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Supreme Court rules that FIFRA does not preempt local regulation of pesticide use

The U.S. Supreme Court ruled 9-0 that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not completely preempt local regulation of pesticide use. *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 59 U.S.L.W. 4755 (U.S. June 18, 1991)(No. 89-1905). The ruling provides in essence that local governments may regulate pesticides under FIFRA to the same extent that FIFRA allows states to regulate pesticides, unless state law imposes further restrictions on local regulation.

The case concerns an ordinance adopted by the town of Casey, Wisconsin, which required a permit for the application of pesticides to public lands or to private lands subject to public use, and for the aerial application of any pesticide to private lands. The town granted the respondent, Ralph Mortier, a Christmas tree farmer, a permit under the ordinance which restricted the lands on which he could apply pesticides and precluded aerial spraying.

Mortier and the Wisconsin Forestry/Rights of way/Turf Coalition, an association of pesticide users, challenged the ordinance in state court on the grounds that FIFRA and state law preempted local regulation of pesticide use.

The trial court granted summary judgment to the plaintiffs, holding that the ordinance was preempted both by FIFRA and state law. The Supreme Court of Wisconsin affirmed that judgment, but declined to reach the issue of state law preemption, relying only on the holding that FIFRA, as indicated by its text and legislative history, clearly demonstrated congressional intent to prohibit regulation of pesticides by local units of government. *Mortier v. Casey 452 N.W.2d 555 (1990).*

The U.S. Supreme Court granted certiorari because of the importance of the issue and the conflict of authority on the issue. The issue of FIFRA preemption has arisen in the lower courts primarily from a provision which states that "(a)...a State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter" and "(b)...Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under the subchapter." 7 U.S.C. § 136v. This amendment was added to FIFRA in 1972 as part of a major renovation of the statute which provided for comprehensive federal regulation of pesticide registration, labeling, and use.

In its ruling on *Mortier*, the Wisconsin Supreme Court found the omission of the

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Eighth Circuit rejects use of FmHA contract rate in Ch. 12 bankruptcy

In a recent decision, the Eighth Circuit Court of Appeals rejected the confirmation of a Chapter 12 plan that used the weighted average of the debtors' original FmHA contract rates of interest. *In re Fisher*, 930 F.2d 1361 (8th Cir. 1991). In reaching its decision, the court addressed two important confirmation issues: first, can the plan apply the contract rate of interest to a restructured loan when the contract rate is less that the current market rate; and second, can Farmers Home Administration (FmHA) low interest loans be restructured at lower than market interest rates.

Under the plan proposed by the debtors and accepted by both the bankruptcy court and the U.S. District Court for the District of North Dakota, the debtors sought to restructure their secured obligation to FmHA using the weighted average of their original contract rates of interest. The FmHA objected, claiming that the plan failed to satisfy the Chapter 12 confirmation requirements set forth in 11 U.S.C. § 1225(a)(5)(B) requiring that a secured creditor be paid the present value of its

Continued on page 2

term "political subdivision" from the definition of "State," 7 U.S.C. 136(aa), and from the provision granting limited State regulatory authority over pesticide use, 7 U.S.C .§136v, indicated congressional intent to preclude local governments from regulating pesticide use. The court further found that this statutory language together with language from legislative reports accompanying the proposed amendments indicated a clear manifestation of a congressional intent to completely preempt local regulation of pesticide use.

In reviewing the Wisconsin opinion, the U.S. Supreme Court applied previously established principles of preemption analysis to FIFRA. The Court first determined whether Congress intended to preempt local authority. The Court found that nothing in the text of FIFRA expressly precludes local regulation of pesticide use. Indeed, the Court determined that the statutory language of FIFRA favors local regulation. The Court relied on the principle that local governmental units are agencies of the state, which may exercise state authority at the absolute discretion of the state. The Court found that the omission of the express term "political subdivisions" from FIFRA's regulatory grant of authority to the states cannot be inferred to exclude local regulation because these political subdivisions are components of the states themselves. A congressional grant of authority to the states encompasses a grant of authority to local governments unless otherwise expressly denied.

The Court also found that FIFRA provisions that require the U.S. Environmental Protection Agency to cooperate with political subdivisions of states in implementing FIFRA, 7 U.S.C. § 136t(b), and that require pesticide manufacturers to produce records for designated state political subdivisions, 7 U.S.C. § 136f(b), support a finding of congressional intent to allow local regulation of pesticides.

The Court was not persuaded by Mortier's reading of the legislative history of the 1972 amendments to infer congressional intent to preclude local regulation. The U.S. Supreme Court determined that on the issue of local regulatory preemption, the legislative history was ambiguous at best.

