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INSIDE

IN FUTURE ISSUES

7th Circuit denies Clean Water Act protection to intrastate, isolated wetlands

In a decision that could have significant implications for wetland protection in agricultural areas, the Seventh Circuit has held that the Environmental Protection Agency's (EPA) jurisdiction under section 404 of the Clean Water Act does not extend to intrastate, isolated wetlands. *Hoffman Homes, Inc. v. EPA*, No. 90-3810, 1992 U.S. App. LEXIS 7329 (7th Cir. Apr. 20, 1992). The court found that the EPA's regulation of intrastate, isolated wetlands was beyond the scope of the Clean Water Act, and that the EPA's claim that the wetland at issue affected interstate commerce because it was a "potential" landing site for migratory waterfowl was insufficient to implicate the Commerce Clause.

Specifically, the court invalidated the EPA's regulatory definition of jurisdictional "waters of the United States" under the Clean Water Act to the extent that the EPA's definition includes intrastate wetlands not adjacent to other "waters of the United States." *Id.* at *8, 21 (citing 40 C.F.R. § 230.3(s)(3)). The court reasoned that the EPA's inclusion of intrastate, isolated (non-adjacent) wetlands within the scope of section 404 of the Clean Water Act was an unreasonable interpretation of the Act because, "[b]y their very definition, isolated wetlands have no relationship or interdependence with any other body of water" and, "therefore, would not further the objective of the Clean Water Act `to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Id.* at *13, 20-21. Because the Army Corps of Engineers operates under an identical regulation, 33 C.F.R. § 328.2, the decision implicitly invalidates the Corps' exercise of section 404 jurisdiction over such wetlands as well. *See Id.* at *8, n.5.

In addition, the court held that the EPA's regulation of the wetland at issue was "beyond the limits of the Commerce Clause. . . ." *Id.* at *38. The court concluded that the EPA's argument that the particular wetland's potential as a landing site for migratory birds supported its regulation under the Commerce Clause was unsound because that potential use was insufficiently connected with human activity to implicate the Commerce Clause. *Id.* at *35-36.

The Clean Water Act regulates the discharge of pollutants into "navigable waters," which are defined as the "waters of the United States." 33 U.S.C. § 1362(7). The Act offers no further definition of "navigable waters" or of "waters of the United States." *Id.* at *7-8.

Section 404 of the Act prohibits the discharge of dredged or fill materials into "navigable waters" without a permit. 33 U.S.C. § 1344. The Army Corps of Engineers and the EPA share responsibility for administering section 404.

The Clean Water Act does not mention "wetlands." *Id.* at *7. Nonetheless, the EPA

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9th Circuit limits PACA trust protection

In 1984, Congress amended the Perishable Agricultural Commodities Act of 1930 (PACA). 7 U.S.C. §499e(c)(1) *et seq.* The amendment creates a statutory trust whereby buyers of perishable produce must hold the purchased produce, or proceeds therefrom, in trust for the benefit of the seller, until the buyer makes full payment for the produce. The statute gives qualifying produce creditors a trust claim which is valid an enforceable whether or not the debtor has filed a petition in bankruptcy. Further, PACA trust interests are superior to those of the buyer's secured and preferred creditors. Accordingly, PACA beneficiaries stand at "the head of the line" when it comes to distribution of trust assets held in trust by the debtor.

While the PACA trust represents a potent weapon for produce shippers, two decisions from the Ninth Circuit Court of Appeals now make it abundantly clear, trust protection will be forfeited unless claimants "strictly comply" with notice and filing requirements under the statute. The Ninth Circuit's most recently published decision, *In re San Joaquin Food Service, Inc.*, No. 90-16433, 1992 WL 43250 (March

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has defined "waters of the United States" to include "interstate wetlands" (40 C.F.R. § 230.3(s)(2)); "[w]etlands adjacent to [other] waters [of the United States]" (40 C.F.R. § 230.3(s)(7)); and

all other waters such as . . . wetlands . . . the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce (40 C.F.R. § 230.3(s)(3)).

The United States Supreme Court has held that section 404 jurisdiction extends to wetlands that are "adjacent to [other] waters [of the United States]" as contemplated by 40 C.F.R. § 230.3(s)(7). *United States v. Riverside Bayview Homes, Inc.* 474 U.S. 121 (1985). As summarized by the Seventh Circuit in *Hoffman Homes*, the United States Supreme Court upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States" because those wetlands are an "`integral part of the aquatic environment'" in that they "`play a key role in protecting and enhancing water quality'" by preventing flooding and erosion and by filtering and purifying water draining into adjacent bodies of water. *Hoffman Homes*, * 12-13 (citations omitted). Nevertheless, according to the Seventh Circuit, neither the United States Supreme Court nor any court of appeals has extended the reach of section 404 to non-adjacent wetlands such as the intrastate, isolated wetlands contemplated by 40 C.F.R. § 230.3(s)(3). *Id.*

At issue in *Hoffman Homes* was a "0.8 acre, bowl-shaped depression . . . lined with relatively impermeable clay so that rain water could not drain off quickly and would collect in the bottom." *Id.* at *3. As described by the court, the area

had no surface or groundwater connection to any other body of water. It did not perform sediment trapping or flood control functions for any body of water, was not used for industrial or fishing purposes and was not visited by interstate travelers for recreational purposes. In fact, there is not even any evidence that migratory birds, or any other wildlife, actually used [the area] for any purpose.

