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Generation skipping tax

Two recent cases from the U.S. Tax Court and the Kansas Court of Appeals highlight the importance of precise drafting when attempting to apportion liability for the generation-skipping transfer (GST) tax to estate property other than the property actually constituting the generation skipping transfer.

Under I.R.C. section 2603(b), the GST tax is a charge on the property constituting the generation-skipping transfer unless the will (or other dispositive instrument) directs otherwise by *specific reference* to the GST tax. Until recently, there has apparently been no case law to provide guidance on the "specific reference" requirement of I.R.C. section 2603(b). These recent cases, however, demonstrate that scriveners must specifically refer to the GST tax if payment of the tax is desired to be paid from property not constituting the generation-skipping transfer.

In *Estate of Monroe v. Commissioner*, 104 T.C. 352 (1995), and in *In re Estate of Tubbs*, No. 70,975, 1995 Kan. App. Lexis 125 (Aug. 4, 1995), the issue was whether the GST tax should be paid from the property constituting the generation-skipping transfer or from the decedent's residuary estate. In *Monroe*, the decedent's will directed that "all federal estate taxes, state and city inheritance or estate transfer taxes or other death taxes attributable to the foregoing bequest be paid from the residuum of decedent's estate." Similarly, in *Tubbs*, the decedent's will (disposing of the decedent's $4 million agricultural estate) provided that "after payment of all my estate, inheritance and other death taxes, and all costs and debts of administration, I give, devise and bequeath all the rest, residue and remainder of my property, real, personal and mixed, to...." The district court upheld the provisions of the testator's will and apportioned the $345,000 GST tax to the residuary estate, thereby totally depleting it. Incidently, the district court testimony revealed that the scrivener was unaware of the GST tax.

The Tax Court and the Kansas Court of Appeals held that use of the language "other death taxes" was not a specific reference to the generation-skipping transfer tax so as to prevent a charge to the property constituting the transfer as required by I.R.C. section 2603(b). In addition, the *Tubbs* court opined that any public policy of Kansas concerning the application of federal taxes among the decedent's property was preempted by the wording of I.R.C. section 2603(b) under the Supremacy Clause of the U.S. Constitution.

—*Roger A. McEowen, Esq., Assistant Professor of Agricultural Economics and Extension Specialist, Agricultural Law and Policy, Kansas State University, Manhattan, Kansas.*

States take action to limit lender liability under environmental laws and regulations

Banks that extend credit to commercial borrowers secured by real estate face the reality that a contaminated condition on the property creates a risk that the bank's position will be adversely affected by the contaminated condition. Dramatic reductions in value of collateral and potential responsibility for clean-up costs as a result of finding that the bank's involvement with the property owner classifies the bank as an operator of the contaminated property are but two examples of the risks creditors face. In the event of foreclosure and acquisition of the collateral, a creditor bank can directly face liability as the owner of contaminated property, even though the bank did not cause or create the contamination.

Under CERCLA (42 U.S.C. § 9601*et seq.*), secured creditors were able to claim some protection under the Act's secured creditor's exemption, which applied to financial institutions that held ownership interests in contaminated property primarily to protect their security interest in the property and that do not participate in the

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District court affirms swampbuster commenced conversion determination

Rejecting the argument that work that was not disclosed on the work plan approved by the ASCS for a commenced conversion determination should be deemed within the "intent" of the plan, a federal district court has affirmed an ASCS determination that the undisclosed work was not within the scope of the commenced conversion determination. *Von Eye v. United States*, No. Crim. 94-4020, 1995 WL 353670 (D.S.D. May 25, 1995). In so doing, the court ruled that all of the requirements set forth in 7 C.F.R. section 12.5(b)(3) and (5) (1995) must be satisfied to obtain a commenced conversion exemption under the wetland conservation ("swampbuster") provisions of the Food Security Act of 1985 (FSA). Under the FSA's swampbuster provisions, wetland conversions qualifying as commenced conversions do not result in disqualification for federal farm program benefits.

In 1984, plaintiff began draining approximately twenty acres of wetland on his farm. In 1988, he submitted a two-paragraph, handwritten summary of his drainage plan in support of his request for a commenced conversion determination.

Plaintiff received a commenced conversion determination in 1989. In 1990, plaintiff discovered that two culverts under a township road needed to be lowered to complete the drainage. The plan did not mention lowering the culverts. Although plaintiff notified the township board that one of the culverts needed replacement, plaintiff lowered the culverts at his own expense without the required prior approval of the township board. Plaintiff then discovered that one of the culverts needed to be lowered an additional two and a half feet to complete the drainage contemplated by his drainage plan.