The Court then determined whether FIFRA preempts local regulation of pesticide use, even in the absence of clear and manifest congressional intent. The Court ruled that, although FIFRA is a comprehensive regulatory statute, it does not occupy the field of pesticide regulation in general or the area of local pesticide use permitting in particular. Additionally, the Court ruled that there was no discernible conflict between FIFRA and the town of Casey's ordinance or between FIFRA and local regulation of pesticide use generally. the Court stated that local use permit regulations are not within an area that FIFRA preempts or even plainly addresses.

The U.S. Supreme Court reversed the judgment of the Wisconsin Supreme Court and remanded the case. The Wisconsin court may now decide to address the issue of whether state law preempts local regulation of pesticide use. *Mortier* is limited to the issue of whether federal law precludes local regulation of pesticide use. FIFRA does not prevent states from prohibiting local regulation. For example, the California legislature adopted a statute expressly overturning the holding of *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 879 (1984). The statute provides that the registration, sale, transportation, or use of pesticides is excluded from all local regulation, unless otherwise provided by specific exceptions in state legislation. Cal. Food & Agric. Code § 11501.1 (West 1986).

—*Martha L. Noble, Staff Attorney, NCALRI, Fayetteville, AR*

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secured claim. The FmHA argued that for purposes of this requirement, present value must be based on the market rate of interest, not the lower FmHA loan rate. Because of the FmHA's unique status as provider of low interest loans to eligible farmers, the contract rates on the Fishers' loans averaged out to be 5.41%, below the "market rate" applicable to other lenders.

In addressing the contract rate/market rate issue, the Eighth Circuit agreed that the debtors' plan did not meet the confirmation standards required by § 1225(a)(5)(B). It held that the requirement that secured creditors receive the value of their secured claim did not allow for the unequal treatment of creditors. The court interpreted § 1225(a)(5)(B) as requiring a present value determination based on the current market rate, not the contract rate originally agreed upon by the parties. Despite the special purpose underlying FmHA financing, the court reasoned that "[h]aving filed for bankruptcy under Chapter 12, we hold that FmHA enters the bankruptcy proceedings the same as any other creditor and is thus entitld to have its claim valued using a discount rate based not on the contract rate of interest but on the 'market rate' of interest." *Fisher*, 930 F.2d at 1363.

In reaching this holding, the court adopts the reasoning of the Sixth Circuit in *U.S. v. Arnold*, 878 F.2d 925 (7th Cir. 1989). Although not discussed by the court, there are also contrary decisions on this issue. Several courts have held that the market rate standard is to be applied only in cases where the contract rate is a higher rate, indicating that if the contract rate is lower, this lower rate would be acceptable. *See, e.g., In re Turner*, 87 Bankr. 514, 517-518 (Bankr. S.D. Ohio 1988); *In re Bartlesmeyer*, 78 Bankr. 975, 977 (Bankr. W.D. Mo. 1987). *See also, In re Hardzog*, 901 F.2d 858, 860 (10th Cir. 1990)("[I]n the absence of special circumstances, such as the market rate being higher than the contract rate, Bankruptcy Courts should use the current market rate of interest used for similar loans in the region.").

Implications of Mortier*— for Iowa and other states*

The major issue the Supreme Court identifies in *Wisconsin Public Intervenor v. Mortier*, 59 U.S.L.W. 4755 (1991)(see discussion on pages 1-2) is that the question of preemption is not that Congress intended to preempt local regulation of pesticide use— the Court ruled clearly it did not; instead the issue is whether under state law the states can or have delegated such powers to local governments, or whether such local exercises of regulatory power, as found in *Mortier*, are preempted by the application of either existing state pesticide laws or under state home rule and preemption doctrines.

Because in *Mortier* the Wisconsin Supreme Court had not ruled on the issue of state-law preemption, the question was not considered on appeal. was that of federal preemption. As a result, the political debate after *Mortier* will shift to two issues: (1) possible Congressional amendment of FIFRA to specifically preempt local regulations; and (2) state interpretations of state pesticide laws or preemption doctrine to determine whether they prohibit such local regulations.

