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Agricultural Law Update

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

IN FUTURE ISSUES

- Reauthorization of the Clean Water Act and Food Security Act

CERCLA "arranger" liability of landowners who contract for pesticide spraying services

In *South Florida Water Management District v. Montalvo*, 1996 WL 257288 (11th Cir. 1996), the Eleventh Circuit Court of Appeals considered whether landowners who contracted for pesticide spraying services could incur liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as "arrangers" of the disposal of hazardous substances. CERCLA, 42 U.S.C.A. § 9607(a)(3). The issue arose when a pesticide formulating business and a pesticide aerial spraying business (the Sprayers) were found liable in a CERCLA action, brought by the subsequent owners of a Palm Beach County site, for seventy-five percent of the cleanup costs at the site where the businesses operated. The site was contaminated with pesticide wastes spilled onto an airstrip and surrounding land during the mixing and loading of pesticides into aerial applicators and by pesticide wastes from the rinsing of the application tanks after pesticide applications. The Sprayers allowed rinsate from the tanks to drain onto the site.

In a subsequent CERCLA action, the Sprayers sought contribution from various farming and ranching corporations (the Landowners) that had contracted with the Sprayers for aerial pesticide spraying services. The Sprayers contended that the landowners were liable under CERCLA as "arrangers" of the disposal of the hazardous pesticide wastes by virtue of the contracts and commercial relationships for application of the pesticides, which were owned by the Landowners.

In review of a Federal Rules of Civil Procedure §(12)(b)(6) motion to dismiss brought by the Landowners, the Eleventh Circuit found as a matter of fact that the Landowners were not liable as CERCLA "arrangers." The court ruled that in order for the Landowners to incur CERCLA "arranger" liability, the Landowners had to have knowledge of and some control over the disposal of the pesticide wastes at the site. The court found that the Sprayers had not alleged circumstances demonstrating that the Landowners had the requisite knowledge and control and dismissed the contribution claim. The court also emphasized, however, that there may be circumstances under which parties contracting for spraying services may incur CERCLA "arranger" liability for improper disposal of pesticide wastes resulting from the application process. The court added that there is no bright line test for determining when a party may incur liability as a CERCLA arranger and that the knowledge of the disposal, the

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Montana arbitration law preempted by Federal Arbitration Act

A case decided by the U.S. Supreme Court on May 20, 1996, will strengthen the enforceability of arbitration agreements commonly contained in industry contracts. The Supreme Court, in *Doctor's Associates, Inc. v. Casarotto*, #95-559, struck down a Montana law that required contracts containing arbitration clauses to set forth a Montana-specific notice that the contract is subject to arbitration on the first page of the contract.

The *Doctor's Associates* decision reversed an earlier decision by the Montana Supreme Court that had found unenforceable an arbitration clause set forth in ordinary type on page nine of a franchise agreement. The Montana statute provided that "[n]otice that a contract is subject to arbitration ... shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration." The U.S. Supreme Court found the Montana statute to be incompatible with the Federal Arbitration Act [9 U.S.C. § 2], which provides that arbitration provisions are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Supreme Court made it clear that "[c]ourts may not ... invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."

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ownership of the hazardous substances, and the party's intent are relevant but not necessarily determinative of liability in every case.

The court also noted that CERCLA contains an express exemption for recovery of CERCLA response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act. 42 U.S.C.A. § 9607(i). The court concluded that this exemption would shield the Landowners from a CERCLA action arising from contamination of the fields where the pesticides were applied but would not by itself exonerate the Landowners from CERCLA liability for contamination of the sites where pesticides were mixed and formulated.

—Martha L. Noble, Staff Attorney, National Center for Agricultural Law Research and Information, University of Arkansas, Fayetteville, AR

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Arbitration Act/ontinued from page 1

The Supreme Court's decision affirms the supremacy of the Federal Arbitration Act over state-enacted laws that could interfere with the enforceability of arbitration agreements. Likewise, the Supreme Court's decision strengthens the enforceability of arbitration clauses commonly contained in contracts in the industry.

—David C. Barrett, Jr., NGFA Counsel for Public Affairs/Secretary-Treasurer, National Grain and Feed Association, Washington, D.C.

FAIR ACT/*ontinued from page 7*

through 2002. Twenty-five percent of guaranteed FO loans and forty percent of guaranteed OLs would be reserved for that group through 2002 as well.

