasize that this protection is not automatic, and that the borrower must apply for it.

Section 1309 states that FmHA borrowers may be released from personal liability with or *without* payment of consideration at the time of claim settlement, so long as the settlement terms are no more favorable than those recommended by the county committee, as well as if certain other conditions are met. This provision clarifies previous claim settlement procedure.

The Food Security Act of 1985 contains a number of provisions that will be of interest to FmHA borrowers generally. Section 1302 provides that the Secretary is *not* permitted to restrict eligibility for farm ownership loans and operating loans to borrowers holding outstanding loans on the date of enactment of the Food Security Act of 1985.

Section 1307 changes the past practice that has required virtually all operating loan funds to be placed in a supervised bank account. Now, 10% of the proceeds of such a loan, or $5,000 (whichever is less), is to go into a *non-supervised* bank account, for use at the borrower's discretion for necessary family needs, or for purposes not inconsistent with the previously agreed upon plan of farm or ranch operations.

To the delight of certain small farm advocates, § 1308 limits eligibility for emergency disaster (EM) loans to "not larger than family farms." Also, except as to crops planted or harvested before the end of 1986, the EM loans are not to be available where the loss could have been insured under federal crop insurance coverage.

A qualifying provision provides that eligibility for EM loans is not lost, however, where the producer has been prevented from planting a crop due to flood, drought or natural disaster — notwithstanding the fact that the producer could have taken out federal crop insurance. The individual EM loan ceiling is $500,000, or the actual loss, whichever is less.

In an effort to make county committees more responsive to local conditions, § 1311 provides that two members of the three-member FmHA county committee must be elected from their number, by farm operators living in the area. One member will still be appointed by the Secretary. This changes 7 U.S.C. § 1982(a), which had provided that all members be appointed by the Secretary.

Section 1312 seeks to insure prompt action on loan applications and loan guarantee applications. Not later than 20 days after the initial application is received, the Secretary is to inform the applicant if some aspect of the application is in-

Agricultural Law Update

VOL. 3, NO. 6, WHOLE NO. 30 MARCH 1986

AALA Editorial Liaison: Donald B. Pedersen, University of Arkansas

Editor: Nancy Harris, Century Communications Inc.

Contributing Editors: John H. Davidson, University of South Dakota; Kenneth J. Fransen, Baker, Manock and Jensen; Neil D. Hamilton, Drake University; Annette Higby, University of South Dakota; Phillip L. Kunkel, Moratzka, Dillon & Kunkel; J.W. Looney, University of Arkansas; Donald B. Pedersen, University of Arkansas.

State Reporters: John C. Becker, Pennsylvania; Annette Higby, Nebraska; Bruce McMillen, Colorado; James H. Simpson, Mississippi.

For AALA membership information, contact Terence J. Centner, University of Georgia, 315 Conner Hall, Athens, GA 30602.

Agricultural Law Update is owned exclusively by **Century Communications Inc.** and published in conjunction with the American Agricultural Law Association. Publication office: Century Communications Inc., 5520-G Touhy Ave., Skokie, IL 60077; (312) 676-4060. Philip C. Miller, president, Marilyn M. Miller, vice president; Lynn O. Henderson, vice president; Christine A. Waligorski, secretary.

PCAs AND OTHER CHAMELEONS

CONTINUED FROM PAGE 1

Haynes argued that the PCA's position within the Farm Credit System was analogous to national, federally chartered banks in the Federal Reserve System. National banks are federally chartered instrumentalities. They are not, however, independent agencies of the United States. Without much discussion, the court found this comparison to be "well founded."

Haynes argued further that the mail fraud indictments should be dismissed because the confidentiality provisions of the Privacy Act (5 U.S.C. § 522a) imposed upon him an obligation not to disclose information allegedly unlawfully withheld from the farmer guarantors. Drawing on its earlier analogy to national banks within the Federal Reserve System, the court held the PCA was not a federal agency subject to the Privacy Act.

In *Smith v. Russellville Production Credit Association*, 777 F.2d 1544 (11th Cir. 1985), claims of farmers brought against their PCA for failure to implement the young, beginning and small farmer and rancher program (12 U.S.C. § 2207 (a)) and for failing to provide a means of forbearance for cooperative borrowers in default (12 C.F.R. § 614.4510 (d) (1)) were dismissed.

The court could discern no legislative intent to provide a private right of action under the Farm Credit Act, which did not impose an affirmative duty on the PCA to implement these provisions. The forbearance regulation was merely a statement of policy, was not a substantive rule, and was without the force and effect of law. In this respect, the court disapproved of *DeLaigle v. Federal Land Bank of Columbia*, 568 F.Supp. 1432 (S.D. Ga. 1983), which held otherwise.

