Agricultural Law Update

VOLUME 13, NUMBER 5, WHOLE NUMBER 150 MARCH 1996

Official publication of the American Agricultural Law Association

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Farm Credit System Reform Act signed into law

On February 10, 1996, President Clinton signed the Farm Credit System Reform Act of 1996, Pub. L. No. 104-105, 110 Stat. 162 (1996) (hereinafter the Act). This little publicized law, sponsored by Rep. Wayne Allard of Colorado, amends the Farm Credit Act of 1971. In broad terms, the Act reduces the regulatory requirements that are placed on Farm Credit System (hereinafter FCS) lending institutions and expands the role of the Federal Agricultural Mortgage Corporation (hereinafter the Corporation). The Act's effective date is the date of enactment, February 10, 1996. *Id.* § 302. The Secretary of Agriculture and the Farm Credit Administration (hereinafter FCA) are directed to promulgate regulations within ninety days after the effective date. *Id.* § 301.

The Act is composed of two substantive titles, the first of which is titled and deals specifically with the Agricultural Mortgage Secondary Market. Numerous and detailed provisions within this title address the Federal Agricultural Mortgage Corporation and its relationship with the FCS lending institutions. Amendments include an increase in the powers of the Corporation (*Id.* § 104, to be codified at 12 U.S.C. § 2279aa-3); amendments to the requisite "minimum" and "critical" capital levels for the Corporation (*Id.* §§ 114, 115, to be codified at 12 U.S.C. §§ 2279bb2 - 2279bb3); mandated recapitalization of the Corporation (*Id.* § 117, to be codified at 12 U.S.C. § 2279bb-7); and changes to the provisions governing the receivership, conservatorship, and liquidation of the Corporation (*Id.* § 118, to be codified at 12 U.S.C. § 2279cc). Also included is a provision superseding certain state usury laws to make them inapplicable to loans made for sale to or guarantee by the Corporation (*Id.* § 112, to be codified at 12 U.S.C. § 2279aa-12), and a provision extending the capital transition period (*Id.* § 113, to be codified at 12 U.S.C. § 2279bb-1). Section 110 of the Act directs the Board of Directors to "promote and encourage the inclusion of qualified loans for small farms and family farmers in the agricultural mortgage secondary market." *Id.* § 110, to be codified at 12 U.S.C. § 2279aa-8).

Title II of the Act, entitled Regulatory Relief, attempts to ease the regulatory burden imposed on FCS institutions. Examples of lessened regulation and eased requirements include provisions:

• allowing loans that exceed 85% of the appraised value of the real estate security provided that the amount in excess of the 85% is covered by private mortgage insurance (*Id.* § 202 (to be codified at 12 U.S.C. § 2018(a)(1));

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Tax court holds that income from lease of farm land to operating entity is self-employment income

It is not uncommon, where an entity such as a corporation or partnership is involved, to put the other operating assets of the farm into the entity while withholding the land. The withheld land is then generally leased to the entity to make it available for the entity's farming operations. Although the rental received by the owner-lessor is includible as income for income tax purposes (I.R.C. section 61(a)(5)), it has been assumed by many that the rental income would *not* be included in computing "net earnings from self-employment" for purposes of the self-employment tax. A recent opinion by a special trial judge in *Mizell v. Commissioner*, T.C. Memo. 1995-571, indicates that that assumption may be incorrect, at least in some circumstances. Interestingly, this seems to be the first case dealing with this precise issue.

The general rule is that neither cash nor share rents from land are subject to the self-employment tax. I.R.C. § 1402(a)(1). However, such rentals *are* includible for self-

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• eliminating the requirement that each FCS bank obtain a financial statement from each of its borrowers at least once every three years or more often as required by FCA regulation (*Id.* § 203, striking 12 U.S.C. § 2018(a)(5));
• amending the continuing eligibility requirements for an association that has received a loan from a bank for cooperatives (according to this amendment, such an association shall continue to be eligible so long as more than 50% of the voting control of the association is held by farmers, producers, harvesters of aquatic products, or eligible cooperative associations) (*Id.* § 204, to be codified at 12 U.S.C. § 2129(a));
• removing the federal certification requirement for certain private sector financing to eligible entities under the Rural Electrification Act of 1936 (*Id.* § 205, to be codified at 12 U.S.C. § 2129(b)(1)(A));
• restricting the requirements of the FCA regarding the dissemination of quarterly reports to stockholders to ensure that this reporting not be "more burdensome or more costly than the requirements applicable to national banks" (*Id.* § 211, to be codified at 12 U.S.C. § 2252(a)(8));
• a provision replacing the annual examination requirement with an eighteen-month-period requirement (*Id.* § 213, to be codified at 12 U.S.C. § 2254(a); and,
• a provision allowing the Corporation to reduce the required premiums obtained from FCS banks for the support of the Farm Credit Insurance Fund (*Id.* § 215, to be codified at 12 U.S.C. § 2277a-4).

