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INSIDE

IN FUTURE ISSUES

Endangered species: U.S. Supreme Court rules "harm" may include habitat modification

The U.S. Supreme Court has ruled that a Department of Interior regulation that includes modification of habitat as a harm to endangered and threatened wildlife under the federal Endangered Species Act (ESA) is valid. *Babbit v. Sweet Home Chapter of Communities for a Greater Oregon*, 63 U.S.L.W. 4665 (1995).

Section 9 of the ESA, 16 U.S.C.A. section 1538, prohibits any person from taking endangered species of fish or wildlife. The act defines the term "take" to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C.A. § 1532(19). By regulation, the Department of Interior has defined "harm" under the ESA to include an act that kills or injures wildlife, including significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. 50 C.F.R. § 17.3 (1994). Agency regulations resulting in the taking of individuals of an endangered species, incidental to the activity, may avoid a section 9 violation against taking an endangered species by obtaining a permit under section 10 of the ESA. 16 U.S.C.A. § 1539. The respondents in this case included small landowners, logging companies, and families involved in the forest industry in the Pacific Northwest and the Southeast. They challenged the validity of the habitat modification regulation on its face, as opposed to challenging specific applications of the regulation.

Justice Stevens, writing the opinion for a six-justice majority, found three reasons in the text of the ESA for concluding that the Secretary of Interior's regulatory definition of harm is reasonable. First, the ordinary definition of the word "harm" includes to cause hurt or damage to, or to injure. The Court found that the inclusion of habitat modification that results in actual injury or harm to endangered or threatened species is encompassed by that ordinary meaning of the word harm. Second, the Court found that a central general purpose of the ESA includes the conservation of ecosystems upon which endangered species depend and that the congressional intent to provide comprehensive protection supports the permissibility of the regulation limiting habitat modification. Third, the Court found that the congressional authority in the ESA for the issuance of section 10 permits for the incidental taking of endangered species evidenced a congressional intent to provide

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Primary jurisdiction doctrine and action for damages for poultry dealer's violation of Packer's and Stockyards Act

The Eighth Circuit has held that the primary jurisdiction doctrine does not apply to claims for damages against live poultry dealers for violating the Packers and Stockyards Act's (PSA) prohibitions against unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences. *Jackson v. Swift Eckrich, Inc.*, Nos. 93-3874, 93-3971, 1995 WL 244610 (8th Cir. Apr. 28, 1995). Concluding that the Secretary of Agriculture has authority only to administratively enforce the PSA's trust and prompt payment provisions as they apply to poultry, the Eighth Circuit ruled that the federal courts are the exclusive forum for actions for damages against live poultry dealers under the PSA's trade practices and preferences provisions.

The judicially-created primary jurisdiction doctrine promotes the proper functioning of the federal courts and administrative agencies when both a court and an agency have the authority to resolve all or part of the dispute presented by the parties. The doctrine applies when a claim capable of being heard by a court and an agency is brought in the first instance in the court. When this occurs, the court must decide

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habitat protection. The permit process requires that the applicant provide a habitat conservation plan to minimize and mitigate the impacts of the proposed activity on endangered or threatened species. Construing the term harm to include only acts directed and intended to kill or injure endangered species would make the section 10 incidental taking permit and conservation plan procedure absurd.

The majority opinion indicated three errors made by the D.C. Circuit Court of Appeals, which had held that the regulation was not valid. *Sweet Home Chapter of Communities v. Babbitt*, 17 F.3d 1463 (1994). The court of appeals relied on the statutory construction doctrine of *noscitur a sociis*, which holds that a word is known by the company that it keeps. In applying that doctrine to the ESA definition of harm, the court of appeals found that the other terms used to define an ESA taking all indicated direct action by a person against an endangered species, e.g., hunt, trap, shoot, etc. Therefore, that court ruled that a definition of harm that included indirect actions, such as habitat modification, would not be permissible.

