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INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- International trade and the future of farm programs

Peanut farmers' claims dismissed for lack of subject matter jurisdiction

In *Texas Peanut Farmers v. United States,* 409 F.3d 1370 (Fed. Cir. 2005), the United States Court of Appeals for the Federal Circuit dismissed an action brought by several peanut farmers for lack of subject matter jurisdiction.

Multiple Peril Crop Insurance (MPCI) policies are crop insurance policies that are issued by private insurers and reinsured by the Federal Crop Insurance Corporation (FCIC) for protection against weather-related crop losses. *See Texas Peanut Farmers,* 409 F.3d at 1370. Prior to 2002, MPCI coverage for peanuts was based upon whether lost peanut crops were considered "quota" or "non-quota." *See id.* at 1372. Quota peanuts were covered at $0.31 per pound and non-quota peanuts were covered at $0.16 per pound. *See id.* The Farm Security and Rural Investment Act of 2002, commonly referred to as the 2002 Farm Bill, repealed the peanut quota "and caused all peanuts to become non-quota with a per-pound-coverage rate of $0.1775." *Id.*

Several peanut farmers from South Carolina, Georgia, Alabama, Texas, and Florida purchased MPCI coverage for their 2001 and 2002 peanut crops. *See id.* After the farmers' peanut crops suffered weather-related damage in 2002, they filed claims for their losses in accordance with their MPCI policies, expecting that their losses would be covered at $0.31 per pound. *See id.* They were informed, however, that due to the repeal of the peanut quota by the 2002 Farm Bill their losses would only be covered at $0.1775 per pound. *See id.*

The farmers brought a breach of contract action against the United States in the United States Court of Federal Claims for breach of contract and argued that their damages equaled the difference between the $0.31 per-pound and $0.1775 per-pound-coverage rates. *See id.* The Court of Federal Claims dismissed the farmers' claims for lack of jurisdiction, holding that 7 U.S.C. §§ 1508(j) and 1506(d) placed exclusive jurisdiction in the federal district courts. *See id. See also Texas Peanut Farmers v. United States*, 59 Fed. Cl. 70 (Fed. Cl. 2003). The farmers appealed that decision to the Federal Circuit. *See id.*

The farmers argued that 7 U.S.C. §§ 1508(j) and 1506(d) did not apply because they did not name the FCIC as a defendant. *See id.* The farmers also argued that the Court of Federal Claims has concurrent jurisdiction with the federal district courts under the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

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Federal Register summary from June 11 to July 6, 2005

COTTON. The CCC has issued interim regulations changing the Extra Long Staple cotton price used to calculate the payment rate from the average domestic spot price quotation for base quality U.S. Pima cotton to the American Pima c.i.f. Northern Europe price. 70 Fed. Reg. 35367 (June 20, 2005).

The CCC has issued proposed regulations which implement provisions of the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005, to provide assistance to producers and first-handlers of the 2004 crop of cottonseed in counties declared a disaster by the President due to 2004 hurricanes and tropical storms. 70 Fed. Reg. 36536 (June 24, 2005).

CROP INSURANCE. The FCIC has adopted as final regulations amending the Nursery Crop Insurance provisions to (1) make container and field grown plants separate crops; (2) provide coverage for plants in containers that are equal to or greater than one inch in diameter; (3) provide separate basic units by share which will be further divided into basic units by plant type and a basic unit for all liners when additional coverage is purchased; (4) offer one coverage level and price election for each basic unit when additional coverage is purchased; (5) offer optional units by

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Section 1508(j) provides that if a claim of loss is denied, "an action on the claim may be brought against the Corporation or Secretary only in the United States district court for the district in which the insured farm is located." 7 U.S.C. 1508(j). Section 1506(d) provides that the FCIC,

> subject to the provisions of section 1508 (j) ... , may sue and be sued in its corporate name .... The district courts of the United States, including the district courts of the District of Columbia and of any territory or possession, shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation. The Corporation may intervene in any court in any suit, action, or proceeding in which it has an interest....

Id. at § 1506(d).

The court first considered the farmers' argument that 7 U.S.C. §§ 1508(j) and 1506(d) did not apply because the FCIC was not named as a defendant in their complaint. *Texas Peanut Farmers*, 409 F.3d 1370, 1372 (Fed. Cir. 2005). The court rejected the farmers' argument, stating that "[t]his theory does not bear scrutiny. It is well settled that this court 'look[s] to the true nature of the action in determining the existence or not of jurisdiction.'" *Id.* (citation omitted). It added that "[a]n inspection of the contract and ... pleadings reveals the true nature of this action: a suit against the FCIC for breach of the MPCI. ... [The farmers'] strategic decision not to name the FCIC as a defendant is merely an attempt to avoid the strictures of the MPCI and sections 1508(j) and 1506(d).