Following plaintiff's initial lowering of one of the culverts, the SCS determined that plaintiff had converted wetlands. On administrative appeal, the ASCS extended plaintiff's commenced conversion determination to cover the lowering of the culvert on the grounds that plaintiff was not notified of the extent of the activities covered by the initial determination. However, the ASCS subsequently determined that the additional lowering of that culvert as desired by plaintiff would be beyond the scope of the commenced conversion determination. Plaintiff's administrative appeal of that determination was unsuccessful.

Under 7 C.F.R. section 12.5(b)(3), a commenced conversion determination must be supported by a showing that the drainage work was started before December 23, 1985, or that substantial funds for the drainage work were expended or legally committed prior to that date. In addition, under 7 C.F.R. section 12.5(b)(5), the determination must be supported by a showing that (1) a request for such a determination was made by September 19, 1988; (2) the conversion has been actively pursued; (3) the conversion has been completed on or before January 1, 1995; and (4) if construction has not yet begun, a contract entered into, or supplies purchased, undue economic hardship would result from "substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland."

On review of the ASCS's determination, the district court upheld the ASCS's findings that plaintiff had failed to demonstrate that he would suffer such "undue financial hardship." The court also declined to consider the plan's "intent." The court noted that neither the swampbuster statute nor the implementing regulations made the intent to convert a consideration. To the contrary, the court found that the intention of the statute was to discourage the draining of wetlands.

The court also held that the township road over the culverts did not create an "artificial" wetland within the artificial wetlands exemption to the swampbuster provisions. Finally, the court concluded that the ASCS had already granted plaintiff considerable relief by allowing him to lower the culverts as much as he had because his plan was "merely an outline, not a detailed construction plan," and the plan had failed to mention anything about lowering township road culverts.

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District court affirms ASCS payment limitation determination

An ASCS determination combining a putative custom farmer and several of his customers for the 1985 through 1987 crop years under the so-called "financing" rule has been upheld by a federal district court. *Lagan Farms, Inc. v. Espy*, Nos. 93-4256-SAC, 94-4012-SAC, 1995 WL 316334 (D. Kan. Apr. 14, 1995).

The court upheld the ASCS's determination that the custom farming arrangement was actually a share-crop arrangement, and it affirmed the ASCS's determination that the deferred payment practices of the putative custom farmer precluded the custom farmer and his customers from each being deemed "separate and distinct" under the "financing" rule.

The court also rejected the putative custom farmer's argument that estoppel principles effectively created a one-year statute of limitations for farm program determinations.

—*Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN*

management of the facility. *Id.* § 9601(20)(A). In addition, EPA adopted its "Lender Liability Rule" in April 1992 to clarify the actions that lenders could take in managing a loan without being considered an owner or operator of a facility with the result that liability for environmental problems would follow. In 1994 the U.S. Court of Appeals for the District of Columbia in *Kelley v. EPA*, 15 F.3d 1100, *rehearing denied*, 25 F.3d 1088 (1994), vacated the rule on grounds that it was an attempt by an agency to make determinations of liability under CERCLA, which only courts are empowered to make. Uncertainty as to the grounds for liability returned to the lending business.

Under these circumstances several states took up the challenge to enact their own provisions for affecting liability of lenders and others, such as fiduciaries and economic development agencies, that faced potential liability under environmental laws and regulations. In view of the threat of liability, many of such agencies took protective action which was reflected in their level of market place participation and activity.

A recent example of such state action is Act 1995-3 of the Pennsylvania General Assembly, known as "The Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act," which is codified at Pa. Stat. Ann. tit. 35, section 6027.1 *et seq.* The following discussion summarizes the key provisions found in the Act. The Act became effective on July 18, 1995 and is part of a three-bill package of environmental measures focusing on improving the economic development impacts of environmental laws and regulations imposing liability for site remediation and response costs.

The Act's declaration of purpose makes a clear reference to the problems faced by lenders, fiduciaries, and economic development agencies that are reluctant to provide funding for business opportunities and economic development when confronted with potential liability based on ownership of or holding of an interest in contaminated property. The Act refers to these as "catastrophic risks of environmental liability and remediation costs" and states that such liability will be limited in scope by the Act in order to promote economic development.

Among the Act's key definitions is a list of laws whose liabilities are affected by it. Included in this list is the Clean Streams Law, the Air Pollution Control Act, the Solid Waste Management Act, the Worker and Community Right to Know Act, the Infectious and Chemotherapeutic Waste Law, the Hazardous Sites Cleanup Act, the Storage Tank and Spill Prevention Act, the Hazardous Material Emergency Planning and Response Act, the Oil Spill Responder Liability Act, and any federal, state or local law, statute or regulation, order, interpretation or guidance that pertains to employees, occupational safety and health, public safety and health, natural resources, or the environment.