- Total emergency loan indebtedness is limited to $500,000 as opposed to the current law's $500,000 limit per disaster.
- The Secretary's current authority to waive the credit elsewhere test on emergency loans on loans of $300,000 or less was reduced to loans of $100,000 or less.
- The guarantee on guaranteed loans is limited to ninety percent of principal and interest except any guaranteed loans to a producer graduating from a direct government loan or to a beginning farmer that is participating in the down payment loan program shall receive guarantees of ninety-five percent of principal and interest.
- Six months after enactment, the Secretary must determine appropriate levels of hazard insurance that should cover property purchased or improved through the use of USDA farm loans or used as security for the loan. After that determination is made, no new loans may be made unless the borrowers has, or obtains, the designated level of hazard insurance. In additiou, once the Secretary makes a determination as to what property should be covered by hazard insurance and the appropriate level, no emergency loan may be made for a property loss unless the property was covered by hazard insurance.
- A new five-year direct or guaranteed line of credit method of financing farm operating expenses is authorized.
- County committees are required to perform annual credit and eligibility reviews on all borrowers.
- The cash flow margin required to qualify for restructuring was raised from 105 percent to 110 percent.
- USDA is barred from placing a wetland conservation easement on inventory property that was cropland on the date of acquisition or used for farming at any time during the five years prior to acquisition.
- The Secretary must notify delinquent borrowers in ninety, as opposed to the current 180, days as to their loan servicing options thus triggering much earlier the forty-five-day period in which a borrower must request those options to preclude other actions being taken on the loan.

The FAIR Act also included the following titles, but due to space limitations, greater detail cannot be provided:

Title II - Agricultural Trade
Title III - Conservation
Title IV - Nutrition Assistance
Title VII - Rural Development
Title VIII - Research, Extension, and Education
Title IX - Miscellaneous

[1] The regulations implementing the new law have yet to be issued. The Secretary of Agriculture was given ninety days from the date of enactment (until July 3, 1996) to issue the regulations implementing the new commodity programs and other FAIR Act changes. In the meantime, the Farm Service Agency (FSA) has issued a series of bulletins to its state and county offices providiug them guidelines for informing people about the new program and enrolling them. This new series is denoted with a "PF" for Production Flexibility and as of 5/29/96, nine bulletins had been issued in this new series, with PF-1 containing the bulk of the information regarding the new contracts.

[2] Contract provisions are to be codified at 7 U.S.C. §§ 7211-18.

[3] Funds available for all participating rice producers are supplemented annually by $8.5 million for 1997-2002.

[4] Section 111(c) of Pub. L. No. 104-127, 110 Stat. 899, 7 U.S.C. § 7211(c).

[5] As of the time this went to press, no PF notice had been issued on this issue. These points are taken from a FSA presentation to agricultural interests in Washington, D.C.

[6] Section 112(a)(2) of Pub. L. No. 104-127, 110 Stat. 899, 7 U.S.C. § 7212(a)(2).

[7] Section 117(c) of Pub. L. No. 104-127, 110 Stat. 904, 7 U.S.C. § 7217(c).

[8] In the fiscal year in which a CRP contract is terminated, a producer must choose between a pro-rated CRP payment and the PFC payment; they may not receive both in the same fiscal year. The only exception is 1996 in which case acreage under CRP contracts terminated by May 31, 1996 may qualify for both payments.

[9] You will note that the expected supplemental PFC payment from the monies collected from repayment of advanced deficiency payments is lower. This is a result of the expectation that more people

NEBRASKA. *Whether delivery of corn was excused by impossibility of performance.* In *Larsen v. Grabowski*, No. A-95-013, 1996 WL 119509 (Neb. App., Mar. 19, 1996), the Nebraska Court of Appeals was confronted with a breach of contract action, where the rent was destroyed by hail.

In April, 1992, Larsen and Grabowski entered into a written farm lease. As rent for the irrigated land, Grabowski was to deliver 3,355 bushels of #2 corn, fifteen percent moisture, to the nearest market at harvest time. On August 4, 1992, a hailstorm totally destroyed Grabowski's corn crop. After Grabowski was unable to make the lease payment, Larsen brought an action for the fair market value of 3,355 bushels of corn. The county court entered judgment against Grabowski in the amount of $7,716.50 (3,355 bushels at $2.30 per bushel). Subsequently the district court affirmed the judgment.

Grabowski appealed, asserting that his performance was excused because the corn crop was 100% destroyed by the hail. Grabowski cited Nebraska's U.C.C. section 2-613 (casualty to identified goods) and section 2-615 (excuse by failure of presupposed conditions). Specifically, Comment 9 to section 2-615 states: "The case of a farmer who has contracted to sell crops to be grown on designated land may be regarded as falling either within the section on casualty to identified goods or this section, and he or she may be excused, when there is a failure of the specific crop, either on the basis of the destruction of identified goods or because of the failure of a basic assumption of the contract."

The Nebraska Supreme Court recently considered a similar situation in *Conagra, Inc. v. Bartlett Partnership*, 540 N.W.2d 333 (Neb. 1995). In *Conagra*, Bartlett made the same argument after he failed to deliver corn to Conagra due to a hailstorm. The supreme court determined that the contract did not contemplate that the corn to be delivered was to be grown on Bartlett's land. Basically, the corn was not identified other than by kind and amount. Therefore, the court concluded that since the contract was not ambiguous, the contract obligations could be honored by acquiring corn grown at places other than Bartlett's land. "The legal reality is that as the corn was fungible and not identified with particularity, neither section 2-613 nor section 2-615 is applicable to this case." *Conagra*, 540 N.W.2d at 337.