Shortly after the June 1990 Wisconsin Supreme Court ruling, the Iowa Attorney General issued an opinion on the question of whether a city could enact an ordinance prohibiting the application of pesticides by a commercial applicator. *See* Iowa A.G. Opin, #90-6-3, Benton to Shoultz, June 26, 1990. The major portion of the opinion analyzes the FIFRA preemption question and agrees with the Wisconsin Supreme Court that FIFRA preempts local regulations. As is clear from the U.S. Supreme Court ruling, that analysis is now incorrect. The issue of state law preemption of local pesticide regulations is addressed only at the conclusion of the opinion, and then only briefly. It states:

> However, if forced to decide the validity of an ordinance as described in your letter solely under the Iowa law dealing with pesticides, it is doubtful that we could find that the ordinance would survive. The Iowa Pesticides Act, Iowa Code chapter 206 (1989) provides for the regulation of pesticides at the state level. As we noted above, the statute provides for the licensing and certification of pesticide applicators by the Iowa Secretary of Agriculture. §§ 206.5, 206.6. The law further provides that the Secretary license pesticide dealers and that every pesticide distributed within the state be first registered with the department. §§ 206.8, 206.12.
>
> In the face of this rather comprehensive regulatory scheme, both municipal corporations and counties in Iowa operate under home rule with the authority to enact ordinances "not inconsistent with the laws of the general assembly." Iowa Const. Art. III, §§ 38A, 39A. Under home rule, cities and counties have the power to enact an ordinance on a matter which is also the subject of a statute, if the ordinance and statute can be harmonized and reconciled. *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983). To the extent that a political subdivision in Iowa banned the application of pesticides by a commercial applicator certified and licensed by the department, it would prohibit an activity which state law permits. In that case, chapter 206 would preempt the local ordinance.
>
> Local governments in Iowa may not adopt an ordinance which makes application of pesticides by a commercial applicator within the boundaries of that local government unlawful.

There must now be some doubt about the viability of the Attorney General's opinion. First the majority of the opinion has been overruled by the Supreme Court's decision. While this does not necessarily reflect on the state law preemption analysis, that portion of the opinion was a secondary issue, which did not receive extensive analysis.

Second, the opinion's description of the existing pesticide regulatory scheme as "comprehensive" does not necessarily agree with the Supreme Court's reading of the law. The Court notes that nowhere does FIFRA restrict the implementation of local pestice use permitting systems: "Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular." The very same thing can be said about the Iowa pesticide act, which is not surprising, given that it was patterned after FIFRA.

Many state lawmakers may have failed to address the issue of local pesticide regulations on the belief the issue was preempted by federal law. The *Mortier* ruling makes the issue fair game for legislative action at both the state and local level.

Finally, the ordinance addressed in the Iowa Attorney General's opinion, a local regulation banning the use of a pesticide, is different from the question of whether a political subdivision may implement a local permitting requirement, one aspect of which might be prohibition of pesticide use on appropriate local grounds. The Supreme Court's reference to local conditions supports the idea that local regulation may be justified. It will probahly take more than generalized conclusions about the comprehensive nature of existing state laws to preempt well-designed local regulations.

—Neil D. Hamilton, Director, Drake Law School Agricultural Law Center, Des Moines, Iowa

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The court explicitly rejects the debtors' reliance on an earlier Eighth Circuit decision, *United States v. Doud,* 869 F.2d 1144 (8th Cir. 1989). It states that *Doud* only addresses the issue of the method used to compute market rate, not the contract rate issue. The *Doud* decision, however, has been interpreted as allowing the use of the lower contract rate. *Bartlesmeyer,* 78 Bankr. at 977. This apparent misinterpretation stems from the fact that although the appellate *Doud* decision only discusses the market rate computation applicable to one of the debtors' loans, it affirmed the lower court's holding that three of the other loans must be left at the low interest FmHA contract rate. For a discussion of the lower courts' analysis on this issue, see *Matter of Doud,* 74 Bankr. 865, 870 (Bankr. S.D. Iowa 1987).

On the second issue, the applicable market rate to be used for FmHA loans, the court took a step back from the equal treatment of creditors position. The court stated that the special status of the FmHA may be relevant in determining what the applicable "market rate" may be. The FmHA argued that the rate should be based on the same method used by the court for other creditors. This method considers the value of the debtors' property and the amount that the FmHA could collect if this value were deposited in treasury notes. It then adds a risk factor percentage that reflects the risk of default by the debtors. The court was not inclined to accept FmHA's reasoning on this issue, noting that the FmHA was required to sell its inventory land to local farmers. Thus, the court indicated that the proper "market rate" should be defined by the rate that the FmHA could expect to receive if it sold the debtors' property to local farmers. Because evidence on this point had not been presented, the court remanded the case for a determination of the appropriate market rate of interest.

—Susan A. Schneider, Attorney at Law, Grand Forks, ND

A TEA Program by any other name: the Market Promotion Program

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Introduction

In recent years the quantity and value of U.S. agricultural exports have fluctuated considerably. Still the world's largest agricultural exporting nation— generating approximately one-sixth of the world's agricultural trade, the U.S. has faced some tough times in maintaining consistent levels of agricultural exports. FAS, USDA, U.S. Farmers' Export Arm (revised December, 1990).