The plaintiffs' pendant state claims for fraudulent misrepresentation and wrongful foreclosure survived. The court, however, held that the PCA could not be held liable for the punitive damages requested in connection with these claims.

Punitive damages cannot be recovered from the United States or its agencies. Despite the PCA's private characteristics, the court said, PCAs remain federal instrumentalities operated pursuant to congressional mandate. Even though a punitive damage award would not be paid out of the federal treasury, it would, nevertheless, undercut a government mission of channeling credit to farmers.

Of course, it remains to be seen whether courts will recharacterize Farm Credit System institutions as independent federal agencies in light of changes in structure wrought by the Farm Credit Act Amendments of 1985, P.L. 99-205. *See* Davidson, Highlights of Farm Credit Act Amendments of 1985, 3 *Agricultural Law Update* 1 (February 1986).

— *Annette Higby*

complete. Within 60 days after an application is complete, there is to be action on the request. In the case of loan approval, loan funds are to be dispersed within 15 days after approval.

Section 1313 provides that an applicant for a loan or loan guarantee who suffers an adverse decision is to be given written notice of that decision not later than 10 days after the fact. The notice must describe the opportunity for an informal meeting as well as the procedure for administrative appeal.

This section also mandates a study of the FmHA appeals procedure, including a study of the feasibility of the use of administrative law judges in the appeals process.

Section 1325 prohibits the use of the "coordinated financial statement" that has received some recent publicity. Section 1329 mandates that the Secretary conduct a study of the appropriateness of the current Farm and Home Plan (Form FmHA 431-2) A report is due no later than 120 days after the date of enactment.

New provisions are included at § 1305, with respect to the use of mineral rights as collateral and at § 1310, as to payments to the FmHA from oil and gas royalties.

Of particular interest to limited resource borrowers is § 1306, which provides for the funding of training in farm and ranch recordkeeping for such borrowers.

Section 1314 will be of general interest to rural communities because of its governing disposition and leasing of farmland. First, the FmHA is not to sell or offer for sale farmland if there will be a detrimental effect on the value of other farmland in the area.

Second, when sales do occur, priority is to be given to properties not larger than family-sized farms.

Third, the FmHA is authorized to lease with option to purchase, with special consideration being given to the former owner if a reasonable prospect of success is demonstrated. The sale may be on an installment land contract.

Finally, § 1314 sets forth certain rules on the subdivision of farmland.

While there are additional FmHA provisions in the Food Security Act of 1985, this summary touches on most of them. Many of the provisions discussed herein will be implemented by regulation, and, therefore, it can be anticipated that there will be a great many pages of new regulatory material to contend with in the near future.

— Donald B. Pedersen

FmHA rewrites regs dealing with real estate management

The avalanche of revised Farmers Home Administration (FmHA) regulations continued with publication on Feb. 3, 1986 of a final rule in 51 Fed. Reg. 4132 (1986). The revision deals with all parts of FmHA rules which describe the various aspects of managing real estate security.

General topics covered in the revision include: 1) Treatment of mineral leases and royalty income; 2) Methods of notifying borrower of decision to accelerate; 3) Effect of prior liens upon the FmHA's decision to foreclose; 4) Treatment of real property which the FmHA determines is abandoned; 5) Effect of foreclosure by junior lienholders; 6) Sale or other transfer subject to FmHA liens; 7) Agency consent to junior lien financing; and 8) Procedures for voluntary and involuntary liquidation.

The new rules require that before the agency can pursue liquidation or acceleration of a borrower's note, any appeal must first be concluded. 51 Fed. Reg. 4149 (1986) (to be codified at 7 C.F.R. § 1965.26).

— John H. Davidson

Corporate owned farm exempt

Traditionally, an individual is entitled to certain exempt property which cannot be reached by judgment creditors. The extent of such exemptions varies from state to state. Among the usual requirements for claiming such an exemption is that the individual own the property claimed as exempt.

However, the Minnesota Supreme Court recently held that the individual shareholder of a family farm corporation is entitled to a homestead exemption in her 80-acre rural homestead, despite the fact that it is owned by the corporation.

In *Cargill Inc. v. Hedge*, 375 N.W.2d 477 (Minn. Sup. Ct., 1985), the court allowed the sole shareholder of a family farm corporation to "reverse pierce" the corporate veil for purposes of establishing her entitlement to an 80-acre rural homestead exemption.

