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Federal Circuit finds "egregious" unfairness in ASCS determination

Strongly criticizing the ASCS's "egregious" violation of fundamental principles of fairness, the United States Court of Appeals for the Federal Circuit has held that the ASCS's denial of program payments based solely on the impeached testimony of an admitted liar was arbitrary and capricious. *Doty v. United States*, Nos. 94-5014, 94-5013, 1995 WL 215646 (Fed. Cir. Apr. 12, 1995). The Federal Circuit's harsh criticism was based on the ASCS's refusal to change its position even after it had been ordered by the Court of Federal Claims to disregard the impeached testimony of the admitted liar. The ASCS sought to justify its refusal by claiming it was entitled to draw all inferences against the program participant. The Federal Circuit, however, summarily rejected the ASCS's claim on the ground that inferences must have an evidentiary basis, and the ASCS's inferences were based solely on the testimony it had been ordered to ignore.

The dispute involved the Dairy Termination Program [DTP] under which eligible dairy farmers were paid to slaughter or to permanently export their dairy herds. James and Susan Doty, Minnesota dairy farmers, participated in the DTP, becoming eligible for nearly $100,000 for disposing of their dairy herd. After the Dotys had entered into their DTP contract and certified to the ASCS that they had disposed of all their cattle, one of their former employees told the ASCS that not all of the herd had been disposed of.

In the investigation that followed, the Dotys disputed their former employee's claim. Subsequently, the former employee told the Dotys' county ASC committee that he had lied. He then made new accusations against the Dotys, again claiming that not all of the herd had been disposed of. After being informed by the committee of the apparent DTP contract violation, the Dotys went before the committee and denied their former employee's accusations. The county committee then referred the matter to the Minnesota State ASC Committee. After consulting with the ASCS national office, the state committee recommended that the Dotys forfeit their contract payments and be assessed a penalty of $5,000 for each of the six cattle allegedly not destroyed. The county committee adopted this recommendation after again meeting with the former employee.

The Dotys then began the ASCS's administrative appeal process. Despite repeated requests, including a request under the Freedom of Information Act, the Dotys did not receive any information about the accusations made against them until nine days

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EPA amends Worker Protection Standards

EPA, on April 27, 1995, announced five regulatory actions to protect the health of agricultural workers and pesticide handlers by revising EPA's Worker Protection Standards [WPS]. These actions strengthen the requirement for training agricultural workers about the risks of pesticides, and, in some cases, reduce restrictions on crop advisors and other workers who enter fields or areas where pesticides have been applied.

Final rule amendment — crop advisors

Summary of final rule amendment

- Certified or licensed crop advisors and persons under their direct supervision are exempt from WPS provisions except for pesticide safety training.
- The exemption applies only after the pesticide application ends and while performing crop advising tasks.
- The exemption describes what constitutes "direct supervision" and the information that crop advisors must convey to those under their direct supervision.
- Certified or licensed crop advisors may substitute pesticide safety training received

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before their appeal hearing before the state committee. Included in the documents they received was an undated, unsigned statement by the former employee admitting he had lied on a second occasion in connection with his accusations against the Dotys. Although the Dotys presented sworn testimony to the state committee contradicting their former employee, including a sworn statement by an ASCS employee who had inspected the herd, the committee refused to permit the ASCS employee and the Dotys' former employee to appear, and it denied the Dotys' appeal.

The Dotys appealed to the ASCS Deputy Administrator (DASCO) in Washington, D.C. Again, the Dotys contradicted the undated, unsigned statement of their former employee with their own sworn statement and the sworn statements of others, including the ASCS employee. DASCO, however, refused the Dotys' request to depose certain ASCS employees, and it ruled against the Dotys.