Many countries provide assistance for their agricultural exporters to make them more competitive. This assistance can take many forms, some of which the U.S. considers to be unfair. Since export markets are perceived to be so important to U.S. agriculture, Congress countered the trend of declining agricultural exports and increasing unfair trade practices affecting U.S. agricultural exports by introducing in the Food Security Act of 1985 (the "1985 Farm Bill") programs to assist U.S. agricultural exporters.

One such program was the Targeted Export Assistance Program ("TEA program"). Food Security Act of 1985, § 1124, 7 U.S.C.A. § 1736s (1988), *repealed by* Food, Agriculture, Conservation and Trade Act of 1990, 104 Stat. 3702 ("1990 Farm Bill"). In the 1990 Farm Bill, Congress repealed the TEA program and created the Market Promotion Program ("MPP") (pronounced MIP). 7 U.S.C.A. § 5623 (West Supp. 1991). This article will provide an overview of the TEA program, a sampling of its problems and criticisms, and commentary on its transformation into the MPP.

Authorization of TEA

The original legislation authorizing the TEA program gives no guidance on the development, organization, or administration of the program. Seven U.S. Code section 1736s(b)(1) (1988) reads as follows:

> Funds or commodities made available for use under this section shall be used by the Secretary only to counter or offset the adverse effect on the export of a United States agricultural commodity or the product thereof of a subsidy (as defined in paragraph (2)), import quotas, or other unfair trade practices of a foreign country.

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Consequently, the USDA had a great deal of latitude in designing the TEA program. Program design and administration were delegated to the Foreign Agricultural Service (FAS). How the FAS chose to implement the broad mandate from Congress is particularly interesting and significant.

FAS implementation

For the past thirty-four years, the FAS has administered the Cooperator Market Development Program (the "Cooperator program"), first introduced in the Agricultural Trade Development and Assistance Act of 1954. 7 U.S.C.A. §1704 (1988 & West Supp. 1991). The Cooperator program was conceived to expand foreign markets for U.S. commodities. It provides direct payments to "Cooperators" for trade servicing, consumer promotion, market research, and technical assistance to potential or actual foreign buyers. FAS, USDA, Foreign Agricultural Service Guidelines, 11 FASG, October, 1985, Sec. 105.1. FAS decided that market development was the best way to accomplish the goals of the TEA legislation. Once that decision was made, it was a natural progression of events for the FAS to model the TEA program after the Cooperator program, albeit with some significant differences.

TEA programs and funding

The TEA program, therefore, became another foreign export market development program, providing assistance for trade servicing, consumer promotion, and technical assistance. About seventy-five percent of the TEA program funds have been used in consumer promotion activities, whereas over eighty percent of the Cooperator program funds are used for technical assistance and trade servicing. *Farm Policy: Proposals for Budget Savings, 1990: Hearings before the Task Force on Urgent Fiscal Issues of the House Comm. on the Budget*, 101st Cong., 2d Sess. 88 (1990) (Appendix 1 to prepared statement of Allan I. Mendelowitz, Director, Trade, Energy and Finance Issues, National Security and International Affairs Division, GAO). Trade servicing and technical assistance respectively include efforts to influence traders and other distributors to handle or promote U.S. products, and assistance in solving technical problems with the export process and use of the products. *Id.* at footnote 3. Consumer promotion involves marketing to the prospective consumers of the products. *Id.*

The level of funding for the TEA program has been much higher than that provided for the Cooperator program. In 1990 the funding for the Cooperator program was $33 million. The TEA program was funded at a level of $110 million per year from 1986 until 1988, and $200 million per year for 1989 and 1990. Compensation under the TEA program was authorized to be paid in dollars or in generic commodity certificates. The practice of the CCC has been to make the payments in CCC certificates, which the participants sell on the open market. United States General Accounting Office, Agricultural Trade: Review of Targeted Export Assistance Program, Report to Congressional Requesters, (1988) 13, 14. (Hereinafter, GAO Report 1988).

Cooperator and TEA programs compared

Although the TEA program was modeled after the Cooperator program, there were some differences, the most significant of which was the requirement of the TEA program that the funds be used to counter or offset unfair trade practices. Also, the TEA program orientation has been more on achieving sales, whereas the Cooperator program focused on long-term market development for the bulk commodity groups such as wheat and rice. U.S. Agricultural Export Development Council, Promoting U.S. Agricultural Products Abroad: A Partnership 28. Further, the FAS wanted to have a different focus in the TEA program and provide market development assistance for more of the processed, high value, or non-traditional commodity groups— groups not well served by the Cooperator program. *Id.* The objective of the TEA program was more immediate market development.