Perhaps most controversial from the perspective of FCS borrowers, are three provisions relating to borrowers' stock, disclosure requirements, and borrowers' rights—sections 206, 207, and 208.

Section 206 governs the sale and retirement of a borrower's stock in the FCS institution when the mortgage from the borrower is sold in the secondary market. *Id.* § 206, to be codified at 12 U.S.C. § 2154a. This section provides that with regard to loans made after the effective date of the Act for sale into the secondary market, "no voting stock or participation certificate purchase requirement shall apply." *Id.* With regard to loans made prior to the effective date of the Act and that are sold into the secondary market, "all outstanding voting stock or participation certificates held by the borrower with respect to the loan" will be retired. *Id.* Exception provisions are included to deal with loans that are designated for sale but not sold within a 180-day period. *Id.*

Section 207 amends the disclosure requirements applicable to adjustable rate loans. *Id.* § 207, to be codified at 12 U.S.C. § 2199(a)(4). It provides that notice to the borrower of a change in the interest rate applicable to the borrower's loan may be made "within a reasonable time *after* the effective date of an increase or decrease in the interest rate." *Id.* (emphasis added).

Section 208 amends the borrowers' rights provisions of the Farm Credit Act of 1971 (most of which stem from the Agricultural Credit Act of 1987, Pub. L. No. 100-233, including the borrowers' rights with regard to debt restructuring). Essentially, the Act makes all of these rights inapplicable to loans made after the effective date of the Act and sold in the secondary market by excluding them from the definition of the term "loan." *Id.* § 208, to be codified at 12 U.S.C. § 2202a. Prior law exempted "pooled" loans from the restructuring requirements, but allowed the loan applicant to refuse to allow the loan to be pooled. *See* Christopher R. Kelley & Barbara J. Hoekstra, *A Guide to Borrower Litigation Against the Farm Credit System and the Rights of Farm Credit System Borrowers*, 66 Wm. Mitchell L. Rev. 127, 227-28 (1990).

Section 221 provides that there is no prohibition on the disclosure by any FCS institution, or director, officer, employee, or agent thereof, of information to the government regarding possible violations of law. *Id.* § 221, to be codified at 12 U.S.C. § 2219e. Immunity from liability for such disclosure, if made in good faith, is provided. *Id.*

Although as noted, much of Title II of the Act relieves FCS institutions from regulatory requirements, certain provisions within Title II also create new requirements, particularly for financially troubled FCS institutions. For example, there is a prohibition on certain "golden parachute" and indemnification payments made by an insolvent institution. *Id.* § 218, to be codified at 12 U.S.C. § 2277a-10b. Additional oversight is to be provided by the Corporation when an institution is undercapitalized or when a merger or restructuring is proposed. *Id.* § 218, to be codified at 12 U.S.C. § 2277a-10a. In addition, the Act authorizes the Board of Directors of the Corporation to act as conservator or receiver for a Farm Credit System institution (Id. § 214, to be codified at 12 U.S.C. § 2277).

—Susan A. Schneider, Hastings, MN

Agricultural Law Update

VOL 13, NO. 5, WHOLE NO. 150 March 1996

AALA Editor . . Linda Grim McCormick
Rt. 2, Box 292A, 2816 C R. 163
Alvin, TX 77511
Phone/FAX: (713) 388-0155
E-mail: hcxb52a@prodigy.com

For AALA membership informatiou, contact William P. Babione, Office of the Executive Director, Robert A Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* from January 22 to February 16, 1996.

1. APHIS; Citrus canker regulations; quarantined areas; interim rule with request for comments; comments due March 22, 1996. 61 Fed. Reg. 1519.

2. EPA; Pesticides; status of dried commodities as raw agricultural commodities; interpretive ruling. 61 Fed. Reg. 2386.

3. USDA; Waiver of penalties for small business and reducing the frequency of reports. 61 Fed. Reg. 2479.

4. CCC; Agreements for the development of foreign markets for agricultural commodities; interim final rule; effective date February 1, 1996. 61 Fed. Reg. 3548.

5. Farm Credit System Insurance Corporation; Supplemental standards of ethical conduct for employees of the Farm Credit System Insurance Corporation; final rule; effective date February 6, 1996. 61 Fed. Reg. 4349.

—Linda Grim McCormick, Alvin, TX

Tax Court/continued from page 1
employment tax purposes if three requirements are met: (1) the income is derived under an *arrangement* between the lessor and lessee of the land that provides that the lessee shall produce agricultural or horticultural commodities on such land; (2) such arrangement also provides that there will be material participation by the lessor in the production or management of production of such agricultural or horticultural commodities; and (3) there *is* such actual material participation by the lessor. I.R.C. § 1402(a)(1).