The majority of the U.S. Supreme Court disagreed with the application of this doctrine. First, the Court found that other words defining an ESA taking, including harass, pursue, wound and kill, encompass both direct and indirect actions. The Court also found that the lower court's limited definition of harm reads an intent or purpose requirement into the term "take," but the ESA itself provides that a knowing action is enough to violate the section 9 provision. Third, the Court found that the lower court's application of the doctrine of *noscitur a sociis* denied an independent meaning to the term "harm," which contradicted a congressional intent to give the term a function consistent with but distinct from the other verbs used to define an ESA taking.

The majority decision also addressed respondent's argument that the provisions of the ESA authorizing the federal government to purchase habitat for endangered species and requiring federal agencies to avoid destruction of habitat critical for endangered species preclude the government from restricting private landowner modification of habitat to protect endangered species. The Court concluded that these other ESA provisions indicate Congress' broad purpose in protecting endangered species and that the overlap in the purpose of these provisions is unexceptional.

In a separate concurrence, Justice O'Connor focused on two points. The first is that a person cannot be found to have violated the section 9 prohibition against taking an endangered species unless the actions taken by the person would foreseeably result in death or injury to an endangered species. In dicta, Justice O'Connor noted a specific application of the regulation which she concluded would not meet the foreseeability requirement. The majority decision also recognized that a foreseeability or proximate cause requirement should be incorporated into the ESA and its regulations but did not address specific applications of the regulation, leaving such questions for future case-by-case adjudication. Justice O'Connor also opined that the ESA does not compel the Secretary of Interior to include habitat modification within the term "harm" and that the agency could narrow its regulatory definition. The majority, however, found only that the regulatory inclusion of habitat modification within the statutory term "harm" is permissible without reaching the issue of whether the agency also has the discretion under the ESA to omit habitat modification from the definition.

Congress is currently considering legislation to reauthorize the ESA, which could significantly restrict the authority of the Secretary of Interior to protect habitat for endangered and threatened species. In addition, the Clinton administration has proposed guidelines and rules, modifying the current regulatory restrictions on habitat modification. *See, e.g.* Dept. of Interior, USFWS, Endangered and Threatened Wildlife and Plants: Proposed Rule Exempting Certain Smal Landowners and Low-Impact Activities from Endangered Species Act Requirements for Threatened Species, 60 Fed. Reg. 37419 (July 20, 1995).

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Federal Register in brief

The following matters have been published in the *Federal Register* from June 26 to July 21, 1995.

1. USDA; NAD; Rules of procedure; proposed rule. 60 Fed. Reg. 32922.

2. USDA; Rules of practice governin, formal adjudicatory proceedings instituted by the Secretary under various statutes; final rule; effective date 6/28/95. 60 Fed. Reg. 33328.

3. USDA; PACA; Formal adjudicatory proceedings; proposed rule. 60 Fed. Reg. 34474.

4. CCC; Crop insurance requirement; final rule; effective date 10/13/94. 60 Fed. Reg. 32899.

5. CCC; Export bonus programs; advance notice of proposed rulemaking. 60 Fed. Reg. 32923.

6. FCA; Loans in areas having special flood hazards; final rule; effective date 1/2/96. 60 Fed. Reg. 35286.

7. FCA; Proposed related services, real estate brokerage, farm management, and mineral management; proposed rule; comments due 9/15/95. 60 Fed. Reg. 36415.

8. FCIC; Late planting and prevented planting of various crops; interim rule; comments due 9/11/95. 60 Fed. Reg. 35832.

9. IRS; Definitions under Subchapter S; proposed rule; comments due 10/10/95. 60 Fed. Reg. 35882.

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Impact on U.S. farms of increasing the minimum wage

By Jill Findeis and John C. Becker

Introduction

The recent proposal to increase the federal minimum wage to $5.15 per hour and the negative responses to it have resulted in numerous comments by economists and politicians alike. In some cases, commentators have referred to research studies to support their conclusion either in favor of or in opposition to increases in the minimum wage. How agricultural producers would be affected will depend on their demand for hired farm labor, as well as on federal and state minimum wage laws. This article examines agriculture's treatment under the prevailing federal minimum wage laws, the general characteristics of agricultural employment, and the impacts that an increase in the federal minimum wage could be expected to have on the use of hired labor by U.S. farms.

