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Farm Credit Administration's final borrowers' rights regulations

On September 14, 1988, the Farm Credit Administration (FCA) published final regulations on the borrowers' rights provisions of the Agricultural Credit Act of 1987 (the Act). 53 Fed. Reg. 35427 (1988). Included are regulations concerning borrowers' rights under the restructuring provisions, Farm Credit System (FCS) lender participation in state mediation programs, and the right of first refusal to repurchase property after foreclosure or deed-back. Also included are regulations involving rights that are not tied to a financially distressed situation. These include specific protection for borrowers who have met all of their loan obligations and protection of borrowers' stock. The regulations will not be effective until thirty days after publication during which either or both Houses of Congress are in session.

In most instances, the final regulations only restate the specific statutory language in spite of previous requests for a more specific interpretation. The FCA rejected these requests, and in its Prefatory Comments (Comments) to the final regulations argued that in most instances the statute is specific enough to not require further interpretation. 53 Fed. Reg. 35428. In some areas, however, the FCA did provide further explanation in its Comments, which in many ways are more helpful than the regulations themselves.

This article highlights those areas of the regulations that appear to present the most immediate concern and controversy, the restructuring process and the right of first refusal.

Under the terms of the Act and now the regulations, a borrower's loan must be classified as a "distressed loan" in order to trigger the right to restructuring consideration. "Distressed loan" is defined in the Act as including the requirement that the borrower not have the financial capacity to repay the loan according to its

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Production districts – a new twist

Agricultural leaders have been encouraging producers to diversify their farms by growing non-traditional or alternative crops. Crops such as crambe, rapeseed, and canola are just a few of the many "alternative crops" suggested to be grown in the areas traditionally dedicated to wheat production. These alternative crops may be used for a multitude of purposes and thus, leaders speculate, will provide new markets and income for producers.

While the introduction of new crops is exciting, it poses problems for growers. In particular, the production of rapeseed is complicated. Rapeseed is an oilseed crop. Rapeseed oil has two distinct product uses: 1) edible oil for human consumption in foods such as margarine, cooking oil, and processed foods; and 2) industrial oil for producing synthetic lubricants, varnishes, and plastics. It is the composition of fatty acids contained in these oils that determines the use of the oil. The composition of edible oil is quite different from that of industrial oil, and the two are incompatible. These differences are controlled genetically through varieties of rapeseed. Varieties of rapeseed can cross-pollinate. Cross-pollination among varieties destroys the purity and marketability of the crops. K. Kephart & R. Schermerhorn, Rapeweed Production Districts in Idaho, CIS 819 U. Idaho Ext. Serv. (1987).

To protect the purity and marketability of rapeseed, two states have passed laws regulating the production of rapeseed. Idaho Code § 22-108 (1986) grants the Director of the Idaho Department of Agriculture the authority to specify the varieties of rapeseed produced within the state and the geographical locations where each variety may be produced or stored. Similarly, Washington state has passed a law whereby the Director of Agriculture may designate the types of and locations for rapeseed production until a commodity commission is formed. Once formulated, the rapeseed commodity commission will regulate rapeseed production.

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terms. The regulations add the phrase "as determined by the lender," thus giving the lender discretion in making this determination. 53 Fed. Reg. 35453.

On other eligibility issues, several areas presently under litigation are addressed. One is the issue of "pipeline loans" – loans that were in foreclosure as of the effective date of the Act. In the Comments, the FCA maintains that as long as the foreclosure proceeding, as defined under the Act, was not complete as of the effective date of the statute (January 6, 1988), restructuring rights are applicable. 53 Fed. Reg. 35428. Whether a foreclosure proceeding is complete will depend upon the relevant state law.

Another issue under litigation involves farmers who have filed for relief in bankruptcy. Not addressed directly in the regulations, it is discussed in the Comments, which state that the FCA believes that this is a determination for the courts to make. 53 Fed. Reg. 35429.

Both the statute and the regulations make a provision for an FCS lender to take action against a borrower when the collateral is at serious risk. 12 U.S.C.A. § 2202a(j) (West Supp. 1988); 53 Fed. Reg. 35455-56. Although the statutory and regulatory language differ slightly, both appear to be directed to the deliberate destruction and/or conversion of collateral. Both indicate that this exception is predicated upon the lender having "reasonable grounds to believe" that the collateral is at risk. Unfortunately, the regulation does not expand upon what constitutes "reasonable grounds."

