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The man who insists upon seeing with perfect clearness before he decides, never decides.

— Henri-Frederic Amiel

Plant exporters directed to new USDA offices

WASHINGTON, D.C. — The U.S. Department of Agriculture (USDA) issued on Nov. 27, 1984, a new list of 21 central offices where plant exporters can inquire about export certification.

"The centrally located offices will direct exporters to one of 200 local offices where an inspector can be on hand to inspect plants for export," according to Don R. Thompson, staff specialist for the USDA's Animal and Plant Health Inspection Service. These advance arrangements are necessary because an appropriate official for export certification is not always available at each local office of the agency's plant protection and quarantine service, he said.

Phytosanitary certificates are required by most importing countries to certify that the plants involved are free from plant pests and diseases.

Up to now, the USDA had designated 74 locations where exporters could inquire about obtaining phytosanitary certificates. This list is no longer in effect, Thompson said.

Phytosanitary certificates for plants protected under the Endangered Species Act and the Convention on International Trade in Endangered Species must be obtained at the port where the plant is to be exported. Approved ports of export for endangered species were listed by the U.S. Department of the Interior in the Oct. 25, 1984 Federal Register.

This USDA action was published in the Nov. 26, 1984 Federal Register.

—USDA News Release

Uniform Commercial Code vs. branding laws

Cugnini vs. *Reynolds Cattle Company*, 687 P.2d 982 (Colo. 1984), entered Sept. 4, 1984 by the Colorado Supreme Court held, in a disputed sale of cattle, that "under the circumstances of this case, the passage of title is controlled by the pertinent provisions of the UCC rather than by the livestock bill of sale statutes." (Branding Laws)

In this case, plaintiff Cugnini placed cattle in the hands of a cattle broker named Russell, although the cattle were never delivered to Russell's place of business. At trial, Cugnini testified that because of his distrust of Russell, he told Russell that he would not "release" the cattle until he received the purchase money. Russell testified to the contrary. The Court made no findings as to the issue of intent.

Russell then conveyed the cattle *via* an incomplete bill of sale to Reynolds, who paid for them. The purchase money disappeared and Cugnini sued Reynolds to recover the cattle.

The Colorado Supreme Court first found "noncompliance with the livestock bill of sale requirements does not necessarily prevent transfer of title." It reached this conclusion based upon a statutory defense in Colorado's cattle rustling law, making any person selling livestock not branded or for which he has no bill of sale or power of attorney guilty of theft unless *upon trial* defendant proves he was the actual owner of the livestock or acted by the direction of one proven to be the actual owner.

The Court cited in support of its principal conclusion as to the controlling provisions of the UCC, decisions from Mississippi, South Dakota, South Carolina and Utah, as well as federal cases applying Nebraska, Iowa and Texas law. The Mississippi, South Dakota and South Carolina cases were motor vehicle cases having nothing to do with mandatory branding and inspection laws. The remaining cases turned upon a trial court or jury finding of intent to convey on the part of the sellers in circumstances of the particular case.

The Court went on to find that the plaintiff's actions amounted to an "en-

(continued on next page)

Zoning restriction on number of animals unreasonable

The Supreme Court of Georgia held that a zoning ordinance which limited the number of animals per tract in a residential area without taking into consideration the size of the tract was unconstitutionally unreasonable and irrational. *Avant v. Douglas County,* 253 Ga. 225, 319 S.E. 2d 442 (1984). Douglas County had sought to enjoin property owners in an R-2 single-family residential district from raising more than three hogs on their 21-acre tract. The court found that the zoning classification did not bear a substantial relation to public health, safety, morality or general welfare. Therefore, the ordinance could be set aside as arbitrary or unreasonable.

—Terence J. Centner

UNIFORM COMMERICAL CODE

CONTINUED FROM PAGE 1

trusting of possession" within the meaning of 4-2-403 of the UCC (delivering possession of goods into the hands of one who ordinarily deals in such goods). The Court so found because..."Cugnini gave Russell *apparent* control over the care and feeding of the cattle...," even though the cattle were never placed on Russell's property and the bills of lading when the cattle were shipped bore no indication that Russell was entitled to possession.

Finally, the Court found Reynolds to be a "buyer in the ordinary course of business" notwithstanding that Reynolds failed to acquire a brand inspection certificate and accepted an inadequate bill of sale from Russell. The Court's rationale for bringing the sale within the scope of "ordinary course of business" was that (a) the evidence showed it was sometimes customary in the cattle trade for buyers to accept brand inspection certificates subsequent to sale, and (b) because Reynolds had not had any prior difficulty in dealing with Russell, the defective bill of sale was "also within the ordinary course."