Direct sales restricted

Market development and direct sales have been distinguished in conflict of interest rules promulgated by the FAS and CCC in 1989. 54 Fed. Reg. 37,781-37,784 (1989). Direct sales by participants were prohibited when those direct sales were made during promotional activities funded in whole or in part by TEA funds, except under very limited circumstances. Participants could make sales contacts, either as members of sales teams on CCC-sponsored or approved trade missions or as participants in U.S. brand-identified promotions. Those contacts had to be reported to the FAS and turned over to all participants. 7 C.F.R. § 1485.5 (1990). This process, hypothetically, gave

all participants access to sales leads.

TEA-targeted markets

An important note about the nature of the program envisioned by the FAS is the definition given by the FAS in the Targeted Export Assistance Guidelines to the terms "counter" and "offset," as used in the legislation. FAS, USDA, TEA Guidelines, Revised and Effective October 1, 1988 ("TEAG 1988"). The FAS determined that it would provide TEA funds for activities designed to "counter" unfair trade practices in "[t]he market responsible for the unfair trade practice," or "[t]he market(s) which have been adversely affected by the practice from the viewpoint of the u.s. [sic] exports." The activities could also be designed to "'offset' the effects of the unfair trade practice by conducting promotional activities in alternative markets...." *Id.* at 5-6. "Alternative markets" are any markets other than those responsible for the unfair trade practices those adversely affected by the unfair trade practice.

Generic v. branded products

The TEA program consists essentially of two parts. The first part is the promotion of generic commodities through nonprofit commodity specific trade organizations or regional state organizations. The second part is known as the TEA/Export Incentive Program ("TEA/EIP"), and consists of the promotion of specific branded products. FAS, USDA, TEAG 1988.

Branded products are promoted in two ways in the TEA program. Nonprofit commodity specific trade organizations or regional state organizations typically administer Branded TEA Promotion Programs. Businesses marketing a specific branded product enter into agreements for reimbursement with the nonprofit trade organization administering the program. Nonprofit trade organizations administer the program under the same rules as the FAS uses to administer TEA/EIP. TEAG 1988, 103.

A business marketing a unique branded product may seek to enter into an agreement directly with the CCC to be reimbursed for "a prearranged percentage of direct promotional expenses incurred in foreign markets to increase sales of private brands of a specific U.S. agricultural commodity or product." *Id.* The CCC enters into direct contracts with only those few participants who are unable to work through the nonprofit commodity specific organizations or regional state organizations.

Funding

Not every applicant for TEA program funds is successful. The law authorizing the TEA program in the 1985 Farm Bill included a requirement giving priority to

(1) agricultural commodities or the products thereof with respect to which there has been a favorable decision under section 2411 of Title 19, or

(2) agricultural commodities and the products thereof for which exports have been adversely affected, as defined by the Secretary, by retaliatory actions related to a favorable decision under section 2411 of Title 19.

7 U.S.C.A. § 1736s(c) (1988).

Beginning in 1987, the FAS issued yearly a description in the Federal Register of the commodities that qualified for priority assistance under section 2411 of Title 19. *See, e.g.* 52 Fed. Reg. 20,764 (1987). Once the applicants qualifying for assistance under a priority were given "adequate" assistance, the FAS could use remaining funding to "enter into agreements to provide export assistance for other commodities or products thereof." 52 Fed. Reg. 10,915 (1987).

The TEA application and funding process was fairly simple, but time consuming. The potential participants had to submit an *application* to the FAS. If approved, a participant would then be required to submit an *activity plan*, a much more detailed description of the proposed activities. TEAG 1988. This process has typically taken anywhere from five months to one year.

GAO criticisms

A criticism leveled at the FAS was that the solicitation of applications from potential participants in the TEA program was limited by the fact that the FAS did not announce and describe the TEA program in the Federal Register for the 1986 program year and that the FAS did not solicit applications in the Federal Register for the 1986 and 1987 program years. *Review of GAO's Report on the U.S. Department of Agriculture's Targeted Assistance Program*, 1988: Hearing before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture, 100th Cong., 2d Sess. 6,7 (1988) (statement of Allan I. Mendelowitz, Director, Trade, Energy and Finance Issues, National Security and International Affairs Division, GAO)(hereinafter GAO Testimony July 1988). Rather, a publicity campaign was mounted in trade publications, among trade associations, and through press releases. According to the GAO, this left a large number of smaller potential applicants in a disadvantaged position and ultimately created a preference for entities already involved with the Cooperator program. GAO Report 1988 19, 20.

The GAO criticized several other aspects of the FAS's handling of the TEA program. The GAO complained that the funding allocation process was not clearly documented and that there was little, if any, substantiation demonstrating the bases on which funding allocation decisions were made. This supposedly left the allocation system vulnerable to charges of unfairness and baseless distinctions between applicants. Although the Federal Register in June of 1987 carried a list of ten formal criteria for funding decisions, the GAO expressed a strong desire to see documentation that established how those criteria were applied in each individual case. The FAS claimed to have inadequate manpower to maintain extensive records of the decision-making process as advocated by the GAO. GAO Report 1990.

