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INSIDE

IN FUTURE ISSUES

Pesticides and food safety: the Clinton administration proposal

On September 21, 1993, the Clinton administration unveiled its proposal for comprehensive reform of the nation's pesticide regulatory programs to enhance food safety protection for the public. The proposed reforms will change the legal standards determining the safety of pesticide residues on foods under the Federal Food, Drug, and Cosmetic Act (FFDCA) and revise the pesticide program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

When fully implemented, the Clinton plan will have a significant effect on the agricultural and food processing industries for decades to come, and it will substantially change the way pesticide and related food safety issues are dealt with administratively and in the courts. Lawyers representing agricultural chemicals, pesticide applicators, farmers, and farm workers are among those whose clients could be affected by the proposed changes.

The Clinton plan was jointly developed and presented by the Environmental Protection Agency (EPA), the Department of Agriculture (USDA), and the Food and Drug Administration (FDA). The joint action was taken to respond to a threat to the federal regulatory programs by a recent court decision, *Les v. Reilly*, 968 F.2d 985 (9th Cir., 1992), *cert. denied* USLW 3384 (1993), invalidating important aspects of the current program and to implement the new administration's environmental policies.

The proposed reform takes the middle ground in the pesticide debate, somewhere between two competing proposals already being considered on Capitol Hill: S. 331, the Kennedy-Waxman food safety bill, and the Lehman-Bliley Food Quality Protection Act of 1993, H.R. 1627. Kennedy-Waxman is largely supported by consumer and environmental groups, while Lehman-Bliley garners the support of the food processing industry and most agricultural groups.

The Clinton package will need action by Congress to go into effect; and the several congressional committees with jurisdiction over these issues have already begun consideration of it, with the goal of pushing through the implementing legislation next year. However, given the difficulty Congress has had in the past in wrestling with food safety and pesticide issues, action by Congress on the package is not assured — even with the urgent need for action created by the *Les* decision. It will take a continued strong commitment by the Clinton White House to see this initiative through to enactment into law.

The driving force behind the need to resolve the food safety and pesticide residue issue is the Ninth Circuit Court of Appeals decision in *Les v. Reilly*, handed down in July, 1992. That decision flatly prohibited an EPA plan to subject the so-called "Delaney Clause" of the FFDCA to a *de minimus* exception.

The Delaney Clause in section 409 of the FFDCA, effective since 1958, states that "no [food] additive shall be deemed to be safe if it is found to induce cancer when

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Eighth Circuit considers railroad's Certificate of Transportation program

In a case of first impression, the Eighth Circuit Court of Appeals affirmed in part and reversed in part an Interstate Commerce Commission decision regarding Burlington Northern Railroad Company's Certificate of Transportation program. *National Grain and Feed Association v. United States, Interstate Commerce Commission, North Dakota Grain Dealers Association v. United States, Interstate Commerce Commission*, Nos. 92-2398 and 92-2455, 1993 WL 349197 (8th Cir., Sept. 16, 1993).

In January, 1988, Burlington Northern Railroad Company (BN) adopted a Certificate of Transportation (COT) program to facilitate rail movements of grain, corn, and soybeans. The COT program offers for sale to shippers guaranteed future transportation capacity. Certificates are purchased through sealed bid public auctions and are transferable. Each COT is assigned a separate tariff number and is filed as a tariff

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ingested by man or animal." 21 U.S.C. § 348(c)(3)(a). Pesticide residues are considered to be food additives under the FFDCA. Thus, if a pesticide residue is found to be present on a processed food in amounts above the established tolerances for it, or if it is present at all when no tolerance is permitted (as under Delaney), the residue adulterates the food, thereby preventing its legal sale.

With advances in residue detection techniques, the ability to determine pesticide residues in processed food has increased dramatically; scientists now can detect residues down to the trillionth part. As a result, in recent years there have been more cases of pesticide residues being detected in processed foods and thus broader application of the Delaney prohibition to food products.