The Dotys filed suit in the Court of Federal Claims. The court ordered the ASCS to give the Dotys a new hearing. *Doty v. United States*, 24 Cl. Ct. 615 (1991). Without holding the ordered hearing, the ASCS reported to the court new findings against the Dotys based solely on the Doty's former employee's undated, unsigned statement. Subsequently, over the Dotys' objections, the ASCS held a telephone hearing and affirmed its earlier decision. The ASCS offered no evidence to corroborate the Dotys' former employee's accusations. The court then declared the telephone hearing a nullity, and it ordered the ASCS to make a new determination not based on the former employee's statement. *Doty v. United States*, 27 Fed. Cl. 598 (1993). The ASCS did so, but it again ruled against the Dotys. The Court of Federal Claims upheld this determination on the grounds that it was unreviewable, and the Dotys appealed to the Federal Circuit.

On appeal, the Federal Circuit found that the ASCS's conduct was an "egregious" violation of the Dotys' right to a fair hearing, declaring that the "totality of the agency's actions leave us with the unavoidable conclusion that there has been a violation of fundamental principles of fairness...." The court also ruled that the ASCS had been properly instructed by the Court of Federal Claims to disregard the only evidence against the Dotys, the unsigned statement of their former employee. Yet, even when it was told to disregard that evidence, the ASCS persisted in ruling against the Dotys, claiming that it was entitled to draw all inferences against the Dotys. This, the court held, was arbitrary and capricious conduct by the ASCS because the inferences drawn by the ASCS could only be based on the former employee's impeached testimony. In reversing the Court of Federal Claims' upholding of the ASCS's determination, the Federal Circuit ordered the agency to pay the Dotys their DTP contract payments, with interest.

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

Of horses, barn doors, and thirty bales of hay

A California appellate court has held that a juvenile who stole 30 bales of hay from an "open pole barn" did not violate the state's burglary statute. *In re Amber*, No. A065729 (Cal. Ct. App. Mar. 16, 1995). The issue was whether the offended "open pole barn" was the kind of barn the statute protected. The pole barn was a roof supported by poles; it did not have walls. Noting that the statute includes "barn" as a type of "building" and citing the long-honored rule in California that a "building" is a "structure which has walls on all sides and is covered by a roof," the court held that the absence of walls on an "open pole barn" meant that it could not be a "building."

The court bolstered its conclusion with the following observation:

> Everyday knowledge is consistent with the applicable law here. We have all heard that it is pointless to close the barn door after the horse has gotten out. But if there are no walls, there is no barn door, and the horse is free to leave anytime. This venerable aphorism is not just a metaphor, but tells us something practical about barns: they must have walls and a door to keep the horse in. If there are no walls, there is no barn.

Although the court's decision was immediately praised by Mr. Ed, television's talking horse, for bringing long overdue horse sense to American jurisprudence, hay owners in California are concerned about the message the court's decision sends to the thousands of bales of hay in the state. They fear the decision can be interpreted as inviting their hay bales stored in open pole barns to leave anytime, something most bales have been reluctant to do even though their open storage allows them to see the fields from where they were harvested. In the words of one of California's largest hay bale owners, John Deere Baylor, "If a horse is free to leave anytime we forget to close the barn door, how long will it be before hay bales demand the same privilege?" Even Mr. Ed expressed some reservations about the decision: he admitted that the last time his barn's door was left open, he feasted on fresh bales of alfalfa at a nearby open pole barn. He now wonders how many bales of hay will forsake a roof over their head for basking in the warm sun or even moving to Oregon.

— Christopher R. Kelley, Lindquist & Vennum P.L.L.P., Minneapolis, MN

Dealing with property use restrictions for the agricultural client; arguing for a reduction in assessed valuation

By Roger A. McEowen, Esq.

It is not uncommon today for a farmer or rancher to have a portion of his or her real estate be delineated as a wetland, or be located within a coastal zone restriction area, or be designated as the habitat for an endangered species. Various governmental agencies have the authority to place significant use restrictions on an agricultural landowner's real estate. For example, in the wetlands context, such restriction requires a permit from the Army Corps of Engineers (COE) to fill or dredge any of the property[1], and the swampbuster provisions of the federal farm programs restrict the type and scope of agricultural activities that can occur on such land.[2] As a result, the land will probably never again be worth, on the open market, what it was worth before it became subject to use restrictions.

