Agricultural Law Update

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INSIDE

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:
Farmland protection tools

EPA offers General Guidance[1] to CAFO operators following Waterkeeper v. EPA[2]

EPA guidance for large CAFO's considering the need for a NPDES permit

In order to guide CAFOs in making a decision on whether or not to seek permit coverage, EPA suggests that Large CAFOs falling into one or more of these categories should consider seeking permit coverage (this list is not intended to be exhaustive):

1) where a CAFO is located in close proximity to waters of the United States with land classified in USDA Land Use Capability Classes III through VIII;

2) where the CAFO's production area is not designed and operated for zero discharge, including where the containment structure is not designed or maintained to contain all manure, litter, process wastewater, precipitation and runoff that may accumulate during periods when the facility is unable to land apply in accordance with a nutrient management plan;

3) where a CAFO that land applies does not have or is not implementing nutrient management planning that is designed to ensure that any land application runoff qualifies for the agricultural stormwater exemption; and

4) where the CAFO has had a discharge in the past and has not corrected the factors that caused the discharge to occur.

EPA seeks comment on the completeness and accuracy of the above list of situations where a discharge may occur to further assist CAFOs in their decisions regarding whether or not to seek permit coverage.

EPA also solicits comment on its proposal to replace the duty to apply provision promulgated in the 2003 CAFO rule with the narrower duty to apply provision described above.

Due dates for developing and implementing nutrient management plans

The 2003 CAFO rule required all CAFOs to develop and implement a NMP by December 31, 2006, except that CAFOs seeking to obtain coverage under a permit subsequent to that date were required to have an NMP developed and implemented upon the date of permit coverage. This timing was consistent with the dates for the implementation of the ELG, which required existing Large CAFOs to implement the

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Federal Register summary from August 26, 2006 to September 22, 2006

BRUCELLOSIS. The APHIS has issued interim regulations amending the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Wyoming from Class A to Class Free. **71 Fed. Reg. 54402 (Sept. 15, 2006)**.

COTTON. The CCC has adopted as final regulations amending the regulations governing the cotton Marketing Assistance Loan Program. The changes provide (1) that bales of upland cotton pledged as collateral for CCC loans may be stored outside at warehouses approved by CCC subject to special storage, protection, receipting, and reporting requirements and loss of any applicable storage credits for the period stored outside; (2) that producers or their agents may transfer cotton loan collateral to another approved location; (3) limits on the amount of storage credits provided to producers when an upland cotton marketing assistance loan is repaid; (4) that ginned cotton is required to meet the definition of good condition and not be wet cotton in order to be eligible for a CCC loan; (5) any unpaid warehouse compression charges are required to be billed to producers on loan cotton collateral that is delivered to CCC in satisfaction of the loan obligation; and (6) a definition for minimum acceptable shipping standard for cotton warehouses. This rule also corrects and clarifies the Marketing

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land application requirements at 40 CFR 412.4(c) by December 31, 2006. (Following the court decision these dates were extended to July 31, 2007, to give EPA time to complete the current rulemaking (see Section II.E).)

As discussed in the preamble to the 2003 CAFO rule, EPA believed that these dates were reasonable given that operations would have had three and a half years from the time the 2003 rule was issued to conduct the necessary planning and construction to implement an NMP.

For Large CAFOs that are new sources (i.e., those commencing construction after the effective date of the 2003 CAFO rule), the land application requirements at 40 CFR 412.4(c) apply immediately.

EPA developed NMP template

EPA is considering the use of a template which could be used as a voluntary tool to facilitate completion of the NMP by CAFO applicants, as well as to facilitate review by the permitting authority. Such a template would help to systematically organize the information necessary to satisfy the NMP requirements in the regulation. The template could, for example, be used as a form, that when completed by the operator, and approved by the permitting authority, could suffice as the NMP itself. Alternatively, it could also be used as a checklist that the operator and/or permitting authority could use to organize the information in the NMP and to assist in assessing its adequacy. It would be up to the permitting authority's discretion as to how to incorporate the terms of the NMP into the permit, and permitting authorities might need to tailor any template to their permit process and technical requirements, including the technical standards established by the Director.

EPA has developed a draft template for public review that is intended to be user friendly. It follows the requirements for an NMP identified in 40 CFR 122.42(e) relating to: manure storage; management of animal mortalities; diversion of clean water; prevention of direct contact of animals with waters of the US; chemical handling; site-specific conservation practices; protocols for testing manure, litter, process wastewater and soil; protocols for land application; and recordkeeping. This draft template is in the public record for this rulemaking at http://www.regulations.gov under docket EPA-HQ-OW-2005-0037 and is also available on the EPA Web site at http://www.epa.gov.

What type of change will be viewed as a substantial change to a NMP and would trigger formal public notice and comment?

EPA offered the following discussion of specific examples of substantial changes:

1) changes to the method of land application from injection to surface application,

2) changes in timing from spring to late fall or winter application, and

3) installation of new drainage systems that would increase runoff from land application fields.