It now appears that cattlemen utilizing the services of a cattle broker under any circumstances other than an outright sale to the broker had best have good reason to place implicit faith in such broker since the withholding of brand certificates, bills of sale and the like will not suffice to prevent passage of title to a buyer even if constructive possession has been made over to the broker.

—Bruce McMillen

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Change in Ohio dairy producer licensing

Beginning July 1, 1985, the Ohio State Director of Health will administer the Grade A milk licensing program. Currently, state regulations are administered by local health departments with jurisdiction based upon the location of bottling plants. More significantly, the new statute (Sub. H.B. 388) amends the State Grade A Milk Sanitation Code *(Ohio Rev. Code* § 3807.371 to 3707.375) to insure protection of milk producers' rights to due process during suspension of revocation procedures.

The bill distinguishes between unwholesome milk and technical violations of the pasteurized milk ordinance (PMO). The former is defined as milk exceeding bacterial or chemical standards, adulterated milk, or"...an emergency exists which presents a clean and present danger to the public health." In these cases, a license can be suspended prior to a hearing upon receipt by licensee-producer of the director's order. A hearing must be held without delay. In the latter case, the suspension can only occur *after* an opportunity to correct and an opportunity to be heard has been given.

The procedure requires such orders be sent either by certified mail to the licensee or by personal service. A licensee has 10 days from date of receipt to request a hearing. The hearing date must be held in the county seat of the licensee within 10 days of receipt of the request by the director. The director of health cannot continue the hearing, but upon a showing of extreme hardship, the licensee can have it continued. In lieu of a hearing the producer can submit evidence and arguments in writing.

The referee or examiner's report shall be made within three days and the producer may file objections to the report also within this three day period. The director shall modify, approve, or disapprove the referee's report. The licensee has a right to appeal to the court of common pleas (Ohio's general jurisdiction trial court) within 15 days. The court may suspend the director's action pending the appeal.

Though the time constraints may be burdensome, all timing begins upon receipt by producer. This insures that actions will not be taken before he has an opportunity to be heard. The bill goes a long way to addressing the lack of notice and opportunity to be heard that now exists in dairy farm suspensions, while still protecting the public health.

— Benjamin F. Yale

Review of recent law review literature

Introductory Note: If the increase in the number of law reviews devoted to a question is any indication, soil conservation is clearly an issue for the rest of the 1980s. The articles summarized here show a consistent view of the continuing seriousness of erosion problems as well as a growing concern with the legal and policy aspects of the issue. For those who are particularly interested in soil conservation policy, the following books should also be of interest: Halcrow, Heady & Cotner, Soil Conservation Policies, Institutions and Incentives (Ankeny, Iowa: Soil Conservation Society of America 1982); American Farmland Trust, Soil Conservation in America: What Do We Have To Lose? (1984).

Arts & Church, ***Soil Erosion — the Next Crisis?*****, 1982 Wis. L. Rev. 535 (1982).**

This article, written by two Wisconsin experts in relation to the passage of the new [1982] soil conservation legislation in their state, provides an extensive and comprehensive primer for anyone interested in the facts, figures and implications of soil erosion.

The article is organized in five major parts. First, it lays out the basic problems of soil erosion, which are water pollution, depletion of the soil base and loss of productive capacity. Secondly, the article outlines a series of possible solutions — discussing both the options and their costs. The third major segment of the article reviews state laws dealing with soil erosion, stating at the outset that "most states have no effective statutory program for dealing with soil erosion." In the fourth section, the article discusses and evaluates the major agencies now involved with soil conservation, describing federal as well as Wisconsin's state agencies. In the final part, the authors set out a design for improving soil conservation by reference to the new soil and water conservation legislation enacted in Wisconsin [1981 Wis. Laws ch. 346, Wis. Stat. ch. 92.]

Braden & Uchtmann, ***Soil Conservation Programs Amidst Faltering Environmental Commitments and the "New Federalism,"*** **10 B.C. Env. Aff. 639 (1982).**

In some ways, the information provided by this article overlaps with the Arts & Church piece: read together, the articles should provide a complete, basic understanding of where the country is in regards to controlling soil erosion and how we reached this point.