The court also rejected the farmers' arguments that the Court of Federal Claims possessed jurisdiction concurrent with the federal district courts. *See id.* at 1373. The court explained that Congress is permitted to withdraw any grant of Tucker Act jurisdiction. *See id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17 (1984); *Wilson v. United States*, 405 F.3d 1002 (Fed. Cir. 2005); and *Massie v. United States*, 166 F.3d 1184 (Fed. Cir. 1999)). The court concluded that because the farmers "are suing the FCIC for breach, sections 1508(j) and 1506(d), by which Congress has granted courts exclusive jurisdiction over claims against the FCIC, govern." *Id.*

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location for field grown plants; (6) allow increases to the plant inventory value report if made on or before August 31 of the crop year; (7) change the provision that precludes acceptance of an application for insurance for any current crop year after May 31 of the crop year; and (8) make other policy changes to improve coverage of nursery plants. 70 Fed. Reg. 37221 (June 28, 2005).

GUARANTEED FARM LOANS. The FSA has issued proposed regulations which revise the Interest Assistance Program as to how a guaranteed loan borrower may obtain a subsidized interest rate on a guaranteed farm loan. The changes include (1) deletion of annual review requirements, (2) limitations on loan size and period of assistance, and (3) streamlining of claim submission. 70 Fed. Reg. 36055 (June 22, 2005).

ORGANIC FOODS. The AMS has issued advance notice of proposed rulemaking concerning the expiration, on October 21, 2007, of the allowed use of 165 synthetic and non-synthetic substances in organic production. On the same date the prohibition of nine non-synthetic substances will also expire. The AMS seeks public comment on the changes. 70 Fed. Reg. 35177 (June 17, 2005).

ORGANIC FOODS. The AMS has issued a notice pursuant to a consent final judgment and order issued in the case *Harvey v. Johanns*, Civil No. 02-216-P-H (D. Me. June 9, 2005). The court issued a declaratory judgment that 7 CFR 205.606 shall be interpreted to permit the use of a nonorganically produced agricultural product only when the product has been listed in Section 205.606 pursuant to National List procedures, and when an accredited certifying agent has determined that the organic form of the agricultural product is not commercially available. The court's order limited an accredited certifying agents commercially available determinations for nonorganic agricultural products used in or on processed organic products to the five substances contained in 7 CFR 205.606. The products involved are native cornstarch, water extracted gums, kelp when used as a thickener and dietary supplement, unbleached lecithin, and high methoxy pectin. 70 Fed. Reg. 38090 (July 1, 2005).

TOBACCO. The CCC has issued a request for public comment on the documents to be used by the CCC in the administration of the Tobacco Transition Payment Program with respect to successor-in-interest contracts, which allow a tobacco quota holder or a tobacco producer who is participating in this program to transfer their rights and obligations to a third-party. 70 Fed. Reg. 36919 (June 27, 2005).

—Robert P. Achenbach, Jr., AALA Executive Director

Wisconsin insurance company subject to jurisdiction in Arkansas

In *Ferrell v. West Bend Mutual Insurance Company*, 393 F.3d 786 (8th Cir. 2005), the United States Court of Appeals for the Eighth Circuit held (1) that a Wisconsin crop insurer was subject to personal jurisdiction in Arkansas, (2) that the insurance policy's "right-to-sue-insurer" clause was enforceable in Arkansas, (3) that the action was not precluded by a previous declaratory judgment in Wisconsin, (4) that damage to a tomato crop was "property damage" under the policy, (5) that damage to the tomato crop constituted an "occurrence" under the policy, (6) that a contractual liability exclusion did not apply, and (7) that Arkansas' penalty statute applied. *See id.*

Arkansas tomato growers Phillip and Tommy Ferrell and Clay and Donny Lowry (growers) purchased a plastic film from Hi-Tech Film, Inc. (Hi-Tech) designed to prevent soil from splashing onto tomatoes and causing blight. *See id.* After placing the film on their fields, the film began to deteriorate causing holes in parts of the film. *See id.* Because of these holes, the growers' tomatoes were splashed with soil when it rained, causing blight. *See id.* As a result, the tomatoes were smaller than normal and suffered from sunburn, rain damage, and cracking. *See id.* Therefore, in August of 2000 the growers sued Hi-Tech in Arkansas federal district court and were awarded damages and attorney's fees due to the breach of warranties of merchantability and fitness. *See id.* The growers then sought indemnification from West Bend Mutual Insurance Company, the insurance company that insured Hi-Tech. *See id.* The court "awarded the tomato growers the underlying judgment, plus attorney's fees and costs, a penalty, prejudgment interest, and postjudgment interest." *Id.* at 790. West Bend appealed the decision to the Eighth Circuit. *See id.*