According to the court, the corporation was operated as the alter ego of the individual. The corporate owned real estate served as the home of the sole shareholder, her husband and family. There was no lease between the corporation and the individuals who operated it, and none of the corporate officers (the shareholders) received any salary from the corporation.

In addition, the court pointed to a strong policy in favor of protecting the home of an individual as a "sanctuary." Finally, the court noted that the legislature had allowed the corporate owned property to be classified as a homestead for real estate tax purposes, where a shareholder occupied and actively farmed the land.

For all of these reasons, the court disregarded the corporate entity and treated the corporate owned farm as if owned by the farm couple. The farm couple were covendees under a contract for deed that had been assigned to the corporation.

As a result, an execution sale which had previously been held (pursuant to a judgment obtained against the non-shareholder spouse) was set aside as to the exempted 80 acres.

— Phillip L. Kunkel

Federal marketing order: Handlers, not producers, have standing to sue

Producers of naval oranges brought suit to compel the Secretary of Agriculture to terminate the federal naval orange marketing order. The order limits, among other things, the percentage of the total crop that may be marketed.

In *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985), the Court of Appeals ruled that since the Agricultural Marketing Act gave handlers, and not producers, the right to challenge the Secretary's actions, the producers had no standing to bring suit.

The Court determined that handlers' interests were closely enough aligned with those of producers that the handlers could fairly represent the producers in any administrative or judicial proceeding.

— Kenneth J. Fransen

Selenium

The Bureau of Reclamation's Task Group on Irrigation Drainage has carried out a study of selenium in western soils, and has identified evidence of abnormally high concentrations of selenium in soils and organisms of 18 of 23 Western areas sampled. 16 BNA Environment Reporter, Current Developments 1627 (Dec. 20, 1985).

— John H. Davidson

Regulations affecting importation of animal embryos*

by J.W. Looney

Embryo transfer technology signals only the beginning of what may become a genetic revolution in livestock agriculture. Embryo transfer offers the opportunity to increase the number of offspring from genetically superior female animals and to rapidly change the genetic makeup of a herd. More advanced techniques of embryo splitting and sexing may also contribute to rapid genetic changes in domestic animals.

These techniques are not nearly as sophisticated as the other biotechnologies (generally referred to as genetic engineering), which may involve the cutting, cloning or splicing of genetic material or the transfer of genes from one biological source to another.[1]

In addition to the possible evolutionary changes in domestic animals by the application of this technology, such techniques may have practical application in the development of new hybrids, drug products, enzymes, and any number of other biological products.[2]

Even though genetic engineering techniques are still generally experimental, the technique of embryo transfer has moved from the confines of the laboratory to the farm, particularly in the area of cattle breeding. Embryo transfer techniques offer a commercially viable application of new technology.

The process of embryo transfer has the potential of significantly increasing the genetic contribution of outstanding female animals much to the same extent as artificial insemination increases the contribution of male animals with preferred genetic makeup. Dramatic growth of an entire industry has occurred since the first commercial application of embryo transfer in the mid-1970s.

Up until 1973, there were no more than 20 successful embryo transfers reported.[3] Today, however, it is estimated that over 100,000 such pregnancies may occur per year by non-surgical techniques.[4]

With the development of the technology for freezing cattle embryos, a new international market is developing for genetic material in this form. Embryo transfer applications in the international market include more rapid herd expansion, faster adoption of desired genetic characteristics, development of new breeds, or improvement of native cattle.

J.W. Looney is Dean of the University of Arkansas School of Law. He teaches a course in government regulation of agriculture in that law school's Graduate Agricultural Law Program.

The importation and exportation of embryos can be accomplished at much lower costs than those incurred when shipping live animals.[5] Some research indicates that embryos are unlikely to transmit disease, thus reducing health risks present in live shipments.[6] At the same time, there is also evidence to indicate that embryos are capable of transmitting diseases, so the U.S. Department of Agriculture (USDA) has felt it necessary to issue regulations relating to importation of embryos.[7]

Since the USDA is authorized to regulate the importation and exportation of animals and animal products (in part to prevent the introduction and dissemination of disease),[8] this regulatory authority presumably extends to the import and export of embryos. The general authority of the USDA is designed to offer protection to animals in the United States against infectious or contagious diseases.[9]

The Secretary of Agriculture is given broad authority to make regulations and to undertake such measures as may be deemed proper to prevent the introduction and dissemination of contagious, infectious or communicable diseases.[10] If the Secretary determines that rinderpest or foot-and-mouth disease exists in any country, the importation of "cattle, sheep, or other ruminants, or swine, or of fresh, chilled, or frozen meat of such animals" is prohibited except in limited circumstances.[11]