The proposed new paragraph 40 CFR 122.42(e)(5)(iv) identifies what would constitute substantial changes to the facility's NMP that would trigger this process for permit revisions.

–John C. Becker,
The Pennsylvania State University,
University Park, PA

[1] 71 Fed. Reg. 37743-37787 (June 30, 20060.
[2] 399 F.3d 486, 2005 U.S. App. LEXIS 3395.

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Assistance Loan (MAL) and Loan Deficiency Payment (LDP) Program regulations of CCC regarding loss of beneficial interest in commodities delivered to certain facilities engaged in storing and handling commodities under those programs. **71 Fed. Reg. 51422 (Aug. 30, 2006)**.

CROP INSURANCE. The FCIC has issued proposed regulations amending the Common Crop Insurance Regulations, Nursery Crop Insurance Provisions by amending the definition of "liners" to remove language that specifies an established root system for a liner plant must reach the sides of the container and to remove language regarding the firm root ball. The proposed regulations also amend the Nursery Peak Inventory Endorsement to clarify that the peak amount of insurance is limited to 200 percent of the amount of insurance established under the Nursery Crop Insurance Provisions. The proposed changes will be effective for the 2008 and succeeding crop years. **71 Fed. Reg. 52013 (Sept. 1, 2006)**.

GRAIN STANDARDS. The GIPSA has adopted as final regulations revising the United States Standards for Soybeans to change the minimum test weight per bushel (TW) from a grade determining factor to an informational factor. As an informational factor, TW will be reported on official certificates unless requested otherwise. If the applicant requests that TW not be determined, soybean TW will not be determined and not reported on the official certificate. The regulations also change the reporting requirements for TW in soybeans from the nearest half pound, with a fraction of a half pound disregarded, to reporting TW to the nearest tenth of a pound. **71 Fed. Reg. 52403 (Sept. 6, 2006)**.

ORGANIC FOOD. The AMS has adopted as final regulations amending the USDA National List of Allowed and Prohibited Substances regulations to reflect recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board from November 15, 2000, through March 3, 2005 for the addition of 13 substances. **71 Fed. Reg. 53299 (Sept. 11, 2006)**.

TUBERCULOSIS. The APHIS has adopted as final regulations amending the bovine tuberculosis regulations by removing Minnesota from the list of accredited-free states and adding the state to the list of modified accredited advanced states. **71 Fed. Reg. 51428 (Aug. 30, 2006)**.

–Robert P. Achenbach, Jr., AALA
Executive Director

U. of Arkansas School of Law names National Ag Law Center Directors

In September of 2006, the University of Arkansas School of Law announced that Professors Doug O'Brien and Harrison M. Pittman will serve as co-Directors of the National Agricultural Law Center for the 2006-2007 academic year. "We are proud to have Doug O'Brien and Harrison Pittman step up to become directors of such a prestigious national center during an exciting time for the Law School," said Dean Cyndi Nance, upon announcing the appointment.

O'Brien and Pittman have been around agriculture their entire lives and have unique agricultural law backgrounds. O'Brien grew up on an Iowa farm, while Pittman grew up in an agricultural community in eastern Arkansas. Both earned their masters degrees in agricultural law at the University of Arkansas School of Law Graduate Program in agricultural law.

O'Brien has worked as a specialist in the USDA's Grain Inspection, Packers and Stockyards Administration's National Hog Office and was counsel for the Senate Agriculture Committee in Washington, D.C., where he worked extensively on the 2002 Farm Bill. O'Brien began his work for the Center in 2004 through a special arrangement with the Agricultural Law Center at Drake University in Des Moines, Iowa. He has served as a Research Assistant Professor of Law and Staff Attorney at the Center while teaching at both Drake University School of Law and the Graduate Program in Agricultural Law at the University of Arkansas School of Law.

Pittman has served as a Research Assistant Professor of Law and Staff Attorney at the Center since 2002. He has a broad spectrum of research areas, ranging from the Perishable Agricultural Commodities Act to the National Organic Program. Among his other research areas are the constitutionality of corporate farming laws, pesticide regulation and litigation, and market concentration and horizontal consolidation in the livestock industry. He founded the agricultural law section of the Arkansas Bar Association, and he currently serves on the agriculture committee of the American Bar Association's section on Administrative Law & Regulatory Practice.

O'Brien and Pittman replace former Center Director, Michael T. Roberts, who recently accepted a position with the Venable Law Firm in Washington D.C. where he will counsel the firm on food law and policy. Roberts will also continue teaching at the Law School as an adjunct professor in food law. O'Brien and Pittman plan to carry on the Center's mission to conduct legal research and provide objective, authoritative and scholarly information to scholars, attorneys, policymakers and others in the agricultural community throughout the United States.

This article is excerpted from the September 12, 2006, press release issued by the University of Arkansas.