As a result of these scientific advances and based on a study by the National Academy of Sciences, EPA, in 1988, developed a *de minimus* exception to Delaney under which it permitted the establishment of tolerances for cancer-inducing pesticides where the human dietary risk from residues of a pesticide in processed food was, at most, "negligible." The Ninth Circuit in the *Les* decision completely rejected this new "negligible-risk" approach and ordered EPA to go back to literal application of the Delaney Clause.

Pursuant to the Ninth Circuit's decision and order, EPA released a list of thirty-five agricultural chemicals that could be prohibited under the strict reading of the Delaney Clause. While EPA stressed that it did not believe those chemicals posed an unreasonable risk to public health, the agency would have no choice but to revoke their tolerance if, upon further review, they were found to violate the Delaney Clause. This action was followed, in May, by EPA withdrawal of emergency exemptions from Delaney for four pesticide chemicals that EPA felt posed only negligible risks, along with an announcement that no further exemptions for negligible risk chemicals could be granted.

The Supreme Court in March refused to hear an appeal of the *Les* decision, thereby providing no further hope for reversing the literal interpretation of the Ninth Circuit and forcing EPA to proceed. Following the Supreme Court denial, the new administration began its work on rewriting pesticide and food safety policy.

Key elements of the new proposal fall under three categories: FFDCA tolerances, FIFRA policies, and the FIFRA legal process. Elements of the new proposal relating to FFDCA tolerances include:

— The zero-tolerance Delaney Clause will be replaced by a pesticide tolerance standard that is health-based and defined as "a reasonable certainty of no harm" to consumers of food. For carcinogens, this represents an upper-bound risk of one in one million over a lifetime.

— EPA would be required to issue specific findings in setting tolerance levels that a tolerance is safe for infants and children from potential pesticide risks.

— EPA is to review all 9,000 currently-approved residue tolerances against the new standard within seven years following enactment of implementing legislation.

— If a pesticide cannot meet the new tolerance standard, it could be granted a five-year transitional tolerance *if* the loss of the pesticide would result in significant disruption in the food supply. This is the only time when the economic benefits of a pesticide may be considered: benefit analysis is removed from the tolerance setting or approval process.

Proposed changes to FIFRA policies include:

— Pesticide registration would sunset every fifteen years under FIFRA unless a new application meeting current scientific standards was submitted by year twelve and approved by EPA.

— EPA, in consultation with USDA, would enact regulations, through the public rule-making process, to phase out or phase down the use of particular pesticides that it finds are reasonably likely to pose a significant risk to humans or the environment.

— New criteria would be established to identify reduced risk pesticides, which would then be eligible for priority treatment and added benefits in the registration process. Minor use pesticides also would be given special treatment in the regulatory program to enable their continued use.

— EPA and USDA, in consultation with the farming and environmental communities, are to develop commodity-specific pesticide use reduction goals over the next year, and USDA is to aggressively develop and promote Integrated Pest Management (IPM) programs for agricultural production and have IPM implementation strategies in place on seventy-five percent of crop acreage by the year 2000.

— EPA would be permitted to establish criteria for "prescription use" of pesticides in certain situations, i.e., when such pesticides are critical to IPM and pesticide management programs.

— Any pesticide that had been canceled or voluntarily removed from the market because of health concerns could not be exported from the U.S. Other notice provisions would also be applied to particular pesticide exports.

Proposed changes to the FIFRA legal process include:

— The current formal, trial-type administration law judge cancellation and tolerance revocation procedure for pesticides under FIFRA would be replaced with a notice-and-comment cancellation process. In addition, suspension procedures would be separated from cancellation procedures and the process for challenging suspensions streamlined.

— Enforcement authorities under FIFRA would be increased, including the allowance of "whistleblower" and citizen suits.

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CONFERENCE CALENDAR

Wetland issues in resources development in the Western United States
November 19, 1993, Hyatt Regency, Denver, Colorado
Topics include: wetland delineation, overview of regulation under section 404 of the Clean Water Act.
Sponsored by: Water Quality Committee Section of Natural Resources, Energy, and Environmental Law American Bar Association.
For more information, call 1-303-321-8100.

