Agricultural Law Update

VOLUME TWO, NUMBER TWO, WHOLE NUMBER FOURTEEN NOVEMBER 1984

Official publication of the American Agricultural Law Association

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Confidence imparts a wonderful inspiration to its possessor.

— John Milton

1984 tax reform act imputed interest rules delayed

The In Depth article in the Agricultural Law Update vol. 1, no. 12 (September 1984) discussed the imputed interest rules that will apply to deferred payment sales after Dec. 31, 1984. On Oct. 12, 1984 Congress passed an amendment to those rules that delays the effective date of the new testing and imputed rates for borrowed amounts of less than $2 million for the sale or exchange of property other than new section 38 (investment credit) property. The effective date of the 1984 tax reform act rules is delayed until July 1, 1985. During the period January 1 - July 1, 1985, the testing rate will be 9% compounded semiannually and the imputed rate will be 10% compounded semiannually.

The Oct. 12, 1984 amendment also requires the parties to an installment sale of property (other than new section 38 property) used in the active business of farming, and in which the borrowed amount does not exceed $2 million to use the cash method of accounting if the sale occurs after Dec. 31, 1984 and before July 1, 1985.

That means the parties must report unstated interest only as the principal payments from which the unstated interest is taken are actually paid. In contrast, under the new imputed rules that are scheduled to go into effect on July 1, 1985, if the installment sale of a farm is for $1 million or more, the imputed interest must be reported by the parties on an annual basis whether or not a principal payment is received.

— Philip E. Harris

Creditors' liquidating plans in farm bankruptcies

Farmers receive extra protection under several sections of the 1978 Bankruptcy Code (hereafter referred to as Code). Persons seeking the status of farmer must affirmatively establish their entitlement to it. *In Re Johnson,* 13 B.R. 342 (Bkrtcy. Minn. 1981)., Section 303 of the Code provides that creditors cannot commence an involuntary case against a farmer. Sections 1112(c) and 1307(e) specifically prohibit conversion of a Chapter 11 or Chapter 13 to a Chapter 7 liquidation over the objection of the farmer-debtor. But what of a farmer who has filed a Chapter 11 and exhausted the 120-day time period for the filing of his own? Is he now subject to liquidation in Chapter 11 pursuant to a plan filed by a creditor? Several recent decisions have split on this issue.

Finding against the farmer, the court in *In Re Tinsley,* 36 B.R. 807 (Bkrtcy. W.D. Ky. 1984), reasoned that a farmer-debtor who voluntarily files a Chapter 11 obtains substantial benefits, including automatic stay protection, retention of control of assets, an exclusive period for filing a plan and the right to assume or reject executory contracts. By voluntarily subjecting himself to the jurisdiction of the court, the farmer-debtor, in the absence of a specific Code provision to the contrary, should be subjected to all the provisions of the Code, including those that confer rights to creditors.

In *Matter of Jasik,* 727 F.2d 1379 (5th Cir. 1984), the court focused on the time period within which the farmer-debtor has the exclusive right to file a Chapter 11 plan. This right extends for the first 120 days following the commencement of the case, Code § 1121(b). If that time period expires, creditors may propose a plan of their own, Code § 1121(c). *Jasik* holds that if the debtor fails to file a plan

(continued on page 2)

within the 120-day period, creditors are free to do so even if the debtor is a farmer. Such plan may provide for the liquidation of the farmer-debtor's property and the distribution of proceeds to creditors. *Accord, In Re Cassidy Land & Cattle Co. Inc.*, Case No. 82-1257 (D. Neb. 1984).

Another adverse case for farmers is *In Re J. F. Toner & Son Inc.*, 40 B.R. 461 (Bkrtcy. W.D. Va. 1984). There, the court examined the Code sections that specifically contemplate Chapter 11 liquidation plans, §§ 1129(a)(11), 1123(a)(5)(D), 1123(b)(4). Nowhere in these sections is there an exception for a farmer.

In contrast to this line of cases, there are several decisions that have held that a creditor cannot compel a Chapter 11 liquidation of a farmer. While the court did not analyze the issue carefully, this was the holding in *In Re Blanton Smith Corp.*, 7 B.R. 410 (Bkrtcy. M.D. Tenn. 1980).

In *In Re Lange*, 11 B.C.D. 1031 (Bkrtcy. Kan. 1984), the *Tinsley, Jasik* and *Cassidy* cases were considered and rejected. The court's analysis began with a consideration of the Frazier-Lemke Act, which was adopted during the Great Depression to provide rehabilitation relief to farm-debtors. Act of March 3, 1933, ch. 204, 476 Stat. 1467. Under Frazier-Lemke, a farmer could not be forced to liquidate against his will. If a composition or extension proposal could not be confirmed and the farmer did not agree to immediate or future liquidation, the case was dismissed. Citing *Wright v. Union Central Life Ins. Company*, 311 U.S. 273 (1940), the court in *Lange* also noted that the Code is to be liberally construed to give debtors the full measure of relief ordered by Congress with ambiguities in the statute to be resolved accordingly. *Lange* held that a creditor-proposed liquidation plan that has been objected to by the farmer-debtor does not comply with the provisions of Chapter 11 requiring a filing in good faith and not under circumstances forbidden by law, § 1129(a)(1), (3).

