INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- GMOs and TRIPs

Public nuisance action against sugar cane producers

Former Florida Governor Claude Kirk, individually and on behalf of the State Florida, and other state residents brought a public nuisance action against three corporate sugar producers, including a cooperative, and a chemical company. They alleged that the sugar producers maintained a public nuisance by the way in which they cultivated, harvested, and processed sugar cane in South Florida. The chemical company was accused of disposing of furfural, a by-product derived from sugar processing, by deep-well injection without having a permit issued by the Florida Department of Environmental Protection.

Kirk and the other plaintiffs alleged damages to the public health and the environment, including the air and water. In addition, they alleged that the various governmental agencies responsible for enforcing health and environmental laws acted in complicity with the defendants by failing to enforce the law and by subsidizing the defendant's conduct. This complicity, the plaintiffs alleged, amounted to "egregious or devastating agency error" and warranted former Governor Kirk suing in his individual capacity.

The trial court dismissed the action with prejudice, essentially ruling that various state and federal agencies were better equipped than the court to address the allegations and that, as to air and water pollution, Florida's public nuisance statute impliedly had been superceded by the Florida Air and Water Pollution Control Act. The intermediate appellate court reversed. On its review, in a decision not yet released for publication in the permanent law reports, the Florida Supreme Court held that Florida's Air and Water Pollution Control Act does not impliedly supercede statutory public nuisance actions alleging air or water pollution. It also ruled, however, that "the doctrine of primary jurisdiction counsels in favor of having an

Continued on page 2

Oklahoma Attorney General issues opinion on poultry production contracts

In an opinion dated April 11, 2001, and scheduled for release in early May, the Oklahoma Attorney General has opined that poultry production contracts can establish an employee-employer relationship. Ok. Att'y Gen. 01-17 (Apr. 11, 2001). The Opinion also concluded that "[c]ontracts establishing contract growing arrangements that are presented to the grower with no opportunity to negotiate their essential terms are contracts of adhesion" and that "[a]bsent an effective choice of law by the parties, contract growing arrangements providing for the raising of a crop in Oklahoma are governed by the laws of Oklahoma." *Id.* at 5 (citation omitted).

Because the text of the portion of the Opinion dealing with the relationship between the contract grower and the integrator is likely to be of particular interest, it is set forth in full below:

IV. RELATIONSHIP BETWEEN THE CONTRACT GROWER AND THE INTEGRATOR

As with any business relationship, the terms of the contracts between contract growers and integrators will vary. You have, however, detailed what you describe as the typical features of one form of contract growing arrangement – that for raising chickens. Under the terms of the typical poultry contract the grower agrees to raise to adulthood a flock of chicks belonging to the integrator. The flock is housed in the grower's barns and tended by the grower. The integrator owns the flock the entire time and provides all food, medicine and other supplies. When the birds are fully grown, the integrator returns for the birds and the grower is compensated under a formula that takes into account the weight and health of the birds as well as the cost of feed expended upon them. You have indicated that under these contracts the grower may hire employees but may not assign the contract or raise birds for another integrator during the contract. Typically the contract will state expressly that the grower is to be considered an independent contractor and not an employee.

Continued on page 2

However, when determining whether a contract creates an employment relationship, courts look not to how a contract describes the relationship but to the actual roles played by the parties. *See Texaco, Inc. v. Layton*, 395 P.2d 398, 398 (Okla. 1964) (citing *Ottinger v. Morris*, 104 P.2d 254 (1999)).

The distinguishing characteristic of an employment relationship is control over the manner in which the work is performed. *See Tulsa County v. Braswell*, 766 P.2d 341, 342 (Okla. 1988) (citing *Clark v. First Baptist Church*, 570 P.2d 327 (Okla. 1977). As the Supreme Court has said:

> An independent contractor is one who engages to perform a certain service for another, according to his own method and manner, free from control and direction of his employer in all matters connected with the performance of the service, except as to the result thereof.

Miller Constr. Co. v. Wenthold, 458 P.2d 637, 639 (Okla. 1969). While the person hiring an independent contractor is limited to specifying what he or she wants accomplished, an employer may specify and control the manner in which an employee performs the actual work itself. This is "[t]he decisive test for determining whether one is an employee or an independent contractor." *Bouziden v. Alfalfa Elec. Coop., Inc.*, 16 P.3d 459, 459 (Okla. 2000).[1]

Some aspects of the contract you describe weigh in favor of a determination that the grower functions as an independent contractor under it. The grower is paid based largely on performance, rather than receiving a wage or salary, which is indicative of an employment relationship. *See Mistletoe Express Serv., Inc. v. Culp*, 353 P.2d 9, 12 (Okla. 1959). In addition the grower raises the chickens in his own barns and is free to hire his own employees. Courts have held that provision of one's own equipment and the right to engage employees are factors which militate in favor of finding that the person in question is an independent contractor. *See id.*; *Cook Constr. Co. v. Longcrier*, 405 P.2d 165, 169 (Okla. 1965) (Williams, J., dissenting).