The Fair Labor Standards Act

The Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) sets minimum wage and overtime pay rates for most employers. At present, the minimum wage rate set under the act is $4.25 per hour (*Id.*§ 206(a)(1)). Employees who are paid on an hourly, weekly, monthly, or piece-rate basis are covered by the minimum wage rate floor. Under the act, wages paid to an employee include the reasonable cost to an employer of furnishing an employee with board, lodging, or other facilities, if such items are customarily furnished by the employer to his or her employees. Reasonable cost to the employer is an amount that is not more than the actual cost to the employer of providing the item and does not include a profit to the employer or any affiliated person. Employees must receive the benefit voluntarily without force or coercion by the employer or anyone else.

Among several key exemptions from the minimum wage rate and overtime pay provisions is employment in the following agricultural situations: (1) where the employer did not, during any calendar quarter of the preceding calendar year, use more than 500 man-days of agricultural labor; (2) the employee is a member of the employer's immediate family (parent, spouse, child, step-child, step-parent, foster-child or foster-parent); (3) the employee is paid on a piece-rate basis as hand-harvest labor for less than thirteen weeks in the previous year and commutes to work daily from his or her principal residence; (4) the employee is sixteen years of age or younger, employed as hand-harvest labor, paid on a piece-rate basis and employed on the same farm as his or her parents or guardian and paid at the same rate as employees over age sixteen on the same farm; (5) the employment is principally range production of livestock; and (6) the employee is a *bona fide* executive, administrative or professional employee. 29 U.S.C. § 213(a)(6).

Of the exemptions, the 500 man-days of agricultural labor is the most widely recognized by agricultural employers who look beyond the family for needed labor. In this context, a "man-day" is any day an agricultural employee works one hour or more. For example, 8 employees working 5 days a week for a full calendar quarter of 13 weeks would meet the 500 man-day test (8 x 5 days x 13 weeks = 520 man-days). Likewise, 20 employees who work 5 days a week for 5 weeks will meet the requirement (20 x 5 days x 5 weeks = 500 man-days). In making the calculation to determine whether the test is met, certain employees are not counted in the number of employees whose activities are examined. These include immediate family members and hand-harvest laborers paid on a piece-rate basis who commute from their homes for less than thirteen weeks.

Because of these requirements for the federal minimum wage to apply to agricultural employment, state minimum wage laws are a second source of requirements.

State minimum wage laws

The Fair Labor Standards Act provides a clear invitation to states to establish higher minimum wages than those set at the federal level, in which case the higher rate would apply. 29 U.S.C. § 218. A representative sample of provisions in the Northeastern states of Pennsylvania, New York, and New Jersey shows a mixed result in terms of provisions. Under Pennsylvania's minimum wage law, employment in agriculture is exempted from both the minimum wage and overtime wage provisions. Pa. Stat. Ann. tit. 43, § 333.105. Despite this clear statement, however, other state laws can modify the general rule. For example, an employee who is considered a "seasonal farm laborer" under Pennsylvania's Seasonal Farm Labor Act (Pa. Stat. Ann. tit. 43, § 1301.101*et seq.*), must be paid at least the minimum wage, irrespective of the number of hours worked (section 1301.201(a)).

New York has a distinct minimum wage statute for farmworkers. N.Y. Labor Law § 671 (McKinney, 1995). Under current law, farmworkers are to be paid at least $4.25 per hour, which is the state and federal minimum (*Id.*, § 673). Farmworkers who are members of the employer's immediate family and minors under the age of seventeen employed as hand-harvest laborers on the same farm and paid on a piece-rate basis equal to what other workers are paid, are excluded from the definition of employee for the purpose of the minimum wage rate for farmworkers.