In the view of the court, a creditor's Chapter 11 liquidation plan would violate Code § 303(a), which is arguably incorporated into Chapter 11. The court concluded that confirmation of a Chapter 11 liquidation plan, in light of the restrictions on involuntary conversion to a Chapter 7, would elevate form over substance. Since there is no substantive difference between the effect of a Chapter 7 liquidation and a Chapter 11 liquidation, a creditor should not be permitted to do in one instance what he could not do in another.

As was the case under Frazier-Lemke, the creditor's remedy in a farm reorganization is dismissal, pursuant to Code § 1112. *Lange* indicates that this must be the result, as there is nothing to indicate that Congress intended the Code to work a fundamental policy change as to farmer-debtors. *Accord, In Re Kehn Ranch Inc.*, 41 B.R. 832 (Bkrtcy. S.D. 1984).

While the issue of whether a creditor may force a liquidation plan upon the farmer-debtor remains clouded, one final issue would seem to be clear. Such a plan may *not* call for the liquidation of all the debtor's assets. Code § 1123(c) expressly provides that such a plan must take into account the debtor's exemption claims. *In Re Tinsley, supra; In Re Lange, supra.* Thus, even a creditor's liquidation plan must allow the debtor a certain amount of property.

— Phillip L. Kunkel

Agricultural Law Update

VOL. 2, NO. 2, WHOLE NO. 14 NOVEMBER 1984

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CENTURY COMMUNICATIONS INC

Agricultural Law Update is owned exclusively by Century Communications, Inc. and published in conjunction with the American Agricultural Law Association. Publication office: Century Communications, Inc. 5520-G Touhy Ave., Skokie, IL 60077 (312)676-4060. Philip C. Miller, President, Marilyn M. Miller, Vice President, Lynn O. Henderson, Vice President, Christine A. Waligorski, Secretary.

Agricultural Law Update is edited for those with a professional interest in agricultural law including attorneys, farm managers, agricultural lenders and agricultural land owners. Subscription $75.00 in U.S., Canada and Mexico; $100.00 to all other countries. Back copies, which available are $9.00 each for U.S., Canada and Mexico. All other countries add $4.00. All U.S. funds. Payment must accompany order.

Federal debt programs

On Oct. 19, 1984, interim regulations were issued implementing the first two of the four initiatives announced on Sept. 18, 1984, to deal with the mounting farm debt problems faced by some farmers. Four initiatives are involved in the program.

- A interest-free set-aside of up to 25% of eligible Farmers Home Administration (FmHA) farmer program loan indebtedness (maximum of $200,000) for five years is available under the first initiative. A positive cash flow is required. Only those in farmer loan programs on September 18 are eligible. Borrowers in bankruptcy or whose accounts had been accelerated by October 19 are not eligible.
- A federal loan guaranty program is available for eligible loans held by commercial lenders such as banks, Production Credit Associations, Federal Land Banks, insurance companies and savings and loan associations. The lender must agree to permanently write off at least 10% of the existing principal and interest owed on the loan. FmHA may provide the lender with a guarantee not to exceed 90% of loss of principal and interest on a loan. The regulations caution that a guarantee of less than 90% may be necessary to assure "an appropriate sharing of risk between the private lender and the federal government." The debt adjustment plan must show a positive cash flow in the farmer's operating budget.
- The third initiative, for which regulations have not yet been issued, provides authority for hiring financial and management consultants at the local level to assist FmHA, the farmer and the commercial lender.
- The fourth initiative gives FmHA offices authority to contract with private sector lenders in servicing FmHA loans.

— Neil E. Harl

Review of recent law review literature

Introductory Note: Concern about the credit situation for agriculture is great. For example, by January 1983, Farmers Home Administration (FmHA) delinquencies had risen to $5.54 billion (from $3.53 billion in 1977). This month's list outlines a few of the recent (since 1982) law review pieces dealing with aspects of financing and credit.