Section five of the Act contains the express statement limiting lender environmental liability. Under its provisions, a lender who engages in activities involved in the routine practices of commercial lending will not be liable under the listed environmental acts or common law equivalents, unless one of two exceptions occurs. First, the lender directly causes an immediate release or directly exacerbates a release of a regulated substance on or from the property. Second, the lender knowingly and willfully compels the borrower to do an act that causes an immediate release of regulated substances, or violates an environmental act. The term "routine practices of commercial lending" includes activities such as providing financial services, holding security interests, putting into effect workout practices, foreclosing, and selling the property.

Furthermore, the act limits whatever residual liability lenders would have to the cost of a response action that is directly attributable to the lender's activities that are the proximate and efficient cause of the release or violation. Ownership or control of property after foreclosure shall not by itself trigger liability for environmental damage that exists on the property as a result of a release that occurred prior to or commenced before and continues after foreclosure. If a lender's activities directly exacerbate a release, the lender will be responsible for the cost of the response action that is attributable to the exacerbation. Releases that are discovered in the process of doing a due diligence inspection are specifically presumed to be prior or continuing releases on the property.

Section six of the Act provides the express limitation of fiduciary environmental liability. Under this provision, fiduciaries will not be liable under the listed environmental acts, or their common law equivalents, unless all of the following three conditions apply. First, during the time when fiduciary services were actively provided, an event occurred that constituted a release of a regulated substance under any of the environmental acts listed. Second, the fiduciary had the express power and authority to control property that was the cause of or the site of such a release. Third, the release was caused by an act or omission that constituted gross negligence or willful misconduct of the fiduciary at the time of the release. In regard to these three conditions, the Act states that control of leased property is to be deemed in the lessee and not the lessor of the property concerned.

In addition to the express limitations of environmental liability for economic development agencies, lenders, and fiduciaries, the Act specifies that liability under environmental acts or their common law equivalents can also be avoided under one of six defenses. This list includes acts of God, intervening acts of a public enemy, migration from property owned by a third party, actions taken or omitted at the direction of the Department of Environmental Resources, acts of third parties who are not agents of or employed by the lender, fiduciary, or economic development agency, and the exercise of due care with respect to knowledge about regulated substances and reasonable precautions against foreseeable actions of third parties and the consequences that arise from such actions. Whatever other defenses may be available by statute or at common law are also preserved

The Act specifies that it preempts and eliminates all present liability standards and places the burden of proof on the person seeking to have a lender, fiduciary, or economic development agency held liable for a response action or damages.

The Act applies to all legal or equitable interests in property presently or subsequently acquired, to those acquired prior to the date of enactment that are held primarily to protect a security interest in the property, and to fiduciary services presently or subsequently provided and those rendered prior to the date of enactment. The Act also provides that its provisions shall apply to administrative actions, actions, claims or suits that are not yet finally resolved by an agency, court or administrative hearing board regardless of when the release or interest in the property occurred.

— John C. Becker, Professor of Agricultural Law and Economics, The Pennsylvania State University, University Park, Pennsylvania

CONFERENCE CALENDAR

Mid South Conference on Emerging Torts
October 13, 1995, The Peabody Hotel, Memphis, TN
Topics include: Tobacco litigation; beyond worker's compensation: emerging tort issues in employer/employee relationships; prosecuting a toxic tort case: pesticides; recent developments in tort reform.
Sponsored by: The University of Arkansas School of Law and The University of Mississippi Center for Continuing Legal Education.
For more information, call Tim Angle, 601-232-7282.

IN DEPTH

The Noninsured Crop Disaster Assistance Program

By Susan A. Schneider

The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, enacted last October, mandated a number of changes in the structure and implementation of federal crop insurance.[1] A primary goal of the Act was to emphasize insurance as the appropriate remedy for dealing with the risk of disastrous crop loss. The Act promotes this goal by both encouraging farmers to obtain crop insurance and discouraging Congress from passing disaster assistance for crop losses experienced in the future. For example, for the first time, the Act requires that minimal insurance be carried on all insurable crops of "economic significance" as a prerequisite for participation in a number of other USDA programs, most significantly, the price support programs.[2] Coupled with this, the Act discourages ad hoc disaster relief by amending the Balanced Budget Act to expressly prohibit the use of the emergency designation for agricultural crop disaster relief.[3] Thus, any future disaster relief will be considered to be an "on-budget" item, and funding for it can be provided only in conjunction with corresponding cuts in spending or an increase in revenue. From a practical standpoint, this will make future disaster relief far more difficult to enact.[4]

Currently, however, federal crop insurance is available for only fifty-one different crops.[5] The availability of insurance is primarily determined by whether sufficient actuarial data is available for production of a particular crop in a specific area.[6] Obviously, there is a large number of crops for which insurance is simply not available. To address the needs of producers of these crops and to further discourage ad hoc disaster assistance, the Act created a new permanent program designed to protect producers of crops for which insurance is not available. This new program is the Noninsured Crop Disaster Assistance Program, referred to as the NAP.