The *Mizell* case involved the owner of farm land who leased it on a crop-share basis to a farming partnership in which the lessor was also a twenty-five percent partner, along with his three sons. The owner included the rentals received under the lease as income for income tax purposes but did not treat it as self-employment income for self-employment tax purposes. The I.R.S., on the other hand, determined that the rent *was* subject to the self-employment tax.

The parties in the case stipulated that the leases provided for production of agricultural products by the lessee partnership on the leased land and that the lessor, as an active partner is the lessee partnership, materially participated in the partnership's production of agricultural commodities on the land. The key issue, therefore, was whether there was an "arrangement" with respect to the leased land that called for material participation by the owner. The taxpayer-lessor argued that the lease itself had to expressly provide for such material participation, and since the one in question did not, no such "arrangement" could be found to exist for purposes of determining whether the rental should be subject to self-employment taxes.

However, because the term "arrangement" is not expressly defined for this purpose in either the Internal Revenue Code or applicable regulations, the special trial judge applied a "plain, obvious, and rational meaning" of the term to include not only "obligations imposed upon [the lessor] by the leases, but to those obligations that existed within the overall scheme of the farming operations which were to take place on [the lessor's] property." These were held to include the lessor's obligations under the partnership agreement and by general understanding with the sons to participate as a partner in the partnership's farming operations. Since the anticipated participation by the lessor as partner was equivalent to an anticipated material participation, there was an "arrangement" providing or at least contemplating such participation. It should be noted that the result in this case could presumably have been the same if the lease to the partnership were based on a cash rent rather than a crop share, since rentals potentially qualifying as self-employment income are not limited to share rents. *See* Treas. Reg. § 1.1402(a)-4(b)(2).

Given the interpretation of the term "arrangement" in this case, the I.R.S. could take the position that the income, whether cash or share rents, from many typical leases of farm land to operating entities is self-employment income if the lessor is also actively involved in the lessee entity's farming operations. Assuming that it is clear that the lessee entity will conduct farming operations on the leased land, the key as to the self-employment tax issue would seem to be whether the lessor's contemplated role in the entity operations will be sufficiently active to constitute "material participation" if it actually occurs. If it is expected from the total context of the understandings of the parties involved that the lessor will act as an active manager, even if not the only one, in the entity's farming operations, it would appear that an "arrangement" for such participation could be found. Assuming the expected participation actually occurs, the income received by the lessor, whether cash or share rents, would seem, under the rationale of the *Mizell* case, to be includible in the computation of the lessor's self-employment tax liabilities. For example, such an "arrangement" could presumably have been found to exist if the lease in the case had instead been to a corporation in whose farming operations the lessor were actively involved as a corporate officer.

If the lessor is not also actively involved in the operation and management of the farming entity, or if the activities are not extensive enough in fact to constitute "material participation," the rental received by the lessor should not constitute self-employment income. Special complications arise where the leased land has more than one owner, such as two spouses, and one or more but not all of the lessor-owners are actively involved in the operations of the lessee entity. Further complications may exist where the land is owned by an entity, such as another partnership, and some of the parties involved in the land-holding entity are also actively involved in the operating entity.

—Lonnie Beard, Professor of Law and Director of the Graduate Agricultural Law Program, University of Arkansas, Fayetteville, AR

Denial of Dairy Termination Program benefits upheld

In a case that has now produced three reported opinions, a federal district court has upheld a USDA National Appeals Division (USDA NAD) decision denying Dairy Termination Program (DTP) benefits totaling $1,734,906.40 and assessing a $26,000 penalty against Roy and Renee Vandervelde. *Vandervelde v. Espy*, 908 F. Supp. 11 (D.D.C. 1995). *See also Vandervelde v. Yeutter*, 774 F. Supp. 645 (D.D.C. 1991); 789 F. Supp. 24 (D.D.C. 1992). The USDA NAD's decision was based on the Vandervelde's failure to comply with their DTP contract in failing to brand certain cows and to dispose of others. The USDA NAD also found that the Vandervelde's had participated in a "scheme or device" to defeat the purposes of the DTP.

The DTP authorized payment to dairy farmers who agreed to slaughter or export their cows and to cease milk production for a specified period. 7 U.S.C. § 1446(d)(3)(A)(ii). The DTP also required persons who violated their DTP contract to repay all payments received and authorized the assessment of civil penalties of $1,000 to $5,000 per head of cattle for various DTP violations. *Id.* §§ 1446(d)(3)(A)(iv)(III), 1446(d)(5)(B). The DTP regulations placed the burden of proving contract compliance on participating producers. 7 C.F.R. § 1430.468(g). Unlike the statute, the regulations also provided for the denial of payments to participating producers who misrepresented facts or who adopted, participated in, or benefited from, a "scheme or device." *Id.* § 1430.461.

