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OIG's effort to conduct payment limitation audits ruled unlawful

In a stinging rebuke of efforts of the Inspector General (IG) of the United States Department of Agriculture (USDA) to conduct payment limitation audits of farmers participating in federal commodity programs, the United States District Court for the Western District of Texas has held such audits to be impermissible and beyond the scope of the IG's authority under the Inspector General Act of 1978, and has quashed subpoenas issued by the IG in furtherance of such an audit. *Winters Ranch Partnership, et al. v. Roger C. Viadero*, Civil Action No. DR-95-CA-10, slip op., (W.D. Tex. October 2, 1995).

Winters Ranch Partnership and its individual partners (David W. Winters, his wife Sarah F. Winters, and his two sons Thomas D. Winters and John C. Winters) operate a ranch headquartered in Del Rio, Texas where they raise goats and sheep that produce wool and mohair. The Winters family members have received incentive payments under the wool and mohair price support programs for a number of years, including the years 1991 through 1993. Their partnership was formed in the spring of 1991 and had operated continuously since that date.

In August, 1994, USDA's Office of Inspector General (OIG) began an audit of the plaintiffs' participation in the wool and mohair program for the years 1991 and 1992. The Winters were informed that the audit, which the IG referred to as a "payment limitation review," was for the purpose of determining whether the Winters family operation had been carried out in 1991 and 1992 as it had been represented to the Agricultural Stabilization and Conservation Service (ASCS), now known as the Consolidated Farm Service Agency (CFSA). The IG sought large quantities of documents and information including tax returns, operating loan documents, income and expense ledgers, bank statements, canceled checks, deposit tickets, property tax statements, and other various documents. This audit by the IG was later expanded to include the 1993 marketing year. For several months, the Winters family cooperated with the IG's audit by producing documents responsive to his request.

On December 16, 1994, the Texas State CFSA Office informed the Winters family that it was commencing its own audit of the Winters farming operation. The Texas State CFSA Office described the purpose of its audit as being to "determine whether Winters farming operation was carried out as it had been reported on the CFSA Form CCC CCC-502" — a description virtually identical to the IG's stated purpose of his audit of the Winters farming operation.

CFSA requested that the Winters family provide it numerous documents and other information as part of the CFSA review, virtually all of the which had previously been requested by the OIG. Counsel for the Winters family then informed the OIG and CFSA that the Winters family would no longer respond to the OIG review but would cooperate with the CFSA review. The rationale for that position was that it would be unfair for the Winters family to have to respond to two virtually identical audits by two closely related constituent agencies of the USDA, that CFSA's review was chosen as the appropriate review to respond to because CFSA was the agency with authority to make final administrative determinations with respect to payment limitations and their application to participate in the wool and mohair programs, and that the entire audit being conducted by the OIG was of questionable authority.

OIG responded by issuing five administrative subpoenas seeking information related to each partner's "eligibility to participate in 1991, 1992, and 1993 Consolidated Farm Service Agency programs as a member of Winters Ranch Partnership." Slip op. at 4. Thus, the subpoenas reaffirmed OIG's previously stated purpose for its audit, i.e., to determine the eligibility of the Winters family for CFSA programs. While boiler plate language on the subpoena forms included a reference to OIG's responsibility to prevent and detect fraud and abuse, the detection of fraud and abuse had never previously been mentioned to any of the Winters family or their counsel by the OIG as a reason underlying its audit.

Plaintiffs then filed a complaint in federal district court in Del Rio, Texas seeking

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a declaratory judgment that the IG's audit of their 1991-1993 farming operations was beyond the scope of the IG's authority and thus unlawful, and that the administrative subpoenas issued in furtherance of that audit were therefore unenforceable. The IG counterclaimed that its audit was not unlawful and that its subpoenas were therefore enforceable, and requested that the court enforce them.

It is undisputed that the Secretary of Agriculture is responsible for administering the Wool and Mohair Price Support programs and for making all eligibility and compliance determinations associated with a producer's participation in such programs — including payment eligibility and payment limitation determinations — and that the Secretary has delegated these responsibilities to CFSA. Slip op. at 5-6. With respect to compliance with payment eligibility and limitation requirements, CFSA conducts regulatory compliance reviews — termed end-of-year reviews — by selecting farming operations that meet certain criteria (criteria originally developed by CFSA in concert with the OIG) for detailed review, after the fact, of the conduct of those farming operations that participate in programs subject to payment limitations. It is also undisputed that CFSA has the authority and responsibility to conduct these end-of-year reviews. An end-of-year review is the type of review undertaken by CFSA of the Winters ranching operations for 1991, 1992, and 1993.