Id. Nonetheless, the area possessed all of the characteristics of a "wetland" under the EPA's regulations "because it had wetland hydrology (it was inundated with water a sufficient period of time), had hydric soil (Peotone soil), and supported hydrophytic vegetation (cattails)." *Id.* *3, n.1 (citing 40 C.F.R. § 230.3(t)).

The "bowl-shaped depression" was located at the border of a 43 acre parcel that in Hoffman Estates, Illinois, that Hoffman Homes had developed into a housing subdivision. During the construction of the subdivision, Hoffman Homes filled and graded the area at issue, known as "Area A." *Id.* at *4.

After Hoffman Homes filled and graded the site, the Army Corps of Engineers discovered the filling and ordered Hoffman Homes "to stop filling Area A and to apply for an after-the-fact permit." *Id.* The EPA, however, objected to Hoffman Homes' application for a permit and ordered Hoffman Homes to cease filling and to restore the wetland. *Id.* at *5.

After administrative hearings arising from the EPA's issuance of a Compliance Order, the EPA Chief Hearing Officer upheld the EPA's assertion of jurisdiction over the wetland at issue under 40 C.F.R. § 230.3(s)(7), concluding that the potential effect on interstate commerce was the wetland's potential use by migratory birds. Hoffman Homes was fined $50,000 for filling Area A. *Id.* at *6-7.

In its review of the EPA Chief Hearing Officer's order, the Seventh Circuit first addressed the issue of whether the EPA's inclusion of intrastate, isolated (non-adjacent) wetlands was a reasonable interpretation of the phrases "navigable waters" and "waters of the United States" as used in the Clean Water Act. The court acknowledged the Act's legislative history indicated that "[t]he Conferees fully intend that the term `navigable waters' be given the broadest possible constitutional interpretation." *Id.* at *10 (citation omitted). Nevertheless, the Seventh Circuit construed the various statements reflected in the Act's legislative history as expressing Congress' intention only to regulate wetlands that functioned to control or prevent flooding or pollution of other waters. *Id.* *10-21.

After concluding that Congress intended only to regulate wetlands that controlled or prevented flooding and pollution of other waters, the Seventh Circuit concluded that only adjacent wetlands served those functions. *Id.* at *19. It examined the functions of "non-adjacent, or isolated, wetlands" and, using exclusively conclusory reasoning without reference to any empirical data in the administrative record or elsewhere, found as follows:

Isolated wetlands, unlike adjacent wetlands, have no hydrological connection to any body of water. By their very definition, isolated wetlands have no relationship or interdependence with any other body of water. Thus, isolated wetlands, like Area A, are not part of an aquatic ecosystem and do not control floods or pollution in other bodies of water. Protection of isolated wetlands, therefore, would not further the objective of the Clean Water Act 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"

Id. at *13-14.

After finding that because "[i]solated wetlands do not contribute to maintaining `the chemical, physical, and biological integrity of the Nation's waters,'" the Seventh Circuit held the EPA's regulation of those wetlands was not within the scope of the Clean Water Act. *Id.* at *20-21. It invalidated 40 C.F.R. § 230.3(s)(3) "as it applies to isolated wetlands." *Id.* at *21.

Having concluded that the EPA's regulation of Area A was not supported by the Clean Water Act, the Seventh Circuit turned to the question of whether the EPA's claim of authority to regulate A was reasonable "[e]ven if Congress did intend to regulate all `navigable waters,' including all wetlands, within its constitutional reach under the Commerce Clause. . . ." *Id.* at *21-22. The court answered that question in the negative.

In concluding that the EPA's regulation of Area A was beyond the reach of the Commerce Clause, the Seventh Circuit

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AALA Editor..... Linda Grim McCormick
195 Dollywood Dr , Toney, AL 35773

Contributing Editors Christopher R Kelley, University of North Dakota; Lewis P. Janowsky, Rynn & Janowsky, Newport Beach, CA, Drew L Kershen, University of Oklahoma College of Law; Scott D Wegner, law clerk to Honorable Bruce Van Sickle, Bismarck, ND, J. Peter DeBraal, USDA; Linda Grim McCormick, Toney, AL

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

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examined a line of Commerce Clause cases and found that "[t]he case law leaves little doubt that tributaries of navigable waters, intrastate waters which are used to irrigate crops, support a fishery, or are visited by interstate travelers, and wetlands adjacent to such waters may be regulated under the Commerce Clause." *Id.* at *31-32 (citations omitted). Then, turning to the EPA's claim that the Commerce Clause was implicated because Area A was a potential landing site for migratory birds, the court reasoned that in each of the Commerce Clause precedents it relied upon "the government has come forward with some connection, no matter how tenuous, with human activity." *Id.* at *36. The court reasoned that "[u]ntil they are watched, photographed, shot at or otherwise impacted by people who do (or, we suppose, have the potential to) engage in interstate commerce, migratory birds do not ignite the Commerce Clause." *Id.* at *33. Finding "no evidence connecting Area A with some human economic activity" such as hunting, fishing, visitation by interstate travelers, the court held that Area A's regulation by the EPA was beyond the limits of the Commerce Clause because there was no reasonable basis for concluding that its filling affected interstate commerce. *Id.* at * 36-37.