New Jersey's minimum wage law (*Id.*, 34, N.J.S.A. Chap 11-56a) broadly defines employers and employees without granting special treatment to farmworkers, other than to exclude them from entitlement to overtime pay (*Id.*, § 11-56a4). On April 1, 1992, New Jersey raised its minimum wage to $5.05 per hour (*Id.*, § 11-56a3).

Effects of a higher minimum wage

Three issues surround the debate over the impacts of increases in the minimum wage: (1) whether a higher minimum wage will increase the incomes of low-wage workers and thus reduce rates of poverty, (2) if (instead) a higher minimum wage will result in additional unemployment, particularly among low-skill, low-wage workers, and (3) if an indirect or "ripple" effect exists that serves to benefit workers already paid above the minimum wage. If an indirect or "ripple" effect exists, wages *already above* the minimum wage will also increase when the minimum wage is increased.

Proponents of an increase in the minimum wage believe that a higher minimum wage helps to reduce rates of poverty, particularly among the "working poor." However, economists generally agree that *increases* in the minimum wage result in *decreases* in employment, particularly among low-skill, low-wage employees. Those employees paid the least are the most likely to become unemployed, once the minimum wage is increased. The result, according to economic theory, is higher unemployment. Some employees will receive higher wages, but other employees will be laid-off, and the unem-

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ployed will be even less likely to find work as a result. The overall impact will be more poverty, not less.

Some empirical studies of the impacts of change in the minimum wage on employment support this view. However, other recent empirical studies have reported that increases in the minimum wage result in no discernible negative impacts on the level of employment, and serve to reduce overall poverty rates. One frequently-cited study was conducted by Princeton economists, David Card and Alan Krueger. This recent study compares changes in employment in fast-food establishments in New Jersey, where the state minimum wage increased in 1992, and in neighboring Pennsylvania, where there was no increase. Card and Krueger found that employment actually increased in New Jersey compared to Pennsylvania, after the New Jersey minimum wage was increased. However, a number of well-known economists have recently argued that this study does not accurately measure the impacts of the minimum wage change. For example, Nobel laureate Gary Becker has argued that New Jersey employers likely anticipated that the state's minimum wage would be raised and cut back their workforces *prematurely* when the federal minimum wage was increased in 1990 and 1991. Therefore, the lack of a negative reaction by employers to the New Jersey minimum wage increase is not surprising.

Whether or not an indirect or "ripple" effect exists is less clear. If a "ripple" effect exists, it would mean that workers in jobs paying more than the minimum wage would also see their wages increase, at least somewhat. Although some studies have tried to measure this effect, the general consensus is that relatively little is known about the magnitude of any indirect effect. Opponents of increases in minimum wage argue that ripple effects may, in fact, be large and could contribute to higher labor costs in the U.S. Proponents, in contrast, argue that the existence of ripple effects that serve to increase wage levels generally is likely overstated and is not well-documented.

Even if the conventional economic view that employment will decline with an increase in the minimum wage is accepted, it should be noted that there will undoubtedly be variations in the magnitude of impacts on employment. In agriculture, the extent to which employers cut back on their workforces will depend on state-level minimum wage laws, conditions in local labor markets, and on the farm-level demand for hired labor. Variations in wages exist, depending on the type of farm work and the extent to which the work is seasonal; part-time, throughout the year; or full-time, year-round.

General characteristics of agricultural labor and farm wages

Over time, employment in agriculture has declined, and productivity has increased. *Understanding Rural America*, Economic Research Service, USDA, p. 4. At the same time, there have been significant changes in the composition of the hired farm workforce in the U.S. One important change has been the decline in the number of farmworkers in the U.S. working part-time, especially employees working less than seventy-five days per year[1]. The size of the full-time hired farm workforce, however, has remained relatively stable in recent years. As a result, the proportion of the hired farm workforce working full-time throughout the year has increased significantly in recent years. Full-time farmworkers earn higher wages, on average, than either seasonal employees or part-time, year-round workers.