Relying on *Conagra*, the court of appeals likewise rejected Grabowski's assertions, finding that the rental contract did not require that the corn to be delivered was to be grown only on the leased land.

—*Scott D. Wegner, Lakeville, MN*

State Roundup

NEW HAMPSHIRE. *Claim that pesticides killed horses.* In *O'Donnell v. Moose Hill Orchards, Inc.*, No. 94-107, 1996 WL 42105 (N.H. Jan. 31, 1996), the New Hampshire Supreme Court considered a claim that pesticides sprayed on orchards resulted in the illness and death of horses.

O'Donnell owns a thoroughbred horse farm that abuts Moose Hill's apple orchards. During the spring of 1983, twenty-two horses at the O'Donnell farm experienced colic and eight horses later died. O'Donnell filed suit alleging that pesticide spraying in Moose Hill's orchards caused the illness and death of the horses. A jury returned a verdict in favor of Moose Hill.

At trial, Moose Hill called Dr. Eaton, an entomologist from the University of New Hampshire as an expert witness. Dr. Eaton testified concerning LD-50, the best available measure of a pesticide's toxicity. The LD-50 is the number of milligrams of pesticide that are required for every kilogram of body weight in order to achieve a fifty percent kill of a target population. Dr. Eaton calculated the LD-50 of Dithane, a chemical sprayed on the orchards, for a thoroughbred horse. Dr. Eaton also determined and testified as to the amount of contaminated hay a horse would have to eat to ingest a lethal quantity of pesticide.

On appeal, O'Donnell contended that Dr. Eaton was not qualified as an expert on LD-50's, toxicology, or the toxic effects of pesticides on horses. Accordingly O'Donnell argued that the trial court erred in allowing the testimony. The Supreme Court made short work of O'Donnell's claims, noting that Dr. Eaton is the statewide integrated pest management coordinator, author of numerous articles, and an editor and participating author of the New England Pesticide Control Guide. The court also cited with approval the trial court's comment that "there is no suggestion by either counsel that there is a better way of measuring toxicity other than the recognized LD-50 process." Further, the supreme court observed that the proper method of testing an expert's opinion is by cross-examination. The decision of the trial court was affirmed.

—*Scott D. Wegner, Lakeville, MN*

FAIR ACT/*continued from page 2*

will be receiving PFC payments than currently must repay 1995 advanced deficiency payments.

[10] USDA estimates oat acreage enrollment would have to be less than forty percent of existing base acres to boost the oat PFC payment rate by two cents per bushel.

[11] This is known as an Olympic average, dropping out high and low years when computing average. Formula for ELS cotton is slightly different than that for wheat and feed grains.

[12] Set by Secretary at level that is "fair and reasonable in relation to rates ... for corn, taking into consideration the feeding value of the commodity in relation to corn." Section 132(b)(3) of Pub. L. No. 104-127, 110 Stat. 906, 7 U.S.C. § 7232(b)(3).

[13] *Competitive Enterprise Institute v. U.S.D.A.*, No. 1:96CV01007 (D.D.C. filed May 1, 1996) dismissed May 30, 1996.

[14] 61 Fed. Reg. 19904, May 3, 1996.

[15] Section 155 of Pub. L. No. 104-127, 110 Stat. 922-930, 7 U.S.C. § 7271.

[16] Section 156 of Pub. L. No. 104-127, 110 Stat. 931-934, 7 U.S.C. § 7271.

[17] Sections 511-526 of Pub. L. No. 104-127, 110 Stat. 1032-48, 7 U.S.C. §§ 7411-25

[18] Compare *Cal-Almond, Inc. v. USDA*, 14 F.3d 429 (9th Cir. 1993) and *Wileman Bros & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted, sub. nom., Glickman v. Wileman Bros. & Elliott, inc.n*, (U.S. June 3, 1996)(No. 95-1184) with *Goetz v. Glockman*, 920 F. Supp. 1173 (D. Kan. 1996) and *United States v. Framen*, 885 F.2d 1119 (3d. Cir. 1989), *cert. denied*, 493 U.S. 1094, 110 S. Ct. 1168, 107 L.Ed.2d 1070 (1990).

[19] This was outlined in FSA Notice FC-37 issued on April 5, 1996. No exceptions were provided.

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* from May 20 to June 13, 1996.

1. APHIS; Tuberculosis in cattle, bison, and cervids; payment of indemnity; final rule; effective date 6/19/96. 61 Fed. Reg. 25135.

2. Natural Resources Conservation Service; Soil loss and wind erosion equations; final rule; effective date 6/3/96. 61 Fed. Reg. 27998.

3. Natural Resources Conservation Service; Changes in hydric soils of the U.S. 61 Fed. Reg. 29050.

4. Foreign Agricultural Service; Notice of a program to provide for the sharing of U.S. agricultural expertise with emerging markets. 61 Fed. Reg. 29049.