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Suggestions for Pursuing ASCS NAD Appeals

By Christopher R. Kelley

In the 1990 farm bill, Congress directed the Secretary of Agriculture to establish a National Appeals Division (ASCS NAD or NAD) within the Agricultural Stabilization and Conservation Service (ASCS). 7 U.S.C.A. § 1433e(c) (West Supp. 1993). Once established, the ASCS NAD became the national level reviewing authority for ASCS administrative appeals, a function previously performed by the ASCS Deputy Administrator for State and County Operations (DASCO). Currently, approximately 150 federal farm program appeals are processed through the ASCS NAD each month.

Although the NAD legislation made improvements in the ASCS administrative appeals process, problems remain. This article will discuss these problems and offer suggestions for processing an appeal through the current ASCS NAD process.

The problems

In 1992, a report prepared within the ASCS Administrator's office identified four problems with the ASCS appeals system:

1. The distinction between DASCO and NAD has been blurred giving the impression that DASCO still runs appeals.

2. ASCS appeal determinations frequently fail to explain the basis for the agency's findings, fail to address specific issues raised by the producer during the appeal, and fail to identify evidence in the Administrative Record that supports the agency's findings.

3. In many cases, ASCS fails to take reasonable steps to uncover facts relevant to an appeal and, in some cases, fails to give producers access to all information used in reaching administrative determinations. For example, Office of Inspector General reports are not always provided to producers, even if these reports contain information upon which the agency is basing its determination.

4. ASCS has not provided clear guidance to producers and state and county committees regarding the applicable appeals procedures at the county, state, and national levels of review.

The internal report concluded that "[a]s a result of these problems, producers, Congress and the courts have lost confidence in the ASCS Appeals system." Recently, a federal district court added support for that conclusion when it characterized the ASCS's review of an appeal as "slapdash;" opined that it was "not clear that there ever was a serious examination of [the producer's] claims [by the ASCS]. . . ;" and found that "the agency failed miserably in following its procedural appeal requirements." *Lucio v. Yeutter*, 798 F. Supp. 39, 43, 45 (D.D.C. 1992) (reviewing a DASCO decision).

In addition to acknowledging the validity of the findings and conclusions of the ASCS's internal report, many observers of the ASCS administrative appeal system would argue that the report's list of deficiencies is incomplete for, among other things, it fails to list the typical six to twelve month lag between the NAD hearing and the issuance of a decision. They would also contend that the problems can be traced to the ASCS's historical inattention to the administrative appeal process.

The Development of the ASCS NAD

Prior to the 1990 farm bill, appeals at the ASCS's national level were decided by DASCO. DASCO's primary responsibilities, however, were making and implementing program policy, and the appeal process was not viewed as a high priority.

In the 1980s, as appeal volume slowly grew in rough proportion to the increasing importance of federal farm program payments to producers, DASCO began using hearing officers to hear administrative appeals. Typically, the hearing officers were drawn from ASCS personnel who previously had been involved in program administration. The decisions were issued by DASCO or an Assistant DASCO based on the hearing officer's recommendations.

By the time that consideration of the 1990 farm bill was underway, dissatisfaction with DASCO's handling of appeals had developed. In large part, the dissatisfaction arose from the combination of program development, administration, and dispute resolution in one office. Many viewed the DASCO appeals system as a classic example of a conflict of interest. Other concerns included the inability to subpoena witnesses and the poor quality of the decisions.

The 1990 farm bill established the ASCS NAD as a separate division within the ASCS. *See* 7 U.S.C.A. § 1433e (West Supp. 1993). In addition to giving the NAD Director the authority to make appeal decisions based on the record developed by the NAD hearing officers, the legislation gave the Director other powers, including subpoena authority. On its face, the NAD legislation appeared to begin to address many of the sources of dissatisfaction with the DASCO appeals system.

