Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless.

— Martin Luther King, Jr.

Coleman/Farmers Home litigation update

On June 2, 1987, Judge Bruce Van Sickle of the United States District Court, District of North Dakota, Southwestern Division, responding to plaintiffs' pleas for a well-defined notice and hearing procedure under 7 U.S.C. Section 1981a, issued the latest order in a continuing litigation involving the Farmers Home Administration and a class of borrowers. (Previous reports tracing the evolution of the *Coleman* litigation can be found in the March, 1984, April, 1986, and March, 1987 issues of the *Agricultural Law Update*.)

In *Coleman v. Lyng*, 663 F. Supp. 1315 (D.N.D. 1987), the plaintiffs presented fourteen claims for relief. The court summarily dismissed all but two of the claims.

The seventh claim challenged three of the requirements for loan deferral found at 7 C.F.R. § 1951.44. That part of the claim which challenged FmHA's statement of the basis and purpose of 7 C.F.R. § 1951.44(b)(5), was found by the court to have merit. Judge Van Sickle gave FmHA thirty days to submit a more detailed statement of the true basis and purpose of the regulation. This claim was dismissed, however, to the extent that it challenged the propriety of the regulation itself.

The tenth claim alleged that the notice provided borrowers by FmHA forms 1924-14, 1924-25, and 1924-26, known as the pre-termination package, was constitutionally deficient. After finding that FmHA borrowers had available a number of complex loan-servicing options, and that less than thirty percent of FmHA borrowers had greater than a high school education, the court was of the opinion that the notice must be tailored to strike a "reasonable balance between providing complete notice of the options available and ensuring that the notice given can be read and understood by its intended recipients." 663 F. Supp. at 1331.

The court found that form 1924-26 was particularly offensive. This form, which gave the borrower a number of loan-servicing options from which to choose, was, in the court's view, more than a notice form. This form was actually the first step in the application of the adverse action. As such, this form had to be clear and comprehensive. Also, the court found that borrowers seeking additional information from FmHA concerning the options available on form 1924-26 were frequently given misleading information or, worse yet, no information at all. Consequently, the court called for changes in form 1924-26.

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Nonpoint source guidance

In August, 1987, the Environmental Protection Agency (EPA) made two publications entitled *Nonpoint Source Guidance* and *Clean Lakes Guidance* available to interested parties. These documents are intended to assist states in fulfilling their obligations under Sections 319 and 314 (33 U.S.C. § § 1329 and 1324) of the Water Quality Act of 1987, Pub. L. No. 100-4. 101 Stat. 7. These two sections require states to develop programs to identify and manage nonpoint sources of water pollution, a category which includes many agricultural production activities.

Under section 319, the governor of a state, after notice and opportunity for public comment, must submit to EPA a State Assessment Report and a State Management Program.

The State Assessment Report should include four categories of information. All of a state's navigable waters that evidence nonpoint source pollution problems should be identified. (These assessments should be made on a watershed-by-watershed basis.) Second, categories and subcategories of nonpoint sources must be identified. Third, state processes for identifying the best management practices to be used in controlling nonpoint source pollution must be described. Finally, state and local programs for controlling nonpoint source pollution must be identified. The Assessment Report is to be submitted either before or concurrently with the state's Management Program.

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A statement must be added to form 1924-26 which notifies the borrower that "complete explanations of the various options listed on the form, and the implications or effects of choosing or rejecting them, are available at the local county FmHA office." *Id.* at 1332. Also, form 1924-26 had to be redrafted "to allow borrowers to make a separate election of options for each loan accelerated and for each reason given for each proposed adverse action. *Id.* at 1333. The court order, entered on May 7, 1987, gave FmHA thirty days to change form 1924-26.

On June 2, 1987, Judge Van Sickle found that retroactive relief was needed to offset the damage done by the defective forms. He grouped those borrowers affected by the May 7 ruling into three categories: (1) those borrowers who received form 1924-26 prior to its being redrafted, but who had not yet had their loans accelerated by FmHA. The court found there to be approximately 65,000 borrowers in this category; (2) those borrowers who had received form 1924-26 before it was redrafted, and had had their loans accelerated, but had not yet lost title to their property. The court determined there to be about 13,000 borrowers in this group; and (3) those borrowers who had received the faulty form 1924-26, and who had lost title to their property. In the court's opinion, there were about 1,000 borrowers in this group.

Which group the borrower was in determined whether, and to what extent, retroactive relief would be granted.

The court granted retroactive relief to those borrowers in the first group. FmHA was barred from accelerating the loan of any person in this group without first providing notice forms which comported with the court's May 7 ruling. Also, any FmHA actions taken in reliance on the defective forms were declared void.

Borrowers in the second group were also protected. The court opted to maintain the status quo as of May 7, and enjoined FmHA from foreclosing on these borrowers until thirty days after the corrected notice forms were available in all FmHA offices. FmHA was not required however, to restore to a borrower in this category any security releases or to reverse the acceleration of a loan.