Alternative approaches

Practitioners with clients facing such restrictions may undertake several courses of action in an attempt to make their clients whole. One strategy for purchased property is to file an action against the seller. However, this approach may be impractical because of problems associated with locating the seller, particularly if the sale occurred many years earlier. In addition, it may be unwise to litigate against one's neighbors and/or business associates. A second option is to apply for a "fill" permit. This option requires a great deal of funds as well as patience. Also, even if a permit application is filed, many permits are difficult to obtain and often come with expensive conditions attached, such as "mitigation."[3]

A third option is to sue the particular government agency that placed the restriction on the property. Typically this option will not consume much time or money because the government agency involved will quickly move to dismiss the action and will usually prevail. Courts generally do not review the conduct of environmental and other governmental agencies before an enforcement action for violation of a standard has been commenced.[4] Consequently, this approach is usually unattractive.

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Another possibility is to file a "takings" claim under relevant constitutional (state or federal) provisions or an "inverse condemnation" claim under state law on the grounds that the government's action has stripped the real estate of much or all of its value. However, unless a landowner has applied for and been denied a permit, the claim will most likely be dismissed. Similarly, even if the landowner has applied for and been denied a permit, the landowner's chances of prevailing are slim. In addition, with two recent exceptions notwithstanding, the general rule is that the Department of Justice will not settle out of court.[5] Another concern is that a "takings" case is both costly and time consuming.

Reducing assessed value of property

Whichever option is chosen, farmers and ranchers and their counsel should not overlook the possibility of dramatically reducing the assessed value of property that has become subject to use restrictions. Real estate developers have been successful with this tactic over the past few years, and it would appear that farmers and ranchers could utilize the same legal strategies in reducing the assessed valuation of their burdened properties.[6]

In *Bergen County Associates v. Burrough of East Rutherford*,[7] the defendant appealed a judgment of the New Jersey Tax Court that substantially reduced the 1990 local property tax assessment on an irregularly shaped, unimproved 240.6 acre tract. Because the property was in part delineated a "wetland," it was subject to fill restrictions requiring a permit. Instead of applying for a permit and being denied, the plaintiff, a developer, went directly to the New Jersey Tax Court to argue that the application process for permits to dredge and fill wetlands had become "much stricter" in the late 1980s. The Tax Court concluded that because of the tougher permit application process, fill permits were "virtually impossible to obtain." Since, the court opined, a fair valuation of real estate recognizes environmental hazards as well as regulatory restraints placed upon the property, a reduction in the property assessment from $19,978,100 to $976,500 was in order.[8] The Superior Court of New Jersey affirmed the Tax Court and rejected the notion that the taxpaer was limited to bringing an inverse condemnation action where the environmental restrictions on real estate development were substantial.

In a similar case, *Zerbetz v. Municipality of Anchorage*,[9] the court referenced the municipal assessor's policy of valuing all parcels classified as "conservation" or "preservation" wetlands at $100, regardless of the property's size or location. For the property at issue in this case, the assessed valuation was $1,489,500 in 1985 before being classified as a wetland. After the classification, the assessed value was $100.

Disadvantages

Successfully achieving a reduced assessed valuation for property tax purposes could work against an agricultural landowner, however. The Internal Revenue Service [Service] has successfully argued that property use restrictions (such as a wetland delineation) reduce the amount of an income tax charitable deduction if the burdened property is donated to a charitable organization. In *Great Northern Nekoosa Corp. v. United States*,[10] a taxpayer donated a perpetual easement in 207 acres of land on the Allagash River in northern Maine to the state, and claimed a $1 million charitable contribution deduction. As the basis for its valuation of the easement, the taxpayer claimed that the highest and best use of the property before the donation was for the construction of a hydroelectric power plant. The deduction was substantially reduced because, at the time the donation was made, state laws had been enacted to preserve the natural scenic beauty of the Allagash River by prohibiting the construction of any hydroelectric power plant on the Allagash River. In addition, in 1969 when the donation was made, the Allagash River was being considered for inclusion in the Federal River System.