In the final paragraph of its decision, the court implicitly criticized the United States Supreme Court for "constricting application of the Takings Clause." *Id.* at *43 (citations omitted). The court then volunteered that "[h]owever, after the Supreme Court decides *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 ([S.C.] 1991), *cert. granted*, 112 S. Ct. 436 (Nov. 18, 1991)... the federal government or, more accurately, taxpayers, might be forced to bear the cost of our national conservation efforts, rather than imposing such costs on fortuitously chosen landowners like Hoffman Homes, Inc." *Id.* at *43-44 (footnote omitted). Notwithstanding its gratuitous remarks on "takings" jurisprudence, the court concluded its opinion without in any way suggesting how the EPA's actions worked a "taking" under existing Supreme Court "takings" jurisprudence or under the "takings" analysis advanced by Mr. Lucas in *Lucas v. South Carolina Coastal Council*.

—Christopher R. Kelley, University of North Dakota

9TH CIRCUIT LIMITS PACA TRUST PROTECTION/CONTINUED FROM PAGE 2

11, 1992) [92 D.A.R. 3283] is consistent with the court's earlier opinion in *In re Marvin Properties, Inc.* (9th Cir. 1988), 854 F.2d 1183. In *Marvin Properties*, the court denied the shipper trust benefits because it failed to send the notice of intent to preserve trust benefits directly to the debtor. The trust claimant argued it substantially complied with the statute's requirement to notify the debtor because 1) the Secretary of Agriculture sent the debtor a letter acknowledging the shipper's filing of the notice, and (2) the undisputed facts in the record established the debtor had actual notice of the trust claim. The court held the "substantial compliance" doctrine is unavailing when the statute's requirements are "unambiguous."

In *San Joaquin Food Service, Inc.*, the court again applied a strict interpretation of the PACA statutory trust when it held a trust claimant will not qualify for trust protection if its payment terms exceed ten days unless the payment terms also appear on the claimant's invoices. The fact that the trust claimant and debtor signed a written agreement for payment terms exceeding the ten-day prompt payments terms prior to shipping the produce will not relieve the trust claimant from the "requirement" of including the payment terms on each invoice, according to the court.

Prior to the court's decision, the U.S. Department of Agriculture PACA division and lower federal district court decisions assumed the ten-day prompt payment terms would apply when either (1) the payment terms were omitted from the invoice but exceeded ten days pursuant to a written agreement, or (2) the parties failed to enter a written agreement exceeding the ten-day prompt payment terms in excess of ten days on their invoices. Under the more "substantial compliance" interpretation of the statute, a trust claimant had a much greater chance that at least a portion of the shipment would be protected.

In light of the Court of Appeals' recent opinion, the following immediate steps should be taken by all shippers to ensure compliance with the court's decision:

1.If payment terms exceed ten days, the terms of payment must appear on each invoice.

2.If payment terms exceed ten days, the shipper must enter into a written agreement with the debtor prior to the transactions.

3.If payment terms exceed ten days, the payment terms on the shipper's invoice and the payment terms in the written agreement between the parties must be identical.

While the case law relating to the PACA statutory trust is in a developing stage, the court's decision is likely to be followed in the circuit and district courts throughout the United States. A significant number of trust claimants stand to lose the benefits of the trust unless they take all necessary steps to immediately comply with the court's holding.

—Lewis P. Janowsky, Rynn & Janowsky, Newport Beach, CA

Invitation to join the Article 7 Task Force

The Permanent Editorial Board of the UCC has issued new revisions or proposed revisions of all the articles of the UCC save one-- Article 7. Now, at the request of the P.E.B., the UCC Committee of the Section on Business Law of the American Bar Association has created an Article 7 Task Force. The charge to the Task Force is to survey the issues, problems, and concerns that exist under Article 7, to determine whether these issues, problems, and concerns are sufficiently serious to warrant revision of Article 7, and to prepare a report on Article 7 for submission to the P.E.B. The Task Force was formed in January, 1992.

Drew L. Kershen, Professor of Law, University of Oklahoma, is the chair of the Article 7 Task Force. The Article 7 Task Force held its first, organizational meeting on Saturday, April 11 in Orlando at the spring meeting of the Business Law Section. Professor Kershen invites anyone who wishes to serve on this Task Force to contact him. To insure that problems relevant to all who deal with bills of lading, warehouse receipts, and other documents of title surface during the Task Force's Work, the Task Force needs a broad-based membership from those who represent shippers and warehouses, trade associations for shippers and warehouses, lenders against documents of title, insurance companies who bond shippers and warehouses, academics who teach about Article 7, and any others who are interested in Article 7. If you work with Article 7, please join us on this Task Force.

Contact: Drew L. Kershen, Professor of Law, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019-0701. TEL: 405/325-4702; FAX 405/325-6282.

Federal Reg. in brief

The following matters were published in the *Federal Register* during the month of March, 1992.

1. FCA; Eligible investments; proposed rule 57 Fed Reg. 7672.

2. FCA; Private Act regulations; new exempt system of records; proposed rule. 57 Fed. Reg. 8851.

3. FCA; Policy statement concerning the disclosure of the issuance and termination of enforcement contracts, effective date 11/14/91. 57 Fed. Reg. 9551.

4. ASCS; List of warehouses and availability of list of cancellations and/or terminations. 57 Fed. Reg 8620

5. IRS; Allocations attributable to partnership nonrecourse liabilities; correction. 57 Fed. Reg. 8961.

—Linda Grim McCormick, Toney, AL

The Plant Variety Protection Act: has the farmer exemption swallowed the act?

By Scott D. Wegner

Introduction

The United States Constitution provides that Congress shall have the power to "promote the Progress of Science" by granting inventors, for a period of time, the exclusive right to their discoveries.[1] Congress has protected intellectual property through patent,[2] trademark[3] and copyright[4] laws. The Plant Patent Act of 1930 granted intellectual property protection to asexually reproduced plants.[5] Subsequently, the Plant Variety Protection Act of 1970[6] (PVPA) extended patent-like protection to sexually reproduced plant varieties.