The article shares the basic concern with soil erosion problems evinced in the other writings reviewed here. It attempts to describe the genesis and continuation of the problem through delineation of the federal and state programs in both soil conservation and nonpoint source pollution control.

The citations to statutory history, regulatory efforts and relevant governmental studies is extensive and the explanation of the pollution control programs under section 208 of the Clean Water Act and their relation to other soil conservation measures is valuable. Current directions are analyzed and evaluated in the perspective of their historical context.

Massey, ***Land Use Regulatory Power of Conservation Districts in the Mid-Western States for Controlling Nonpoint Source Pollutants*****, 33 Drake L. Rev. 35 (1983-84).**

This article is among the most recent to discuss agriculturally-related nonpoint source water pollutants and legislative efforts to address the problem. The federal Soil Conservation Act of 1935 is reviewed as background for state statutory and administrative initiatives regarding soil conservation. The structure of, and variation among, state programs are described in detail, with particular attention being paid to the nature (mandatory or permissive) of the authority to control land usage by regulation.

The examples discussed in the article are limited to the 13 midwestern states, but the analysis of the regulatory powers of these states and of the Standard State Soil Conservation Districts Law and the Model Act for Soil Erosion and Sediment Control should provide the reader with a general understanding of the legal context of soil conservation in other regions.

Batie, ***Innovative Strategies for the Conservation of America's Soil Resource*****, 3 Agr. L.J. 569 (1982).**

This article provides a brief overview of most of the major factors to be considered in contemplating a revision of the nation's soil conservation programs [many of which are described in more depth in the Arts & Church piece described *supra*]. From a brief review of soil conservation efforts since the 1930s, the author notes that to understand today's soil erosion problems it is necessary to understand the history of governmental programs intended to address them. Of particular importance is the conflict which ultimately developed between two policies inherent in the early conservation programs, i.e., between soil conservation and maintenance of farm income.

Within this historical context, the findings of the RCA reports (required by the Soil and Water Resource Conservation Act of 1977) are noted and certain improvements, including targeting of soil conservation monies to areas of the most serious erosion and removal of other lands from crop production, are suggested. Batie is clearly aware of political issues which surround changing the soil conservation programs and discusses the cost and policy implications of soil conservation strategies outlined.

Other articles of note include: **Batie,** *Institutions and Incentives for Soil Conservation*, 4 Agr. L.J. 77 (1982); **Bernick,** *Farmers, Conservation Groups Back New Tax Benefits for Soil, Water Conservation*, 22 Tax Notes 1152 (March 12, 1984); **Garner,** *Innovative Strategies for Conserving Soil and Water*, 3 Agr. L.J. 543 (1982); **Note,** *Moser v. Thorp Sales Corporation: The Protection of Farmland from Poor Farming Practices*, 27 S.D. L.Rev. 513 (1982) casenote of Moser, 312 N.W.2d 881 (Iowa 1981).

Recent non-law review articles of interest include: **Ervin, Heffernan, and Green,** *Cross-Compliance for Erosion Control, Anticipating Efficiency and Distributive Impacts*, 66 Am. J. Agric. Econ. 273 (1984); **Ebenreck,** *Stopping the Raid on Soil: Ethical Reflections on "Sodbusting" Legislation*, 1 Agric. and Human Values 3 (1984).

—Sarah Redfield

The Future of Transferable Development Rights in the Supreme Court*

By Linda A. Malone

Despite growing utilization of transferable development rights (TDRs) to insulate land use measures (including farmland preservation) from taking challenges, the Supreme Court has yet to determine whether TDRs may salvage government regulation that would otherwise constitute a taking of private property without just compensation. The saving grace of TDRs is that an owner of restrictively zoned property may be able to recoup a resulting economic loss by selling the property's severed development rights to an owner of receiving properties authorized for increased density of development.[1] In theory, no taking clause objections exist when TDRs are used since any economic loss attributable to the restrictive zoning arguably can be recouped through sale of the TDRs.

TDRs have proven to be useful as a tool for preservation of farmland, landmarks, historic sites and open space which are threatened by approaching development. Their growing popularity makes it quite likely that the Supreme Court will soon face two issues of fundamental importance to every TDR scheme: (1) what is the relevant unit of property when a taking challenge is being evaluated; and (2) is the value of TDRs relevant to whether a taking has occurred, or relevant only to whether just compensation has been provided once a taking has been found. This update focuses on the first issue — given its broad implications — for the future of "taking" jurisprudence.