Beyond the initial eligibility issues, the regulations also deal with the requirements for the application for debt restructuring. The final regulations fail to go beyond the statute in defining the requisite elements. In declining to elaborate on the statute, the FCA emphasized that because each restructuring application is different, depending upon all of the individual factors associated with the loan, "FCA should not and cannot create uniform, consistent procedures." 53 Fed. Reg. 35433.

Much controversy has surrounded the issue of disclosure of information to borrowers in the restructuring process. Borrowers have requested information on the criteria used by lenders to evaluate restructuring proposals. Lenders, on the other hand, have frequently been reluctant to release this information. This controversy is based upon differing interpretations of the statutory requirement that lenders provide borrowers with "all materials necessary to enable the borrower to submit an application for restructuring on the loan." 12 U.S.C.A. § 2202a(b)(1) (West Supp. 1988). In the Comments, the FCA disagrees with the position that the lender should provide cost of foreclosure and restructuring formulas at this point in time. The FCA alleges that it would be impossible for a lender to do so in that each loan and restructuring proposal is different. 53 Fed. Reg. 35434.

As part of the application process, the borrower must submit a "preliminary plan" for restructuring. Neither the Act nor the regulations provides a definition of "preliminary plan." The Comments, however, give some insight into the FCA's interpretation. As to whether the "preliminary plan" can be amended pursuant to negotiations between the borrower and the lender, the Comments indicate that the FCA agrees that this plan need not be a final plan, but rather, can be revised based, in part, on communications between the parties. The Comments go on to emphasize, however, that the borrower will not be allowed to continually amend the plan. Emphasis is placed upon the requirement that there be cooperation and a "good faith effort" on both sides. 53 Fed. Reg. 35433-34.

If the borrower's restructuring proposal is denied, the Act entitles the borrower to a Credit Review hearing. A resulting issue involves what information should be disclosed to the borrower along with the required notice of denial and right to review. Here the regulations go beyond the statute and explain that in addition to providing the borrower with the reason(s) for the denial, the notice must also provide the borrower with "any critical assumptions and relevant information upon which the reason(s) are based, except that any confidential information shall not be disclosed." 53 Fed. Reg. 35455. Unfortunately, the regulation does not define "critical assumptions," "relevant information," or "confidential information." In the Comments, the FCA acknowledges that a borrower must have enough information to make a decision regarding his or her right to a review. The FCA expresses concern, however, that the lender must not be required to disclose information and calculations that will make it unable to effectively negotiate and/or compete with other lenders. 53 Fed. Reg. 35444.

The regulations clarify that the Credit Review Committee must contain at least one member from the lender's board. 53 Fed. Reg. 35453. The Comments explain that this representative must be from the board of the direct lender. This duty cannot be delegated to a local association, unless that association is the direct lender.

As to the issue of the participation of the loan officer on the Credit Committee, the statute and the regulations provide that the loan officer may not be a member of the committee. 53 Fed. Reg. 35453. The Comments maintain, however, that the the loan officer may be present at the meeting to discuss the case and answer any questions but that he or she may not participate in the ultimate decision making. 53 Fed. Reg. 35436.

The Comments clarify that the role of the Credit Committee does not include ongoing negotiation with the borrower. The Committee's function is limited to reviewing the loan officer's decision. 53 Fed. Reg. 35439. Similarly, documentation presented by the borrower at the review hearing must relate to the restructuring proposal being reviewed. 53 Fed. Reg. 35439.

The Agricultural Technical Corrections Act of 1988, H.R. 3980, 100th Cong. 2d Sess., 134 Cong. Rec. S10798 (daily ed. Aug. 3, 1988) clarified a borrower's right to request an independent appraisal as part of the credit review process. The FCA regulations reflect this right. 53 Fed. Reg. 35453. However, neither the regulations themselves nor the Comments deal with the definition of an independent appraisal. The Comments indicate that in response to requests for further guidance, this issue will be addressed in subdsequent regulations. 53 Red. Reg. 35438.

On the question of the borrower's right

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FCA's FINAL BORROWERS' RIGHTS REGULATIONS / CONTINUED FROM PAGE 2

of first refusal to repurchase property acquired by FCS lenders, two important issues are addressed. As to whether this right attaches to property acquired by the FCS lender prior to the effective date of the Act, the Comments indicate that all applicable rights should apply to this property. 53 Fed. Reg. 35448.