The district court determined that legal obstancles to the development of a power plant on the taxpayer's land prevented valuation on the basis of the property's potential for the construction of a hydroelectric power plant. In affirming the decision of the district court, the First Circuit held that, as of the date of the donation, designation of the Allagash River as part of the Federal Scenic River System was so certain to occur that it would have significantly reduced the price

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any knowledgeable buyer would have paid for the property. The Service allowed, and the court upheld a $26,240 charitable deduction based on an appraisal that valued the parcel principally for its timber, and disregarded the value of the parcel as a potential hydroelectric power site.

Similarly, in *McMurray v. Commissioner*,[11] the court held that environmental restrictions on the development of a bog must be taken into account in determining the bog's fair market value. The plaintiffs conveyed a portion of the bog outright to the Audubon Society in 1979 and followed that conveyance with a 1982 conveyance of a sixty-five percent interest in the remaining portion of the bog for which they claimed a $780,000 income tax deduction. The Service determined that the fair market value of the 1982 conveyance was $23,200. In 1985, the plaintiffs conveyed the remaining thirty-five percent interest in the bog to the Audubon Society and valued the thirty-five percent interest at $580,000. The Service determined that the fair market value of the 1985 transfer was $6,250. The Service also asserted additions to tax for negligence and intentional disregard of rules and regulations as well as penalties for underpayment of tax attributable to a charitable valuation overstatement.

The taxpayers attempted to establish fair market value on the basis of the value of the peat contained in the bog as a fuel resource, and did not account for the presence of state and local zoning restrictions on the use of the bog. Conversely, the Service's expert gave much weight to the presence of state and local zoning restrictions on the bog's use and opined that any request for a permit to harvest the peat or otherwise develop the bog would have encountered substantial opposition and would have had little chance of success. The court, in ruling for the Service, noted that the law was well settled that legal restrictions on development or use diminish a property's fair market value.[12] The court also assesed additional penalties for a valuation overstatement attributable to a charitable contribution. However, the court found that the record lacked sufficient evidence of bad faith to support the Tax Court's negligence ruling.

Conclusion

Requesting that a tax assessment be reduced is not a panacea for a property owner. Such a request can be time consuming and can lead to potential condemnation of the real estate. However, the advantages of challenging an assesment can be substantial. In any event, there appears to be an increasing recognition by both local county assessors and the courts that environmental and other property use restrictions reduce assessed values. As such, arguing for a valuation reduction on behalf of a client could at least improve the client's cash flow.

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[1] 31 U.S.C. § 1334.

[2] For example, under the 3rd edition of the Natural Resource Conservation Service's National Food Security Act Manual (NFSAM), agricultural commodities can be produced on farmed wetlands, but existing drainage systems can be maintained only to the scope and effect that existed before 12/23/85 (par. 514.22(e)). Under 33 U.S.C. § 1344(f)(1), an exemption exists from the permit requirement for "normal farming activities." However, COE regulations limit the exemption to pre-established farming activities that do not bring a new area into farming or require modifications to the hydrological regime (33 C.F.R. § 323.4(a)(1)(ii)). In addition, the courts have narrowly construed the exemption (see, e.g., *United States v. Akers*, 785 F.2d 814 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *United States v. Cumberland Farms of Connecticut, Inc.*, 826 F.2d 1151 (1st Cir. 1987); *United States v. Brace*, 41 F.3d 117 (3rd Cir. 1994)).

[3] For example, under swampbuster provisions, when a wetland is converted to crop production, a mitigation easement must be granted to the government that is equal in size to the converted wetland. Less than one-to-one mitigation is allowed only if the NRCS and the Fish and Wildlife Service (FWS) both agree (3rd ed. NFSAM, ¶ 517.14(d)). In addition, the mitigation easement site must be classified as prior converted cropland that is privately owned and not subject to any lien (¶¶ 517.14(a) and (c)).