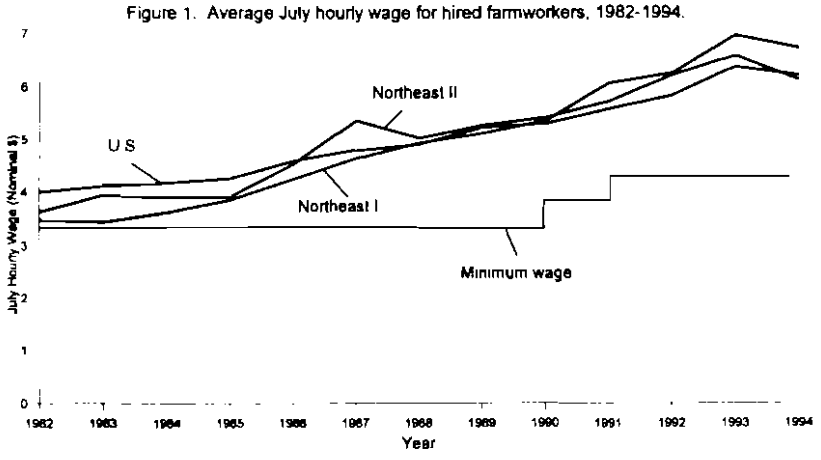
Average wages paid for hired farm labor in the U.S. have generally increased over time, although at a rate less than inflation. Figure 1 shows increases in the average July hourly wage paid to farmworkers in the U.S. overall, and wages paid in the Northeast I and Northeast II Regions as defined by the National Agricultural Statistics Service (NASS).[2] Over time, there has been a steady increase in the average (nominal) farm wage, at least until 1994 when farm wages declined relative to 1993 wage levels.

Figure 1 also shows the federal minimum wage since 1982. In 1982, the minimum wage of $3.35 per hour was about sixteen percent below the average wage paid to U.S. farmworkers. By 1994, the minimum wage of $4.25 per hour was about thirty-two percent lower than the average farm wage in the U.S. A minimum of $5.15 per hour would be about seventeen percent lower than the 1994 average U.S. farm wage. This would be roughly comparable to the wage situation in 1982. This would be the case despite the fact that the U.S. farm workforce today includes a greater proportion of full-time workers than was the case in the past.

Farm wages vary by seasonal; part-time, year-round; or full-time, year-round work; by method of pay (hourly or piece-rate); and by type of work (field, livestock, field and livestock, or supervisory). In addition, wages paid to hired farmworkers differ predictably by farm size. Full-time farmworkers are the least likely to be affected by a higher minimum wage since full-time farmworkers earn higher average wages than either seasonal or part-time, year-round workers. An increase in the federal minimum wage is most likely to result in cut-backs in seasonal or part-time, year-round employment on U.S. farms. Part-time, year-round workers may be the most vulnerable. A 1991 study of hired farm labor in Pennsylvania showed that part-time workers earned lower average wages than either seasonal or full-time workers.[3] But the Pennsylvania study also showed that seasonal workers earn relatively low average wages. For seasonal workers, declines in employment resulting from an increase in the minimum wage will depend on the demand for seasonal workers, which is crop-specific. Those workers paid on an hourly basis are more likely to be negatively affected than workers paid piece-rate, since workers paid on an hourly basis earn less per hour.

Wages also vary by type of work: field, livestock, and field and livestock. Overall for the U.S., average wages are slightly lower for livestock workers. *Farm Labor*, (August 1994) National Agricultural Statistics Services, USDA. For the U.S. as a whole, the only significant difference in average wages paid is for supervisory

Figure 1. Average July hourly wage for hired farmworkers, 1982-1994.



Source: *Statistical Bulletin 822* and *Farm Labor* (selected years), National Agricultural Statistics Service, USDA

Continued on page 6

labor, which receives about $10 per hour, on average.