In addition to the authority to regulate importation, the Secretary is authorized to inspect animals intended for export[12] and to take such steps and adopt such measures as are necessary to prevent the exportation of livestock or poultry affected with contagious, infectious, or communicable diseases.[13]

The USDA, through the Veterinary Services, Animal and Plant Health Inspection Service (APHIS), has issued detailed regulations to carry out the delegated authority. The regulations cover the importation of live animals,[14] the importation of animal products,[15] the importation of animal by-products,[16] the exportation of live animals,[17] the interstate movement of animals,[18] as well as various indemnity programs.[19] APHIS has now adopted final rules, effective Nov. 25, 1985, regulating the importation of embryos in order to protect animals in the United States.[20]

Under the embryo importation regulations, it is recognized that any transmission of disease by the embryo would have to come either from an infected sire or dam or from contamination during or after collection. Thus, the new regulations focus on control at these crucial times in the embryo transfer process.

The regulations prohibit the importation of embryos unless both the donor sire and the donor dam would have met all the requirements for a health certificate under the general importation regulations.[21] A health certificate, issued by a full-time, salaried veterinarian of the national animal health service of the country of origin, or signed by a veterinarian authorized by the national animal health service of the country of origin and endorsed by a salaried veterinarian of that country's animal health service, must accompany the embryo.[22]

In addition, the embryo must come into the United States from the country in which it was conceived.[23] The regulations further restrict the importation of embryos to those conceived as a result of artificial insemination with semen collected at an "approved artificial insemination center" or those conceived as a result of natural breeding by a donor sire at an "approved embryo transfer unit,"[24] and to those where the dam conceived after it was inseminated in an "approved embryo transfer unit" with semen collected at an "approved artificial insemination center."[25]

These provisions are designed to provide added protection against animal disease since such facilities must, by definition, meet the approval and licensing standards of the countries in which they are located.

Importation can be prohibited if there is some basis for denying an import permit under certain existing regulations.[26] These regulations deny import permits for domestic ruminants or swine from countries where: 1) rinderpest or foot-and-mouth disease has been determined to exist;[27] 2) communicable disease conditions exist in the area or country of origin;[28] 3) there are deficiencies in regulatory programs for disease control;[29] 4) the importers fail to provide evidence of the appropriate health status;[30] and 5) there is a general lack of information that the importation will not be likely to transmit any communicable disease.[31]

Apparently, exceptions to importation restrictions ranging from those applicable to rinderpest and foot-and-mouth disease countries to those regarding semen import[32] or live animal import through the Harry S Truman Animal Import Center,[33] would not be applicable to embryo transfers from such countries under the regulations. This creates an "unacceptable risk of causing the introduction of infectious animal diseases into the United States."[34]

The final regulations, however, do provide an alternative. Section 98.10 states that

the USDA may "in specific cases allow the importation and entry into the United States of embryos other than as provided for in this part under such conditions as the Deputy Administrator may prescribe to prevent the introduction into the United States of infectious animal diseases."[37]

Two technical requirements appeared in the final regulations following a hearing and the receipt of comments on the proposed regulations. The embryo must, at the time it was placed into its shipping container (straw or ampule), have an intact zona pellucida determined by microscopic examination.[38] This will help ensure that no bacterial or viral contamination of the embryo has occurred.[39]

Second, the embryo must be in a shipping container which is sealed with an official seal affixed by a full-time, salaried veterinarian of the national animal health service of the country of origin, or by a veterinarian authorized to do so by the country of origin.[40] This is to help ensure that the container has not been tampered with during shipping.[41]

In order to import embryos into the United States, all of the regulations outlined above must be met. In addition, the embryo must be accompanied by an import permit which specifies a proposed date of arrival. The importation must occur within 14 days of the date stated on the permit.[42]

The import permit is available upon application to: Import-Export Animals and Products Staff, Veterinary Services, APHIS, USDA, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.[43]

The application for the permit must include the following information:

1. The name and address of the person intending to export an embryo from the country of origin
2. The name and address of the person intending to import an embryo
3. The species, breed and number of embryos to be imported
4. The purpose of the importation
5. The county in which the embryo is conceived
6. The port of embarkation
7. The mode of transportation
8. The route of travel
9. The port of entry in the United States
10. The proposed date of arrival in the United States
11. The name and address of the person to whom the embryo will be delivered in the United States
12. The measures taken to ensure that the embryo is collected and maintained under conditions adequate to protect against contamination of the embryo with infectious animal disease organisms.[44]

Embryos may only be imported into the United States at ports of entry designated for the general importation of animals and birds.[45]

While it is not entirely clear how embryos can be imported in all circumstances, the new regulations make it possible to bring new genetic stock into the United States more conveniently than by means of live animal importation.