The PVPA is administered by the PVP Office[7]. The Secretary of Agriculture appoints a PVP Board to advise on the Act's administration.[8] The breeder of any novel variety of sexually reproduced plant may be issued an eighteen-year certificate of plant variety protection,[9] which entitles the holder to exclude others from selling or reproducing the variety.[10] The breeder is responsible for enforcement and may bring a civil infringement action.[11] Remedies for infringement include injunctive relief[12] and money damages in an amount not less than a reasonable royalty.[13] Congress explained that the PVPA's intent is to encourage research so that the public may benefit from new varieties.[14] Toward that end, over 2,000 PVP certificates have been issued on new varieties.[15] The total includes 458 soybean varieties, 176 wheat varieties, and 156 cotton varieties.[16]

Commercial breeding

The wheat breeding experience demonstrates both the PVPA's potential and the PVPA's fundamental weakness. Wheat breeding programs at state agricultural experiment stations have been very successful. Since 1930, U.S. wheat yields have increased 115%, with genetic improvements accounting for forty percent to sixty percent of the increase.[17] Not surprisingly, university-developed varieties are by far the most widely grown. In 1979, ninety percent of the total wheat acreage was planted to varieties developed by state agricultural experiment stations.[18] By 1984, eighty percent of the acreage was still planted to public varieties.

Scott D. Wegner, LL.M. Agricultural Law, is law clerk to Hon. Bruce Van Sickle, U.S. District Court, Bismarck, ND.

In 1970, following passage of the PVPA, commercial breeders such as Pioneer Hi-Bred International Inc. joined the experiment station breeders and began to release private varieties. As a result, more varieties became available to farmers. However, plant breeding is a slow and expensive process, taking approximately ten years[19] and one million dollars[20] to breed a new, successful wheat variety.

Consequently, commercially developed wheat varieties did not appear until around 1980. Then, in the next decade, Pioneer varieties captured a sizable percentage of the market. For example, in 1989 Pioneer varieties accounted for 11.9% or 1.5 million acres of Kansas' 12.4 million acres of hard red winter wheat.[21] Pioneer 2157 alone was seeded on 1.2 million acres or 9.5% of the total. In 1990, North Dakota farmers seeded Pioneer hard red spring wheat varieties on 576,000 acres or 7.2% of the total acreage.[22] Pioneer 2375, the leading commercial variety, accounted for 3.4% of the total, or 272,000 acres.

However, Pioneer wheat breeding did not prosper, but lost six million dollars from 1984 to 1989.[23] Therefore, in October 1989, after 20 years of development and sales with no profit, Pioneer announced that it was discontinuing its hard red spring wheat and hard red winter wheat breeding programs. In early 1990, Pioneer donated their spring wheat germplasm, research results, and commercial varieties to North Dakota State University.[24] Pioneer donated their winter wheat program to Kansas State University.[25] So, although commercial breeding can be successful, it is apparent that the PVPA does not adequately protect the breeders' intellectual property rights. Section 113 of the PVPA has placed commercial wheat and soybean breeding in jeopardy.

The farmer exemption

The PVPA contains a crop exemption, section 113, also known as the farmer exemption or the saved seed exemption.[26] The farmer exemption permits three practices. The exemption reads:

> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 111 [7 U.S.C. § 2541(3), (4)], it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: Provided, That without regard to the provisions of section 111(3) [7 U.S.C. § 2541(3)] it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 127 [7 U.S.C. § 2567] that his actions constitute an infringement.

Bin run

Bin run allows a farmer to save seed that he produced from a protected variety for use in producing subsequent crops. It is not an infringement for a farmer "to save seed produced by him" from a protected variety and "use such saved seed in the production of a crop." The practice is known as bin run because a farmer stores his crop in a grain bin and then retrieves the crop for use as seed the next planting season. Bin run lets a farmer make only a small, initial purchase of seed. Thereafter, the farmer has the potential to multiply his supply of seed. For example, a Kansas farmer may buy 100 bushels of Pioneer 2157 hard red winter wheat seed. The farmer will seed roughly 100 acres with the 100 bushels which will yield approximately 5,000 bushels. If the farmer saved all 5,000 bushels of Pioneer wheat, the next year he could, utilizing bin run, seed 5,000 acres of the protected variety. Accordingly, the second generation after purchasing 100 bushels, the farmer will harvest 250,000 bushels of Pioneer 2157. Wheat farmers rely heavily on bin run. Kansas farmers seed at least sixty percent of their acreage from bin run, while North Dakota farmers plant from sixty percent to one hundred per cent bin run. As a result, commercial seed companies can make only small sales, because after the initial purchase, a farmer can produce all the seed he requires.

Bin run is a valuable system for farmers. The system works for two reasons. First, farmers can rely on bin run since wheat, like soybeans and cotton, is self pollinated, meaning that it reproduces true-to-type. Wheat seed produces progeny that maintains the essential characteristics of the variety. In contrast, corn, sorghum and sunflowers are hybrid crops. Corn loses its hybrid vigor after one planting and so new seed must be purchased each year. Hybrids, therefore, need no intellectual property protection as they have biological protection.[27] Second, properly maintained wheat can be kept in storage for years. A farmer need only segregate the varieties and clean the wheat prior to planting. Thus, bin run allows a variety to be used for several years following the initial purchase of seed.