Important regional differences in wages also exist across the U.S. by type of work. As shown in Table 1, in some regions of the country, livestock workers receive lower average wages. In fact, in some regions, the average wage paid to livestock workers is about equal to the proposed $5.15 per hour federal minimum wage. For example, livestock workers in the Northeast Region II, which includes Pennsylvania, received an average wage of $5.17 per hour in July 1994. The average wages for livestock workers in the Lake Region (Michigan, Minnesota, and Wisconsin) and in the Delta Region (Arkansas, Louisiana, and Mississippi) are also low — $4.78 and $5.19 per hour, respectively. Even in the Northern Plains region, the average livestock wage ($5.29 per hour) is only slightly above the proposed new minimum wage. In these regions, livestock workers are more vulnerable, if the individual states do not exempt agricultural labor from minimum wage requirements.

In other regions, field workers and field and livestock workers may also be negatively affected (Table 1). Average wages for field workers in the Southeast, Southern Plains, and Appalachian regions are low. For example, in July 1994, the average wage for field crop workers in the Southeast Region was $5.27 per hour, and for field and livestock workers was $5.35 per hour. In the Southern Plains, the average wage for field workers was $5.17 per hour, and the average wage for field and livestock workers was only $5.29.

The group least likely to be affected by a new minimum wage will be supervisory labor, which received an average wage of $9.55 per hour in July 1994. Supervisors and full-time farm workers that help to manage the farm are more likely to be paid higher wages. Part-time workers and full-time workers on more marginal farms or in regions of the country that are less suitable to livestock, field crops, or both, will most likely find it more difficult to find work.

Finally, changes in the federal minimum wage could have differential impacts on farms of different sizes. In the Northeast as well as across the U.S., both the largest farms and the smallest farms pay the highest wages to farmworkers. For example, in July 1994, farms in the Northeast with sales of $250,000 or more annually paid farmworkers $6.88 per hour, on average. Small farms with annual sales less than $40,000 paid an average $7.08 per hour. The mid-size farms in the Northeast region paid the lowest average wages, in part caused by their reliance on less full-time labor. It is reasonable to expect that the mid-size farms will be most likely to be affected by minimum wage legislation. Very small farms and large farms are already more likely to pay higher wages. This is true in the Northeast as well as more generally in the U.S., as a whole.

Table 1. Average wage rates for July 10-16, 1994.

Region	Type of Farm Labor			
	Field	Livestock	Field and Livestock	Supervisory
	($/hour)			
Northeast I	6.35	5.71	6.08	10.05
Northeast II	6.10	5.17	5.80	8.77
Appalachian I	5.29	5.93	5.41	8.90
Appalachian II	5.33	5.71	5.52	ns
Southeast	5.27	5.88	5.35	9.56
Lake	5.86	4.78	5.45	9.91
Combelt I	5.82	5.97	5.86	7.48
Combelt II	5.72	5.84	5.78	ns
Delta	5.20	5.19	5.19	8.87
Northern Plains	5.49	5.29	5.44	6.36
Mountain I	5.44	5.77	5.52	ns
Mountain II	5.63	5.40	5.53	9.81
Mountain III	5.43	6.68	5.80	ns
Pacific	6.12	6.35	6.14	9.73

Source: *Farm Labor* (August 1994), National Agricultural Statistics Service, USDA
ns = not sufficient data

How agricultural employers will react

In the 1991 Hired Farm Labor Survey conducted in Pennsylvania, farmers expressed concern about the cost of hired farm labor. An increase in the federal minimum wage will mean that it will become even harder for many farmers to afford farm labor, at least on those farms paying lower wages. Farmers in this situation may decide to cut back on their use of hired farm labor, while attempting to increase the productivity of the labor that is hired. This strategy is most likely to be used on those farms that hire large numbers of seasonal farmworkers.

Other farmers may decide not to cut back on employment, particularly if the difference between the minimum wage and actual wage paid today is low, or if the number of workers or hours worked is low. Farmers might also pay workers higher wages but reduce the value of benefits or perquisites received by their workforce. Unfortunately, most farmers potentially affected by changes in the minimum wage will not be able to rely on this strategy, because most low-wage farmworkers already do not receive nonpecuniary benefits. Those farm-workers that receive benefits such as health insurance or paid vacation time are already likely to be full-time workers, the group least likely to be affected by a minimum wage increase.