The Vanderveldes admittedly violated their DTP contract by failing to brand eleven cows as required under the DTP regulations, 7 C.F.R. § 1430.458. The USDA NAD, however, also concluded that these cows and approximately 175 other cows were either intended to be sold for purposes other than slaughter or export or were actually sold to third parties with the Vanderveldes' knowledge that they would not be slaughtered or exported. In part, these conclusions were based on findings that Mrs. Vandervelde had admitted lying about the financing for one third-party's purchase of cattle and the Vanderveldes' failure to explain why certain required records were unavailable. Accordingly, the USDA NAD determined that the Vanderveldes had failed to comply with their DTP contract and had participated in a "scheme or device" to defeat the DTP's purposes.

In upholding the USDA NAD's determination, the court addressed three issues of general interest to federal farm program litigants. First, the court relied

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Proposals for property rights reform

By John C. Becker

Of the political and social issues surfacing over the past five years, one that consistently evokes an excited emotional reaction is the impact that government laws and regulations have on property owners. In recent congressional debate, legislators referred to property rights as sacred fundamental rights guaranteed under our Constitution; basic principles that our nation's founding fathers knew must be protected if the nation was to survive.[1] One congressman went so far as to say that property rights are the foundation for all economic progress in this country and therefore must be maintained.[2] With such rhetoric from the Congressional Record, it should be no surprise that Americans who pride themselves on their independent and hard-working spirit become emotional over a threat to the basic fabric of their society.

In addition to considering the impact of government action, an important collateral issue is that of government's obligation to compensate property owners for the loss of the right to make decisions in regard to his own property as a result of action taken by the government. The proliferation of land use, environmental, and work place laws and regulations that affect a property owner's right to decide what is done on his or her property has caused many to question the necessity of such regulations and the negative effects on owners' rights that are created thereby. While people may disagree with the necessity for a law or regulation, demanding compensation for lost property rights is an effective strategy for dealing with unpopular restrictions. The fundamental premise for this position can be captured in the statement, "Government can regulate as much of my property as it wants, as long as it pays me for it."

In several different forums and several different ways the call has gone out for reform of the process by which government laws and regulations are adopted. These proposals seek to fill the perceived void in the current regulatory process that fails to consider the effects that such laws and regulations have on property owners. The present methods of protecting property rights are considered inadequate to support the rights affected and the concerns being raised. In the minds of some, a complete overhaul of government's system for adopting such rules, and the rules themselves, is needed.

John C. Becker is Professor of Agricultural Law and Economics, The Pennsylvania State University, University Park, PA

This article addresses three federal proposals that typify the call for reform of the present system and identifies the main thrust of the proposals, evaluating the role each could play in changing current rules.

The current situation

The constitutional basis for the protected nature of property rights is found in three sources: Amendments Five and Fourteen of the United States Constitution; the inherent power and authority of government known as the police power; and a series of U.S. Supreme Court decisions over the last seventy years that have addressed the nature of government power, the nature of an owner's rights in property, and the extent to which government can regulate an owner's use without having to compensate the owner for a loss of value that results from the regulatory action.

The Fifth Amendment prohibits government from taking a person's private property for some public use without paying the owner just compensation for what is taken. To many, this amendment refers to government's right of eminent domain, which allows it to take ownership and possession of private property for public purposes. In cases where actual ownership and exclusive possession and control of private property are acquired by government, few would argue that the right of the private owner should not be respected. The Fourteenth Amendment prohibits states from taking action that deprives persons of their property without due process of law, which seems to mandate that a process be employed before rights in property are affected.

In contrast to the right of eminent domain is the inherent right of government to exercise its police power for the purposes of protecting public health, safety, and welfare. On this basis, government has authority to restrict land use in many different ways without transferring ownership or exclusive possession and control of another's property.

Beginning in 1922, the United States Supreme Court recognized that government action that restricts an owner's right to make a lawful use of property could result in a government obligation to compensate the owner, even though the owner retained ownership and control of the affected property.[3] In the Court's view, if regulatory control goes too far, government may be forced to compensate a property owner for loss of value suffered as a result of government action. In deciding when regulatory action has gone too far, courts balanced the regulatory interests of the state with the impact that such action had on property owners. The greater the impact on property values or choice of land use decision, the greater the likelihood that compensation would be required. Other factors such as interference with an owner's investment-backed expectations for the affected property introduced new concepts to the analytical mix.

By 1992, the Court added additional factors such as a categorical finding of a government taking when the result of government action is to deprive an owner of all economically beneficial or productive use of the owner's land.[4] A second factor inquired whether the property owner's proposed use of the affected land was one that could be conducted without triggering society's right to enjoin it as a nuisance. It is no longer enough for a property owner to show that property value was lost as a result of government action; the owner must also establish that the proposed use cannot be enjoined as an unreasonable interference with society's rights.

