Agricultural Law Update

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- USDA animal research and Environmental Impact Statements

It cannot be helped, it is as it should be, that the law is behind the times.

— Oliver Wendell Holmes

USDA payment limitation termed capricious

As previously noted, (see ALU June 1987, page 7) in the case of *Esch v. Lyng,* CA 87-0885 (D.D.C.), on July 22, 1987 the U.S. District Court for the District of Columbia reversed a decision by the USDA which reduced the Esch family's "person determination" from nine to one, thereby reducing the available payment limitation under the Conservation Reserve Program from $450,000 to $50,000. The court ruled that "the USDA had acted arbitrarily, capriciously, without substantial evidence and in the absence of due process in reaching its decision."

The Esch family, a Colorado partnership originally consisting of four persons, had participated in government support programs since 1981, filing at various times as nine- and four-person partnerships. In 1984, in applying for an FmHA loan, the Esches reorganized their operation as a two-person partnership. This change was suggested by FmHA personnel to facilitate their loan application. Earlier that same year, the plaintiffs filed as a four-person partnership with the ASCS office.

In addition, in 1984, the plaintiffs borrowed money from their father to pay in full the seller of their 20,000-acre farm. All nine children were obligated to their father for the loan. Late in 1984, a nine-person partnership was formed. The operation filed income tax returns for the next two years as a nine-person partnership.

In the summer of 1986, the ASCS office requested for the first time that the Esches complete a farm operation plan, ASCS Form 561-B. They received no guidance or instruction as to how to complete the form. The Esches' responses were central to the government's subsequent challenge — those concerning the partners' claimed percentage interest in the farm and the individual contributions of "capital, land, equipment, labor, and management." In these answers, no partner claimed a contribution to labor, but all claimed an equal 11.1% contribution to the other categories.

(continued on next page)

Right-to-farm law applied favorably

The Indiana Court of Appeals ruled in July that the Indiana right-to-farm law denies any injunctive relief or damages to homeowners in their nuisance suit against a neighboring hog producer. The decision in *Shatto v. McNulty,* 509 N.E.2d 897 (1987) is an important legal victory for livestock producers because the case is the first reported state high court decision in which a right-to-farm law has been applied to protect a farm operation from a nuisance judgment. In the last ten years, nearly all states have enacted some form of right-to-farm law, but for the most part those statutes have been untested in court or have been held inapplicable in specific cases.

The Indiana case involved a hog operation of more than thirty-years' duration. McNulty kept approximately 100 hogs in partial confinement. In 1968, plaintiffs purchased fifteen acres of land across the road from and to the north of McNulty's operation. In 1970, plaintiffs built a house at the edge of their tract, directly across the road from McNulty's barn. The plaintiffs had complained of odors since building their house, suing ultimately for abatement of a nuisance and for damages.

The trial court ruled that the hog operation was not negligently operated, that it was not a nuisance, and that the Indiana right-to-farm law applied to these facts.

The court of appeals refused to overturn the trial court's ruling, noting that the determination of nuisance requires a balancing of competing interests and is a determination for the trier of fact.

In discussing the applicability of the right-to-farm law, the appeals court noted the clear statement of legislative policy: "People may not move to an established agricultural area and then maintain an action for nuisance against farmers because their senses are offended by the ordinary smells and activities which accompany agricultural pursuits." 509 N.E.2d 897, 900 (1987).

The plaintiffs had further argued that the right-to-farm law could not be applied to these facts because the law was not enacted until 1981. The appeals court disagreed, holding that the statute applies retroactively "to any premises with a history of agricultural activities." *Id.*, at 900.

— Neil D. Hamilton

CONTINUED FROM PAGE 1

In 1986, the USDA's Office of the Inspector General conducted an audit of the local ASCS office. The county committee had approved the Esches as nine persons for 1985 and 1986. However, the auditor determined that the Committee had erred and that the Esches should be treated as one person for deficiency payment purposes and as two persons for CRP purposes.

Statements in the audit and subsequent testimony indicate that at an early date the USDA had concluded that the Esches' reorganization was fraudulent, although the plaintiffs were never informed of this position until the court hearing.

The plaintiffs sought administrative review of the determination until imminent foreclosure proceedings by the Federal Land Bank prompted this suit.