On the other hand, a number of other elements of the contract you describe militate in the direction of an employment relationship. The integrator may terminate the contract at any time and for any reason. This has been held to be characteristic of an employment relationship. *See Mistletoe Express Serv.*, 353 P.2d at 12. Some of the tools of the job such as feed, medicine, and other supplies are furnished by the integrator which is consistent with an employment relationship. *See id.*; *Smith v. St. Francis Hosp., Inc.*, 676 P.2d 279, 281 (Okla. Ct. App.1983). Performance under the contract may not be assigned to another, a fact which courts have held tends to indicate a master-servant relationship. *See Cook Constr. Co.*, 405 P.2d at 169,170. Similarly, the contract you describe provides that the grower may not raise birds for himself or any other integrator. This sort of exclusivity is a badge of an employment relationship. *See Commonwealth Life Ins. Co. v. Gay*, 365 P.2d 149, 151 (Okla. 1961) (citations omitted).

Most importantly, however, the contract you describe grants the integrator a remarkable degree of control over the manner in which the chickens are raised. Although the grower provides the barns, the barns must be outfitted to the integrator's specifications. These specifications frequently include such details as the water storage capacity of the barns, the wattage of backup generators, and even the spacing of the light fixtures. The methods for raising the chicks are themselves minutely specified in the contract or an addendum to it which lays out such requirements as the maximum number of chicks per brooder, the air temperature inside the barns, and the angle of the watering tubes. The contract also provides for inspection by the integrator to ensure that these conditions are complied with. It is extremely difficult to characterize this situation as one in which the grower fulfills the contract "according to his own method and manner, free from control and direction of ... [the integrator] in all matters connected with the performance of the service, except as to the result thereof." *Miller Constr. Co.*, 458 P.2d at 639.

Although we cannot in an Opinion determine that any particular contract growing arrangement establishes an employer-employee relationship, where the contract provides in detail the manner in which the livestock or crop is to be raised, the contract grower ceases to be an independent contractor and becomes an employee.

[1] *Bouziden* is only the most recent in a long line of cases that have described the control of the work done as "the decisive test" in determining whether a employment relationship exists. *See, e.g., Barfield v. Barfield*, 742 P.2d 1107, 1110 (Okla. 1987); *Murrell v. Goertz*, 597 P.2d 1223, 1225 (Okla. Ct. App. 1979); *Union Mut. Ins. Co v. Hill*, 356 P. 2d 336, 337 (Okla. 1960); *Yellow Cab Co. v. Wills*, 185 P.2d 689, 690 (Okla. 1947). There is, somewhat confusingly, a parallel line of cases that list several relevant factors and announce that "no one factor is controlling." *See, e.g., Duncan v. Powers Imports,* 884 P.2d 854, 856 (Okla. 1994) (quoting *Coleman v. J.C. Penney Co.*, 848 P.2d 1158, 1160 (Okla. 1993)); *Swafford v. Williams,* 863 P.2d 1215, 1217 (Okla. 1993). The apparent tension between these decisions can be resolved by reference to the seminal case relied upon by all of the "no one factor is controlling" decisions – *Page v. Hardy*, 334 P.2d 782 (Okla. 1958). That case held that "control ... in all matters connected with the performance of the service" is the determinative issue, with the various factors offered as means of determining if such control exists. *Id* at 784.

–Christopher R. Kelley, Assistant Professor of Law, University of Arkansas, Of Counsel, Vann Law Firm, Camilla, GA

VOL. 18, NO. 5, WHOLE NO. 210 April 2001

AALA Editor.....Linda Grim McCormick
Rt. 2, Box 292A, 2816 C.R. 16, Alvin, TX 77511
Phone: (281) 388-0155
FAX: (281) 388-0155
E-mail: lgmccormick@teacher.esc4.com

Contributing Editors: Susan A. Schneider, University of Arkansas, Fayettevklle, AR; Christopher R. Kelley, University of Arkansas; Irene S. Egyir, North Carolina State University; Theodore A. Feitshans, North Carolina State University.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office: Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313.

Sugar cane/C*ont. from p. 1*

administrative agency with the experience and expertise to deal with complex issues...." *Flo-Sun, Inc. v. Kirk*, Nos. SC95044, SC95045, 2001 WL 298917 at *10 (Fla. Mar. 29, 2001).

The Florida Supreme Court had relatively little difficulty in concluding that Florida's public nuisance statute, Fla. Stat. ch. 823, was not superceded by the Florida Air and Water Pollution Control Act, Fla. Stat. ch. 403. The latter statute specifically states that its purpose is to provide "additional and cumulative remedies...." Fla. Stat. § 403.191. Thus, it did not expressly repeal chapter 823. Furthermore, Florida law strongly counsels against implied repeals. As to whether the Florida legislature may have implicitly intended to repeal the authority for public nuisance actions, the Court opined that Florida's Right to Farm Act, Fla. Stat. § 823.14, "provides a solid basis for the conclusion that chapter 403 was not intended to supercede chapter 803." *Flo-Sun*, 2001 WL 29917 at *5. It found this "solid basis" in the fact that the Right to Farm Act was enacted ten years after chapter 403, yet it provided a defense to public nuisance actions when the challenged agricultural activity was "'not a nuisance at the time of its established date of operation ... if the farm operation conforms to generally accepted agricultural and management activities.'" *Id.* (quoting Fla. Stat. 823.14(4)(a)). This, according to the Court, indicates that the Florida legislature "anticipated that agricultural activities would still be subject

Cont. on page 3

Agricultural law bibliography

Administrative law

Kelley, *The Basics of Federal Farm Program Payment Limitation and Eligibility Law*, 18 Agric. L. Update 4-7, 2-3 (Dec. 2000).