Those borrowers in the third group were dealt with differently. The court felt that, as applied to this group, the benefits of retroactive relief would be outweighed by the unequal results of such relief. Borrowers in this group were considered to be free to pursue individual litigation in local courts provided they could prove actual damages as a result of the defective notice forms.

— Michael B. Thompson

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The Management Program should serve as an overview of a state's nonpoint source pollution control programs. The Management Program must contain a summary of what the state intends to achieve in the four fiscal years following the date of program submission. To the extent workable, the Management Program must be developed on a watershed-by-watershed basis. In addition, the Management Program should focus on geographical areas that have been found to need priority treatment.

The State Management Program should include six categories of information. One, best management practice (BMP) which will be used should be identified. Two, programs designed to further implementation of the BMPs should be listed. Third, a schedule of implementation should be included. Fourth, the state attorney general must certify that the state laws provide sufficient authority to implement the Management Program, and if not, what remedial actions will be taken. Fifth, the program should list available funding. And sixth, the state must identify federal programs that it will monitor for their effect on the purposes and objectives of the Management Program.

The Management Program and the Assessment Report are to be submitted to the correct EPA Regional Office no later than August 4, 1988.

Pursuant to the "clean lakes" provision, beginning April 1, 1988, every state must prepare and submit to EPA a biennial report outlining state efforts to keep lakes unpolluted. As indicated by the Clean Lakes Program Guidance, this report should include a classification study, a delineation of damages and threatened lakes, and an explanation of the status and trends of lake water quality. The submission of this report will make the state eligible for some amount of federal financial assistance.

Sections 314 and 319 also contain provisions concerning federal financial help to states in implementing the nonpoint source pollution control programs contained in their reports. This in turn may lead to nonpoint source pollution control, and address a regulatory omission found in the Federal Water Pollution Control Act.

Copies of the Nonpoint Source Guidance and the Clean Lakes Guidance may be obtained by writing to the U.S. Environmental Protection Agency, Office of Water, Office of Water Regulations and Standards, Washington, D.C. 20460.

— Michael B. Thompson

Cattle Not Tools of the Trade

In re Newbury, 70 Bankr. 1 (Bankr. D. Kan. 1985) clarified certain provisions of 11 U.S.C. § 522 as applied to cattle. The debtors, who are farmers, moved to avoid liens on their cattle pursuant to § 522(f) (2) (A), contending that § 522(b) and Kansas Stat. Ann. § 60-2304 permitted the exemption. § 522(f) (2) (A) includes animals and crops that are "held primarily for the personal, family, or household use of the debtor." The court, noting the fact that federal law determines the availability of lien avoidance, held that liens can be avoided only on items that are exempt under state law *and* which are included under the provisions of § 522(f) (2).

Accordingly, the court held that the debtors were entitled to avoid liens on those cattle which they could prove were to be used within one year as food for their family. Cattle which were being held for income purposes did not qualify for lien avoidance.

Alternatively, the debtors contended that their cattle were tools of their trade of farming. 11 U.S.C. § 522(f) (2) (B). The court held that, under Kansas law, cattle are not tools of a farmer's trade, disagreeing with the holding in *In re Walkington*, 42 Bankr. 67 (Bankr. W.D. Mich. 1984) that dairy cattle are tools of the trade of a dairy farmer.

— Julia R. Wilder

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Cooperative Director Legislation

Cooperative farmer directors are increasingly concerned about personal liability exposure for acts performed in their director capacity. (*See, generally*, Wiggins, *Cooperatives, Securities Violations, and Advisor Liability: A Case Study*, 2 J. of Agricultural Cooperation (in press); *Robertson v. White*, 633 F. Supp. 954 (W.D. Ark. 1986); *Robertson v. White*, 635 F. Supp. 851 (W.D. Ark. 1986); and D. Fee, A. Hoberg and L. McCormick, Director Liability in Agricultural Cooperatives, USDA, ACS Information Rept. 34 (Dec. 1984).

Attempts to alleviate the problem include increased emphasis on director education, indemnification programs in which a cooperative may indemnify directors for costs and expenses they incur defending their actions, director and officer insurance, and statutory modification or limitation of individual director's liability. The end result of the latter may be to lower standards applied to directors to eliminate personal liability for conduct for which they would otherwise be liable, or to limit the class of persons to whom they may be liable.

Washington is one state which has authorized modification or limitation of directors' liability. Recently it extended several options to cooperatives. Act of April 29, 1987, ch. 212, 1987 Wash. Legis. Serv. 334 (West).

The act permits cooperatives to add to articles of incorporation a provision "eliminating or limiting the personal liability of a director to the association or its members for monetary damages for conduct as a director." A cooperative may not eliminate liability for acts or omissions involving intentional misconduct, a knowing violation of law, or a transaction improperly benefitting a director personally.

A second change extends to cooperative directors protections given directors of Washington nonprofit corporations. The provision says a director "is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes gross negligence." However, the provision does not limit or modify "in any manner the duties or liability of a director or officer of a corporation to the corporation or the corporation's members." Finally, statutory liability for certain kinds of financial mismanagement is not eliminated or limited.