On the other hand, the regulations make no provision for the regulation of the exportation of embryos from the United States. Existing exportation provisions are designed only for the regulation of live animal exports.[46]

Footnotes

*For a review of various legal issues relating to embryo transfer, see Looney, *Emerging Legal Issues Associated with the Application of Embryo Transfer Technology in Livestock Agriculture*, 34 Drake L. Rev. 321 (1985). The discussion in Section V.B., p. 353-355, of that article was based upon proposed regulations relating to embryo importation. Those regulations were finalized as modified in 50 Fed. Reg. 43560-43564 (Oct. 25, 1985) (to be codified at 9 C.F.R. Part 98). This article is an update of that section, and otherwise, draws upon the original article.

1. Jones, *Genetic Engineering in Domestic Food Animals, Legal and Regulatory Considerations*, 38 Food, Drug Cosm. L.J. 273 (1983).
2. *Some Wild Happenings in Embryo Research*, Progressive Farmer, Sept. 1984 at 6; Mapletoft, *General Updating of Status of Embryo Transfer*, Angus J., Sept. 1983 at 66.
3. Humes & Godke, *Genetic Impact of Embryo Transfer in Beef Cattle* in Proceedings of the Annual Conference on Artificial Insemination and Embryo Transfer in Beef Cattle 38 (The National Association of Animal Breeders and the International Embryo Transfer Society, Denver, Colo., Jan. 12, 1985).
4. *Id.*
5. Mapletoft, *supra* n.2 at 67.
6. *Id.*
7. Supplementary Information, 49 Fed. Reg. 41257 (1984).
8. 21 U.S.C. §§ 104-49 (1982).
9. *Id.* § at 111.
10. *Id.*
11. 19 U.S.C. § 1306 (1982). *See also* 21 U.S.C. § 135 (1982) which permits entry after quarantine in a special facility.
12. 21 U.S.C. § 105 (1982).
13. *Id.* at § 113.
14. 9 C.F.R. § 92 (1985).
15. *Id.*
16. *Id.* at §§ 95-96.
17. *Id.* at § 93.
18. *Id.* at §§ 71-83.
19. *Id.* at §§ 50-57.
20. The proposed regulations were issued on Oct. 22, 1984, 49 Fed. Reg. 41257-41261 (1984). Final regulations were issued Oct. 25, 1985 in 50 Fed. Reg. 43560-43564 (1985) (to be codified at 9 C.F.R. Part 98). Hereinafter, the final regulations will be cited as they will appear in the pending 1986 codification of C.F.R., Title 9.
21. Supplementary Information, 50 Fed. Reg. 43560 (1985).
22. 9 C.F.R. § 98.3(d), (e) (1986).
23. 9 C.F.R. § 98.5 (1986).
24. 9 C.F.R. § 98.3(a) (1986).
25. 9 C.F.R. § 98.3(b) (1986).
26. 9 C.F.R. § 98.3(c) (1986).
27. Supplementary Information, 50 Fed. Reg. 43561.
28. 9 C.F.R. § 98.3(f) (1986). This regulation refers to 9 C.F.R. § 92.4(a)(2) or (3).
29. 9 C.F.R. § 92.4(a)(2) (1985).
30. *Id.* at § 92.4(a)(3).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at § 92.4(d).
35. *Id.* at § 92.41.
36. Supplementary Information, 49 Fed. Reg. 41258 (1984). This restriction was not changed in the final regulations. *See* Supplementary Information, 50 Fed. Reg. 43561 (1985).
37. 9 C.F.R. § 98.10 (1986).
38. 9 C.F.R. § 98.3 (1986). The zona pellucida is the more or less elastic layer or envelop surrounding the embryo.
39. Supplementary Information, 50 Fed. Reg. 43560.
40. 9 C.F.R. § 98.3(f) (1986).
41. Supplementary Information, 50 Fed. Reg. 43562.
42. 9 C.F.R. § 98.4(a) (1986).
43. 9 C.F.R. § 98.4(b) (1986).
44. 9 C.F.R. § 98.4(c) (1986).
45. 9 C.F.R. § 98.6 (1986). These ports of entry are designated in 9 C.F.R. § 92.3 (1985) and include Canadian border ports, Mexican border ports, special ports and a group of limited ports designated as having inspection facilities for the entry of animals and animal products not requiring restraint or holding facilities. Obviously, embryos would fit this latter class.
46. 9 C.F.R. § 91 (1985).

