Agricultural Law Update

VOLUME 13, NUMBER 10, WHOLE NUMBER 155 AUGUST 1996

Official publication of the American Agricultural Law Association

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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

- The Animal Welfare Act

Federal government liable for contractual obligations

The Supreme Court in a major decision announced July 1, 1996, clarified that the federal government is liable for its contractual obligations, even when the federal government's failure to perform its contractual obligations is the result of subsequent legislation. The decision should bolster the contractual integrity of the Uniform Grain and Rice Storage Agreement and other contracts entered into by industry firms with the Commodity Credit Corporation or other federal government entities. Likewise, the decision may enhance the enforceability of production flexibility contracts entered into by producers under the Federal Agriculture Improvement and Reform Act of 1996.

In *United States v. Winstar Corp.* (No. 95-865), the United States argued that it should not be held liable for contracts made by the Federal Home Loan Bank Board to encourage healthy savings and loan associations and investors to acquire ailing savings and loan associations in the 1980's. The Supreme Court found that the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation contractually bound the federal government to recognize favorable accounting treatment that would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations. The agencies argued that subsequent changes to the relevant law made by Congress insulated the federal agencies from liability for breach of contract.

Justice David Souter, in writing for the Court, said that "[c]ontracts like this are especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for performance is always lurking in the shadows." The majority of the Court agreed that Congress, in the exercise of its legislative power, could change the law applicable to savings and loan associations. However, the Court also agreed that the affected companies could seek damages for the government's breach of a binding contract.

While the Supreme Court focused on the enforceability of the federal government's contractual obligations, the Court's opinion also discussed and applied general contract law. Those dealing with contract enforceability issues may, therefore, find parts of the Court's opinion helpful. In addressing the issue of contractual promises and risks, the Court said:

> We read this promise as the law of contracts has always treated promises to provide something beyond the promisor's control, that is, as a promise to insure the *promisee* against loss arising from the promised condition's nonoccurrence.... One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking.

—David Barrett, National Grain and Feed Association, Washington, D.C.

Forced marketing contributions violate First Amendment

In May, 1996, the California Court of Appeals for the Third Appellate District decided the case of *California Kiwifruit Commission v. Dave Moss*, 96 D.A.R. 5783 (May 22, 1996), providing an instructive analysis differentiating between commercial speech, which may be regulated if it meets a standard of serving a substantial state interest, and forced association, which is subject to a showing of a compelling state interest.

The Kiwifruit Commission's sole purpose is to advertise and promote kiwifruit by developing and managing a national and international advertising program. California Food and Agriculture Code §§ 68001 *et seq.* The operations of the commission are funded through assessments on kiwifruit handlers. The assessments are based upon a per tray basis and an average of the grower's production. Producers may not "opt

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out" of the program. The suit appears, in part, to have been motivated by the commission's filing of a lawsuit against New Zealand for dumping kiwifruit, which resulted in a $1,000.000.00 charge for the costs of the suit, apparently resulting in insufficient funds to complete consumer advertising.

The grower in this case, Mr. Moss, produces kiwifruit on approximately five acres of land in Chico, California, and spends approximately $3,000.00 to $4,000.00 each year advertising and promoting his kiwifruit. Mr. Moss claimed he derives no benefit from the California Kiwifruit Commission.

The California Court of Appeals for the Third Appellate District reviewed a variety of commercial speech cases and the accepted standard that such speech must be regulated by a "substantial state interest...narrowly tailored to achieve the desired objective." *California Kiwifruit Commission* at 5785, citing *Board of Trustees S.U.N.Y. v. Fox*, 492 U.S. 469, 480 (1989). However, while conceding that such commercial speech could be regulated, the assessments in this case were determined to have other implications. Specifically, the California court was asked to determine whether the "state may conscript a subgroup of individuals to fund a specified private organization so the organization may speak for that subgroup, thus invoking concerns of forced association and compelled speech." *California Kiwifruit Commission*, at 5785, citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Comparing the *Kiwifruit* case to cases involving collective bargaining agreements and "agency shops," the court found that the freedom of association presupposed a freedom not to associate. *See, Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Roberts v. United States Jayeees*, 468 U.S. 609 (1984).

The "challenge" to be reviewed by the court was whether or not the commission could force a grower to subsidize the commission as its "mouthpiece." Because such activity implicated associational concerns, it was subject to the "strict scrutiny" standard rather than the lesser standard for commercial speech. *California Kiwifruit Commission*, at 5786. "Due to the inapplicability of commercial speech analysis, and with the Commission's sole purpose being speech, the assessments are constitutional only if they serve a compelling state interest. An infringement on the right to associate for expressive purposes 'may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Kiwifruit,* at 5787, quoting *Roberts, supra*, 468 U.S. at p. 623.

The court, in reviewing the state's interests in this case, found that the commission's evidence was "troublesome." There was no evidence that the advertising had any effect on growers returns, and the state did not prove that the state's interest could not be achieved through less restrictive means. Accordingly, the trial court's judgment was reversed.