The second issue concerns the sale of property by public auction. Both the regulations and the Comments support the lender's position that the public auction sale is an exception and that the lender is not required to afford the borrower the initial right of first refusal offering. The comments do concede, however, that the FCA may reconsider this issue depending upon the outcome of *Leckband v. Naylor*, No. 3-88-167 (D. Minn. May 17, 1988) (order granting preliminary injunction) *appeal filed*, No. 88-5301 MN (8th Cir. July 18, 1988) 53 Fed. Reg. 35447.

In summary, although some specific clarification is provided in the regulations and the Comments, in many instances, interpretation of the requirements of the Act remains clouded. The FCA appears to have taken the position that such areas are within the discretion of the decision making of the individual FCA districts. It is likely that the struggle between district lenders and borrowers will continue.

– Susan A. Schneider

PRODUCTION DISTRICTS – A NEW TWIST / CONTINUED FROM PAGE 1

To date, few producers have objected to the establishment of production districts because the prices for edible and industrial rapeseed are competitive, and there is no economic advantage to either variety. Secondly, regulatory bodies have been responsive to grower concerns. In Washington, regulations are established by the commodity commissioners who represent growers. This cooperative regulatory environment has kept challenges to a minimum. (Conversation with Al Stine, Washington State Department of Agriculture). As competition for production land increases, pressure will be placed on growers, who are expected to challenge the state's authority in these situations.

Laws to protect vegetation from disease or infection have existed for nearly thirty years. These statutes have generally been challenged on such constitutional bases as denials of due process or equal protection, illegal regulation of commerce, or a taking without just compensation. The courts have held that a state's action to protect vegetation has generally been a valid exercise of police power. Annot., 70 A.L.R. 2d 852 (1960 and Supp. 1988).

Given recent Supreme Court opinions of *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232 (1987), *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2384 (1987), and *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), the likely challenge will assert that production districts are land use regulations constituting takings without just compensation to landowners. Producers affected by the regulation would need to prove that regulating the production of the crop does not substantially advance legitimate state interests or that it denies the owner of an economically viable use of his property.

– Alice A. Devine

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in the past few weeks:

1. CCC; Grains and similarly handled commodities; loan and purchase programs; final rule; effective date 8/30/88. 53 Fed. Reg. 34004.

2. CCC; Loans and purchase programs; grains and similarly handled commodities; disaster payment program; final rule; effective date: 9/23/88. Sets forth regulations at 7 CFR Part 1477 which are necessary to establish the criteria to be used in making disaster payments to eligible producers. 53 Fed. Reg. 37700.

3. CCC; Interest on delinquent debts; final rule; effective date 9/29/88. 53 Fed. Reg. 37987.

4. CCC; interest on delinquent debts; proposed rule. 53 Fed. Reg. 38011.

5. FCA; Funding and fiscal affairs, loan policies and options, and funding operations; proposed rule. 53 Fed. Reg. 34109.

6. IRS; Partnership statements and nominee reporting of partnership information; temporary regulations; effective for partnership taxable years beginning after 9/3/82. 53 Fed. Reg. 34488.

7. USDA; Rules of practice governing formal adjudicatory proceedings instituted by the Secretary under various statutes; final rule; effective date 9/13/88. 53 Fed. Reg. 35296.

8. FmHA; Revision of policies and procedures for considering the environmental impacts of proposed agency actions; final rule; effective date 10/19/88. 53 Fed. Reg. 35237.

9. FmHA; Program revisions to provisions of the Supplemental Appropriations Act; proposed rule. "Proposed to amend its authority that became effective on Marcy 16, 1988, for making annual production loans to delinquent borrowers." 53 Fed. Reg. 37317.

10. FCIC; General crop insurance regulations; proposed rule; withdrawal. Concerns "a claim for indeminty when the information provided by the policyholder on the acreage report results in a lower premium than is determined to be due." 53 Fed. Reg. 36464.

– Linda Grim McCormick

AG LAW CONFERENCE CALENDAR

Sixth Annual Rural Attorneys and Agriculture Conference: Preparing for the 1990's.

Nov. 4. 1988. Drake University School of Law, Des Moines, IA.

Topics include: representing farm borrowers in debt negotiations with the Farm Credit System; FmHA programs for implementation of debt restructuring; significant developments in agricultural bankruptcy and secured financing.

Sponsored by Drake Law School Agricultural Center.

For more information, call Jean Johnson, 515-271-2955.

Tax week at Penn State.

Dec. 5-8, J.O. Kelley Conference Center, University Park, PA.

Topics include: government farm program issues; commodity certificates; dairy termination; passive losses and farming.

Sponsored by Penn State University College of Agriculture.

For more information, call 814-865-7656.

Non-point water quality concerns – legal and regulatory aspects.