West Bend argued that the district court did not have personal jurisdiction over it because it lacked sufficient minimum contacts with Arkansas. *See id.* West Bend asserted that it was a Wisconsin company with its principal place of business in Wisconsin, that it conducted no business and had no offices or agents in Arkansas, that it had no bank accounts or property in Arkansas, that it solicited no business in Arkansas, and that it was not licensed to operate in Arkansas. *See id.* The court explained that the policy covering Hi-Tech contained a territory-of-coverage clause providing that the policy covered Hi-Tech "against injury or property damage from occurrences in '[t]he United States of America . . . Puerto Rico, and Canada.'" *Id.* at 790. The court determined that West Bend chose to extend its coverage into Arkansas and was therefore subject to personal jurisdiction in Arkansas. *See id.* It also determined that the "territory-of-coverage clause" in the policy satisfied the minimum contacts requirement of the Due Process Clause. *See id.*

West Bend also argued that the growers' only cause of action arose out of § 23-89-101 of the Arkansas Code, which provides for direct actions against an insurer based on an insurance policy issued or delivered in Arkansas. *See id.* Although the growers abandoned their reliance upon this section because the insurance policy at issue was neither issued nor delivered in Arkansas, the court explained that the express language of the policy provided for a cause of action. *See id.* The court explained that the language of the policy providing that "[a] person or organization may sue us to recover . . . on a final judgment against an insured obtained after an actual trial." *Id.* at 792. The court explained that § 23-89-101 of the Arkansas Code did not preclude a claim based upon the express language of a policy and the common law. *See id.*

West Bend further argued that the growers' claim was foreclosed by a previously issued declaratory judgment in Wisconsin that West Bend "had no duty to defend or indemnify Hi-Tech." *Id.* at 792. West Bend argued that such judgment should be given full faith and credit in Arkansas. *See id.* The court explained that the district court had concluded that "the Wisconsin judgment did not bar the tomato growers' action in Arkansas, because the growers were not a party to the Wisconsin action, and Hi-Tech had little or no incentive to obtain a full and fair adjudication in that case." *Id.* at 792-93. The court agreed with the district court that the Wisconsin judgment did not bar this action. *See id.* It stated that the growers would not have been precluded in Wisconsin and that the growers' interests cannot be deemed to have been litigated in the Wisconsin action. *See id.*

West Bend next argued that the breach-of-warranty damages were for economic losses not covered by the policy and that the policy's contractual liability exclusion applied. *See id.* The court explained that the growers did sustain property damage as a result of the defective film purchased from Hi-Tech. *See id.* It noted that the tomato plants were "stunted, undersized, sunburned, or waterlogged, and they were cracked in parts." *Id.* at 795. The court stated that measuring the damage in terms of lost profits or diminished gross receipts did not alter the fact that property (tomatoes) was damaged. *See id.* The court also stated that there was an "occurrence" within the meaning of the policy. *See id.* It noted that the plants were accidentally and unintentionally damaged due to the faulty film. *See id.* The court further explained that the plants were exposed to blight, overwatering, and underwatering. *See id.* The court further determined that because there was no agreement or contract between the growers and Hi-Tech assuming liability for damages, West Bend's contention that the policy's exclusion of coverage for contractual liability applied was erroneous. *See id.*

West Bend also argued that the growers were not entitled to a penalty and attorney's fees under § 23-79-208(a)(1) of the Arkansas Code. *See id.* That section provides that if an insurance company fails to pay in accordance with the policy after demand is made, they are liable to pay a 12% penalty on the amount of the loss and reasonable attorney's fees. *See id.* The court explained that even where the law of another state governs the substantive issues, the award of the 12% penalty and attorney's fees is procedural and therefore governed by Arkansas law. *See id.* The court cited *USAA Life Ins. Co. v. Boyce*, 745 S.W.2d 136 (Ark. 1988), an Arkansas Supreme Court decision, for that proposition. *See id.* The court explained that under § 23-79-208 of the Arkansas Code, there must be a connection with Arkansas for the court to award the penalty and attorney's fees on a policy. *See id.* The court further explained that the "insurance policy matured in Arkansas, the injury occurred in Arkansas, the damaged property was owned by Arkansas residents, and the Arkansas residents brought suit and obtained a judgment in Arkansas." *Id.* at 797. The court concluded that because of these factors there was a sufficient connection to apply § 23-79-208.

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The Nebraska hog wars

By J. David Aiken

Nebraska has always been a major livestock producing state. Until the 1980s, most livestock production was on small to medium-sized family operations. Nebraska has always had some large cattle feedlots, but most feedlots have been smaller. Swine production traditionally has been on small and medium-sized operations. Just over one-third of Nebraska counties were zoned by the late 1970s, with quarter-mile (or smaller) setbacks being a common livestock zoning regulation.

Beginning in the late 1960s, large confined swine production facilities were developed in the eastern US, similar to the poultry industry. Initiative 300's corporate farming restrictions no doubt slowed the development of large swine confinements in Nebraska until the late 1980s and early 1990s. This development then became a high-profile public policy issue. Strident opposition to large swine confinement operations from smaller swine producers and neighbors concerned about odors and pollution led to a state moratorium on processing livestock waste permits until regulations could be changed to deal with larger operations. Many features of the new state livestock waste regulations were ultimately included in the 1998 Nebraska Livestock Waste Management Act, Neb. Rev. Stat. §§ 54-2401 to -2435 (2004 Supp).