—Thomas P. Guarino, Senior Associate, Myers & Overstreet, Fresno, CA

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VOL 13, NO 10, WHOLE NO 155 August 1996

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New liability rules for equine accidents

In the January, 1995 issue of *Agricultural Law Update*, new statutory provisions regarding liability for horse accidents were reported. By reason of a statutory command, qualifying persons are not "liable for an injury or the death of a participant" resulting from certain activities. The directives are similar to the directives of good Samaritan statutes.

Several additional states have passed new legislation on this subject, and the following is an updated statutory compilation of the equine liability legislation.

Ala. Code § 6-5-337
Ariz. Rev. Stat. Ann. § 12-553
Ark. Code Ann. §§ 16-120-201 to -202
Col. Rev. Stat. Ann. § 13-21-119
Conn. Gen. Stat. § 52-557p
Del. Code Ann. tit. 10,§8140
Fla. Stat. Ann. §§ 773.01—773.05
Ga. Code Ann.§§ 4-12-1 to -4
Haw. Rev. Stat. Ann. §§ 663B-1 to -2
Idaho Code §§ 6-1801 to -1802
ILCS ch. 745, §§ 47/1 to 47/999
Ind. Code Ann. § 34-4-44-1
Kan. Stat. Ann. §§ 60-4001 to -4004
La. Rev. Stat. Ann. § 2795.1
Me. Rev. Stat. Ann., title 7, §§ 4102—4104
Mass. Gen. Laws Ann., chapter 128, § 2D
Mich. Comp. Laws § 691.1661 to .1667
Minn. Stat. Ann. § 604A.12
Miss. Code Ann. § 95-11-1 to -7
Mo. Rev. Stat. § 537.325
Mont. Code Add. §§ 27-1-725 to -728
N.M. Stat. Ann. §§ 42-13-1 to -5
N.D. Cent. Code §§ 53-10-01 to -02
Or. Rev. Stat. §§ 30.687—.697
R.I. Gen. Laws §§ 4-21-1 to -4
S.C. Code Ann. §§ 47-9-710 to -730
S.D. Codified Laws Ann. §§ 42-11-1 to -5
Tenn. Code Ann. §§ 44-20-101 to -105
Tex. Civ. Prac. & Rem. Code §87-001 to .005
Utah Code Ann. §§ 78-27b-101 to -102
Va. Code Ann. §§ 3.1-796.130—.133
Wash. Rev. Code Ann. §§ 4.24.520—.540
W.V. Code §§ 20-4-1 to-7
Wis. Stat. § 895.525
Wyo. Stat. § 1-1-122.

—Terence J. Centner, Professor, University of Georgia, Athens, GA

Federal Register *in brief*

The following is a selection of items that were published in the *Federal Register* from June 17 to July 12, 1996.

1. FSA; NAFTA, End-use certification program; final rule; effective date 6/25/96. 61 Fed. Reg. 32,641.

2. FSA; Loan assessment, market placement, and graduation of direct loan borrowers; interim rule; comments due 10/7/96. 61 Fed. Reg. 35,916.

3. EPA; Worker Protection Standard, decontamination requirements; final rule; effective date 8/26/96. 61 Fed. Reg. 33,207.

4. EPA; Pesticide Worker Protection Standard; language and size requirement for warning sign; final rule; effective date 8/26/96. 61 Fed. Reg. 33,202.

5. FCIC; FAIR Act of 1996; State catastrophic risk protection plan; reinsurance agreement; final rule; effective date 6/27/96. 61 Fed. Reg. 34,367.

—Linda Grim McCormick, Alvin, TX

Is the Illinois Mechanics Lien Law available to farm tenants?

Dating at least to 1885, Illinois courts have held that tenants who make improvements on rented property at their own expense are not entitled to recover from the landlord under the Mechanics Lien Law. 770 ILCS 60/1 *et seq.*

In *Gardner v. Watson*, 18 Ill. App. 386 (1885), decided by the Illinois Appellate Court in 1885, the tenant sought to foreclose a mechanics lien on the rented property to recover payment for a steam-heating system and pipes he had purchased and installed in the rented property. In ruling against him, the court said, "The right of a tenant to receive payment from a landlord at the expiration of the tenancy for fixtures placed on the demised premises during the term, arises from no rule of law or legal duty growing out of the relation of landlord and tenant. It is always a matter of express contract and in the absence of such contract, the fixtures at the expiration of the term become by operation of law the property of the landlord without payment. 18 Ill. App. 386, 396 (1885).

Using similar language, subsequent cases have reiterated this view. Though under these holdings a tenant cannot recover from a landlord for the value of improvements made by the tenant, a statute on the removal of fixtures provides some relief by permitting a tenant to remove an improvement if the following conditions are met:

The improvement is "a removable fixture" within the meaning of the law. The general rule in this regard is that if it can be removed without damage to the real estate, then it is a "removable fixture."

A tenant owes no back rent and is thus not subject to "the right of the landlord to destrain for rent."