—James R. Baarda

FmHA loan prevents condemnation

In 1971, Bear Creek Water Association, a nonprofit corporation, obtained a certificate of public convenience, which entitled them to operate a rural water utility near Madison, Mississippi. Subsequently, Bear Creek established and operated a rural water system, receiving financial assistance from the Farmers Home Administration.

In 1985, Madison launched eminent domain proceedings to condemn Bear Creek's facilities within Madison's city limits, as well as Bear Creek's certificate to operate in the area. Farmers Home Administration intervened in the litigation, and the case was removed to federal court.

The district court granted Bear Creek's motion for summary judgment. The court found that because Bear Creek was indebted to FmHA, 7 U.S.C. § 1926(b) prevented Madison's condemnation action. The city thereafter appealed.

The Fifth Circuit Court of Appeals agreed with the district court in *Madison, Mississippi v. Bear Creek Water Association*, Inc., 816 F.2d 1057 (1987). It held that "[a] bright-line rule which prohibits condemnation throughout the FmHA loan term at least creates certainty for the municipal planner and rural water authority, even if it limits the municipality's options. 816 F.2d at 1059.

Tenth amendment arguments were rejected, with the court characterizing the effect of 7 U.S.C. § *1926(b) as not being an infringement on Madison's sovereign powers, but as rather "fosterfing] a cooperative effort between local and federal authorities."* *Id.* at 1061.

Michael B. Thompson

Federal Register in brief

The following is a selection of items that have been published in the *Federal Register* in the last few weeks.

1. **FmHA.** Sale and Release of Chattel Security; Final Rule. Effective date: Aug. 26, 1987. 52 Fed. Reg. 32119.

2. **FmHA.** Sale of Section 502 Rural Housing Loans; Borrowers' Rights Guidelines; Final Rule. Effective date: Sept. 21, 1987. 52 Fed. Reg. 35520.

3. **PSA.** Amendment to Certification of Central Filing System; Oregon. Aug. 28, 1987. 52 Fed. Reg. 33260.

4. **IRS.** Income Taxes; Tax on Unearned Income of Certain Minor Children; Temporary regulations. Regulations are effective for taxable years beginning after Dec. 31, 1986. 52 Fed. Reg. 33577.

5. **IRS.** Income Taxes; Tax on Unearned Income of Certain Minor Children; Correction. 52 Fed. Reg. 36133.

6. **IRS.** Basis Adjustments for Investment Tax Credits; Notice of Proposed Rulemaking. Written comments due by Nov. 20, 1987. 52 Fed. Reg. 35438.

7. **EPA.** Water Quality Act of 1987; Implementation; Draft Guidance Availability. 52 Fed. Reg. 33643. See accompanying article in this issue.

8. **APHIS.** Availability of Environmental Assessment and Finding of No Significant Impact for Field Testing of a Recombinant Derived Live Pseudorabies Virus Vaccine; Notice. Field trials were to commence Oct. 9, 1987. 52 Fed. Reg. 33982.

9. **APHIS.** Genetically Engineered Organisms and Products; Exemption for Interstate Movement of Certain Microorganisms Under Specified Conditions; Proposed rule. 52 Fed. Reg. 35921.

10. **USDA.** Highly Erodible Land and Wetland Conservation; Final Rule and Notice of finding no significant impact. Effective date: Sept. 17, 1987. 52 Fed. Reg. 35194.

11. **USDA.** Agricultural Marketing Service; Standards for Grade of Slaughter Cattle and Standards for Grades of Carcass Beef; Final Rule. Effective date: Nov. 23, 1987. 52 Fed. Reg. 35679.

—Linda Grim McCormick

AG LAW CONFERENCE CALENDAR

Farm Bankruptcies under Chapter 12 — Recent Developments.
Nov. 12, Satellite seminar.

Topics include: income tax aspects, management of secured liens, senior lien subordination, and cash flow.

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National Agricultural Bankers Conference.
Nov. 15-18, Washington, D.C.

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Conservation easements: qualifying for federal tax incentives

by Edward Thompson, Jr.

An agricultural conservation easement is an interest in real property[1] that gives the holder the right to prevent uses of the land — nonfarm construction, removal of soil conservation practices, improper cultivation, etc. — that would destroy or erode its capacity to produce food and fiber. Such easements are used by a growing number of landowners to assure that heirs or other successors to title will be conscientious stewards of the "home place." They are flexible instruments that can also accommodate a wide variety of purposes — preserving scenery, wildlife habitat and historic buildings among them — as well as a landowner's desire to permit some future development such as homes for family members, hired hands, and so forth.

When perpetual in duration and otherwise qualified under the Internal Revenue Code, the donation of an agricultural conservation easement (or sale at less than market value) to certain nonprofit organizations, entitles the donor to claim federal income, gift, and estate tax deductions provided by Congress as an incentive to land conservation.[2] Thus, they can also serve as a significant tool for farm business and estate planning.[3] This article will briefly discuss issues related to the qualification of agricultural conservation easements as charitable contributions under I.R.C. § 170.