Dec. 11-12. Marriott Hotel, New Orleans, LA.

Topics include: a status report on federal, state, and local water quality laws; examination of the approaches for providing clean water in presence of agricultural, industrial, municipal, and reactional activities.

Sponsored by the American Society of Agricultural Engineers.

For more information, call 616-429-0300.

Hazardous wastes, superfund, and toxic substances.

Dec. 1-3, Westin Hotel, Washington, D.C.

Topics include: groundwater, pesticides, and non-point source pollution.

Sponsored by ALI-ABA and Environmental Law Institute.

For more information, call Alexander Hart, 215-243-1630 or 1-800-CLE-NEWS.

Can farmers and hunters coexist: Fee hunting and other alternatives

by James L. Huffman

Private landowners and hunters have had their disagreements over the years, but generally they have gotten along reasonably well. In recent years, however, the always present potential for conflict has been realized with increasing frequency, in part because a few western landowners have adopted a long-standing British tradition: fee hunting. The charging of a fee for the right to hunt on private land has provoked many hunters long accustomed to hunting on private lands for free. Advocates of fee hunting and fishing have surfaced[1], but it is clear that the opponents are strong in numbers if not in the logic of their arguments.[2] This article surveys some of the problems of game management on private lands and considers alternative solutions, including fee hunting and private game management. An example will help to illustrate the nature of the problem.

The Dana Ranch, located in west-central Montana, borders on public lands that support large deer and elk populations. In March of 1988, the Montana Fish and Game officials estimated that 500 head of elk were resident on the Dana Ranch and another 1,300 on the adjoining public and private lands. The deer population was larger. Over the course of the last thirty years, an estimated 7,000 people have hunted on the Dana Ranch, the vast majority without charge but many with some assistance from ranch personnel. Until recently the game population was largely deer, which did not present serious management problems for the Ranch. However, a significant growth in the elk population led the Ranch to consider alternative management techniques.

In the late 1970s, the Ranch instituted a system that required elk hunters to reserve a place in advance and to pay a $20 fee for the Ranch to escort or direct hunters to good elk hunting areas and to provide return transportation, including hauling any animals that were shot. The hunters were required to sign a disclaimer of liability. However, the Ranch was soon sued after one hunter got lost in a storm. The Ranch personnel's extensive search failed to find the hunter, who was forced to spend a night out before being rescued by helicopter the next day. The poorly equipped hunter evidenced little knowledge of winter survival skills, but the Ranch's insurance company agreed to settle for tens of thousands of dollars. After that, the Ranch was unable to get insurance unless it operated a full-fledged outfitting service.

As a result the Dana Ranch adopted a new policy that allows local residents to hunt for free on a limited access basis while providing an outfitting service to about a dozen non-resident hunters each year. Ranch owner and manager David Cameron indicates that this approach avoids liability problems, but does not provide adequate management of the elk population. Because elk tags are available in Montana on a random draw basis, there is no assurance that the hunters will be capable of stalking, tracking, and shooting an elk.

The elk herd has grown in size over the last few years and the Ranch has no adequate way of controlling it. The elk, contrary to accepted theory, do not move to the high country in the summer, but rather choose to stay on the ranch's low lying winter ranges where feed is abundant. The Ranch loses to the elk its second cutting of hay at one site each summer and many units of prime winter grazing. The Ranch has proposed cooperative management and income sharing arrangements with in-lying adjacent state lands, but the State of Montana has not been willing to participate.

The economic basis of the problem

Farmers and ranchers have always had a complex relationship with hunters.[3] Hunters are often trespassers who damage crops, leave gates open, kill livestock, and leave garbage behind. But when hunters assume the "roles of predator and pest exterminators, they ... [become] the farmers' friend."[4] Although the balance in this relationship has generally led farmers and ranchers to permit hunting on their property, the trend in recent years has been in the other direction. Many landowners have been forced to restrict hunting on their lands, with resulting antagonism from hunters, which "may lead landowners to close off all their land to hunters."[5]

Accommodating these conflicting interests presents a challenge, but the situation is further complicated by pressures for the provision of nongame habitat and the protection of threatened and endangered species. Public lands do not provide a full range of wildlife habitats, which leads wildlife groups to look to the regulation of private lands. The impact on the farmer and rancher, whether the concern is to provide habitat for game or nongame wildlife, is to reduce the productive capacity of the land for commercial purposes. Farming, while often providing a good source of food for game animals, creates ecological monocultures, which do not preserve natural wildlife habitat. Ranching often relies on the natural habitat, but wildlife compete with the domestic livestock for the available food supply and frustrate attempts to institute schemes of "rest" in grazing cycles.