The USDA predictably challenged the court's jurisdiction of the case under the Tucker Act, which if applicable would have limited the forum to the Claims Court, with no prospect of immediate relief, since the Claims Court has no injunctive powers. The district court, in rejecting this position, noted that the parties were not seeking to recover any sums past due for prior crop years, but were "seeking redress for arbitrary and capricious agency action and violation of their due process rights." Specifically, the Esches were seeking a declaration of permament eligibility for receipt of price support and CRP benefits as a nine-person entity for current (1987) and future crop years.

The court determined that the agency had failed in two respects. First, the agency failed to give valid consideration to the Esches' statements concerning management responsibility, even though the regulations required that each factor be given equal consideration in determining the number of persons in a partnership for payment limitation purposes. 7 U.S.C. Section 795.7.

The agency had also not considered all of the available information, such as the federal tax filings in 1985 and 1986 as a nine-person partnership.

Second, its was the court's belief that throughout the process, the agency had unjustifiably decided that the Esches were attempting to defraud the agency. Even though the ASCS at later hearings attempted to back away from this motivation for its action, it was clear to the court that this original conclusion was still present and had tainted all of the agency's actions against the Esches. Further, the court noted that even if the agency was now retreating from accusing the Esches of fraud, it was not willling to accord them relief for 1987 and treatment comparable to what other participants received or what due process required.

Moreover, the Court concluded that the fact that the ASCS had legitimate concerns about the diligence of the local committee in enforcement of the person determination did not, within the court's view, mean that those sins could be visited on participants who had relied on local agency interpretations in good faith.

The court's listing of inadequacies in the proceedings was characterized as only a "sampling . . . of the arbitrary and capricious actions of this agency in its interactions with the Esches."

The court permanently enjoined the government from finding the Esches to be anything but nine persons for 1987, and remanded the matter to USDA for a determination of the "person" eligibility of plaintiffs for 1988 and future years in accordance with the court's due process findings.

— Neil D. Hamilton

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Processor damages to growers limited

The defendant in *Johnson v. Pacific Lighting Land Co.*, 817 F.2d 601 (9th Cir. 1987) owned a commercial packing house licensed by Sunkist, a farmers' cooperative, to perform harvesting and packing services for Sunkist grower members. The license agreement between Sunkist and the packing house required the packing house to return its net proceeds to growers, less costs and agreed charges. Growers contracted directly with the packing house. Contracts between the growers and the packing house, in contrast to the Sunkist-packing house license, were simply agreements for harvesting and packing house services at current commercial rates.

Growers brought a class action against the packing house for breach of contract and antitrust law violation.

Plaintiffs said the packing house withheld citrus from the market to maintain a higher price, costing growers when prices fell substantially. Growers alleged the action was a conspiracy violating antitrust laws. The court held growers' losses did not stem from anticompetitive actions and injury was not of the type the Arizona antitrust statute sought to forestall.

Growers sought breach of contract damages of all packing house profits for a five-year period. The court said the contracts between the growers and the packing house controlled, not the license from Sunkist. It distinguished the situation from that of an agent unjustly profiting from the principal-agent relationship, in which the agent is required to pay the principal all secret profits. In this case, the packing house simply performed services under contract. The class may be entitled to refunds for overcharges or damages from defective performance, but is not entitled to packing house profits for the period.

— James R. Baarda

Sole proprietor in bankruptcy

For some time, there has been concern about the proper characterization of amounts paid by a bankruptcy estate to the debtor under Chapter 11 of the Bankruptcy Code. Letter Ruling 8728056, April 15, 1987, has provided some guidance.

In the facts of the ruling, the farmer was a debtor in possession. The IRS pointed out that I.R.C. § 1398(e)(3)(B) controls and that amounts paid out are treated as though the debtor was still engaged in the business of operating the farm. Thus, the amounts paid to the debtor were not properly characterized as wages. Presumably, the amounts paid out are self-employment income.

Although not dealt with in the ruling, it would appear that amounts paid to a spouse or children under age twenty-one should be treated as though paid by the debtor and, further, would not be subject to social security tax.

— Neil E. Harl

Federal Register in brief

The following is a selection of matters published in the *Federal Register* in the last few weeks.

1. **FmHA.** Debt Settlement; Final Rule. Effective date: July 29, 1987. "[A]uthorizes the State Director to approve a cancellation of Chapter 7 bankruptcies regardless of the amount. Also, raises the State Director's approval authority on all other debt settlements when the outstanding balance of the indebtedness involved less the amount of compromise or adjustment offer is less than $250,000." 52 Fed. Reg. 28239.