The fixture is removed before the tenancy ends, and the lessee is no longer on the land in his or her character as tenant. This right would probably exist during a holdover period after termination of the lease during which the holdover lessee could be characterized as a "tenant at sufferance."

The above are all statutory requirements. There are two additional factors that need to be considered: what was the intent of the landlord and the lessee at the time the improvement was made, and would an incoming tenant or purchaser of the land be led to believe that the fixture is a part of the land being rented or purchased?

While the Removal of Fixture Statute and cases decided under it provide an alternative to the tenant having no remedy at all, it does not alter court holdings that a tenant is not entitled to reimbursement for improvements left on the land unless there is a specific contract under which the landlord agrees to make reimbursement. Some farm leases contain a provision under which the landlord does agree to pay for the unexhausted value of improvements made by the tenant. Though purchase and application of limestone and phosphate by the tenant are the usual items listed in such a lease provision, there is no reason why structures, permanent fencing, or other items cannot be included.

In 1995, the First District Illinois Court in *Leveyfilm, Inc. v. Cosmopolitan Bank & Trust*, 653 N.E.2d 875 (1995), the court held that under the circumstances presented in that case, the tenant was entitled to the benefit of the Illinois Mechanics Lien Law. [For a discussion of this case and its possible impact, see the article by Gregory A. Thorpe and Annette L. Brands in the Illinois Bar Real Property Newsletter, Vol. 41, No. 6, April, 1996, at 3.] After leasing the property from the beneficial owners, Kelliher and Kerry, the property snffered from flooding, sewage overflow, and asbestos and paint contamination. The beneficial owners undertook to remedy these conditions but in doing so requested the tenant, Leveyfilm, to perform certain services for maintenance and improvement of the property. In response to this request, Leveyfilm did a number of things, including foundation repair, installation of wainscoting, and the performance of work necessary for the installation of drywall. Leveyfilm was not compensated for services and materials, and therefore filed a lien claim under the Mechanics Lien Law.

The court first examined the Mechanic's Lien Law in detail to determine in particular if "contractor" as used in the Act could include a tenant. The court quoted under section one of the Act, "Any person who shall by any contract...with the owner of a lot or tract of land...perform any service or incur any expense...or furnish material...is known under this Act as a contractor and has a lien upon the whole of such lot or tract of land...." 770 ILCS 60/1.

The defendant owner argued that a tenant is not the type of person intended by the Act, that in effect it means people in the business of contracting and not a tenant who does maintenance or repair work on the leased premises. In answer to this, the court said that a contractor need not be an architect, a structural engineer, professional engineer, land surveyor, or property manager. It said that the purpose of the Act is to require a person with an interest in real property to pay for improvements that are made for the property, and that, in effect, when the Act says "any person," that is what it means. So the court held that a lien was available to the tenant. Justice Cousins dissented from the holding, saying that the Act was meant to protect only those who were in the business of "contracting" and that since a lessee did not qualify on this basis and also had an interest in the land, he or she could not have a lien for services or materials supplied.

The question, then, becomes: should the Mechanics Lien be available to Illinois farm tenants, and if so, under what circumstances?

In *Leveyfilm*, the court held that a tenant who furnished labor and supplies under an agreement with the owner was entitled to enforce a Mechanic's Lien. In reaching this conclusion, the court found the following:

That a "person," as used in the Act, could mean anyone who does improvement work under a contract with the landowner—and that the categories named in the Act were not exclusive.

A contractor within the meaning of the Act does not have to be a "professional" in some phase of building, construction, and repair.

The tenant, of course, must have supplied labor and materials at his or her own expense; otherwise there would be no issue.

Under farm leases, whether written or oral, it is customary for the landlord to pay for materials used in construction or repair and for the tenant to furnish the labor, unless skills the tenant does not possess are required. This arrangement can be considered an integral part of the tenancy and is justified because both parties benefit from the work that is done. It can he said that this is an integral part of the economics of the rental arrangement—namely that the landlord makes expenditures for those things that will become a part of his real estate and thus enhances it value—and that the tenant who will benefit from such, supplies the necessary labor.

When the tenant supplies both labor and materials for something that enhances the value of the landlord's property, it would seem only fair that the tenant receive either full or partial reimbursement, depending on depreciation through his own use. However, with respect to improvements made by the tenant, this has not been the law, even with permission from the landlord. So it seems that the most important element, when the tenant furnishes both labor and materials, is whether or not there is a contract between the landlord and tenant under which the landlord agrees to pay for the improvement. Though the nature of the improvement and who will benefit most from it may be important questions with respect to the tenant's right to move it at the end of the term, these considerations become unimportant when the owner

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Wetlands provisions in the Federal Agriculture Improvement and Reform Act of 1996*

By Darren McBeth

**The following is an excerpt from Darren McBeth's article concerning wetlands conservation and federal regulations that will be printed in Vo. 21, of the Harvard Environmental Law Review (Jan./Feb., 1997). The author reserves the copyright to himself.*

On April 4, 1996, President Clinton signed into law the 1996 Farm Bill, which amended the Food Security Act of 1985 and is called the Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888. After lengthy and controversial debate in both the House and Senate, the Congress made many key modifications concerning wetlands conservation, which will be codified in the Food Security Act (16 U.S.C. section 3801 *et seq.*).