Nat. Ag. Law Center and Grad. Program in Ag. Law welcomes new students

Since 1980, the University of Arkansas School of Law has offered the Graduate Program in Agricultural Law, the first and only comprehensive agricultural law program of its kind in the United States. Each year, the Program admits a small number of attorneys from around the U.S. and the world to train them as agriculture and food law specialists. In addition to their enrollment in the Program, the attorneys often serve as Graduate Assistants to the National Agricultural Law Center, www.nationalaglawcenter.org, which has been a part of the University of Arkansas School of Law since 1987. This year, each of the attorneys enrolled in the Program also serves as a Graduate Assistant at Center. The Center and the Program are pleased to welcome and introduce these attorneys to the American Agricultural Law Association.

Raised on a dairy farm in northwest Wisconsin, Jeffrey A. Peterson graduated *cum laude* from Hamline University, St. Paul, Minnesota with degrees in economics and management. Craig received his J.D. degree from the University of Kansas School of Law. He worked as an agricultural commodity analyst and later branch manager for the commodity brokerage arm of Cenex Harvest States Cooperatives. He is the author of an article on government subsidies and the transition of the domestic farm economy, *The 1996 Farm Bill: What to (Re) Do in 2002*, 11 Kan. J.L. & Pub. Pol'y 65-87 (2001). Jeff has been in private practice in the Kansas City metropolitan area since graduation. His current research efforts focus on agricultural bankruptcy issues, secured transactions, and urbanization and agriculture.

Raised in Newport News, Virginia, Craig Raysor graduated from Randolph-Macon College in Ashland, Virginia with a B.S. in political science and a minor in biology. He graduated with his J.D. *cum laude* from Roger Williams University. During his law school career, Craig interned for Philip Morris U.S.A. with its in-house counsel in Richmond, Virginia and worked with the human resources legal department in the New England market for Target Corporation. Craig currently works with National Association of Environmental Law Schools researching legal connections between agriculture and the goal of climate neutrality. His areas of interest include administrative law and renewable fuels.

Marne Coit graduated with a B.A. in anthropology and human and natural ecology from Emory University in Atlanta, Georgia where she was introduced to the ideas of therapeutic and community gardens. She apprenticed at two small organic farms in the Northeast and then went on to study environmental law at Vermont Law School where she received her J.D. and her Master's of Studies in Environmental Law (*cum laude*). Marne contributed to the SARE-funded publication "A Legal Guide to the Business of Farming in Vermont." Currently, Marne's research efforts focus on the National Organic Program, estate planning and taxation, and farm credit issues.

Emilie Leibovitch was born and raised in Paris, France, where she enrolled in the European Section of her high school, a program devoted to the intensive study of foreign languages. She then moved to the United States and graduated *cum laude* and Phi Beta Kappa from the University of Miami with a B.A. in criminology and minors in political science and business law. She received her J.D. at the University of Arkansas at Little Rock. Her legal experience includes clerking for immigration law firms in both Miami, Florida and Little Rock, Arkansas. Emilie has an interest in several agricultural law areas, including food safety, international agricultural law, and international agricultural trade.

Eric Pendergrass graduated *magna cum laude* with a B.S.A. degree in agricultural business and a minor in business economics from the University of Arkansas Dale Bumpers College of Agriculture Food & Life Sciences. He graduated *cum laude* from the University of Arkansas School of Law where he received the Bard Rogan Natural Resource Law Award for outstanding study in the areas of oil and gas law and the related fields. Eric co-authored *How Cooperation May Lead to Consensus Assessing the Realities and Perceptions of Precision Farming in Your State*, J. Am. Assn. Farm Managers & Rural Appraisers 26-31 (2002). He has a strong interest in livestock issues, including animal identification, the Packers and Stockyards Act, and animal feeding operations.

Amy Miller graduated *with distinction* from Purdue University with a B.S. in management. Although Amy grew up on a grain farm in Illinois, it was not until her senior year in college that she began to consider a career in agriculture. She continued her studies at Indiana School of Law – Indianapolis where she graduated *cum laude*. She is the author of *Blue Rush: Is Privatization a Viable Solution for Developing Countries in the*

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Conservation easements: smart growth or sprawl promotion?

By Jesse J. Richardson, Jr.

A conservation easement is a legal agreement between a landowner and a government agency or nonprofit organization that limits development of the land. The conservation easement may be permanent or for a term of years. Even if an owner sells the land or passes it to his or her heirs, the conservation easement remains in effect for so long as the deed of easement states. By donating a perpetual conservation easement, a landowner may qualify for a variety of tax benefits. These possible benefits include reduced local real property taxes and federal and state estate taxes. Perhaps most importantly, a gift of a conservation easement may qualify as a charitable deduction, allowing a federal[1] and state income tax deduction. A few states provide additional state tax benefits.