The IG and his office are an independent unit within USDA that is authorized by the Inspector General Act of 1978 (the IG Act). 5 U.S.C. §§ 1-12 App. 3 at 222-250 (Supp. 1993). The IG Act specifically prohibits an IG from assuming any of the "program operating responsibilities" possessed by an administrative agency, such as CFSA. Slip op. at 7. An IG does have the power to conduct audits and investigations relating to the efficiency and economy of program operations and the prevention and detection of fraud and abuse in such programs. *Id.* Congress has made clear, however, that it did not intend to transfer "responsibility for audits and investigations constituting an integral part of the program involved. In such cases, the Inspector General [has] oversight rather than direct responsibility." Slip op. at 7 quoting H.R. Rep. No. 584, 95th Cong., 1st Sess., at 12-13 (1977).

In deciding whether USDA's OIG had authority to conduct the subject audit of the Winters farming operations, U.S. District Judge Fred Biery looked to the Fifth Circuit's 1993 opinion in *Burlington Northern Railroad v. Office of the Inspector General, Railroad Retirement Board*, 983 F.2d 631 (5th Cir. 1993), *aff'g* 767 F. Supp. 1379 (N.D. Tex. 1991). In that case, the IG for the Railroad Retirement Board notified Burlington Northern that he intended to audit Burlington Northern for the purpose of determining whether Burlington Northern had complied with its reporting requirements and had paid the proper amount of tax as required by the Railroad Unemployment Insurance and Railroad Retirement Acts. Like the Winters family in this case, Burlington Northern argued that the audit being conducted by the IG was a classic regulatory compliance audit that was not authorized by the IG Act and was therefore unlawful. In addition, the IG of the Railroad Retirement Board had issued an administrative subpoena, just as in the Winters case, and had articulated his purpose as being to determine the accuracy of tax contributions made by Burlington Northern. 983 F.2d 653-36.

Burlington Northern instituted an action in federal district court seeking declaratory and injunctive relief against enforcement of the subpoena. Soon thereafter, again similar to the action of USDA's IG in this case, the Railroad Retirement Board's IG changed his description of the stated purpose of his audit from a description of a regulatory compliance audit to one of oversight and a spot check for detecting fraud and abuse. *Id.* at 638. The district court, however, after reviewing documents and statements by the Railroad Retirement Board's OIG, found that the audit of Burlington Northern was of a regulatory, rather than oversight, nature and was therefore outside the statutory authority of the IG as a matter of law. Accordingly, the subpoenas issued pursuant to that audit were unenforceable. On appeal, the United States Court of Appeals for the Fifth Circuit held that "as a general rule, when a regulatory statute makes a federal agency responsible for ensuring compliance with its provisions, the Inspector General of that agency will lack the authority to make investigations or conduct audits which are designed to carry out that function directly." *Id.* at 641-42. The Fifth Circuit cite in *Burlington Northern* went into legislative history demonstrating that Congress did not intend Inspectors General to have responsibility for audits and investigations constituting an integral part of the programs being audited and would in fact not have program responsibilities because having such program responsibilities would create an inherent conflict for the Inspector General. *Id.* at 642-43.

Applying the principles of *Burlington Northern* to the audit of the Winters family farming operations, Judge Biery found that there was undisputed evidence demonstrating that the audit being conducted by the Inspector General of USDA was, in fact, a regulatory audit as opposed to an audit of an oversight nature. Slip op. at 12. The court held that any fraud and abuse detected by the audit would only be a by-product of the payment limitation compliance review being conducted by the IG, and that the detection of any such fraud and abuse was not the primary purpose of the Winters audit. *Id.* at 13. Moreover, the court rejected the IG's proferred oversight justifications, finding them to be "merely post-hoc rationalizations designed to save the audit." *Id.*

Finding that the audit of the Winters family farming operation was, in fact, a regulatory compliance review, the court held, as a matter of law, that USDA's OIG was not authorized to conduct such a compliance review because that responsibility was, in fact, assigned to CFSA. *Id.* at 13-14. According to the court, the IG had "assumed a program operating responsibility delegated to the CFSA and thus exceeded his oversight statutory authority." *Id.* at 15. As a result, enforcement of the administrative subpoenas issued by the IG pursuant to that audit was denied.