By 1994, the Supreme Court decided its latest case that asked the court to review the power that government has to require property owners to give up certain rights in their property, such as land for a bike path or flood plain, in return for authorization to expand an existing land use.[5] The Court concluded that for government's demand to give up property to be upheld, it must establish that what it is asking for bears a reasonable relationship to the demands placed on government by the proposed activity. Government demands to give up property cannot be sustained if there is no relationship between what the owner gives up and the impact on government of the property owner's proposed use.

Proposals for reform

Nearly twenty states have adopted some form of property rights legislation to date.[6] At the federal level, many different bills have addressed one or more aspects of the property rights debate. Of the statutes adopted and the bills proposed, most can be classified in one of two ways. The first classification are those laws designed to modify the law and regulatory formation process by introducing an evaluation of the impact the proposed rule will have on the rights of property owners before the law or regulation is adopted. The second classification includes laws that change the current rules for determining government's obligation to compensate property owners when government actions restrict property owners to such an extent that significant value in the property is lost.

Proposals to modify the regulatory process

Senate Bill 22

In its 104th session, Congress considered Senate Bill 22, which addressed the need to modify the regulatory formation process. Under this bill, all agencies of the federal government would be required to complete a "private property taking impact analysis" before issuing or promulgating any policy, regulation, proposed legislation, or related agency action that is likely to result in a taking of private property. The sweeping nature of this statement is offset by a list of activities that are not subject to this requirement, including action taken with respect to property held in trust, action in connection with treaty negotiations with foreign nations, law enforcement action, communication between federal agencies and state or local land use planning agencies, placement of military facilities, military or foreign affairs functions, and action in any case in which there is an immediate threat to health or safety that constitutes an emergency requiring immediate response. For purposes of Senate Bill 22, the term "taking of private property" refers to any government action whereby private property is taken in such a way as to require compensation under the Fifth Amendment to the Constitution. This statement seemingly would leave intact the current rules and requirements for compensation.

The called-for "private property taking impact analysis" is to include five key categories of information: the proposal's specific purpose, the likelihood a taking will occur, the likelihood that government's impact on property owners will require compensation, alternatives to the proposal, and an estimate of the federal government's potential to compensate property owners. This analysis is submitted by the agency to the Office of Management and Budget in conjunction with the proposed regulation. The public is given access to the impact analysis, and the bill proposes that the agency, "to the greatest extent possible," is to transmit copies of the analysis to the owner or other person with a property right or interest in the affected property. This release of the report comes at the end of the process when the analysis is complete, unlike the comparable environmental impact analysis process, which provides for public input while the analysis is being prepared.[7] The proposal does not address the question of a legal consequence for failing to make a disclosure to the holder of an interest in any affected property.

Proposals to change the conditions under which government is obligated to compensate property owners for rights that are taken

Several proposals attacked the issue of property rights head-on by proposing to amend the rules that the courts have fashioned in past years. Two such proposals are Senate Bill 145 and House Bill 925.

Senate Bill 145

Senate Bill 145, the "Private Property Rights Restoration Act," provides that owners of real property have a cause of action against the United States if, on or after January 1, 1994, the application of a statute, regulation, rule, guideline, or policy of the United States restricts, limits, or otherwise takes a right to real property that would exist in the absence of such application, and the application results in a discrete and non-negligible reduction in the fair market value of the affected portion of the real property. Under the proposal, property owners establish a prima facie case against the United States if the government action results in a temporary or permanent reduction of fair market value of the affected portion of real property to the lesser of either twenty-five percent or more or $10,000 or more. Claims must be brought within six years of the application of the government action and are brought in the Court of Federal Claims, which is given exclusive jurisdiction over these claims.

If the owner's proposed use of the affected property amounts to a public nuisance under state law, the owner of the affected property is not entitled to receive any compensation under the proposed bill. The government has the burden of proving that a property owner's proposed use constitutes a public nuisance.

Owners of affected property interests are given the right to elect to (1) recover an amount equal to the reduction in fair market value caused by the government action, or (2) relinquish title to the affected portion of real property in return for its full fair market value. In addition to recovering the reduction in fair market value, property owners are entitled to receive reasonable attorney's fees and expert witness fees if they prevail in their claim. Any awards of compensation, including damages and costs of litigation, are to be paid out of funds of the agency or agencies responsible for the action that resulted in the reduction in fair market value.

House Bill 925

As originally introduced, House Bill 925, the "Private Property Protection Act," provided that government is obligated to compensate a property owner whose use of property has been limited by an agency action that diminishes the fair market value of the property by ten percent or more, based on the value of the property. Property with respect to which compensation has been paid by the government shall not be used for the originally intended use, even if the limitation is later rescinded or otherwise invalidated. If the limitation is later declared invalid, property owners who receive compensation for the limitation may elect to use the property for the originally intended use by refunding the amount of compensation received, as adjusted for inflation. Under the proposal it is unclear whether the property being considered in this instance is the entire parcel, or only that portion of a parcel that is affected by government action.