Wetlands regulations is very controversial. The changes in wetland conservation under the Farm Bill will likely set the tone for modifying wetlands provisions contained in section 404 of the Water Pollution Control Act (the Clean Water Act), the reauthorization of which is already one year overdue and may come next year.

Although the fate of the federal farm programs—and conservation compliance—after the Farm Bill expires is still uncertain, the following changes to Swampbuster reflect a more common sense approach to wetlands conservation.

Reduction of ineligibility and good faith exemption

If a farm program participant produced an agricultural commodity on a converted wetland, Swampbuster used to require that that producer "shall be ineligible for" price support payments, loans, disaster payments, payments under voluntary incentive programs, cost-share assistance, and all other benefits conferred by the USDA.[1] The Secretary, under the Food Security Act, had little or no discretion to be flexible with a producer. This violation was lethal for program participants, unless they qualified for a "good faith" exemption[2] and graduated sanction reduction,[3] where the Secretary could reduce ineligibility if (1) the participant was actively restoring the converted wetland, (2) the participant had not violated the provisions of Swampbuster in the previous ten-year period, and (3) the participant committed the conversion in good faith without the intent to violate the provision.[4] Even if a participant could meet these requirements, the Secretary could only reduce the participant's ineligibility by "not less than $750 nor more than $10,000."[5]

In other words, if a program participant only received minimal USDA program benefits—$500 or less in any one year—because of the rigid language of 16 U.S.C. section 3822(h)(2), that participant would still at best have the ineligibility reduced by "not less than $750." However, in amending section 3821 by stating the person shall be "ineligible for loans or payments in an amount determined by the Secretary to be *proportionate* to the severity of the violation,"[6] Congress untied the hands of the Secretary in giving flexibility to a producer.

Further amendment to the "Good Faith Exemption" at 16 U.S.C. section 3822(h) would allow the Secretary to completely waive a person's ineligibility for converting a wetland upon a showing of good faith and lack of intent concerning the violation.[7] If the Natural Resources Conservation Service [NRCS] chooses to waive ineligilility after a good faith conversion, the new language states that the producer has "a reasonable period, not to exceed 1 year, during which to implement the measures and practices necessary to be considered to be actively restoring the subject wetland."[8]

These changes in the good faith exemption will solve the problems where tenants plant land owned by absentee landowners, and make a good faith wetland conversion. Before the amending language, if a different producer subsequently planted on the absentee landowner's land two years later and also committed a good faith wetland conversion, the Food Security Act would not have allowed both the second producer and the absentee landowner to come back into compliance without losing program benefits. This was because the Act allowed only one violation every ten years for each parcel of land.[9]

Abandonment

The 1996 Farm Bill provides for the production of an agricultural commodity on a converted wetland, or conversion of a wetland, if:

> the original conversion of [that land] was commenced before December 23, 1985, and the Secretary determines the wetland characteristics returned after that date as a result of—
>
> (i) the lack of maintenance of drainage, dikes, levees, or similar structures;
>
> (ii) a lack of management of the lands containing the wetland; or
>
> (iii) circumstances beyond the control of the person.[10]

This language has the effect of repealing part of the NRCS's "abandonment" provision.[11] Previously, if a program participant abandoned a prior converted (PC) wetland—which is exempt from Swampbuster—for five years where wetland characteristics returned to the PC, the PC was considered "abandoned" by the NRCS and relabeled as a wetland, subject to Swampbuster. However, what if a landowner with a PC voluntarily wanted to allow the PC to revert back to wetland characteristics, but not lose the PC designation? Under the National Food Security Act Manual [NFSAM] guidelines, the landowner would still have to "plow up" the PC once every five years to maintain the PC label. The NRCS knew this was contrary to the goals of the agency; NRCS did not want to require a landowner to plow up a PC once every five years to maintain the label, when the landowner was willing to let the PC revert to wetland characteristics indefinitely. Warren Lee, Director of the Watersheds and Wetlands Division of NRCS, stated that:

> if a landowner with a PC wishes to provide wetland functions and values to society by letting his land labeled PC revert back to a wetland, we should not make him plow it up every five years just so he can keep his designation. Even if he wishes to then turn it into a corn field fifteen years later, society received those benefits of the wetland for that time, and it doesn't seem right to penalize the producer by saying he just converted a wetland. That is not the intent of Swampbuster or abandonment.[12]

The preceding new language "perfects" the PC label for a landowner: once a PC, always a PC.

Darren McBeth spent seven months as a law clerk working with the USDA's National Wetlands Staff Office of the General Counsel. During this time, Congress and the USDA completed the 1996 Farm Bill, and this article is a product of the author's experience. The author recently graduated from Drake University Law School and completed the Wisconsin bar exam.