Animals – animal rights

Favre, *Equitable Self-ownership For Animals*, 50 Duke L.J. 473-502 (2000).

Nussbaum, *Animal Rights: the Need for a Theoretical Basis. (Reviewing Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals,)* 114 Harv. L. Rev. 1506-1549 (2001).

Student article, *With Best Friends Like Us Who Needs Enemies? The Phenomenon of the Puppy Mill, the Failure of Legal Regimes to Manage It, and the Positive Prospects of Animal Rights*, 6 Buff. Envtl. L.J. 253-289 (1999).

Verchick, *A New Species of Rights (Reviewing Steven M. Wise, Rattling the Cage: Toward Legal Rights for Animals)*, 89 Cal. L. Rev. 207-229 (2001).

Biotechnology

Goklany, *Applying the Precautionary Principle to Genetically Modified Crops*, Weidenbaum Center Working Paper No. PS 157 (Washington Univ., St. Louis, Aug. 2000).

Gupta, *Governing Trade in Genetically Modified Organisms: The Cartagena Protocol on Biosafety*, 42 Env't. 22 (2000).

Murphy, *Biotechnology and International Law*, 42 Harv. Int'l L.J. 47-139 (2000).

Tracy, *Does a Genetically Modified Rose Still Smell as Sweet? --- Labeling of Genetically Modified Organisms Under the Biosafety Protocol*, 6 Buff. Envtl. L.J. 129-168 (1999).

Commodities futures

Comment, *The Hedge-To-Arrive Controversy: Conflicting Outcomes in Administrative and Judicial Proceedings*, 52 Admin. L. Rev. 1423-1445 (2000).

Environmental issues

Comment, Pork, *Pollution, and Priorities: Integrator Liability in North Carolina*, 35 Wake Forest L. Rev. 1055-1077 (2000).

Farm labor

Aliens

Comment, *The H-2A Non-immigrant Visa Program: Weakening its Provisions Would be a Step Backward for America's Farmworkers*, 31 U. Miami Inter-Am. L. Rev. 419-438 (2000).

Note, *Immigrant Farmworkers and the North American Agreement on Labor Cooperation*, 31 Colum. Hum. Rts. L. Rev. 597-623 (2000).

Note, *You Sure Know How to Pick 'em: Human Rights and Migrant Farm Workers in Canada*, 15 Geo. Immigr. L.J. 199-227 (2000).

Farmer-processor bargaining – production contracts

Boehlje, Schrader; Hurt, Foster & Pritchett, *The Producer Protection Act – Will it Protect Producers?*, 18 Agric. L. Update 4-6 (Jan. 2001).

Harl, *The Age of Contract Agriculture*, 18 J. Agribusiness 115-127 (2000).

Harl, Sturno, McEowen, Heffernan & O'Brien, *The Producer Protection Act – Will it Protect Producers? A Rejoinder*, 18 Agric. L. Update 1,3,6-7 (February 2001).

Food and drug law

Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, 4 Colum. J. Eur. L. 525 (1998).

Forestry

Staff Report, *The National Forest Management Act: Law of the Forest in the Year 2000*, 21 J. Land Resources & Envtl. L. 151-218 (2001).

International trade

Coffield, *Biotechnology, Food, and Agriculture Disputes or Food Safety and International Trade*, 26 Canada-U.S. L.J. 233-251 (2000).

Frechette, *Biotechnology, Food, and Agriculture Disputes or Food Safety and International Trade*, 26 Canada-U.S. L.J. 253-269 (2000).

Note, *Bananas, Beef, and Compliance in the World Trade Organization: the Inability of the WTO Dispute Settlement Process to Achieve Compliance From Superpower Nations*, 10 Mimn. J. Global Trade 133-168 (2001).

Note, *Harmonizing TRIPs and the CBD: a Proposal From India*, 10 Mimn. J. Global Trade 169-207 (2001).

Note, *United States/European Union Trade Relations: the Need For a Solution to the Bovine Trade Disputes*, 78 Wash. U. L.Q. 645-673 (2000).

Livestock and packers & stockyards

Hannah, *Survey of Illinois Law: Animal Control Law*, 24 S. Ill. U. L.J. 698-721 (2000).

Marketing boards, marketing orders & marketing quotas

Kelley, *An Introduction to Federal Marketing Orders for Fruits, Vegetables, Nuts and Specialty Crops*, 18 Agric. L. Update 4-6 (February 2001).

Patents, trademarks & trade secrets

Comment, *The Evolution of the Enablement and Written Description Requirements Under 35 U.S.C. Section 112 in the Area of Biotechnology*, 15 Berkeley Tech. L.J. 1233-1274 (2000).

Comment, *Patenting Life: the Potential and Pitfalls of Using the WTO to Globalize Intellectual Property Rights*, 26 N.C. J. Int'l L. & Com. Reg. 143-181 (2000).