Easements as charitable contributions

Charitable contributions are broadly defined by the Internal Revenue Code as all gifts, including property interests, to certain nonprofit organizations described in I.R.C. § 170(c). Normally, gifts of partial interests in real property, including conservation easements, do not qualify for a deduction, but there is an exception for a "qualified conservation contribution."[4]

Internal Revenue Code § 170(h)(1) defines a "qualified conservation contribution" as a contribution —

(A) of a qualified real property interest,

(B) to a qualified organization,

(C) exclusively for conservation purposes.

"Qualified real property" interests include a "restriction (granted in perpetuity) on the use which may be made of the real property" — *i.e.*, a conservation easement.[5] Easements for a term of years thus do *not* qualify.

"Qualified organizations" include public agencies and private groups like the American Farmland Trust that are tax-exempt, nonprofit organizations under I.R.C. § 501(c)(3) and are *not* "private foundations" under I.R.C. § 509(a)(2).[6]

Farmland as open space: two-part test

"Conservation purposes" is defined by I.R.C. § 170(h)(4)(A) to mean —

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,

(iii) *the preservation of open space (including farmland and forest land) where such preservation is* —

(I) for the scenic enjoyment of the general public, or

(II) *pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit,* or

(iv) the preservation of an historically important land area or a certified historic structure.

The underscored language highlights the two-part "open space" test that conservation easements intended to preserve agricultural production capability of farmland and ranchland must satisfy to qualify for tax deductions.[7]

Clearly delineated conservation policy

In applying this test, ask first whether the donation of an easement is "pursuant to a clearly delineated Federal, state, or local governmental conservation policy." The legislative history of the applicable tax law and IRS regulations (Treas. Reg. § 1.170A-14 (1986)) provide guidance on what qualifies as such a policy.

Congressional committee reports on the Tax Treatment Extension Act of 1980, Pub. L. No. 96-541, 94 Stat. 3204 (codified at I.R.C. § 170) explain that the policy test is intended to "protect the types of property identified by representatives of the public as worthy of preservation or conservation."[8] However, a broad declaration by a single public official or legislative body does not by itself constitute a clearly delineated policy. The official expression of public conservation policy must be backed by a "significant commitment."[9]

The IRS regulations themselves cite a state purchase-of-development-rights program in an example of a qualifying agricultural conservation easement.[10] Private letter rulings issued under this Code section have held that specific local master plans, agricultural zoning ordinances, state constitutional provisions, agricultural district and taxation statutes are clearly delineated governmental policies.[11]

Note that a conservation easement donation must be "pursuant to" the governmental policy of preserving agricultural land. The land over which the easement is to be placed should meet the criteria established by the policies relied on to support the claim of a deduction. An example would be farmland that is, in fact, zoned for agricultural use under a community master plan that seeks to preserve such land.

Significant public benefit

The second part of the open space test is whether the easement donation must "yield a significant public benefit." To demonstrate this, the farmland subject to the easement must be distinguished from "ordinary" land.[12] The above-noted congressional committee reports state that all facts and circumstances germane to the contribution will be evaluated in determining public benefit. No single factor is necessarily determinative. The IRS regulations list the following considerations, intended as examples rather than a checklist.

- uniqueness of the property to the area
- intensity of (existing and foreseeable) land development in the vicinity of the property
- consistency of proposed open space use (i.e., agriculture) with public conservation programs in the region
- consistency of use with private conservation programs (e.g., other lands under easement)
- likelihood that development of property would degrade the scenic, natural or historic character of the area
- opportunity of the public to use the property
- importance of preserving a landscape that attracts tourism or commerce (arguably including agriculture)
- likelihood that donee will acquire equally desirable and valuable substitute property (i.e., acquire other easements)
- cost to donee of enforcing easement
- population density in the area
- consistency of open space use with a legislatively mandated program identifying particular parcels of land for future protection.[13]

In private letter rulings applying this test, the Service tends to emphasize the intensity of development in the vicinity of a farm, apparently on the theory that open space is more valuable to the public as it becomes scarce. *See supra* note 11. The public benefit requirement tends to merge with the policy test to the extent that the existence of a governmental conservation policy is

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evidence that the officials who adopted it were of the opinion that the public would thereby benefit. The IRS regulations recognize this in a "sliding scale" approach to determining if this test is met.[14]

Restriction on use

Conservation easements are a very flexible method of protecting resource values of property. The Internal Revenue Code does not stipulate the extent to which an easement must restrict the use of the land. However, the IRS regulations provide that "(a) deduction will not be allowed for the preservation of open space ... if the terms of the easement permit a degree of intrusion or future development that would interfere with the ... governmental conservation policy being furthered."[15] Thus, the restrictions in the instrument of conveyance must at a minimum enable it to serve its enumerated conservation purposes.