The GAO Report 1988 and the GAO Testimony July 1988 also expressed dissatisfaction with the decision of the FAS to allocate funds based on TEA applications rather than on detailed activity plans. The FAS rationale was that the time and expense burden would be too great for applicants to create full-fledged activity plans prior to the allocation of funds. The GAO countered that requiring the activity plans before deciding on the allocation of funds would optimize the use of government funds. The FAS indicated that the fact that the funds were not actually dispersed until an activity plan was in place provided the government with a safeguard against the misuse of funds, even if not a guarantee of absolute optimal use. GAO Report 1988.

According to the GAO reports cited above and the Audit Reports of the Office of the Inspector General of the USDA, submitted to the Administrator of the FAS on March 25, 1988 and September 28, 1990, there have also been significant problems in the way the TEA program participants have participated and maintained records of their participation. Of primary concern are the accuracy and reliability of the reports made by the participants in accounting for the activities conducted with the program funds.

The foregoing issues were by no means the only areas of concern expressed by

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the GAO and OIG, but are a sampling.

TEA guidelines and regulations

In 1986 the FAS promulgated the original set of guidelines for the TEA program, entitled the Targeted Export Assistance Guidelines (TEAG). The TEAG were based in large measure on 11 FASG, the guidelines for the Cooperator program. The TEAG were not published in the Federal Register and Code of Federal Regulations. After two years of experience, FAS issued a revision, TEAG 1988, effective October 1, 1988. Under TEAG 1988, participants in the TEA/EIP branded promotion program could enter into an agreement with the CCC for up to three years. That version is still effective for participants who have ongoing funding under applications and activity plans approved prior to the implementation of the Uniform Market Promotion Program (MPP) Provisional Rules on March 6, 1991. (Interim Contract Provisions). The CCC promulgated proposed rules in April of 1990. Targeted Export Assistance Guidelines, 55 Fed. Reg. 17,618 (1990) (TEAG 1990). Due to the creation of the MPP in the 1990 Farm Bill, the final rules for TEAG 1990 were never issued, and the proposed rules were never implemented.

The FAS is currently responsible for administering the TEA program under TEAG 1988, and the MPP under the Interim Contract Provisions. The number of operative regulations could temporarily grow to three if the Interim Rules slated for publication in July actually appear. Eventually, the approvals authorized under the TEAG 1988 will expire.

MPP

In spite of, or perhaps because of, the many criticisms of the TEA program, the TEA program was not renewed but was replaced with the MPP in the 1990 Farm Bill. In the process, some of the more distinctive features of the TEA program were eliminated. Primarily, the requirement that the program assistance be provided only to offset or counter an unfair trade practice was eliminated. The new requirement is simply that the FAS must give some "preference" to commodities that have been adversely affected by unfair trade practices. This loosening up of one of the basic tenets of the program may be desirable, but with the funding remaining level at $200 million under the MPP, it is currently meaningless. Seven U.S.C. section 5623(c)(2) states that "[t]he Secretary shall provide export assistance under this section on a priority basis in the case of an unfair trade practice." Applicants for priority funding requested in excess of $600 million this year. Telephone interview with David McGuire, Director of Program Operations Staff (Jun. 1991). Once the allocation is made to qualifying priority applicants, the FAS has no funds left to allocate to commodities not qualifying for the priority assistance.

Accommodations to GAO criticisms in MPP

The Interim Contract Provisions also contain several changes made to accommodate the GAO critics. Although the FAS has resisted some changes that it considers as unfair or unduly burdensome to participants, the trend is to increase the record keeping and accept the administrative controls advocated by the GAO. Some changes instituted by Congress in the MPP seem to respond directly to some GAO criticisms.

The FAS strongly resisted the GAO's notion that participants should be required to submit complete activity plans before funding allocation decisions are made. The burden of creating an activity plan is substantial, since the level of detail required is so great. TEAG 1988. The legislation creating the MPP directly addresses this issue, calling for the allocation of funds to be made after the submission of "marketing plans" and omits any mention of either applications *or* activity plans. 7 U.S.C. § 5623(e). This suggests quite convincingly a requirement to submit a document more thorough and detailed than the application, but still leaves some room for the FAS to recognize the needs of the applicants and require something less detailed than an activity plan.

An additional requirement for TEA/EIP participants was that they match the TEA funds on as much as a dollar for dollar basis with funds which the participant would not have spent on the funded activity in the absence of the TEA program. TEAG 1988, 106. Other participants were encouraged, but not required, to spend dollars on the funded activity which they would not have spent in the absence of the TEA program. The GAO was dissatisfied, in both the 1988 and 1990 reports, with the FAS process for determining which participants should contribute and at what level.

