NAT'L CENTER FOR AG LAW
OCT 26 1992
LAW LIBRARY, U. OF ARK

Agricultural Law Update

VOLUME 9, NUMBER 12, WHOLE NUMBER 109 SEPTEMBER 1992

Official publication of the American Agricultural Law Association

INSIDE

- Ag Law Conference Calendar
- Agricultural law bibliography
- IN DEPTH: Treatment of agriculture in the North American Free Trade Agreement
- A tale of two mangoes
- Ninth Circuit affirms invalidation of marketing order amendments
- *Federal Register* in brief
- State Roundup

IN FUTURE ISSUES

- Agriculture and the Common Market: the different commodity markets

FmHA borrowers score litigation victories

FmHA borrowers Tom and Brenda Tate of Tahlequah, Oklahoma have won two significant court victories in an on-going legal battle with FMHA.

On June 9, 1992, United States District Judge Frank Seay issued an opinion declaring that FmHA had violated the Tates' statutory and constitutional right to an administrative hearing and appeal when it "suspended" their administrative appeal and refused to allow it to resume. *Tate v. United States of America,* Civ. No. 90-084-S (E.D. Okla. June 9, 1992). On August 19, 1992 the judge issued an order granting the Tates' attorney's fees of $49, 100.00 under the Equal Access to Justice Act. 28 U.S.C. § 2412(d)(E.D. August 19, 1992).

Tom and Brenda Tate filed an application for restructuring of their FmHA debt under the Agricultural Credit Act of 1987 on December 30, 1988. The FmHA county supervisor denied the application on March 3, 1989, claiming that the Tates had failed to file a "complete application" under FmHA's restructuring regulations and that the Tates had failed to act in "good faith." The notice to the Tates did not state how the government believed their restructuring application was "incomplete," nor did it specify how the FmHA believed they had not acted in "good faith." (The Tates first learned in depositions conducted nearly two years later that both of these reasons cited by FmHA for denial of loan restructuring stemmed from the county supervisor's belief — and insistence — that the Tates owned real estate assets that were not listed on their financial statement. The county supervisor testified that he *believed* that the Tates owned this additional property that was not listed and that, therefore, it was his *belief* that the restructuring application was not "complete." He also testified that the Tates were not acting in "good faith" because they had failed to list the properties on their financial statement. The county supervisor offered no evidence of Tates' ownership of any such property.) On March 7, 1989, the Tates filed their request for an appeal of FmHA's determination. On April 6, 1989, the Tates received a letter from the FmHA National Appeals Staff (NAS) identifying the hearing officer who would handle their appeal. Later that month, however, that hearing officer informed Mr. Tate by telephone that the Tates' administrative appeal had been "put on hold" by FmHA because the plaintiffs were "being investigated" by the agency. During this discussion, the NAS representative suggested to Mr. Tate that he seek to resolve his FmHA loan through a "recovery value buyout" of the loan collateral, rather than through a protracted appeal.

Based upon this advice, Mr. Tate wrote to the NAS May 19, 1989 stating that he wished to pursue the "recovery value buyout" option with the agency, and requesting a postponement of his appeal hearing. The NAS hearing officer wrote back May 26, 1989 acknowledging Mr. Tate's letter and stating that "if payoff at net recovery value

Continued on page 2

New Government Accounting Office report on deficiency payment payees

The GAO has issued a new report summarizing, for the 1990 crop year, the number of individuals who received federal farm program deficiency payments in their own name and through entities, general partnerships, and joint ventures and the amount of those payments. United States Gen. Accounting Office, *Agriculture Payments: Number of Individuals Receiving 1990 Deficiency Payments and the Amounts* (RCED-92-163FS, Apr. 1992).

Under the current payment limitation rules, deficiency payments are limited to $50,000 per person annually. A "person" may be an individual; an entity such as a corporation, limited partnership, association, trust, estate; or a member of a joint operation such as a general partnership or joint venture. Individuals and entities may be members of joint operations. The rules permit a "person" to double the $50,000 limit by receiving payments from either two or three entities in which the "person" holds a substantial beneficial interest. If the "person" directly receives payments, payments can be received indirectly through two entities. Otherwise, a person can receive

Continued on page 3

is not consummated you have not waived any of your rights under the current appeal."

The Tates' efforts to negotiate a settlement with FmHA through the "recovery value buyout" procedure were not successful. When the Tates requested that their administrative appeal be resumed, they were informed by FmHA and the USDA Office of General Counsel that they no longer had the right to appeal, and, if they felt otherwise, they would have to file a lawsuit. They did.

The Tates alleged in their lawsuit that their application for FmHA loan restructuring was complete when filed with FmHA, that they were not able to service a restructured debt and that they were, thus, entitled to enter into a "recovery value buyout" with FmHA. They also alleged that FmHA had denied their statutory and constitutional right to an administrative appeal. They asked the court — on the basis of the agency record — to declare, that they were entitled to recovery value buyout or, in the alternative, that they were entitled to complete their administrative appeal.