As of 2003, 1,500 local and regional land trusts in the United States had placed 9,361,600 acres of land under perpetual conservation easements.[2] This acreage was double the number of acres under easement in 1998, and the number of land trusts increased by 26% during that time period.[3] National land trusts held easements on an additional 25,000,000 acres, for a total of almost 35,000,000 acres under easement in 2003.[4]

A wealth of literature extols the virtues of perpetual conservation easements, without any critical examination of the tool.[5] Most notably, little or no literature exists that explores the perpetual conservation easement from a land use planning perspective. A handful of articles critically explore the issue of perpetuity.[6] This article attempts to briefly summarize some of the land use planning issues arising from perpetual conservation easements.

Conservation easements and growth

Conservation easements may play an important role in land use planning. However, prior to assessing the tool's role in managing growth, one must first understand the impact of conservation easements. A fallacy about the impact of conservation easements appears to exist. Conservation easements, perpetual or not, fail to impact the rate or amount of growth in a region. The tool does not alter birth rates, death rates, immigration rates, jobs, or other factors determining the rate and amount of development. Conservation easements merely hold the ability to move development around on a small scale (within a region).

Regardless of the number of easements, the population and developed acreage in a region will remain approximately the same. Given this relationship, the present state of affairs in proves puzzling. Land trusts and environmental groups frantically place easements on any and all land offered for protection, regardless of whether that land is a good candidate for protection or not. The affected parties appear to believe that a large number of acres must be protected as quickly as possible. In truth, caution is advisable given the perpetual nature of the easements. A more deliberative process to choose the most appropriate land for development would be preferable.

Some localities with a large percentage of land under easement, or a large number of acres under easement, may successfully push development out to other jurisdictions through the use of conservation easements. These effects promote sprawl and other detrimental effects. In addition, concentration of easements in particular areas may negatively impact affordable housing.

In actuality, since perpetual conservations irreversibly affect development patterns, leaving a mark for potentially centuries, to come, the tool should be judiciously implemented. The United States Congress used such terms as "rare" and "unique" in describing conservation easements eligible for the federal income tax deduction when the legislation was first proposed.[7] Advocates appear to have forgotten those origins and now urge that "more is better".

Gross conservation benefit or net conservation benefit?

Another misconception of perpetual conservation easements underlies the "more is better" belief. Land trust officials, citizens, and even planners operate on the assumption that each and every conservation easement provides a conservation benefit to society by preventing development on that particular parcel.

This assumption appears to originate with the poorly conceived and drafted I.R.C. provisions surrounding the granting an income tax deduction for donation of an easement. The easement must "yield a significant public benefit".[8] The Code and Regulations appear to consider prevention of development (or the creation of "open space" as a "significant public benefit".

Popular perception and the Internal Revenue Code and associated regulations fundamentally err in calculating "conservation benefit" or "public benefit" of a conservation easement. Calculations of benefit appear to only look at a particular parcel and determine that preventing development on that parcel is a conservation benefit. This procedure calculates the "gross conservation benefit". To correctly assess the impact of a particular conservation easement, one must also calculate the costs of the conservation and subtract these costs from the benefits (a benefit-cost analysis), yielding the net conservation benefit.

For this extremely simplified discussion, I assume that the parcel proposed for the conservation easement ("Parcel CE") will be developed in the relatively near future without the conservation easement. In actuality, many parcels burdened by conservation easements will not be developed in the near future, or perhaps at all. These conservation easements obviously yield little or no conservation benefit. The taxpayers merely pay a landowner to restrain from doing what the taxpayer did not plan to do anyway.

If the parcel may be developed in the near future, the conservation easement prevents the development on that parcel. However, this development, instead of magically "disappearing", occurs on another, relatively nearby, parcel (Parcel NB). Therefore, the net conservation benefits of a conservation easement on Parcel CE consists of the conservation costs of developing Parcel NB subtracted from the conservation benefit of preventing development on Parcel CE.[9]

In a perfect world, the prevention of development on Parcel CE and the diversion of that development to Parcel NB would further land use planning goals and yield large, positive net conservation benefits. Sadly, no one knows whether particular easements even yield positive net conservation benefits. The process presently involves ad hoc donations of easements that the donee agencies and organizations fail to analyze at all for net conservation benefit or land use planning sensibility.

Another misconception about perpetual conservation easements consists of the thought that these easements are "free". To the contrary, state and federal tax payers pay a substantial price in the form of tax benefits to donors of perpetual conservation easements.[10]

Further, state and federal law base these tax benefits on the fair market value of the development rights foregone. The development value may or may not approximate conservation value. Taxpayers truly buy a pig in a poke whenever a conservation easement is accepted for donation or purchased under a purchase of development rights program.

Jesse J. Richardson, Jr. is Associate Professor of Urban Affairs and Planning, Virginia Tech, Blacksburg, Virginia.

Finally, note that land trusts and state agencies should accept a low percentage of conservation easements offered for donation ("rare", "unique"). Statistics on rates of acceptance are not available, but anecdotal evidence indicates that easements are rarely refused.