—*Linda Grim McCormick, Alvin, TX*

The Federal Agriculture Improvement and Reform Act of 1996

By Wayne Watkinson and John Sheeley

On April 4, 1996, President Clinton signed into law the most comprehensive change in farm policy in decades. The Federal Agriculture Improvement and Reform (FAIR) Act of 1996 (Pub. L. No. 104-127, 110 Stat. 888) contains nine separate titles ranging from the core commodity price support programs to agricultural trade to conservation to promotion programs to farm credit and rural development. However, the most far-reaching changes are contained in Title I, the Agricultural Market Transition Act (AMTA), more commonly known as Freedom to Farm, outlining the commodity support program for crop years 1996-2002.

Under the AMTA, producers of wheat, feed grains (corn, grain sorghum, barley, oats), upland cotton, and rice will have the opportunity to enter a seven-year Production Flexibility Contract (PFC) that will serve as the only source of government crop support income for the next seven years. Secretary of Agriculture Dan Glickman has slated May 20 through July 12, 1996 as the one and only sign-up period for the new program. The statute required all enrollment to be completed on or before August 1, 1996.[1]

Target prices, base acres, deficiency payments, maximum permitted acres, maximum payable acres, normal and optional "flex" acres, set-aside acres (ARPs), and possibly annual acreage certifications are all things of the past. The new lingo is PFCs, contract acreage, SL, and NL payment rates.

What does a PFC provide?

Essentially, a PFC provides the eligible producer with guaranteed, yet declining, payments on eligible contract acres for 1996-2002.[2] Those payments will be received regardless of whether the producer grows the crop for which the payment is made, or any crop for that matter. Planting flexibility under the AMTA was increased substantially in response to heavy producer pressure during the Farm Bill deliberations. Many producer groups are now amazed at how much flexibility they do have. Estimated payments for crop years 1996-2002 are shown in Table I.[3]

Table I
Estimated Ag Mkt. Transition Act Production Flexibility Contract Payments
(assumes 100% enrollment):

Fiscal Year (10/1-9/30)	Total Funds Available (billions)	Wheat $/bu.	Corn $/bu.	Grain Sorghum $/bu.	Feed Barley $/bu.	Oats $/bu.	Rice $/cwt.	Upland Cotton $/lb.
Crop Share of Total		26.26%	46.22%	5.11%	2.16%	0.15%	11.63%	8.47%
1996	$5.570	$ 0.87	$ 0.24	$ 0.31	$ 0.32	$ 0.03	$ 2.78	$ 0.0906
1996 advance		$ 0.31	$ 0.12	$ 0.155	$ 0.115	$ 0.01	$ 1.39	$ 0.03875
1997	$5.385	$ 0.61	$ 0.46	$ 0.50	$ 0.25	$ 0.03	$ 2.74	$ 0.0740
1998	$5.800	$ 0.65	$ 0.36	$ 0.42	$ 0.26	$ 0.03	$ 2.94	$ 0.0787
1999	$5.603	$ 0.63	$ 0.35	$ 0.40	$ 0.24	$ 0.03	$ 2.85	$ 0.0760
2000	$5.130	$ 0.57	$ 0.32	$ 0.37	$ 0.22	$ 0.03	$ 2.61	$ 0.0696
2001	$4.130	$ 0.46	$ 0.26	$ 0.30	$ 0.18	$ 0.02	$ 2.11	$ 0.0564
2002	$4.008	$ 0.45	$ 0.25	$ 0.29	$ 0.17	$ 0.02	$ 2.04	$ 0.0547

However, PFCs contain certain requirements that must be abided by that include: producers must certify compliance with the highly erodible and wetlands conservation (HELC/WC) provisions of the Food Security Act of 1985 (Form AD-1026); while no crop need be grown, the land must be maintained in an agricultural or related activity; and contract acreage may not be planted to certain fruits and vegetables (FAVs) unless there is a history of such plantings. Importantly, there are no haying and grazing or alfalfa growing restrictions for contract and noncontract acreage on participating farms. Conservation Reserve Program (CRP) restrictions on such activities will continue on CRP acreage.

Who is eligible to sign a PFC?

Section 111 of the AMTA describes eligible owners and producers as follows:

(1) An owner of eligible cropland who assumes all or a part of the risk of producing a crop.

(2) A producer (other than an owner) with a share-rent lease of eligible cropland, regardless of the length of the lease, if the owner enters into the same contract.

(3) A producer (other than an owner) on eligible cropland who cash rents the eligible cropland under a lease expiring on or after September 30, 2002, in which case the owner is not required to enter into the contract.

(4) A producer (other than an owner) on eligible cropland who cash rents the eligible cropland under a lease expiring before September 30, 2002. The owner of the eligible cropland may also enter into the same contract. If the producer elects to enroll less than 100 percent of the eligible cropland in the contract, the consent of the owner is required.

(5) An owner of eligible cropland who cash rents the eligible cropland and the lease term expires before September 30, 2002, if the tenant declines to enter into a contract. In this case, contract payments shall not begin under a contract until the lease held by the tenant ends.