Typically, an easement designed to conserve the agricultural production capacity of land will restrict the construction of non-farm buildings, but will permit farm-related structures and all normal farming activities.[16] Houses for family members, quarters for farm workers or ranch hands, and even a few building lots for later sale, can also be permitted to the extent that they will not substantially interfere with the farm operation or otherwise defeat the easement's purpose.[17]

Permissible development will, of course, tend to reduce the value of the easement for purposes of calculating the amount of any tax deduction. Covenants requiring compliance with soil conservation plans or imposing other stewardship obligations may also be included in an agricultural conservation easement.

Enforceability of easements

Conservation easements must be enforceable in perpetuity to give rise to tax incentives.[18] Apart from the obvious drafting considerations, this requirement has a number of implications.

First, the donee organization or agency, and any subsequent transferee, "must have the resources to enforce the [easement] restrictions and must be able to demonstrate a commitment to protect the conservation purposes."[19] Second, if the easement is extinguished through judicial proceedings (e.g., condemnation of the property, unforeseeable conflicts between farming and adjacent urban land uses), IRS regulations require that the share of the proceeds from the sale or other disposition of the land attributable to the easement must be used by the donee "in a manner consistent with the conservation purposes of the original easement donation."[20] Third, a release or subordination agreement should be obtained from all holders of mortgages or other liens against the property prior to execution of a conservation easement.[21] Assuming that the easement will not impair the value of the agricultural land as collateral — typically, it does not where farm loans have been based on ability to repay rather than the speculative value of the land — this should not pose a problem.

Valuation and appraisal

How an agricultural conservation easement is valued for tax purposes is just as important as whether a donation qualifies for a deduction. Rather than disputing the qualification of conservation easements, the practice of the Service has been to challenge overly aggressive appraisals. Generally, the value of an easement must be determined by competent appraisal of the value of the property both before and after imposition of the restrictions on use.[22] Appraisals must be done in accordance with temporary IRS regulations governing valuation of conservation easements and other non-cash charitable contributions.[23]

Footnotes

1. Technically, a negative easement in gross. Where state law does not expressly provide for their enforceability against third-party transferees, the form should be an easement appurtenant, requiring conveyance in fee of an adjacent small (minimum permissible lot) parcel of land benefited by the easement's land use restrictions. Forty-four states have adopted legislation to obviate this problem. *See* Garrett, *Conservation Easements: the Greening of America,* 73 Ky. L.J. 255, 258 (1984); *and see,* National Conference of Commissioners on Uniform State Laws, *Uniform Conservation Easement Act,* 12 U.L.A. 55 (Supp. 1985).

2. *See,* S. Rep. No 96-1007 (on P.L. 96-541, Tax Treatment Extension Act of 1980), 96th Cong. 2d Sess., at 9; *and see,* H.R. Rep. No 96-1278, 96th Cong. 2d Sess.

3. The value of qualified easements is deductible for federal (and often state) income tax purposes, subject to a limitation of 30% of the donor's adjusted gross income in the year of the donation, with a 5-year carryforward. I.R.C. § 170(b). *See,* Temp. Treas. Reg. § 1.170A-13T (December 26, 1984) for valuation and appraisal rules. Easements are also deductible for federal estate and gift tax purposes. I.R.C. §§ 2055(f) and 2522(a). Under the right circumstances, easement donations can result in lower federal estate taxes than the farm use valuation election under I.R.C. § 2032A. Easements can also achieve estate tax reduction where the farm operator cannot qualify under 2032A. A *caveat,* however: conveyance of an easement within 10 years after a 2032A election has been ruled a "disposition" under 2032A(c)(1), thus triggering recapture, T.A.M 8731001; similarly, conveyance of an easement may defeat the family ownership requirement of I.R.C. § 2032A(b)(1)(C) and thus rule out subsequent 2032A election.

4. I.R.C. § 170(f)(3)(B)(iii).

5. I.R.C. § 170(h)(2)(C).

6. I.R.C. § 170(h)(3). *And see,* text accompanying n. 19, *infra.*

7. Note that protecting wildlife habitat, scenery and historic resources are other allowable conservation purposes. If a farm or ranch encompasses any of these resources, an easement may qualify regardless of its importance as agricultural open space. Where it is questionable whether an easement over land would qualify by meeting the "open space" test, look at the property in view of these alternative resource tests as set forth in the IRS regulations. The terms of the easement may be structured to achieve multiple conservation purposes, thus improving the likelihood that it will qualify for a deduction.

8. S. Rep. No. 1007, 96th Cong., 2d Sess. 11 (1980); H.R. Rep. No. 96-1278, 96th Cong., 2d Sess. 17 (1980).

9. The commitment need not be financial or involve an appropriation. *See,* Treas. Reg. 1.170A-14(d)(4)(iii). "[A] governmental program according preferential tax assessment or *preferential zoning* for certain property deemed worthy of protection or conservation would constitute a significant commitment by the government." (Emphasis supplied.)

10. Treas. Reg. § 1.170A-14(f)(5).

11. *See, e.g.,* Ltr. Rul. 8544036, 8623037, 8422064. Private letter rulings are addressed only to specific taxpayers. Although they are not to be used or cited as precedent, I.R.C. § 6110(j)(3), they are nevertheless illustrative of the Service's reasoning. A request for such an advance ruling can avoid the risk of a later adverse Service interpretation.