2. **FCIC.** General Crop Insurance Regulations; Final Rule. Effective date: Jul. 30, 1987. 52 Fed. Reg. 28443.

3. **INS.** Immigration Reform and Control Act; Special Agricultural Workers; Final Rule. Effective date: Jul. 31, 1987. "The temporary transitional admission program will provide for the entry of SAW eligible aliens who were not present in the U.S. prior to June 26, 1987, in order to avoid projected agricultural labor shortages in the U.S. during the 1987 harvest season. 52 Fed. Reg. 28660.

4. **IRS.** Income Taxes; Capitalization and Inclusion in Inventory of Certain Costs; Practical Capacity; Temporary Regulations. Effective for costs incurred after Dec. 31, 1986. 52 Fed. Reg. 29375.

5. **APHIS.** Viruses, Serums, Toxins; Experimental Products and Exempted Products; Final Rule. Effective date: Sept. 14, 1987. Concerns exemptions from the 1985 amendments to the VST Act, including the exemption for "products prepared by a person for administration to his own animals, products prepared by a veterinarian solely for administration to animals under that veterinarian's client-patient relationship," ...and "products which are prepared solely for distribution within the State of production pursuant to an approved State licensing program." 52 Fed. Reg. 30128.

6. **APHIS.** Viruses, Serums, Toxins; Inspections, Seizure and Condemnation; Final Rule. Effective date: Sept. 14, 1987. Regulations regarding the authority of USDA to "enter and inspect any establishment preparing animal biologics at any hour, day or night." 52 Fed. Reg. 30132.

7. **FGIS.** Grain Standards; Review of Regulations; Request for Public Comment. Comments due by Oct. 13, 1987. Invitation for comments and suggested changes to FGIS regulations under the Grain Standards Act. 52 Fed. Reg. 30167.

8. **FCA.** Disclosure to Shareholders; Accounting and Reporting Requirements; Proposed Rule. Comments due by Oct. 13, 1987. Concerns "disclosure of loans that involve a greater than normal risk of collectibility to senior officers and directors, their immediate family, and affiliated organizations." 52 Fed. Reg. 30374.

9. **CCC.** Grain Reserve Program for 1986 and Subsequent Crop Years; Final Rule. Effective date: Aug. 14, 1987. Amends regulations to Farmer-Owned Grain Reserve, specifically (1) length of reserve agreements, (2) maximum quantity that may be stored in FOR, and (3) trigger release levels. 52 Fed. Reg. 30657.

10. **CCC.** Standards for Approval of Warehouses for Grain, Rice, Dry Edible Beans, and Seed; Proposed Rule. Comments due: Sept. 16, 1987. 52 Fed. Reg. 30689.

11. **INS.** Immigration Reform and Control Act; Temporary Disqualification of Certain Newly Legalized Aliens From Receiving Benefits From Federal Programs of Financial Assistance; Proposed Rule. Comments due: Sept. 23, 1987. Lists program of financial assistance for which aliens granted lawful temporary resident status under § 245A(a) of the IRCA are ineligible for 5 years. 52 Fed. Reg. 31784.

— Linda Grim McCormick

Conservation Reserve Program and 2032A

With participation in federal farm programs constituting essentially a cash rent lease to the government, and with cash renting generally causing recapture of special use valuation benefits during the recapture period after death (except for the two-year grace period immediately following death), the question has been raised from time to time whether program participation would cause recapture on land under special use valuation.

In 1983, the IRS published Ann. 83-43, 1983-10 I.R.B. 29 indicating that participation would not cause recapture of special use valuation benefits and would not be a barrier to electing special use valuation. A few days later, Pub. L. No. 98-4, 97 Stat. 7 (1983) was enacted with essentially the same message for those participating in the 1983 PIK program. Although Pub. L. 98-4 was later extended to the 1984 wheat PIK program, the legislation did not become part of the Internal Revenue Code and cannot be relied upon presently.

The IRS has now issued Ltr. Rul. 8729037, April 21, 1987, indicating that Ann. 83-43 controls as to participation in the 10-year Conservation Reserve Program. Hence, participation in the program is not considered a cessation of qualified use and special use valuation benefits are not recaptured as a result.