The law specifically avoided micro-managing the relationship between landlord and tenant and merely provides that "the Secretary shall provide adequate safeguards to protect the interests of tenants and sharecroppers."[4] In draft FSA guidelines implementing this provision, the Department has taken the position that if an entire farm is leased by share, the PFC payments must be shared. No party in that situation may receive 100 percent of the payments.

Guidelines are being provided to the FSA County Committees for purposes of review and approval of PFCs involving owner/tenant shares.[5] Even where the parties agree to a division of payments, the FSA County Committee will review the contract and may reject the proposed shares if:

(1) an owner/operator is denying tenants or sharecroppers an opportunity to participate in a PFC;

(2) anyone is attempting to circumvent the payment limitation rules;

(3) a state court determines a signatory is in violation of state law;

(4) an owner or operator is adopting a scheme or device to deprive tenants or share croppers of payments they would otherwise be entitled to receive.

Furthermore, if an owner or operator has reduced the number of tenants from the preceding year, they may still participate in the PFC if the reason for the reduction was either that the landlord or operator purchased the farm for the current year or the tenant's lease expired and the tenant has no further rights to the farm. Thus while USDA intends to stay out of the landlord-tenant relationship, this is a very complicated area, and USDA will insert itself if the contract shares do not appear to be fair and equitable. If, in an extreme case, the landlord and tenant cannot agree on how to share payments for a particular year (in which case the FSA County Committee will pro-

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vide suggested shares) or FSA rejects a particular contract seeking a change in shares. FSA officials have publicly stated that they will not make a payment for that year and will reserve the funds for payment in a following year.

1996 sign-up is all or nothing

It is most important to note that the law is very specific, except with respect to CRP lands on which contracts expire or are terminated after August 1, 1996: "the Secretary may not enter into a contract after August 1, 1996."[6] Therefore, it is vitally important that all producers — whether tenant, sharecropper, owner, operator, or other participant — make sure they get into an FSA office prior to July 12 to sign up a farm if it is eligible and sign up the maximum acreage allowable on that farm. After July 12, unless sign-up is extended (in which case it may not be beyond August 1), FSA by law will have to reject any contract, and that land will be locked out of the farm program for seven years. This is not an annual sign-up. This is a one time sign-up for the next seven years.

While the law provides that a producer may voluntarily reduce the amount of acreage under a contract in future years, no acreage may be added after July 12. Shares in a contract may change after the first year or on an annual basis and the interests of a contract holder are transferable, provided the new interest holder agrees to assume all obligations under the contract. Furthermore, if a contract holder dies or becomes incompetent, the law provides that the contract payment will be made in accordance with regulations prescribed by the Secretary.[7] However, the acreage under the contract may not increase. In addition, because a reconstitution of a PFC covered farm and a non-PFC covered farm would effectively increase acreage under the PFC contract, such reconstitutions will not be permitted. Reconstitutions of PFC covered farms will be permitted.

What acreage is eligible?

Cropland is eligible for coverage under a contract only if the "land has contract acreage attributable to the land and . . . for at least 1 of the 1991 through 1995 crops, at least a portion of the land was enrolled in the acreage reduction program" under the now-old farm program "or was considered planted." USDA has also interpreted this to include a farm that may not have been enrolled but on which a producer was reporting acreage for the purpose of building base acres. In addition, CRP contract acreage where the contract expires or is voluntarily terminated on or after January 1, 1995 is eligible as is CRP acreage released by the Secretary between January 1, 1995 and August 1, 1996.[8]

Table II
Unearned Deficiency Payments to be Repaid
(Estimated Amounts Available for Supplanting PFC Payments)

Commodity	Amount Due ($ mil.)	Date Due/ Added to PFC	Per unit Repayment	Per Unit Added PFC[9]
Wheat	$558	FY 1996	$0.35/bu.	$0.25/bu.
Corn	$933	FY 1997	$0.20/bu.	$0.13/bu.
Grain Sorghum	$ 78	FY 1997	$0.195/bu.	$0.11/bu.
Barley	$ 39	FY 1996	$0.20/bu.	$0.09/bu.
Oats	$ 2	FY 1996	$0.05/bu.	$0.01/bu.
Upland Cotton	$109	FY 1996	1.85 ¢/lb.	1.31 ¢/lb.

How are the payments computed and when are they made?

On a national basis, the law makes specific amounts available for all contract payments and then allocates those monies per contract commodity according to specific percentages. Those amounts and the commodity allocations are indicated in Table I. Those gross amounts in any fiscal year available for a particular commodity will be supplemented by the amount of repayments of unearned advance deficiency payments on that commodity otherwise due to be repaid under the previous farm program. The amount and timing of such repayments is indicated in Table II.

Furthermore, the gross amount of funds available for a commodity in a fiscal year must be reduced for any earned deficiency payments still payable on any 1994 or 1995 crop (i.e., final 1994 corn and grain sorghum deficiency payments and guaranteed 0/50/85/92 payments for the 1995 crop year). The amounts still due to be paid are provided in Table III below.