After two and a half years of litigation — including dozens of hours of depositions conducted by both sides, a United States Magistrate Judge appointed by the court issued "Findings and Recommendation" May 12, 1992 which were adopted by the court in its June 9, 1992 order. In the Findings and Recommendation, the Magistrate Judge concluded that:

> [I]t is clear that in the instant case the administrative process was interrupted before Plaintiffs first appeal could transpire. Resort to the administrative process in the instant case will allow the Plaintiffs to continue the appeal guaranteed them by Congress, and mandated by their constitutional right to due process.

The court had particularly harsh words concerning the government's only justification for FmHA's denial of the Tates' appeal rights— that the FmHA NAS hearing officers were not competent:

> The court finds it unusual to say the least the Defendant would take the position that completion of the administrative process is useless. Defendant's brief states in pertinent part: "Bottomline, it would be folly to revert to FmHA's administrative appeal process when all issues are before the Court (sic), particularly in light of the fact that the FmHA appeal process is not designed, nor equipped, to handle complex legal issues now before the Court (sic). The FmHA administrative hearing officers are almost without exception non-lawyers and in many instances have no prior agricultural experience." (Defendant's Response BR. at 24-25). Generally, the administrative agency, directed by Congress to be responsible for the administration of a program, is deemed to have the expertise to deal with the technical problems of administration. Defendants' argument that its officers are inept to handle these type issues is contrary to the very premise upon which the agency was established.

Based upon the Findings and Conclusions, the Magistrate Judge concluded that the Tates' statutory and constitutional rights had been violated; Judge Seay agreed in his June 9, 1992 order.

Following issuance of the court's order, the Tates filed a motion with the court requesting an award of attorney's fees and costs under the Equal Access to Justice Act. On August 12, 1992 the court issued an order on that request, granting a total award to the Tates of $46,147.50 in attorney fees and $2,960.50 in costs. In the order, the court concluded that the Tates were "prevailing parties" under the EAJA, even though the ultimate impact of the court's earlier order was to remand the case to the FmHA administrative appeal process. The government had argued in its briefing and in oral argument that the "prevailing party" determination could not be made until after the agency process was completed. This argument was rejected by the court:

> This court's decision granted plaintiffs that significant and substantive right, irrespective of any future litigation between the parties, either administratively or legally. If a party succeeds on any significant litigation which achieves some of the benefit sought in bringing suit, that party is a "prevailing part."

The court also rejected the government's argument that fees should not be awarded because the FmHA action was "substantially justified" or that "special circumstances" made a fee award unjust:

> Here, the court has previously found that the defendant's decisions and action did not have a reasonable basis in law and fact, and that there was not substantial evidence in the record to support them. In fact, this court found defendant's action to be unreasonable and without evidence to support it. Further, the court finds that there are no "other special circumstances" which would make such an award unjust. Accordingly, plaintiffs, as prevailing parties, are entitled to their attorneys' fees under § 2412(d) of the EAJA.

Finally, while the court did enter the fee award for the hours and expenses requested by the Tates, it declined to adjust the EAJA's base hourly fee of $75.00 for the cost of living increases from 1981, when the EAJA was enacted, through the present. That adjustment, which is within the court's discretion to make under the act, would have put the present hourly fee at $112.00. In declining to make the adjustment the court held that "in recent opinions, this court has rejected cost of living enhancements to the $75.00 per hour ceiling imposed by 28 U.S.C. § 2412(d). *Pierce v. Underwood,* 487 U.S. 552, 572 (1988); *Headlee v. Bowen,* 869 F.2d 548 (10th Cir. 1989), *cert. denied,* 110 S.Ct. 507 (1989)." The court made no other adjustments to the fee request.

The case is now expected to proceed through the FmHA appeal process. Copies of the court's order can be obtained from FLAG or from Mr. Massey's office, P.O. Box 1689, Sisters, OR 97759.

— James T. Massey, Counsel for Plaintiffs

Agricultural Law Update

VOL. 9, NO. 12, WHOLE NO. 109 Sept. 1992

AALA Editor..........................Linda Grim McCormick
195 Dollywood Dr., Toney, AL 35773

Contributing Editors: James T. Massey, Sisters, OR; Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK; Christopher R. Kelley, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.; Joseph Sandler, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.; Linda Grim McCormick, Toney, AL.

State Reporters: Van Z. Hampton, Patton & Kerbs, Dodge City, KS.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Views expressed herein are those of the individual authors and should not be interpreted as statements of policy by the American Agricultural Law Association.

Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 195 Dollywood Drive, Toney, AL 35773.

Copyright 1992 by American Agricultural Law Association. No part of this newsletter may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system, without permisaion in writing from the publisher.

AG LAW CONFERENCE CALENDAR

Nonpoint Source Water Pollution: Causes, Consequences, and Cures
October 30-31, 1992, Center for Continuing Education, Fayetteville, AR.
Sponsored by National Center for Agricultural Law Research and Information; Arkansas Water Resources Research Center.
For more information, call (501) 575-7646.

Agricultural law bibliography

Agricultural Law: Attorney Roles and Educational Programs

Economides, *The Country Lawyer: Iconography, Iconoclasm, and the Restoration of the Professional Image*, 19 J. L. & Soc'y 115-123 (1992).

Aquaculture

Watters, Daughtrey & Burckel, *Proper Tax Classification of Aquacultural Products Needs Clarification*, 14 J. Agric. Tax'n & L. 140-157 (1992).