— Neil E. Harl

AG LAW CONFERENCE CALENDAR

Current Issues in Lender Liability.
Nov. 9-10, 1987, Westin Galleria, Houston, TX.

Topics include: common law theories of lender liability, equitable subordination, the lender's defense, and liability for failure to honor a loan commitment.

Sponsored by the Banking Law Institute.

For more information, call 800/223-0787; in New York, call 800/831-8333.

Penn State Tax Institutes.
Dec. 2-3, Uniontown, Johnstown, Soudertown, PA.
Dec. 7-8, State College, PA.
Dec. 14-15, Monroeville, Edinboro, Harrisburg, PA.
Dec. 16-17, Beaver Falls, Dubois, Hazelton, PA.

Topics include: depreciation after 1986, capitalization and preproductive costs, and TRA '86.

For more information, call 814/865-7656

Shepard's Chapter 12 Seminar.
Oct. 16, Marriott Airport Hotel, St. Louis, MO

Sponsored by Shepard McGraw-Hill, Inc.

For more information, call Cheryl Lannen at 800/525-2474

Fifth Annual Oil and Gas Law Short Courses.
Oct. 18-23, Beaver Run Resort, Breckenridge, CO.

Topics include: royalties and division orders, conveyancing of oil and gas interests, and implied covenants.

Oct. 25-30, Beaver Run Resort, Breckenridge, CO.

Topics include: administrative procedures and judicial review, right-of-way leasing, lease forms and basic provisions, and surface management requirements.

Sponsored by the Rocky Mountain Mineral Law Foundation.

For more information, call 303/321-8100.

Legal Issues in Groundwater Protection.
Oct. 8, live via satellite to 50 cities.

Topics include: the federal regulatory framework to protect groundwater; emerging problems in aquifer protection, state responses, wellhead protection, FIFRA, and non-point sources.

Co-sponsored by ALI-ABA Committee on Continuing Professional Education and the Environment Law Institute.

For more information, call Susan O'Conner at 800/253-6397.

Bureau of Reclamation acreage limitation rules

by Kenneth J. Fransen

Long-awaited revisions to Bureau of Reclamation regulations regarding eligibility for, and costs of, irrigation water from federal water projects were finally issued on April 13, 1987. 52 Fed. Reg. 11938 (1987) (to be codified at 43 C.F.R. Part 426). The new regulations had been expected months earlier, but were held up because of public controversy and internal wrangling.

Already, the new rules have been challenged in Congress. A proposal to strike down the regulations entirely has died in Congress. However, in its place a revised bill that would eliminate special treatment for trusts and impose certain new requirements has passed the House and, at this writing, is now being considered in the Senate.

The original purpose of the new rulemaking by the Bureau was to implement the "hammer clause" of the Reclamation Reform Act of 1982 (RRA), title II, Pub.L. 97-293 (96 Stat. 1263). The hammer clause is contained in Sec. 203(b) of the RRA. It states that any farm entity leasing more than 160 acres of reclamation farmland would be subject to dramatically increased irrigation water charges unless the farm entity elects to come within the "discretionary provisions" of the RRA (sections 203 through 208) prior to April 13, 1987.

Such an election in most cases triggers little or no increase in irrigation water charges, unless the total lands owned and leased exceed 960 acres. A substantial amount of landholdlings farmed in the arid regions that are subject to reclamation law are well over 960 acres, and, therefore, electing under the discretionary provisions in most cases requires a substantial reorganization of the farm. The new regulations answered many questions regarding the validity of such reorganizations.

The new regulations provide:

Implementation of hammer clause. The original regulations issued by the Bureau of Reclamation in 1983 following the adoption of the RRA did not include any provisions implementing the hammer clause. At the time, the Bureau anticipated that before April 13, 1987, the hammer clause provisions might be modified or eliminated by legislative or judicial action. Neither has come to pass, although the constitutionality of the hammer clause is still the subject of ongoing litigation.

The new regulations implement the hammer clause and require that the full cost of federal irrigation projects be passed on to farmers using water on leased land in excess of a landholding of 160 acres, unless the farmer has elected to come within the discretionary provisions. The new rules acknowledge that a husband and wife can receive water at the contract rate for 160 acres each; the full cost rate is only charged on lands leased in excess of their combined 320 acres.

