Agricultural Law Update

VOLUME 3, NUMBER 1, WHOLE NUMBER 25 OCTOBER 1985

Official publication of the American Agricultural Law Association

INSIDE

- In Depth: 1985 Farm bill debate update
- Pseudorabies regulations upheld
- Farm Credit Administration assumes power to order intersystem fund transfers
- Dairy farmers approve continuation of National Dairy Promotion order
- State Roundup
- Ag Law Conference Calendar

IN FUTURE ISSUES

- In Depth: Foreign investment in agricultural land
- PCA must litigate damage claims
- Security interest in crop insurance proceeds

Time is the most valuable thing a man can spend.
— Theophrastus

Court upholds farmland preservation zoning

The Pennsylvania Supreme Court recently gave hope to local governments which are attempting to preserve prime farmland from urban sprawl. In *Boundary Drive Associates v. Shrewsbury Township*, ______Pa______, 491 A.2d 86 (1985), the Court held that a "sliding scale" zoning ordinance, calling for residential development at lower densities on large farm parcels rather than on smaller, rural tracts of land, was a valid exercise of local government police powers, and did not result in the unconstitutional "taking" of a developer's property rights.

Boundary sought to subdivide a 43-acre farm parcel it had acquired for development into 70 building lots. Shrewsbury Township's zoning ordinance permitted the construction of only three dwellings on the tract because of its "farmable" size and the fertility of its soils. The township denied Boundary's application, prompting the latter to file suit. The Commonwealth Court held for Shrewsbury and the developer appealed.

On appeal, the Pennsylvania Supreme Court held that the ordinance was a valid exercise of the police power that promoted the public health, safety and welfare, as demonstrated by the adoption of state and federal legislation to preserve farmland, including the Pennsylvania Municipalities Planning Code (56 P.S. 10604(3)), the state Agricultural Areas Security Law (3. P.S. 901), and the federal Farmland Protection Policy Act (7 U.S.C. 4201). "Unquestionably," said the Court, "preservation of agricultural land is a legitimate governmental goal..." (491 A.2d at 90).

(continued on next page)

FmHA litigation update

In *United States v. Servaes*, 608 F. Supp. 775 (D.C. Mo. 1985), the Farmers Home Administration (FmHA) was enjoined from further execution on its trustee deed to defendant's farm until the Secretary of Agriculture had satisfied the procedural and substantive requirements imposed in *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983), for borrowers requesting deferral relief under 7 U.S.C. § 1981a, and until defendants were given the opportunity to apply for emergency disaster relief under 7 U.S.C. § 1961.

The government claimed that defendant's failure to account for crop proceeds pledged to the FmHA as security provided an independent, non-monetary basis for foreclosure, and therefore, defendant lacked standing to raise the deferral defense. See *Turnball v. Block*, No. 82-6053-CV-SJ, Nov. 1, 1982.

The Court followed *Chandler v. Block*, 589 F. Supp. 876 (W.D. Mo. 1983), in holding that monetary and non-monetary defaults were concurrent, rather than independent, grounds for foreclosure, and that where the facts indicated that foreclosure proceedings would not have been instituted if the sole basis for default had been the alleged collateral conversion, borrowers were harmed by the Secretary's failure to implement deferral relief.

The Court concluded that the primary reason for acceleration and foreclosure was the Servaes' monetary default, and the relief pursuant to the *Allison* injunction was available to them.

Defendants also challenged the Secretary's failure to implement a 1978 amendment to emergency credit legislation, 7 U.S.C. § 1961. The 1978 amendment purportedly abolished the disaster area designation scheme for making emergency loans available to farmers. The legislative history suggested the amendment was to allow the Secretary to make loans available to individual farmers, regardless of disaster area designation.

FmHA regulations, however, still require designation as a prerequisite to eligibility. The Court directed the FmHA to consider the defendant's application for disaster relief despite the fact that the county in which they farmed had not been declared a disaster area. See also *Chandler v. Block*, supra.

The Court also held that failure to comply with a 30-day deadline for filing a request for further administrative review was not a failure to exhaust administrative remedies, where the FmHA had failed to give notice of loan serving tools, including emergency or disaster loans for which they might be eligible.

(continued on next page)

PRESERVATION ZONING

CONTINUED FROM PAGE 1

Substantive Due Process

To determine the constitutionality of Shrewsbury Township's ordinance, the Court applied a substantive due process test, *i.e.*, whether there was a "substantial relationship" between its public purpose and the means selected to achieve it. See *e.g.*, *Surrick v. Upper Providence Twp.*, 382 A.2d 105, 108 (Pa 1977) (land use regulations may not unduly restrict property rights).

The Court held that the method of regulating land use embodied in Shrewsbury Township's ordinance — establishing residential densities in its agricultural zone on the basis of a "sliding scale," relating development to soil fertility and parcel size — was, indeed, reasonably related to its purpose of preserving farmland and therefore, was not arbitrarily or unduly restrictive.

Agricultural Law Update

VOL. 3, NO. 1, WHOLE NO. 25 — OCTOBER 1985

AALA Editorial Liaison . . . Donald B. Pedersen, University of Arkansas

Editor . . . Nancy Harris, Century Communications Inc.