The quantity of an individual producer's production eligible for payment is computed by multiplying eighty-five percent times what would have been the producer's 1996 crop acreage base under the old farm program times the producer's farm program payment yield (85% x 1996 CAB x farm program yield). Under this formula, someone building base would get credit for any additions made in the 1995 crop year. For wheat and feed grains, eligible contract acreage is the average acreage planted and considered planted (P&CP) for 1991 through 1995; for cotton and rice, it is a three-year average of P&CP from 1993-1995. *The 1996 calculation of contract acreage (except for any added CRP acreage) is a one-time calculation that sticks for the life of the contract (no more base building).* Essentially PFC payment acres are eighty-five percent of eligible contract acres.

Once the quantity eligible for all PFCs for a commodity are aggregated, this national quantity will be divided into the gross PFC-available monies for that commodity to determine the commodity payment rate. The estimated payment amounts provided in Table I are based on 100 percent participation of existing base acres. Should actual enrollment be less than that, which it is expected to be, then the payment rates will increase since the money will be spread over less eligible production.

It is important to note that while the unearned deficiency payments of most producers, if not already repaid, will simply be deducted from the second half of the PFC payment; the obligation to repay those monies remains. Thus, if a producer does not enroll in a PFC or they are no longer the tenant on a property where they were enrolled last year, the obligation remains with them, not the land, and they still must repay any unearned deficiency payments.

Payments will be made in two parts at the option of the producer — advance and final. For 1996, the advance payment will be made thirty days after the PFC is

Table III
Earned Deficiency Payments to be Paid
(Estimated Amounts Subtracted From PFC Available Monies)

Commodity	Amount Due
Wheat	$ 50 million
Corn	$806 million
Grain Sorghum	$ 79 million
Barley	$ 21 million
Oats	$ 2 million
Upland Cotton	$ 2 million
Total	$960 million

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approved. Those payments could start being made around the end of June. That advance will be based off the estimated payments shown in Table I. The final 1996 payment will be made on September 30 and that amount will contain any supplemental payment from the unearned deficiency overpayments, and any unrepaid deficiency payments will be withheld from that payment. Unfortunately, unless a lot of oats acres are not enrolled and the estimated payment rate increases, oats producers will owe the government a net 2¢/bu. in 1996, although this is better than the full 5¢/bu. advanced deficiency payment they would otherwise owe.[10]

In future years, producers may elect to receive the advance payment on either December 15 or January 15, with the final payment being made again on September 30. Thus, producers could receive up to three checks in calendar 1996 if they so choose. It must be noted that it appears USDA will be interpreting the definitive advance dates of December 15 and January 15 very strictly in that if a landlord and tenant have not agreed on shares by those dates, then no advance payment may be made, only one payment (although a full payment) on September 30. It remains to be seen whether that interpretation will stand. Also, even if it takes years to settle the shares issue, as long as the contract is recorded by July 12, 1996, then funds allocable to that contract will be reserved and be fully paid once the shares issue is resolved.

Planting flexibility

Except for fruits and vegetables (FAVs), any contract commodity or crop may be planted on contract acreage on a farm. There are no haying and grazing restrictions on contract acreage, and there are no planting restrictions on alfalfa or other forage crops. The planting of FAVs (except for lentils, mung beans, and dry peas) for harvest on contract acreage is prohibited except in the following situations:

(1) Planting FAVs that are double cropped with contract commodities on contract acreage is permitted, without any loss in payments, in any region which has a history of double-cropping contract commodities with FAVs. FSA State and County offices are currently reviewing instructions to determine the regions where such historical practices exist. It is important to note that an individual producer need not have a double-cropping history to be able to double-crop FAVs with contract commodities if they fall within a designated double-cropping region.

(2) A farm that has an individual history of FAV plantings may continue to plant FAVs. However, there will be an acre-for-acre loss of contract payments for each contract acre planted for harvest to FAVs.

(3) Producers with an individual planting history of a specific FAV may carry that history to a new farm and plant the specific FAV for harvest on contract acreage. However, the producer will suffer an acre-for-acre loss of contract payments for each contract acre planted for harvest to the FAV, and the quantity planted for harvest cannot exceed the producer's average annual planting history for the 1991-1995 crop years, excluding years with no plantings.

Marketing assistance loans

The new farm program preserves the old program's price support loans although they are renamed nonrecourse "marketing assistance loans," and certain significant changes are made. The most significant change is that all such loans have maximum loan rates attached to them. In addition, the nine-month loans (beginning on first day of month following that in which the loan was made) may not be extended for any amount of time. The minimum, maximum, and 1996 loan rates by commodity are shown in Table IV below. Wheat and feed grain loan levels are subject to up to ten percent reduction depending on various stocks to use ratios.

Loan deficiency payments are available to eligible producers who forego obtaining the marketing assistance loan. Producers with a PFC contract are eligible for recourse loans on high moisture feed grains and seed cotton as well. Production eligible for loans for wheat, feed grains, upland cotton, and rice (contract commodities) is any production of a producer on a farm containing eligible cropland covered by a PFC. In the case of commodities not eligible for a PFC — extra long staple (ELS) cotton and oilseeds — any production is eligible for a loan.