The stated goal of the NAP is to provide "coverage equivalent to catastrophic risk protection," the minimum level of federal crop insurance, for non-insurable crops.[7] Accordingly, the program provides for benefits only in the event of a major crop loss caused by drought, flood, or other natural disaster, and then only to compensate for a percentage of the loss incurred.

Several features, however, distinguish the NAP from basic federal crop insurance programs and make it more similar to a permanent disaster assistance program. First, the NAP is not an insurance program. Producers are not required to pay processing fees or premiums, although there are annual acreage reporting requirements.[8] Second, "added" or additional levels of insurance coverage are not available.[9] Third, the Act requires that there be an "area loss" in order to trigger NAP coverage.[10] This means that in order to be eligible for NAP benefits, not only must the individual producer experience a severe crop loss, there must also be a loss experienced throughout the producer's "area."[11]

The Act gave the Federal Crop Insurance Corporation (FCIC) the task of implementing the NAP. Accordingly, on May 18, 1995, the FCIC issued interim regulations.[12] This article discusses these regulations and the implementation of the new NAP.

Administration of the NAP

The NAP is administered "under the general supervision of the FCIC."[13] The FCIC may designate the state and local offices of the Consolidated Farm Service Agency (CFSA) to carry out the program.[14] The regulations specifically provide, however, that the FCIC will determine all yields and prices under the NAP, and no delegation of authority to CFSA will preclude the FCIC Manager from determining any question arising under NAP or from reversing or modifying any determination related to NAP made by a CFSA committee.[15]

Eligibility for NAP benefits

In order to be eligible for the NAP, one must be a producer with an interest in an eligible crop.[16] "Producer" is broadly defined to include any "person who, as owner, landlord, tenant, or sharecropper, is entitled to share in the production from the eligible commodity or in the proceeds thereof."[17] The term "person" is defined by reference to the payment limitation rules.[18]

An NAP eligible crop is generally defined as an agricultural commodity crop "for which insurance is not available under any FCIC insurance program and which is commercially produced for food or fiber."[19] This definition includes "floricultural, ornamental nursery, Christmas tree, turfgrass sod, industrial crops, and aquacultural species."[20]

The regulations provide six specific eligibility exclusions. NAP benefits will not be made:

(1) For livestock or livestock by-product losses;

(2) To any person who has "qualifying gross revenues in excess of $2 million;[21]

(3) For losses on crops eligible for catastrophic risk protection insurance;

(4) To any person who has violated chapter XII and section 1764 of the Food Security Act of 1985 by being convicted under Federal or state law of planting, cultivating, growing, producing, harvesting or storing a controlled substance in any crop year;

(5) For producing an agricultural commodity in any crop year on a field on which highly erodible land is predominant, unless the person is exempt under the provisions of 7 C.F.R. § 12.5; or,

(6) For producing an agricultural commodity in any crop year on converted wetland, unless the person is exempt under the provisions of 7 C.F.R. § 12.5.[22]

In addition to the basic eligibility requirements for the producer and the subject crop, the regulations provide that in order for a person to receive NAP benefits in any given year:

(1) The crop loss or prevented planting must have been caused by a drought, flood or other natural disaster;[23]

(2) The producer must have filed one or more acreage reports annually at the local office no later than the date specified by the FCIC for each crop the producer will want made eligible for the NAP program;[24]

(3) The average yield for the area where the producer's losses occurred must be below 65% of the expected area yield;[25]

(4) The producer must have experienced a crop loss greater than 50% of his or her approved yield or have been prevented from planting more than 35% of the total eligible acreage intended to be planted to the eligible crop;[26] and

(5) The producer must "make application and provide a notice of damage or loss within 15 calendar days after the occurrence of the prevented planting (the end of the planting period) or damage to the crop," or for the 1995 crop year only, within the later of 45 days after May 18, 1995 (the date that the regulations were published in the *Federal Register*).[27]

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NAP coverage provided

NAP benefits provide recovery for only a percentage of the producer's yield loss at only a percentage of the expected market price. Thus, there are two reductions as compared with a producer's profit expectations for a non-disaster crop: yield and price.

With regard to yield, producers who are eligible to receive NAP payments will receive benefits based only on whatever crop loss they have that exceeds 50% of their approved yield for the eligible crop. Crop loss will be determined by unit, based on the production of all acreage of the eligible crop (planted and prevented from being planted) in the unit.[28]

With regard to price, for crop years 1995 through 1998, loss payments will be made at 60% of the established average market price for the crop.[29] For crop years after 1998, payments will made at 55% of the established average market price for the crop.[30]

The regulations further provide that FCIC will adjust the NAP payment rate for "significant and variable expenses" that are not incurred because the crop acreage was prevented from being planted or planted but not harvested.[31]

Area loss requirements and area determination

As noted, one of the eligibility criteria for NAP benefits is that the average yield for the "area" where the producer's losses occurred must be below sixty-five percent of the expected area yield.[32] Thus, the producer's "area" must experience a thirty-five percent crop loss in order for the producer to qualify, regardless of the extent of his or her individual loss. This area trigger is "expected to result in major savings on Federal outlays."[33] In other words, there will be numerous cases in which individual producers will not receive benefits despite severe crop loss, because their loss is somewhat isolated or limited in their area.