Contributing Editors: R. Charles Culver, Agricultural Aide to Sen. Dale Bumpers; Annette Higby, University of South Dakota; Donald B. Pedersen, University of Arkansas; Edward Thompson Jr., American Farmland Trust; Gerald Torres, University of Minnesota.

State Reporters: John C. Becker, Pennsylvania; Anthony Ferrise, West Virginia; Annette Higby, South Dakota; Allen C. Hoberg, North Dakota; William H. Rice, Vermont; Paul L. Wright, Ohio.

For AALA membership information, contact Terence J. Centner, University of Georgia, 315 Conner Hall, Athens, GA 30602.

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.

Copyright 1985 by Century Communications Inc. All rights reserved. First class postage paid at Skokie, IL 60077.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Views expressed herein are those of the individual authors and should not be interpreted as statements of policy by the American Agricultural Law Association, nor by Century Communications Inc.

Letters and editorial contributions are welcome and should be directed to Don Pedersen, director of the Graduate Agricultural Law Program, University of Arkansas, Waterman Hall, Fayetteville, AR 72701.

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, when available, are $9.00 each for U.S., Canada and Mexico. All other countries add $6.00. All U.S. funds. Payment must accompany order.

Copyright 1985 by Century Communications Inc. No part of this newsletter may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system, without permission in writing from the publisher.

"Sliding Scale" Farm Zoning

On prime agricultural soils (SCS Classes I, II, IIIe-1 and IIIe-2), the ordinance permitted only two dwellings, regardless of parcel size. This fixed quota allocation was similar to that of a farmland zoning scheme the Court struck down in *Hopewell Township v. Golla*, 499 Pa 246, 452 A.2d 1337 (1982) (five units per parcel), which did not attempt to relate residential density to the suitability of land for farming, and thus, was held to be arbitrary and unreasonable in limiting the development of large tracts of land.

However, the Court distinguished Shrewsbury Township's approach, because it also permitted residential development on less productive farmland (Class IIIe-3 and below) at higher densities, depending on parcel size.

Under Shrewsbury Township's "sliding scale" method, less productive farmland could be developed as follows: One dwelling on parcels up to five acres in size; two dwellings on parcels up to 15 acres; three dwellings on parcels up to 30 acres; and one additional unit for each additional 30-acre increment, or part thereof.

This novel approach was calculated to encourage non-farm development of smaller tracts — the smaller the tract, the harder it is to farm — while preserving larger tracts for agricultural use. It was fundamentally different from the ill-fated Hopewell ordinance, the Court said, because "the disparate treatment accorded large and small tract owners has a rational basis."

Postscript

When the *Hopewell* case was decided a few years ago, local governments in Pennsylvania began to lose hope of preserving farmland. Both Hopewell and Shrewsbury Townships are located in York County, west of Philadelphia, in the region that could be called the "breadbasket" of the Commonwealth. The land there is so fertile, relatively speaking, that York, Lancaster (the most productive non-irrigated county in the United States) and five neighboring counties produce half of Pennsylvania's entire agricultural output.

But, in recent years, population expansion from the nearby metropolitan area has consumed a great deal of prime farmland in the region.

In trying to forestall this trend through rather primitive zoning schemes like Hopewell Township's, local governments were frustrated by the courts. The townships' response was to become more sophisticated, and the Pennsylvania Supreme Court appears to have responded in kind by approving the innovative "sliding scale" approach to farmland zoning taken by Shrewsbury Township.

— *Edward Thompson Jr.*

Editor's note: For further discussion of substantive due process analysis, see ***Pennsylvania*** *section of the State Roundup, October 1985.*

LITIGATION UPDATE

CONTINUED FROM PAGE 1

Shick v. FmHA, 611 F. Supp. 260 (D.C. Mass. 1985), is a memorandum decision on plaintiff's motion to further amend their complaint. On appeal of dismissal of the first amended complaint, the First Circuit Court of Appeals held that Shick's 7 U.S.C. § 1981a claim was not barred by failure to exhaust administrative remedies because the Shicks were never notified of the special appeals procedure for 1981a relief, but that the claim failed to allege facts sufficient to survive a rule 12 b(6) motion to dismiss. *Shick v. FmHA*, 748 F.2d 35 (1st Cir. 1984).

Specifically, plaintiffs failed to allege that, due to circumstances beyond their control, they were temporarily unable to continue making payments without unduly impairing their standard of living.

The second amended complaint alleged that due to a temporary market aberration which *raised* the cost of dairy cows while *reducing* the price of milk, plaintiffs were unable to meet their obligations or to pay essential family living and farm operating expenses.

The government contended that the motion to amend should be denied because plaintiffs failed to allege that the situation was temporary, and that by their calculations, plaintiffs would be unable to meet their obligations even when market conditions improved.

The Court held that these calculations were an inappropriate matter for resolution on a 12 b(6) motion, and not an adequate cause to deny the motion to amend.

The Fifth Amendment constitutional claims were also exempted from the exhaustion requirement, while all other claims were dismissed.

In *United States v. Missouri Farmers Association* (MFA), 764 F.2d 488 (8th Cir. 1985), the Court held that FmHA regulations, rather than the commercial law of Missouri, governed the release of an FmHA security interest in crop proceeds.