Penn Central and its Progeny

In 1978, the Supreme Court upheld application of New York City's Landmarks Preservation Law to the Grand Central Terminal, rejecting claims that the owners' property had been taken without just compensation in violation of the Fifth and Fourteenth Amendments and that they had been arbitrarily deprived of their property without due process of law in violation of the Fourteenth Amendment.[2] To alleviate the economic burden placed on landmark owners, the New York law permitted affected owners to transfer their unusable development rights in the landmark site to other proximate lots. However, the relatively limited reassurance that *Penn Central* posited for such zoning is now reflected as lower courts grapple with the Court's repeated admission that taking challenges require an ad hoc, factual inquiry.

The Court in *Penn Central* never reached the issue of whether a TDR could be just compensation, but suggested that a TDR might be of some significance in determining whether a taking has occurred.[3] Justice Brennan, speaking for the Court, acknowledged that the Court had been unable to develop any "set formula" for determining when economic injury caused by governmental action requires compensation. Each case necessitates an "ad hoc, factual inquiry"[4] and the Court had little difficulty in determining that the diminution in value of Grand Central Terminal did not constitute a taking, particularly in light of Penn Central's concession that the property was still capable of earning a reasonable return.[5] In assessing the diminution in value, the Court refused to define the affected property as "air rights," focusing instead on the economic effects on the entire city tax block designated as the landmark site.[6] In reaching its holding, the Court addressed only briefly the relevance of the TDRs to the taking issue:

> Although appellants and others have argued that New York City's transferable development rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law had imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.[7]

Having concluded that there was no taking, the Court did not determine whether the TDRs provided "just compensation."[8]

Although the majority seemed inclined to consider the value of TDRs in relation to the taking issue, Justice Rehnquist in his dissent (joined by Chief Justice Burger and Justice Stevens) took a different approach. He concluded that the landmark preservation ordinance had taken Penn Central property by restricting the use of air rights.[9] In singling out individual landowners, the landmark law failed to guarantee the "average reciprocity of advantage" necessary to trigger the traditional "zoning" exception to the taking prohibition.[9] In a footnote, Justice Rehnquist sharply criticized the Court's vacillating suggestions that a taking results when restrictions have "an unduly harsh impact upon the owner's use of the property," prevent "a reasonable return" on the landowner's investment, or prohibit the property from being "economically viable."[10]

Rehnquist stressed that the Court would not only have to define *"all* reasonable return" for a variety of types of property, but would have to define the particular property unit to

**This update is drawn from Malone, The Future of Transferable Development Rights in the Supreme Court, ____ KY. L. J. ____ (1985).*

be examined (for example, air rights *or* the restricted parcel of property *or* all contiguous parcels of property owned by the restricted landowner).

Penn Central was followed by a series of taking cases in which the character of the interference with the property right was outcome-determinative.[11] The Court's emphasis on the character of the governmental interference reached its peak in *Loretto v. Teleprompter Manhattan CATV Corp.*[12] In an opinion by Justice Marshall, from which Justices Blackmun, Brennan and White dissented, the installation of a television cable on an apartment roof as authorized by New York law was held to constitute a taking of the apartment owner's property without just compensation. Despite the minimal interference with the owner's enjoyment of his property, the Court held the physical invasion to be a "per se" taking of the private property. The character of the governmental action, therefore, is the only factor necessary for finding a taking if that action results in a physical invasion.

These post-*Penn Central* cases provide little guidance as to the future direction the Court will take in evaluating TDR techniques. Indeed, the Court in *Loretto* took care to distinguish between land use regulation and physical intrusion cases.[13] Nevertheless, these cases are instructive in tracing the apparent "wooing away" of Justices Stewart, White and Powell in the *Penn Central* majority to Justice Rehnquist's views of property as expressed in his dissent in that case.

The Rehnquist approach is to determine which "stick" in the "bundle of sticks" constituting property is being interfered with (for example, the right to exclude others). The next step is to determine how important that "stick" is to the use or economic value of the property and whether its deprivation alone constitutes a taking. In contrast, the *Penn Central* majority would be more inclined to examine the entire "bundle of sticks" (e.g., the full fee interest or all the landowner's contiguous property) and refuse to find a taking unless some significant number of "sticks" had been destroyed by the governmental action.