The persistence of problems under the ASCS NAD legislation

Critics of the current appeal process contend, however, that any expectations that the ASCS NAD legislation would make dramatic improvements in the ASCS appeal process have not been realized for two principal reasons. First, dramatic improvements have not occurred because the ASCS implemented the NAD legislation by merely giving the DASCO hearing officers and their supervisor new titles. Arguably, the decision to continue with the same personnel reflected the ASCS's general lack of enthusiasm for dealing with appeals, and it perpetuated the same shortcomings in the quality of decision-making that brought about the NAD legislation.

Second, some critics of the current system maintain that dramatic improvement in the appeals system did not occur because the 1990 NAD legislation did not go far enough in its attempt to make the NAD independent from the program development and implementation functions of the agency. The conflict of interest inherent in the DASCO appeals system continues to a certain extent under the 1990 NAD legislation. The NAD is not independent of the agency. The rules for the conduct of NAD appeals are still issued by the ASCS, not NAD. *See* 7 C.F.R. pt. 780 (1993). Also, the NAD Director and the NAD hearing officers still consult, ex parte, with program administrators at all levels of the ASCS. Finally, the ASCS Administrator has the authority to reverse or modify the NAD Director's decisions. *See* 7 U.S.C.A. § 1433e(f) (West Supp. 1993).

Proposals for change and recent improvements

The continuing dissatisfaction with the ASCS appeals system and with the appeals systems of other USDA agencies has prompted new proposals for legislative change. On August 6, 1993, bills intended to establish an independent USDA National Appeals Division to hear administrative appeals arising from determinations made by the ASCS, the Commodity

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Credit Corporation (CCC), the Soil Conservation Service (SCS), the Rural Development Administration (RDA), the Farmers Home Administration (FmHA), and the Federal Crop Insurance Corporation (FCIC) were introduced in the Senate (S. 1425) and the House of Representatives (H.R. 2950). The bills are modeled on bills introduced in the previous session, S. 3119 and H.R. 5742, but they contain a number of new provisions. If enacted, the bills will create a USDA National Appeals Division (USDA NAD) within the Office of the Secretary, independent of the agencies involved, for the purpose of making the final determination in the administrative appeal process. The bills also contain detailed provisions for the processing of appeals and the conduct of appeal hearings.

Subsequently, on September 7, 1993, Secretary Espy also announced, in general terms, a proposal for creating a USDA NAD. The Secretary's proposal, however, differs from the proposed legislation by excluding SCS appeals from the USDA NAD. The Secretary's concept is part of USDA's proposed reorganization (H.R. 3171).

In the last year, as criticism of the ASCS appeals system mounted, the ASCS responded by making some improvements. Most notably, the improvements have included the following:

● Steps have been taken to reduce DASCO's influence over NAD decisions. While NAD and DASCO personnel remain free to consult with each other, ex parte, during the pendency of an appeal, DASCO personnel have been directed to take their concerns about NAD decisions to the ASCS Administrator instead of the NAD Director.

● The format and structure of NAD decisions has been modified so that a decision's findings of fact, conclusions, and supporting analysis are more clearly and completely set forth.

● The NAD has developed procedures for conducting its hearings and these procedures are now routinely made available to appellants.

● Attempts have been made to resolve the problems associated with the ASCS's reliance on USDA Office of Inspector General (OIG) reports, particularly reports that the OIG refuses to release to the affected producer. During the Bush administration, the Administrator instructed ASCS personnel and ASC county and state committees to make independent determinations instead of relying solely on information contained in OIG reports.

● The ASCS Administrator has implemented a process whereby NAD decisions are reviewed by the Administrator's office as a routine procedure. As a result, some NAD decisions that were unfavorable to the producer have been reversed or modified. Not all NAD decisions, however, receive a full review of the case file under this process. Typically, only those decisions that have been brought to the attention of the Administrator by the producer, a member of Congress, or personnel within the USDA receive thorough review.