The bill defines the term "property" to include land and the right to use or receive water. The significance of this will be seen in a later discussion. Use of property is considered to be limited by agency action if a particular legal right to use the property no longer exists because of the government action. In several instances, limitations imposed on property owners will not trigger an obligation to compensate the property owner. For example, the bill specifies that agency action that is intended to prevent identifiable hazards to public health or safety, that prevents damage to specific property, or that relates to federal navigational servitudes will not trigger an obligation to compensate an affected property owner. In addition, no compensation is due under the bill if use of property that is limited by government action is proscribed under the law of the state in which the property is located. If a use is a nuisance as defined by the law of a state or is prohibited under a local zoning ordinance, then such use shall also be proscribed for purposes of the bill and no compensation shall be due the owner.

Unlike Senate Bill 145, House Bill 925 requires the landowner to file a claim with the agency within 180 days. This period begins to run when the owner receives actual notice of agency action. If

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the owner and the agency are unable to reach an agreement within 180 days of the date the written claim is filed, the owner may choose to take the claim to binding arbitration or seek compensation in a civil action against the United States. All payments made to property owners under the proposed bill are made from annual appropriations of the agency whose action occasioned the payment. If agency appropriations are inadequate to complete the required payment, it is the duty of the agency to seek appropriation of required funds for the next fiscal year.

Several amendments and amendments in the form of substitutions were offered in debate on the House floor. Included among these is an amendment that would limit government's obligation to compensate a property owner to government action taken under the following laws only: wetland provisions of section 404 of the Federal Water Pollution Control Act (the Clean Water Act), the Endangered Species Act, provisions of title XIII of the Food Security of 1985, the right-to-receive-water provisions of the Reclamation Acts, the Federal Land Policy Management Act, and section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974. A second key amendment clarified that "affected property" under the bill was to refer to only the portion of land that is actually affected by government action. A third key amendment would allow a property owner to force the government to purchase affected property outright if the property's fair market value is reduced by fifty percent or more.

Consequences of enactment of these reforms

How will these proposed reform measures affect property rights and government's obligation to compensate property owners who suffer a loss in value as a result of government action? To respond to this question requires one to answer to a more fundamental question of whether the motive of the proposal is to uphold the special status given an owner's right in property under our law, whether the proposal is motivated by a desire to make government regulatory action more effective, or whether the proposal is simply intended to make government action more difficult to take. In general terms, proposals that impose private property taking impact analysis requirements on government agencies are motivated by a desire to make regulatory action more effective as the purpose of the planning requirements is to identify impacts and address them before regulatory action is taken. As apparent as that may be, however, it is also clear that once the analysis is completed, the next logical question to ask is how will the information be used? What would be the purpose of conducting the analysis if it is not intended to be used in the regulatory formation process? Perhaps, the purpose of the impact analysis is to establish that if the cost of the regulatory action exceeds its benefit, then the action ought not be taken. If that is the implicit purpose for requiring the analysis, should not the proposal require that the analytical output be shared with concerned audiences before the analysis is complete or while information for the analysis is being gathered?

Likewise, if the purpose of gathering the information and conducting the analysis is to improve agency decision making, with the result that its decisions are made on more economically rational grounds, should not the proposal make that an express requirement, rather than let the issue remain unresolved until some later time and place? If efficiency is the goal, environmental economics recognizes efficiency measurements in several different forms, such as maximum net present benefit and positive cost/benefit ratios. Which of these or other measures of efficiency is the goal that the measure is to achieve, and what is the legal consequence of failing to apply this requirement in any given situation? Experience under the National Environmental Policy Act[7] establishes that without express direction, the question of which alternative should be selected remains open and unresolved and a source of conflicting speculation.

If the purpose of the reform proposal is to make government action more difficult to take, proposals such as Senate Bill 22 and House Bill 925 will have a very profound impact. Each of these proposals adds new and broader categories of situations that require government to pay compensation to affected property owners. What is the purpose of this revised compensation payment arrangement? Is it to uphold the special status that property rights are entitled to under our legal system, or is the addition of cost factors simply a way to persuade an agency to pass on the opportunity to regulate when the cost cannot be effectively managed by the agency? If the latter is the case, property owners who believe that the call for support for these reform measures is a means to receive immediate financial benefits will be sadly mistaken about the prospects of a pot of gold at the end of their rainbow.