The implications for land use regulations that severely restrict development cannot be ignored. Following Justice Rehnquist's approach, denial of a right to develop one's property (a deprivation of one stick) could be important to the economic value of the property for the landowner and thus, constitute a taking. Under the approach of the *Penn Central* majority, deprivation of one property right alone would rarely constitute a taking. Since the landowner would still have use of all the property rights other than the right to develop, it is unlikely that the economic value of the property as a whole has been destroyed. In sum, under Justice Rehnquist's approach, the nature of the restricted property right becomes more important than property rights that remain.

Although the majority and the dissenters in *Penn Central* were unable to agree on the extent of economic deprivation necessary to constitute a taking, the Court recently agreed on certain general guidelines in *Ruckelshaus v. Monsanto Company.*[14] In *Monsanto,* the Court determined that certain trade secrets were property for Fifth Amendment purposes and has ostensibly been taken by the Environmental Protection Agency (EPA). The EPA utilized trade secret information submitted by Monsanto to evaluate not only Monsanto's, but other manufacturers' applications for registration. In addition, the EPA disclosed some of the data to the public pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

On behalf of the entire Court,[15] Justice Blackmun stated that whether a governmental action has gone beyond "regulation" to a "taking" depends upon "the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations;"[16] a test first formulated in *Penn Central.* In *Monsanto,* the Court found the last factor to be "overwhelming" and dispositive of the taking question given the explicit guarantee of confidentiality in the 1972 amendments to FIFRA that formed the basis for Monsanto's reasonable investment-backed expectations.[17] The EPA's disclosure and utilization of the data deprived Monsanto of its "right to exclude others...central to the very definition of [its] property interest" in a trade secret. The remaining uses of the data were "irrelevant to the determination of the economic impact" of the EPA's action because the essential economic value of Monsanto's property right lay in the competitive advantage destroyed by disclosure of the data.[18] For the first time, in a case not involving a physical invasion, the Court found the importance of the property interest invaded to outweigh consideration of any remaining rights in the property.

Defining the Unit of Property

The inherent difficulty posed by TDR schemes for defining the appropriate unit of property is that TDRs inextricably link together several parcels that may or may not be contiguous or under the same ownership. The very nature of TDRs is to coordinate densities of separate parcels of property, thus evaluating them as a unit for planning purposes.

Penn Central certainly triggered the definitional dilemma, but did nothing to resolve it. Its broad suggestion that " 'taking' jurisprudence does not divide a single parcel into discrete segments"[19] is easily circumscribed by the facts of the case. The Court's reasoning in this context was addressed to Penn Central's argument that the property in question was the air rights, a segment of a single parcel — the city tax block designated as the landmark site. *Penn Central* is more instructive for what it did *not* do: it did not define the unit to encompass other contiguous or noncontiguous property owned by Penn Central to which the development rights could be transferred. From an economic perspective, the true impact of the governmental action on the claimant's restricted property cannot be measured without reference to how the claimant's unrestricted property may alleviate or intensify the resulting economic burden.

Rehnquist's dissent in *Penn Central* and the Court's subsequent decisions

suggest a different approach: the taking issue is determined without reference to a permissible/impermissible percentage of economic return, which in turn obviates the need for defining the property unit on which the return is based. It is clear from Rehnquist's *Penn Central* dissent that he views a taking as deprivation of a property right or rights, not deprivation of a degree of economic return on some undefined physical unit of real property:

> The term [property] is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it...denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, *as the right to possess, use and dispose of it*...The constitutional provision is addressed to *every sort of interest* the citizen may possess.[9]

Monsanto takes such reasoning to its conclusion, holding that deprivation of a single property right (the right to exclude others) may be a taking, irrespective of the economic value of any remaining rights in the property.

Ostensibly then, under Justice Rehnquist's approach, there is no need for definition of the property unit. Yet the problem resurfaces in another context: the two unexplored factors of "economic impact" and "interference with reasonable investment-backed expectation." As first formulated in *Penn Central,* they were not separate and distinct factors, rather interference with investment-backed expectations was the most significant aspect of economic impact. Indeed, the two factors are inextricably linked in *Monsanto.* Having concluded that FIFRA conferred a reasonable investment-backed expectation of confidentiality in certain submitted data, the Court held that the right to exclude others was so central to a trade secret and its economic value that its destruction alone was tantamount to a taking. The remaining uses for the data were deemed "irrelevant" to the economic impact of the EPA's action on Monsanto's property right.