Note, *Substitute This! A New Twist on Lost Profits Damages in Patent Infringement Suits (Grain Processing Corp. v. American Maize-Products Co.*, 185 F.3d 1341, Fed. Cir. 1999), 2000 Wis. L. Rev.

Public lands

Andrus & Freemuth, *Policy After Politics: How Should the New Administration Approach Public Land Management in the Western States?* 21 J. Land Resources & Envt'l L. 1-11 (2001).

Muhn, *Public Water Reserves: the Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envt'l L. 67-149 (2001).

Rural development

Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 Nw. U. L. Rev. 505-580 (20001).

Taxation

Note, *Tax Consequences for Owners of Farmland: Why Land Owners Who Rent Their Land to Farming Employers are Probably Liable for Self-employment Tax On Rent Received and Why Congress Should Change the Current Policy*, 76 N.D. L. Rev. 605-631 (2000).

Water rights: agriculturally related

Bricker & Filippi, *Endangered Species Act Enforcement and Western Water Law*, 30 Envt'l L. 735-768 (2000).

Wilder, *Border Farmers, Water Contamination, and the NAAEC Environmental Side Accord to NAFTA*, 40 Nat. Resources J. 873-894 (2000).

If you desire a copy of any article or further information, please contact the Law School Library nearest your office. The AALA website < http://www.aglaw-assn.org > has a very extensive Agricultural Law Bibliography. If you are looking for agricultural law articles, please consult this bibliographic resource on the AALA website.

–Drew L. Kershen, Professor of Law
The University of Oklahoma, Norman, OK

Sugar cane/C*ont. from p. 2*

to public nuisance actions even after the enactment of chapter 403. *Id*.

As to whether the doctrine of primary jurisdiction should apply, the Florida Supreme Court first described the doctrine as dictating "that when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been ruled upon by the agency." *Id*. at *6 (citations omitted). It then acknowledged that it had recognized certain narrowly-defined instances in which the doctrine was inapplicable. One of these instances is when there have been "egregious or devastating agency errors." In the case before it, plaintiffs sought to invoke this exception. The court, however, concluded that the plaintiffs' contention in this respect was deficient for two reasons. First, as the exception required, the plaintiffs had not alleged that Florida's Administrative Procedure Act failed to provide a remedy

Cont. on p.7

Environmental regulation in Ghana

By Irene. S. Egyir and Theodore A. Feitshans

Common law environmental regulation

Most environmental law worldwide is of relatively recent origin. Historically, in those nations that derive their law from the English common law, the common law of torts provided the remedy, if any, to environmental problems. Torts protecting two rights of ownership in real property were, and remain, particularly useful. These are the rights of possession and of use and quiet enjoyment. When the first is violated, a trespass action may be brought; when the second is violated, a nuisance action may be brought.[1] In either, money damages, injunctive relief, or both may be available.

However, certain shortcomings in the common law of torts as practiced in Ghana and all common law jurisdictions have demonstrated the insufficiency of common law environmental regulation.

- Causation is often difficult to establish, especially where the environmental damage is the cumulative effect of many sources of pollution. Without proof of causation, there can be neither a recovery nor an injunction against future harm.
- The tort system is not preventative in nature; where degradation is irreversible, the common law may not provide an adequate remedy.
- The tort system provides little regulatory certainty in the context of the environment because the approach depends upon the lawsuits of individual plaintiffs and jury determinations of the reasonableness of the conduct that was the subject of objection in each situation.
- Some types of environmental damage have long latency periods. Years may elapse between the damage and the point at which the damage becomes recognized. Long latency periods make proof of causation difficult and may result in suits being time-barred.

In general, the common law does a poor job of protecting the environment. Thus most countries now have enshrined in their constitutions provisions for environmental protection.

Irene S. Egyir is a Doctoral candidate, Department of Agricultural Economics, University of Ghana, Legon; visiting student, Department of Agricultural and Resource Economics, North Carolina State University, Raleigh, NC.

Theodore A. Feitshans is Extension Specialist and Lecturer, Department of Agricultural & Resource Economics, North Carolina State University, Raleigh, NC.

Ghana's framework for environmental protection

Politically, Ghana has the distinction of being the first African country south of the Sahara to have attained independence from British Colonial rule (in 1957). The 1992 (4th republic) Constitution provides for a unitary system of government along the American model of separation of powers between the executive and legislature, and an independent judiciary. Provision is made for a decentralized system of local government, the cornerstone of which is the District Assembly. District Assemblies are corporate bodies with perpetual existence. District Assemblies are entrusted with certain functions for their respective districts. Among these are the development, improvement, and management of human settlements and the environment.[2] The 1992 Constitution does not expressly grant environmental rights to citizens. Some of its provisions, however, address the subject. Article 37(9) of the Constitution enjoins the state to take appropriate measures to protect and safeguard the natural environment for posterity and to seek cooperation with other states and bodies for the purpose of protecting the wider international environment for mankind. An injunction is also placed on every Ghanaian citizen by article 41k to protect and safeguard the environment.[3]

Following the Stockholm Conference on the Human Environment, the government of Ghana in 1974 established an Environmental Protection Council (EPC) (under NRCD 239, amended in 1976-SMCD 58) as an advisory institution on environmental management. This was one of the first environmental agencies in Africa to address problems relating to development and the environment. In order that a National Environmental Policy (NEP) could be formulated, the EPC was charged to prepare an Environmental Action Plan (EAP) for the country. The resulting project, supported by the World Bank, considered policy proposals on mining, industry and hazardous chemicals; marine and coastal ecosystems; human settlements; forestry and wildlife; land management; and water management. In addition, Draft Recommended Legislation and Supplementary Reports were prepared, and a set of District Environmental Guidelines to assist Environmental Committees of the 110 District Assemblies[4] with management of their local environment were also put in place.[5] Environmental law enforcement is at the district level.