It is clear that much of what drives concern about property rights is based on the perception that some regulatory action is unnecessary and imposes siguificant burdens on property owners who would much rather see the offending regulations eliminated. By imposing additional economic burdens on agencies and tying those burdens to the agency's annual appropriations, agencies are given a sobering lesson in regulatory responsibility. Congressional debate has raised this point by referring to anecdotal evidence of situations where constituents are adversely affected by rogue regulatory action. It seems that many members of Congres can relate a situation or two in their districts or state to gain additional support. Therefore, if the perception is that statutory and regulatory action has caused constituents unnecessary financial pain and suffering, an effective strategy for eliminating the pain may be to make regulatory action more difficult to take in the future. Proponents can eliminate the adverse impact of the law without changing one word of its provisions; essentially repealing it without having to bear the political heat for proposing and supporting that result. The amendment to House Bill 925 that limits the application of the Bill to specific regulatory laws and regulations is a clear example of this approach.

The current debate on the issue of property rights reform seems to be driven by several of these considerations. The debate is marked by frequent references to situations and circumstances that members feel are representative of abusive exercise of agency authority. As agency action is based on enabling authority found in legislation passed by Congress, is the problem caused by the agency or by Congress that passed the law that enabled the agency to take the regulatory action in the first place? By throwing roadblock in front of agency action and imposing higher financial burdens for exercising that authority, is Congress avoiding the real issue of whether there is a need to revise the laws involved?

In this country, an active struggle is being waged to win the political and philosophical minds of the electorate who vote. The property rights debate is an important part of this political and philosophical struggle as it has been used to describe what most consider to be fundamental concepts in our society. In order to properly evaluate it, it is necessary to know and understand what it is, as well as what it is not.

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[1] Cong. Rec. H2495-567 (daily ed. Mar. 2, 1995).

[2] *Id.* (comments of Mr. Crapo).

[3] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[4] *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

[5] *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

[6] An excellent discussion of state property rights initiatives can be found in Professor Jerome M. Organ's materials, "Understanding State and Federal Property Rights Legislation," in the proceedings of the 1995 AALA Conference, November, 1995.

[7] National Environmental Policy Act, 42 U.S.C.A. §§ 4321-4370d.

[8] *Id.*

State roundup

KENTUCKY. *Mistaken transfer of tobacco poundage.* In *Cox v. Wagner*, 907 S.W.2d 770 (Ky. 1995), the Kentucky Supreme Court considered a dispute between parties to a land sale contract over the tobacco base.

In October, 1990, Cox conveyed a thirty-acre tract and a seven-acre tract to Poe, for $16,000 consideration and with an oral understanding that the tobacco base would be retained by Cox. Thereafter, Wagner executed a contract of sale with Poe for the thirty-acre tract. The terms provided that no tobacco base was involved.

Subsequently, Wagner requested of the local ASCS office that the Cox tobacco base be reconstituted. Wagner was later awarded a 1,749 pound tobacco base — fifty percent of the Cox tobacco base. Cox's suit in the Bracken County Circuit Court was dismissed for lack of jurisdiction. The court of appeals affirmed the circuit court judgment.

On appeal, Wagner argued that the tobacco allotments are to be transferred only as provided by USDA regulations. *See Hart v. Hassell*, 250 F. Supp. 893 (E.D.N.C. 1966). Accordingly, the state court is without jurisdiction. The supreme court agreed with the general proposition, but determined that the issues go further than whether parties can privately contract to sell farm land but retain the tobacco poundage.

Cox argued that the value of the tobacco poundage was not included in the sale price. "Said otherwise, this was a 'bare realty' sale." Holding that state law is not preempted to the extent that Cox can prove mutual mistake, fraud, or unjust enrichment, the supreme court reversed the court of appeals and remanded to the circuit court for trial.

— Scott D. Wegner, Lakeville, MN

MAINE. *Tenant / potato grower limited to seed costs in breach of lease by landlord.* In 1984, Gervais, a potato farmer, entered into a lease with J.R. Simplot Company to rent 445 acres of farmland for five years at $13,350 per year. In 1987, McCain bought the cropland from Simplot. Thereafter, McCain terminated the lease agreement with Gervais. However, Gervais refused to give up the lease and farmed the land in 1987, but did not pay rent. Gervais did not plant a crop on the land in 1988 and did not pay rent that year.

In 1989, McCain brought an action against Gervais for unpaid rent for the 1987 and 1988 crop years. Gervais counterclaimed for loss of profit, contending that he was prevented from putting in a crop in 1988. The jury determined that Gervais owed $13,350 rent for 1987, but no rent for 1988. On Gervais' counterclaim, the jury found that McCain breached the lease contract and awarded $1,760 damages. The superior court denied Gervais' motion for a new trial.

On appeal, Gervais maintained that $1,760 in damages for McCain's breach of the lease is inadequate. The jury's rationale, disclosed in a note to the judge, indicated that they compensated Gervais only for seed potato costs. ("[W]e feel [Gervais] deserves $1 dollar per barrel 8 barrels per acre x 220 acres that was planted in potatoes in prior years, which results in 1,760.00 for seed dumped for the year of 1988.")