Because *Winters* is the first case to apply the law of *Burlington Northern* to

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the Inspector General at USDA, and because audits of this type have become a mainstay of the Inspector General's work at USDA during recent years, the court's ruling is an extremely significant one. Hopefully, producers will now be relieved from the burden and incredible expense of having to comply with such unauthorized OIG audits, which oftentimes duplicate reviews being simultaneously conducted by program operating agencies within USDA.

—Alan R. Malasky and William E. Penn, Arent Fox Kintner Plotkin and Kahn, Washington, DC

Federal Register in brief

The following matters appeared in the *Federal Register* from 9/15 to 10/14/95.

1. CCC; 1995 Wheat and Feed Grain Acreage Reduction Programs; 1995 oilseed price support rates, and 1994 Wheat and Feed Grain Farmer-Owned Reserve Programs; final rule; effective date 9/18/95. 60 Fed. Reg. 48015.

2. CCC; Disaster Payment Program for 1990-94; final rule; effective date 10/4/95. 60 Fed. Reg. 52609.

3. EPA; Notification to the Secretary of Agriculture of proposed regulations on Worker Protection Standards. 60 Fed. Reg. 48680.

4. EPA; Worker Protection Standards; decontamination requirements; proposed rule; comments due 11/13/95. 60 Fed. Reg. 50686.

5. EPA; Pesticide Worker Protection Standard; language and size requirement for warning signs; proposed rule; comments due 11/13/95. 60 Fed. Reg. 50682.

6. Agricultural Marketing Service; Voluntary and mandatory egg and egg products inspection; final rule; effective date 10/23/95. 60 Fed. Reg. 49166.

7. Agricultural Marketing Service; Sheep promotion, research, and information program; rules and regulations; proposed rule. 60 Fed. Reg. 51737.

8. USDA; Nonprocurement debarment and suspension; notice of proposed rulemaking; comments due 11/27/95. 60 Fed. Reg. 49519.

9. PSA; Pilot programs allowing more than one official agency to provide official services within a single geographic area; effective date 11/1/95. 60 Fed. Reg. 49827.

10. PSA; Amendment to certification of central filing system; Nebraska; effective date 10/4/95. 60 Fed. Reg. 52896.

11. FCIC; Notice of specialty crops research studies for fiscal year 1996. 60 Fed. Reg. 50541.

12. NRCS; Conservation and environmental programs; Forestry Incentives Program; implementation; effective date 10/3/95. 60 Fed. Reg. 52148.

—Linda Grim McCormick, Alvin, TX

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Emerging issues in U.S. agricultural law and food policy

By Prof. Neil D. Hamilton

The following article includes comments presented to the Second Congressional Aide Training Conference held in May 1995 in Washington, D.C., which was sponsored by the National Center for Agricultural Law Research and Information, University of Arkansas School of Law.

As an academic and one who devotes considerable amounts of time to thinking about agricultural law and policy and trying to identify which issues farmers, lawyers, and law makers will be facing in the months and years ahead, I have some thoughts about emerging issues you will face.

Speakers always tell you we are at a crossroads or a turning point and you had better pay attention. I am not going to so abuse you. We have long crossed the turning point on many of the important issues facing American agriculture — be they social, economic, or even political. In many ways the die is cast; we must now turn to reaping the harvest of the crop we have sown, be it sweet or bitter, abundant or lean. Rather than being at a turning point, we may now be in the early stages of a significant shift in agricultural policy, involving a variety of issues, some old and some emerging.

Export markets for agricultural products

The continuing importance of export markets to agriculture and the extent to which we can rely on them for our "economic salvation" and as an alternative to traditional farm programs will no doubt be a major part of the agricultural agenda. These questions will in large part be determined by our working out of the meaning of the provisions of the GATT and NAFTA agreements as they relate to agricultural trade. A number of questions arise. Did we get what we thought; is what we thought we wanted what we need; and will it ever be possible to bring a sector of every country's domestic economy and society, which is as political as agriculture, within the "discipline" of international trading rules?