Farmer-to-market sales

Normally, in the months following harvest a farmer will sell a significant portion of his crop to a local cooperative. The crop is sold as food and feed or for non-reproductive purposes, meaning that the crop is not being sold as seed. The statute expressly permits protected varieties to be sold in this manner. "A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes ... shall not constitute an infringement."[28]

Farmer-to-farmer sales

In addition to food and feed sales, the farmer exemption grants another type of sale. Crop sales for reproductive purposes or as seed are known as farmer-to-farmer sales or over-the-fence sales.[29] A person "whose primary farming occupation is the growing of crops for sale for other than reproductive purposes" may sell wheat or soybeans seed "to other persons so engaged, for reproductive purposes."[30] Farmer-to-farmer sales of protected varieties in non-descriptive brown bags is known as "brown bagging." Brown bag seed is less expensive than PVPA protected seed sold by a dealer. Thus, it is hard for seed companies to compete. <body text>The consequences of the farmer exemption to seed companies can be devastating. In 1989, Kansas farmers seeded 1.2 million acres of Pioneer 2157. It follows that Pioneer should have sold over 1 million bushels of seed wheat. Instead, Pioneer sold just 100,600 bushels of seed wheat in the States of Kansas, Nebraska, Colorado and part of Wyoming combined.[31] The ambiguous statutory language opens the farmer exemption to abuse. Seed companies argue that while the intent was localized sales, such as within the same township, farmers in the Midwest have made sales as far away as the Carolinas.[32] Farmers advertising protected seed for sale aggravates the problem. A common example is the following: "SEED WHEAT FOR SALE: [Pioneer] 2375. Bin run or cleaned. Can deliver." Obviously, advertising goes beyond the over-the-fence sale concept.

The statute does not literally require that a person's primary occupation be farming. The statute requires only that the part of a person's occupation involving farming be primarily the growing of crops for non-reproductive purposes. Conceivably, non-farming entities could enter the seed business as long more than half of their crop is sold for non-reproductive purposes.[33] Next, the term "primary farming occupation" is indefinite. Farmers have argued that the term requires that only part of their crop be sold for non-reproductive purposes. Of course, the other portion may then be sold as seed. In *Asgrow Seed Company v. Kunkle Seed Company*,[34] the farmer had harvested over 60,000 bushels of soybeans in one crop year. Of that, over 20,000 bushels of protected Asgrow varieties were set aside for sale as seed. Nevertheless, the court refused to grant a preliminary injunction because the defendant's *primary* farming occupation, as reflected in the total harvest, was the growing of crops for non-reproductive purposes. The court defined "primary" to require only that more than fifty percent of the crop be grown for non-reproductive purposes, apparently without regard to the number of bushels involved. Further, the court found brown bagging to be in the public interest. "The public interest will be furthered by providing area farmers an opportunity to purchase seed from Ken Kunkle at a price lower than that charged for legitimate Asgrow seed."[35]

In the recent case of *Asgrow Seed Company v. Winterboer*,[36] the court took a drastically different approach to this issue. The court did not analyze the defendant's "primary farming occupation" as being for reproductive or non-reproductive purposes (the defendant claimed that since eighty percent of his crop was sold for non-reproductive purposes, the exemption applied), but instead determined that the defendant could not sell more than the amount of his "saved seed." "The exemption allows a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year."[37] Essentially, this decision restricts a farmer to bin run and eliminates farmer-to-farmer sales. Farmer-to-farmer sales would be possible only if planting requirements changed. Nonetheless, the court determined that a restrictive reading of the exemption was required to give effect to the Congressional intent of encouraging research and development.

On appeal, Asgrow argues that without a quantitative limitation on farmer-to-farmer sales, unrestricted brown bagging could eliminate Asgrow from the marketplace. Moreover, Asgrow would be eliminated by the sale of their own seed. The Winterboers argue that the court must apply the text as written and leave policy concerns to Congress.

Proposed amendments

The American Seed Trade Association has proposed amendments[38] to PVPA sections 111[39] and 113.[40] The bin run exemption would not be amended. Farmers would continue as they always have, saving a portion of their crop for use as seed. However, farmer-to-farmer sales, regardless of the amount, would be prohibited. A farmer would only be able to sell seed for non-reproductive purposes. Also, section 111(6)[41] would be amended to provide that it will be an infringement to "clean, condition or treat seed of the novel variety and dispense the novel variety for reproductive purposes to a person other than the person from whom such seed was received."[42] Concerns have been raised that the proposed language makes the elevator the policeman for the certificate holder.[43] Finally, a new subsection would be added, section 111(9).[44] As added, it will be an infringement to "knowingly purchase seed of the novel variety from any person for reproductive purposes without the authority of the owner of the variety."[45]

Conclusion

In *Delta & Pine Land Co. v. Peoples Gin Co.*,[46] the court stated that "[i]n purpose and operation, the farmer exemption appears to be at odds with the primary purpose of the Act." The Pioneer wheat breeding experience confirms the court's statement. The farmer exemption has swallowed the Act. However, neither the *Kunkle* nor the *Winterboer* approach seems particularly satisfactory. Restricting farmer-to-farmer sales to an amount certain, such as 1,000 bushels, in addition to bin run, may be more workable for all. Or, perhaps plant breeding is best left to publicly supported land grant universities. But, although the future of wheat breeding is in safe hands with the agricultural experiment stations, the concern is that with half as many plant breeders studying twice as much genetic material, fewer new varieties will be released. In the end, farmers may suffer the most from the very exemption they enjoy.