Bankruptcy

Copeland, *Current Agricultural Bankruptcy Issues*, 14 J. Agric. Tax'n & L. 166-177 (1992).

Kelley & Schneider, *Selected Issues of Federal Farm Program Payments in Bankruptcy*, 14 J. Agric. Tax'n & L. 99-139 (1992).

Biotechnology

Note, *Beyond Animal Legal Defense Fund v. Quigg: The Controversy Over Transgenic Animal Patents Continues* (Animal Legal Defense Fund [ALDF] v. Quigg, *932 F.2d 920, Fed. Cir. 1991.)*, 41 Am. U. L. Rev. 1023-1074 (1992).

Cooperatives

Saker, *Creating an Agricultural Trust: Law and Cooperation in California*, 1898-1922, 10 L. & Hist. Rev. 93-129 (1992.)

Environmental Issues

Goble, *Of Wolves and Welfare Ranching*, 16 Harv. Envtl. L. Rev. 101-127 (1992).

Noble, *The Everglades and Agricultural Water Pollution*, 14 J. Agric. Tax'n & L. 178-186 (1992).

Note, *Agricultural Chemical Contamination of Groundwater: An Economic Analysis of Alternative Liability Rules*, 1991 U. Ill. L. Rev. 1135-1167.

Farm Labor

General & Social Welfare

Maciel, *"There's More to Pickle Pickers Than Picking Pickles": Reflections on the Migrant Experience in Wisconsin*, 1991 Wis. Multi-Cultural L.J. 86-104.

Hunting, Recreation & Wildlife

Note, *The Continuing Significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora During the 1990's*, 15 Suffolk Transnat'l L. J. 122-152 (1991).

International Trade

Kerr & Hobbs, *Consumer Protection and Legal Nontariff Barriers to Trade: An Example from the New British Food-Safety Legislation*, 14 J. Agric. Tax'n & L. 158-165 (1992).

Paarlberg, *How Agriculture Blocked the Uruguay Round*, 12 SAIS Rev. 27-42 (1992).

Land Sales/Finance, Mortgages/Foreclosures

Allen & Lueck, *The "Back Forty" on a Handshake: Specific Assets, Reputation, and the Structure of Farmland Contracts*, 8 J.L., Econ. & Organization 366-376 (1992).

Land Use Regulation

Land Use Planning and Farmland Preservation Techniques

Mudge, *Impact Fees For Conversion of Agricultural Land: A Resource-based Development Policy for California's Cities and Counties*, 19 Ecology L.Q. 63-96 (1992).

Patents, Trademarks & Trade Secrets

Crespi, *Patents and Plant Variety Rights: Is There an Interface Problem?*, 23 Int'l. Rev. Indus. Prop. & Copyright L. 168-184 (1992).

Pesticides

Casenote, *The Possibility that FIFRA Might Preempt State Common-law Tort Claims Should be Exterminated* (Papas v. Upjohn Co., *926 F.2d 1019, 11th Cir. 1991, petition for cert. filed, 60 U.S.L.W. 3053, U.S. May 29, 1991)*, 45 Ark. L. Rev. 729-745 (1992).

Comment, *Aerial Pest Eradication in Massachusetts and California and the Pesticide Malathion*, 19 B.C. Envtl. Aff. L. Rev. 851-884 (1992).

Note, *Pesticides and Precaution: The Bamako Convention as a Model for an International Convention on Pesticides Regulation*, 24 N.Y.U. J. Int'l L. & Pol. 557-609 (1991).

Public Lands

Libecap, *Bureaucratic Issues and Environmental Concerns: A Review of the History of Federal Land Ownership and Management*, 15 Harv. J.L. & Pub. Pol'y 467-488 (1992).

Taxation

Recent Decision, Taxation — Discharge of Indebtedness Income, (Zarin v. Commissioner, *916 F.2d 110, 3d Cir. 1990.)* 64 Temp. L. Rev. 1189-1202 (1991).

Trade Regulation/Antitrust

Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 Econ. Inquiry 242-262 (1992).

Water Rights: Agriculturally related

Brienza, *Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects*, 11 Stan. Envtl. L.J. 151-199 (1992).

Comment, *Water Quality Control: The Reality of Priority in Utah Groundwater Management*, 1992 Utah L. Rev. 491-527.

Gregory, *Groundwater and Its Future: Competing Interests and Burgeoning Markets*, 11 Stan. Envtl. L.J. 229-258 (1992).

Harnsberger, Potuto, Thorson, *Interstate Transfers of Water: State Options After Sporhase*, 70 Neb. L. Rev. 754-872 (1991).

Morris, *When Rivers Run Dry Under a Big Sky: Balancing Agricultural and Recreational Claims to Scarce Water Resources in Montana and the West*, 11 Stan. Envtl. L.J. 259-302 (1992).

Note, *Agricultural Chemical Contamination of Groundwater: An Economic Analysis of Alternative Liability Rules*, 1991 U. Ill. L. Rev. 1135-1167.

If you desire a copy of any article or further information, please contact the Law School Library nearest your office.

—Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Continued from page 1

payments indirectly through three entities.