How farms will react to a change in the minimum wage will vary by farm and by state, depending on state-level legislation. Given the concerns that farmers already have about their ability to pay their workers and maintain a qualified workforce, changes in the minimum wage may serve to exacerbate these problems.

[1]*See* Oliveira, V. and E. Cox. 1989. "The Agricultural Work Force of 1987: A Statistical Profile." Agricultural Economics Report No. 609. Washington, DC: Economic Research Service, USDA.

[2]Northeast I Region, as defined by the National Agricultural Statistics Service (NASS), includes New York, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. The NASS Northeast II Region includes Pennsylvania, Delaware, Maryland, and New Jersey.

[3]See Findeis, J., Y. Chitose, and T Bowser. 1992. *Farm Labor Availabilit and Constraints in Pennsylvania.* Final Report to the Pennsylvania Department of Agriculture, Harrisburg, PA.

Anglo-American Agricultural Law Symposium

The Agricultural Law Association of the United Kingdom and the American Agricultural Law Association will hold a joint agricultural law symposium in Oxford, England, September 18-19, 1995. AALA members interested in attending should contact Terence J. Centner, Committee Chair, 301 Conner Hall, University of Georgia, Athens, GA 30602 (phone 706/542-0756) for registration materials. Attendees are invited to stay in Oxford for the 1995 Meeting of the Comite Europeen de Droit Rural, September 20-23. The 2-day program includes:

Land Use and the Environment
Moderator: David A. Myers

1. "Agriculture and the Common Law" by David A. Myers
2. "Species and Habitat Conservation in the European Union and the United States" by Margaret R. Grossman
3. "Agricultural Zoning: The *Gardner* and *Dolan* Cases" by John Harbison
4. "Developing A New Worker Protection Standard for Agricultural Pesticides in the United States" by Martha Noble

Pollution Control, Agriculture, and Agri-Business
Moderator: Margaret R. Grossman

1. "Controlling Agricultural Non-Point Source Pollution: The New York Experience," By Ruth A. Moore
2. "Employing BMPs to Reduce Agricultural Water Contamination," By C. Fuchs, J. Zeddies, T. Centner, and J. Houston
3. "Biomass Energy: An Agricultural Role in Pollution Control?" by Allan M. Richards
4. "A Comparison of U.S. and U.K. Law Regarding Pollution from Agricultural Runoff" by Staci Pratt and Andrew Carr
5. "Law and Policy Aspects of Watershed Management" by Larry Frarey, Vincenzo Mennella, and Paolo Abbozzo
6. "Pollution Control of Industrialized Agriculture in Thailand" by Steve Matthews and S. Mallikamarl

Agri-Business -- The Way Ahead
Moderator: Keith G. Meyer

1. "Laws to Feed the World: Emerging International Food and Agricultural Law" by Neil D. Hamilton
2. "Preservation of Family Farms — The Way Ahead" By Steven C. Bahls
3. "Protecting the Rural Environment — The Grass in Greener on the Other Side of the GATT" By Norman W. Thorson
4. "Risk Sharing Down on the Farm: A Comparison of Farmer Bankruptcy and Insolvency Statutes" by L. Leon Geyer
5. "Decoupling Environmental and Economic Objectives in Agricultural Regulation" by Jim Chen
6. "U.S. Agriculture Production Financing: Sources, Legal Rules and Controversies" by Keith G. Meyer

—Submitted by Terence J. Centner, University of Georgia, Athens, GA

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whether it should defer exercising jurisdiction until the appropriate party seeks relief from the administrative agency and the agency has acted.

Under the doctrine, no fixed formula determines whether a court should defer exercising its jurisdiction until the agency acts. In general, however, claims requiring the application of agency expertise, implicating the need for uniform and consistent enforcement of a regulatory scheme, or having an impact on the agency's performance of its regulatory functions, are likely to cause the court to await agency action. *See generally* Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 14.1 (1994)("Increasingly, however, courts balance the considerations that favor allocation of initial decisionmaking responsibility to an agency against the likelihood that application of primary jurisdiction will unduly delay resolution of the dispute before the court.").