The ASCS has also taken steps to improve the appeals process at the state and county committee levels by issuing a new Program Appeals (1-APP) volume of the *ASCS Handbook*. The ASCS, however, has yet to complete action on proposed changes to the administrative appeal regulations that were published in 1992. *See* 57 Fed. Reg. 43,937 (1992). Additional improvements in the ASCS NAD process are rumored, possibly appearing in the form of new NAD procedures based on some of the provisions in the proposed USDA NAD legislation.

Some suggestions on how to process an appeal at the ASCS NAD

Because the ASCS NAD processes about 150 appeals a month, a significant number of farm program participants are being processed through an appeals process that is improving only very slowly. While the approaches that one can take toward the goal of obtaining a favorable result from the ASCS NAD or the ASCS Administrator will vary from appellant to appellant and case to case, the following are some general suggestions:

● There is no substitute for preparation. Whatever approach you take, be certain that you are fully familiar with:

1. the facts and circumstances of the dispute, including the administrative record developed at the county and state levels;

2. the program rules as set forth in the applicable statutes and regulations, the ASCS's interpretation of those rules as set forth in the applicable *ASCS Handbook* volume, any applicable contracts, including addendum; and

3. the basic principles of judicial review as set forth in the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and in the cases interpreting the APA.

● Consider whether you want to appeal administratively in light of *Darby v. Cisneros*, No. 91-2045, 1993 U.S. LEXIS 4246 (June 21, 1993). Unless and until the ASCS appeal regulations or the statutes applicable to ASCS appeals change, the exhaustion of administrative remedies requirement may no longer dictate taking an administrative appeal. Except in extraordinary circumstances, however, pursuing administrative appeal remedies will be the more prudent course.

● As a general rule, it is better to appear in person than to conduct the hearing by telephone. In some circumstances, however, such as when the amount of money in dispute does not justify the travel to Washington, D.C., the option of a telephone hearing should be selected. Only in very exceptional circumstances should the case be submitted on a written record. The suggestions that follow assume that a personal hearing has been requested, although most of the suggestions will also apply to telephone hearings.

● Although many appellants handle appeals to the NAD without the assistance of an attorney, the assistance of a competent attorney can improve the chances for success by ensuring the development of an administrative record that addresses all of the factual and legal issues. Also, while the appeals process is "informal" and intended to allow appellants to appear without an attorney, the complexity of federal farm program requirements tends to defeat the conceptual simplicity of the appeals process.

● Present your case to the NAD hearing officer as you would to any judicial or quasi-judicial officer who was not familiar with either the facts or the law. Do *not* assume that your hearing officer will be familiar with either the facts, the law, or ASCS policy. Even if the hearing officer appears to know what is going on, you must make a complete administrative record. Do not assume that the hearing officer will help you develop your case. You must fully and completely present all

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of the facts and law needed to prevail. The following suggestions and comments may help you prepare and present your case:

- Realistically estimate the time that you will need for the hearing and request that it be scheduled accordingly;

- Request that the hearing be transcribed, particularly if judicial review is a possibility. A transcription of the hearing also provides a more complete basis for review by the NAD Director and, if appropriate, the ASCS Administrator;

- Consider the need for obtaining testimony by subpoena, or, if you need the testimony of an ASCS county or state employee (often useful to show that you deserve equitable relief under 7 C.F.R. pt. 790 because you relied in good faith on erroneous advice), ask NAD to arrange for a conference call to that employee during the hearing;

- Be organized. Consider using a checklist to be certain that you establish all of the facts and legal premises for your position;

- Most appeals will involve documentary evidence, such as receipts, financial records, or contract documents; and illustrative materials, such as maps, chronological summaries, or organizational diagrams. Have your exhibits marked and ready for introduction into the administrative record and present an exhibit list for inclusion in the administrative record. One way to begin a hearing is by reviewing the exhibit list and by providing extra copies of the exhibits to all persons who will need to refer to them in the hearing;

- Be prepared for questioning and prepare any other witnesses for your questioning and for questioning by the hearing officer or any other DASCO or NAD personnel who may be present;