The GAO Report indicates that of the 1,104,445 individuals who received deficiency payments in 1990, 829,572 received payments in their own name only, 171,559 owned an interest in one or more entities, 87,909 owned an interest in general partnerships and joint ventures, and 15,405 owned an interest in both one or more entities and general partnerships and/or joint ventures.

Of all of the individuals receiving payments, 903,049 averaged $2,500 in payments, 118,723 averaged $14,000 in payments, 78,862 averaged $31,500 in payments, and 3,811 averaged about $65,500 in payments.

The 1990 crop year is the most recent year for which USDA data is substantially complete. In preparing its report, the GAO did not independently verify the USDA's 1990 deficiency payments.

— Christopher R. Kelley, Of Counsel, Arent, Fox, Kintner, Plotkin & Kahn

Treatment of agriculture in the North American Free Trade Agreement

By Joseph Sandler

On September 18, 1992, President Bush formally notified the Congress of his intent to sign the North American Free Trade Agreement (NAFTA). Nearly every sector of U.S. agriculture could be significantly affected by this sweeping agreement among the U.S., Mexico and Canada.

The conclusion of more than a year of negotiations on August 12, followed by release of the text of the agreement itself for the first time on September 8, was heralded by a torrent of analysis, claims, predictions, praise and criticism from a variety of farm groups and farm state Members of Congress. Although USDA has praised the pact, and the official advisory group to the U.S. Trade Representative issued a report (on September 16) concluding that NAFTA would have a net positive impact on agriculture, agricultural interests have raised a number of specific concerns about it.

In hopes of providing some useful introductory guidance though this thicket, this article provides a brief overview of the agricultural provisions of NAFTA, highlights some of the areas in which legal issues are likely to arise in the future, and summarizes the process for implementation of the agreement by the U.S.

Overview

Although NAFTA is a trilateral agreement among the U.S., Canada and Mexico, most of its impact on agriculture will derive from provisions applying only to trade between the U.S. and Mexico. That is because, for the most part, the agricultural provisions of the U.S.-Canada Free Trade Agreement, which became effective in 1989, will remain in place and will not be affected by NAFTA.

NAFTA affects agriculture primarily through (1) the elimination or phase-out of tariffs on agricultural commodities and processed goods; and (2) phase-out and/or modification of quantitative restrictions including some quotas on the U.S. side and limits imposed through import licensing on the Mexican side.

With respect to tariff and quota changes, there are numerous exceptions and safeguard provisions for products considered import-sensitive by each country.

NAFTA addresses, as between the U.S. and Mexico, some of the same agricultural issues that are the subject of the current round ("Uruguay Round") of multilateral negotiations under the GATT. While a number of those issues remain under discussion, the approach taken in NAFTA to quantitative restraints — which is to transform them into tariff equivalents — is intended to be consistent with the anticipated treatment of such restraints in any new GATT agreement.

It should be noted that NAFTA does not require either the U.S. or Mexico to modify any domestic commodity support program or any specific export subsidy program. The parties commit to deal with the latter issue in the current GATT round, and to refrain from introducing new subsidy programs on exports to each other except where necessary to counter imports from a third country. (NAFTA, Article 706).

The pact also allows the U.S. to continue to apply grade standards in marketing orders, providing only for future consultation to address concerns Mexico has raised about such standards in the past. (Annex 704.3). NAFTA contains an entire section dealing with sanitary and phytosanitary regulations — see discussion below.

The provisions of NAFTA are extremely complex and some of the most important elements are buried in the details of the tariff schedules and other annexes to the agreement. Illustrative highlights of NAFTA's operation in some key areas would include:

Corn: Current Mexican import license restrictions on U.S. corn would be replaced with a tariff-rate quota, i.e., duty-free treatment up to a set quota, in this case 2.5 million metric tons (MT)/year, an amount set to increase three percent each year, with a prohibitive duty (215%) on imports above that level. The duty would be phased out over fifteen years.

Oilseeds: The current Mexican seasonal (Oct. 1-Dec. 31) duty of 15% would be cut to 10%, then phased out over 10 years.

Wheat: Mexican import licensing restrictions are to be eased and duties of 15% phased out over ten years.

Horticulture: To allow increased counter-seasonal imports from Mexico, specified seasonal duties on most imports of Mexican fresh vegetables into the U.S. would be phased out, with a phase-out of up to fifteen years for the most import-sensitive products. Under so-called "snap-back" provisions, however, the U.S. could restore the full current quota on six items if imports exceed specified levels in the U.S. season: tomatoes, onions, eggplants, chili peppers, squash, and watermelons.

Mexico would similarly phase out duties on its imports of counter-seasonal fresh vegetables and some U.S. fruits, including apples, pears, and peaches, with similar "snap-back" provisions for certain items including fresh potatoes, some potato products, and apples. As noted below in more detail, the agreement does not attempt to resolve any of the specific plant health issues that have proved troublesome on each side, but procedures are established to address those issues.

Livestock and meat: Most import licensing restrictions on Mexican imports of U.S. livestock would be eliminated. The current 10-percent Mexican tariff on U.S. pork would be phased out, with a tariff-rate quota and "snap-back" provision for live swine and most categories of pork products. The 10-percent tariff on live sheep and poultry would be phased out over ten years. Most other Mexican tariffs on U.S. meat would be phased out.