Dean, ***Financing Cooperatives — A Challenge of the 1980's,*** **4 Agricultural**

This article considers financing mechanisms of particular interest to farmer cooperatives. It describes six major sources of long-term financing for cooperatives: 1) the Farm Credit System's Bank for Cooperatives; 2) industrial revenue bonds; 3) lease financing; 4) commercial banks and insurance company loans; 5) joint ventures with non-cooperative organizations; and 6) limited partnerships (with the cooperative as general partner and farmers as limited partners). Possible short-term financing mechanisms are also reviewed, including bankers' acceptance, or redeemable preferred stock. In each instance, the mechanism is clearly described, the advantages outlined and the frequency (or not) of its use is considered.

Dean's article is followed by a case study of one major coop's approach to financing, presented by John Long, director of finance for AGRI Industries Inc. of Des Moines, Iowa, a federal cooperative involved primarily in marketing grain. The article and Long's discussion should provide an excellent primer for those interested in expanding their knowledge of farm credit sources and mechanisms.

Medero, ***Access to Capital: One of the Most Important Current Threats to American Agriculture,*** **4 Agricultural L.J. 491 (1983).**

This article focuses on the historical development of and current crises concerning the Farm Credit system. Of particular interest is the discussion of the role of the Farm Credit Bank in the "agency" capital market. The article concludes with an analysis of the current — and potentially adverse — trend toward the "privatization" of farm credit systems.

Agricultural Law: FmHA Farm Foreclosures, An Analysis of Deferral Relief and the Appeals System, **23 Washburn L.J. 287 (1984)**

This article touches all the major aspects of the subject indicated by the title — legislative, regulatory, and judicial. It first details the historical development of the FmHA farm credit programs and then describes eligibility, foreclosure and deferral relief mechanisms available.

Three legal issues are briefly laid out: 1) whether the Secretary of Agriculture is required to allow a farmer to apply for deferral relief under §1981a or whether it is discretionary; 2) whether the provisions of § 1981a must or should be implemented by additional rulemaking; and 3) whether the USDA is required to provide notice of the availability of deferral relief. The article concludes with an overview of recent litigation surrounding these issues, focusing particularly on *Curry v. Block,* 541 F.Supp. 506 (S. D. Va. 1982) and *Matzke v. Block,* 542 F.Supp. 1107 (D.Kan. 1982). [Note that since this article's publication appellate court decisions have been issued in several cases of this type. See September 1984 Ag Law Update.] ***Selected articles, 37 Arkansas L. Rev. 1-312 (1983).***

This special agricultural volume of the Arkansas Law Review includes several articles on the subject of agricultural financing and related topics. Beard & Hoffman's ***Compensating Family Members: A Survey of Major Tax Planning Problems and Opportunities of the Family Farm*** outlines the opportunities (and potential problems) for family unit tax savings. Topics discussed include various approaches to income shifting by payments for services, use of individual retirement accounts, deductions for two-income married couples, employment taxes and fringe benefits. Although the authors indicate that the article is not intended to serve as a "definitive" study, it does present a thorough, well-organized and detailed analysis of a wide range of family compensation issues.

The McGivern article on ***International Letters of Credit and Their Use in Agricultural Export Situations*** enters the arena of financing in the export markets. Noting the four major methods of payment in international trade — cash in advance, open accounts, drafts and letters of credit — the article focuses mainly on the last. International letters of credit are defined and their potential use explained carefully. Legal issues surrounding their use are delineated with discussion of both British and American case law. The author succeeds in his undertaking, i.e. in making international letters of credit less of a mystery and hence, more frequently used.

Other articles in the Arkansas issue include discussions of ***Potential Liability of Directors of Agricultural Cooperatives*** (Free & Hoberg). ***Legal Implications of Livestock Auction Bidding Practices*** (Kershen), ***Simmons First National Bank v. Wells;*** [279 Ark. 204, 650 S.W.2d 236 (1983)], ***An Interpretation of the UCC's Consignment Rule*** and [Arkansas] ***Act 401 of the Public Grain Warehouse Law and An Exception to the UCC Concept of Voidable Title.***

Agricultural Law Symposium Articles, 3 Northern Illinois University Law Review 253-200 (1983).

This symposium contains four concise pieces on the future of government regulation of agriculture: two which focus especially on financing issues. Jake Looney's paper entitled: ***The Future of Government Regulation of Agriculture: Finance & Credit*** discusses government involvement in agricultural credit and related policy concerns and questions the impact of "privatization" of the Farm Credit system. Neil Harl's paper entitled: ***The Future of Government Regulation of Agriculture: Implications of Tax Policy for Agriculture*** causes readers to consider the values and problems inherent in using the tax system to implement national policy. The article then focuses in on the tax policy and the unique aspects of agriculture, detailing both income tax incentives and estate tax considerations.

Final Note: Not reviewed (because of unavailability in library) was the discussion of **Curry v. Block** at 28 S.D. Law Rev. 413.