Wetland protection

A unanimous Supreme Court has upheld the Army Corps of Engineers' broad exercise of jurisdiction over wetlands under the Clean Water Act. *United States v. Riverside Bayview Homes, Inc.*, 54 Law Week 4027, 106 S.Ct. 455 (1985) (Dec. 12, 1985).

The court held that the Corps' jurisdiction could reasonably encompass all wetlands adjacent to navigable or interstate bodies of water, even if the wetland's source was groundwater.

The Clean Water Act requires individuals to obtain a permit from the Corps for any

continued on next page

WETLAND PROTECTION
CONTINUED FROM PAGE 5

discharge of fill material into the "waters of the United States." 33 U.S.C. §§ 404, 1311, 1362. Corps regulations assert jurisdiction over navigable waters and their tributaries, interstate waters and their tributaries, and non-navigable interstate waters, the use or misuse of which could affect interstate commerce. 40 Fed. Reg. 31320 (1975).

The Corps also asserts jurisdiction over freshwater wetlands adjacent to covered waters. Corps regulations define a wetland as an area inundated or saturated by surface or groundwater which, under normal circumstances, supports a prevalence of vegetation typically adapted for life in saturated soils. 33 C.F.R. § 323.2(c) (1978).

Defendant Bayview Homes Inc. owns 80 acres of marshy land near the shore of Lake St. Clair in Macomb County, Michigan. In 1976, without the benefit of a permit from the Corps, the corporation began adding fill material, preparing the tract for construction of a housing complex.

The property is saturated with groundwater and lies adjacent to Black Creek, a navigable waterway. On petition of the Corps. a federal district court enjoined the filling of the property without a permit.

The Sixth Circuit Court of Appeals reversed, construing Corps regulations narrowly to avoid the regulatory takings issue. *United States v. Riverside Bayview Homes*, 729 F.2d 391 (6th Cir. 1984).

The appellate court limited the subject water of the Clean Water Act to "navigable waters." The wetland in question was likened to fast lands, which lie adjacent to navigable waters, and beyond the navigation servitude.

In *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979), a case the court found closely parallel to the one at bar, the Supreme Court required the government to exercise its eminent domain powers in order to obtain a public right of access to a pond made navigable by private efforts. The similarities, which the court described as "obvious," raised "a serious taking problem" to be avoided by adopting a narrow construction.

The court concluded that wetlands adjacent to, but not subject to frequent flooding by, the navigable waters were outside the Corps' jurisdiction. Since the source of the inundation of defendant's wetland was groundwater, a permit from the Corps was unnecessary.

The Supreme Court reversed, dispensing first with the appellate court's narrow rule of construction. The court said that where compensation was available, the putative governmental taking was not unconstitutional.

Because the Tucker Act, 28 U.S.C. § 1491, presumptively supplied a means of obtaining compensation (if in fact there was a taking), the adoption of a narrow rule of construction did not constitute avoidance of a constitutional difficulty, it merely frustrated the permissible application of the Clean Water Act.

The court went on to hold that the plain language of Corps regulations encompassed adjacent wetlands inundated or saturated by groundwater, and further, that this was a reasonable agency interpretation of authority not in conflict with the Clean Water Act.

The Corps argued that wetlands which serve as a purifying filter for diffused surface water, or act to slow the rate of surface runoff, can affect the water quality of adjacent lakes, rivers and streams.

This is true whether the source of the wetland is groundwater, or frequent flooding from the adjacent body of water. The Court concluded that "waters of the United States" could reasonably encompass all wetlands adjacent to navigable or interstate waters.

— *Annette Higby*

Ag Law Conference Calendar

Agricultural Finance: How Lawyers Can Help Lenders and Borrowers.
March 20-21, 1986, Denver, CO.
May 8-9, 1986, St. Louis.

For registration information, contact American Bar Association, Division for Professional Education, 750 N. Lake Shore Drive, Chicago, IL 60611; 312/988-6200.

Problems and Opportunities During Hard Times in the Minerals Industry.
May 1-2, 1986, Denver, CO.

For more information, contact Rocky Mountain Mineral Law Foundation, 303/492-6545.

Representing the Agricultural Client.
April 18, 1986, Rochester, NY.

May 2, 1986, Syracuse, NY.

Topics include: Agricultural workouts and bankruptcies; Farm business and estate planning in times of economic uncertainty.

For more information, contact Continuing Legal Education Department, NYSBA, 1 Elk St., Albany, NY 12207; 518/463-3724 or 518/463-3725.