Personally, I recognize the importance of export markets and encourage their development and expansion for high value markets such as for meat, wine, processed foods, and produce. But at the same time, I doubt the "myth of export salvation" and question the wisdom of a policy premised largely on the theory that if only we can reduce our prices low enough then we can drive other producers out of the market and capture our rightful share. What prices do farmers need to survive and what is our "rightful" share?

If I had to make predictions about what we will hear in a few years on this topic, it will be: farmers will still complain that the European Union is over-subsidizing its farmers; the grain trade and agribusiness will still argue we are taking too much land out of production and our farm programs are "unilaterally disarming" us in this trade war: we will still believe the GATT rules do not work like they should; and we will continue to be subject to fluctuations in the world economy, as seen in the recent "burp" in the Mexican economy. All of this will create pressure for unilateral measures or government programs to develop our markets.

While there are bright spots in foreign sales, I fear the U.S. will continue to be frustrated by the lack of economic results from such a policy, and that both our natural resources and farming communities may suffer from a failure to address the real costs, both social and environmental, of farming. You will see this debate played out in several ways — the debate over the extension and form of the CRP; the "success" of our efforts to obtain trading discipline in the GATT dispute resolution system; and whether we should continue such programs as "export enhancement" as an alternative to traditional price and income policies.

The continuing segmentation of American agriculture

In recent years, we have seen a growing segmentation of agriculture in terms of scale, independence, and production-related issues. These divisions might be seen as small farmer versus large, or sustainable producer versus conventional, or even independent farmer versus contract "employee." This segmentation has significant policy importance because it affects our farm policies on such issues as rural development, the shape of farm programs, and the role of environmental and food safety concerns. It will be reflected in a number of specific policy areas, including such things as:

- the development of niche markets for locally produced high-value foods and produce, often raised on smaller farms in contrast to larger-scale commercial production of bulk foods and commodities;
- an increase in developments such as the "community supported agriculture" (CSA) movement, in which local farmers sell subscriptions to the production of their farms, directly to consumers. While small farmers may not account for a large share of farm production, they are an important part of agriculture — one in which innovation and marketing opportunities may find the most fertile ground;
- the need to address the barriers to entry into farming, especially for those without family resources. Innovative matching programs like "Land Link," which facilitates the exchange of farms as ongoing operations between non-related parties, may help lead the way to address the demographic and land tenure shifts now underway in American agriculture. Land Link was developed by the Center for Rural Affairs in Nebraska and has provided the model for over fifteen states similar programs; and
- the importance of rural development policies and expansion of off-farm employment opportunities, as distinct from "farm" policies.

One issue I have addressed in recent years is the effect of industrialization on American agriculture. My concerns are best summarized in a recent article in the Northern Illinois Law Review titled "Agriculture Without Farmers," 14 N. Ill. U. Law Rev. 1 (1995), which questions whether industrialization threatens our nation's ability to develop the type of food and natural resource policy we need.

In recent years, it has become clear that the public expects agriculture to perform many new tasks in many new and different roles — as environmental stewards; as producers of safe, abundant, inexpensive food; as preservers of rural culture; and as engines of rural economic growth. In many ways these are the challenges the family farm and American agriculture have tried to meet in the past. What is new is that the public is now more involved and more specific in determining the content of how the tasks will be placed on agriculture. But at a time when it is clear we expect more of farmers, the structure of agriculture and thus its ability to fulfill the public expectations is moving the other way to a smaller role and responsibility for farmers. Farm numbers are declining; tenancy is increasing

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along with farm size; livestock production is increasingly being concentrated in an industrialized structure that often relies on contract relations that reduce the farmer's independence; and agribusiness plays a dominant role both in production and in shaping agriculture's policy responses. Food production has become increasingly specialized to the point where the traditional diversified family farmer with wide knowledge of cropping systems has disappeared.

This is especially a concern when you consider that one of the other major developments in American agriculture in the last decade has been the rise of "sustainable agriculture" as a potential unifying theme around which to organize our policies. While definitions of sustainable agriculture may differ, in anyone's definition it takes people in the equation "as farmers" to make the policy work. The question then is whether we can develop a food and agriculture system that relies on the farmer to play a central role in meeting public goals, or whether agricultural policy will in reality be industrial policy? In other words, can the agriculture we are building yield the harvest we desire?