A major focus of the Nebraska "hog wars" has been county livestock zoning regulations. The Nebraska Supreme Court ruled in 2000 that counties could not regulate livestock facilities except through county zoning regulations. *Enterprise Partners v. Perkins County*, 260 Neb. 650, 619 N.W.2d 464 (2000). See *County feedlot regulations invalidated*, 17 Agric. L. Update 12 (November, 2000). Thereafter, developing restrictive county AFO (animal feeding operation) zoning regulations became the principal strategy for limiting the development of mega-livestock facilities. Many unzoned counties sought to develop zoning to give them control over the location (and size) of large swine confinement operations. Anti-confinement groups sought changes in county zoning laws to allow temporary zoning so that counties had time to develop permanent zoning. Temporary zoning legislation was first proposed in 1998 but was not adopted until 1999, as confinement developers lobbied hard to have the law delayed. This allowed some confinement operations to be developed before counties could regulate them through temporary zoning regulations. See Neb. Rev. Stat. §§ 23-115 to -115.02 (2004 Supp.). Now most Nebraska counties are zoned; some regulations are strict enough to make development of new confinements difficult if not either impossible or uneconomical.

In most zoned counties, new livestock facilities need both (1) a state livestock waste control permit from the Nebraska Department of Environmental Quality and (2) a county zoning permit. Often counties will require the producer to first obtain the DEQ livestock waste permit before the county will issue the zoning permit. Some livestock producers have received their state DEQ livestock permit, only to then have their county zoning permit denied. A livestock producer may spend hundreds or even thousands of dollars to obtain the DEQ permit. Most producers would prefer to know whether or not the county will issue the zoning permit before spending the money to obtain the DEQ permit, an issue addressed as part of 2003 "livestock friendly" legislation.

The Nebraska system of dual livestock facility regulation is in contrast to Iowa's, where counties cannot zone agricultural land or buildings. In Iowa, the Department of Natural Resources issues environmental permits for livestock operations with state setbacks of 750-1,875 feet depending upon the facility waste handling system. In contrast, most county zoning regulations of livestock facilities in Nebraska have much larger setback requirements (up to four miles), and some have capacity limits, putting a ceiling on larger facilities. Livestock industry advocates have proposed that county zoning of livestock facilities be limited or prohibited, but have been unsuccessful in implementing restrictions on county zoning authorities.

County AFO zoning upheld

In *Premium Farms v. Holt County*, 263 Neb 415, 640 N.W.2d 633 (2002), the Nebraska Supreme Court ruled that a Holt County zoning regulation could require a conditional use zoning permit before hog production facilities could be developed. Premium Farms wanted to build a large swine facility in Holt County. The county's zoning regulations required Premium Farms to obtain a conditional use zoning permit before constructing the hog confinement facility. Premium Farms began construction without obtaining the zoning permit, contending that the county zoning permit requirement was illegal and unenforceable. The county then took Premium Farms to court for beginning construction without the zoning permit.

Premium Farms argued that Nebraska zoning statutes prohibited counties from requiring permits for farm buildings. Premium Farms argued that because they were constructing a farm building, they were not subject to county permit requirements. The county argued that the farm buildings statute applied only to building permits and not to zoning permits. The county also argued that Nebraska zoning statutes clearly authorized counties to regulate agricultural land uses.

The district court ruled that the zoning statute prohibited counties from regulating farm buildings. The district court concluded that the county could regulate the use of the land surrounding the farm building but not the farm building itself. This ruling was overturned by the Nebraska Supreme Court, which ruled that the farm building statute applied only to building permits and not to zoning permits. The Supreme Court also ruled that the Holt County zoning permit requirements for the hog buildings were legal.

The Premium Farms decision is a major legal decision. The Iowa Supreme Court had ruled in similar cases that Iowa counties are not authorized to zone agricultural land. *DeCoster v. Franklin County*, 497 N.W.2d 849 (Iowa 1993); *Thompson v. Hancock County*, 539 N.W.2d 181 (Iowa 1995); *Kuehl v. Cass County*, 555 N.W.2d 686 (Iowa 1996). A similar decision by the Nebraska Supreme Court would have required most Nebraska counties to rewrite their zoning regulations, and would allow new livestock facilities to be developed throughout the state if they met DEQ environmental regulations (which contain no setback requirement).

County livestock zoning has continued to generate controversy. Most zoned counties establish zoning setbacks for livestock operations, and some counties have larger setbacks (up to 4 miles) for very large facilities. These types of zoning regulations will make livestock expansion (especially swine expansion) difficult in much of Nebraska.

Open meetings law

In Nebraska, as in most other states, most actions by public officials are subject to compliance with state public meeting or open meeting law requirements. Failure to comply with open meeting requirements can lead to a court's declaring the action taken by public officials to be invalid. Such was the case in a zoning deci-

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sion involving a dairy expansion in Antelope county. *Alderman v County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002).