—Sarah Redfield

Agricultural lands and Section 404 wetlands protection

by Gerald Torres

In the 1972 amendments to the Federal Control Act,[1] Congress significantly enlarged the powers of the Army Corps of Engineers to control the dredging and filling of the nation's waters. The 1977 amendments to the act marked a departure from the common-law concept of "navigable waters" by defining the term to include all "the waters of the United States, including the territorial seas."[2]

This change in definition has resulted in a number of lawsuits over the extent of the Corps' jurisdiction. The most significant case to date has come out of the 5th Circuit Court in *Avoyelles Sportsmen's League Inc. v. Marsh*.[3] This case, like many others now being brought to court, has broad implications for landowners who wish to convert land within the Corps' jurisdiction to agricultural uses.

Commentators have suggested that up to 80% of wetland loss is due to its conversion to agricultural uses.[4] The confluence of these factors sets the stage for a confrontation between agriculture and environmentalists over wetlands protection and farmland use. The scene is further complicated by the express exemptions written into the Act for "normal farming, silviculture and ranching activities...or upland soil and water conservation practices."[5]

Avoyelles concerned a tract of approximately 20,000 acres located in Avoyelles Parrish, La. This land, called the Lake Long tract, lies within the Bayou Natchitoches Basin, which is part of the Red River backwater area. The Bayou Natchitoches Basin has an average yearly rainfall of 60 inches and regularly floods in the spring. The land in the tract was forested and uneven, containing some areas of permanent water impoundment and some drier areas.

The landowners began a large-scale deforestation program in June 1978 in order to convert the land into a soybean operation. Using bulldozers mounted with heavy shearing blades, the trees and other vegetation were cut off at or just above ground level and then raked or burned. The ashes and stumps were then disced into the ground. The landowners also leveled some of the ground and dug one drainage ditch.

Wetlands Determination Made

In August of that year, the Army Corps of Engineers ordered the landowners to end the deforestation program they had begun, pending a wetlands determination. The subsequent determination found that 35% of the Lake Long tract were wetlands. Following that determination, the landowners resumed their operations on the dryland acreage in the tract.

In November 1978, a citizen's suit under section 505(a)[6] was initiated against the Corps, the Environmental Protection Agency (EPA) and the landowners. The claim raised by the plaintiffs was that the land-clearing activities of the owners would result in the discharge of dredged and fill materials into the waters of the United States in violation of sections 301(a) and 404 of the Clean Water Act[7] as well as resulting in the discharge of pollutants into the waters of the United States in violation of section 402 of the Act.[8]

The plaintiffs sought a declaration that the entire tract was wetlands under the Clean Water Act,[9] that the landowners should be prohibited from clearing their land without a permit from the EPA or the Corps and that the federal defendants failed to perform their "mandatory duty"[10] to designate the entire tract a wetlands. Finally, they sought an order directing the landowners to stop their land-clearing activities until they obtained the requisite permits.

The district court immediately issued a temporary restraining order and in January 1979, granted the plaintiffs' motion for a preliminary injunction ordering the federal defendants to prepare a final wetlands determination within 60 days. The EPA issued a report concluding that 80% of the tract was wetlands and subject to the jurisdiction of the Corps. In reviewing the actions of the EPA, the district court conducted a "de novo" review of the final wetlands determination, holding that over 90% of the tract was wetlands and that the landowners must, therefore, obtain a section 404 permit before proceeding with their agricultural conversion.

The 5th Circuit Court faced two major issues on appeal. First, was the district court correct in substituting its own wetlands determination for that of the EPA? Secondly, was the district court correct in ruling that the land-clearing activities of the private defendants required a permit under the Clean Water Act? The 5th Circuit Court ruled that the district court applied the wrong standard of review in assessing the EPA's wetlands determination and had erred in substituting its judgment for that of the agency, but that it was correct in holding that the land-clearing activities were subject to the 404 permit requirements.

The crux of the court's analysis of the first issue was that the district court misapplied the standard of review required by the Administrative Procedures Act (APA).[11] The APA provides that a court shall set aside the judgment of an agency only where it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law," or where it fails to meet other statutory, procedural or constitutional requirements.[12]

In other words, the district court had abused its own authority by failing to apply the "arbitrary and capricious" standard and by substituting its judgment for that of the agency, ignoring the U.S. Supreme Court's injunction in *Citizens to Preserve Overton Park Inc. v. Volpe*[13], that courts are "not empowered to substitute [their] judgment for that of the agency."[14]

In rebuking the lower court for its failure to apply the correct standard in its review of the EPA's wetlands determination, the 5th Circuit Court noted that "[d]e novo review would permit the court to intrude into an area in which they have no particular competence."[15]

Rather than remanding the case to the district court, the 5th Circuit Court itself applied the "arbitrary and capricious" standard to the facts, noting that the administrative record should be the focal point for review, obviating the need to take additional evidence. They further noted that the notice and comment requirements of the APA[16] were

not triggered by the EPA's use of a new wetlands determination methodology, because the one adopted by the EPA was viewed as an interpretation of administrative regulations and not the promulgation of new legislative or substantive rules. Thus, the agency's interpretation of the wetlands definition was consistent with the regulations, the Clean Water Act and the U.S. Constitution.