From a policy perspective, the industrialization of agriculture poses a number of legal issues, including:

- state regulation of contract production relations;
- increased likelihood for litigation over contract terms;
- examination of state corporate farming laws and other programs that attempt to regulate agricultural markets;
- scrutiny of the effectiveness of antitrust laws to deal with concentration in the market place such as exists for livestock;
- pressure for enhancement of intellectual property right protections for the companies engaged in agriculture. In 1994 Congress amended to the Plant Variety Protection Act and incorporated the 1991 UPOV agreement. For now, the issue of the right of farmers to brown bag and sell protected seed varieties has been resolved, but the seed industry can look forward to years of potential litigation determining what is meant by "essentially derived varieties;" and
- efforts to address the environmental and social impacts of large scale livestock production facilities.

The last issue is being played out in a livestock sector experiencing significant economic changes leading to large scale facilities organized more on an integrated basis than traditional family operations and using such tools as contract production and outside investor financing. In turn, these developments have raised social issues about the control over the livestock industry, questions of corporate farming, and whether some forms of production should be more welcome in a locale than others.

In fifteen years of teaching I have not seen a more contentious or divided issue in the farm community than the debate over changes in swine production. While state legislatures are currently at work on bills they think will provide some of the answers, I think it is doubtful laws will resolve the problem. In fact in some ways, the law may heighten the frustrations of rural residents on both sides of the issues.

Future environmental policies in an age of property rights hysteria

Perhaps the most significant change in American agriculture in the last decade has been the application of a wide array of environmental laws to agriculture and a measuring of its performance against those laws. In some areas, agriculture's performance has been found lacking and is being altered, water quality and wetland protection being prime examples. In other areas, such as soil conservation, agriculture's historic commitment to soil stewardship has been built upon by the wise policies of the 1985 Conservation Title. But in all areas and by any measure, agriculture is much more aware of, responsive to, and concerned about the environment today than it was ten years ago.

On the issue of soil conservation, we have made great strides since the 1930's, but most significantly since the 1980's. This is directly attributable to the soil conservation titles of the 1985 Farm Bill and farmers' acceptance of conservation planning. We have rapidly increased levels of participation in conservation practices such as reduced tillage, a change driven both by economics and conservation planning.

Many of our environmental gains in agriculture are threatened, both indirectly, through such ideas as "farm policy reform," and more directly, through ideas such as "property rights reforms" and restraints on government actions. As to farm program reforms, while there is no reason to expect farmers will forget about saving soil if we do not have farm programs, it is also important to recognize that compliance with the soil conservation laws was the prerequisite for eligibility for farm program benefits. If benefits are reduced or ended, there will be less financial incentive for soil conservation.

Similarly, on the issue of "regulatory reform," is it reasonable to expect that agriculture can or should escape accepting its responsibility for non-point source pollution under the Clean Water Act or its potential adverse impact on endangered species? While there is ample room to debate the best legislative approaches for achieving the goals reflected in the laws, the idea that agriculture will or should be exempted is not a serious proposition.

An even more serious threat to agriculture and to the perception of it by the public comes masked in the apparently friendly terms of "protections for private property rights." There is no question that private property rights are important. And it is hard to argue that government regulations, especially those relating to environmental protection, have not increased or are not now placing additional burdens on farmers, ranchers, and landowners. But there is another side to the story about property rights and the "takings issue" as it relates to agriculture that has not been well told in the recent debate.

From a legal perspective, the issue is not as simple or one-sided as property rights activists would have you believe. The issue of the balance between the property rights of individuals, as protected by the Fifth Amendment, and the right of society, acting through the government, to protect the health, safety, and welfare of our citizens, is one of the most fundamental questions in shaping our nation. The debate over property rights does not hinge on whether you are for or against private property or even whether you favor a more powerful government. The issue is what balance does the Constitution require between the property rights of individuals and the ability of society to place reasonable restrictions on how land is used.

Where to draw the line between a legitimate exercise of the police power, which may restrict property use or value but which does not require compensation, and taking of property for public use, for which compensation is required, is a complicated question to answer. The state and federal courts have wrestled with these issues for decades, with great difficulty. This uncertainty has added confusion

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about the reach of government regulations and the protections of private property.