The teVelde brothers filed an application with the Antelope County board of supervisors for a zoning permit to expand their dairy. The dairy is located in the watershed of East Verdigree Creek, a cold-water stream that provides 40% of the trout stocked in Nebraska.

On August 10, 1999, before any action was taken on the zoning permit application, the county board approved a $158,000 loan to the teVelde brothers for their dairy expansion. On August 24, 1999, after the loan for the dairy expansion had been approved, the Antelope County planning commission held a public hearing on the proposed zoning permit for the teVelde dairy expansion. (Under Nebraska zoning law, the planning commission makes a recommendation to the county board, which makes the final decision on conditional use zoning permits such as the one requested by the teVeldes.) Because the public notice of the planning commission meeting was not legally adequate, the commission continued (i.e. delayed) its meeting to September 7, 1999.

Between these two meetings the planning commission and the teVeldes arranged a tour of the dairy at which a University of Nebraska livestock environmental engineer could address issues concerning the dairy expansion raised in the August 24 hearing. The meeting was held August 31, 1999 and was attended by seven of nine planning commission members, and five of seven county board members. The August 31 meeting was not advertised as a public meeting pursuant to open meeting requirements.

On September 7, 1999, after the unadvertised meeting at the dairy, the planning commission voted 6-2 to grant the dairy expansion conditional use permit. On September 14, 1999, the county board approved the dairy expansion conditional use permit. On October 1, 1999, the plaintiffs filed a lawsuit to invalidate the dairy expansion conditional use permit. On November 17, 1999 the district court invalidated the dairy expansion conditional use permit because the unadvertised meeting at the dairy constituted a violation of the open meetings law.

On November 18, 1999 the teVeldes filed a second application for a dairy expansion conditional use zoning permit. On January 24, 2000 the planning commission held a public hearing to consider the second zoning permit application. After plaintiffs pointed out fatal deficiencies in the second application, the hearing was adjourned and no action was taken.

On February 3, 2000 the teVeldes filed a third zoning permit application. On February 15 and 16, 2000, the planning commission held a public hearing to consider the third zoning permit application, and voted 7-2 to grant the third application. On March 7, 2000 the county board approved the third zoning application after a public hearing.

On June 1, 2000 the plaintiffs filed a lawsuit challenging the validity of the grant of the third zoning permit application. At trial, two planning commission members indicated that their votes in favor of the third zoning permit application were influenced by information received at the illegal dairy meeting. Two county board members indicated that their votes in favor of the dairy expansion application were influenced by the vote of the planning commission. Despite this testimony, the district court ruled that the approval of the third zoning permit application was legal.

This determination was overruled by the Nebraska Court of Appeals. The Court of Appeals ruled that the votes on the third zoning permit application were tainted by reliance upon information presented at the illegal dairy meeting, and invalidated the dairy expansion zoning permit. The Court of Appeals noted that in Nebraska "the public meetings laws are to be broadly interpreted and liberally construed to obtain the objective of openness in favor of the public." In a sharp rebuke, the court continued:

> It is unthinkable that after a court has voided a board's action after determining that a meeting was held in violation of the public meetings law, the law would still allow members of that board to consider information obtained at that illegal meeting. To do so would completely contradict the stated intent of the public meetings law, which is to ensure that the formation of public policy is public business, not conducted in secret, and to allow citizens to exercise their democratic privilege of attending and speaking at meetings of public bodies. We simply do not know the content and extent of the information that was presented at the illegal meeting. Furthermore, official reports of closed meetings, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action.

11 Neb. App. at 422.

The court concluded:

> To allow board members to consider information obtained at a meeting that has been judicially determined to be in violation of the public meetings law would allow those board members to consider information that has not been brought before the public and thus would deprive citizens of both hearing said information and speaking either for or against it. Thus, we hold that once a meeting has been declared void pursuant to Nebraska's public meetings law, board members are prohibited from considering any information obtained at the illegal meeting.

Id. at 422-23.

The teVelde's ultimately filed for bankruptcy and abandoned the dairy operation. Part of the controversy in this case is that the teVelde's has been recruited to Nebraska by the Nebraska Department of Economic Development dairy expansion program. Significant state economic development grants were made to the teVelde's in addition to county economic development funding. The case was a train wreck that the state of Nebraska would no doubt like to avoid in the future.

Livestock friendly legislation

In 2002, and in response to the Alderman decision (as well as more widespread livestock developer frustration with increasingly restrictive county AFO zoning regulations), livestock and other agricultural interests sought a state study of the economic importance of the Nebraska livestock industry. That proposal was defeated by counties, anti-confinement advocates, and others who saw it as laying the foundation for a political attack on county livestock zoning. Livestock supporters returned in 2003 with LB754, a state livestock-friendly-county program, which was enacted. Neb. Rev. Stat. §§ 54-2801 to -2802 (2004). The statute (1) allows the Nebraska Department of Agriculture to designate counties as livestock friendly, and (2) changed procedures for county livestock zoning permits.