The primary jurisdiction doctrine differs from the exhaustion of administrative remedies doctrine, although each doctrine allocates responsibilities between courts and agencies. "The basic difference is that primary jurisdiction determines whether a court or an agency has *initial* jurisdiction; exhaustion determines whether *review* may be had of agency action that is not the last agency word in the matter." Bernard Schwartz, Administrative Law § 8.26 (1991)(emphasis in original; footnote omitted).

In *Jackson*, the Jacksons began growing turkeys for Swift Eckrich in 1985. At the time, Swift Eckrich offered two types of one-year contracts — "floor" contracts and "performance" contracts. Under these contracts Swift Eckrich would sell turkey poults to independent growers who would raise the turkeys for about seventeen to nineteen weeks before selling them back to Swift Eckrich. Under the "floor" contract, growers were paid a per-pound price for the turkeys, but they were responsible for feed costs. Grower profits under a "floor" contract thus depended on the grain and turkey markets. Under the less risky "performance" contract, growers were reimbursed for their costs in raising the turkeys and were paid an additional sum based on their performance.

The Jacksons grew turkeys for Swift Eckrich under "floor" contracts from 1985 until 1991. In 1989 and 1990, the Jacksons asked to switch to "performance" contracts. The company's policy had changed by that time, and only growers who had their own feed mill or who could control their feed costs were being offered "performance" contracts. The Jacksons did not have their own feed mill.

In 1992, the Jacksons brought suit against Swift Eckrich alleging a variety of PSA violations, together with fraud, breach of contract, and negligence claims. They alleged that Swift Eckrich's failure to offer them a choice of contracts violated the PSA's prohibitions against unfair, unjustly discriminatory, or deceptive trade practices and the PSA's prohibition against undue and unreasonable preferences. *See* 7 U.S.C. § 192(a). In addition, the Jacksons alleged that Swift Eckrich mishandled and improperly weighed turkeys they sold to it under their contracts.

The district court jury awarded the Jacksons over $300,000 for PSA violations, including $251,000 for Swift Eckrich's failure to offer the Jacksons a choice of contracts. The district court, however, vacated the $251,000 award on the grounds that the primary jurisdiction doctrine dictated that the choice of contract claim should have been first brought before the Secretary of Agriculture and that Swift Eckrich's failure to offer both contracts did not violate the PSA. *Jackson v. Swift Eckrich, Inc.*, 836 F. Supp. 1447 (W.D. Ark. 1993).

On appeal, the Eighth Circuit affirmed the district court, but only on the grounds that Swift Eckrich's failure to offer both contracts did not violate the PSA. It held that the PSA did not override traditional principles of freedom of contract. Swift Eckrich, therefore, was free to offer either or none of its two available contract types to the Jacksons at the end of the one-year contract cycle.

On the primary jurisdiction issue, the Eighth Circuit held that the Secretary of Agriculture simply did not have the authority under the PSA to take action against live poultry dealers, except with regard to the PSA's trust and prompt payment provisions. The trust provisions protect poultry growers in the event of a buyer bankruptcy, 7 U.S.C. § 197, and the prompt payment provisions regulate the time of payments to growers, 7 U.S.C. § 228(b)(1), (2). It ruled that the district court erred when it construed the PSA's coverage of livestock "dealers" to be coextensive with its coverage of "live poultry dealers." Therefore, since no administrative referral was feasible, the primary jurisdiction doctrine could not serve to suspend the district court's jurisdiction.

—Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN

ADDRESS
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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA news

New Directory
We hope to publish a new directory at the end of this month. If you have had any changes to the personal data returned with your 1995 dues statement, please update us as soon as possible.

1995 Election
Ballots for this year's election are due no later than Aug. 16th. If you have not voted, please take a few minutes to do so now.

Brochures
Brochures for the Educational conference in Kansas City, November 3-4, should be in the mail by the end of this week. Please plan to join us if you can. If you receive more than one brochure or cannot attend yourself, would you please pass the brochure along to a colleague whom you think may be interested in attending.