With reference to the relatively unexplored element of "interference with reasonable investment-backed expectation," the Court, in zoning cases, will find itself confronted by the general rule that there are no vested rights to develop based on reliance on any preexisting zoning scheme. A theory of taking jurisprudence that reinstates the right to develop as fundamental or paramount fails to reflect the modern realities of property and owner expectations.

Monsanto does not offer as much hope for the future of TDR schemes as did *Penn Central.* Following Justice Brennan's approach in *Penn Central,* Monsanto's loss of competitive advantage and potential profits arguably would not have been a taking, given the remaining value of the data. Remaining uses would not have been irrelevant, but determinative of whether a taking had occurred. *Monsanto's* more stringent approach toward regulation, if applied in the land use context, comes very close to contradicting the axiom that regulatory deprivation of property's most beneficial use does not alone render the regulation unconstitutional.[10] However, given the impermanence of zoning, the requirement that there be interference with a reasonable investment-backed expectation might mitigate against a proliferation of successful taking challenges. In any event, the "property right" approach leaves little room for TDRs to redeem a zoning measure. The focus is narrowly on the right that has been taken — without regard to remaining rights in the property or benefits that might be conferred in return.

If the more recent cases are seen as a reformulation of taking jurisprudence along the lines of the *Penn Central* dissent, the property right, not the property unit, is determinative of a taking challenge. If the right itself is central to the concept of the *type* of property at issue, its deprivation may be enough for a taking without regard to any remaining uses, other economically related property, or the availability of TDRs. With the recent emphasis on loss of profit potential in *Monsanto,* deprivation of the right to develop property stands a better chance of protection under the taking elause. If TDRs are relegated to the issue of just compensation, zoning prohibiting all development may not withstand a taking challenge.

The Future of TDRs

TDRs are an innovative advance in preservation techniques. When well planned and implemented, TDRs promise an equitable distribution of the costs of preservation. Farmland, landmarks and scenic open areas are "public goods" like clean air and clean water; without allocation by regulation, preservation costs will not fall proportionally on all those who benefit. There is a need for great flexibility in taking jurisprudence, tempered by deference to the difficult economic and administrative findings made by local planning agencies. Yet, the Supreme Court appears to be moving toward a taking jurisprudence that would elevate certain select property rights (including the "right to develop") above others and above the needs of the community. The emerging recognition of a hierarchy of property rights suggests there will be less flexibility and, accordingly, less of a future for innovative land use planning.

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1. For an analysis of the mechanics of various TDR schemes, see Torres, *Helping Farmers and Saving Farmland,* 37 OKLA. L. REV. 31, 38-45 (1984); Merriam, *Making TDR Work,* 56 N.C. L. REV. 77 (1978).

A preservation technique related to the transfer of development rights is the technique of purchase of development rights. In such a program, the development rights are purchased by a local planning agency to hold in abeyance indefinitely (in what has been referred to as "land banking") or until a decision is made to release them for further development. E.F. ROBERTS, THE LAW AND THE PRESERVATION OF AGRICULTURAL LAND 76-77 (1982).

2. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

3. *Id.* at 137.

4. *Id.* at 124.

5. *Id.* at 129. This strategic concession on the central issue in the case has been described by Professor Costonis as an inexplicable "boner of litigation strategy..." Costonis, *Comment,* 30 ZONING DIGEST 6 (1978).

6. Penn Central Transp. Co. v. City of New York, 438 U.S. at 130-31.

7. *Id.* at 137.

8. *Id.* at 143.

9. *Id.* at 147. For a critique of Justice Rehnquist's dissent utilizing the Court's decisions prior to *Penn Central,* see Torres, *supra* note 1, at 56-61.

10. Penn Central Transp. Co. v. City of New York, 438 U.S. at 149 n. 13.

11. *Compare* Kaiser Aetna v. United States, 444 U.S. 164 (1979), (government

navigational easement giving the public a right of free access to private lagoon constituted a taking) *with* Pruneyard Shopping Center v. Robbins, 447 U.S 74 (1980), (state constitutional requirement permitting individuals to exercise their free speech and petition rights in shopping center not a taking).

12. 458 U.S. 419 (1982).

13. *Id.* at 426.

14. Ruckelshaus v. Monsanto Co., 52 U.S.L.W. 4886 (June 26, 1984). For additional discussion of Monsanto, see 2 AGRICULTURAL LAW UPDATE 2 (December 1984).