In 1993, the Ministry of Environment, Science and Technology was established, and at the end of 1994, the EPC—which had only an advisory role—was changed into an Environmental Protection Agency (EPA) by an Act of Parliament—the 1994 EPA Act (Act 490)—and given the powers of enforcement and control of the environment. In carrying out its various duties, the EPA collaborates with other institutions and agencies. Notable among these are the Ministry of Food and Agriculture, the Forestry Department, the National Energy Board, and some research institutions.

The Ministry of Agriculture, for instance, is responsible for the implementation of a soil conservation program that focuses on restoring soil fertility, supporting the inter-departmental pesticide control program, supporting the agri-forestry programs, and providing encouragement for the development of private and community forests with the active involvement of the Forestry Department. The EPA also collaborates with the following institutions on their various areas of specialization: Soil Research Institute, which investigates the effects of mechanization and agri-chemicals on agricultural lands; Institute of Renewable Natural Resources, which is working on agri-forestry, especially with reference to indigenous species and indigenous agri-forestry systems; Zoology Department, University of Ghana, which examines the effects of pollution on wildlife; and Institute of Aquatic Biology, which monitors water pollution, environmental impacts of water resources development projects, and siltation resulting from deforestation, soil degradation and erosion.

Part III of Act 490 establishes a National Environment Fund for environmental education of the general public; research, studies and investigations relating to the functions of the EPA; human resource development; and other purposes to be decided upon by the Board of the EPA, in consultation with the Minister.

In addition to the above, the Fourth Republican Constitution of Ghana, which was adopted by referendum in 1992, provides for the establishment of a National Development Planning Commission. The responsibility of the latter is to plan for the long-term sustainable development of the country. Also, a wide range of environment-related non-governmental organizations (NGOs) are represented in Ghana. Many of these are associated with the National Union of Environmental Non-governmental Organizations (NUENGO), which was established in 1994 with the purpose of coordinating

the activities of environmental NGOs in Ghana.

All NGOs have been grouped under one umbrella organization known as the Ghana Association of Private Voluntary Organizations in Development (GAPVOD). Through its committee on Water and Sanitation, Environment and Disaster Relief, Health and Safety, GAPVOD organizes public forums to raise environmental consciousness at workplaces.

Two national unions affiliated with the Trade Union Congress (Ghana) play an active role in environmental management. These are the General Agricultural Workers' Union (GAWU) and the Timber and Woodworkers' Union (TWU). The GAWU has an active Rural Workers' Organization in selected villages in the southern part of the country, providing them with education on issues such as grain storage and community reforestation, among others. The Union recognizes that rural workers abuse the environment through improper farming methods, such as shifting cultivation, because of their poverty level. Therefore, by assisting them with techniques for achieving improved crop yields, their incomes should be enhanced, which could help in the long-term struggle against environmental degradation.

In 1993, the TUC established a Health and Safety Desk in its Research and Industrial Relations Department. The officer who operates the Health and Safety Desk is charged with responsibility to organize enterprise-level seminars in collaboration with the various national unions for workers to increase their awareness of health and safety issues. The Ghana Employers Association has as one of its major policies to watch over and keep its members informed of legislation that affects, or tends to affect, the interests of employers. The International Institute for Communication and Development (IICD) in the Netherlands is providing funding for the Environmental Information Network Project. The project takes the National Environmental Plan as a starting point to build on other national and regional initiatives at EPA in the management of environmental information. These initiatives include a bibliographic database developed by the Agency, called the Ghana Environmental Database (GHANED). In addition, the EPA acts as the National Focal Point in Ghana for the Global Environmental Information Exchange Network.

Furthermore, as a member of the international community, Ghana, since the attainment of independence, has participated in all the major conferences on the environment and has signed or ratified the major instruments concluded at these conferences. Having ratified these treaties, Ghana is required to enact appropriate legislation to domesticate these international norms.

Sarpong[6] has also observed that as a people, Ghanaian "cultural norms and life styles also portray strong environmental preservation tendencies." For instance, "it is partly to preserve and sustain biodiversity that from time immemorial, it has been a taboo among the fishing communities in Ghana to go sea fishing on Tuesdays; or to enter certain forests and groves on specified week days."[7]

Generally, it can be concluded that, inspired by international and domestic concerns, Ghanaian environmental law, the aggregate of rules and principles aimed at controlling the environment and controlling activities in Ghana that may adversely affect neighboring states or the international community, is effective.