Payment limitations

A new annual payment limitation level of $40,000 per person was established for the PFC contract payments. This is a reduction of $10,000 from the previous payment level for deficiency payments under the old farm program. The three entity rule and the annual $75,000 per person payment limitation for marketing loan gains and loan deficiency payments, however, were essentially retained from previous law. More specifically, the $40,000 annual limitation applies only to the PFC payments attributable to specifically allocated monies per commodity as illustrated in Table I by the percentages in row one of that table, known as SL payments. Any supplemental payments in fiscal years 1996 and 1997 arising from the overpayment of 1995 deficiency payments (repaid payments that are then redistributed) are subject to a $50,000 payment limitation covering all seven years, referred to as NL payments.

Permanent law

A significant issue of debate during the formulation of the FAIR Act was what to do with permanent price support authority (namely the Agricultural Adjustment Act of 1938 and the Agricultural Act of 1949). The House-passed bill would have repealed permanent law; and provisions suspending permanent law were only added on the Senate floor, not in Committee. The final FAIR Act suspends certain provisions of permanent law and repeals others, but it fundamentally leaves in place the high-cost, nearly impossible to implement, parity-price-based permanent price support provisions that most analysts feel will force further action on price support legislation at the end of the seven-year PFCs. Interestingly, the lawyers failed to suspend two permanent law provisions, one dealing with the sugar program and one with the peanut program. The failure to suspend Section 371 of the 1938 Act and the Department's failure to implement the peanut program with that revived section in mind have formed the basis of a suit filed in the D.C. Circuit of the U.S. District Court by the Competitive Enterprise Institute and a peanut producer.[11]

Highlights of other commodity provisions

Non-PFC commodities that have en-

Table IV
Marketing Assistance Loan Rates

Crop	Minimum	Maximum	1996
Wheat (bu.)	85% of 5/yr.[11]	$2.58	$2.58
Corn	85% of 5/yr.	$1.89	$1.89
Grain Sorghum	off of corn[12]	off of corn	$1.81
Barley	off of corn	off of corn	$1.55
Oats	off of corn	off of corn	$1.03
Rice (cwt.)	$6.50	$6.50	$6.50
Upland Cotton (lb.)	$0.50	$0.5192	$0.5192
ELS Cotton (lb.)	85% of 5/yr.	$0.7965	$0.7965
Soybeans (bu.)	$4.92	$5.26	$4.97
Other oilseeds (lb.)	$0.087	$0.093	$0.0891

joyed other forms of government support include dairy, sugar, peanuts, and tobacco. Of these commodities, only tobacco enjoys a permanent authorization that does not require renewal each farm bill. The FAIR Act made no changes in the tobacco program.

Subtitle D, Chapter 1 of the AMTA (§§ 141-152, 7 U.S.C. §§ 7251-59) contains provisions significantly restructuring the government's dairy price support program. The FAIR Act immediately eliminated the budget assessment on dairy producers and phased down and out the support price for butter, non-fat dry milk, and cheese from $10.35/cwt. in 1996, to $10.20/cwt. in 1997, $10.05/cwt. in 1998 and $9.90/cwt. in 1999. In years 2000 through 2002, a recourse loan program at $9.90/cwt. would be available for dairy processors. USDA was also obligated to reduce the number of milk marketing orders from the current thirty-three down to between ten and fourteen in three years. A provision permitting federal approval of the Northeast Dairy Compact was also included and USDA sought formal comments on such a proposition until June 3.[14]

The peanut program was reauthorized through 2002 and changed to make it a low- or no-cost program.[15] The quota support rate was set at $610/ton through 2002, down from the previous $678/ton that would previously increase, but not decrease, in any given year. The national poundage quota floor of 1.35 million tons was eliminated as was undermarketiug provisions. USDA has established the 1996 quota at 1.1 million tons. Greater flexibility was provided in the sale, lease, and transfer of quota across county lines, although non-producers residing outside the state where the quota exists were precluded from holding such quota.

The sugar program was also reauthorized through 2002.[16] It largely escaped much change as the price supports remained at the 1995 levels of 18 cents and 22.9 cents respectively for raw cane sugar and refined beet sugar. If sugar imports drop below existing international obligations, then nonrecourse support loans convert to recourse loans. In addition, if a processor forfeits the sugar pledged as collateral on a loan, a one-cent-per-pound penalty will be assessed. Finally, marketing allotments were suspended, and the marketing assessment for deficit reduction was raised to 1.375% of the raw cane loan rate for fiscal years 1997-2003 and 1.47425% of the refined beet sugar loan rate.