Historically the farmer and rancher often found that the most efficient method of controlling crop damage and predator loss was by permitting and even inviting hunting. However, the economics of agriculture have changed in many areas, making the hunter an inefficient method of control. The costs associated with the presence of both wildlife and hunters have provided a growing disincentive to the farmer and rancher to provide wildlife habitat. Every deer or elk on private land involves a cost to the farmer or rancher in the form of damaged crops and consumed forage. Unless hunters are able to reduce these costs by an amount greater than the costs associated with the hunters' presence, the farmer and rancher are better off with the wildlife and without the hunters. Although many farmers and ranchers have been willing to suffer some increased costs in the spirit of neighborliness, it is ultimately a question of economics, particularly in troubled agricultural times.

Under current law in most states, three basic alternatives are available to the farmer and rancher. They can permit people to hunt without charge; they can levy a fee for the right to hunt on their land; or they can close their land to hunting. The trend seems to be in the direction of the third alternative. A few private landowners in the West have experimented with fee hunting, a practice which is far more common in the East and in Texas.[6] For reasons discussed below, this is an approach laced with potential problems. Unfortunately, the most promising solution, private game

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management for profit, is not feasible under the laws of most states. This article explains why the historic solutions to the problem of game on private lands are no longer adequate and proposes an approach that will serve the interests of landowners, hunters, and the wildlife that interest both groups.

The institutional basis of the problem

The allocation of the wildlife resource poses a particularly difficult problem because of its migratory nature.[7] In common law countries, this migratory nature of wildlife has long been understood to justify a system of public ownership under which private rights arise only after an animal is captured and reduced to possession.[8] In the United States, the concept of public ownership was translated and expanded into the rule of state ownership.[9] Under this rule, private landowners control access to wildlife that happens to he on their land, but they have no right in the wildlife except for whatever rights the state chooses to grant.[10] Normally, this means that the landowner has the same right to capture wildlife as the state grants to the population generally.[11]

As owner of the wildlife, the state has the authority to regulate its taking or to prohibit hunting entirely. Pursuant to this authority wildlife officials in the states have developed elaborate rules governing species, numbers, age and sex of animals taken, and the location and season for hunting. Private landowners' influence lies primarily in restricting or prohibiting hunting on their land, independent from the actual nature of the wildlife population on their land. Landowners' influence on public wildlife authorities is limited by the realities of politics in a world where hunters and conservationists far outnumber farmers and ranchers.

The theory of state ownership "continues to provide the legal support for contemporary wildlife law, which is dominated by regulation and control at the state level,"[12] and is thus a significant obstacle to the solution of the problem of wildlife management on private lands. The states and their wildlife experts have become very proprietary about the wildlife that they are charged to manage, notwithstanding that the U.S. Supreme Court has expressly rejected the state ownership theory,[13] explaining that the concept of state ownership was simply a shorthand statement of the importance of wildlife to the public in general. Thus, although it is clear that the state has a significant interest in providing wildlife habitat and regulating the taking of wildlife, the state does not possess any unique powers to pursue this particular aspect of the public interest.[14]

Incentives for private wildlife management

Private ownership:

Private ownership of game animals is an approach to private wildlife management that can be effective, but that has limited viability in most areas of the United States. Under a system of private ownership a landowner has a property right in the live game and markets the right to hunt for that game. The landowner determines who can hunt, what animals can be taken, when and how animals can be shot, and the price that hunters must pay.

Many states permit private game farms and ranches,[15] but land ownership patterns and the extensive range of many game animals makes private control difficult or impossible. Dean Lueck has demonstrated that rules governing the ownership of wildlife tend to relate to the range of the animal in question and the size of property holdings.[16] Even where property holdings are large enough to provide game habitat, the costs of confining the wildlife are likely to be prohibitive. Thus, although private game ranches are a partial solution for some game species, they will not assure the provision of sufficient hunting opportunities nor the production of adequate game populations.

Private management:

A second alternative is private management. Farmers and ranchers presently have the authority and ability to manage wildlife habitat, but they have little incentive to do so since they cannot effectively manage the hunting of the wildlife on their land. Management of habitat requires control of wildlife populations and the coordination of wildlife production with other land uses. Wildlife and domestic livestock can coexist on the same land; indeed some wildlife use can benefit forage production for livestock just as crop production can provide food sources for wildlife. However, the landowner must be able to control the numbers of both game and domestic animals.