Congress has responded by requiring contributions from participants. The FAS felt it was important to recognize varying abilities to contribute since the participants represented interests injured by unfair trade practices. The GAO found this flexibility in levels of contribution requirement to be too variable. GAO Report 1990. The MPP legislation requires the participants to contribute at least "50 percent of the cost of implementing the marketing plan," except in cases where "there has been a favorable decision by the U.S. Trade Representative under section 2411 of Title 10." 7 U.S.C. § 5623 (g)(2). The "favorable decision" referred to may be under the mandatory or discretionary powers of the United States Trade Representative (USTR) in making a determination that the U.S. is being denied rights under any trade agreements or is being subjected to some burden by an unfair or unreasonable trade practice. In the cases where there has been a favorable decision by the USTR, the FAS is required to apply consistent and documented criteria when waiving the fifty percent minimum contribution requirement. 7 U.S.C. § 5623(g)(2).

Conclusion

The Targeted Export Assistance Program was introduced in the 1985 Farm Bill to help US agricultural exporters counter or offset unfair trade practices that had an adverse impact on their ability to export. The FAS designed a market development program to achieve that objective. The implementation of the program by the FAS was not perfect and the GAO was given some significant opportunities to criticize the FAS.

Adoption of recommendations made by the GAO would create significantly increased administrative burdens on the FAS, and increased documentation and compliance burdens on the participants. Although the FAS has tried to retain as much flexibility as possible in administering a program of such diverse application, the trend, both in the FAS regulations and practices, and the Congressional mandate in the MPP, has been to move to a more structured, controlled and burdensome administrative process. As a matter of logic, the more rigidly structured a program is, the less flexible it tends to be. Participants in the MPP are not likely to see any meaningful changes from the TEA program, but MPP participation will be more structured and require more effort to meet the administrative requirements.

In effect, Congress has taken the TEA program created by the FAS under Congressional mandate and codified it with some minor modifications. The TEA program by any other name is still the TEA program.

CONFERENCE CALENDAR

Land Use Institute
July 31-August 2, 1991
Coronado (San Diego), CA
Sponsored by ALI-ABA
For more info., call 1-800 CLE-NEWS

Farm, Ranch, and Agri-Business Bankruptcy Institute
Oct. 17-19, 1991
Lubbock, TX
Sponsored by West TX Bankruptcy Bar Assoc., and others
For more info., call 1-806-744-1100.

Right of first refusal under Ag Credit Act construed

The Agricultural Credit Act of 1987 requires Farm Credit System lenders, except for the banks for cooperatives, holding agricultural real estate acquired through foreclosure or voluntarily conveyed by a borrower who, in the lender's determination, did not have the financial resources to avoid foreclosure, to give the former owner the right of first refusal to repurchase or lease the property at its appraised value. 12 U.S.C. § 2219a. A former owner has the option of offering less than the property's appraised value, but the lender is not obligated to accept that counteroffer. 12 U.S.C. § 2219a(b)(4). However, the Act requires System lenders that reject a former owner's counteroffer to give the former owner a second opportunity to purchase the property by matching the price offered by a third party if that price is equal to, or less than, the price offered by the former owner. A second opportunity must also be given if the third party's offer was based on different terms and conditions than those originally offered to the former owner. 12 U.S.C. § 2219a(b)(5).

A federal district court has held that the right of first refusal provision of the Agricultural Credit Act of 1987 does not prohibit a Farm Credit Bank from dividing the property subject to the right into separate parcels after having elected to sell the entire property. *K Lazy K Ranch, Inc. v. Farm Credit Bank of Omaha*, No. CIV 90-3029 (D.S.D. May 15, 1990)(1991 WestLaw 110802). In doing so, it declined to follow a bankruptcy court decision in the same jurisdiction that had held to the contrary. *In re Jarrett Ranches, Inc.*, 107 Bankr. 969, 974 (Bankr. D.S.D. 1989), *vacated on other grounds, Jarrett Ranches, Inc. v. Farm Credit Bank of Omaha*, No. CIV 89-1048 (D.S.D. Nov. 21, 1990).

The court also held that it was permissible for the Bank to sell the property under different terms and conditions than those offered to the former owners whose initial offer to purchase it was less than the property's appraised value without giving the former owners the opportunity to purchase the property when those terms and conditions concerned the former owners' current possession of the property. It reasoned that the "different terms and conditions" provision was intended to ensure that former owners were not offered less favorable terms and conditions than other prospective buyers and was not to be interpreted literally when the differing terms and conditions did not place the former owners at a disadvantage.