Conservation easements and land use planning

Conservation easements should be closely tied to the comprehensive plan and the planning process. Some states make this connection explicit. Virginia law provides that each conservation easement must conform to the local comprehensive plan. State agencies follow this rule diligently. Compliance by land trusts is unknown, but suspected to be uneven. Further complicating matters, however, many local comprehensive plans fail to meet even modest expectations of quality.

However, even if easements are consistent with well-drafted local comprehensive plans, the perpetual nature of the easements proves problematic. Planning is a dynamic process. Planning tools are, therefore, generally adaptable so that planners may meet future changes in conditions. Comprehensive plans typically look twenty years into the future. Zoning can be, and should be, changed if conditions dictate a change. Urban growth boundaries are moved as time passes. Conservation easements, on the other hand, purport to last into perpetuity.

Many state conservation easement acts allow a conservation easement that no longer serves its conservation purpose to be "traded" for an easement of equal value (market and conservation) on another parcel. However, these provisions are rarely, if ever, utilized. Land trusts and state agencies resist removing an easement from property, giving almost total deference to the wishes of the (often now deceased) donor, to the detriment of societal good.

This regime goes against the basic principles of planning. Most planners agree that "adaptive planning" best fits in our dynamic, changing world. Adaptive planning involves an iterative process of gathering and analyzing information, adopting and implementing strategies, assessing results, and repeating the process. By definition, change makes up an important part of adaptive planning. Perpetual conservation easements prevent adaptive planning.

Conclusions

State and federal taxpayers currently pay substantial amounts of money, in the form of tax benefits, to pay landowners for perpetual conservation easements. Incredibly, these easements are placed on property without any cost/benefit analysis, state oversight or assessment of whether the conservation benefit exceeds the taxpayer cost. More fundamentally, no one knows whether these easements make long range planning sense, in isolation or in conjunction with the hundreds of other easements in the state.

Few states have an agency with land use planning functions and the funding and staffing to carry out such functions. Land trusts tend to lack any land use planning capacity and seek to maximize the number of perpetual conservation easements held. Local governments, on the other hand, tend to be parochial and favor conservation easements as a means to exclude people from the locality.

Conservation easements (term and perpetual) hold the potential to play a vital role in land use planning and smart growth within the state. However, to reach this potential, the ad hoc free-for-all that now exists must be changed to a rational planning approach. The following recommendations are submitted in the hopes of providing a starting point for a much needed policy discussion on conservation easements. If implemented, these recommendations will reduce the cost of conservation easements to the taxpayers and result in widespread smart growth, with the consequent benefits, within the state.

So, do conservation easements promote smart growth or sprawl? This writer must reply with the attorney's favorite answer: it depends.

Recommendations

(1) Revise the federal income tax provisions to require consistency between the easement and state planning goals in order to receive federal tax benefits. If particular states lack state-wide planning for conservation easements, donors in that state fail to qualify for federal tax breaks.

(2) To avoid the parochialism of local governments, each state should develop a state-wide conservation easement plan. Regional planning bodies could serve as coordinators in developing and implementing this plan. Ensure that the plan not serve the parochial interests of each individual locality, but the overall interests of the citizens of the Commonwealth.

(3) Each statewide conservation easement plan should include procedures for calculating and using net conservation benefit in implementation of the plan. Eschew the simplistic and clearly incorrect use of gross conservation benefit.

(4) Each state should prepare annual economic budgets for perpetual and term conservation easements. These budgets should include cost/benefit analyses that include economic and conservation considerations, while recognizing the inevitability of population growth and development in the state.

(5) The IRS should track and compile tax costs of conservation easements at the federal level.

(6) Statewide plans should include a recognition of, and consideration of, the impact of land conservation on affordable housing.

(7) Each state should provide oversight and control over perpetual conservation easements through a state agency. This state agency would approve or disapprove all proposed perpetual conservation easements pursuant to state conservation easement plan.

(8) The federal government and the states should encourage judicious use of perpetual conservation easements only in those rare and unique cases that warrant the use of such a dramatic tool. Disallow widespread, ad hoc implementation of perpetual conservation easements through limitations on tax and other benefits.

(9) Federal and state rules should encourage purchase or other acquisition of open space lands that allow public access. Few easement lands provide such access.

(10) Federal and state policy should encourage widespread use of term conservation easements through tax benefits and grants to local governments allocated pursuant to the state conservation easement plan. Allow implementation of term conservation easements by local governments pursuant to local comprehensive plans. Place limits on the terms of the easements and provide oversight to avoid excessive use for exclusionary purposes.

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[1] I.R.C. Section 170(f)(3)(B)(iii).