[4] See, e.g. *Rueth Development Co. v. Environmental Protection Agency*, No. 92-4139 (7th Cir. Dec. 30, 1993)(federal courts lack jurisdiction to review wetlands delineation prior to enforcement); *Child v. United States*, 851 F. Supp. 1527 (D. Utah 1994)(court held that landowner could not challenge COE jurisdiction over .04 acres of alleged wetlands until the government levied penalties and attempted enforcement.

[5] The exceptions are *Beure Co. v. United States*, No. 129-86L (Ct. Cl. 1992) and *Roberge v. United States*, No. 92-753L (Ct. Cl. 1994). In *Roberge*, the court entered a settlement order against the government for $338,000 on 12/9/94, on the basis of a temporary regulatory taking arising from a permit denial to fill a wetland.

[6] In Missouri, it appears that many local county assessors are willing to reduce the assessed valuation of agricultural land subject to wetland restrictions by at least forty percent upon request supported by evidence of use restrictions. This is based on a random telephone survey of local county assesors conducted by the author the week of May 14, 1995.

[7] 265 N.J. Supr. 1, 625 A.2d 524 (1993).

[8] At a one percent tax rate on assessed value, the financial savings for the developer over five years would be almost $1 million.

[9] 856 P.2d 777 (Alaska 1993).

[10] *Great Northern Nekoosa Corp. v. United States*, 711 F.2d 473 (1st Cir. 1983).

[11] *McMurray v. Commissioner*, 985 F.2d 36 (1st Cir. 1993).

[12] Similarly, courts have held that the presence of hazardous waste and chemical contamination reduces a property's fair market value for tax assessment purposes. In one case, the fair market value for tax assessment purposes was reduced from $2,400,000 to $1 million because of the presence of oil contamination. (*In re B.P. Oil Co., Inc.*, 633 A.2d 1241 (Pa. Comm. 1993)). In *Boekeloo v. Board of Review of Clinton*, 529 N.W.2d 275 (Iowa 1995), the court ruled that hydrocarbon contamination of groundwater should be a consideration in determining the valuation of property for tax assessment purposes. However, the court rejected the taxpayer's assertion that the property was worthless because of testimony that the property would be marketable if cleanup costs were known and because the taxpayer made no effort to ascertain such costs.

State Roundup

ILLINOIS. *Family farms and the legislature.* An Illinois law entitled "The Agricultural Land Ownership Act" took effect in Illinois on January 1, 1986. 765 ILCS 55/0.01 *et seq.* The bill stated that it was "an act in relation to ownership of agricultural land by certain corporations, partnerships, and trusts." *Id.* 0.01.

The Act is prefaced by a public policy statement that says "It is hereby declared to be the public policy of this State to maintain the family farm and encourage the actual owners to maintain a system of widely dispersed and independently owned farms and an active interest in the supervision, management and operations of farms." *Id.* 1.

It has long made good political sense for the members of Congress and of state legislatures to vouchsafe that family farms must be preserved and corporate farming and the alien ownership of farmlands be discouraged. State legislatures have enacted a variety of laws, some lengthy and detailed, some little more than policy statements, directed at achieving this objective. The Illinois Agricultural Land Ownership Act is an example.

The purpose of this article is to assess the effectiveness of the Illinois act and to comment on provisions which, in the opinion of the author, make the achievement of its objective difficult.

After reading the puhlic policy statement, one would expect to find a definition of "family farm" and "actual owner," but none appear. In coining other defiuitions, it is obvious that those wbo drafted the law wished to avoid, insofar as possible, details that would beg for further definition — which would include something not intended or not include something intended. These are well known hazards in drafting definitions that become a part of legislation; but leaning in the other direction can also create prohlems — for example, "agricultural land" is defined as that which is "suitahle for farmiug." *Id.* 2.(1). How will it be determined what lands fall within this definitiou; and if there are lands which are not suitable for farming which are in fact being farmed (and there surely are), then does the law not apply to corporate ownership of such land — or does it apply? And if it does, then the definition of "agricultural lauds" for purposes of the Act loses its meaning.