[1] U.S. Const. art. I, § 8, cl. 8.
[2] 35 U.S.C. §§ 1-376.
[3] 15 U.S.C. §§ 1051-1127.
[4] 17 U.S.C. §§ 101-914.
[5] 35 U.S.C. §§ 161-164.

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[6] Act of Dec. 24, 1970, Pub. L. 91-577, 84 Stat. 1542, *codified at* 7 U.S.C. §§ 2321-2582. Minor amendments were made in 1980. *See generally Plant Variety Protection Act: Hearings on S. 23, S. 1580, & S. 2820 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 96th Cong., 2d Sess. (1980) and *Plant Variety Protection Act Amendments: Hearings on H.R. 999 Before the Subcomm. on Department Investigations, Oversight, and Research of the House Comm. on Agriculture*, 96th Cong., 1st and 2d Sess. (1979, 1980).

[7] 7 U.S.C. § 2321. The PVP Office is located within the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture. 7 C.F.R. § 180.1(b)(17).

[8] 7 U.S.C. § 2327(b)(1).

[9] 7 U.S.C. § 2483(b). The breeder must deposit 2,500 viable seeds to be held at the National Seed Storage Laboratory in Fort Collins, Colorado. 7 C.F.R. § 180.6(d). See generally Mitgang & Raeburn, *Federal Collections of Seeds Withering*, Chicago Trib., Mar. 27, 1989 at 1C.

[10] 7 U.S.C. § 2483(a).

[11] 7 U.S.C. § 2561. *See also Public Varieties of Mississippi, Inc. v. Sun Valley Seed Company, Inc.*, 734 F. Supp. 250 (N.D. Miss. 1990) (licensee of breeder not entitled to bring PVPA suit).

[12] 7 U.S.C. § 2563.

[13] 7 U.S.C. § 2564(a).

[14] 7 U.S.C. § 2581.

[15] Office of Technology Assessment, U.S. Congress, New Developments In Biotechnology: Patenting Life 11 (1989). The PVPA is not the only form of protection available for sexually reproduced plants. Breeders may also seek utility patent protection for new plant varieties. *See, e.g., Ex parte Hibberd*, 227 U.S.P.Q. 443 (B.P.A.I. 1985); *Diamond v. Chakrabarty*, 447 U.S. 303, 100 S.Ct. 2204, 65 L.Ed.2d 144 (1980). *See also Seay, Protecting The Seeds of Innovation: Patenting Plants*, 16 A.I.P.L.A. Q.J. 418 (1988-89).

[16] Asgrow Seed Company, A Chronicle of Plant Variety Protection 8 (1989).

[17] *See, e.g.*, Christensen, *Genetic Ark: A Proposal to Preserve Genetic Diversity for Future Generations*, 40 Stan. L. Rev. 279, 288 (1987-88).

[18] Statistical Reporting Service, USDA, No. 739, Distribution Of The Varieties and Classes of Wheat in the United States 8 (1984).

[19] *See, e.g.*, Asgrow Seed Company, supra note 16, at 21.

[20] *See Proposed Amendments to the Plant Variety Protection Act: Hearing Before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 101st Cong., 2d Sess. 9 (1990) [hereinafter *Hearing*] (statement of Owen J. Newlin, Senior Vice President, Pioneer Hi-Bred International, Inc.).

[21] *See, e.g.*, Hemman, *Many Companies Abandon Wheat Research*, Hutchinson News, Oct. 29, 1989.

[22] Agricultural Statistics Service, North Dakota, Wheat Varieties (1990).

[23] *Hearing*, supra note 20, at 8.

[24] It will take NDSU from six to ten years to evaluate Pioneer's wheat breeding material. The North Dakota Wheat Commission will contribute $60,000 over the next three years to held NDSU absorb the gift. The germplasm will be shared with South Dakota State University and the University of Minnesota.

[25] KSU had identified about 76,000 different strains of wheat. The Pioneer gift added another 110,000 strains.

[26] 7 U.S.C. § 2543.

[27] Despite considerable research effort, hybrid wheat development has been largely unsuccessful. In 1984, hybrid wheat acreage amounted to less than 1/10 of 1%. *E.g.*, Statistical Reporting Service, USDA, Distribution of the Varieties and Classes of Wheat in the United States 8 (1984).

[28] 7 U.S.C. § 2543.

[29] The sales must be directly from one farmer to another without the intervention of a third party, such as a cooperative. *See Delta & Pine Land Co. v. Peoples Gin Co.*, 546 F. Supp. 939 (N.D. Miss. 1982), *aff'd*, 694 F.2d 1012 (5th Cir. 1983).

[30] 7 U.S.C. § 2543. However, such sales must be made in compliance with state seed laws.

[31] *Hearing, supra* note 20, at 9 (statement of Owen J. Newlin, Senior Vice President, Pioneer Hi-Bred International, Inc.). The absence of bin run allowed Pioneer to retain their soft red winter wheat program. Soft red winter wheat is grown primarily in the Corn belt and the Southeast. These farmers, for various reasons, tend to buy more than 60% of their seed wheat yearly.

[32] *Hearing, supra* note 20, at 6 (statement of Jerome J. Peterson, President, American Seed Trade Association).

[33] *Hearing, supra* note 20, at 33 (testimony of Jerome J. Peterson, President, American Seed Trade Association).

[34] Civ. No. 86-3138-A (W.D. La. Apr. 1, 1987) (order denying preliminary injunction), *aff'd*, No. 87-1402 (Fed. Cir. Feb. 18, 1988) (per curiam). Thereafter, on February 28, 1989, the parties agreed to the entry of a consent judgment which included a permanent injunction.