[2] Land Trust Alliance, 2003 National Land Trust Census, http://www.nationalaglawcenter.org/

[3] *Id.*

[4] The 2005 Census is set to be released later this year. *Id.*

[5] *See, e.g.,* Lawrence R. Kueter and Christopher S. Jensen, *Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources,* 83 Denv. U. L. Rev. 1057 (2006); Carol Necole Brown, *Time to Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easement*s, 40 Ga. L. Rev. 85 (Fall 2005); Gwenann Seznec, Note, *Effective Policies for Land Preservation: Zoning and Conservation Easements in Anne Arundel County, Maryland*, 23 Va. Envtl. L. J. 479 (2005); C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 Wyo. L. Rev. 1 (2005).

[6] Julia D. Mahoney , *The Illusion of Perpetuity and the Preservation of Privately Held Lands*, 44 Nat. Res. J. 573 (Spring 2004); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739 (June 2002).

[7] Senate Report 96-1007, 9-10, 1980-2 C.B. at 603).

[8] I.R.C. Section 170(h)(4)(A); se also Income Tax Regs. Section 1.170A-14(d)(1).

[9] This simplified model does not discount for the effects of time or calculate many other subtle effects. The author is presently developing a much more complex quantitative model to calculate the net conservation benefit of a perpetual easement. Such a model, however, lies beyond the scope of this brief article.

[10] No figures exist at the federal level to estimate the cost of the income tax deductions.

Written jury questionnaires: learn what your neighbors might not be telling you about CAFOs without poisoning the jury pool during voir dire

During voir dire, juror responses regarding potential bias could poison the jury pool based on unfavorable opinions of large-scale animal feeding operations. This issue arose in a recent agricultural law case involving concentrated animal feeding operations ("CAFOs"), also known as concentrated animal feeding facilities ("CAFFs").[1] In order to avoid such a result, counsel for the CAFO owner prepared a written jury questionnaire regarding anti-CAFO bias and the trial judge allowed the questionnaire to be answered by potential jurors while at home.

Eighty-two potential jurors answered the 40 questions on the questionnaire. Two of the questions were:

20. Have you or a relative, or close friend, ever owned, lived on, or worked on a farm? _____ Yes _____ No. If "yes", list the names of those persons and describe the nature of the farming operation. (Include whether livestock were raised.)

* * *

29. Do you hold any opinions or beliefs about large livestock operations sometimes referred to as "CAFO" or "CAFF" or "factory farms"? _____ Yes _____ No. If "yes", please briefly describe.

In the predominantly rural county in which this case was litigated, many potential jurors had a farming background or had a relative or friend who did. In total, 71.9% of potential jurors (59 of 82) responded "Yes" to Question #20. In regards to the portion of the question relating to whether livestock was involved, the 59 jurors with a farming background responded as follows:

23 (28.0%) livestock only farming background;

14 (17.0%) non-livestock only farming background; and

22 (26.8%) combined livestock and non-livestock farming background.

As can be seen, almost three quarters of the potential jurors had some farming background and over half had some specific background in raising livestock. While these numbers may not be surprising in a county with a significant agricultural base, the responses to Question #29, however, were more unexpected.

Twenty-three of 82 (28.0%) potential jurors had no farming background and, of this number, 8 (or 34.7% of non-farmers) had negative opinions of CAFOs. Of those with a farming background, 23 of 59 (40.6%) had negative opinions of CAFOs. Even though some potential jurors noted more than one reason for their negative opinions, the overriding concern with CAFOs was their perceived negative impact on the environment. The negative opinions regarding CAFOs may be grouped into the following general categories: environmental concerns (19); reduction of local jobs/economic concerns (5); animal welfare concerns (5); regulatory concerns/ lack of adequate oversight (4); general concerns (4); and concerns regarding non-local ownership of farms (3).[2] In sum, roughly 40% of potential jurors with a farming background and 35% of potential jurors with no farming background had negative opinions relating to CAFOs.

Although the local CAFO owner was a "good neighbor," complied with or exceeded regulatory parameters including environmental regulations, provided employment in the community, and supported local charities, there nevertheless was a strong bias against CAFOs in general. A good way to understand "what your neighbors might not be telling you about CAFOs" is to review a few of the potential jurors' comments[3] that followed Question #29:

They are an abomination. They are filthy and unethical. However, I am fair and balanced.

Get rid of everyone there is.

They get too large and have too much manure in one small area affecting the ground/neighbors.

Why does EPA allow them to pollute and not prosecute?

They pollute our air and water and drive small farmers out of business.

I'm against them because I believe they take jobs from smaller family farms, pollute water sources, and crowding causes mad cow and/or bird flu disease.

I don't think they are good for our community. Too many chemicals are ruining our water supply and our land.

They make raising livestock on a small scale very unprofitable.

All of the responses to the questionnaire were reviewed with the court during a pretrial conference prior to the start of trial and challenges for cause were expressed. The purpose for doing so at this time was to avoid poisoning the jury during voir dire. In a county in which 71.9% of the potential jurors had a farming background, environmental concerns exceeded all others by roughly 4 to 1 as the basis for negative opinions regarding CAFOs. Unless you ask, you may never know what your neighbors might not be telling you about CAFOs. Moreover, unless you prepare a written jury questionnaire, negative opinions regarding CAFOs expressed during an oral voir dire may poison the jury pool.