The definition of "farming" seems fairly inclusive, and though it lists three things that are uot "farming," there is no mention of forestry, Christmas-tree growing, aquaculture, or greeuhouse operations. Excluded are custom applicators supplying services to farmers, livestock or poultry held for less than thirty days for slaughter, and the growing of nursery stock. *Id.* 2.(2), 2.(2)(a), 2.(2)(b), 2.(2)(c).

The definition of "corporations engaged in farming" refers to those as defined in the Illinois Business Corporation Act (*Id.* 2.(6)), yet not-for-profit corporations in Illinois do own land that is used for agricultural purposes. Could ownership of land by such corporations pose a threat to the family farm policy?

The heart of the Act consists in its definition of "authorized farm business," the reporting requirement, the responsibility for implementing the act, and penalties for violation.

There are four kinds of authorized farm businesses, sole proprietorships, corporations, and trusts that meet the restrictions imposed by the law. *Id.* 55/3. A partnership for which the "prnciple business" is farming qualifies if there are not more than ten partners and they are all natural persons (*Id.* 3(b)) — but the statement that agents, trusts, or persons acting in a fiduciary capacity may participate in such partnership, provided that the limitation of ten partners who are natural persons is satisfied, is not clear. Does it mean that "agents, trusts, or persons acting in a fiduciary capacity" are to be considered as natural persons and included in the limitation of ten, or does the statement that they may "participate in such partnership" mean that they can somehow work with the partnership but not he partners?

A qualifying farm corporation is one in which there are not more than ten shareholders. These shareholders, except for an estate that may be a shareholder, must he natural persons or persons acting in a fiduciary capacity for the benefit of natural persons, or another authorized farm corporation; also sixty percent of the gross receipts of the corporation must come from farming. *Id.* 3.(c). There is a statement that "Lineal ascendants and descendants of one natural person for three generatious may count collectively as one shareholder for purpose of this section, but this collective authorization may not be used "for more than one family in a single corporation." Though the drafter may have had clearly in mind what was intended, this writer finds difficulty in determining just wbo qualifies. Does this mean three ascending generations and three desceuding generations of some "natural person" constitute one partner — and if so, what "natural person" is the measuriug stick? This provision illustrates the difficulties in mauy laws attempting to define an acceptable corporation for farming purposes when there is an attempt to define the relationship of the persons who qualify. Yet it is understandable that uuless some generational measuring stick is provided, the purpose may not be achieved.

Authorized trusts operating farmland are those for which there are not more than ten beneficiaries. Spouses may be treated as one beneficiary and those acting in a fiduciary capacity for related persons shall be treated as one beneficiary. Bona fide beneficiaries must be natural persons. *Id.* 3.(d). These criteria are easier to apply than those listed for a corporation. Why this should be so is not clear since both the trust and the corporation are artificial entities operating farmland.

What effect does this law have on partnerships, corporations, and trusts engaged in farming? The only effect is to distinguish between those who must report to the Department of Agriculture and those not required to report. A telephone call to the Department of Agriculture on May 6, 1994 disclosed that for lack of funds, the department has not yet implemented this Act. When and if it does, each corporation, partnership, limited partnership, or trustee of an entity that does not qualify as an "authorized farm business" must report annually to the Department of Agriculture, supplying information required by the law: name, place of business, type of agricultural activity, extent and location of acreage being farmed are among items to be included in the report. *Id.* 4., 5., 6., 7., 8.

The Department of Agriculture is charged with the duty of implementing the Act (*Id.* 10), including the supplying of forms and informing the Attorney General and states attorneys of possible violations. The penalty for violation is a business offense hut courts are authorized to "prevent and restrain violations of this Act through the issuance of injunciton." *Id.* 11.