No fiduciary relationship established between bank and borrower

A recent Iowa Supreme Court case addresses the question of fiduciary duty in an agricultural lending situation. *Kurth v. VanHorn*, Iowa Sup. Ct., #84-963, filed Jan. 15, 1986.

First National Bank in Glidden appealed from verdicts and judgments granting actual and punitive damages, and cancellation of a real estate mortgage, based on a breach of fiduciary duty by the lender.

The Supreme Court reversed, finding the evidence insufficient to establish a fiduciary relationship between bank and borrower. An elderly landlord had cosigned a note with his tenant, secured by a mortgage on farmland owned by the landlord. The landlord died, and his trustee and two beneficiaries of his estate sued the bank.

The court seemed to struggle with the issue of fiduciary duty, mentioning the difficulty in categorizing the relationship of banks to their customers, and citing to four different definitions of fiduciary duty. But the court was settled on the rule that a fiduciary duty does not arise solely from a bank-depositor relationship.

In reviewing the facts, it was significant that the landlord knew of the tenant's financial difficulties long before he executed the note. And even though the landlord was 80 years old and had recently been ill, the court found no evidence of any physical or mental impairment at the time of the loan.

In addition, the evidence was found to be clear that the landlord understood the nature and purpose of the loan, and that the bank did not make any misrepresentations in that regard. The borrower had not relied upon the bank for advice in this matter, nor had the bank misled him in any way. The court stated that the bank was under no duty to intercede and to "prevent [the landlord] from doing what the evidence clearly shows he wanted to do." After all, he "had only been a depositor at the bank."

The lower court was also found to be in error in cancelling the real estate mortgage, since no fiduciary duty was established. A cross appeal by account claimants, based upon conspiracy to defraud, was summarily dispensed with by the court.

— *Neil D. Hamilton*

STATE ROUNDUP

COLORADO. *Onion Broker is a Fiduciary*. Mr. Brunner, an onion farmer, engaged Mr. Horton, a produce broker, to market his crop. Horton shipped four loads to Valdez Brokerage in Texas, for which payment was never received. Brunner sued Horton and won.

The Colorado Court of Appeals said that Horton was Brunner's agent because he had the responsibility of arranging transportation, selecting buyers, setting prices, and collecting the proceeds.

The Court found that Horton knew that Valdez Brokerage had just gone into business, that it had been very slow in paying other people, and that the truck driver who delivered the first load of onions had called Horton to tell him that he had trouble contacting Valdez and arranging for unloading.

The Court concluded that Horton had a fiduciary duty to act with the utmost faith and loyalty on behalf of Brunner, which he had breached. *Brunner v. Horton*, 702 P.2d 283 (Colo. App. 1985).

— *Bruce McMillen*

MISSISSIPPI. *1985 Legislation*. Owners of livestock or poultry, their family or agents may kill any dog that is in the act of chasing or killing any such poultry or livestock, and any such person shall not, as a result, be liable to the owner of the dog. Miss. Code of 1972, Sec. 95-5-19, as amended.

1986 Proposed Legislation. Shifts in the ad valorem property tax burden (resulting from statewide reappraisal) prompted passage in 1982 of an amendment to the Constitution of 1890, allowing differential assessment rates by class of property.

Under this amendment, the highest assessment rate can be no more than double the lowest. Legislation has been proposed which would allow the public to vote on a constitutional amendment increasing this ratio to a maximum of three to one.

Current assessment rates are 15% of true value on real and personal property and 30% on motor vehicles and utilities. Supporters of this legislation favor lowering the assessment rate on residential and agricultural property to 10% if this amendment is approved.

—*James H. Simpson*

NEBRASKA. *Legislative Update*. The Nebraska unicameral is considering a bill that would add substantially to the rights of debtors in default. (L.B. 999, Judiciary Committee).

In the case of real estate debt, creditors would be required to give notice at least 120 days prior to acceleration, repossession, execution or commencement of a foreclosure action under the terms of any loan or security agreement. The notice must state the financial implications of acceleration, the borrower's right to cure his default, a listing of delinquent amounts due, as well as the amount which the lender would accept to bring the loan current.

If the debtor complies within 120 days, his status under the note and mortgage will be reinstated in full.

The bill would also increase the period for a stay of an order for the sale of mortgaged property from nine months to 12 months (when the original maturity of the debt is more than 20 years), from and after the date of the filing of the petition for foreclosure.

Debtors would also be given the right at anytime prior to confirmation of sale to make a partial redemption of their homestead by paying into the court its appraised value and the proportionate share of all interest and costs. The homestead includes the dwelling house, its appurtenances, and the land on which the dwelling is located — not exceeding 160 acres.