The second part of the revised abandonment provision states that no person shall be ineligible for production of an agricultural commodity on a converted wetland, or for conversion of a wetland if:

(i) the [land] was determined by the Natural Resources Conservation Service to have been manipulated for the production of an agricultural commodity or forage prior to December 23, 1985, and was returned to wetland conditions through a voluntary restoration, enhancement, or creation action subsequent to that determination;

(ii) technical determinations regarding the prior site conditions and the restoration, enhancement, or creation action have been adequately documented by the Natural Resources Conservation Service;

(iii) the proposed conversion action is approved by the Natural Resources Conservation Service prior to implementation; and

(iv) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action.[13]

The new language emphasizes the point made in Warren Lee's above statement: now a producer will truly be able to voluntarily abandon a previously manipulated wetland, and then have the freedom to (re)convert that land without being ineligible. The only caveat to this new common sense freedom is that the producer must document the benchmark of the activity with the NRCS prior to the implementation of a voluntary restoration, enhancement, or creation.[14] This is so the Agency understands and can document the producer's intentions. Should the landowner then wish to (re)convert the wetland some time in the future, he may do so to "the extent the ... conversion is limited so that the conditions will be at least equivalent to the wetland functions and values that existed prior to implementation of the voluntary wetland restoration, enhancement, or creation action."[15]

Mitigation of functions and values

Congress made the most important change in all of the wetland conservation provisions of the Farm Bill in a new exemption expanding mitigation. This change, developed by the NRCS and implemented by Congress, is believed by many to be the solution to Swampbuster criticism.[16]

Section 322(d) amends 16 U.S.C. section 3822(f)(2), which describes the guidelines by which NRCS will allow the mitigation through restoration, enhancement, or creation action.[17] This section states that the Secretary shall exempt a person from converting a wetland under provision of swampbuster if:

The wetland and the wetland values, acreage, and functions are mitigated by the person through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland, and the restoration, enhancement, or creation is—

(A) in accordance with a wetland conservation plan;

(B) in advance of, or concurrent with, the action;

(C) not at the expense of the Federal Government;

(D) in the case of enhancement or restoration of wetlands, on not greater than a 1-for-1 acreage basis unless more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion to be mitigated;

(E) in the case of creation of wetland, on greater than a 1-for-1 acreage basis if more acreage is needed to provide equivalent functions and values that will be lost as a result of the wetland conversion that is mitigated;

(F) on lands in the same general area of the local watershed as the converted wetland; and

(G) with respect to the restored, enhanced, or created wetland, made subject to an easement that—

(i) is recorded on public records;

(ii) remains in force for as long as the converted wetland for which the restoration, enhancement, or creation to be mitigated remains in agricultural use or is not returned to its original wetland classification with equivalent functions and values; and

(iii) probibits making alterations to the restored, enhanced, or created wetland that lower the wetland's functions and values.[18]

This new authority will effectively untie the hands of the NRCS to allow common sense mitigation, where before the amendment, mitigation of wetlands could only occur on prior converted croplands,[19] and only wetlands that were "frequently cropped" could be mitigated.[20] For example, assume a producer had degraded a wetland in the middle of a field that was disrupting the farming operation. The existing wetland may be degraded, for example, from the deposition of sediment, while the proposed mitigation site could be managed as a wetland with more permanent water and buffer vegetation. The producer may be willing to replace or greatly increase the functions and values of the degraded wetland at the alternative site. However, if the mitigation site that the participant wishes to use is not located on a prior converted cropland, the Food Security Act up until now prohibited the NRCS from accepting the mitigation plan.

The additional guidelines assure the mitigation plan will be effective. Paragraph (D) assures the producer that the Agency will not require—when restoring or enhancing a wetland—more land from the producer than that equal to what he is converting, unless more wetland is needed to produce equivalent functions and values as the wetland being converted. Paragraph (E), on the other hand, assures the Agency and the public that when *creating* a new wetland—a practice not as efficient or as successful as restoring or enhancing an existing wetland—the mitigation plan will produce an amount of land *more* than equal to the wetland being converted if necessary to provide equivalent functions and values that will be lost as a result of the wetland conversion that is being mitigated. Paragraph (F) restricts mitigation projects to the same general watershed as the wetland being converted. This is to prevent a true mitigation banking situation from taking place where, for example, a producer in Montana could plow up his wetland and somebody in Iowa would enhance an existing wetland to offset the conversion. Finally, paragraph (G) requires an easement to be placed on the newly mitigated site, to assure that the process of mitigation is not in vain and so that the achievement of no net loss of wetland functions and values is preserved.

Restoration of "the" converted wetland

Section 322(g) of the Farm Bill fixes a problem that severely prohibited the NRCS from being more flexible with producers. The section amends the "Restoration" provision of 16 U.S.C. section 3822(i):

Any person who is determined to be ineligible for program benefits under section 3821 (16 U.S.C. section 3821) for any crop year shall not be ineligible for such program benefits under such section for any subsequent crop year if, prior to the beginning of such subsequent crop year, the person has fully restored the characteristics of the converted wetland to its prior wetland state, *or has otherwise mitigated for the loss of wetland values, as determined by the Secretary, through the restoration, enhancement, or creation of wetland values in the same general area of the local watershed as the converted wetland.*[21]

Before the addition to 16 U.S.C. section 3822(i) from the text of the Conference Report, the NRCS would only allow resto-

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ration of "the" converted wetland. For example, if a producer converted a wetland, sold the property where the converted wetland was located, and then wished to mitigate the converted wetland to regain program eligibility, the producer had to receive permission from the subsequent landowner to restore "the" converted wetland. However, the amending language allows the producer to mitigate the lost wetland functions and values of the converted wetland through restoration, enhancement, or creation of another wetland.