This area trigger is likely to produce a bureaucratic nightmare for the FCIC. Areas must be established, and expected area yields must be calculated. Numerous crops are likely to be involved in any given area, crops that are not covered by insurance primarily because sufficient actuarial data is not available. Moreover, under the regulations, the precise area determination will not be completed until a crop loss is experienced.[34]

The regulations define the term "area" to be "[t]he geographic region recommended by the state CFSA committee, and approved by FCIC."[35] This region must have a minimum area of 320,000 acres or have not less than an $80 million average value for all crops produced annually within the area.[36] In an apparent attempt to anticipate the erratic path that natural disasters can take, the regulations describe complicated standards for making an area determination. They provide that the minimum area will be determined as follows:

> (a) The shape of the area will be contiguous and will correspond to the shape of the natural disaster to the maximum extent possible. If the acreage affected by the natural disaster is less than the number of acres needed to meet the area size requirement and does not meet the $80 million value requirement, the state CFSA committee will add acres equally from all surrounding cropland including undamaged acres until the minimum size is met.
>
> (b) If the acreage affected by the natural disaster is not contiguous:
>
> (1) The area will include all acreage that has been affected by the same natural disaster within the area.
>
> (2) The acreage included in the area will be contiguous taking into consideration geological breaks (identifiable variations in topography such as mountain ranges and rivers).
>
> (3) If the distance between affected acreages is so distant that it is not practical to include all of the acreage within the area, the acreage may be divided into separate areas.[37]

However, the regulations also provide that the area "may not be defined in any manner that arbitrarily includes or excludes producers or cropland."[38]

Despite even the best intentions of the FCIC, area determinations will likely be a controversial aspect of the NAP. However, the regulations provide that the area determination is "a rule of general applicability" from which there are no appeal rights.[39]

Payment limitations and multiple benefit provisions

NAP payments made to eligible producers are subject to payment limitation provisions similar to those that applied to previous ad hoc disaster assistance. The term "producer" is "considered to mean the term 'person' as determined in accordance with the payment limitation restrictions at 7 CFR part 1497, subpart B."[40] The regulations then provided that "[n]o person shall receive payments under this part in excess of $100,000" and that any "person who has qualifying gross revenues in excess of $2 million for the previous calendar year shall not be eligible to receive NAP payments under this part."[41]

With regard to other USDA benefits, although presumably most price support programs will be inapplicable to the crops eligible for the NAP, there is a provision preventing certain multiple payments. The regulations provide that:

> If a producer is eligible to receive NAP payments under this part and benefits under any other program administered by the Secretary for the same crop loss, the producer must choose whether to receive the other program benefits or NAP payments.[42]

The regulations list the affected benefits as including the Emergency Livestock Feed Assistance Program and "any other program determined by FCIC to compensate the producer for the same crop loss."[43]

Misrepresentation, "scheme and device," and fraud provisions

The regulations set forth strict rules regarding producers who make any misrepresentation to the FCIC in connection with the NAP.[44] They provide that if the FCIC determines that a producer has made a misrepresentation or "participated in, or benefited from, any scheme or device that has the effect of defeating, or is designed to defeat the purpose of" the regulations, benefits will be denied to this producer.[45] If a payment was improperly made to this producer, refund of the payment must be made with interest.[46] Moreover, the regulations authorize the FCIC to "impose such other penalties as authorized by section 506(n) of the Federal Crop Insurance Act, as amended or available under 7 CFR part 400, subpart R."[47]

Appeal rights

The regulations provide that the "appeal, reconsideration, or review of all determinations" made regarding the NAP must be in accordance with 7 C.F.R. Part 780 or the regulations promulgated by the National Appeals Division.[48] As noted previously, the FCIC takes the position that area determinations are not appealable, as they are matters of "general applicability."[49]

Possible changes in the NAP regulations

On August 7, 1995, the FCIC issued a request for comments on the rules that it has published so far this year implementing the Act. Included in this request for comments are the catastrophic risk protection implementing regulations[50] and the catastrophic risk protection endorsement[51] published last January, and the Non-insured Crop Disaster Assistance Program (NAP) regulations discussed herein.[52] The notice indicated that the FCIC was seeking further comments on these regulations, and presumably, amendments may be made in response to the comments received.