- Be prepared to make an opening statement raising all of the factual and legal issues. Although the NAD legislation requires the NAD to advise the participant of the issues involved (7 U.S.C.A. § 1433e(4)(B)(i) (West Supp. 1983)), the NAD statement of issues may be incomplete or erroneous. If it is, the statement should be corrected on the record;

- Methodically develop all factual and legal issues. A detailed, step by step, point by point, presentation is essential. Do not allow the informality of the hearing to distract you from clearly and completely developing your position;

- If necessary, leave the record open for the post-hearing submission of additional facts and a supporting memorandum. If a post-hearing memorandum is submitted, and it is usually advisable to do so, the memorandum should set forth the relevant facts developed at the hearing and should persuasively argue your position based on the facts and the law. If you add to your exhibits, remember to update the exhibit list;

- Make sure that anything you want in the administrative record that was developed at the county and state levels is in the NAD record. Always ask to review the file transmitted by the state committee either before the hearing or while the administrative record is still open, preferably before the hearing;

- Consider asking the hearing officer, on the record, to take administrative notice of all other DASCO and NAD determinations. Alternatively (and preferably), use the Freedom of Information Act to obtain any DASCO and NAD determinations that granted relief to similarly situated producers. In that way, if the producer loses, the record will contain evidence of the discriminatory treatment. *See Golightly v. Yeutter*, 780 F. Supp. 672 (D. Ariz. 1991);

- Always be aware that your task will be to clearly and completely describe what happened. Sometimes this will require showing local customs and practices. A good example of such a showing is found in *Golightly v. Yeutter*, 780 F. Supp. 672 (D. Ariz. 1991), where the appellants' evidence of financing practices of local cotton gins significantly contributed to the appellants' success on judicial review.

- NAD hearings are *de novo*. This means that the NAD is not bound by any finding or determination made by the county or state ASC committee. It also means that NAD can deny the appeal on grounds not relied upon by the county or state committee.

- Almost invariably, the hearing officer will announce that the hearing is not adversarial, and that its purpose is to develop all the relevant facts and issues. Ideally, that is what should happen, and, in many cases, it is what will happen. But accepting that announcement as the gospel can be perilous. The more prudent approach is to assume that the hearing officer or the NAD Director will look for every possible reason to deny relief, even reasons never raised by anyone earlier. By making that assumption, one will be well-prepared. A review of your compliance with all applicable farm program rules can be a prudent precaution in preparing for an appeal.

- Be forewarned: sometimes the hearing officer will embark on a polite but obvious quest to find some reason to deny relief. In other cases, the hearing officer will appear wholly sympathetic, sometimes lulling the appellant into a less than thorough presentation. Later, when the decision is rendered by the Director, the appellant will discover that the hearing officer was not as sympathetic as he or she appeared, or, even if the hearing officer was sympathetic and sided with the appellant, the NAD Director elected to deny relief.

- If you lose before the NAD, consider asking the Administrator to review the case and, if you do, provide the Administrator with a succinct summary of the reasons for reversing or modifying the decision. If the dispute justifies the time and expense, ask to meet with the Administrator. The Administrator has the authority to review the entire administrative record and to reverse or modify the NAD decision.

- Another word of caution: While a reconsideration can lead to a more favorable outcome, sometimes a reconsideration by the agency can make the outcome worse for the producer, particularly if the reconsideration results in a final decision that more fully supports and analyzes the reasons for denying relief.

- Finally, on a more mundane note, the principal hearing room in the South Agriculture Building is small. Chairs are arranged around a large conference table. The hearing examiner typically sits at one end of the table and the court reporter at the other. Sometimes more than one hearing examiner and one or more DASCO program specialists are present. Hearings usually begin with the hearing officer identifying the matter, stating the purpose of the proceeding, and asking those present to identify themselves. The appellant or the appellant's representative is then asked if there will be an opening statement. The questioning of the appellant and other witnesses then proceeds. No rules of evidence apply, except the hearing officer may exclude "irrelevant, immaterial, or unduly repetitious evidence, information, or questions." 7 C.F.R. § 780.9(b) (1993).