The bill also provides that in an action to foreclose a farm mortgage, the farmer/debtor will be appointed receiver without bond (unless a preponderance of evidence indicates he is unable to maintain the property), and that only debts secured by a first mortgage on homestead property, executed by both husband and wife, are subject to execution or forced sale.

— *Annette Higby*

PENNSYLVANIA. *Realty Transfer Tax Amended*. For agricultural interests, Sections 2 and 3 of Act of Dec. 19, 1985, No. 1985-102, §§ 2, 3 1985 Pa. Legis. Serv. 212 (Purdon) have some interesting results. Section 2 amends Pa. Stat. Ann. tit. 72, § 8101-C (Purdon) dealing with the *state* real estate transfer tax, and adds new provisions exempting transfers within a family from a sole proprietor family member to a family farm corporation.

The Act at § 3 adds § 8102-C.1, which provides for a recapture of the realty transfer tax saved by this provision if any stock of the family farm corporation which devotes is transferred to a person who is not a family member within 10 years from the date of the exempt transfer.

Section 2 defines a family farm corporation as a Pennsylvania corporation which devotes at least 75% of its assets to the business of agriculture. Certain enumerated enterprises are deemed *not* to be "the business of agriculture." At least 75% of all of the stock of the corporation must be owned by "members of the same family."

Sections 2 and 3 of the Act became effective Feb. 17, 1986.

A similar exemption from the *local* government realty transfer tax became effective Dec. 10, 1984. Pa. Stat. Ann., tit. 72, § 6902(1) (Purdon). Note that under the 1984 amendment, a conveyance between siblings is exempt from the *local* government realty transfer tax, but the 1985 amendment to the *state* realty transfer tax did not make the same amendment, and such transfers apparently remain subject to that tax.

— *John C. Becker*

FmHA not entitled to adequate protection

As a general rule, a secured lender will be prohibited from obtaining relief from the automatic stay imposed by 11 U.S.C. § 362, as long as its secured position is "adequately protected."

However, according to the court in *In re Errington*, 52 B.R. 217 (Bankr. Minn. 1985), the Farmers Home Administration (FmHA) was not entitled to any "adequate protection" during the pendency of the farm debtor's bankruptcy.

The court reasoned that Bankruptcy Code § 361 requires the debtor to adequately protect the creditor to the extent that the stay imposed by § 362 results in a decrease in the value of the creditor's interest in property.

According to the court, the stay imposed by § 362 did not damage the position of the FmHA during the pendency of the bankruptcy case. Rather, the FmHA was enjoined from foreclosing its mortgages in *Coleman v. Block*, 562 F.Supp. 1353 (D.N.D., 1983).

The injunction precluding foreclosure of the mortgage caused the damage, if any, to the value of the FmHA's interest. The debtor's bankruptcy filing added nothing to the scope of the injunction, and, accordingly, the FmHA was prohibited from obtaining any "adequate protection."

— *Phillip L. Kunkel*

Address Correction Requested

agricultural law update
5520-G Touhy Avenue
Skokie, IL 60077

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA REQUESTS NOMINATIONS. The American Agricultural Law Association (AALA) Nominating Committee requests your candidate suggestions and selection comments for the 1986-87 office of president-elect and two new members of the board of directors for the three-year term beginning in 1986. Please send your nominations and comments to Professor Keith G. Meyer, committee chairperson, University of Kansas School of Law, Lawrence, KS 66045. Deadline for all nominations is April 1, 1986.

AALA DISTINGUISHED SERVICE AWARD. The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information of no more than four pages (in quintuplicate) in support of the nominee. The nominee must be a current member of the AALA, and must have been a member thereof for at least the preceding three years. Nominations for this year must be made by May 1, and communicated to: Patrick K. Costello, chair, AALA Awards Committee, P.O. Box 1, Lakefield, MN 56150; 507/662-6621.

THIRD ANNUAL STUDENT WRITING COMPETITION. The AALA is also sponsoring its third annual Student Writing Competition. This year, the AALA will award two cash prizes in the amounts of $500 and $250.

The competition is open to all undergraduate, graduate or law students currently enrolled at any of the nation's colleges or law schools. The winning paper must demonstrate original thought on a question of current interest in agricultural law. Articles will be judged for perceptive analysis of the issues, thorough research, originality, timeliness, and writing clarity and style. Papers must be submitted by May 1, 1986. For complete competition rules, contact: Patrick K. Costello, chair, AALA Awards Committee, P.O. Box 1, Lakefield, MN 56150; 507/662-6621.