As indicated in the beginning of this article, it is the author's opinion that though the law is not wholly "cosmetic," its main purpose is to express a policy and assuage the feelings of those who have strong convictions about preserving their conception of the family farm, a conception that varies considerably between those of us who were born 75 years ago and those who were born 25 years ago.

It is interesting that more than five years after passage of this Act, the legislature enacted the "Family Farm Assistance Act." 20 ILCS 660/1. *et seq.* The purpose of this act was to "assist eligible farmers, farm families and farm workers who are dislocated from their farms due to farm closing, or layoffs caused by business slowdown or failure." *Id.* 20. Though "family farm" is used in the title of the Act, it is not defined in the Act. But there is a definitiou of "farm family" which does not identify the kind of farm to be helped but simply says that it "means the eligible person, his or her legal spouse, and the eligible person's dependent children under the age of 19. *Id.* 15.

Added to the requirement that corporations, partnerships and trusts must report to the Department of Agriculture is a requirement imposed upon supervisors of assessments. 765 ILCS 55/9. This section states that the supervisor shall forward to the Department, annually by January 31, the "name and address of every corpo-

ration, partnership, limited partnership, trust or other business entity owning agricultural land in the county during the calendar year 1986 as shown by the assesment records. Annually thereafter the assessor is to report changes. A telephone call to the Steve Lueker, supervisor of assessment for Jefferson County disclosed that the assessor had no knowledge of this law and had received no information from the Department of Agriculture. He further stated that if requested, his office would comply but there would be difficulties. Thus far, no forms have been supplied which would let the supervisor's office know what information is needed. Also, he stated that many corporations do not record their articles as required by law and his office would have no way of getting further information about the nature of these corporations without calling the corporation division in the secretary of state's office in Springfield.

Perhaps the legislators were wise in drafting both of these acts to avoid defining a "family farm." Rather they have chosen to provide guidelines for determining the eligibility of those corporations, partnerships, limited partnerships, or trusts which do not have to make an annual report to the Department of Agriculture. One can sympathize with the legislature in trying to preserve a kind of life which was important in the formation of our country, but be concerned that they cannot identify anything sufficiently tangible to protect or devise effective and constitutionally acceptable methods of protection should a satisfactory definition emerge.

—Harold W. Hannah, Southern Illinois Universtiy, School of Law

ARKANSAS. *Wetlands legislation.* Governor Jim Guy Tucker recently approved four pieces of wetlands—water resource legislation passed by the General Assemhly in its 1995 regular session. These bills were recommended by the Governor's Water Resources and Wetlands Task Force.

Act 341 allows a fifty percent state income tax credit of up to $9,000 per year for up to ten years for the costs associated with development of surface water impoundment or water control structures of twenty acre—feet or more; fifty percent within critical ground waters, ten percent outside critical ground water areas, credit of up to $9,000 per year for three years for costs associated with the conversion from surface water to ground water; a ten percent credit of up to $9,000 per year for three years for costs associated with the conversion from surface water to ground water; a ten percent credit of up to $9,000 per year for three years for costs associated with agricultural land leveing for water conservation purposes.

Act 560 incorporated sections 126 and 175 of the Internal Revenue Code into the state income tax code.

Act 561 allows a hundred percent state income tax credit of up to $5,000 per year for up to ten years for costs associated with creation and restoration of wetlands and riparian zones. One of the potential uses of the Act would be to exclude cattle from riparian zones to unprove water quality.

Act 562 would allow the state Soil and Water Conservation department to establish a wetlands mitigation bank for both public and private use in meeting Clean Water Act section 404 permit mitigation requirements.

