

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PVPA Docket No. 02-0001
)
J.R. Simplot Company,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

J.R. Simplot Company [hereinafter Petitioner] requested that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93¹ from AgriBioTech, Inc., to Petitioner; (2) the Plant Variety Protection Office recognize Petitioner as the owner of the application for a certificate of plant variety protection for Lofts L-93;² and (3) the Plant Variety Protection Office and Dr. Thomas Salt, a senior plant variety plant examiner employed by the Plant Variety Protection Office, disavow the statement “[a]nybody is free to grow and market the turfgrass” attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week’s Superintendent News*.³ The Commissioner denied Petitioner’s request to record

¹Lofts L-93, also referred to a “L-93,” is the varietal name of a variety of creeping bentgrass.

²The application for a certificate of plant variety protection for Lofts L-93 is identified by the Plant Variety Protection Office as PVP Application No. 9600256.

³See letter dated April 17, 2002, from Gary M. Zinkgraf, to Paul M. Zankowski,

(continued...)

the assignment of PVP Application No. 9600256 and denied Petitioner's request that the Plant Variety Protection Office disavow the statement attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week's Superintendent News*.⁴

On July 15, 2002, Petitioner filed "Petition Under 7 C.F.R. § 97.300 For Recording PVP Application No. 9600256 in the Name of J.R. Simplot Company" [hereinafter Petition] pursuant to the Plant Variety Protection Act, as amended (7 U.S.C. §§ 2321-2582) [hereinafter the Plant Variety Protection Act] and the regulations promulgated pursuant to the Plant Variety Protection Act (7 C.F.R. pt. 97) [hereinafter the Regulations] (Pet. at 3). Petitioner seeks reversal of the Commissioner's denial of Petitioner's requests that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93 from AgriBioTech, Inc., to Petitioner; and (2) the Plant Variety Protection Office and Dr. Salt disavow the statement "[a]nybody is free to grow and market the turfgrass" attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week's Superintendent News* (Pet. at 3).

On August 23, 2002, the Commissioner filed "Answer to Petition for Recording Abandoned Application" [hereinafter Answer] contending I have no jurisdiction to consider Petitioner's Petition and, if I conclude I do have jurisdiction to consider Petitioner's Petition, the Petition should be denied (Answer at 2-4). On September 10, 2002,

³(...continued)
Commissioner, Plant Variety Protection Office, Science and Technology Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Commissioner].

⁴See letter dated May 13, 2002, from the Commissioner to Gary M. Zinkgraf.

Petitioner filed “Simplot’s (1) Reply to Commissioner’s Answer to Petition for Recording of Application and (2) Suggestion That Petition Be Deferred Pending Disposition of Upcoming Related Petition.”

Petitioner requested an informal conference pursuant to section 97.300(d) of the Regulations (7 C.F.R. § 97.300(d)). On January 2, 2003, I held an informal conference.⁵ Richard G. Stoll and Richard C. Peet, Foley & Lardner, Washington, DC, represented Petitioner. Joel Barker and Gray Young also appeared on behalf of Petitioner. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, represented the Commissioner.

On February 18, 2003, pursuant to section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443), I requested that the Plant Variety Protection Board provide me with written advice regarding Petitioner’s Petition. During its March 5 and 6, 2003, meeting, the Plant Variety Protection Board held a hearing to consider the Petition.⁶ Richard G. Stoll and Joel Barker appeared on behalf of Petitioner. Robert A. Ertman appeared on behalf of the Commissioner. At the conclusion of the hearing, the Plant Variety Protection Board voted 10 to 1 in favor of a motion to advise me that the procedures followed by the Plant Variety Protection Office with respect to *In re J.R. Simplot Company*, PVPA Docket No. 02-0001, and *In re J.R. Simplot Company*, PVPA Docket No. 02-0002, “were fair and

⁵The January 2, 2003, informal conference was also held in connection with a related proceeding, *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

⁶The Plant Variety Protection Board also considered a related petition filed by Petitioner in *In re J.R. Simplot Company*, PVPA Docket No. 02-0002.

consistent with their [sic] handling of PVP applications” and to recommend that PVP Application No. 9600256 for Lofts L-93 “should not be revived” (Transcript of the March 5, 2003, Plant Variety Protection Board Hearing at 78-80). On April 11, 2003, the Plant Variety Protection Board provided me with a copy of the transcript containing its advice and recommendation.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.