Sugar. The sugar quotas would effectively be lifted on imports from Mexico after a fifteen-year transition period. Duty-free treatment would be provided for the current quota quantity applicable to Mexico, about 7,200 MT a year; then, if it is determined that Mexico becomes a net surplus producer, that quantity would increase to 25,000 MT per year during the first six years and to 150,000 MT per year, increasing ten percent a year, over the subsequent nine years. Sugar could be imported from Mexico over the quota limits subject to a high duty, which would be phased out over the fifteen-year period. At the end of fifteen years, all quotas and duties would be eliminated regardless of Mexico's production situation.

In an effort to preclude use of third-country sugar to create exports, the pact will utilize a complex formula to measure surplus production and require Mexico, beginning in the seventh year, to impose a tariff-rate quota equivalent to that of the U.S.

Peanuts. Peanuts are currently subject to quotas under section 22 of the Agricultural Adjustment Act, 7 U.S.C. § 624 ("section 22 quotas"). For Mexico, this quota will be replaced by a tariff rate quota, under which the duty on peanuts

Joseph Sandler is a partner in the Washington, D.C. firm of Arent, Fox, Kintner, Plotkin & Kahn.

from Mexico will be eliminated for imports up to a certain quota limit (starting at 3,377 MT, and increasing each year), and a high over-quota duty will be established. That over-quota duty would then be phased out over fifteen years.

Dairy. Mexican tariffs on most dairy products will be phased out over ten years. Milk powder will be subject to a tariff rate quota, with duty-free treatment up to an initial limit of 40,000 MT/year and a high over-quota duty, to be phased out over fifteen years. With regard to U.S. imports from Mexico, too, a tariff-rate quota will be put in place for dairy products now subject to section 22 quotas. Again, duty-free treatment will be accorded to products within a quota limit, which will increase 3 percent a year; and a high-over quota duty will be imposed, to be phased out over ten years.

Cotton. Cotton now subject to section 22 quotas will also be subject to a tariff-rate quota, with the over-quota duty phased out over ten years. In addition, NAFTA will, for imports from Mexico, lift the textile quotas now in place under the Multi-Fibre Agreement.

Legal Issues

A number of legal and interpretative issues are likely to arise under provisions of NAFTA affecting agriculture in the following general areas, among others:

Sanitary and Phytosanitary Measures

Neither the U.S. nor Mexico will be required specifically to modify any of their plant and animal health standards that have been the subject of controversy in the past, but NAFTA does provide criteria for evaluation of such standards, sets out a process for consultation, and makes the dispute settlement procedures of the agreement available for challenges to those standards. (Article 7, subchapter B). The three countries are supposed to use international standards as the basis for their own measures, but each is free to adopt more stringent requirements.

Either the U.S. or Mexico could challenge a standard of the other country on the ground that it is not based on "scientific principles," not based on "a risk assessment, as appropriate to the circumstances," (Article 754, § 3 and Article 757) or that the protesting country's own standard achieves the other country's chosen "level of protection." (Article 756). The agreement also sets forth some general goals for streamlining control and inspection procedures on each side of the border, including reasonable sampling and clarification of the reasons for rejection (Article 759).

Under a prior binational agreement, consultations have already been taking place between the U.S. and Mexico on specific animal and plant health requirements, and those discussions are expected to continue.

Rules of Origin

While producers of a commodity on either side of a border may be willing to allow (or are not concerned about) increased imports from the other side, they are often fearful about third countries taking advantage of the benefits of reduced tariffs and quotas. That was the case with U.S.-Canada Free Trade Agreement, and it is equally true with respect to NAFTA. Thus, as under the U.S.-Canada pact, NAFTA provides that, in order to be entitled to its benefits, products must meet certain requirements designed to ensure that they are products of North America. These requirements, called "rules of origin," vary from product to product and can become quite complicated. In some cases, producer groups may seek clarification in the implementing legislation; other issues may be resolved on a case by case basis in the future by the U.S. Customs Service, in enforcing the rules if and when NAFTA comes into effect.

In general, to be considered a product of a NAFTA country, a product must either be grown or entirely produced in that country, or else each of the components or ingredients must (through processes conducted in one of the North American countries) undergo a specified change in the category under which it is classified in the tariff schedules. (Article 401). In certain cases in which an ingredient or component does not undergo such change because of the way the tariff schedules are structured, the value of the product must be 60% North American in origin calculated under a "transaction value" method or 50% of calculated under a "net cost" method. Formulas are set out for measuring value under each of these methods. (Article 402 & 403). There is also a *de minimis* rule allowing up to 7% non-NAFTA content, by "transaction value," to come from third countries. (Article 405).

Several examples may serve to illustrate the complexity of these provisions and the type of issues that may arise:

· **Peanuts**: Mexican peanut butter will be entitled to reduced tariffs if it is made from peanuts of North American origin. Some peanut growers have noted that the agreement is unclear as to whether "additional" peanuts grown for export will be treated as "North American" for this purpose.