Permit Requirements Set

The court then turned its attention to the permit requirements. Section 502 (12) defines "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source..."[17] The 5th Circuit Court broke this definition into four parts asking whether the landowners' clearing activities were: (a) a discharge; (b) of a pollutant; (c) from a point source; or (d) into navigable waters.

The court held that the landowners' activities met all four tests. A "discharge", the court reasoned, may be the redeposition of vegetation or other materials. Thus, the discing of the stumps and other residue of the land-clearing operations constituted a discharge.

The court also found that the contents of the discharge were "fill material" under section 404 and as such, met the requirements of a "pollutant."

A point source is "any discernible, confined and discrete conveyance, including but not limited to, any...container, rolling stock...or vessel... from which pollutants are or may be discharged."[18] Using this definition, the court found that the bulldozers and other land-clearing machinery constituted point sources.

In order to determine whether the Lake Long tract was indeed within the jurisdiction of the Corps, the court looked to Congress, which faced the issue of including wetlands in the statutory definition of navigable waters in 1976 and 1977.

By reviewing the legislative history, the court concluded that Congress had intended to include wetlands such as the Lake Long tract in the navigable waters definition.

Finally, the court had to decide whether the activities of the landowners were exempt from the permitting requirements by dint of section 404(f).[19] As noted earlier, that section of the act specifically exempts normal farming activities from the permit requirements of the Act.

The district court held that the exemption was not available to the defendants because it was limited to "normal" farming practices, which the court interpreted to mean "on-going" agricultural activity. This interpretation was supported by the EPA's regulations. The district court further reasoned that since section 404(f)(2) prohibits the exemption of activities that involve bringing the land "into a use to which it was not previously subjected..."; its interpretation of "normal" as "on-going" was correct.

5th Circuit Court's Conclusion

The 5th Circuit Court accepted the reasoning of the lower court and affirmed its holding that the land-clearing activities were not exempt under section 404(f).

While we should appreciate the court's attempt to clarify the complicated issues raised by this case, the implications of its decision should not be overlooked. Nor should we be misled into believing that it has conclusively resolved the issues raised by section 404, especially as they relate to agriculture.

The effect of the court's decision is to put millions of acres of southern bottomland into the Corps' jurisdiction. Many of the activities on these lands, which will now trigger the Corps' permitting processes relate directly to the conversion of such lands to agricultural uses.

One view, of course, is that agricultural uses are no different from any other developmental uses of land and should be regulated in the same way. There is considerable merit to this perspective, especially if one believes that agriculture ought to be directed onto those lands best suited for it and away from more sensitive lands.

In adopting this view, however, one should continue to focus on the goals of the Clean Water Act and ask whether or not the conversion to agricultural uses is destructive of those goals.

Such questions have special weight in light of the Congressionally-mandated exemptions for "normal" agricultural practices, despite the 5th Circuit Court's treatment of that exemption. A deeper question remains, however, which is: Whether or not the court's jurisdictional determination was correct — a question further complicated by the court's treatment of the standard of review to be applied to the agency's jurisdictional determination.

As mentioned earlier, the court noted that the trial court was wrong in applying *de novo* review to the EPA's jurisdictional finding since it was not a determination of whether or not the Corps had jurisdiction, but merely a review of whether the agency had "arbitrarily or capriciously" classified the proper amount of land as wetlands.

The court reasoned that *de novo* review would have been proper if the district court had been reviewing whether or not the agency had any jurisdiction over the tract at all. It is exactly that question which continues to raise considerable controversy.

The 6th Circuit Court in *United States v. Riverside Bayview Homes* vacated an injunction issued by the district court, which had required the landowners to get a permit from the Corps before depositing fill on their lands. The court noted that the regulations governing the jurisdiction of the Army Corps of Engineers had to be strictly construed in light of the purposes and scope of the Clean Water Act. It held that in order for the regulations to be within the permissible reach of the Clean Water Act, the jurisdiction they describe must comport with the constitutional limitations under which the Act was drafted.

Since the power of the Corps to regulate such activities comes from the "navigable waters" language in the Act, that provision — at its broadest — must be coterminous with the applicable reach of the commerce clause.[20]

The power of the Congress to act under the Clean Water Act as interpreted through the regulations limiting the Corps' jurisdiction must be consistent with the general constitutional powers that Congress has in regulating pollution of the nation's waters. Thus, the regulations defining "wetlands" must be very narrowly construed.