Minimal effects

Section 322(c) directs the Secretary, through regulations, to establish "categorical minimal effect exemptions on a regional basis to assist persons in avoiding a violation" under Swampbuster.[22] This will have the effect of clarifying the scarcely used "Minimal effects" exemption in 16 U.S.C. section 3822(f)(1). Because minimal effects on a wetland conversion differ from region to region, this language gives the flexibility for establishing regulations setting out general minimal effects guidelines.

Consistency between section 404 and Swampbuster

Section 322(d) adds an additional exemption to the "Minimal effect; Mitigation" section at 16 U.S.C. section 3822(f).[23] The new language provides that producers converting wetlands authorized under a Clean Water Act (CWA) section 404 permit may remain eligible for USDA program benefits, provided the functions and values of the converted wetland are adequately mitigated for the purposes of the Food Security Act.[24] This provision will help reduce confusion from interpreting multiple agency definitions of wetland compliance policies, and add predictability, consistency, and reliance for expectations of wetlands compliance. Specifically, the provision will prevent landowners from finding themselves in a "catch-22" situation caused by differences between Swampbuster and CWA section 404 when they apply for federal crop insurance. For example, a landowner who never participated in a USDA program may have obtained a section 404 permit from the Corps of Engineers [COE] in 1992 to convert a wetland and grow an agricultural crop such as vegetables. Under requirements for that permit, assume the producer was required to mitigate for the lost functions and values of the wetland. In 1995 after Congress changed the disaster assistance program, program participants were required to participate in the Federal Crop Insurance program to be eligible for disaster assistance.[25] If this producer sought crop insurance, the USDA would make a wetland determination on the property. The site which was converted would be labeled CW-91, making the client ineligible for crop insurance. Before the amending language, the only way this client could regain eligibility would be to restore the wetland that was converted in 1991—regardless of who currently owns that property. Furthermore, the only time the mitigation performed under the COE permit could be accepted for previous Swampbuster requirements is if the area converted was a frequently cropped wetland and the landowner performed the mitigation on a prior converted cropland.

Mitigation banking

Section 322(i) authorizes the Secretary to establish a pilot mitigation banking program,[26] where wetlands credits could be established that involve the restoration, enhancement, or creation of wetlands by public or private entities for use in compensation for lost wetland functions and values.[27]

Fish and Wildlife Service concurrence eliminated

The amending language deletes controversial provisions within Swampbuster that required the NRCS to seek concurrence from the Fish and Wildlife Service [FWS] and Department of the Interior before approving mitigation plans and while making wetland delineations.[28] Legislators likely viewed the deleted provisions as unnecessary, cumbersome requirements that only slowed the process for program participants. However, much of the scientific, wildlife, and ecological expertise in designing mitigation plans and making delineations often came from the FWS officials. It is not likely anyone will feel negative ramifications from this provision, except the Department of Interior, which will probably help the NRCS perform these functions anyway—only now without financial appropriation from Congress.

Conclusion

The NRCS carries a heavy responsibility in protecting wetlands located on agricultural lands, and the decline in wetland conversions indicates that the agency does this effectively. Although there are inconsistencies and confusing divisions of authority in protecting wetlands between the Clean Water Act and Swampbuster program, the goal of "no net loss" established by President Bush is finally starting to level off. This is the result of coordinated efforts between the NRCS and agencies implementing the Clean Water Act.

The definition of "wetland" is cumbersome and complicated, but is accurate at the very least. Despite efforts to cloud a report produced by the National Academy of Science, the most scientific and accurate definition of wetland has survived the 1996 reauthorization of the Farm Bill and Swampbuster program.

Society is becoming more aware of the functions and values of wetlands. This has been shown in the progress made by the Congress in reauthorizing the Food Security Act.