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ENDNOTES

[1] Pub. L. No. 103-354, 108 Stat. 3178 (1994) (codified as amended at 7 U.S.C. §§ 1500 - 1520 and in other scattered sections of 7 U.S.C.). Hereinafter, this law will be referred to as the Act, and section citations will refer to sections set forth in Pub. L. No. 103-354.

[2] The Act, at § 106 (codified at 7 U.S.C.A. § 1508(b)(7)(A) (West Supp. 1995)). The phrase "economic significance" is defined as a crop that "has contributed or is expected to contribute 10 percent or more of the total expected value of all crops grown by the producer." The Act at § 106 (codified at 7 U.S.C.A. § 1508(b)(7)(B) (West Supp. 1995)).

[3] The Act at § 119(d), codified at 2 U.S.C.A. §§ 901(b)(2)(D)(i), 902(e) (West Supp. 1995).

[4] *See*, Economic Research Service, USDA, *Federal Crop Insurance Reform: How Does It Work?* Agric. Outlook, March 1995, at 24.

[5] *Id.*

[6] 60 Fed. Reg. 1998 (1995) (to be codified at 7 C.F.R. § 400.652(a)).

[7] *Id.* at § 111(a) (codified at 7 U.S.C.A. § 1519(a)(1) (West Supp. 1995)). The Catastrophic Risk Protection program is the base level of insurance provided through the federal crop insurance program. It provides basic crop disaster protection for crop losses that exceed fifty percent (50%). Payment is made on 50% of the producer's historical crop yield (APH) at 60% of the expected market price, as determined by FCIC. The Act at § 106 (codified at 7 U.S.C.A. § 1508 (West Supp. 1995).

[8] The Act at § 111 (codified at 7 U.S.C.A. § 1519(a)(2) (West Supp. 1995)).

[9] Economic Research Service, *supra* note 4 at 29.

[10] *Id.* at § 111(c)(1) (codified at 7 U.S.C.A. 1519(c)(1)).

[11] *Id.*

[12] 60 Fed. Reg 26,669 (1995) (to be codified at 7 C.F.R. pt. 404).

[13] 60 Fed. Reg. 26,671 (1995) (to be codified at 7 C.F.R. § 404.5).

[14] *Id.*

[15] *Id.*

[16] 60 Fed. Reg. 26,673 (1995) (to be codified at 7 C.F.R. § 404.11).

[17] 60 Fed. Reg. 26,672 (1995) (to be codified at 7 C.F.R. § 404.7(z)).

[18] 7 C.F.R. pt. 1497, subpt. B (1995).

[19] 60 Fed. Reg. 26,671 (1995) (to be codified at 7 C.F.R. § 404.7(n)).

[20] *Id.*

[21] 60 Fed. Reg. 26,673 (1995) (to be codified at 7 C.F.R. § 404.11). The phrase "qualifying gross revenues" is defined differently depending upon whether the person receives more than 50% of his or her income from farming. 60 Fed. Reg. 26,672 (1995) (to be codified at 7 C.F.R. § 404.7(bb)). If more than 50% percent of the person's income comes from "farming, ranching, and forestry operations," the phrase "qualifying gross revenue" refers to only "annual gross income for the calendar year from such operations". *Id.* If not, it means "total gross income for all sources." *Id.* This exclusion is apparently based on the exclusion contained in prior ad hoc disaster assistance. 7 U.S.C. § 1421 note § 231; 7 C.F.R. § 1477.3(g) (1995). The specific language used with regard to NAP, however, takes into consideration some of the arguments used in litigation challenging the regulatory interpretation of the exclusion as applied to disaster assistance. The Act at § 112 (codified at 7 U.S.C. § 1519). *See, Doane v. Espy*, No. 91-C-852-C, 1993 WL 762880 (W.D. Wisc. July 20, 1993), *rev'd*, 26 F.3d 783 (7th Cir. 1994); *Haubein Farms, Inc. v. Department of Agric.*, 824 F.Supp. 239 (D.D.C. 1993); *Vculek v. Yeutter*, 754 F. Supp. 154 (N.N.D. 1990) *aff'd per curium sub. nom. Vculek v. Madigan*, 950 F.2d 727 (8th Cir. 1991). *See generally*, Phil Fraas, *USDA Disaster Payments "Means Test,"* Agric. L. Update, Nov. 1994, at 1 (discussing the foregoing cases).

[22] 60 Fed. Reg. 26,673 (1995)(7 C.F.R. § 404.11(b)).

[23] *Id.*

[24] 60 Fed. Reg. 26,674 (1995) (to be codified at 7 C.F.R. § 404.17).

[25] 60 Fed. Reg. 26,674 (1995) (to be codified at 7 C.F.R. § 404.19).