The "full cost" of water means a charge sufficient to pay not only the operation and maintenance charges associated with the federal project, but also a component to repay construction costs with interest. In many districts, the normal "contract rate" charged by the government under the existing water contracts is not sufficient to pay even the operation and maintenance expenses. Thus, the full cost rate has been as high or higher than five times the normal contract rate.

Farm management and custom farming arrangements. For many farmers in reclamation districts, paying increased water costs at the full rate would deal a devastating, and perhaps fatal, blow to their economic ability to survive. On the other hand, because of the substantial capital costs needed to farm arid regions typically subject to reclamation law, virtually all farms located in such areas exceed 160 acres in size, and in many cases, 1,000 or more acres.

The necessity of avoiding full-cost water rates under the hammer clause has forced the vast majority of such farmers to elect to come under the discretionary provisions of the RRA. In so doing, these farmers agree to pay full-cost rates on water delivered to a landholding (owned and leased) exceeding 960 acres.

An inherent inconsistency in the RRA has led to numerous major farm reorganizations involving the use of farm management or custom farming arrangements. Specifically, under the RRA an individual may own and lease up to 960 acres directly or by attribution through other entities. However, each farm entity is also subject to the 960-acre limitation on lands owned and leased. As a result, two brothers may not (without paying substantially increased water rates) farm two 960-acre farms together in partnership, but are permitted to farm each block separately, one by each brother.

Often, however, the capital and equipment needs of a 1,000- acre farm are not substantially less than those for a farm two or three times that size. Therefore, in situations where a larger farm has been broken up into smaller independent farms, the new owners still find it advantageous to pool their equipment and, in some cases, labor forces by forming farm management or custom farming companies to perform farming services on their various lands.

In issuing the new rules, the Bureau of Reclamation resisted an earlier proposal to restrict or prohibit such arrangements. Instead, the Bureau retained the prior rules, which have been in effect since 1983. The 1983 rules indicated that legitimate farm management arrangements in which the manager or custom farmer does not assume economic risk in the farming operation, and where the landholder retains the right to the use and possession of the land, is responsible for payment of the operating expenses, and is entitled to receive the profits from the farming operation, would not be treated as leases. Otherwise, the custom farmer or farm management company will be considered as having leased all of the subject lands and will be required to pay the full cost for water delivered to lands farmed in excess of 960 acres.

At one point in the rulemaking process, the Bureau considered adopting a provision that would have prohibited a farmer from using a farm management company or custom farming entity in which the farmer held an interest (or, as some suggested, more than a 20% interest). However, such efforts were resisted and no such limitation exists in the new rules.

One of the Congressional proposals now circulating requires that farm management and custom farming arrangements be reported to the Bureau and that all such arrangements be subject to Bureau approval. Another Congressional initiative requires that any farm management, farm services, or other operational agreement intended to evade the provisions of reclamation law be treated as a lease and be subject to a penalty equal to the full-cost rate of irrigation water delivered plus interest at the same rate provided for underpayments of tax under the Internal Revenue Code.

Trusts. The RRA included a special rule for trusts which stated that the acreage limitation provisions and the pricing provisions did not apply to lands held by a fiduciary. This exception for trusts has generated substantial controversy, since it allows a single trust to own or operate an unlimited amount of land (although each beneficiary by attribution is nevertheless subject to acreage and pricing limitations).

An earlier proposal to treat irrevocable trusts differently from revocable trusts was ultimately discarded. The final rules provide that trust holdings will be attributed to the beneficiary regardless of whether the trusts are irrevocable or revocable.

The new rules require that trust agreements be in writing, be approved by the Bureau, identify the beneficiaries, and describe the respective interests of the beneficiaries in the trust.

The treatment of trusts under the RRA and the new rules is a major focus of current legislative activity. Efforts are being made that, if successful, would impose acreage and pricing limitations on each separate trust. Although a single fiduciary could continue to hold unlimited amounts of land in separate trusts, any single trust would be subject to the limitations. The current proposals

(continued on next page)

would also attribute lands in a revocable trust to the grantor or to the person holding the reversionary interest.

Involuntary acquisitions. A critical issue surrounding the rulemaking process was the Bureau's proposed treatment of lands acquired through foreclosure or other involuntary process. Under the RRA, nonexcess land (that is, land that is not held in excess of ownership limitations) that becomes excess when it is acquired involuntarily is nevertheless eligible to receive water at prior rates for a period of five (5) years, during which time the acquiring party may resell the property with no price restriction.