· **Fruit juices**: Single fruit juices are classified in the same chapter as the fruits from which they are made; thus frozen and concentrated juices must be made from NAFTA-origin fruit. The *de minimis* rule generally allowing some non-NAFTA content does not apply to such juices. Juice mixtures, however, in which no one juice is more than 60% by volume, can consist of juices imported from third countries.

· **Textiles**: For cotton, a "fiber forward" rule would apply, meaning that goods must be produced from cotton fiber made in a NAFTA country.

· **Meats**: Most processing of meats that results in a packaged or canned product involves a change in tariff chapter and thus will suffice to turn third-country meats into products of NAFTA origin.

· **Dairy**: Cheese and ice cream must contain only milk originating in a NAFTA country. The origin of drink mixes and confectionery products containing dairy ingredients can turn on the percentages of the dairy ingredients, as well those of cocoa, sugar and other ingredients.

· **Sugar**: Refining sugar does not change the tariff classification. However, third-country sugar could be used to manufacture a number of certain confectionery and other products in Mexico (including some currently subject to section 22 quotas which will effectively be phased out under NAFTA) which would be considered Mexican in origin for NAFTA purposes.

"Emergency" Import Restriction

In addition to the specific "snapback" provisions noted above, there is a general "snapback" provision (Article 801), under which any of the three countries may temporarily impose full pre-NAFTA duties on any product being imported from another NAFTA country if those imports — as a result of NAFTA duty reduction — "constitute a substantial cause of serious injury, or threat thereof, to a domestic injury" producing a "like or directly competitive good." The "snapback" to full duties may not be taken for longer than three years or, in the case of certain very import-sensitive items, four years. (*Id.* § 2(c)). Those items include some of the vegetables and other agricultural commodities and products for which the phase-out is fifteen years, as noted above.

Article 8 sets detailed requirements for the procedures in any domestic investigation leading to a general "snapback" action. (Article 803).

General Dispute Resolution

NAFTA would create a Free Trade Com-

Continued on page 6

mission to settle disputes among the three governments about interpretation and implementation of the agreement. The governments are first required to consult (Article 2006); and if consultations fail to resolve the matter, either government can request that the Commission make a decision. If either government is not satisfied with the Commission decision, or the Commission is unable to decide, a government may request that an arbitral panel be convened. (Article 2008). If any government does not follow the decision of the panel, the other government may withdraw benefits under NAFTA. (Article 2019).

NAFTA precludes any government from affording a private right of action under its domestic law for violation of the agreement. (Article 2021).

Agreement Implementation on U.S. Side

Negotiation of bilateral trade agreements such as the NAFTA is authorized by section 1102(c) of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2902(c). The Act requires that the Administration provide certain notifications in advance of the negotiations, and consult with the Congress during the negotiating process. (*Id.*) Now that the agreement has been negotiated, the 1988 Act requires three basic steps for implementation of such an agreement:

First, the President must notify the Congress of his intent to sign the agreement ninety calendar days before he actually does sign it. (19 U.S.C. § 2903(a)(1)(A)). In addition, he is required to submit a report of the Advisory Committee for Trade Policy Negotiations (ACTPN), and of its component advisory committees, on the extent to which the agreement promotes the economic interest of the U.S. and has achieved the negotiating objectives set forth in the authorizing legislation. (19 U.S.C. § 2155(e)). The ACTPN is composed of representatives from the private sector in the areas of labor, industry, agriculture, small business, service industries, retailers, and consumer interests. (19 U.S.C. § 2155(b).

Second, the President must submit to the Congress the final legal text of the agreement, together with a draft of implementing legislation; a statement of administrative action proposed to implement the agreement; and supporting information including an explanation of how the agreement achieves the negotiating and other objectives set forth in the statute. (19 U.S.C. § 2903(a)(1)(B), (a)(2)). It is important to note that, following signature of the agreement, there is no set time period within which the President must submit it to Congress.

Third, that submission to Congress triggers the so-called "fast track" procedures for congressional consideration of the agreement and implementing legislation. Under those procedures, congressional committees have only forty-five days to consider the resolution approving the agreement and legislation. Then, the legislation must be considered on the House and Senate floor within fifteen days after the committees complete (or are discharged from) consideration. (19 U.S.C. § 2191). (These are not calendar days, but are rather computed in a special way). Debate is limited and the legislation is not subject to amendment. (*Id.*)

These "fast track" procedures are actually rules of the House and Senate, respectively, and either chamber can change or modify its own rules at any time. In addition, the law includes a "reverse fast track" procedure, under which the Congress can make the "fast track" rules inapplicable by passing a resolution to that effect within sixty days following introduction of the implementing legislation.

In this case, the first step has already been taken. The ACTPN completed its report on NAFTA on September 16, and the President provided the required notification to Congress on September 18. It should be noted that, although the law does not require the President to submit the final legal text of the agreement in taking this first step, the Administration has made a near-final text available to the Congress. That approach was likely inspired by the experience with the U.S.-Canada Free Trade Agreement. In that case, the Administration did not make a text available when the notice was given, which frustrated key Members of Congress who believed the very purpose of the ninety-day notice provision is to enable the Congress to review the details of the Agreement before it is signed.

This time, the Congress has a detailed text and is already making use of the ninety-day pre-signature period to study the agreement. Hearings have been held by the Senate Finance Committee, House Ways and Means Committee, and House Agriculture Committee, and additional hearings have been scheduled, both of those and other committees.