[26] *Id.*

[27] 60 Fed. Reg. 26,675 (1995) (to be codified at 7 C.F.R. § 404.21).

[28] 60 Fed. Reg. 26,672 (1995) (to be codified at 7 C.F.R. § 404.9). The regulations state that:

Approved yields for the eligible crop will be based on the producer's actual production history in accordance with the provisions of 7 CFR part 400, subpart G. The approved yield established for the producer for the year in which the NAP payments are offered will be equal to the average of the consecutive crop year yields reported and certified of that producer for that eligible crop.

60 Fed. Reg. 26,673 (1995) (to be codified at 7 C.F.R. § 404.15).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] 60 Fed. Reg. 26,674 (1995) (to be codified at 7 C.F.R. § 404.19).

[33] *Supra* note 4 at 29.

[34] 60 Fed. Reg. 26,673 (1995) (to be codified at 7 C.F.R. § 404.13).

[35] 60 Fed. Reg. 26,671 (1995) (to be codified at 7 C.F.R. § 404.7(f)).

[36] 60 Fed. Reg. 26,673 (to be codified at 7 C.F.R. § 404.13). As an alternative, for eligible areas outside the United States, the area shall include ten or more producers of the crop. *Id.*

[37] *Id.*

[38] *Id.*

[39] 60 Fed. Reg. 26,676 (1995) (to be codified at 7 C.F.R. § 404.33).

[40] 60 Fed. Reg. 26,675 (1995) (to be codified at 7 C.F.R. § 404.25).

[41] *Id.*

[42] 60 Fed. Reg. 26,675 (1995) (to be codified at 7 C.F.R. § 404.23).

[43] *Id.*

[44] 60 Fed. Reg. 26,675 (1995) (to be codified at 7 C.F.R. § 404.27).

[45] *Id.* "Scheme and device" is defined as including:

(1) Concealing any information having a bearing on the application of the rules of this part;

(2) Submitting false information to the FCIC or any county or state CFSA committee; or

(3) Creating fictitious entities for the purpose of concealing the interest of a person in the farming operation.

Id.

[46] *Id.*

[47] *Id.*

[48] 60 Fed. Reg. 26,676 (1995) (to be codified at 7 C.F.R. § 404.33).

[49] *Id.*

[50] 60 Fed. Reg. 1996 (1995) (to be codified at 7 C.F.R. pt. 400).

[51] 60 Fed. Reg. 2000 (1995) (to be codified at 7 C.F.R. pt. 402).

[52] 60 Fed. Reg. 26,671 (1995) (to be codified at 7 C.F.R. pt. 404). The notice also requested comments on the regulations establishing a new reconsideration process for reinsured companies, a topic not discussed in this article. 60 Fed. Reg. 21,035 (1995) (to be codified at 7 C.F.R. pt. 400).

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* from July 24, 1995 to August 17, 1995.

1. APHIS; Tuberculosis in cattle, bison, and cervids; payment of indemnity; interim rule; comments due 9/24/95. 60 Fed. Reg. 37804.

2. FCIC; Crop insurance endorsements, corn, grain sorghum, soybeans, etc.; late and prevented planting provisions; 1994 and succeeding crop years; final rule; effective date 11/30/93. 50 Fed. Reg. 37933.

3. FCIC; Late planting agreement option; final rule; effective date 5/1/95. 60 Fed. Reg. 40054.

4. FCA; Capital adequacy; proposed rule; comments due 10/25/95. 60 Fed. Reg. 38521.

—*Linda Grim McCormick, Alvin, TX*

CALIFORNIA. *Rezoning of agricultural land conditional on voter approval.* The California Supreme Court has ruled that there is no statutory or state constitutional defect in Measure J, a citizen-sponsored initiative measure approved by the voters of Napa County in 1990. *DeVita v. County of Napa*, 9 Cal. 4th 763, 38 Cal. Rptr.2d 699, 889 P.2d 1019 (Cal. 1995).

Measure J amends the land use element of the Napa County general plan by requiring that redesignation of existing agricultural land and open space in the general plan and map for the county be essentially conditional on voter approval. The Measure is effective for thirty years, i.e., until the year 2021. Measure J applies to about eighty-five percent of the unincorporated land in Napa County. The Measure includes exemptions rhr allow redesignation without voter approval in the following situations: (1) the land is redesignated in conjunction with annexation to a city; (2) the county board of supervisors makes specified findings including that the land is physically unusable for agriculture, that it is likely to be annexed in the future, and that the proposed use of the land is compatible with agriculture;(3) the land is redesignated to accommodate the siting of a solid waste disposal facility; or (4) the redesignation avoids an unconstitutional taking of property

— State Roundup —

As noted in an amicus brief in support of the Measure filed by the cities of Napa County, the purpose of Measure J is to slow suburban sprawl into agricultural areas and direct growth to existing municipal areas, thus reducing developmental encroachment incompatible with farming. This long-term protection of agricultural land is also intended to encourage farmers to make investments in capital equipment for agricultural production and to alleviate farmers' fears that their land will be subject to property tax increases associated with developing areas.