Finally, the court held that the former owners could not challenge the appraisals used in the initial offerings of the property to them when the ultimate sale of the property being challenged was to third parties who were unaware of the earlier appraised price and who willingly purchased the property for more than that price. In essence, the court interpreted the Act as precluding collateral attack on the validity of the property's appraised value when the ultimate sale price was dictated by the marketplace.

—*Christopher R. Kelley, University of North Dakota School of Law*

Federal Register in brief

The following is a selection of matters that were published in the *Federal Register* during the month of June, 1991.

1. APHIS; Horse protection inspection guidelines; proposed rule. 56 Fed. Reg. 26043.
2. CCC; Export Bonus Program; interim rule with request for comments due 8/6/91. 56 Fed. Reg. 26323.
3. CCC; Disaster Payment Program for 1989 crops; interim rule; effective date 7/11/91. 56 Fed. Reg. 26761.
4. CCC; Export Bonus Program. 56 Fed. Reg. 28037.
5. PACA; Rules of practice under; interim rule. 56 Fed. Reg. 26759.
6. EPA; Worker protection standards for agricultural pesticides; notification of the Secretary of Agriculture. 56 Fed. Reg. 27484.
7. EPA; Existing stocks of pesticide products; statement of policy. 56 Fed. Reg. 29362.
8. FmHA; Farm labor housing loan and grant program; final rule. 56 Fed. Reg. 28469.
9. FCA; Disclosure to shareholders; accounting and reporting requirements; final rule. 56 Fed. Reg. 29412.

–*Linda Grim McCormick*

State Roundup

FLORIDA. *St. Johns River Water Management District makes funds available for BMPs.* The St. Johns River Water District, the second largest water management district in Florida, has recently established a program providing for cost share grants for selected agricultural best management practices (BMPs).

Most such practices are not eligible for funding from the U.S.D.A. Nonetheless, the Water Management District is attempting to improve water qulity by providing cost share funding on a limited matching basis against ASCS grants.

Eligible BMPs include 90% of cost associated with backflow prevention, 65% of cost associated with drainage channel regrading, 65% of vegetative filter strip costs, 90% of pump platform fuel and oil containment cost, and 90% of pesticide mixing and storage area costs.

The cap of cost share per fiscal year is $25,000. An operator or owner of an agricultural facility must have all current permits or consent orders for a consumptive water use management and storage of surface waters and other necessary Florida DER permits related to water quality in order to be eligible.

—*Sidney F. Ansbacher, Jacksonville, FL*

NEBRASKA. *Constitutionality of statute prohibiting non-family corporate farming.* In *MSM Farms, Inc. v. Spire*, 927 F.2d 330 (8th Cir. Feb. 27, 1991), the Eighth Circuit Court of Appeals held that a Nebraska statute prohibiting non-family farm corporations from owning and operating Nebraska farm and ranch land was consitutional.

Nebraska voters, by way of the initiative and referendum process, adopted a law prohibiting non-family farm coporations from owning and operating Nebraska farm and ranch land. The law is similar to statutory provisions adopted by Iowa, Kansas, Minnesota, Missouri, North Dakota, Oklahoma, South Dakota, and Wisconsin.

MSM Farms, a Nebraska corporation with unrelated shareholders, sought a declaration that the law violates the equal protection clause of the fourteenth amendment of the U.S. Constitution. MSM Farms claimed that the law's prohibition of non-family corporate farming was not rationally related to achieving any legitimate state purpose.

Evidence submitted by supporters of the law reasoned that a rise in corporate farming in Nebraska would lead to the decline of the family farmer. The evidence demonstrated that family farmers would be unable to compete fairly with the ability of corporations to raise capital and benefit from the tax laws. Supporters further maintained that corporate farming would lead to absentee landowners and tenant operation of farms; adversely affect the rural social and economic structure; and result in decreased stewardship and preservation of soil, water, and other natural resources.

The equal protection clause is satisfied if the law adopted through the initiative process is rationally related to a legitimate state interest. The court reasoned that by preventing the concentration of farmland in the hands of non-family corporations, the voters sought to prevent the perceived threat that would stem from unrestricted corporate ownership of Nebraska farmland. Nebraska voters could have rationally decided that prohibiting non-family farm corporations might protect, retain, and promote the family farm. Thus, the court concluded that such a policy represents a legitimate state interest under the equal protection clause, and held that the law is rationally related to that interest.

—*John Treangen, law student, The University of South Dakota School of Law*

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INSIDE:

TWELFTH ANNUAL MEETING

AMERICAN AGRICULTURAL LAW ASSOCIATION

NOVEMBER 1-2, 1991
Colony Square Hotel • Atlanta, Georgia

- Agenda
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