— A. Mark Bennett III, Little Rock, AR

Certified mailing of FmHA loan servicing notice

A federal district court has held that the failure of FmHA borrowers to actually receive notice of loan servicing did not violate their statutory or due process rights. *United States v. Birchem*, No. CIV. 94-1002, 1995 WL 244388 (D.S.D. Apr. 3, 1995). The borrowers had filed a confirmed Chapter 11 bankruptcy plan in April 1987, and a final order closing the bankruptcy file had been entered a few months later. In 1988, the FmHA sent two notices of loan servicing by certified mail to the borrowers' bankruptcy attorney. A copy of the second notice was also sent by certified mail to the borrowers at their residence. The borrowers did not receive the second notice because their son, who signed the return receipt for the notice, returned to college without giving the notice to them. Subsequently, the FmHA sent a third letter to the borrowers' bankruptcy attorney informing him the borrowers had been denied loan servicing because they had not responded to the notices. About two months later, the borrowers called the attorney and informed him that they had learned they been denied loan servicing. In response, the attorney notified the FmHA that he had not represented the borrowers since the bankruptcy file was closed in 1987. He also asserted tbat the FmHA should have uotified the borrowers directly. The FmHA, however, maintained that it had acted properly, and it began foreclosure proceedings against the borrowers. The borrowers challenged the foreclosure proceedings on the grounds that the FmHA had denied their statutory and constitutional due process rights by not providing them with personal notice of their right to apply for loan servicing.

The borrowers claimed that provisions of the Agricultural Credit Act of 1987, 7 U.S.C. §§ 1981a and 1981d, and the Act's implementing regulations required the FmHA to give them personal notice of loan servicing. Acknowledging that the Act requires the FmHA to give notice "by certified mail to each borrower," the court rejected the borrowers' statutory claim by holding that the FmHA had followed the requirements of the Act and its implementing regulations and that neither the statute nor the regulations state that a borrower must receive personal notice.

The court also held that personal notice was not a constitutional due process requirement, primarily relying the United States Supreme Court's standard that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action...." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) The borrowers claimed that their son's signature on the certified mail receipt placed the FmHA on notice that they did not receive the notice. The court, however, adopted the First Circuit's standard that "[k]nowledge of the likely effectiveness of the notice is measured from the moment at which the notice is sent." *Sarit v. DEA*, 987 F.2d 10, 14 (1st Cir. 1993). Applying this standard to the facts before it, the court found that the FmHA had sent the notices to the proper addresses, and the return receipts indicated the notices had been received. Recognizing the harshness of the result, the court stated that the "FmHA could not, at the time the notice was mailed, know that [the borrowers' son] would receive and sign for the letter, much less neglect to deliver it to his parents."

—Christopher R. Kelley, Lindquist & Vennum P.L.L.P., Minneapolis, MN

CONFERENCE CALENDAR

Fourth Annual Western Agricultural and Rural Law Roundup

June 22-24, 1995, The Lincoln Center, Fort Collins, CO

Topics include: Federal water policy under the Endangered Species Act: Farm Bill and farm program update: agricultural lending; preserving family lands/ private property rights.

Sponsored by: the Agricultural Law Section of the Colorado Bar Association, Colorado State University Coop. Extension, University of Colorado School of Law, and Agricultural Group Commodity Organizations.

For more information, call (303) 860-0608.

Drake University's Summer Agricultural Law Institute

June 12-15 — Business planning for farm operations; June 19-22 — Agricultural insurance; June 26-29 — Industrialization of agriculture; July 3-7 — Water law and agriculture; July 17-20 — Agricultural conservation and diversification in the UK and EU.

Call 515-271-2947 or 2065.

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA Annual Educational Conference: Agriculture and the Environment — The Legal Domain

November 3-4, 1995, Ritz-Carlton Hotel, Kansas City, Kansas
Topics include: Congressional reauthorization and action concerning wetlands, the Conservation Reserve Program, pesticides, the Clean Water Act, and the implications of the 1995 Farm Bill for agricultural environmental law; agricultural real estate transactions and their environmental implications or consequences; environmental considerations and implications for agricultural taxation and estate planning; international agricultural trade and environmental provisions of NAFTA; agriculture and "takings" issues under the Fifth Amendment and property rights legislation.

Brochures and complete information should be available beginning July, 1995. For further information about this conference, please contact Bill Babione, Executive Director, AALA, (501) 575-7389; FAX (501) 575-5830.