12. *Cf.* "The preservation of an ordinary tract of land would not, in and of itself, yield a significant public benefit, but the preservation of ordinary land areas in conjunction with other factors that demonstrate significant public benefit or the preservation of a unique land area for public enjoyment would yield a significant public benefit." Sen. Rep. No. 1007, 96th Cong., 2d Sess. 12 (1980).

Also, recognize the potential of soils to distinguish farmland. As a general proposition, the conservation of "prime" and "unique" farmland — the former comprised of the best available soils for growing crops, the latter of special soils and climatic conditions suited to growing particular crops such as fruits and vegetables — ought to yield a significant public benefit, provided that the state and/or local agricultural conservation policy itself targets such land for preservation.

13. Treas. Reg. § 1.170A-14(d)(iv).

14. "Although the requirements of clearly delineated governmental policy and significant public benefit must be met independently, the two requirements may also be related. The more specific the governmental policy with respect to the particular site to be protected, the more likely

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INDEPTH/CONTINUED

the governmental decision, by itself, will tend to establish the public benefit associated with the donation " Treas. reg. § 1.170A-14(d)(4)(vi).

15. Treas. Reg. § 1.170A-14(d)(4)(v). *And see,* Treas. Reg. § 1.170A-14(g)(4), which requires that surface mining be prohibited.

16. Where an easement is intended to serve multiple conservation purposes, *e.g.*, agriculture and wildlife or scenery, some limitations on farming activities may be necessary. Treas. Reg. § 1.170A-14(e)(2) provides that a deduction will not be allowed if an easement "permit[s] the destruction of other significant conservation interests," citing as an example the use of pesticides that could injure or destroy a *significant* natural ecosystem. However, this provision also suggests that "normal agricultural uses" would be appropriate on farmland where the alternative to conservation, development of the land, could also destroy the ecosystem. *And see,* Small, *The Federal Tax Law of Conservation Easements* (Land Trust Exchange 1986).

The author is not aware of any case in which an agricultural conservation easement has been disapproved because it permits the use of agrichemicals. Federal and state laws under which agrichemicals are stringently regulated represent government policy with respect to balancing the goal of conserving ecological resources with that of promoting agriculture and food production. As long as agricultural practices on farmland under easement comply with these laws, they arguably should not be deemed "inconsistent" uses under the IRS regulations.

17. The condition of the property at the time of the donation must be documented as a baseline for future enforcement. Treas. Reg. § 1.170A-14(g)(5). For the text of a sample agricultural conservation easement, *see* K. Meyer, *et al, Agricultural Law* 886 (West 1986).

18. Treas. Reg. § 1.170A-14(g).

19. The instrument of conveyance should require subsequent transferees to uphold and enforce the conservation purposes of the easement. Treas. Reg. § 1.170A-14(c)(1).

20. Treas. Reg. § 1.170A-14(g).

21. Treas. Reg. § 1.170A-14(g)(2).

22. Treas. Reg. § 1.170A-14(h).

23. Temp. Treas. Reg. § 1.170A-13T (December 26, 1984).

EIS not required for USDA animal productivity research

A number of individuals and public interest groups brought an action in U.S. District Court claiming that the USDA violated the National Environmental Policy Act by failing to prepare a programmatic environmental impact statement (EIS) on its animal productivity research. The Court of Appeals held in *Foundation on Economic Trends v. Lyng*, 817 F.2d 882 (D.C. Cir. 1987) that an EIS was not required because no "major Federal action" was involved.

The program complained of was one part of the USDA's Agricultural Research Service's six main areas of research — animal productivity. No particular project or technology was objected to. Rather, appellants claimed that the department's focus on "developing faster growing, more productive, and larger animals" required preparation of an EIS "to evaluate the statutory goals — national priorities and policies — that should have been considered in the development of the USDA research program." 817 F.2d at 884.

Appellants relied on that part of the Council on Environmental Quality (CEQ) guidelines stating that Federal action can be found in the "adoption of programs, such as a group of concerted actions to implement a specific policy" or in the "systematic and connected agency decisions allocating agency resources to implement a specific statutory program." 40 C.F.R. § 1508.18(b) (3).

The court found that the CEQ guidelines require more than the presence of a common policy objective; the agency's actions must be "concerted" or "systematic and connected." The court found no such interrelationship or interdependence in the array of projects concerning animal productivity.

Addressing the issue of the need for a programmatic EIS, the court noted that the CEQ guidelines require one "where the proposals for federal action 'are related to each other closely enough to be, in effect, a single course of action' 40 C.F.R. § 15002.4(a)." 817 F.2d at 884. No such finding could be made in this case.

As further support for its holding, the court noted that no specific "proposals" for action in the animal productivity research were cited by the appellants as requiring an EIS. The court referred to *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) in explaining that "EIS responsibilities are triggered only by *proposals* for action." 817 F.2d at 885-6.

In conclusion, the court noted that an EIS was not a suitable vehicle for causing the USDA to re-evaluate its research focus.