Gervais asserted that the jury acted under mistake of fact or law in not awarding damages for lost profits. While the trial court's instructions called for the jury to award lost profit damages, the supreme judicial court found evidence in the record to support a price for potatoes that would result in no profit for the 1988 growing season. A contract price of $3.00 was referred to in testimony. Further, the record supported an average yield of 275 hundredweight per acre and average expenses of $1,211 per acre. Use of these figures results in a loss. Finding a rational basis for the damage award, the Supreme Judicial Court affirmed the judgment. *McCain Foods, Inc. v. Gervais*, 657 A.2d 782 (Me. 1995).

—Scott D. Wegner, Lakeville, MN

Fulbright Scholar awards for U.S. faculty, professionals

The competition for 1997-98 awards opens March 1, 1996. Opportunities for lecturing or advanced research in over 135 countries are available to college and university faculty and professionals outside academe. Awards range from two months to a full academic year, and many assignments are flexible to the needs of the grantee.

Virtually all disciplines participate: openings exist in almost every area of the arts and humanities, social sciences, natural and applied sciences, and professional fields such as business, journalism, and law.

The basic eligibility requirements are U.S. citizenship and the Ph.D. or comparable professional qualifications (for certain fields such as the fine arts or TESOL, the terminal degree in the field may be sufficient). For lecturing awards, university or college teaching experience is expected. Foreign language skills are needed for some countries, but most lecturing assignments are in English.

The deadline for lecturing or research grants for 1997-98 is AUGUST 1, 1996. Other deadlines are in place for special programs: distinguished Fulbright chairs in Western Europe and Canada (May 1) and Fulbright seminars for international education and academic administrator (November 1).

For further information and application materials, contact the USIA Fulbright Senior Scholar Program, Council for International Exchange of Scholars, 3007 Tilden Street, N.W., Suite 5M, Box GNEWS, Washington, CD 20008-3009. Telephone: 202/686-7877. Web Page (online materials): http://www.cies.org/ E-Mail: cies1@ciesnet.cies.org (requests for mailing of application materials only).

Dairy Termination Program/continued from page 3

on 7 U.S.C. sections 1385 and 1429 and the presumption of reviewability attendant to the Administrative Procedure Act for the related propositions that USDA findings of "fact" are not reviewable, but USDA "'determinations' are reviewable and reversible if 'arbitrary and capricious.'" 908 F. Supp. at 14 (citation omitted).

Second, the court raised, but did not decide, the issue of whether the Due Process Clause required the USDA to prove by "clear and convincing" evidence the Vanderveldes' adoption or participation in a "scheme or device." Relying largely on *Shepherd v. American Broadcasting, Inc.*, 62 F.3d 1469 (D.C. Cir. 1995), the district court stated that the application of the 'clear and convincing" standard to the USDA NAD's determination under review presented an issue of "first impression in this Circuit...." *Id.* at 16. The issue was presented because the USDA NAD had "ruled, in part, that plaintiffs defrauded the Department and had the burden of proof to prove otherwise...." *Id.* The issue was not resolved, however, because the court determined that other grounds adequately supported the USDA NAD's determination. *Id.* at 17.

Third, the court also suggested that it would be improper to hold the program participant to the "clear and convincing" evidence standard in asserting entitlement to administrative equitable relief under 7 C.F.R. section 791.2. That regulation permits the USDA NAD to grant relief where the participant made a good faith effort to comply with program requirements but failed to achieve more than substantial performance. Although its opinion is not altogether clear, the court at least implied that the USDA NAD had the burden of basing any conclusion that the participant was not acting in good faith on "clear and convincing" evidence or its functional equivalent. *Id.* at 17-18.

—Christopher R. Kelley, Of Counsel, Lindquist & Vennum, P.L.L.P., Minneapolis, MN

Agricultural Law Update

219 New York Avenue
Des Moines, Iowa 50313

ADDRESS
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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Share your Expertise!
Russian Ag Lawyer Seeks to Visit US Firm(s)

The Center for Citizen Initiatives, a non-profit organization linking American and Russian citizens, is currently seeking a law firm(s) that specializes in agricultural law to host a Russian lawyer for two weeks to a month in May, September or November.

The host firm's primary responsibilities are to prepare an informal work plan, show the attorney the business, and help identify a home host.

If you would like to find out more about this program, please call Christina Henry at 415-346-1875 at the Center for Citizen Initiatives in San Francisco.

1996 Dues

Thanks to all of you who returned your 1996 dues payment and directory information sheet. We still plan to print a new directory around the first of May and would like to use as up to date information as possible. Therefore, if you have not done so as yet, would you please take a few minutes now to check and correct the information as necessary and return it along with your 1996 dues.