TITLE 7—AGRICULTURE

. . . .

CHAPTER 57—PLANT VARIETY PROTECTION

. . . .

SUBCHAPTER II—PROTECTABILITY OF PLANT VARIETIES AND CERTIFICATES OF PROTECTION

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PART F—EXAMINATIONS; RESPONSE TIME; INITIAL APPEALS

§ 2441. Examination of application

The Secretary shall cause an examination to be made of the application and if on such examination it is determined that the applicant is entitled to plant variety protection under the law, the Secretary shall issue a notice of allowance of plant variety protection therefore as hereinafter provided.

§ 2442. Notice of refusal; reconsideration

(a) Whenever an application is refused, or any objection or requirement made by the examiner, the Secretary shall notify the applicant

thereof, stating the reasons therefore, together with such information and references as may be useful in judging the propriety of continuing the prosecution of the application; and if after receiving such notice the applicant requests reconsideration, with or without amendment, the application shall be reconsidered.

(b) For taking appropriate action after the mailing to an applicant of an action other than allowance, the applicant shall be allowed at least 30 days, and not more than 180 days, or such other time as the Secretary shall set in the refusal, or such time as the Secretary may allow as an extension. Without such extension, action may be taken up to three months late by paying an additional fee to be prescribed by the Secretary.

§ 2443. Initial appeal

When an application for plant variety protection has been refused by the Plant Variety Protection Office, the applicant may appeal to the Secretary. The Secretary shall seek the advice of the Plant Variety Protection Board on all appeals, before deciding the appeal.

7 U.S.C. §§ 2441-2443.

7 C.F.R.:

TITLE 7—AGRICULTURE

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SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

**CHAPTER I—AGRICULTURAL MARKETING SERVICE
(STANDARDS, INSPECTIONS, MARKETING PRACTICES),
DEPARTMENT OF AGRICULTURE**

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SUBCHAPTER E—COMMODITY LABORATORY TESTING PROGRAMS

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PART 97—PLANT VARIETY AND PROTECTION

SCOPE

§ 97.1 General.

Certificates of protection are issued by the Plant Variety Protection Office for new, distinct, uniform, and stable varieties of sexually reproduced or tuber propagated plants. Each certificate of plant variety protection certifies that the breeder has the right, during the term of the protection, to prevent others from selling the variety, offering it for sale, reproducing it, importing or exporting it, conditioning it, stocking it, or using it in producing a hybrid or different variety from it, as provided by the Act.

DEFINITIONS

§ 97.2 Meaning of words.

Words used in the regulations in this part in the singular form will import the plural, and vice versa, as the case may demand. The definitions of terms contained in the Act shall apply to such terms when used in this part. As used throughout the regulations in this part, unless the context requires otherwise, the following terms will be considered to mean:

Abandoned application. An application which has not been pursued to completion within the time allowed by the Office or has been voluntarily abandoned.

Act. The Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

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Applicant. The person who applied for a certificate of plant variety protection.

Application. An application for plant variety protection under the Act.

Assignee. A person to whom an owner assigns his/her rights in whole or in part.

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Certificate. A certificate of plant variety protection issued under the Act by the Office.

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Commissioner. The Examiner in Chief of the Office.

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Office or Plant Variety Protection Office. The Plant Variety Protection Office, Science and Technology Division, AMS, USDA.

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Owner. A breeder who developed or discovered a variety for which plant variety protection may be applied for under the Act, or a person to whom the rights to such variety have been assigned or transferred.

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THE APPLICATION

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§ 97.18 Applications handled in confidence.

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(c) Decisions of the Commissioner on abandoned applications not otherwise open to public inspection (see paragraph (b) of this section) may be published or made available for publication at the Commissioner's discretion. When it is proposed to release such a decision, the applicant shall be notified directly or through the attorney or agent of record, and a time, not less than 30 days, shall be set for presenting objections.