–Vincent I. Holzhall, Columbus, OH

[1] This article is based on the work of Theodore M. Munsell and David G. Cox, members of the Agricultural Law Practice Group at Lane, Alton & Horst, LLC, in Columbus, Ohio. Mr. Munsell and Mr. Cox represented the interests of a local, family-owned CAFO against claims of nuisance and personal injury. Substantial assistance in preparing this article was provided by Intern Michael A. Wehrkamp.

[2] Because some jurors listed more than one reason for their negative opinion of CAFOs, the total number equals 40 even though only 31 potential jurors indicated they had a negative opinion.

[3] Spelling and punctuation have been edited without noting those alterations.

Students/Cont. from page 3

Face of an Impending World Water Crisis?, 16 Ind. Int'l & Comp. L. Rev. 217 (2005). Amy's areas of interest include commodity programs, cooperatives and marketing, conservation programs, and sustainable agriculture.

Raised on a rice farm in Bono, Arkansas, Autumn Tolbert received her B.A. degree in political science from the University of Arkansas and her J.D. from the University of Arkansas School of Law. While in law school, she worked as a volunteer for Innocence Project Arkansas and clerked for the Office of the Public Defender for the Fourth Judicial District of Arkansas and for the Public Protection Department of the Arkansas Attorney General's Office. Autumn's research currently emphasizes agri-tourism, agricultural labor, and landowner liability.

Chuck Munson was born and raised in Mountain Home, Arkansas. He received a B.S. in environmental science with an emphasis in biology from the University of Central Arkansas. Chuck worked under Dr. M. Victoria McDonald at the Smithsonian Conservation and Research Center in Front Royal, Virginia on an ongoing research project involving neo-tropical migrant birds during two consecutive breeding seasons. He received his J.D. from the University of Arkansas School of Law where he was president of the Environmental Law Society and a regional representative for the National Association of Environmental Law Societies. His areas of interest include sustainable agriculture, conservation programs, the National Organic Program, animal feeding operations, and commercial transactions.

Yufeng Xie earned her L.L.B. in Economic Law from North China University of Technology in 2002. Her professional experiences includes Legal Advisor to the China Council for the Promotion of International Trade and Legal Advisor to the Beijing Huadu Co., Ltd. Yufeng has a strong interest in several areas, including food safety, international agricultural law, and international agricultural trade. Currently, Yufeng's research efforts focus on the areas of corporate farming laws, federal crop insurance, and biotechnology.

State and federal roundup

ADVERSE POSSESSION—CEMETARY. The plaintiff's predecessor in interest had sold a portion of a farm but reserved a two-acre parcel for use as a cemetery. The parcel was sold to subsequent buyers until the defendants purchased a portion of the original parcel which included the cemetery. None of the deeds in the subsequent sales mentioned the reservation of the cemetery but the deeds did reference earlier deeds. The owners of the main parcel had farmed the land up to about 30 feet of the cemetery and had cut the weeds and brush in the cemetery. No burials had taken place in the cemetery after 1946. The plaintiff sought to quiet title to the cemetery and the defendant claimed title by adverse possession. The plaintiff argued that the defendant did not meet the test of exclusive possession because the cemetery was occupied by the graves. The court rejected this argument as without precedent and upheld the jury verdict for the defendant's acquisition of title to the cemetery by adverse possession. ***Jernigan v. Herring*, 2006 N.C. App. LEXIS 1901 (N.C. Ct. App. 2006)**.

CHAPTER 12 BANKRUPTCY—CREDIT COUNSELING REQUIREMENT. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No 109-8, individuals are required to seek and attend credit counseling within 180 days before filing a bankruptcy petition. The debtor filed for Chapter 12 bankruptcy as a family farmer and initially sought a waiver from the credit counseling requirement because there were no credit counselors for family farmers. The Bankruptcy Court denied the waiver after the debtor presented statements from credit counseling agencies that they provided credit counseling for family farmers. The debtor then argued that the credit counseling requirement did not apply to family farmers because Section 109(h) did not mention family farmers and Section 109(f) did not define a family farmer as an individual. The court noted that Section 109(g) includes family farmers, indicating that Congress intended all of the Section 109 provisions to apply to family farmers filing as individual debtors. The court held that the debtor must comply with the credit counseling requirement before filing for Chapter 12. ***Bogedain v. Eisen*, 2006 U.S. Dist. LEXIS 59926 (E.D. Mich. 2006)**.