Livestock friendly counties

Nebraska Revised Statute section 54-2801 declares that "the growth and vitality of the state's livestock sector are critical to the continued prosperity of the state and its citizens." Section 54-2802 authorizes the Nebraska Department of Agriculture (NDA) to establish criteria to recognize and assist county efforts to maintain or expand their livestock sector. Counties may be designated as livestock friendly if they request the NDA designation and meet the NDA livestock-friendly criteria. Livestock friendly criteria include setbacks of no more than 3/4 mile. 29 Neb. Adm. Code § 008.05F (2004). Counties may also designate themselves as being livestock friendly. The implicit objective of the NDA livestock friendly designation process is to allow counties to signal to producers whether or not they are receptive to new and/or expanded livestock operations. Certainly the state would be justified in limiting the spending state economic development funds for livestock development to livestock-friendly counties. Some opponents fear that the NDA livestock friendly zoning criteria (which would make it difficult for a recently zoned county to qualify as livestock friendly) may be the

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basis for restricting county AFO zoning regulations to those that do not conflict with the NDA livestock friendly zoning criteria. However, the NDA has recently approved the first county (which is zoned) as livestock friendly that has setbacks slightly in excess of the NDA livestock friendly zoning criteria. *Counties want to be friendly*, Nebraska Farmer (July 2005) at 7.

County livestock zoning permits

Nebraska Revised Statutes section 23-114.01 (2004 Supp.) establishes that a livestock producer applying for a county AFO zoning permit may request the county to specify what requirements the producer must meet in order to receive county zoning approval. The statute also requires a written statement of the reasons why a the livestock zoning permit was granted or denied. The implicit objective of the §23-114.01 zoning requirements is to allow applicants to get an advance written determination of whether or not their permit will be granted before they seek the more expensive DEQ permit. The statute also makes the record clearer if county AFO zoning decisions are appealed.

Municipal AFO regulations upheld

While much of the hog-war battles have involved county zoning, at least one community has joined the fray. In 1997, the community of Alma (pop. 1,214) learned that Furnas County Farms (FCF) and Sand Livestock Systems planned to build a large swine confinement approximately eight miles northwest of the Alma city limits in Harlan County. The city hired an environmental engineer to prepare a report on the potential impact of the swine facility upon Alma's water supply. On the basis of the consultant's report, Alma adopted five municipal ordinances, based upon Neb. Rev. Stat. §§17-536 and 17-537. Section 17-536 establishes that the authority of cities of the second class (including Alma) and villages "to prevent any pollution or injury to the stream or source of water for the supply of such [community] waterworks, shall extend fifteen miles beyond its corporate limits." The Alma ordinances required livestock producers to obtain permits from the city before developing livestock facilities within 15 miles of Alma's city limits. The permit process required the applicant to line waste lagoons with a synthetic liner, to install monitoring wells to detect ground water pollution, and to submit a financial bond for cleanup.

The city notified FCF of the permit requirements. FCF informed the city that it believed the city ordinances to be invalid, and stated its intention to proceed with construction activities. The city filed suit to stop construction, and construction stopped when the suit was filed.

FCF contended in court that the 15-mile municipal water pollution control authority was preempted by the Nebraska Environmental Protection Act (NEPA), and since FCF had received its state permits from the DEQ, FCF was legally entitled to construct its livestock facilities without regard to the Alma ordinances. The district judge ruled in favor of Alma. An appeal to the Nebraska Supreme Court resulted in the matter being returned to the district court in 2001 for further proceedings. The district judge again ruled for Alma, and this decision was again appealed.

The Nebraska Supreme Court ruled that the 15-mile municipal water pollution control authorities were not preempted by NEPA. Normally, the courts will try to sustain both state law and local ordinances if they are not mutually exclusive. In its NEPA analysis, the court noted several NEPA provisions encouraging municipalities to establish their own local pollution control programs. The court did, however, invalidate the Alma cleanup bond requirement as being inconsistent with NEPA. The court also ruled that FCF could not raise the issue of whether the Alma ordinances conflicted with DEQ livestock waste control facility regulations and the 1998 Livestock Waste Management Act because such issues had not been raised in the district court. The Alma decision is another judicial warning to livestock facility developers that they ignore local regulations at their peril.

Failure to establish a non-conforming use

One of the most misunderstood concepts in zoning law is that of non-conforming uses, or "grandfathering." Most zoning regulations exempt existing uses that would not conform to the new (or revised) zoning regulation. These uses (land uses or buildings) are called non-conforming uses because they do not conform to the new (or revised) zoning regulation. The often mistaken belief is that zoning regulations must leave non-conforming uses alone. This is incorrect: Nebraska Revised Statutes § 23-173.01 allows non-conforming uses to be terminated, continued, or regulated by a county zoning regulation. As a practical matter, however, most counties will not regulate or terminate non-conforming uses; doing so would often make adoption of the proposed zoning regulation or amendment difficult if not impossible.