The FmHA had directed the borrower to sell his crop and deliver the proceeds to the agency. The crop was sold to defendant MFA, but the proceeds never reached the

Farm Credit Administration assumes power to order intersystem fund transfers

New regulations of the Farm Credit Administration (FCA) attempt to establish a mechanism whereby the Farm Credit Board can, in anticipation of default on systemwide obligations by a district bank, order other banks in the system to transfer funds.

The Farm Credit Act of 1971, 12 U.S.C.A. § 2155, states that each farm credit bank is primarily liable for its portion of systemwide debt obligations. In addition, each bank is liable for any additional sums the FCA directs it to make "which any bank primarily liable therefore shall be *unable* to make."

If the FCA makes such a call, it must do so first upon the other banks of the same type "as the *defaulting* bank." Thereafter, calls may be made upon other banks in the system.

There is some question whether § 2155 requires that there be an actual default before the FCA can make a call on other system banks. In the agency's introduction to the recent regulations, it states: "While the Act provides for a method to cure a bond default through a call...[on other system banks]..., *such a default* would damage, perhaps irreparably, the system's credibility and viability in the capital markets."

The FCA has, therefore, expressly stated that its authority is 12 U.S.C.A. § 2252(11), which gives it the power to "[r]egulate the borrowing, repayment and transfer of funds and equities between institutions of the system."

The regulations appear at 50 Fed. Reg. 36985-87 (1985) (to be codified at 12 C.F.R. § 611.1145) (effective Sept. 10, 1985). They state that the FCA may direct a transfer of funds or equities from any bank in the system to another upon finding that one of several conditions is present. One condition is that a receiving bank will be unable to meet its obligations.

Alternative conditions which may activate FCA authority relate to specific financial indicators, such as a drop in book value of bank stock, and so forth. The new regulations also authorize the FCA to direct fund transfers between or among land bank associations or production credit associations in the same district.

The rules were published finally, without notice and comment.

— *John H. Davidson*

National Dairy Promotion Order continued

Secretary of Agriculture John R. Block recently announced that dairy farmers across the United States have voted overwhelmingly in favor of continuing the Dairy Promotion and Research Order.

Block said continuation of the order was approved by 107,926 dairy producers, or 89.7% of the 120,330 producers voting.

The Dairy Promotion and Research Order was established to implement a national program for the promotion of dairy products and nutritional education.

The dairy promotion program is financed by a 15-cent per hundredweight assessment on all milk produced in the 48 contiguous states and marketed commercially by dairy farmers. The program is administered by the Dairy Promotion and Research Board, which is comprised of 36 dairy producers appointed by the Secretary to represent the dairy industry.

The Dairy and Tobacco Adjustment Act of 1983 required that a nationwide referendum be held to determine whether the order should be continued after Sept. 30, 1985.

Only those farmers who were engaged in dairy production during April 1985 were eligible to vote.

— *USDA News Release*

FmHA. The District Court held defendant liable for conversion and entered judgment for $32,014.90. *United States v. Missouri Farmers Association*, 580 F. Supp. 35 (E.D. Mo. 1984).

FmHA regulations contemplate authorization of sale without release of the FmHA's lien, while Missouri law terminates the security interest upon consent of sale, even if the consent is given conditionally.

The Court followed *United States v. Kimball Foods Inc.*, 440 U.S. 715 (1978), which held that state law could be adopted as the federal rule only if it did not conflict with a federal interest. Because FmHA regulations provided borrowers with needed flexibility, in addition to reflecting the unique needs of FmHA borrowers, application of Missouri law would interfere with an important objective of the FmHA loan program.

— *Annette Higby*

Ag Law Conference Calendar

Oct. 18, 1985

Agri-Bankruptcy: A Farm Chapter 11 Seminar. Marriott Inn East, Columbus, Ohio. Sponsored by: North Central Bankruptcy Institute, Capital University. For more information: 614/445-8836.

Recent Developments in Agricultural Law. Sponsored by: 1985 Arkansas Agricultural Law Institute. Oct. 18, Fayetteville; Oct. 31, Magnolia; Nov. 1, Pine Bluff; Nov. 7, Jonesboro; Nov. 8, Forrest City. Topics: Co-ops, Leases, Taxation, Finance Crisis, Bankruptcy. For more information: 501-371-2024.

USDA extends comment period on sulfa residues

The U.S. Department of Agriculture (USDA) is extending, for 60 days, the public comment period on its notice of intent to propose a program to control sulfa residues in swine.

"Ideas from all interested parties are essential to developing an effective program, so we are responding to requests to extend the comment period beyond the Aug. 30, 1985 deadline," said Donald L. Houston, administrator of the USDA's Food Safety and Inspection Service. "The new deadline for comments is Oct. 29, 1985."

In the original notice, published May 20, 1985 at 50 Fed. Reg. 20796 (1985), the USDA described a possible regulatory program that would include testing hogs at slaughter for sulfa residues. Because testing by the USDA inspectors could delay slaughter operations and have a significant impact on the industry, the notice announced plans for a program, rather than the regulatory proposal itself, in order to allow for submission of relevant comments. The comments will be taken into account when the USDA formulates the actual program proposal.

Notice of this 60-day extension appeared in the Aug. 29, 1985 Federal Register. 50 Fed. Reg. 35098 (1985). Public comments on the original notice of intent to propose a regulatory program may be submitted until Oct. 29, 1985 to: Food Safety and Inspection Service, Hearing Clerk, Room 3803, South Agriculture Bldg., USDA, Washington, D.C. 20250. Comments should be submitted in duplicate.