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EXAMINATIONS, ALLOWANCES, AND DENIALS

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§ 97.107 Reconsideration and final action.

If, upon reconsideration, the application is denied by the Commissioner, the applicant shall be notified by the Commissioner of the reason or reasons for denial in the same manner as after the first examination. Any such denial shall be final unless appealed by the applicant to the Secretary within 60 days from the date of denial, in accordance with §§ 97.300-97.303. If the denial is sustained by the Secretary on appeal, the denial shall be final subject to appeal to the courts, as provided in § 97.500.

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PROTEST PROCEEDINGS

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§ 97.201 Protest proceedings.

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(e) As soon as practicable after the petition or the petition and answer are filed, or after the expiration of any period for filing sworn statements or affidavits, the Commissioner shall issue a decision as to whether the protests are upheld or denied. The Commissioner may, following the protest proceeding, cancel any certificate issued and may grant another certificate for the same variety to a person who proves to the satisfaction of the Commissioner, that he or she is the breeder or discoverer. The decision shall be served upon the parties in the manner provided in § 97.403.

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PRIORITY CONTEST

§ 97.220 Decision by the Commissioner.

(a) When a priority contest is concluded on the basis of preliminary statements, or proposed findings of fact, conclusions and notice of priority shall be issued by the Commissioner to the interested parties, giving them a

specified period, not less than 30 days, to show cause why such proposed findings of fact, conclusions, and notice of priority should not be made final. Any response made during the specified period will be considered by the Commissioner. Additional affidavits or exhibits will not be considered, unless accompanied by a showing of good cause acceptable to the Commissioner. Thereafter, final findings of act, conclusions, and notice of priority shall be issued by the Commissioner.

(b) The decision shall be entered by the Commissioner against a party whose preliminary statement alleges a date of determination later than the filing date of the other party's application.

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APPEAL TO THE SECRETARY

§ 97.300 Petition to the Secretary.

(a) Petition may be made to the Secretary from any final action of the Commissioner denying an application or refusing to allow a certificate to be issued, or from any adverse decision of the Commissioner made under §§ 97.18(c), 97.107, 97.201(e), and 97.220.

7 C.F.R. §§ 97.1, .2, .18(c), .107, .201(e), .220, .300(a) (footnote omitted).

Discussion

Effective December 1, 1977, the Secretary of Agriculture delegated to the Judicial Officer authority to exercise the functions of the Secretary of Agriculture “where an appeal is filed under section 63 of the Plant Variety Protection Act (7 U.S.C. 2443).”⁷ Section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443) provides that an applicant for plant variety protection may appeal to the Secretary of Agriculture the Plant Variety Protection Office’s refusal to grant the applicant’s application for plant variety protection.

⁷42 Fed. Reg. 61,029-30 (Dec. 1, 1977).

In this proceeding, Petitioner appeals the Commissioner's denial of Petitioner's requests that: (1) the Plant Variety Protection Office record the assignment of Lofts L-93 from AgriBioTech, Inc., to Petitioner; and (2) the Plant Variety Protection Office and Dr. Salt disavow the statement "[a]nybody is free to grow and market the turfgrass" attributed to Dr. Salt in the April 5, 2002, issue of *Golf Week's Superintendent News* (Pet. at 3). The Commissioner's refusal to record an assignment is not a refusal to grant an application for plant variety protection which may be appealed under section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443). The Commissioner's refusal to disavow a statement attributed to a Plant Variety Protection Office employee is not a refusal to grant an application for plant variety protection which may be appealed under section 63 of the Plant Variety Protection Act (7 U.S.C. § 2443). Therefore, I have no authority to entertain Petitioner's Petition.

For the foregoing reasons, the following Order should be issued.

ORDER

Petitioner's Petition is dismissed with prejudice. This Order shall become effective on the day after service of this Order on Petitioner.

Done at Washington, DC

April 14, 2003

William G. Jenson
Judicial Officer