Significant changes were also made in the crop insurance and non-insured disaster crop assistance program (NAP) programs recently reformed by the Federal Crop Insurance Reform Act of 1994 (Pub. L. No. 103-354, "FCIRA"). The mandatory crop insurance requirement imposed by the FCIRA for all commodity and credit program recipients as a condition of eligibility, commonly referred to as "linkage," was altered. Now producers may remain eligible for a PFC or the peanut, sugar, tobacco, dairy, or credit programs if they either have at least a catastrophic level of crop insurance coverage or they sign a written waiver (FSA-570) in which they waive any claim to any potential disaster payment on the crop for which they could have secured crop insurance. In addition, the former Federal Crop Insurance Corporation (FCIC), which had been merged with the former ASCS and FmHA to form the Farm Service Agency, was reestablished as a separate agency entitled the Office of Risk Management. Administration of the NAP remained with FSA. FCIC was also instructed to pilot various revenue insurance products in crop years 1997-2000. Finally, USDA's ability to maintain government delivery of catastrophic risk protection (CAT) to producers was severely restricted. The FAIR Act adopts a strong preference for single, private delivery of CAT wherever an adequate private sector delivery force can be established.

New research and promotion programs are authorized

Title V of the FAIR Act contained three specific new commodity research and promotion programs — canola and rapeseed, kiwifruit, and popcorn. It also authorized USDA to issue promotion, research, and information orders without specific legislative authorization — essentially creating a generic promotion program authorization to be accessed through petition to the Secretary of Agriculture.[17] Most importantly, the FAIR Act included language specifically aimed at correcting shortcomings in existing authorities and operations of current promotion programs as they relate to generic advertising and free speech that have been contested in recent court cases.[18]

Significant changes in farm credit are mandated

Title VI of the FAIR Act included changes to the government's farm credit programs, significantly rolling back many borrower protections provided in the Agricultural Credit Act of 1987 and refocusing the mission of the former Farmers Home Administration (FmHA), now the credit division of FSA. In fact, one provision denies any producer a new loan who has previously had any form of debt forgiveness, with such forgiveness being defined as reducing or terminating any loan that resulted in a loss to the government through a writedown or writeoff. The immediate implementation of this particular provision caused chaos for many producer who had loan applications pending on April 4 who were then informed that the applications had to be rejected as a result of the new farm law.[19] Congress responded through a special provision in the Omnibus Appropriations and Recision Act of 1996 (Pub. L. No. 104-134) providing that notwithstanding any other law, USDA could make or guarantee a loan to any applicant who submitted the application prior to April 5, 1996 and who was less than ninety days delinquent on any loan as of April 4, 1996.

This title also eliminated the leaseback/buyback program, removing any priority right to purchase inventory property (except under the Homestead Protection Program as modified) formerly held by former owners as well as any priority rights previously enjoyed by spouses, children, and former operators. Significant changes were also made in the process for selling and leasing inventory property, providing beginning farmers and ranchers first priority on purchases and leases.

Other highlights of the credit title include:

- Direct Farm Service Agency (FSA) loans are authorized through 2002 at $585 million annually with $85 million for direct farm ownership (FO) loans and $500 million for direct farm operating loans (OL). FSA guaranteed loans are authorized at increasing levels through 2002 beginning at $2.5 billion in FY96 and ending at $2.85 billion in FYs2000 through 2002. The FO portion of guaranteed loans increases from $600 million in FY96 to $750 million in FY2000 through 2002. Guaranteed OL levels increase from $1.9 billion in FY96 to $2.1 billion in FY2000 through 2002. All of these loan levels are subject to annual appropriations.
- FSA farm loans may no longer be made to finance recreational uses and facilities, enterprises to supplement farm income, non-fossil fuel energy systems, rural small business enterprises, or waste pollution abatement control projects. Direct FO loans may not be used to refinance other debts.
- Direct FO loans are limited to farmers with at least three years but not more than ten years farming experience. Former direct borrowers would be virtually excluded from obtaining new loans. Special transition rules are provided for current borrowers. Direct OL loans would be restricted to those with less than five years of farming experience or who have been direct borrowers for less than seven years.
- Seventy percent of direct FO loan funds would be reserved for qualified beginning farmers and ranchers, with sixty percent of those funds reserved for the down payment loan program. Twenty-five percent of direct OLs in FYs96-98 would be reserved for qualified beginning farmers and ranchers; thirty percent in FY99; and thirty-five percent in FYs2000

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

17th Annual Educational Conference: October 3-5, Seattle

Brochures for the Annual Education Conference will be mailed soon. The Conference will focus on "Serving Agriculture in the 21st Century."

Room registrations may be made directly with The Westin by calling (206) 728-1000 or toll free U.S./Canada (800) 228-3000. A limited number of rooms are available and reservations must be made by September 11, 1996. After that date, rooms will be booked on a space available basis at the prevailing hotel rates. When making reservations, please indicate that you are a registrant of the American Agricultural Law Association Conference in order to obtain the $120 Single/Double rate from October 2 through 5.

Travel information

As a member of the AALA, you are eligible for discounts on travel to the annual meeting. Traveltrust is the official agency for the AALA, and offers the lowest available airfare for any airline — guaranteed! There are three ways to book your travel and receive the discounts:

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