— *USDA News Release*

1985 Farm bill debate update

by R. Charles Culver

As this article is being written, the full House of Representatives is entering into its third day of debate on the 1985 farm bill. Exhibiting strong leadership, the leaders in the House have, so far, managed to maintain the committee bill in essentially its reported form, with the leadership winning two major victories over the Reagan administration regarding dairy and sugar supports through the aid of defecting Republicans. The major setbacks have been the stripping of the Bedell amendment and the marketing loan option from the House bill.

On the Senate side, the farm bill debate is not likely to begin until the week of October 21. Through an arrangement crafted by Sen. Dole and Sen. Helms, a vote was allowed in the Senate Agriculture Committee by Sen. Helms, its chairman, on whether or not to report a farm bill with the inevitable four-year target price freeze amendment. This would occur in exchange for the highly controversial tobacco support program being allowed to proceed through the Senate Finance Committee as part of its eleventh-hour resolution of the federal tobacco tax issue.

The Senate Agriculture Committee reported a farm bill, S.616, on September 19, with a 10-6 vote, with Republican Sens. Andrews and McConnell joining a solid Democratic minority.

The Senate Agriculture Committee proposal now includes a four-year freeze on target prices for all program commodities (corn, $3.03 per bushel; wheat, $4.38 per bushel; rice, $11.90 per hundredweight; and cotton, 81 cents per pound). This motion, offered by Sen. Melcher during the final mark-up session, supplanted the earlier Senate Agriculture Committee-adopted proposal, which called for a two-year freeze.

Sen. Zorinsky, of Nebraska, the ranking minority member, rejoined the Democratic minority, while Sen. Andrews voted with the Democrats, as he had done in earlier markups. However, it is expected that a four-year freeze will be a major issue of debate in the full Senate deliberations.

On the House side, target prices were proposed to be frozen in 1986 and 1987 (at 1985 levels) for wheat, corn, rice and cotton.

Current program proposals are as follows:

Rice

In the Senate, the Agriculture Committee has recommended a lowering of the loan from $8 to $7.20 per hundredweight for 1986. In 1987 and beyond, the loan will be set at 85% for the three- to five-year market average (throwing out the high and low years), or $6.50 per hundredweight, whichever is higher. The loan can be reduced up to 5% per year, and in any year, the Secretary of Agriculture can reduce price supports 20% to help spur exports if the average market price in the preceding year is not more than 105% of the loan. Any increase in deficiency payments caused by the latter will not count against the $50,000 payment limitation.

Rice, like the other program commodities in the Senate version, will have a required marketing loan program. Repayment of a marketing loan will be allowed at the price support loan level, or the most recent calculated world market price, whichever is lower. The loans will still be non-recourse, and a floor on "loan deficiency" payments of 30% below the price support loan level will be established. Loan deficiency payments will not count against the payment limitation.

The Senate also would give the Secretary the discretion to announce up to a 35% acreage reduction program (ARP) and discretion to authorize paid diversions. Initially, the production base formula will be an average of the past two years, with an additional year added beginning in 1987, until a five-year rolling average is reached in 1989.

Lastly, the Secretary is given the authority to offer loan deficiency payments, or in-kind payments, to producers who forego regular loan protection, but who lay out at least 50% of the announced ARP. This provision is intended to induce large producers to enter into some type of production control program who would normally be deterred by the $50,000 payment limitation. This same program will be offered to cotton producers.

The House Agriculture Committee proposal would immediately base price support loans for rice at 85% of the average market price for 1986 and beyond. The same 20% reduction option, as provided in the Senate version, is included. The target price is recommended to be frozen for 1986 and 1987, and for the out years, the target price is to be no less than 90% of the three-year average cost of production figure.

The House proposal would establish an immediate five-year base and would authorize an unpaid 25% ARP with any amount over 25%, but not more than 50%, to be paid with payment-in-kind (PIK) commodities. Also, the House would offer PIK certificates to exporters for sales reimbursements if the world price for rice falls below the established loan rate. A marketing loan option was discussed, but not adopted.

Cotton

The Senate proposal recommends the maintenance of the 55-cent per pound average support loan level for 1986, then a move to a level that is 85% of the two- to five-year spot market price for 1987 and beyond — a version similar to current law. The loan can be reduced up to 5% per year, but not below 50 cents per pound. However, the 20% reduction option is offered. Cotton will have the same three- to five-year rolling base as provided for rice, and a discretionary 20% ARP with paid diversions is recommended. The marketing loan option will not be limited in 1986, but for 1987 and beyond, a 20% floor below the loan level is established.

The House proposal for cotton would also maintain the price support loan based on 85% of the three- to five-year spot market price (as found in the Senate version and current law). However, implementation would begin in 1986, and no minimum price is established.

The same 20% loan reduction option, the 25%-50% ARP option with a five-year base, and the PIK export certificate option (as provided for rice) will be recommended for inclusion in the cotton program. Also, like rice, the target price for cotton in 1988 and beyond shall be no less than 90% of the three-year cost of production figure.