In the summer, the operation of the window air conditioning unit interferes with the tape recorder. Even with the air conditioner running, the room is warm, and without it, the room gets very warm. Fortunately, the informality of the process permits the removing of suit coats or sport jackets, and requesting the periodic interruption of a lengthy hearing to crank up the air conditioner for a few moments is usually welcomed by all involved. Rumor has it that a member of the Carter transition team threw a chair through a South Building window in frustration over

the heat, and that was in the winter.

In summary, although NAD appeals are "informal," they require the same thoroughness of preparation and presentation as most "formal" administrative appeals. All too often, appellants are unsuccessful because they failed to clearly and completely support their position and the NAD hearing officer failed to make up for that shortcoming by identifying and asking for the needed evidence or consulting the applicable program rule. Finally, because most ASCS NAD determinations are judicially reviewable, a clear and complete administrative record is essential if judicial review is a possibility.

Director position: Agricultural Law Graduate Program

The University of Arkansas School of Law seeks to hire a Director of the Graduate Program in Agricultural Law, its unique program of study leading to the Master of Laws (LL.M.) degree. The appointment will involve approximately one-half time administrative and one half-time teaching. A 12-month appointment at the Associate or full Professor rank, tenure or tenure track, is anticipated.

Administrative duties include directing the recruitment, admissions, placement and alumni relations efforts of the program; advising and counseling; supervision and coordination of student projects and overall direction of the program. Teaching responsibilities will be in the wide range of Agricultural Law courses available for LL.M. and J.D. students or in related areas of interest.

Applicants should hold the J.D. degree from an accredited law school with an outstanding academic record and possess familiarity with the discipline of Agricultural Law, broadly defined. Applicants should further demonstrate a significant scholarship record in Agricultural Law or related areas, such as environmental or natural resources law. Previous teaching experience in Agricultural Law or such related areas is preferred.

The Graduate Program in Agricultural Law, started in 1981, offers the only LL.M. degree in Agricultural Law in the U.S. The program is strengthened by the presence, within the School of Law, of the congressionally funded National Center for Agricultural Law Research and Information. Close cooperation also exists with the College of Agriculture and Home Economics. The American Agricultural Law Association is also headquartered at the School of Law.

Applications and nominations should be sent to Professor Mary Beth Matthews, U. of Ark. School of Law, Fayetteville, AR 72701. (501) 575-3299. Consideration of applicants will commence January 15, 1994. The University of Arkansas is an equal opportunity/affirmative action institution.

Federal Register *in brief*

The following is a selection of matters that were published in the Federal Register in September, 1993.

1. FmHA; Servicing and liquidation of chattel security; final rule; effective date 9/1/93. 58 Fed. Reg. 46074.

2. FmHA; Direct and guaranteed operating and farm ownership loan and related instructions; interim rule. 58 Fed. Reg. 48275.

3. CCC; Common provisions for the 1994 wheat, feed grains, cotton, and rice programs, and cost reduction options; proposed rule. 58 Fed. Reg. 46886.

4. APHIS; Use of direct final rulemaking; policy statement. 58 Fed. Reg. 47206.

5. ASCS; Amendment to the regulations for the Agricultural Foreign Investment Disclosure Act of 1978 regarding land used for forestry production; final rule; effective date 10/15/93. 58 Fed. Reg. 48273.

—Linda Grim McCormick, Toney, AL

Courts disagree on CRP payments

Two recent cases involving the characterization of Conservation Reserve Program payments reached inconsistent conclusions. In *In re Butz*, 154 B.R. 541 (S.D. Iowa 1993), the court addressed the character of farm program payments as collateral. FmHA had argued that its mortgage provision covering "rents, issues, and profits" applied to the CRP and feed grain program payments at issue. The bankruptcy court rejected this argument, holding that the payments resulted from the contractual agreement with the Agricultural Stabilization and Conservation Service (ASCS) and were not "rents, issues, and profits." The district court affirmed on this issue. *Id.* at 543. The court also addressed the issue of setoff, holding that the Farmers Home Administration (FmHA) and the ASCS, each as federal agencies, were not separate entities for purposes of setoff. *Butz*, 154 B.R. at 544.