Private wildlife management has been successful in some areas. For example, the Deseret Ranch in Utah has engaged in active deer and elk management for several years,[17] while maintaining a large and successful livestock operation. The ranch reports increased numbers and improved quality of the game, achieved by intensive management of the game including careful regulation of the number of hunters permitted on the Ranch.

A key to a successful private wildlife management effort is the ability to control the numbers and location of the wildlife population. The laws of most states make it difficult for farmers and ranchers to exercise the kind of control that is necessary. A bill designed to give landowners this kind of control was introduced in a recent session of the Montana legislature. A landowner would have been able to develop a wildlife management plan subject to the approval of the state wildlife authorities. In return the landowner would have been able to license hunting on his land. The measure did not get very far in the legislative process, largely because it involved an unusual approach to wildlife management, which threatened the traditional control of the state wildlife officials.

Cooperative state and private management:

Private wildlife management is most likely to be successful when done in cooperation with state officials. Although ranches like the Dana in Montana and the Deseret in Utah may be large enough to provide year round habitat for big game, most private land holdings are too small to permit comprehensive wildlife management. Cooperative arrangements among private landholders can expand the management area, but in the West the interspersion of public and private lands will usually make state-private cooperation necessary.

Several states have legislation intended to facilitate such public-private cooperation. For example, Connecticut

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law authorizes the Commissioner of Environmental Protection to regulate hunting "in the interest of developing a sound wildlife program . . . [and] to encourage landowner participation in such program."[18] The Connecticut statute, however, does not provide any specifics on how this encouragement is to be accomplished. Nevada law is more explicit in authorizing the wildlife department "to enter into agreements with landowners . . . to establish wildlife management areas. . . ."[19] Iowa law also authorizes the state to "establish a game management area upon . . ., with the consent of the owner, . . . private lands or waters . . . to provide for public hunting. . . ."[20]

The success of these cooperative efforts will turn upon the extent to which the private landowner can afford to participate. On a small scale, Wisconsin[21] leases private lands for public hunting. This alternative provides an economic return to the private landowner and can involve the landowner in the management of wildlife. States are not likely, however, to have the resources necessary to accomplish much through leasing. An alternative that will involve many more farmers and ranchers in wildlife management is fee hunting.

Fee hunting has the advantage of linking the wildlife manager directly to the wildlife consumer. Unlike the public wildlife manager who has no way of accurately measuring the cost of providing wildlife habitat, the private landowner knows the opportunity costs of foregone crops and livestock and can charge accordingly. Evidence from existing fee hunting operations is that hunters are more than willing to pay the price. Jo Kwong reports that the Deseret Ranch charged $400 for a non-guided, antlerless elk hunt and $1,000 for an eleven-day unguided deer hunt in 1987. Greyson Creek Meadows Recreation, Inc. in Montana charges an annual membership of $300 plus $100 for each bull elk and $25 for each buck deer killed. Bobwhite hunting in South Carolina goes for $175 and a three-day turkey hunt costs $125 in Texas.[22] In each case the hunters are buying more than an opportunity to do what they could do for free on public lands. They are buying the right to hunt for quality wildlife under circumstances of limited access, which greatly improves their chances of success.[23]

Fee hunting can be an attractive alternative for landowners like the Dana Ranch who provide habitat to large numbers of game animals. Although the Dana Ranch is free to charge hunting access fees, as are landowners in most states, it is constrained in its legal ability to actively manage the resident wildlife and to regulate the hunting that takes place on its lands. Legislation like that introduced in the past session of the Montana legislature would encourage improved private wildlife management by giving the landowner greater control over the wildlife population and its harvesting.

There has been considerable opposition to fee hunting in many western states. It is argued, as in the response to the proposal for leasing of water for fish habitat,[24] that people should not have to pay for what they have previously received for free. That argument carries even less weight in the case of hunting on private land since the law of every state has always permitted landowners to exclude hunters from their lands or to charge them access fees. More importantly, the idea that any resource can be had for free reveals a fundamental misunderstanding of the problems of scarcity and the associated "tragedy of the commons."[25]

The political debate should not be over fee hunting on private lands, but rather over the lack of any appropriate charge for hunting on most public lands. The normal hunting license fees do not come close to the real cost of providing a valuable resource to a small segment of the population. If public game managers charged a license fee that approximated the true costs of providing game wildlife, they would have a much better sense of the nature of the demand. Public resource managers face opportunity costs just like those with which private landowners must cope.