Wheat

In the Senate proposal, the wheat price support loan level will be lowered to $3 per bushel for 1986 (from $3.30 in 1985). For 1987 and beyond, the loan level will be based on 75% to 85% of a three- to five-year market average. The loan can be lowered no more than 5% per year except in that year in

R. Charles Culver is a member of the American Agricultural Law Association and reports on congressional activity to the Agricultural Law Update. He holds a J.D. from the University of Arkansas School of Law and is a candidate for the LL.M. in agricultural law at that institution. Culver works as a legislative aide for Sen. Dale Bumpers.

which the 20% reduction for export enhancement option is announced.

In the final mark-up session before the August recess, a marketing loan option was adopted. A floor of 30% below the loan level was established. Wheat will immediately move to a full five-year average base formula, and up to a 20% ARP, with discretionary paid diversions, is authorized.

Unlike other commodities, the Senate version recommends that a referendum for mandatory production controls and higher support levels be provided. It is expected that when the full Senate begins debate in the middle of this month, there will be building pressure to provide this referendum feature for all program crops.

As recommended, the Secretary is directed to hold a referendum vote for wheat no later than April 1, 1986. Fifty percent of all eligible producers must vote in favor of a referendum for one to be held for the 1987 crop. If in the latter vote, 60% of all eligible producers vote in favor of quotas and production controls, such will be established for the 1987 through 1989 crop years.

The loan will be the greater of 75% of the national variable average cost of production figure, or $3.55 per bushel, and the target price will be 100% of the cost of production figure, but no less than $4.65 per bushel.

In the House, price support loan levels for wheat will be set 75% to 85% of a five-year market average for 1986 and beyond. The maximum reduction in any year will be 5%, except for that year when the 20% reduction for export enhancement is announced. A $250,000 cap per producer is established for eligibility for non-recourse loans. Any loan over this amount will be with recourse.

For 1986, the ARP on wheat will be 30%, and for 1987 through 1989, the ARP will be based on carryover levels. A five-year average base formula will be established.

Feed Grains

The Senate version tentatively calls for reducing the corn price support loan level to $2.40 per bushel (from $2.55) for 1986, and then setting the loan at 75% to 85% of a three- to five-year market average for 1987 and beyond. The loan may not be reduced more than 5% for a succeeding year, except when the Secretary implements the 20% loan reduction for export enhancement. Up to a 15% ARP is authorized and discretionary land diversion payments are allowed. An intermediate five-year base for program eligibility is also provided.

In the proposed House version, corn price support loans will be set at a level that is 75% to 85% of the three- to five-year average market price. The basic loan rate cannot be reduced more than 5% in any succeeding year, except when the Secretary implements a 20% loan reduction authorized to spur exports.

An ARP of 20% is recommended for 1986, with the ARP for the out years to be triggered by legislatively-established surplus level criteria. As with wheat, a $250,000 nonrecourse loan cap is established.

Soybeans

Both the House and Senate have essentially recommended that the current soybean program be maintained, including the $5.02 per bushel price support floor.

Dairy

Widely divergent proposals were adopted by the respective Agriculture Committees. The Senate recommendation calls for the continuance of the current $11.60 per hundredweight support price until Jan. 1, 1987. On this date, if purchases are estimated to exceed five billion pounds milk equivalent for the next 12 months, the Secretary shall reduce the support rate by 50 cents.

On January 1 of each succeeding year, further reductions are authorized, depending on surplus trigger levels. If the surplus shonld fall under two billion pounds, the Secretary may increase support levels by 50 cents.

The full House has adopted authority that would allow the continuance of the farmer-funded diversion program. By a vote of 244 to 166, the House rejected an amendment that would have scrapped the diversion proposal. If such a program is eventually implemented, the Secretary shall assess producers at such a rate that both the cost of the diversion program and government purchases over five billion pounds will be producer-financed.

The House Agriculture Committee projected the assessment to be approximately 40 cents per hundredweight, and the milk payment to be $10 per hundredweight. The full House adopted an amendment that would cap the assessments at 50 cents per hundredweight. Support rates, beginning in 1985, will be based on a formula that compares cost of production figures and government surplus purchases. The House Agriculture Committee estimates that milk support rates in 1986 will be $11.74 per hundredweight.

Peanuts, Sugar, Honey, Wool and Mohair

Although all these commodities can expect heated attention as the debate shifts to the floor of the House and Senate, little controversy surfaced in the Agriculture Committees. In the Senate proposal, the peanut, wool and mohair programs will be relatively unchanged from current law. The sugar program will be maintained, with price supports set at 18 cents per pound for raw cane sugar (beet sugar support prices shall be set in fair relation to cane sugar).

For 1986, the honey program will be continued as in current law, then for 1987 and beyond, price supports will be set at the higher of 85% of the preceding five-year market price, or 50 cents per pound. The loan can be reduced no more than 5% in any year.

In the House version, the current peanut program is extended for four years, while the wool program is recommended to be extended for five years. Wool supports will be frozen at the current level through 1990. The House sugar proposal is similar to the Senate version, and, in a major rebuff to the Reagan administration, the full House rejected, by a 263-142 vote, an amendment to scale down sugar supports to 15 cents per pound by 1988.