When zoning is being adopted for the first time, some property owners may attempt to establish a non-conforming use before the zoning regulation is legally implemented in order to qualify for the zoning regulation's non-conforming use exception. In Nebraska, many county zoning regulations have been adopted in recent years to restrict the location and operation of animal feeding operations (AFOs). It is not surprising, then, that a firm attempted to develop two AFOs in Red Willow county before county zoning regulations restricting AFOs were adopted, seeking to grandfather them. This was the issue before the Nebraska Supreme Court in *Hanchera v. Board of Adjustment*, 269 Neb. 623, 694 N.W.2d 641 (2005).

In *Hanchera*, Furnas County Farms was attempting to develop two swine AFOs in Red Willow County before the county's new zoning regulation took effect. Mr. Hanchera filed a complaint with the county zoning administrator that Furnas County Farms' two AFOs did not meet the new county zoning regulations. The zoning administrator concluded that the two AFOs qualified as non-conforming uses and were grandfathered. This conclusion was affirmed by the county zoning board of adjustment and the county district court, but was reversed on appeal to the Nebraska Supreme Court.

The court noted that in 2001 the county was in the process of adopting a comprehensive development plan and accompanying zoning regulations, which would have restricted AFO location. Furnas County Farms had participated in this process by attending public hearings and public meetings on the proposed zoning regulations. The comprehensive plan and zoning regulations were adopted by the Red Willow Planning Commission and recommended to the county commissioners on September 24, 2001. On the next day the county commissioners adopted the comprehensive plan and zoning regulations, with the effective date of October 16, 2001.

Regarding Furnas County Farm's attempt to grandfather their two new AFOs, the court indicated the following activities:

I. $1,320 spent for easements and state AFO environmental permit applications, Aug. 1-6, 2001;

II. $93,533 spent as down payments to purchase the two sites, Sep. 30, 2001;

III. $4,000 spent for down payment for one site, October 5, 2001;

IV. $11,480 spent for pouring concrete, October 13, 2001; and

V. $138 spent for electrical inspections, October 15, 2001.

The court also noted that Furnas County Farm had not entered into a land purchase agreement on the two sites until October 4, 2001 and did not take title to the land until December 2001. The decision does not indicate whether Furnas County Farms had received the state AFO permits, but it is not likely that they had in 2001 as it often takes several months for the DEQ AFO

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Hog wars/cont. from page 6

permitting process to be completed.

After reviewing these facts, the court noted that under previous Nebraska court decisions, a new zoning regulation will not have a retroactive effect where a landowner, in good faith reliance on existing zoning regulations, has spent substantially on construction where the new construction would not meet the new zoning regulations. The landowner, however, has the burden of proving that it did not know that the new construction would violate the new zoning regulations. The court then quoted from a North Carolina decision,

> Good faith ... is not present when the landowner, with knowledge that the adoption of the zoning ordinance is imminent and that, if adopted, will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations [such as land purchase agreement or a construction contract] before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

269 Neb. at 629.

The court ruled that Furnas County Farms was aware that Red Willow County was in the process of adopting zoning regulations that would restrict if not prohibit its proposed AFOs. All the AFO construction activities at the two sites occurred after the zoning regulations were adopted by the county commissioners on September 25, 2001. The court characterized these construction activities as an obvious attempt to circumvent the zoning regulations, and therefore were not undertaken in good faith. The court ruled that the two AFOs were not grandfathered, and that they were required to comply with the new county zoning regulations. The AFOs will likely have to be abandoned as a result of this decision.

What does the future hold? For many years Nebraska's corporate farming restrictions slowed the development of mega-livestock facilities in the state. However, given the 8th Circuit's ruling in *South Dakota Farm Bureau v Hazeltine*, 340 F.3d 583 (8th Cir. 2003), cert den. 2004 U.S. Lexis 3351 (May 3, 2004), the validity of state corporate farming restrictions is in doubt. If Nebraska's Initiative 300 is invalidated, out-of-state livestock developers may be interested in locating livestock production facilities in Nebraska. This may lead to additional county AFO zoning challenges. The hog wars are a long way from being over, at least in Nebraska.

Regulation of hydrologically-connected ground water in Nebraska

Nebraska has traditionally kept surface water law and ground water law separate. Surface water is subject to the statutory doctrine of prior appropriation, and ground water is subject to the common-law doctrine of reasonable use and correlative rights, supplemented by natural resource district (NRD) regulation in ground water management areas. See *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005), noted at 22 Agric. L. Update 6 (May, 2005). This bifurcated approach poses major difficulties when, for example, ground water pumping interferes with streamflow. Under the 1997 Platte River cooperative agreement, Nebraska must protect Platte River streamflows from inter alia ground water pumping in order to meet endangered species requirements. See Aiken, *Balancing Endangered Species Protection and Irrigation Water Rights: the Platte River Cooperative Agreement*, 3 Great Plains Nat. Res. J. 119 (1999). Nebraska must also protect Republican River streamflows into Kansas in order to comply with the settlement of Republican River Compact litigation. See Aiken, *The Western Common Law of Tributary Ground Water: Implications for Nebraska*, 83 Neb. L. Rev. 541 (2004).