The court does this by breaking down the regulations into two requirements: (1) that the land be frequently inundated; (2) that the inundation must support aquatic vegetation. This view, at least superficially, seems to comport

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with the regulations adopted by the EPA, but it does not seem to be consistent with the methodology approved of by the 5th Circuit Court in *Avoyelles*.

The methodology applied there focused on the frequency of inundation, the type of vegetation and the types of soils. Part of the land in the Lake Long tract was excluded from the wetlands designation because the expert in that case could not conclude that the soils in that part of the tract were restricted solely to wetlands.

The view of the 6th Circuit Court, while noting the *Avoyelles* decision in a footnote, contradicts the tack adopted by that court. It seems more troubled by the potential constitutional problems posed by Corps' regulation of wetlands, noting that "we see a very real taking problem with the exercise of such apparently unbounded jurisdiction by the Corps."[21] It avoided the problem by construing the amended wetlands definition to be limited to lands that are frequently flooded by waters subject to the jurisdiction of the Corps.

"Accordingly, we interpret the words 'inundated at a frequency and duration sufficient to support and that under normal circumstances (does) support (wetlands vegetation)' as set forth in the amended regulation to require frequent flooding by waters flowing from 'navigable waters' as defined in the Act. The definition (does not cover) inland low-lying areas...that sometimes become saturated with water."[22]

What makes the 6th Circuit Court's treatment of the jurisdictional question troublesome for the disposition of that issue by the *Avoyelles* court is that the broad scope accorded to the Corps' activities in *Avoyelles* is arguably a result of their unclear application of the "arbitrary and capricious" test to the agency's action. As one commentator has noted,[23] even upon a close reading of the case, one is still uncertain of the facts to which the court was applying the test.

Under *Overton Park*, the reviewing court still has the obligation to assess the agency's construction of the statute to be assured that the judgment of the agency is reasonably within the range of discretion accorded to it. That step is necessarily made prior to the review of the record required to determine if the choice made by the agency is, *in fact*, reasonably made. The court must make these judgments independently and should, therefore, be empowered to take additional evidence to aid in their evaluation of an agency's decision.

This, in essence, was the point made by the *Riverside Bayview Homes* court. While there is great deference to be given to the agency's interpretation of the statute and their power under it, such deference should not be used to assume away difficult problems, especially where the court sees its role in applying the arbitrary and capricious test as that of determining whether or not the agency had correctly interpreted the reach of its jurisdictional authority.

Avoyelles makes it clear that any deposition into wetlands of material from farming activities without a permit from the Corps will be prohibited unless the discharge is from an on-going farming or silviculture operation.[24] That was the position adopted by the EPA. The court noted that the section 404(f)(1) exemptions should be read in light of 404(f)(2) which, it argued, limits the reach of the exemptions by subjecting "new uses" to the permitting process.

Explanation of Exemptions

Read this way, the exemptions exist only for those activities which will have little or no adverse effect on the nation's waters. Given its interpretation of "discharge of pollutants," any new agricultural activity would be subject to the Corps jurisdiction, even if it involved only wetland farming. Any change in the character of the land triggers the 404(f)(2) limitation on the exemption.

To further buttress this point, the court pointed to its ruling in *Save Our Wetlands Inc. v. Sands*, where it distinguished the activities contemplated by the landowners in *Avoyelles* from the actions undertaken there. In that case, trees were to be cut, windrowed and allowed to deteriorate. The land cleared would be changed to swamp grasses, shrubs and other low growth, whereas in *Avoyelles* the land would be shifted to a non-wetlands type of vegetation and the land would cease to be wetlands. Even though it would be shifted to an arguably exempted use, the change would be to a new use, triggering the Corps' authority. Thus, while EPA's interpretation makes sense, it reduces the statutory exemption almost to a nullity.

While the cases discussed here point to an expanded role for the Corps in the regulation of wetland uses, considerable controversy remains over the legitimate scope of its authority and over the impact of their jurisdiction on those activities Congress intended to exempt. Agriculture seems destined to remain on the cutting edge of this dispute.

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1. 33 U.S.C. Section 1251 et seq.
2. id. Section 1362(7); 502 (7).
3. 715 F.2d 897 (5th Cir. 1983).
4. Tripp, **Judicial Review of Section 404 Wetlands Protecting Actions: A Reaction,** 14 ELR 10096 (1984); Rosenbaum, *Fifth Circuit Defers to EPA's Expertise, Approves Broad Section 404 Wetlands Jurisdiction,* 13 ELR 10397 (1983).
5. 33 U.S.C. 1344 (f) (1) (A); 404(f) (1) (A).
6. 33 U.S.C. 1365(a); 505(a).
7. 33 U.S.C. 1311, 1344; 301, 404.
8. 33 U.S.C. 1342; 402.
9. 715 F.2d 897, 902 fn. 10 (5th Cir. 1983):