In contrast, in *In re Zweygardt*, 149 B.R. 673 (D. Kan. 1992), the district court in Kansas held that the CRP payments at issue were "rents." *Id.* at 680-81. comparing the CRP contractual terms to a leasing agreement, the court noted that the contract provided for "annual rental payments," provided for a long term (10 year) commitment that "run[s] with the land", and required specific land usage. On this basis, the court affirmed the bankruptcy finding that the contract payments were properly characterized as "rents." *Id.*

—Susan A. Schneider, Hastings, MN

Certificate of Transportation program/continued from pg. 1

with the Interstate Commerce Commission (ICC). 49 U.S.C. § 10762. In March, 1988, the National Grain and Feed Association (NGFA) filed a complaint with the ICC challenging the lawfulness of the COT program and seeking a cease and desist order. NGFA and numerous intervenors claim that the COT program has made it more difficult for shippers who rely on the conventional tariff service to obtain rail cars. Specifically, NGFA contends that: the COT program violates BN's common carrier obligations, 49 U.S.C. §§ 11101(a) and 11121(a)(1); the COT program violates the requirement that a railroad's transportation practices be reasonable, 49 U.S.C. § 10701; the program does not qualify as a special tariff pursuant to 49 U.S.C. section 10734; and COTs are contracts, not tariffs, and as such, must be filed with the ICC under 49 U.S.C. section 10713. Subsequently, the ICC approved BN's COT program and dismissed the complaint. *National Grain and Feed Association v. Burlington Northern Railroad Company*, 8 I.C.C.2d 421 (1992).

Writing for the court, Senior Judge Heaney, addressing this "new approach to the sale of rail transportation," determined that the ICC did not abuse its discretion in ruling that COTs may be filed as special tariffs rather than as contracts. 1993 WL 349197, *2. However, the court reversed the ICC's holding that the COT program does not infringe BN's common carrier obligations. According to the court, the key issue is whether the COT program prevents BN from meeting its common carrier obligations under the Interstate Commerce Act. In particular, the court directed the ICC to consider the COT program's impact during periods of grain car shortages. It is during shortages that conventional, non-COT shippers claim they are denied adequate rail transport upon reasonable request. Further, the court instructed the ICC to address whether non-COT shippers receive an equitable distribution of rail cars.

Citing the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, the court noted that BN may offer other forms of service through contracts or premium tariffs. Nevertheless, "the special service may not so adversely affect the carrier's conventional tariff service as to prevent or frustrate its ability to meet its common carrier obligations through that conventional tariff service." 1993 W.L. 349197, *6. Because the ICC did not adequately address BN's common carrier obligations to non-COT shippers, the court remanded for further proceedings. Judge Beam dissented, opining that under *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a permissible construction of an ambiguous statute by an agency must be upheld.

—Scott D. Wegner, Lakeville, MN

ADDRESS
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219 New York Avenue
Des Moines, Iowa 50313

agricultural update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

From the Board of Directors

The AALA Board of Directors has voted to add a new membership classification, "Associate Member Association," to the Association's bylaws for foreign membership associations. Associate Membership Associations shall include associations where membership consists primarily of individuals with a professional interest in the subject of agricultural law, but which do not exist under the laws of the United States or any subdivision thereof. Membership as an associate member association is conferred by the Board of Directors.

The Board also designated four members to represent the Association at the XVIIth European Agricultural Law Congress and Colloquium in Interlaken Switzerland, October 13-15, 1993: Terence J. Centner, Neil D. Hamilton, John S. Harbison, and Norman W. Thorson.

Three topics will be addressed at the Interlaken Congress: "Legal Problems Resulting from the Assignment of New Tasks to the Agricultural Sector," "Specific Legal Problems in Agriculture in Montain Areas and Other Naturally Less-Favored Regions," and "Legislative Measures to Guarantee the Quality of Agricultural Products."