Miscellaneous

The Agriculture Committees of the House and Senate have recommended the extension of the current $50,000 payment limitation. Loan deficiency payments and those deficiency payment increases created by adopting a 20% support loan decrease in any year will not count against the limit. Also, the Senate version calls for the abolition of the current farmer-owned reserve program and the food security wheat reserve. In their places, a 500 million bushel wheat and feed grains humanitarian reserve will be created.

The debate in the House has produced a few surprises, and the Senate debate is expected to be long and heated, because it is Republican-controlled and because several of these same Republicans, who hail from farm states, will be up for re-election in 1986. Also, momentum generated by the Farm Aid concert in Illinois will heat up the debate and make the full Senate a prime arena for further discussion of S.1083, the Harkin farm bill.

Pseudorabies regulations upheld

In *Johansson v. Board of Animal Health*, 601 F.Supp. 1018 (D. Minn. 1985), the court upheld the constitutionality of Minnesota Board of Health (hereafter Board) regulations designed to control pseudorabies (PRV) in Minnesota's swine population. Pseudorabies is a highly contagious form of herpes virus, and is estimated to be responsible for losses of $1 million per month to Minnesota's hog producers.

The U.S. Department of Agriculture (USDA) first adopted PRV rules in 1979. 9 C.F.R. §§ 85.1-85.13 (1985). The federal PRV rules contain a powerful incentive for states to develop their own rules, and require that interstate commerce of swine from states with standards more lenient than the federal standards be restricted. 9 C.F.R. § 85.7 (1985). Consequently, Minnesota established its own PRV quarantine program in 1979, and updated it in 1984. *See* Minn. Rules §§ 1705.2400-.2530 (Supp. 1984).

Basically, the Minnesota PRV rules require that veterinarians or testing laboratories immediately report to the Board any diagnosis of PRV in individual hogs or herds. The Board then quarantines the entire herd, plus any other livestock that may have been exposed. The farmer then has three options for ending quarantine.

First, since humans can safely consume the cooked meat of infected hogs, the entire herd can be sold for slaughter. Minn. Rules §§ 1705.2430, subp. 3(A), (B) (1984).

Secondly, a farmer may remove all the reactors (PRV-carrying swine) and submit the remainder of the herd to a series of two PRV tests, spaced 30 days apart. If both tests come up negative, the quarantine can be lifted. Minn. Rules §§ 1705.2440, subp. 1(B) (1984). Finally, the Minnesota PRV rules allow the quarantine to be lifted if the farmer can show that the diagnosis of PRV was the result of a PRV vaccination reaction. Minn. Rules 1705.2440, subp. 2 (1984).

In the *Johansson* case, these PRV rules were challenged in a declaratory judgment action. However, the defendants successfully moved for dismissal for failure to state a claim upon which relief could be granted. Questions regarding the scope of the state's inherent police power to quarantine animals were summarily dismissed. States can select any means (including destruction) to control disease in animals, provided that their methods do not "go beyond the necessities of the case or unreasonably burden constitutional rights." *Reid v. Colorado*, 187 U.S. 137, 151 (1902). The court then turned its attention to the constitutional issues.

Do Minnesota PRV quarantine rules operate so as to deny livestock owners of equal protection of the laws? Plaintiff first argued that the PRV rules imposed a greater economic burden on the owners of breeder hogs (plaintiff), than on farmers who only raised hogs for slaughter. The court conceded that the rules fail to distinguish between such operations and, because breeder hogs are more valuable than slaughter hogs, the breeder hog owner suffers a greater harm when his livestock are slaughtered. The court noted that despite this disparate impact, it was obliged to uphold the Minnesota rules unless plaintiff could demonstrate that there was no rational relation between the rules and a legitimate state interest. This deferential standard of review for equal protection challenges to state economic regulations is mandated by a long line of cases. *E.g.*, *Vance* v. *Bradley*, 440 U.S. 93 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). Using the "rational basis test," the court upheld the Minnesota rules, noting that distinguishing between hog owners would be complex and would hinder the legitimate state interest in thorough enforcement.

The same standard of review was applied to the second aspect of the plaintiff's equal protection argument. So although plaintiff convincingly alleged that dishonest farmers and unethical veterinarians were taking advantage of the PRV vaccination reaction rule (Minn. Rules § 1705.2440, subp. 2 (Supp. 1984)), such infirmities in the regulatory scheme are not fatal. Under the rational basis test, economic regulations can be incomplete or slightly flawed, but still be closely enough related to a legitimate state end to sustain their validity. *Clover Leaf Creamery*, at 466; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). The *Johansson* opinion reminds us that nearly all economic legislation can satisfy the requirements of the rational basis test.

Are Minnesota's PRV quarantine rules so arbitrary and irrational that they constitute a violation of the 14th Amendment guarantee of due process of law? In resolving the substantive due process question, the court employed the same rational basis test it had used in the equal protection analysis. Although the court agreed that the PRV rules could be improved, it refused to address legislative inadequacies because the scheme met the limited requirements of the rational basis test. The court noted that the judiciary should "defer to the experience and judgment of administrative agencies, where reasonable minds may differ as to which of several remedial measures should be chosen..." *Mourning v. Family Publications Service Inc.*, 411 U.S. 356, 371-72 (1973).