A number of Members of Congress and interest groups concerned over particular provisions of NAFTA have called for renegotiation of those provisions. Such renegotiation is technically possible, although the Administration has given strong indications that it will resist pressure to re-open the negotiations. It should be noted that, in the case of the U.S.-Canada FTA, one provision — a maritime issue involving with national treatment under the Jones Act — was re-negotiated in the period between notification and signing.

The period between the signing of the agreement and its formal submission to the Congress is likely to consume some time and be used, in effect, for resolution by the Administration and the Congress of many of the controversial issues through negotiation of the terms of the implementing legislation. In the case of the U.S.-Canada FTA, there were many unresolved issues, and congressional leaders actually requested a delay in submission of the agreement and implementing legislation. The agreement was signed on January 2, 1988, but the agreement and its implementing legislation were not formally submitted to the Congress until July 14, 1988. During that period, the Congress held hearings, held ongoing discussions with the Administration, and developed various means to deal with controversial provisions in the implementing legislation, including commitments to further negotiations, agreements about the way certain provisions would be implemented and understandings about the administration of various trade actions and remedies. *See generally*, United States — Canada Free-Trade Agreement Implementation Act of 1988, P.L. 100-449, 19 U.S.C. § 2112 note.

In the case of NAFTA, it now appears the President will sign the agreement before the end of the year. Regardless of who wins the election, there will likely follow, in the first part of 1993, a period of development of the implementing legislation during which interest groups, the Administration, and Congress will try to come to terms with the controversial issues. That will, undoubtedly, mark only another stage in the ongoing evolution of this historic pact, which is likely to present interesting and challenging issues for agriculture and agricultural lawyers for years to come.

A tale of two mangos

The USDA's Judicial Officer has assessed a civil penalty of $375 against an individual who imported "approximately two mangos" from Trinidad into the United States in violation of a regulation, 7 C.F.R. § 319.56, promulgated under the Plant Quarantine Act. *In re Vanessa Hopkins*, P.Q. Docket No. 92-14 (Aug. 27, 1992). The Administrative Law Judge had found that although the minimum civil penalty for a typical violation of the Plant Quarantine Act should be $500.00, a lower penalty was justified in this case because the respondent's default made a hearing unnecessary, the respondent was unemployed, and "[t]he limited nature of the danger involved in this incident is underscored by the fact that the Departmental inspector who located the prohibited fruit apparently assumed the risk of consuming the mango, immediately, at the point of interception."

— *Christopher R. Kelley, Of Counsel, Arent, Fox, Kintner, Plotkin & Kahn*

Ninth Circuit affirms invalidation of marketing order amendments

The Ninth Circuit has affirmed a district court decision invalidating amendments to the marketing order for Valencia oranges established under the Agricultural Marketing Agreement Act (AMAA), 7 U.S.C. § 601 et seq. *Sequoia Orange Co. v. Yeutter*, No. 91-15241, 1992 WL 201038 (9th Cir., filed Aug. 21, 1992). After concluding that the procedures followed by the Secretary in establishing the referendum procedures for the amended marketing order were subject to judicial review, the court held that the Secretary had failed to comply with the requirements of the AMAA and the Administrative Procedure Act (APA) when changes in those procedures were made.

Since 1954, Valencia oranges have been subject to a marketing order imposing quotas on the number of oranges that could be sold each week. Under the AMAA, the order could be amended only with the approval of a specified number of growers.

In 1983, as required by the AMAA, the Secretary published in the Federal Register proposed changes to the Valencia Marketing Order. The notice expressly recited that the proposed action was governed by the provisions of the APA. Written comments were solicited and subsequently received.

In July, 1984, a proposed rule containing twenty-one amendments to the marketing order was published in the Federal Register. The proposed rule also indicated that the required grower referendum would be on the entire amended order rather than on each of the proposed amendments. Also contained in the proposed rule was a "tendency finding," stating that the amended order would tend to effectuate the AMAA's declared policy as required by the AMAA.

After the issuance of the proposed rule, certain growers objected to the contemplated referendum on the entire amended order. The dissatisfied growers lobbied Congress and the Secretary, and, as a result, the Secretary changed position and announced in the Federal Register that the referendum would permit voting on each amendment. Subsequently, thirteen of the twenty-one amendments were approved by the growers.

After unsuccessfully challenging the validity of the amended marketing order administratively, Sequoia Orange Co., a handler of Valencia oranges, brought an action in district court to invalidate the marketing order. The action challenged Secretary's change in position to permit separate voting on the amendments on several grounds, including that the change failed to comply with the APA and the AMAA. The district held that the change did not comply with the notice and comment provisions of the APA, 5 U.S.C. § 553.

In affirming the district court, the Ninth Circuit rejected the Secretary's argument that judicial review of the referendum procedures was barred by the APA's preclusion of judicial review of agency actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Ninth Circuit noted that Sequoia had asserted that the amended order was not issued in accordance with law, and held that "[j]udicial review was proper to determine if the Secretary complied with the procedural requirements of both the AMAA and the APA in amending the marketing order." 1992 WL 201038 *3-4.