[35] *Id.* slip op. at 8.

[36] Civ. No. C91-4013 (N.D. Iowa Sept. 30, 1991), *appeal docketed*, No. 92-1048 (Fed. Cir. Nov. 14, 1991). The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over this appeal. *See* 28 U.S.C. § 1292(c)(1).

[37] *Id.* slip op. at 7.

[38] Hearing, supra note 20, at 37-39.

[39] 7 U.S.C. § 2541.

[40] 7 U.S.C. § 2543.

[41] 7 U.S.C. § 2541(6).

[42] *Hearing, supra* note 20, at 38.

[43] *Hearing, supra* note 20, at 47 (testimony of Howard Lyman, National Farmers Union).

[44] 7 U.S.C. § 2541(9).

[45] *Hearing, supra* note 20, at 39.

[46] 694 F.2d 1012, 1016 (5th Cir. 1983). The experience of the PVPA's farmer exemption raises the question of whether a livestock farmer exemption to a future animal patent law would be effective.

CONFERENCE CALENDAR

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Foreign ownership of U.S. ag land in '91

Foreign interests owned 14.8 million acres, or slightly more than 1% of privately owned U.S. agricultural land as of Dec. 31, 1991, according to the U.S. Department of Agriculture's Economic Research Service. Foreign ownership increased 3% (419,474 acres) from a year earlier but remains in the range of just above or below the 1-% figure, where it has been since 1981.

About 53% of the reported foreign holdings is actually land owned by U.S. corporations. The law requires them to register their landholdings as foreign if as little as 10% of their stock is held by foreign investors. The remaining 47% of the foreign-held land is owned by investors not affiliated with U.S. firms.

Because of the corporate holdings, an increase in foreign ownership from one year to another does not necessarily represent land newly acquired by foreigners. Nor do the numbers necessarily represent ownership exclusively by foreigners. A U.S. firm's landholdings can show up as "foreign owned" one year, but not another, as the firm's stock passes in and out of foreign hands. The land, however, is still owned by the same entity as before.

These and other findings are based on an analysis of reports submitted to USDA under the Agricultural Foreign Investment Disclosure Act of 1978.

The analysis also revealed:

—Forest land accounts for 49% of all foreign-owned acreage; cropland, 17%; pasture and other agricultural land, 31%; and nonagricultural land, 3%.

—Corporations (U.S. and foreign) own 73% of the foreign-held acreage; partnerships, 19%; and individuals, 6%. The remaining 2% is held by estates, trusts, associations, institutions, and others.

—Japanese investors own only 3% of the total foreign-held acreage, in contrast to 25% for Canadian investors, who lead. Investors (including individuals, corporations, partnerships, etc.) from Canada, the United Kingdom, Germany, France, Switzerland, the Netherlands Antilles, and Mexico own 73% of the foreign total.

—The largest foreign-owned acreage, mostly timberland, was reported in Maine. Foreign holdings account for 16% of Maine's privately owned agricultural land. These holdings represent 19% of all the reported foreign-owned land nationwide. Four companies own 93% of the foreign-held acres in Maine, all in forest land. Two are Canadian, the third is a U.S. company that is partially Canadian-owned, and the fourth is a U.S. company that is partially French-owned.

—Except for Maine, foreign holdings are concentrated in the South (32%) and West (34%). Rhode Island and Alaska are the only States with no reported foreign-owned agricultural land.

—Ninety-four% of the foreign-owned acreage will remain in agricultural production, according to the foreign owners. No change in tenure is reported for 49% of the acres, while some change is planned on 24% of the acres. "No response" accounted for 27%.

—J. Peter DeBraal, USDA

Fifth Circuit reverses DCP Farms

The Fifth Circuit has held that the district court erred in *DCP Farms v. Yeutter*, 761 F. Supp. 1269 (N.D. Miss. 1991), when it enjoined the national level of the USDA, including the ASCS Deputy Administrator for State and County Operations (DASCO), from participating in any determinations or administrative appeals concerning the plaintiffs' farm program eligibility. *DCP Farms v. Yeutter*, No. 91-1384, 1992 U.S. App. LEXIS 5248 (5th Cir. Mar. 23, 1992). The district court had enjoined DASCO's participation on the grounds that DASCO's initial determination of the plaintiffs' ineligibility for program payments was "impermissibly obtained by Congressional interference" and that DASCO's participation in the administrative review of that determination would violate the plaintiffs' due process rights. *DCP Farms*, 761 F. Supp. at 1272, 1276. *See generally* Alan R. Malasky, *Mississippi Federal District Court Reinstates Farm Program Payments; Impermissible Congressional Interference Found*, Agric. L. Update, Feb. 1991, at 1.

The district court had found that it was "abundantly clear" that Representative Jerry Huckaby, Chairman of the House Committee on Agriculture's Subcommittee on Cotton, Rice, and Sugar, and "his key staff aide" had used their influence in an effort to have DASCO "adopt the conclusion" that the plaintiffs had adopted a scheme or device to evade the farm program payment limitations rules. *Id.* at 1271, 1273-74. Specifically, the court noted that Rep. Huckaby had written the Secretary of Agriculture to advise him that "I feel strongly that the [plaintiffs'] operation violates both the spirit and letter of the law," and, "[i]f the Department is unable to correct this situation, it is my intention to enact legislation making all trusts and estates ineligible for payments, beginning with the 1989 crop year." *Id.* at 1271.