EASEMENT. The plaintiffs sold 77 acres of a 117 acre farm to the defendants and retained the unsold portion. The retained portion did not have access to any roads except through the 77 acres sold to the defendants. The sales agreement provided that the plaintiffs would have a 40 foot wide easement through the defendants' property but did not specify the location because the defendants did not know where they were going to locate their residence. During the subsequent year while the defendants were deciding the location of their house, the plaintiffs used one of three roads through the defendants' property to access their property. The defendants eventually decided to locate their house near the road used by the plaintiffs and wanted the easement to be located on another road of lesser quality away from the house. The trial court awarded the easement to the plaintiffs on the road near to the house on the basis of strict necessity. Although the appellate court ruled that the trial court misapplied the doctrine of strict necessity because the easement was created by agreement, the appellate court held that the choice of the road nearest to the house was the correct choice in that the other roads were not suitable for transporting farm machinery. ***Beery v. Shinkle*, 2006 Mo. App. LEXIS 808 (Mo. Ct. App. 2006)**.

FARM PROPERTY LOANS. Farmers had borrowed funds from the FSA which were secured by mortgages on their farm. The farmers defaulted on the loans and filed for bankruptcy. The farmers further defaulted on the loans and failed to pay the property taxes. The local town foreclosed on the farm to collect the unpaid taxes and the farm was purchased by the defendant. The town failed to give notice of the tax foreclosure to the FSA but the FSA eventually learned about the foreclosure sale. The FSA did not attempt to redeem or enforce its mortgage against the farm for almost seven years after learning about the tax foreclosure sale. The court held that the FSA lost its right to enforce its mortgage under Me. Stat. tit. 36, §943, when the FSA failed to redeem the property within three months after learning about the tax foreclosure sale. Thus, the court held that, once the three month period expired, the tax sale purchaser, the defendant, acquired title clear of the FSA mortgages, although the mortgages remained enforceable against the farmer-borrower. ***United States v. Sayer*, 450 F.3d 82 (1st Cir. 2006), *vac'g and rem'g*, 2005 U.S. Dist. LEXIS 2952 (D. Me. 2005)**.

FREEDOM OF INFORMATION ACT REQUESTS. The plaintiff submitted a Freedom of Information Act (FOIA) request to the FSA seeking the release of database records that FSA maintains pertaining to 12 agricultural subsidy and benefit programs. The request also sought the release of a copy of the Geographic Information System ("GIS") database for the contiguous 48 states. The FSA referred this latter request to the USDA's Aerial Photography Field Office, which decided to release the database in part. FSA processed the request for records pertaining to the 12 programs, announcing that it would release five files in full and release seven files in part. The withheld information involved the Livestock Assistance Program (LAP) file, the Livestock Compensation Program (LCP) file, the Compliance file, and the GIS database. The USDA filed a motion for summary judgment, arguing that the withheld information fell within FOIA's Exemption 6, which pertains to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The court held that Exemption 6 applied to the withheld information because the information pertained overwhelmingly to family-owned or closely-held farms and would reveal personal information about the owners. The court also held that valid personal privacy interests existed in the withheld information because the information could reveal personal financial information. As to the LAP and LCP files, the court held that the personal privacy interests were not so great as to outweigh the public benefit of disclosing the information; therefore, the court denied summary judgment for the USDA and ordered the information disclosed to the plaintiff. The court held, however, that the personal privacy interest in the Compliance file and GIS database outweighed the public interests in disclosure; therefore, the Compliance file and GIS database should not be disclosed. ***Multi Ag Media LLC v. USDA*, 2006 U.S. Dist. LEXIS 55170 (D. D.C. 2006)**.

TAX—CHARITABLE DEDUCTIONS. The taxpayers, husband and wife, owned two farms. Based on two sets of appraisals, the taxpayers sold the development rights to the farms to a land preservation foundation for less than the fair market value of the development rights. The taxpayer claimed a noncash charitable gift deduction for the difference in the amount received from the fair market value of the development rights. The taxpayers filed Form 8283, Noncash Charitable Contributions; however, the form was not signed by the donee or the appraisers, did not include an appraisal made for tax purposes, did not specifically identify the property, the date and circumstances of the contribution, and did not identify that the contribution resulted from a bargain sale. The IRS requested the missing information and the taxpayer re-filed the form but only added the missing signature from the donee. The court held that the taxpayer failed substantially to comply with the reporting requirements of Form 8283 and were properly denied the charitable deduction. ***Ney v. Comm'r*, T.C. Summary Op. 2006-154**.

– Robert P. Achenbach, Jr., AALA Executive Director

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Annual Conference: The 2006 Annual Agricultural Law Symposium is on October 13 & 14, 2006 at the Hyatt Regency Hotel in Savannah, GA. I will be leaving for Savannah on October 10 so the AALA office will be closed from October 10 to October 16. Last minute registrations will be accepted but please note the following procedures to help me accommodate you. Up to and including Monday October 9: please fax your registration (541-302-1958) even if payment is coming by mail – a backup e-mail notice might be helpful. Up to October 12, registrations made by PayPal will be accepted and I will have access to e-mail. Walk-in registration will be possible, but I cannot guarantee a spot for lunch or a handbook at the conference.

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