Conclusion

Effective game management on habitat that extends over multiple public and private ownerships requires more flexible thinking than has been evidenced by state game laws in the past. Rather than assuming that the state must exercise exclusive control over game animals, it should be recognized that wildlife have several attributes that may be able to be controlled separately. "For example, a landowner may control hunting rights to a species, while the government may control the population in many other respects."[26] The legislation proposed in Montana reflected this recognition. The fact that it received little political support evidences that we have a long way to go in understanding and dealing with wildlife management in the western United States.

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1. Kwong, Private Hunting Provides Public Benefits, *The Wall Street Journal* (June 19, 1987); Anderson and Leal, A Private Fix for Leaky Trout Streams, *Fly Fisherman* 29 (June, 1988).

2. A recent exchange of view in *Fly Fisherman*, although addressing fishing rather than hunting, illustrates the thinking of some who are opposed to charging for the right to pursue game on private land. In response to an article by Terry Anderson and Donald Leal, *id.*, which proposes that groups like Trout Unlimited lease water rights to assure adequate stream flows, Marv Hoyt, President of the Upper Snake River chapter of Trout Unlimited asks: "[W]hy should residents of a state pay for what is already theirs to begin with?" For reasons discussed below, the assertion of public ownership is a fiction to which some courts have subscribed under the name of the public trust doctrine, at the expense of vested private rights.

3. "Agriculture, the great civilizing force, was caught in the middle between the wild hunters and the wild animals. The takers had to be prevented from disrupting agriculture, but they also had to be encouraged to control harmful wildlife. Developing the proper policies tested everyone's ingenuity." T. Lund, *American Wildlife Law* 31 (1980).

4. T. Lund, *American Wildlife Law* 32 (1980).

5. Kwong, *supra* note 1.

6. See Kwong, Public and Private Benefits: The Case for Fee Hunting, *PERC Viewpoints*, No. 2, July/August, 1987 at p. 1.

7. "Live stocks of wildlife are difficult to own. The main obstacle in establishing effective control of wildlife results because ownership patterns of land . . . do not always coincide with the actual territories of valuable wildlife stocks." Lueck, The Economic Logic of Wildlife Law, Political Economy Research Center and Montana State University (December, 1987) at p. 9.

8. See M. Bean, *The Evolution of National Wildlife Law* 10 (1983).

9. The state ownership doctrine was articulated by the Supreme Court in *Geer v. Connecticut*, 161 U.S. 519 (1896). See Bean, *id.* at 12-17.

10. Under the English common law rule of public ownership a private individual acquired title by reducing a wild animal to possession. Under the American state ownership rule, the capturer did not necessarily acquire title to the animal. The state has the power to regulate the use and disposal of the animal, a power that has been exercised by most

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states to prohibit the commercial sale of many species of wildlife.

11. The exception will normally be under laws that permit landowners to control wildlife that do damage to property. See W. Sigler, *Wildlife Law Enforcement* 85-87 (1980).

12. Lueck, *supra* note 7 at p. 6.

13. In *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Supreme Court ruled that "the 19th century legal fiction of state ownership" was a recognition of the "legitimate state concerns for conservation and protection of wild animals."

14. The state ownership doctrine was seen by some as a basis for extraordinary state power in relation to private rights. The argument was analogous to that often made with reference to the usufructuary nature of water rights. However, the fact that rights are usufructuary does not diminish their value or importance to the holder of those rights. Even if the state does own wildlife and the property owner has only the authority to exclude others from taking it on his property, the private interest is valuable and deserving of protection as a vested property right.

15. See, e.g. Mont. Code Ann. § 87-2-112 (1987) [interpreted in 36 A.G. Op. 112 (1976)].

16. Lueck, *supra* note 7 at 19-22.

17. The information on the Deseret Ranch reported in Kwong, *supra* note 1 at 4-5.

18. Conn. Gen. Stat. § 26-65 (1987).

19. Nev. Rev. Stat. § 504.140.

20. Iowa Code § 109.6 (1987).

21. Wisconsin law authorizes up to $200,000.00 per year "to obtain leases to private lands in order to provide additional public hunting." Wis. Stat. § 20.370 (1985-86).

22. Kwong, *supra* note 1 at 1-2.

23. Kwong reports that on the Deseret Ranch "success rates . . . range from 75% to 90% in contrast to the 20-30% success rates on public lands." *Id.* at 3.

24. *Supra* at note 2.

25. G. Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

26. *Supra* note 7 at 13.