Do Minnesota's PRV rules unconstitutionally take property without just compensation in violation of the 5th and 14th Amendments? Plaintiff contended that the reduction in the value of breeder hogs (caused by the quarantine rules) constituted a taking without just compensation. The defendants answered that contraction of the disease itself, not the rules, caused the loss in value. However, the court did not address that defense, but chose to focus on the limits of police power "takings" — in light of other quarantine decisions.

The Texas brucellosis quarantine program, like Minnesota's PRV rules, requires that the diseased livestock be sold for slaughter after imposition of the quarantine.

When this program was challenged, the Texas court held that mere reduction in value did not constitute a taking. *Nunley v. Texas Animal Hospital Commission*, 471 S.W.2d 944 (Tex. Civ. App. 1971). *Johansson* built on the *Nunley* precedent by analogizing these livestock quarantine programs to zoning laws. Mere diminution in value, caused by a valid police power regulation, is insufficient to make out a taking claim. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Johansson pointed out that under the challenged PRV rules, the breeder hog's value was reduced — not extinguished. Therefore, since the breeder hog was still valuable for slaughter, leaving a residuum of value to be captured by the producer could not be considered an unconstitutional taking.

The court then examined unsuccessful constitutional challenges to quarantine programs that provide minimal compensation to farmers whose livestock are slaughtered. *Conner v. Carlton*, 223 So.2d 324 (Fla.) *appeal dismissed*, 396 U.S. 272 (1969); *Burt v. Arkansas Livestock and Poultry Commission*, 278 Ark. 236, 644 S.W.2d 587 (1983). *Johansson* held that although payments to hog farmers could be beneficial, failure to provide for such compensation does not constitute a constitutional violation. *Griffin v. State*, 595 S.W.2d 96, 100 (Tenn. Crim. App. 1980); *Loftus v. Department of Agriculture of Iowa*, 211 Iowa 566, 232 N.W. 412, 420 (1930), *appeal dismissed*, 283 U.S. 809 (1931).

In a related matter, *Johansson* alluded to the possibility that the 11th Amendment and the doctrine of sovereign immunity might prohibit compensation even if a taking is found. Despite the fact that *Johansson* did not decide this issue, it could prove to be a provocative element in future cases.

— *Gerald Torres*

STATE ROUNDUP

NORTH DAKOTA. *Farm Products Rule Changed.* The North Dakota Legislative Assembly again has amended U.C.C. § 9-307, (N.D.C.C. § 41-09-28), the farm products exception to the buyer in the ordinary course of business rule. 1985 N.D. Sess. Laws § 472. Changes to the uniform version of § 9-307, enacted in 1983, apparently proved unworkable.

The 1985 changes allow "a crop or livestock buyer" to take free of a security interest against crops or livestock if: 1) The buyer issues a check in the names of the secured party or seller; 2) No evidence of a security interest appears on the most current list to be kept by the Secretary of State; and 3) The name of the person represented to be the seller of crops and livestock does not appear on that list.

A crop or livestock buyer is "a person who buys crops or livestock from, or who sells crops or livestock on a fee or commission for, a person engaged in farming operations."

By these changes (related changes found in N.D.C.C. § 41-09-28.1, 41-09-42 and 41-09-46), North Dakota has established a modified central filing system. The Secretary of State is required to keep a separate list for crops and livestock, and to publish the lists each month with information regarding security interests pertaining to persons engaged in farming operations.

A secured party has the option of filing certain information with the Secretary of State, but to continue within the farm products exception, a secured party must be named on the list and file certain other information with the Secretary of State.

The information form is effective for five years. Secured parties who file an information form also need to make certain disclosures to the person engaged in farming operations.

The new legislation places time as well as other limitations on actions by a secured party against a crop or livestock buyer.

Once again, rather than adopting a straight central filing system, or leaving intact the uniform version of § 9-307 (without a central filing system), North Dakota has attempted to strike a compromise between agricultural creditors and commercial purchasers of farm products.

The effective date of the new legislation is Jan. 1, 1986.

— *Allen C. Hoberg*

OHIO. *Tenancy by the Entireties.* Tenancy by the entireties has been replaced by a survivorship tenancy in Ohio. Ohio Rev. Code Ann. §§ 5302.17 - 5302.21. Any deed or will containing language that shows a clear intent to create a survivorship tenancy will be liberally construed to do so.

Section 5302.20(C)(4) allows a creditor to enforce a lien against the interest of one or more survivorship tenants by an action to marshall liens.

Upon determination by the court that the creditor has a valid lien, the title to the real property ceases to be a survivorship tenancy and then becomes a tenancy in common. The court can order the sale of the debtor's fractional and apply the proceeds to lien creditors in the order of their priorities.

— *Paul L. Wright*

PENNSYLVANIA. *Zoning to Preserve Land for Agricultural Purposes.* When a zoning ordinance which was designed to preserve agricultural land is attacked as unconstitutional and unreasonably restrictive, a reviewing court should follow a substantive due process analysis to determine whether a challenged provision is rationally related to the legitimate goal of preserving agricultural land.

This approach requires a court to balance the interests of the landowner in the unfettered use of property against the objectives of the community as a whole in preserving and maximizing the use of productive farmland.

Using this approach, the court upheld a zoning provision that required lots subdivided from an original tract to be at least 50 acres. The court emphasized that such provisions are not necessarily valid in every situation, but must be scrutinized under the substantive due process analysis to determine validity in any given case. *Codorus Township v. Rodgers*, 492 A.2d 73 (Pa. Commonwealth Ct. 1985).