— Linda Grim McCormick

FmHA's assessment of creditworthiness

In the case of *Woodsmall v. Lyng*, 816 F.2d 1241 (8th Cir. 1987), the Woodsmalls applied for a rural housing loan from the Farmers Home Administration, which was denied. An FmHA county supervisor informed the Woodsmalls that unfavorable credit reports formed the basis for the rejection. After exhausting all administrative appeals, the Woodsmalls sought judicial review under the Administrative Procedures Act, 5 U.S.C. Sections 701-706 (1982).

The Woodsmalls contended that the agency decision to deny their loan application was not based on substantial evidence. The District Court for the Southern District of Iowa dismissed the action. The Woodsmalls appealed.

The Eighth Circuit Court of Appeals opined that an FmHA determination of creditworthiness was "a qualitative, subjective decision based on agency expertise,... within the bounds of the statute's direction that the Secretary 'may' make loans to applicants that he determines to have 'the ability to repay in full the sum to be loaned, with interest.'" 816 F.2d at 1245-46. Consequently, FmHA's decision to not lend money to the Woodsmalls was committed to agency discretion by law and was not judicially reviewable.

The Woodsmalls also claimed that FmHA had failed to promulgate adequate standards for evaluating creditworthiness, resulting in a violation of due process. The court dismissed this argument by noting prior cases finding no entitlement or property right in FmHA loan applicants.

Finally, the Woodsmalls argued that the Secretary's failure to promulgate further credit standards violated a "good faith consideration" of the rural housing loans statute. *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983). The court found that the Secretary had promulgated some creditworthiness regulations, and that further regulations were unnecessary and would be unduly burdensome to the agency.

— Michael B. Thompson

STATE ROUNDUP

INDIANA. *Compensatory damages against PCAs in state court.* In *Kalwitz v. La Porte Production Credit Association,* 508 N.E.2d 819 (1987), the Indiana Court of Appeals held that dismissal of defendant farmers' state court counterclaim against the PCA for compensatory damages was in error.

In responding to the PCA's foreclosure action, the Kalwitzes filed a counterclaim for compensatory and punitive damages. The Kalwitzes alleged fraud and misrepresentation in the parties' financial dealings. The PCA filed a motion to dismiss the counterclaim on grounds that the Kalwitzes failed to state a cause of action and that the court lacked subject matter jurisdiction. The trial court granted the PCA's motion to dismiss.

It was clear to the Indiana Court of Appeals that "Congress waived sovereign immunity for suits against PCAs for monetary damages, other than punitive damages, by its use of the 'sue or be sued' language in the Farm Credit Act." Immunity from punitive damages was noted to require express waiver, which Congress has not done.

The PCA claimed that federal common law, rather than state law, should be applied. The court rejected that assertion on the grounds that the PCA had failed to show "a significant conflict . . . between some federal policy or interest and the use of state law to resolve the dispute."

—Gerald A. Harrison

NORTH DAKOTA. *Corporate farming law preempted by the National Bank Act.* On August 3, 1987, in the case of *State v. Liberty National Bank and Trust Co.*, Civ. No. 1-87, a North Dakota trial court ruled that a part of North Dakota's corporate farming law is preempted by the National Bank Act.

North Dakota law requires all corporations to dispose of farmland or ranchland acquired as "security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or a claim, whether created by a mortgage or otherwise," within three years after acquiring ownership. N.D. Cent. Code Section 10-06-13. The National Bank Act, however, allows national banks to "hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it," for a period of five years. Extensions are possible if approved by the Comptroller of the Currency. 12 U.S.C. Section 29.

The trial court found a fundamental conflict between the provisions of the National Bank Act and the application of North Dakota law to national banks in that compelling the bank to comply with the provisions of N.D. Cent. Code Section 10-06-13 expressly denied the bank the flexibility provided to it by 12 U.S.C. Section 29.

Citing the decision in *Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 141 (1982) as persuasive authority, the court found that the North Dakota statute was preempted because of this fundamental conflict.

The trial court stated that by granting banks with national charters the opportunity to dispose of real property acquired in the ordinary course of their business, the United States expressly granted to national banks flexibility within their internal operations. For the state to suggest that any reduction of that period of time by state statute is not in conflict with the federal law is without merit. The court said that it follows from having determined that a fundamental conflict exists that the United States has preempted the area of retention of real property interests by a nationally chartered bank. Accordingly, the state of North Dakota may not enforce against national banks legislation which would directly conflict with the provisions of 12 U.S.C. Section 29.

The trial court granted summary judgment to the bank. The North Dakota Attorney General, who brought the lawsuit against the bank, has appealed the decision to the North Dakota Supreme Court.

— Allen C. Hoberg

IOWA *Retroactive mediation requirement.* In the case of *First National Bank in Lenox v. Heimke,* 407 N.W.2d 344 (1987), the Iowa Supreme Court ruled that the mediation requirement of Iowa Code Chapter 654A (1987) applies retroactively to "actions filed prior to the effective date of the act."