STATE ROUNDUP

FLORIDA. *Tax benefits for alcohol made from state crops struck down. Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), concerned Fla. Stat. §§ 564.06 and 565.12, which grant exemptions or tax preferences to wines and distilled spirits manufactured from agricultural crops that would grow in Florida, regardless of the point of manufacture. Two Florida distributors and a California wine cooler manufacturer sued the state, claiming that the statutes discriminated against interstate commerce in favor of local commerce.

The plaintiffs invoked *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), in which the U.S. Supreme Court held that a Hawaiian tax scheme exempting local agricultural products unconstitutionally discriminated in favor of such local products. The Florida statutes at issue in *McKesson* had been amended after *Bacchus* in an attempt to meet the Bacchus standards.

Two Florida manufacturers who benefitted from the statutes intervened as defendants and alleged that the plaintiffs lacked standing. The trial court subsequently granted motions for summary judgment for the two Florida plaintiff distributors and for partial summary judgment and preliminary injunction for the California plaintiff wine cooler manufacturer. The trial court held that the challenged amendments did not meet the standards of *Bacchus*.

On appeal, the Florida Supreme Court held that general damages under the discriminatory taxation sufficed to give standing to the plaintiff appellees. Further, the court held that they had standing under their interstate commerce rights to conduct business free of constitutional burdens.

The state argued that the statutes operated evenhandedly because the protected agricultural products – citrus, sugarcane, and certain varieties of grape – are grown both in and outside of Florida. The court held that this did not detract from the discriminatory impact on other states that grow other products for beverage manufacture, citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

The court held that the Florida statutes discriminated against possibly superior out-of-state products by raising the costs of beverages made from such products. Therefore, Florida must show both local benefits "and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."

The state and the intervenors alleged that the statutes were constitutional, even if they burdened interstate commerce, because those statutes furthered the legitimate state interest of promoting Florida crops and beverages made from those crops.

The state supreme court held that this argument was outweighed by "the general principle that the Commerce Clause prohibits a state from using its regulatory power to protect its own citizens from outside competition," citing *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44.

The court also held that the state failed to show that less discriminatory alternative means to support the local interest were not available.

Following the decision in *McKesson*, the Florida Department of Agriculture has drafted amendments to the sections at issue there. These amendments would fully tax all such alcoholic beverages, but would have a portion of the taxes collected from Florida distributors placed into a limited trust fund for research and marketing of alcoholic beverages made from Florida crops.

– *Sidney Ansbacher*

ARKANSAS. *Organic fertilizer law enacted.* On July 25, 1988, Arkansas enacted a law that regulated the manufacture and sale of chicken litter (manure) as an organic fertilizer. 1988 Ark. Acts 24. Prior Arkansas law addressed only the manufacture of chemically-based fertilizers, thus creating legal uncertainties for companies attempting to develop organic fertilizer products in Arkansas.

The law requires that litter fertilizer consist of a "100 percent natural organic fertilizer" compound with guaranteed NPK content. (The bill sponsor noted that these levels are set by the chickens themselves.) Other provisions include the registration of manufacturers by the State Plant Board, the restriction of manufacturing processes to specified "biological degradation processes," and an exemption for private sales of unprocessed poultry litter.

– *Julia R. Wilder*

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Association Conference. More than 185 educators, government officials, practitioners, industry representatives, and guests met in Kansas City, Missouri, October 13-14, 1988 at the American Agricultural Law Association's Ninth Annual Meeting and Educational Conference.

A total of 32 speakers addressed a wide range of topics including international agricultural trade, current issues in farm program participation, and agriculture and the environment.

Philip E. Harris delivered the presidential address.

Thursday's luncheon address was delivered by Jim Nichols, Minnesota Commissioner of Agriculture.

Dean J.W. Looney was awarded this year's "Distinguished Service Award" for, among other things, his scholarly attainments in the field of agricultural law and his long-term service to the AALA.

The AALA Job Fair, held concurrently with the Annual Meeting, attracted considerable attention. Thirty-six on-site interviews were conducted. Gail Peshel, the coordinator of the Job Fair for the past four years, was recognized for her exceptional efforts.

Donald B. Pedersen is the Association's President-elect. Phillip L. Kunkel, St. Cloud, Minnesota, assumed his duties as President. Joining the board are newly elected members Donald H. Kelley and Walter J. Armbruster.

Margaret Grossman and J. Patrick Wheeler leave the board. We express our deep appreciation to these individuals, who both have served the organization well.

Next year's AALA Annual Meeting will be November 3-4, 1989 at the Hotel Nicco, San Francisco, California.