The Ninth Circuit also rejected the Secretary's related claim that judicial review was precluded because the AMAA leaves the choice of referendum procedures to the Secretary's discretion and is so broadly drawn so as to provide no meaningful standards against which to judge the Secretary's action. The court held that both "[t]he APA and the AMAA provide legal requirements that the Secretary must follow." *Id.* *4.

In reviewing the Secretary's compliance with the APA and AMAA, the Ninth Circuit held that the Secretary had not complied with the APA's notice and comment requirements notwithstanding the Secretary's claim that the method of voting on amendments was excepted from those requirements as an internal rule of "agency organization, procedure or practice." 5 U.S.C. § 553(b)(A). The court reasoned that "the referendum procedure was an important part of the entire proposal to amend the marketing order and not merely a procedural nicety." 1992 WL 201038 *6. The court also held that the Secretary had not made a proper "tendency finding" as required by the AMAA when the voting procedure was changed, reasoning that the change disregarded the tendency finding made in the proposed order because, "[w]ith the new voting procedure[,] the order could survive with only partial adoption of the slate of amendments originally proposed." *Id.*

Although it affirmed the district court's judgment, the Ninth Circuit declined to accept Sequoia's request that the matter be remanded to the Secretary "with instructions to limit the approval referendum for the marketing order to a vote on a single package." *Id.* at *7. Instead, it concluded that the referendum procedures should be addressed first by the Secretary on the remand.

—Christopher R. Kelley, Arent, Fox, Kintner, Plotkin & Kahn

State Roundup

KANSAS. *Coop Marketing Act amended.* The 1992 Kansas legislature enacted significant amendments to the Cooperative Marketing Act. 1992 Kan. Sess. Laws 227, amending Kan. Stat. Ann. 17-1601 *et seq.*

The Cooperative Marketing Act now includes a definition of "cooperative," which incorporates the definition used under the I.R.C. of 1986. The definition specifically identifies the two types of cooperatives recognized in the Code: the "farmer's cooperative" within the meaning of 26 U.S.C. § 521, as amended, and all other cooperatives covered under the provisions of 26 U.S.C. § 1381, as amended. 1992 Kan. Sess. Laws 227, § 2(a)(7).

The second noteworthy amendment is the designation of two additional classes of nonvoting patrons. Now "participating non-members" and "participants" may be admitted to the cooperative, regardless of occupation. 1992 Kan. Sess. laws 227, § 6, amending Kan. Stat. Ann. § 17-1606(a). These additional classes of patrons are not defined, but it is apparent the legislature recognized de facto changes in the operation of cooperatives, including providing products and services to the general public (but not more than one-half to non-members).

The most significant amendment is that which addresses voting by members of the cooperative. Cooperatives may now provide in their bylaws that voting may be allowed on a one vote per member basis *or may provide for voting based upon patronage or patronage equity or both.* (Emphasis added). 1992 Kan. Sess. Laws 227 § 13, amending Kan. Stat. Ann. § 17-1613(b). This amendment limits a member's vote to five percent of the total unless that member is another cooperative association in which case the vote would be unlimited.

— Van Z. Hampton, Patton & Kerbs, Dodge City, KS

Federal Register in brief

The following is a selection of items published in the Federal Register in the month of August, 1992.

1. ASCS; CCC; Food, Agriculture, Conservation and Trade Act Amendments of 1991; final rule; effective date 8/4/92. 57 Fed. Reg. 34201.

2. CCC; Market Promotion Program; Fiscal year 1993; notice. 57 Fed. Reg. 34545.

4. Ag. Marketing Service; dairy products; grading, inspection, and standards; program integrity; proposed rule; comments due 10/9/92. 57 Fed. Reg. 35492.

5. EPA; Worker protection standard; hazard information; proposed rule; comments due 11/20/92. 57 Fed. Reg. 38167.

— Linda Grim McCormick, Toney, AL

219 New York Avenue
Des Moines, Iowa 50313

ADDRESS
CORRECTION REQUESTED

American Agricultural Law Association News

Report on the 1992 Annual Conference. More than 215 practitioners, educators, government officials, and industry representatives met in Chicago, Illinois September 24-26, 1992 at the American Agricultural Law Association's Thirteenth Annual Business Meeting and Education Conference.

Neil Hamilton delivered the Presidential Address on Philosophical Issues Shaping Agriculture. Friday's luncheon address was delivered by Luther McKinney, Senior Vice President, The Quaker Oats Company, Chicago, IL.

President elect is Professor Norman W. Thorson, the University of Nebraska College of Law. Terence Centner assumed his duties as President. Joining the Board of Directors are Steve Bahls, Professor of Law, University of Montana School of Law, and Delmar Banner, Attorney at Law, Champaign, IL. Retiring Board Members are Sarah Vogel and Ted Deaner. A certificate of appreciation was presented for their good service.

The Awards Committee announced the winner of the Student Writing Competition: Andrew John Norris, "CERCLA's Affirmative Disclosure Requirements."

1993's Annual Meeting will be held November 11-13 at the Hotel Nikko in San Franscisco.

1994's meeting will be October 21-22 at the Peabody Hotel in Memphis, TN.

The 1995 meetin will be held in Kansas City, MO.