The court determined that the mediation requirement is procedural and that retroactive application is implicit in the statutory language. The court did not answer the questions of how far back in time the retroactive treatment reaches or what type of action would block the availability of mediation.

— Neil D. Hamilton

PENNSYLVANIA. *Recreational Use of Land and Sovereign Immunity.* When the Commonwealth of Pennsylvania passed its Sovereign Immunity Act (42 Pa. Cons. Stat. Ann. § 8501 *et seq.*), it agreed to accept the same liability that private landowners were exposed to at that time. If a private landowner could use the Recreational Use of Land and Water Act (68 Pa. Stat. Ann. § 477-1 *et seq.*) as a defense to a personal injury action, the Pennsylvania Supreme Court held that the Commonwealth should also be able to use the Act as a defense to a personal injury action. *Commonwealth Dept. of Envtl. Res. v. Auresto,* 511 A.2d 815 (1986).

— John C. Becker

VERMONT. *Agricultural finance program.* Vermont established a $2,000,000 agricultural finance program to assist family farmers and agricultural processing facilities by providing low interest loans. Vt. Stat. Ann. tit. 10, §§ 321-346.

Housing and conservation trust fund. Vermont also established a $3,000,000 housing and conservation trust fund. The program has dual goals of creating affordable housing for Vermonters and conserving and protecting Vermont's agricultural land, historic properties, important natural areas and recreational lands. Any state municipality, department of state government, or non-profit organization qualifying under I.R.C. § 501(c) (3) may apply for a grant or a low-interest loan. The law went into effect July 1, 1987 and the Board has already granted funds to the Vermont Land Trust to assist it in purchasing the development rights on a substantial farm in central Vermont. Vt. Stat. Ann. tit. 10, §§ 301-325.

Farm product central filing system. Vermont established a central filing system for U.C.C. farm product security interest notices pursuant to the 1985 Farm Bill. The system has received U.S.D.A. certification and will become effective September 1, 1987. Vt. Stat. Ann. tit. 9A, Article 9, Part 6.

Amendments to pesticide laws. The Legislature added two non-expert members to the Pesticide Advisory Council in order to provide public input. The Commissioner of Agriculture was also given authority to assess up to $1,000 per violation in administrative penalties for certain violations of the pesticide laws. The Commissioner already has authority to seek injunctions and criminal penalties against pesticide law violators. Vt. Stat. Ann. tit. 6, chapter 87.

Livestock dealer bonding. The Commissioner of Agriculture has been authorized to accept packers and stockyards trust agreements and irrevocable letters of credit in lieu of bonds. The Commissioner may accept a letter of credit only if the issuing bank serves as trustee. Vt. Stat. Ann. tit. 6, § 764(f).

— William H. Rice

MINNESOTA. *Redemption period and Mediation Act.* In *Carnel v. Travelers Insurance Company,* 402 N.W.2d 190 (1987), the Minnesota Court of Appeals held that the Minnesota Farmer-Lender Mediation Act does not apply to a mortgage foreclosure when there has been a foreclosure sale before the act was enacted. Additionally, the court held that the act does not toll the statutory one-year redemption period after a foreclosure sale. Finally, the court held that the act cannot be retroactively applied when there are no longer any foreclosure or debt collection proceedings pending.

— Gerald Torres

agricultural law update
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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

ASSOCIATION CONFERENCE. More than 118 educators, government officials, practitioners, farmers, industry representatives, and guests met in Washington, D.C., October 15-16,1987 at the American Agricultural Law Association's (AALA) Eighth Annual Meeting and Educational Conference.

A total of 22 speakers addressed a wide range of topics, including Chapter 12 of the Bankruptcy Code, agriculture and foreign policy, regulation of pesticides, and farm taxation.

Don Paarlberg gave the Keynote address, entitled "The Effect of Agriculture on Washington."

Jim Dean delivered the Presidential Address on "An appraisal of a year as association president."

Thursday's luncheon address was delivered by Bryan Slone on "A look at future tax law changes."

Donald H. Kelley was awarded this year's "Distinguished Service Award" for, among other things, his contribution to scholarship in the field of agricultural law, his long-term participation in the AALA, and his support in the development of correspondent relationships between agricultural lawyers.

The AALA Job Fair, held concurrently with the Annual Meeting, attracted considerable attention, and brought together a number of job speakers and potential employers in need of expertise in the field of agricultural law. Fifty-nine on-site interviews were conducted. Maintaining her past record, Gail Peshel, Valparaiso University, did an excellent job in coordinating this event.

Phillip L. Kunkel is the Association's president-elect. Mason E. Wiggins, Jr. has been appointed secretary-treasurer. Philip E. Harris, University of Wisconsin-Madison, assumed his duties as president. Joining the board is newly elected member Drew L. Kershen.

Neil D. Hamilton and Phillip L. Kunkel leave the board. Terence J.Centner steps down as secretary-treasurer. We express our deep appreciation to these individuals, all of whom have served the organization well.

Next year's AALA Annual Meeting will be held Oct. 13-14, 1988, at the Crown Westin Hotel in Kansas City, Mo. Plan to attend.