Five Napa County residents, the Building Industry Association of Northern California, and Security Owners Corporation, Inc. challenged Measure J on two grounds, contending that general plans cannot be amended by voter initiative and that the authority of future county boards of supervisors cannot be limited by mandatory voter approval requirements such as those found in Measure J. Both the trial court and the California Court of Appeals upheld the validity of Measure J against these challenges.

On appeal to the California Supreme Court, the court ruled for the first time that the land use element of general plans may be amended by voter initiative. The court found that under state law, general plan amendments are a matter of local, not statewide concern, and that the state legislature has not given governing bodies of local governments exclusive authority to amend general plans. The court also found that in California Elections Code section 9111, the state legislature specifically recognized that general plans may be amended by initiative.

The court also ruled that the requirement of Measure J that a majority of county voters approve of subsequent general plan redesignations of agricultural and open space for a period of thirty years did not unduly interfere with the power of future county boards of supervisors to amend the general plan. The court also found that the voter approval provisions, including the specific exemptions from voter approval, did not contravene any existing state law provisions.

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

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New one "person" joint operation rule

The CFSA recently amended its internal operating handbook for farm program payment limitations, 1-PL (Revision 1), to permit joint operations whose members are willing to limit themselves to one payment limit to deem a member to be a "person" who is "actively engaged in farming" even though none of the operation's members actually satisfies the otherwise applicable "actively engaged in farming" requirements. This new "one 'person' joint operation rule" is a substantive one, and the current payment limitation regulations do not permit the result it produces. The CFSA, however, has not amended the payment limitation regulations, 7 C.F.R. Part 1497, to reflect the new "rule". Thus, the public has had no opportunity to comment on it and little chance to learn of its existence, both of which would have happened if the CFSA had complied with the "notice and comment" rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. section 553, as it is required to do.

For payment limitation purposes, "joint operations" are general partnerships, joint ventures, and similar business organizations. Unlike corporations, joint operations cannot receive farm program payments as "persons." Only the joint operation's members are eligible to be "persons", and each member can become eligible for a separate payment limit.

Under the current payment limitation regulations, only joint operation members who are "actively engaged in farming" can receive program payments. To be "actively engaged in farming", a member must make "significant" contributions of land, capital, equipment, or a combination thereof, or the joint operation must do so on the member's behalf. In addition, the member must make a "significant" contribution of labor, management, or a combination thereof. These contributions must be "commensurate," or about equal, in value with the member's share of the joint operation's profits and losses. If any member does not satisfy these requirements, no other member can receive the payments that would have been earned by the ineligible member.

Typically, the "significant contribution" of inputs is made by the joint operation on behalf of its members. In this way, the contribution is attributed proportionally to the members in determining whether their respective contributions are "commensurate." Each member must then contribute the required services. Sometimes a member's total contributions will fall short of being "significant" or "commensurate." When this happens, the member's potential payments are not paid to anyone. While the loss of these payments can hurt any farming operation, the burden may be especially hard on small operations. This hardship may explain the CFSA's motivations for the recent handbook amendment.

In direct contradiction of the regulations' requirements, the recent handbook amendment allows joint operation members to satisfy the "significant contribution" requirement through the combined contributions of the joint operation's members. It also effectively eliminates the "commensurate" contribution requirement for each of the joint operation's members. In return, the joint operation's members must all agree to be treated as one "person" for payment limitation purposes.

The amendment essentially allows at least one, but only one, joint operation member to be a "person" who is "actively engaged in farming" when the total contributions of all of the joint operation's members are "significant." This new "rule", therefore, benefits joint operations that are incapable of earning, or relinquish the right to earn, program payments greater than a single limit and that have one or more individual members who cannot make "significant" or "commensurate" contributions. Whether this "rule" can be relied upon before it appears in the payment limitation regulations is an open question, however.

—*Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN*

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA news

16th Annual Education Conference — Nov. 3-4, 1995
The Annual meeting is just two months away. Those of you thinking of going to Kansas City should consider making your reservations now. This is especially true for hotel reservations, which may be made directly with The Ritz Carlton by calling (816) 756-1500. A limited number of rooms are available and **reservations must be made by October 2, 1995**. After October 2, rooms will be booked on a space available basis only at the prevailing hotel rates. When making reservations, please indicate that you are a registrant of the American Agricultural Law Association Conference in order to obtain the $110 Single/Double rate from November 2 through November 5, 1995.

If you have not received a brochure or would like additional ones, please let me know. I look forward to seeing you in Kansas City in the near future.

—Bill Babione, AALA Director