— *John C. Becker*

SOUTH DAKOTA. *Parole Evidence.* In *National Boulevard Bank of Chicago v. Makens*, 370 N.W.2d 183 (S.D. 1985), the court found that it was not an error to admit parole evidence to void a contract for deed between members of a farm family, or to adjust equities of the parties based upon that evidence.

— *Annette Higby*

VERMONT. *1985 Vermont Agricultural Legislation.*

Farm Fraud Protection. Vermont's Consumer Fraud Act was expanded to include the protection of farmers as a class of consumers in which goods and services are used in connection with farming operations.

Previously, the Act had excluded goods and services sold, leased, or furnished primarily for agricultural use. 9 Vt. Stat. Ann. § 2451(a), (b) and (c).

Farm Loan Program. Vermont has made up to $400,000 of Vermont Industrial Development Authority funds available for temporary, low-cost loan assistance to family farmers. The Vermont Rehabilitation Corp., a non-profit, quasi-state corporation, will establish an assistance program using these funds to strengthen existing farms, encourage diversification and innovation, increase energy efficiency and conservation, as well as assist beginning farmers. 10 Vt. Stat. Ann. Ch. 12, Subch. 6.

Farming Definition. The Legislature added a definition of "farming" to the Land Use and Development Act (Act 250) in order to clarify the sentence reading, "The word 'development' shall not include construction for farming. . . purposes below the elevations of 2,500 feet." Only construction that falls under the definition of "development" requires an Act 250 permit. For purposes of Act 250, farming now means:

(A) The cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops; or
(B) The raising, feeding or management of livestock, poultry, equines, fish or bees; or
(C) The operation of greenhouses; or
(D) The production of maple syrup; or
(E) The on-site storage, preparation and sale of agricultural products principally produced on the farm; or
(F) The on-site production of fuel or power from agricultural products or wastes produced on the farm.

10 Vt. Stat. Ann. § 6001(22).

Pesticide Monitoring. The Commissioner of Agriculture has been authorized to develop a pesticide monitoring program to be funded by a portion of pesticide registration fees. The program will be designed to research pesticide effectiveness, groundwater contamination, residual bio-accumulation, and degradation under Vermont geographic conditions. The Department will catalogue such information, as it becomes available, for use by the pesticide and farming industries, and the general public. 6 Vt. Stat. Ann. §§ 918(b), 929, 1110.

— *William H. Rice*

WEST VIRGINIA. *State Death Taxes.* On April 12, 1985, the West Virginia Legislature passed a bill, S.B. #73, abolishing state inheritance and transfer taxes, effective July 1, 1985. These taxes were replaced by a "pick-up tax," which limits the state estate tax to that amount for which full credit is allowed against the federal estate tax.

— *Anthony Ferrise*

PEDEDUNIDE2 AL 120 99 1
JAN 00P10CT5503240850S
DONALD B PEDERSEN/PROF
AGRICULTURAL LAW PROGRAM
SCH OF LAW WATERMAN HALL
UNIVERSITY OF ARKANSAS
FAYETTEVILLE AR 72701

5520-G Touhy Avenue
Skokie, IL 60077

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Report on the Sixth Annual Agricultural Law Conference

More than 200 educators, government officials, practitioners, farmers, industry representatives and guests were in Columbus, Ohio Oct. 3-4, 1985, to attend the American Agricultural Law Association's (AALA) Sixth Annual Meeting and Educational Conference. Seventeen speakers addressed a wide range of topics, including the agricultural finance and credit crisis, issues in soil and water management, farm estate planning concerns, as well as the impact of biotechnology on agriculture.

Dr. Neil E. Harl gave the Keynote Address, entitled "The Architecture of Public Policy." Keith G. Meyer delivered the Presidential Address, commenting on the future of AALA, in addition to analyzing Uniform Commercial Code issues now before the Congress. Friday's Luncheon Address was delivered by William Richards, a prominent Ohio farmer, who focused on the demands that will be made on the legal profession by the family farmer of tomorrow.

Harold W. Hannah, Professor of Agricultural Law Emeritus, University of Illinois, Champaign-Urbana, was the recipient of this year's "Distinguished Service Award," recognizing his invaluable, pioneering work in the field of agricultural law over a period of many decades.

The AALA Job Fair, held concurrently with the Annual Meeting, attracted considerable attention, and brought together a number of job seekers and potential employers in need of expertise in the field of agricultural law. Some 30 on-site interviews were conducted. Gail Peshel, Valparaiso University, did a superb job of coordinating this event.

James Dean of Denver, Colo., is the association's new president-elect and Terence J. Centner, University of Georgia College of Agriculture, has been appointed secretary-treasurer. David A. Myers, Valparaiso University School of Law, has assumed his duties as president. Joining the board are newly-elected members J. Patrick Wheeler and Margaret R. Grossman.

Past President J.W. Looney leaves the board, as do members John R. Schumann and Philip E. Harris, whose terms have expired. Margaret R. Grossman has stepped down as secretary-treasurer. We express our deep appreciation to these individuals, all of whom have served the organization well.

Next year's AALA meeting will be held Oct. 23-24, 1986, at the Americana Hotel in Fort Worth, Texas. Plan to attend!