Challenges to EPA's effectiveness

Incentives versus dictates

Economic instruments such as tax incentives and bonds as tools for environmental protection are virtually neglected. There are no legal provisions governing environmental rights in the Ghanaian legislation embodying concepts such as the polluter pays principle, the precautionary principle, the preventive principle.[8] Environmental law relies on the employment of criminal sanctions (command and control methods). Without modification, expanding firms in the growing agricultural sector may have little incentive to practice firm level environmental preservation.[9]

Challenges to ability to monitor

The administrative cost to environmental law enforcement in Ghana is indisputably huge! The EPA, pursuant to section 9 of the EPA Act, 31 has established a legal advisory committee with membership drawn from academia, the Attorney General's Department, the EPA, and NGOs to advise and assist the EPA in the fulfillment of its mission objectives. This, *inter alia*, includes "to keep under review, draft, advise on and proffer opinions on all proposed legislation concerning the environment."[10] With the assistance of the committee, the EPA in August 1999 organized a workshop for major stakeholders, including NGOs and the media in environmental protection and management; and to sensitize them about the EPA and its regulatory and enforcement powers. In a country where databases on most subjects are meager and high technology means of monitoring are almost non-existent, the task of monitoring compliance becomes costly, both implicitly and explicitly. Most agricultural polluters are small and dispersed, making monitoring even more expensive. Ghana's EPA, like all agencies, is underfunded.

Few environmentally trained attorneys

Generally, attorneys are few, and most need training in environmental law. Not many attorneys in Ghana understand the environment well enough to employ an ecological perspective. Inadequate numbers of such legal practitioners has implications for time spent on legal issues and legal fees.

Characteristics of the farm population

Certain characteristics of the developing communities in particular affect law enforcement. These include level of polluter knowledge of the existence of regulations and the benefits that these regulations provide. Measures of knowledge level of individuals include literacy status and the ease of access to information; both factors are undoubtedly very minimal in Ghana. For instance, less than forty-two percent of all Ghanaians have formal education. Most illiterate citizens are in the rural areas where over seventy percent of the residents are farmers.[11] In addition to the high illiteracy rate, communication instructure is inadequate. Farmers' most available source of information is their neighbors (also farmers). Government extension personnel and administrative officials, who are also relied upon, are few. The extension officer-to-farmer ratio is estimated at 1:600 farm households or more. Technical assistance to farmers is production-oriented; thus, the officers' knowledge in other areas may be wanting. Fewer still are NGO officials whose contribution to information supply and diffusion is becoming more important in view of their non-political appropach to subject matters. Several of them, including Technoserve Inc., Global 2000, and Catholic Relief Services, for instance, have as their broad objective, "to enhance food security for farmers." However, their activities are not widespread or production-oriented because of logistic problems—inadequate financial, human, and infrastructure resources.

Controlling dispersed, small polluters who individually contribute modestly to pollution is very difficult.[12] Small farmers hardly know or may not care how much they contribute. If violations of environmental decrees result in fines or imprisonment, how much rural farmers are able to pay is anybody's guess. Are resource-poor farmers prepared to reveal what practices of theirs constitute serious environmental repercussions so that they will be made to pay for emitting? This is not to say that resource-rich firms reveal their actions easily—without incentives! Undoubtedly the level of pollution farmers in Ghana are emitting is relatively low, but when regulators do

Continued on p. 6

District Court affirms shared appreciation obligation

The United States District Court for the Western District of Wisconsin recently ruled on the enforceability of the recapture obligation under a Farm Service Agency (FSA) Shared Appreciation Agreement (SAA). In *Israel v. USDA*, No. 00-C-223-C, 2001 WL 273913 (W.D. Wis. Mar. 2, 2001), the court affirmed the National Appeals Division (NAD) ruling that held that the SAA recapture obligation was owed at the end of the ten year term of the agreement, despite the fact that the borrowers had not stopped farming, sold the farm, or paid off the underlying debt. This is the first published decision that addresses what is an ongoing controversy between FSA borrowers and the agency.

The plaintiffs in this case were Donald and Patsy Israel and Richard and Shirley Quinton, owners of the farming partnership, Israel and Quinton Farms. This partnership obtained farm loans in the 1980's from the "lender of last resort," Farmers Home Administration (FmHA), a predecessor agency of FSA. In 1988, Israel and Quinton Farms participated in the FmHA debt restructuring process and obtained a "write down" of just over $100,000. As a condition to the write down, the parties signed the SAA that is the focus of the present action. *Id*. at *1.

The SAA contained the following operative language:

As a condition to, and in consideration of [Farm Service Agency] writing down the above amounts and restructuring the loan, borrower agrees to pay [Farm Service Agency] an amount according to one of the following payment schedules:

1. Seventy five (75) percent of any positive appreciation in the market value of the property securing the loan as described in the above security instrument(s) between the date of the Agreement and either the expiration date of this Agreement or the date the borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs four (4) years from the date of this Agreement.

2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of the Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs after four years but before the expiration date of this Agreement.

The amount of recapture by [Farm Service Agency] will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of [f]arming and the value of the security at the time this Agreement is entered into. If the borrower violates the terms of this agreement [Farm Service Agency] will liquidate after the borrower has been notified of the right to appeal.

Id. at *1-2.

The conflict between the partnership and the FSA arose approximately ten years after this agreement was signed. The FSA notified the partnership that because they were at the end of the term of the SAA, and because their property had appreciated in value, the partners owed a recapture obligation. The FSA computed that the property had appreciated in value $193,000 and notified the partners that they owed fifty percent of this, $96,000, pursuant to the SAA. *Id*. at *3.