In response to the state's Platte and Republican River legal obligations, Nebraska enacted 1996 ground water management legislation authorizing NRDs to prohibit well drilling and limit ground water withdrawals to protect streamflows. The Nebraska Department of Natural Resources (DNR) was also authorized to exercise these same authorities if necessary to insure compliance with interstate water obligations. The DNR authorities were expanded in 2004, authorizing it to designate all or parts of river basins statewide as being "fully appropriated," which triggered an immediate ban on new wells and new surface water appropriations. Neb. Rev. Stat. §§ 46-713, -714 (2004). Areas subject to NRD well bans under the 1996 statute were designated in the 2004 statute as "over-appropriated" basins and the temporary NRD well bans were extended. Id. § 713(4). Consequently, approximately one third of Nebraska has been closed to new wells pumping more than 50 gallons per minute, This is a dramatic break with Nebraska's traditionally wide-open approach to ground water development. Furthermore, by January 1, 2006 the DNR must decide whether additional areas should be designated as fully appropriated and closed to new water rights and wells. Id. § 46-713(1). This determination will include a consideration of the effects of withdrawing "hydrologically-connected" ground water (HC ground water) on streamflow.

Once an area has been designated as fully appropriated or over-appropriated, the DNR and NRD (or NRDs) must cooperatively prepare an integrated management plan (IMP). Id. § 46-715. For over-appropriated basins (primarily the Platte and Republican River basins), the goal of the IMP is to restore streamflows to their July 1, 1997 condition (this is the date the Platte River endangered species cooperative agreement was signed). Streamflow restoration can be accomplished by limiting ground water withdrawals and by leasing (and essentially retiring) surface water rights. IMPs will be implemented in 10-year increments.

The 2004 statute puts Nebraska in the forefront in terms of attempting to anticipate and prevent future conflicts between HC ground water users and surface water users. However, the statute does nothing to deal with surface water appropriators who have already been harmed by streamflow reductions caused by HC wells. Under *Spear T*, such disputes will be resolved by § 858 of the Second Restatent of Torts. The late Frank Trelease, the special ALI reporter for the Restatement water law provisions, favored priority (first in time is first in right) as the legal basis for resolving such disputes. See Aiken, *Hydrologically-Connected Ground Water, § 858 and the Spear T Decision*, 84(2) Neb. L. Rev. (forthcoming). However there is sufficient leeway in § 858 to argue that only a narrow range of ground water users should be liable for interfering with streamflow. Additional litigation is necessary to more fully define what § 858 means for resolving HC water conflicts in Nebraska.

—J. David Aiken, University of Nebraska, Lincoln. NE

FLAG Executive Director search

Farmers' Legal Action Group, Inc. (FLAG) is searching for an executive director to lead this nineteen-year old national nonprofit public interest law firm, based in St. Paul, MN. FLAG provides legal services to protect family farms and their rural communities. Requirements include a law degree or substantial knowledge of agriculture issues, foundation fundraising ability, commitment to public interest/social justice work, and senior management experience. Experience with agricultural law and/or legal services is a plus. For information on FLAG, visit: www.flaginc.org. To discuss the position or recommend a candidate, call Don Tebbe at (301) 330-4624 or email FLAG@transitionguides.com

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

From the Executive Director:

Annual Conference: All members should have received or will soon receive the brochure for the 2005 Annual Agricultural Law Symposium on October 7 & 8, 2005 at the Marriott Country Club Plaza in Kansas City, MO. Because of minor changes and updates to the conference schedule, please check the conference brochure posted on the AALA web site for the latest information. See the link on the main home page.

The conference brochure contains a reminder about the 2005 Membership Recruitment Program and three membership brochures. If you recruit a non-member to attend the 2005 conference, you will receive four chances in a drawing to win $345.00, the cost of a member registration to the conference. You can request additional conference brochures from me. Be sure to add your name to the conference registration form for any non-member you recruit for the conference.

If your firm would like to sponsor one of the food breaks, breakfasts, lunches or the Friday evening reception, please let me know. We also will need to borrow three LCD projectors for both days of the conference. This will save the association very expensive rental costs.

Nominations for Annual Scholarship Awards. The Scholarship Awards Committee is seeking nominations of articles by professionals and students for consideration for the annual scholarship awards presented at the annual conference. Please contact Jesse Richardson, Associate Professor, Urban Affairs and Planning, Virginia Tech, Blacksburg, Virginia 24061-0113,(540) 231-7508 (phone) (540) 231-3367 (fax) email: jessej@vt.edu

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