However, the Food Security Act and federal farm programs are now set to expire in seven years— this time without renewal. The valuable Swampbuster program and other conservation compliance initiatives will lose their grip as producers no longer have the incentive to comply. Will landowners and agricultural producers maintain wetlands conservation on their own, without the threat of program ineligibility to keep them in line? If not, will the public then understand the value of farm programs and realize subsidy payments come with a bonus: conservation and environmental protection? This remains to be seen. With the added common sense flexibility for wetlands conservation provided by the Congress in the Federal Agriculture Improvement and Reform Act of 1996, it would be a shame to implement these provisions for the next seven years and then pull the rug out from under the public as farm programs— and Swampbuster—cease to exist

[1] 16 U.S.C. § 3821(a)(1994).
[2] 16 U.S.C. § 3822(h)(1).
[3] 16 U.S.C. § 3822(h)(2).
[4] 16 U.S.C. § 3822(h)(1).
[5] 16 U.S.C. § 3822(h)(2).
[6] Federal Agriculture Improvement and Reform Act of 1996 [hereinafter FAIRA], Pub. L. No. 104-127, § 321(a)(2), 110 Stat. 888, 986 (to be codified at 16 U.S.C. § 3821).
[7] FAIRA, Pub. L. No. 104-127, § 322(f), 110 Stat. 888, 991 (to be codified at 16 U.S.C. § 3822(f)).
[8] *Id.*
[9] FAIRA, Pub. L. No. 104-127, § 321(a)(2), 110 Stat. 888, 986-987 (to be codified at 16 U.S.C. § 3821).
[10] FAIRA, Pub. L. No. 104-127, § 322(b), 110 Stat. 888, 988-989 (to be codified at 16 U.S.C. § 322(b)).
[11] Natural Resources Conservation Service, USDA, National Food Security Act Manual at 514-23. Abandonment is the cessation of cropping, forage production, or management on PC or FW for 5 consecutive years such that the three wetland criteria are met. After this time, NRCS would label the land a "W" for wetland.

The purpose behind the controversial abandonment policy is interesting: Remember that PCs are exempt from Swampbuster and PCs are those wetlands manipulated to the extent that agricultural production was made possible before December 23, 1985. Because the degree of alteration is the key to the decision determining whether land is a "wetland" or "PC," something was needed to categorize the severity of the alteration. Abandonment was one such categorization. In other words, the Agency couldn't realistically label a parcel of land as a PC which was manipulated in 1920 and now meets the

wetland criteria; conceivably all land has been manipulated at some time, and would prevent anything from being labeled as a wetland. In making the decision relative to the return of wetland characteristics after 5 years, landowners had time within which to catch-up with their management of the land so as not to have a wet area become unjustly reclassified as a wetland. This prevented the agency from having to protect one area as a wetland while they ignored another one (that may have been "manipulated" in 1920) that looks the same and is as good or better in terms of ecological value. In this context, abandonment was simply the other side of the equation where the landowner fails to maintain the drainage system and at some point in time (5 years) the wetland once again was declared to be a wetland. This is still the case under the 1996 amendments; however, the landowner is allowed to keep the PC label with adequate documentation of when manipulations were made. (Warren Lee & Bob Misso, NRCS USDA, Washington, D.C. (Oct. 1995)). (On file with author.) (Lee is the Director, Wetlands and Watershed Division, USDA, and Misso is the Program Manager of the Wetlands Reserve Program, USDA.)

[12] Telephone interview with Warren Lee, Director Watershed and Wetland Division, NRCS USDA (Mar. 29, 1996).

[13] FAIRA, Pub. L. No. 104-127, § 322(b), 110 Stat, 888, 989 (to be codified at 16 U.S.C. § 3822(b)).

[14] *Id.*

[15] *Id.*

[16] This statement is personal knowledge and opinion. The author worked as a law clerk at the USDA for the National Wetlands Team of NRCS, the Farm Bill Team of NRCS, and the Natural Resources Division at the Office of the General Counsel. The author witnessed the inception of the provision following infra, through its drafting, redrafting, lobbying, explaining, and "selling" to members of the Administration, Congress, field personnel, program participants, and environmental, wildlife, and conservation organizations all having a stake in the reauthorization of the Swampbuster provisions of the Farm Bill.

[17] FAIRA, Pub. L. No. 104-127, § 322(d), 110 Stat. 888, 990-991 (to be codified at 16 U.S.C. §3822(f)).

[18] *Id.*

[19] 16 U.S.C. § 3822(f)(2)(1994).

[20] *Id.*

[21] 16 U.S.C. § 1222(i); and FAIRA, Pub. L. No. 104-127, § 322(g), 110 Stat. 888, 991 (to be codified at 16 U.S.C. 3822(i)). (Emphasis added.) (The text in italics was added by the Conference Report.)

[22] FAIRA, Pub. L. No. 104-127, § 322(c), 110 Stat. 888, 990 (to be codified at 16 U.S.C. § 3822(d).

[23] FAIRA, Pub. L. No. 104-127, § 322(d), 110 Stat. 888, 990 (to be codified at 16 U.S.C. § 3822(f)).

[24] *Id.*

[25] *See generally*, The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, 7 U.S.C. § 1501 (1994). Pub. L. No. 103-354, 108 Stat. 3178.

[26] FAIRA, Pub. L. No. 104-127, § 322(i), 110 Stat. 888, 992 (to be codified at 16 U.S.C. § 3822(k)).

[27] *See* Federal Guidance for the Establishment Use and Operation of Mitigation Banks, 43 Fed. Reg. 12,286 (1995); Virginia C. Veltman, *Banking on the Future of Wetlands Using Federal Law*, 89 Nw. U. L. Rev. 654 (Winter 1995); Richard M. Hopen, *Wetlands Mitigation Banking: Giving Entrepreneurs a Chance to Build Better Wetlands*, J. Envtl. L. & Prac. at 32; Lew Lautin, *Wetlands Mitigation Banking: Understanding—and Joining—an Emerging Industry*, Land Dev. at 10 (Winter 1995).