The partners disagreed with the FSA interpretation of the SAA on both contract and estoppel grounds. They appealed the FSA decision to the NAD, the USDA agency that hears the administrative appeals of FSA adverse decisions. In the NAD hearing, the partners argued that recapture was only due if they disposed of the property, ceased farming, or paid the underlying obligation in full prior to the expiration of the agreement. They argued that upon "expiration" of the SAA, their potential obligation ceased. They based their argument on the language in the agreement that establishes the recapture amount. This language states that, "[t]he amount of recapture by [Farm Service Agency] will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of [f]arming and the value of the security at the time this Agreement is entered into." The partners argued that the absence of any reference to the expiration of the agreement is an indication that no obligation would be owed unless one of the triggering factors occurred prior to expiration. They further argued that their FSA county officials led them to believe that the SAA expired at the end of its term, without obligation, giving rise to a claim of equitable estoppel. *Id*. at *6.

The FSA defended its contrary interpretation of the SAA, arguing that the agreement provides for recapture at the

C*ont. on p. 7*

Ghana/C*ont. from p. 5*

not know how low this level is, regulating the polluter is made more difficult. Polluters have different impacts on ambient pollution so the characteristics of polluters must be known so that they can be rewarded for safe disposal or penalized for unsafe disposal.

Court actions and procedures, attorney fees and expenditure on additional input to reduce pollution, etc. add to the cost of production. How far can the farmer pass this increase on to consumers, the majority of whom are also resource-poor, whether as urban or rural residents? Over thirty-five percent of Ghana's population is below the poverty line, and of this, eighty percent live in rural areas.[13]

Conclusion

The extent to which environmental regulation results in a cleaner environment is mixed. Measuring the results of economic incentive approaches has been done and cost-saving levels (permits) and revenue redistribution have been significant in selected developed economies.[14] In developing economies, particularly Ghana, where the command and control approach is the only option for regulation, monies gained from environmental law enforcement (taxes, fines, grants/gifts, etc.) are put in a fund, but whether the funds are used directly for the protection of the environment is another matter. Ghana's environmental awareness programs are well established, although the coverage is yet to be significant. Most activities are concentrated in the national capital, which is far removed from where most of the agriculture is located.

Environmental protection laws are recent developments in almost all economies. The inadequacies of tort law meant that sometimes pollution went unabated. By direct regulation, pollutants are supposedly controlled from the producers' end. While developing economies seek to expand their productive sectors by means that also increase the negative impact on the environment, law enforcement becomes an important issue.

The laws are being formulated (from both domestic and international fronts) but the resources that are needed to support their implementation and enforcement are meager. The cost is too huge for resource-poor economies: Ghana's EPA budget is insignificant, attorneys are few and need further training, the regulated community is ignorant of the law and cannot afford to pay fines or reduce pollution by adding to their cost of production. Consumers do not have the ability to pay for high-priced essential commodities.

Farmers' need for education is the most important aspect of enforcement. An adequate budget for the enforcement agency, EPA, is being called for. Strengthening the capacity of other supporting agen-

Cont. on p.7

Obligation/C*ont. from p. 6*

end of the ten year term, regardless of whether or not any other event has occurred, if the property had appreciated in value. It based its position on the language in the agreement that provides for recapture if appreciation occurs "between the date of this Agreement and *either* the expiration date of the Agreement *or* the date Borrower pays the loan in full, ceases farming or transfers title of the security." (Emphasis added.) *Id.*

The NAD hearing officer held in favor of the FSA, holding that both the SAA and the associated FSA regulations "clearly state that the shared appreciation is due at the expiration of the agreement." *Id.* at *3.

On review, the Director of NAD affirmed the hearing officer's decision, stating that "the terms of the [SAA] are clear and published regulations, by law, are a proper basis for the Hearing Officer's determination.... Substantial evidence supports the Hearing Officer's determination that the agency did not err in establishing the amount of recapture due under the [SAA] and requiring payment of such." *Id.* at *4.

The partners appealed the final NAD determination to federal court in the present action. The district court reviewed the administrative record and affirmed the NAD determination. The court reviewed the contract language, and although it noted that the agreement "could have been written more artfully," found that it "conveyed the basic concept" that appreciation would be recaptured when the agreement expired. As such, the court held that it could not find the that the Director's decision irrational. *Id.* at *6.

The court further found that the FSA's position was "supported strongly" by the statute and the regulations. The relevant statute provides that "[r]ecapture shall take place at the end of the term of the agreement, or sooner—(A) on the conveyance of the real security property; (B) on the repayment of the loans; (C) if the borrower ceases farming operations." *Id.* (citing 7 U.S.C. § 2001(e)(4)).

Similarly, the regulations provide that "[s]hared appreciation is due at the end of the term of the Shared Appreciation Agreement, or sooner, if one of the following events occurs: (1) The sale or conveyance of any or all the real estate security ...; (2) Repayment of the loans ...; (3) The borrower or surviving spouse ceases farming operations or no longer receive farm income....; (4) The notes are accelerated." *Id.* (citing 7 C.F.R. § 1951.914(b)(1999)).