"Now that we have set out the alleged violations, perhaps a brief explanation is in order of why *land-clearing* activities on *wetlands* might violate the Clean Water Act (CWA). The CWA provides for regulation of the discharge of pollutants into "navigable waters." The term "navigable waters" is defined by the statute as "waters of the United States, including territorial seas." 33 U.S.C. 1362(7) (1976). Pursuant to its authority under 33 U.S.C. section 403 (1976). (River and Harbors Act) and 33 U.S.C. section 1344, the Corps, in cooperation with the EPA, has further defined the term "waters of the United States," to include wetlands "adjacent" to "navigable waters," and "wetlands...the degradation of which could affect interstate commerce." 33 C.F.R. Section 323.2(a) (1)-(5) (1982). *See also,* 40 C.F.R. Section 230.3(s) (1982); *United States v. Holland, 373 F.Supp.665 (M.D. Fla. 1974).*"

10. 715 F.2d 897, 902, ft.11 (5th Cir. 1983): "We have held that enforcement of the Clean Water Act is not a "mandatory duty." *Sierra Club v. Train,* 557 F.2d 485 (5th Cir. 1977)."
11. 5 U.S.C. Section 701, et seq. (1976).
12. 5 U.S.C. 706(2) (A) (B) (C) (D) (1976).
13. 401 U.S. 402 (1971).
14. id. at 416.
15. 715 F.2d 897, 906 (5th Cir. 1983).
16. 5 U.S.C. 553 (1976).
17. 33 U.S.C. 1362 (12); 502(12).
18. 33 U.S.C. 1362 (14); 502(14).
19. 33 U.S.C. 1344(f); 404(f).
20. 729 F.2d 391 (6th Cir. 1984); *Kaiser Aetna v. United States,* 444 U.S. 164 (1979).
21. *United States v. Riverside Bayview Homes,* 729 F.2d 391, 398 (6th Cir. 1984).
22. id.
23. Tripp, *supra,* note 2.
24. 33 U.S.C. 1317; 307.
25. 711 F.2d 634 (5th Cir. 1983).

Fair Labor Standards Act — Recent Agricultural Case

Three recent agricultural cases decided under the Fair Labor Standards Act (FLSA) offer an opportunity to review well-established general rules as applied in unique fact situations.

In *Donovan v. Brandel,* 736 F.2d 1114 (6th Cir. 1984), the court determined for FLSA purposes that certain migrants who contracted with a farmer to harvest pickles from specific plots were independent contractors rather than employees. Thus, the Secretary of Labor's claim that the farmer had violated FLSA child labor and record-keeping requirements failed.

The court weighed the outcome and determinative factors articulated in *Real v. Driscoll Strawberry Associates, Inc.,* 603 F.2d 648 (9th Cir. 1979), and concluded that there was insufficient economic dependence to create the employment relationship: (1) while some of the harvesters returned to the farm for 30-40 days each year, the relationship was characterized as temporary, not permanent; (2) pickle harvesting requires a significant level of skill, setting these workers apart from other hand-harvest laborers; (3) while workers had a relatively small investment in their own equipment, pails and gloves, this suggestion of an employment relationship was given little weight; (4) the opportunity for economic gain was given considerable weight as workers received 50% of the proceeds from the sale of harvested pickles; (5) the farmer did not set hours of work and did not conduct day-to-day field supervision, allowing the workers to control their harvesting operations. Caveat: FLSA employee v. independent contractor issues are resolved on a case-by-case basis and *Brandel* involved particularly well-developed evidence for the farmer, harvesters who earned the equivalent of $6 to $9 per hour and nine harvesters who intervened as defendants to assist the farmer in the litigation. Compare *Brandel* with *Donovan v. Gillmor,* 535 F.Supp. 154 (N.D. Ohio 1982), *appeal dismissed,* 708 F.2d (6th Cir. 1982) (employment relationship established).

By ways of contrast, consider *Castillo v. Givens,* 704 F.2d 181 (5th Cir. 1983), where a registered farm labor contractor, Tonche, was found to be an employee of the farmer. In a more typical fact situation, the farm labor contractor would be classed as an independent contractor asn the issue as to the farmer's responsibility to the crew under FLSA would turn on whether the farmer and the farm labor contractor are joint employers of the crew under the FLSA joint employer doctrine.

However, in *Castillo,* given Tonche's status as an employee of the farmer, there was no need to address the joint employment issue as the workers hired by Tonche were automatically considered employees of the farmer. Factors that cumulated to support the finding that Tonche was an employee included: supplying crews only to the defendant farmer upon whom he was entirely economically dependent; being illiterate; supervising only "minor routine tasks"; he had but a minimal investment in hoes for the crew; his relationship with the farmer was permanent; he did not receive enough from the farmer to pay the crew the minimum wage; and he himself was paid by the hour at less than the minimum wage.