In response to Rep. Huckaby's letter, William Penn, a DASCO official, wrote a letter for the signature of a superior USDA official assuring Rep. Huckaby that the USDA would take a "very aggressive position in dealing with [the plaintiffs'] case." *Id.* Nevertheless, as noted by the Fifth Circuit, "the letter did not suggest that the USDA was committed to a specific outcome." *DCP Farms*, No. 91-1384, slip op. at 5.

Several months after drafting the USDA's response to Rep. Huckaby, Mr. Penn overturned the prior decisions of two county ASCS committees approving the plaintiffs' 1989 farm operating plans, thus rendering the plaintiffs ineligible for 1989 program payments. He also took the "unprecedented action of rendering the initial determinations denying the plaintiffs' request for the 1990 crop year," a determination that also denied benefits for the 1991 crop year because it concluded that a scheme or device had been adopted in 1989 and 1990. *DCP Farms*, 761 F. Supp. at 1271-72. Ordinarily, initial determinations are made by the county committees. *See* 7 C.F.R. § 1497.2(e).

The plaintiffs sought reconsideration of the determinations. Subsequently, when a Freedom of Information Act request revealed the contacts between the USDA and Rep. Huckaby and his aide, the plaintiffs petitioned the agency to disqualify its national office from reviewing the determinations. When that petition was denied, the plaintiffs brought their action in the district court. *Id.* at 1272.

In concluding that the DASCO determinations had been "impermissibly obtained by Congressional interference," the district court relied on the "mere appearance of bias or pressure" standard of *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966). *DCP Farms*, 761 F. Supp. at 1272, 1276. In doing so, it implicitly found that the determination at issue was an "agency adjudicative proceeding[]." *See Id.* at 1273.

The Fifth Circuit held that the district court had erred in using the "mere appearance of bias or pressure" standard adopted in *Pillsbury*. It ruled that the "mere appearance of bias or pressure" standard does not apply "to claims of improper congressional interference with an administrative determination of eligibility for farm subsidies" so long as the determination is "neither quasi-judicial nor judicial." *DCP Farms*, No. 91-1384, slip op. at 1, 7. Instead, "the proper standard for evaluating congressional interference with non-judicial decisions of administrative agencies is whether the communication actually influenced the agency's decision" by causing "the administrator to consider extraneous factors in reaching his decision." *Id.* at 8-9, 1-2 (citing *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983)).

The court held that the district court's reliance on the *Pillsbury* standard was inappropriate because the congressional contact at issue "occurred well before any proceeding which would be considered judicial or quasi-judicial." *Id.* at 7. Specifically, the court concluded that "[t]his case would not have reached the stage when it could fairly be called adjudicative or quasi-judicial until the hearing [on the plaintiffs' request for reconsideration]," a hearing that was never held because the plaintiffs sought judicial relief before the scheduled hearing when they were unsuccessful in recusing the USDA's national office.

After holding that the *Pillsbury* standard was inapplicable, the Fifth Circuit proceeded to apply the "intrusion of extraneous factors into the consideration" standard. In doing so, the Fifth Circuit's characterization of Rep. Huckaby's motivations sharply diverged from the district court's. For example, while the district court found that Rep. Huckaby's actions were "an effort to dictate the outcome" of the plaintiffs' application for program payments, *DCP Farms*, 761 F. Supp. at 1274, the Fifth Circuit concluded "[t]hat a congressman expresses the view that the law ought not sanction the use of fifty-one irrevocable trusts to gain $1.4 million in subsidies is not impermissible political 'pressure.' It certainly injects no extraneous factor." *DCP Farms*, No. 91-1384, slip op. at 10.

In the Fifth Circuit's view, "Congressman Huckaby was concerned about the administration of a congressionally created program," and "[t]he dispute between the USDA and DCP Farms was part of a larger policy debate." *Id.* at 8. From that perspective, the Fifth Circuit reasoned "that the force of logic and ideas is not our concern. They carry their own force and exert their own pressure. In this practical sense they are not extraneous." *Id.* at 10.

In contrast, the district court was unpersuaded by arguments that the Congressman's desires did not include the agency's denial of the plaintiffs's requested payments. It asserted that "[t]he defendants' novel argument that Congressman Huckaby was merely urging enforcement of the law is simply unconvincing." *DCP Farms*, 761 F. Supp. at 1274.

The Fifth Circuit also held that the plaintiffs were not excused from exhausting their administrative remedies because they had neither challenged the lawfulness or constitutionality of the administrative process nor had they produced evidence sufficient to support a finding of futility. *DCP Farms*, No. 91-1384, slip op. at 10-11. Finding that the USDA was justified in summarily rejecting the plaintiffs' "unreasonably broad" request for the recusal of the national level of the USDA, the court concluded that the USDA's denial of the request "does not convince us that the USDA would have unreasonably refused a request for a different hearing officer had DCP Farms made such a request," and "evidence that [the] hearing officer [appointed to review the determinations had] read a letter involving this case is weak evidence that pursuing administrative appeals would have been futile." *Id.* at 11-12.

Characterizing the relief granted by the district court as "exceptional," the Fifth Circuit stated the "[t]he appropriate forum for resolving this dispute is an appeal from a final USDA decision." *Id.* at 12. It ordered the dismissal of the district court action. *Id.*

—Christopher R. Kelley, University of North Dakota

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Agricultural Update

AMERICAN AGRICULTURAL
LAW ASSOCIATION NEWS

Membership renewal notice reminder

Membership dues for 1992 were due February 1, 1992. Those of you who have not yet paid, please be aware that in order to vote in the important upcoming election for officers and board members, you must be a paid-up member. Please send your dues to:

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