15. Justice White took no part in the consideration or decision of the case. *Id.* at 4886. Justice O'Connor dissented only as to that portion of the Court's opinion which concluded that Monsanto did not have a reasonable investment-backed expectation that the EPA would maintain the confidentiality of data submitted prior to the 1972 amendments to FIFRA, a prerequisite to a taking. *Id.* at 4895-96.

16. *Id.* at 4891, *citing* Pruneyard Shopping Center v. Robbins, 447 U.S. at 83.

17. Justice O'Connor dissented as to that portion of the Court's opinion that Monsanto had no expectation of confidentiality prior to the 1972 amendments to FIFRA. FIFRA prior to 1972 essentially being silent as to confidentiality, Justice O'Connor concluded that agency practice, the Trade Secrets Act and the applicant's reasonable expectations made any disclosure of data prior to 1972 a taking of that data. Ruckelshaus v. Monsanto Co., 52 U.S.L.W. at 4895.

18. *Id.* at 4892-93; *compare* Andrus v. Allard, 444 U.S. 51 (1979).

19. Penn Central Transp. Co. v. City of New York, 438 U.S. at 130.

20. *Id.* at 142-43, *quoting* United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).

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Taylor Grazing Act litigation

Livestock may not be on the public lands without a permit, lease, or other grazing use authorization. In *Holland Livestock Ranch v. U.S.*, 588 F.Supp. 943 (D. Nev. 1984), the court sustained the decision of the Winnemucca district manager of the Bureau of Land Management (BLM), revoking plaintiff's Taylor Grazing Act permits.

Revocation or suspension is authorized in addition to the imposition of monetary penalties when trespasses have been willful and repeated, involved a "fairly long period of time" and have not been cured by remedial action by the rancher after notification of the trespass. Factors such as "inadequate employment of control staff, poor fence conditions, a history of ignoring the condition upon his permits and a failure to remedy trespass upon notification" are evidence of willfulness.

In this case, there were three specific incidents of trespass in late 1981 and early 1982, together with a previous history of trespass. On one occasion, at least, some 51 head of cattle were involved. Plaintiff also failed to respond adequately to a trespass notice. It was also found that plaintiff failed to complete a fencing project, thus giving his cattle ready access to the public range to reach water.

The fact that the rancher may have "settled" monetary penalties was held not to bar the Bureau from imposing revocation or suspension as further punitive measures. See also *Holland Livestock Ranch v. U.S.* (Holland I), 655 F.2d 1002 (9th Cir. 1981); *Diamond Ring Ranch Inc. v. Morton*, 531 F.2d 1397 (10th Cir. 1976).

In another 1984 development, the Interior Board of Land Appeals held that a decision by BLM reducing authorized livestock grazing use pursuant to 43 C.F.R. § 4110. 3-2 (b) in order to facilitate achieving multiple use management objectives, vis, allocating available forage to a competing antelope herd in the interest of promoting hunting and future transplanting, will not be disturbed absent substantial evidence showing that the decision was improper. *Charles Blackburn*, 80 IBLA 42 (March 28, 1984).

—Donald B. Pedersen

Obligation required for favorable cooperative tax treatment

The Court of Appeals of the State of South Carolina denied FCX Inc., a farmers' cooperative, a state tax refund for funds paid to its member patrons as certificates of equity. *FCX Inc. v. South Carolina Tax Commission*, Case No. 0187 (S.C. May 29, 1984).

Although all of the funds were paid out of profits or income from transactions with the particular patrons receiving the refund, FCX did not have any pre-existing legal obligation to redeem the certificates to its patron members. Thus, under applicable South Carolina law, earnings redeemed to member patrons did not qualify for exclusion from FCX's gross income for state tax purposes.

—Terence J. Centner

Preferential assessment - recapture tax

The Court of Appeals of Maryland has upheld a county levy of a tax on the transfer of preferentially assessed farmland pursuant to a condemnation proceeding by the federal government. *Vournas v. Montgomery County*, 300 Md. 123, 476 A.2d 705 (1984).

The property had been accorded special tax treatment under Maryland law as land devoted to farm or agricultural use. Maryland law, however, enabled counties to recapture some of the lost revenues resulting from preferential assessment by enacting an ordinance imposing a transfer tax to be paid by the transferor. Since the transfer to the United States of a fee simple in real property assessed and taxed on the basis of farm or agricultural use was not excluded from the transfer tax, the transferor was liable for the payment of this tax.

—Terence J. Centner