If, on the other hand, a mortgage is taken on land that is already excess, no relief is given under the RRA to a person acquiring the property involuntarily. When excess land is sold to a qualified buyer, for a price approved by the Bureau, the land may thereupon become nonexcess. However, in such cases, the land sold becomes subject to a ten-year covenant prohibiting resale except at a price approved by the Bureau of Reclamation.

The purpose of this covenant is to prevent speculators from acquiring excess lands at low prices and then immediately reselling the property for dramatic profits attributable to the presence of the reclamation project.

During the rulemaking process, the Bureau has suggested that a party involuntarily acquiring land which is burdened with such a deed covenant could nevertheless be generally bound by the requirements of the deed covenant unless the mortgage foreclosed was for an operational loan. The final rules recognize that upon an involuntarily acquisition, no further restriction under the deed covenant would apply. The new rules provide that in such cases the covenant can be removed of record. The earlier Bureau proposal to distinguish between involuntary acquisitions pursuant to an operational loan versus a land loan was discarded; the RRA makes no such distinction.

Nonresident aliens. Historically, nonresident aliens were not discriminated against with regard to the eligibility for, or the price of, reclamation water. With the RRA, however, Congress decreed that nonresident aliens would not be eligible to receive water under the discretionary provisions thereof.

Any nonresident alien becoming subject to that restriction was nevertheless given the opportunity to sign a recordable contract entitling him to water for a five-year period during which he would be obligated to sell the land to an eligible buyer, but at an unrestricted price.

The RRA did not clearly state whether a corporation, partnership, or other legal entity established under state or federal law would become ineligible (wholly or partially) in the event an interest in such entity was held by a nonresident alien.

The new rules permit nonresident aliens to hold interests in such legal entities without affecting the eligibility of the legal entity for reclamation water. Provisions were added, however, to conform the treatment of nonresident aliens who receive water through legal entities so that such nonresident aliens may not hold more land indirectly than would be permitted a citizen or a resident alien.

Eligibility of minors. Under the discretionary provisions of the RRA, a husband and wife and all of their dependents are considered one person and are subject to a single 960-acre limitation. Under the RRA, dependency is determined with reference to the Internal Revenue Code.

The Bureau had earlier proposed that nondependent status be established in the preceding water year as well. No such restriction is found in the Internal Revenue Code or in the RRA, and the final rules do not impose any such requirement. The Bureau of Reclamation has indicated that henceforth, nondependent status need only be established for the respective water year at issue, by so indicating on the annual certification forms that are required to be filed by persons subject to the discretionary provisions.

— Kenneth J. Fransen

STATE ROUNDUP

GEORGIA. *Is a farmer a merchant?* In *Goldkist, Inc. v. Brownlee,* 182 Ga. App. 287, 355 S.E.2d 773 (1987), the Georgia Court of Appeals held that the trial court erred in ruling that defendant farmers, as a matter of law, were not "merchants" within the meaning of Ga. Code Ann. § 11-2-104(1).

Plaintiff Goldkist alleged that it and defendants entered into an oral contract over the telephone for the sale of soybeans. Plaintiff followed the conversation with a letter of confirmation, to which no objection was made within ten days.

Although the sale price exceeded the $500 threshold for invoking the statute of frauds, Goldkist asserted that defendants were merchants and that, hence, the transaction was exempt from the requirement that it be in writing.

The court of appeals overruled the trial court's grant of summary judgment. It found that it could not be said that, as a matter of law, defendants were *not* merchants. The court was persuaded by the fact that defendants had been farming for more than a decade and were familiar with the transaction procedure. Further, the court noted that, given this common selling procedure, to hold otherwise would permit farmers to renege on confirmed oral agreements to sell, if the price subsequently increased.

—Daniel M. Roper

FLORIDA. *State liability for well condemnation.* The appellants in *Schick v. Florida Department of Agriculture,* 504 So. 2d 1318 (1987), alleged that the state department of agriculture was strictly liable in inverse condemnation for polluting the appellants' wells with ethylene dibromide (EDB), a result of negligent operation of a nematode eradication program. From 1961 through 1983, the agriculture department had applied excessive amounts of EDB. In 1983, the Florida Department of Environmental Regulation prohibited further domestic consumption of water from the wells, because of EDB contamination. The trial court held that sovereign immunity barred the complaint.