With regard to the issue of estoppel, the partners claimed that the government should be estopped from collecting the recapture obligation because the partners had relied to their detriment on statements made by local agency representatives telling them that no recapture would be owed at the end of the term. *Id.* at *8.

The court noted the general rule that "equitable estoppel will not lie against the government," citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct.1, 92 L.Ed.10 (1947). In *Merrill*, the farmer relied upon erroneous information given to him by an agent of the Federal Crop Insurance Corporation. The United States Supreme Court rejected his claim of equitable estoppel, stating that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Israel,* at *8 (citing *Merrill* at 384).

The partners argued that government should not be entitled to immunity from estoppel in the present case because it acted in a "proprietary and not a sovereign capacity," but the court rejected this argument as well. The court stated that "the government acts in a proprietary capacity when it undertakes activities 'primarily for the commercial benefits of the government.'" *Israel,* at *8 (citing *Rew Enterprises, Inc. v. Premier Bank, N.A.,* 49 F.3d 163, 170 (5th Cir.1995)). The court found that FSA's social welfare mission as a lender did not support the "proprietary" categorization. *Israel,* at *8 (citing *Green v. United States*, 8 F.Supp.2d 983, 994 (W.D.Mich.1998) (stating "government acts in a sovereign rather than a proprietary role 'by providing grants for the purpose of realizing particular social goals'")).

The court noted that there is a narrow category of cases in which equitable estoppel can lie against the government. *Id.* at 9, citing *Kennedy v. United States,* 965 F.2d 413, 417 (7th Cir.1992). In order to fit within this category, traditional elements of estoppel must be shown along with "affirmative misconduct on the part of the government." *Id.*, citing *Kennedy,* 965 F.2d at 417; *LaBonte v. United States,* 233 F.3d 1049, 105 (7th Cir.2000). In the present case, the court found that the partners failed to show any affirmative misconduct on behalf of the government in misleading them as to the terms of the recapture provision. *Id.* The court noted that "[a]t most, it appears that [the FSA officer] misunderstood the terms of the agreement and conveyed his mistaken understanding to plaintiffs; plaintiffs do not argue that he tried to trick them or knew of his mistake." This does not demonstrate affirmative misconduct in that, "[a]ffirmative misconduct is 'more than mere negligence'" *Id.* (citing *LaBonte,* 233 F.3d at 1053).

—Susan A. Schneider, Assistant Professor and Director, Graduate Program in Agricultural Law, University of Arkansas School of Law

---

Ghana/C*ont. from p. 6*

cies, both governmental and non-governmental, should go a long way to boost the enforcement of environmental regulations in Ghana's developing economy.

[1] Kubasek, Nancy K. and G.S. Silverman. 2000. *Environmental Law*. Prentice Hall, New Jersey.

[2] The Local Government Act, 1993 (Act 462) s.10.

[3] G. A. Sarpong, "From Stockholm to Rio, Supra, n.5. "Environmental Justice in Ghana", RGL forthcoming.

[4] Ghana is divided into 10 regions and 110 districts. Some regions have more districts than others but each region and district is a unit of the central government.

[5] Vormawor, Dennis K.Y. and Joshua Awuku-Apaw. 1996. Environment and the World of Work--Ghana. International Labour Organization.

[6] Sarpong, C.A. 2000. Environmental Law From the Ghanaian Perspective. University of Ghana, Legon.

[7] Dankwa, E.v.O. 1995. Environmental Legislation in Ghana. UNEP Legal Consultancy Report, March 1995.

[8] Sarpong, Ibid.

[9] Jaffe, A.B. and R.N. Stavins. 1995. Dynamic Incentives of Environmental Regulations: the Effects of Alternative Policy Instruments on Technology Diffusion. *J. Env. Econ. Mgmt.* 29: S-43- S-63.

[10] Sarpong, Ibid.

[11] It is known that agriculture (including forestry and fisheries) accounts fo 69 percent of the cost of environmental degradation in Ghana (Vander Mey, B.J. 1998. "Key Challenges that Ghana is Facing." Seminar paper. ISSER, Accra, Ghana.)

[12] Kolstad, C.D. 2000. *Environmental Economics*. Oxford University Press, New York.

[13] Vander Mey, B.J.1998. "Key Challenges that Ghana is Facing." Seminar paper.

[14] Kolstad, Op. cit.

Sugar cane/C*ont. from p. 3*

for the agency errors. Second, the plaintiffs' complaint failed to allege sufficiently the ultimate facts required to invoke the exception. In essence, it found the plaintiffs' allegations of widespread government corruption too conclusory and illogical to be credited, even for purposes of a motion to dismiss. *Id.* at *8-*10.

Finally, the Court noted that the plaintiffs' action presented numerous issues that were beyond the simple, routine matters that could be easily understood by trial judges and juries. While it cautioned that the doctrine of primary jurisdiction calls for judicial restraint in such instances, the Court added that the doctrine does not command dismissal of the action. Instead, the doctrine only operates to postpone judicial consideration until an agency has applied its special competence. The Court therefore concluded that the trial court's dismissal of the action was improper.

—Christopher R. Kelley, Assistant Professor of Law, University of Arkansas, Of Counsel, Vann Law Firm, Camilla, GA