The farmer, as the employer of Tonche and the crew, was found to have "willfully" failed to pay minimum wages to his agricultural employees and the employees were entitled to recover unpaid minimum wages and liquidated damages in an equal amount. 29 U.S.C. § 216(b).

Neither of the above cases involved facts that would trigger the FLSA agricultural exemptions. However, that potential existed in *Martinez v. Deaf Smith County Grain Processors Inc.,* 583 F.Supp. 1200 (N.D. Texas 1984). There the employer clearly had not used 500 man-days of agricultural labor in any quarter of the preceding calendar year. Having failed to reach the 500 man-days threshold, the employer would normally be free from the FLSA agricultural minimum wage requirement.

Further, regardless of man-days used, the employer would not be required to pay overtime, given the general agricultural exemption. However, the defendants in *Martinez,* who were joint employers, assigned the farm employee in question 15-20 hours a week at a corn processing operation that did not meet the FLSA primary or secondary definition of agriculture. 29 U.S.C. § 203(f). This triggered the rule that the FLSA agricultural exemption is not applicable when the worker is assigned both agricultural and non-agricultural work in the same work week. See 29 C.F.R. § 780.11. Thus, the employee was entitled to both minimum wage and overtime protection.

— Donald B. Pedersen

Government Regulation: 1985 Feed Grains Program

In September, the USDA announced the regulations for the 1985 production control programs for feed grain, rice, upland cotton and wheat. See 49 Fed. Reg.____. The program for feed grains is a 10% voluntary, non-paid set-aside. There is no paid diversion for feed grains, a decision that was reaffirmed after the October 1 stock report indicated that the projected Oct. 1, 1985 carryover was less than the 1.1 billion bushels that, by law, would have triggered a 5% paid diversion.

As in recent years, enrollment in the program is based on producers signing a binding contract with liquidated damage provisions for failure to comply. The loan rate for corn remains at 2.55 per bushels and the target price remains at $3.03. Signup for the program opened on October 15 and will extend until March 1, 1985. The program allows a producer to request advance deficiency payments for the 1985 crop of 50% at the time of signup. The USDA is projecting deficiency payments for the 1985 crop at 47¢ per bushel. No advance deficiency payments were made for the 1984 crop.

Other rules of the program are similar to previous programs, such as dedication of set-aside acres to acreage conservation reserve, restrictions on haying and requirements that set-aside land have been devoted to row crops or small grains for the last 3 years. There will be no immediate entry of 1985 crops into the farmer-owned grain reserve.

— Neil D. Hamilton

agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Report on 5th Annual Ag Law Conference

More than 150 educators, government officials, practitioners, students and guests attended the American Agricultural Law Association's (AALA) Fifth Annual Meeting and Educational Conference October 25-26, 1984. This event, which was co-sponsored by the University of Denver College of Law, was held at the Brown Palace Hotel, Denver, Col.

Nineteen speakers from academia and private practice addressed a wide range of topics, including conservation easements, groundwater law, secured financing, animal rights, Packers Stockyards Act issues, U.S. and Canadian cooperative law, commodity option contracts, credit reform, labor issues, embryo transplants and various tax topics.

President J.W. Looney delivered the Thursday luncheon address and called for increased attention to improving laws impacting agriculture. The Friday luncheon address was delivered by W. Scott Burke, USDA Deputy General Council, and focused on international agricultural trade issues. As part of the regular program, Dr. Malgorzata Korzycka, a member of the agricultural law faculty at the University of Warsaw, spoke on agricultural law in Poland.

Dr. Neil Harl was the recipient of this year's "Distinguished Service Award," a well-deserved recognition of his vital contribution to the advancement of the field of agricultural law. The winner of the First Annual Student Writing Competition was James Ranier, a student at the Cecil B. Humphrey's School of Law, Memphis State University. His topic was "The Impact of Biotechnology on the Farmer and Agricultural Taxation."

Rachel C. Lipman, a student at the University of Kansas School of Law, was second place winner with her paper on the Uniform Commercial Code farm products rule. We congratulate these individuals.

The new officers of AALA are President Keith G. Meyer, President-Elect David A. Myers, and board members Phillip Kunkel and Neil D. Hamilton. We express our deep appreciation to Past President J.W. Looney and outgoing board members Norman W. Thorson and David A. Myers for their contributions to the Association. We also acknowledge, with thanks, the ongoing work of Margaret R. Grossman as AALA secretary-treasurer.

Next year's meeting will be held October 3-4, 1985 at the Hyatt Regency Hotel in Columbus, Ohio. Plan to attend!