The district court found that appellants had stated a cause of action for inverse condemnation. The department's use of a known toxic chemical had contaminated the wells, which permanently deprived the appellants of their water supply, rendering their residences worthless.

The court distinguished this case from the holding in *Village of Tequesta v. Jupiter Inlet Corporation,* 371 So. 2d 663 (Fla.), *cert. denied,* 444 U.S. 965 (1979), where the Florida Supreme Court found no compensable taking. Tequesta had mined a shallow aquifer to such an extent that a developer that owned the land overlying the aquifer was deprived of the beneficial use of that aquifer.

The *Tequesta* court ruled that the developer did not hold a constitutionally protected right to the groundwater, only an unperfected *proposed* use of the aquifer. Although the developer lost an inexpensive water supply, it had alternative sources.

The *Schick* court held that the appellants differed from the developer in *Tequesta* because they were deprived of a constitutionally protected *existing* use of their wells and pipes. Therefore, the EDB contamination could be found to be inverse condemnation.

The district court held that the state department of agriculture could not assert sovereign immunity to block the action. Florida law allows governmental tort liability for operational actions but not discretionary governmental functions. The court held that the allegedly negligent application of the EDB was action of the operational type. It refused, however, to allow the strict liability claim, holding that the Florida Tort Claims Act did not contemplate such an extreme waiver of immunity.

The court remanded with instructions to allow the appellants to seek compensation under their inverse condemnation claim and their tort claim.

— Sid Ansbacher

Address Correction Requested

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1987 AALA ANNUAL MEETING. The American Agricultural Law Association will hold its Eighth annual conference October 15-16, 1987, at the Omni-Shoreham Hotel, Washington, D.C. This year's theme is "How Washington Works."

Sessions on "Taxation" will be moderated by C. Allen Bock. Phillip L. Kunkel will chair the panel discussion on "Chapter 12 in Bankruptcy." The session on "Washington at Work" will be moderated by Philip E. Harris. David A. Myers heads the session on "Regulation of Pesticides."

The keynote speaker will be Don Paarlberg, speaking on "The Effect of Agriculture on Washington." AALA President James B. Dean will give the Presidential Address at the Friday luncheon. Bryan Slone will be Thursday's luncheon speaker.

Other speakers and their topics include: Charles Davenport on "History of Farm Taxation"; Denise Bode on "Lobbyist's View of the 1986 TRA"; Maxine Champion on "Legislative Staff View of 1986 TRA"; Orville Bloethe on "What We Have Now"; Prof. Patrick Bauer on "Historical Background of Chapter 12"; Sam Jerdano on "Legislative Process of Chapter 12"; Mark Bromley and Judge Robert Martin on "Making Use of Chapter 12"; William E. Lesher and J.B. Penn on the "Administrative Perspective of the Relationship of Federal Agencies to Each Other"; Robert J. Gray on the"Lobbyist's Perspective on the Relationship of Federal Agencies to Each Other"; Sonja Hillgren on the "Journalist's Perspective on the Relationship of Federal Agencies to Each Other"; Rita Reimer on "Sources for Finding the Rules and Regulations"; Leo Mayer on "U.S. Perspective of Effect of Foreign Policy on U.S. Agriculture"; Rudi Gotzen on "E.C. Perspective of U.S. and European Agricultural Relations"; Sherwin Lyman on "Canadian Experience with Regulation of Pesticides"; Prof. Thomas O. McGarity on "Overview of FIFRA"; Al Meyerhoff on "An Environmentalist's Perspective of FIFRA"; W. Scott Ferguson on "Industry Perspective of FIFRA."

For more information concerning the conference, contact Philip E. Harris at 608/262-9490.

ROOM RATE EXTENSION. The deadline for reserving a room at the conference rate has been extended from September 14 until October 14, subject to availability of rooms.

JOB FAIR. The AALA's third annual Job Fair will be held concurrently with the 1987 Annual Meeting. Notices of available positions will be sent to law school placement offices for dissemination to interested students and both entry level and experienced attorneys.

To obtain further information or to arrange an interview, contact the Job Fair Coordinator: Gail Peshel, Director of Career Services and Alumni Relations, Valparaiso University School of Law, Valparaiso, IN 46383; 219/465-7814.