[28] FAIRA, Pub. L. No. 104-127, § 322(h), 110 Stat. 888, 991 (to be codified at 16 U.S.C. 3822(j)).

MECHANICS LIEN /*continued from page 3*

enters into a special contract with the tenant. If a tenant is skilled at plumbing and the landowner asks him to purchase and install plumbing fixtures in the farm home, it would seem that the principles in *Leveyfilm* should apply. Though the farm family may live more comfortably after such installation, it is the landlord who benefits most through improvement to the property—and the plumbing system in the home has little to do with lease arrangements providing for a division of costs and income and spelling out the duties of both landlord and tenant.

While foreclosing a Mechanics Lien by a tenant who is in possession of the property may seem to conflict with the landlord-tenant relationship, this would not be true if the repair or construction contract does not affect the contractual relations of the parties under the lease. There are many part-time farmers on rented land who are skilled and who work in the construction trades. If their landlord asks them to employ their skills and purchase the materials needed to make an improvement on the rented property and agrees to pay them, it can be argued that they should have the remedies available for payment that they would have had if they did the same work on a neighboring property.

Whether or not it would be helpful for the legislature to amend the Mechanics Lien Act, spelling out guidelines under which a tenant would be entitled to enforce rights under the Act for payment, is a question which the legislature might, in its wisdom, wish to consider.

—Harold W. Hannah, Professor Emeritus, Agricultural & Veterinary Medical Law, Univ. of Illinois; Adjunct Professor of Law Emeritus, SIU.

Cargo preference rules for Great Lakes ports

The U.S. Department of Transportation's Maritime Administration (MARAD) has adopted a final rule amending the federal cargo preference regulations governing U.S. government food aid vessel shipments loaded at U.S. Great Lakes ports. 61 Fed. Reg. 24,895 (May 17, 1996)(to be codified at 46 C.F.R. section 381.9). Under the new rule, MARAD will consider U.S.-flag cargo preference requirements met "where the cargo is initially loaded at a Great Lakes port on one or more U.S.-flag or foreign-flag vessels, transferred to a U.S.-flag commercial vessel at a Canadian transshipment point outside the St. Lawrence Seaway, and carried on that U.S.-flag vessel to a foreign destination." The new rule is effective for a five-year period beginning with the 1996 Great Lakes shipping season.

U.S. cargo preference laws generally requires that at least seventy-five percent of U.S. government food aid cargoes transported by sea be carried on privately-owned U.S.-flag commercial vessels. The law is applicable to food aid programs administered by both the U.S. Department of Agriculture and the U.S. Agency for International Development. In addition to being widely criticized as adversely affecting U.S. food aid programs, the cargo preference laws have effectively precluded food aid cargoes from originating at Great Lakes ports. As MARAD noted in its Federal Register notice, **"dramatic changes in shipping conditions have occurred ... including the disappearance of any all-U.S.-flag commercial ocean-going bulk cargo service to foreign countries from U.S. Great Lakes ports....** No bulk grain preference cargo has moved on U.S.-flag vessels out of the Great Lakes since 1989, with the exception of one trial shipment in 1993 [emphasis added]."

While the new MARAD rule permitting the transshipment of food aid cargoes on a foreign-flag vessel from a Great Lakes port to a Canadian port may offer some potential relief for Great Lakes-originated cargoes, it still leaves Great Lakes ports at a substgantial disadvantage. Under the new MARAD rule, such food aid cargoes would have to be off-loaded at the Canadian port and then reloaded on a U.S.-flag vessel for shipment to the ultimate destination.

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

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Spirit of Washington Dinner Train

AALA Board Member John E. Baldrige shares this invitation with the membership of the AALA who might be interested in "experienc[ing] the nostalgia of passenger rail as you ride and dine in luxurious vintage rail cars. The Spirit of Washington Dinner Train takes you on a three-and-one-half hour excursion... You'll dine in comfort and elegance as your journey takes you to Woodinville's beautiful Columbia Winery. There you'll sample fine Northwest wines and enjoy a tour of the winery before returning to the depot."

Dear Friends,

We who wish to go on the dinner train on October 5 should make our individual reservations by sending your request to Spirit of Washington Dinner Train, P.O. Box 835, Renton, Washington 98057. 206/227-RAIL.

Seating in the dome car costs $69 per person, which includes the meal. Seating in the parlor car is $57 per person, meal included. Payment must be made when you make your reservation.

Dinner entrees are prime rib, Dungeness crab crepes, breast of chicken, cherry smoke roasted salmon. You should specify your dinner choice at the time you make your reservations.

Reservations may be cancelled seven days before the trip with a full refund.

We hope to see you on the train.

Sincerely,

John E. Baldrige
Phone 319/653-5434
Fax 319/653-5435