The combination of the new Congress and the current legislative debate over important resource conservation laws such as the Clean Water Act, the 1995 Farm Bill, and legislative proposals to change the laws on property rights, make the "takings issue" and property rights central in the public debate. Regardless of your opinion about such proposals, it is clear Congress can, if it chooses to, change the law concerning the legal rules for when a compensable taking has occurred. The question is the wisdom or the workability of doing so.

The important point to recognize is that such action would not be a "clarification" of existing law, but rather would be a radical change in existing property law and constitutional interpretations of the Fifth Amendment. One change being proposed is to legislate the level of reduction of value that requires compensation. Such changes would not provide the bright line clarity backers desire but instead would result in consideration of a host of new legal questions, such as how reduced value should be measured. Further, the federal changes could lead to a greater use of state environmental laws and common law remedies, making uniform national programs difficult.

Shaping market driven solutions to resource protection efforts

There are no doubt real costs to environmental protection and real questions for society about the wisdom of our approaches to environmental protection. But the key interest for both the public and property owners should be to see that the following happen:

(1) that there are well-drafted public policies with sufficient

(a) public expenditures or

(b) market-driven solutions to pay for the programs, and

(2) that there is recognition of the important roles private property owners play in protecting the natural environment. Part of the difficulty with regulatory costs in agriculture and with deciding who should bear them concerns the nature of the agricultural economy.

Our system makes it difficult for producers to pass on the costs of environmental protection in the form of higher prices. It is difficult for a farmer or rancher to pass on the costs of protecting water quality to the public, although it is the public who also benefits from the restrictions. However, inability to pass the costs on to others does not make the regulation any less legal or constitutional. Instead, what this observation should do is to instruct agriculture that the real answers to the "property rights" question are in making the public recognize the important benefits agriculture is providing that are not being reflected in the costs of food and fiber. This recognition should be taken one step further to obtain public support for agricultural programs.

Agriculture should be working to develop market-driven methods that value and pay for the non-production goods being sold. The wetland reserve program, which uses conservation easements to pay farmland owners to restore wetlands, and innovative state and local efforts to preserve farmland are examples.

Agriculture should be quantifying the costs of environmental restrictions and valuing the benefits it provides to the public. Rather than use this information to argue property rights have been taken, agriculture should use this evidence to support legitimate claims to public support and funding to pay for these costs. Whether it is through continued funding for the CRP or the Wetland Reserve Program, or for water quality protection, agriculture must be willing to claim the value of the public benefits it produces. In many ways, the "greening" of the farm programs, which will be a factor in the policy debate, reflects this view.

Consider the example of the future of the CRP. It has proven to be one of the most popular conservation and land retirement programs ever. It has been effective on a number of fronts — surplus reduction, increased land prices, increased income, wildlife habitat protection, and reduced erosion — although it has also reduced economic activity in some areas. It has been a very popular and successful program, although a costly one at over $19 billion for its life. The issue is what to do with contracts as they expire. Some officials are predicting that the new version of the CRP will be scaled back, perhaps to forty to fifty percent of its current size, with contracts focused more heavily on environmental benefits, *e.g.*, field buffer strips and watersheds, as opposed to allowing whole field retirement and focussing only on erodibility.

The debate so far indicates two things, first that much land will come back into production and that the new CRP will be focused on environmental values. How we handle the future of the CRP promises to shape not just the future of environmental programs for agriculture but also to determine whether the gains we make in environmental protection can be preserved.

For agriculture at this time to be promoting a hard view of property rights and a restrained view of environmental responsibility, while also supporting significant cuts in farm program support, is a terrible policy mistake. This is true because even with "reforms," agriculture will still be expected to protect the soil with or without federal benefits to help it do so. Just because we do not have farm programs, do you think this will mean the public is going to accept a return to massive soil erosion or dirty water? Do you think our society is without the legal tools or authorities to protect its interest in clean air or clean water?

If the resources cannot be protected voluntarily through programs that offer financial incentives, the public will try to obtain the same results using state, local, or federal regulations or common law remedies such as nuisance, which do not provide financial incentives. Even if property rights advocates can win a skirmish or two on the definition of what is a taking, there is no reason to expect the courts will rule society has no right to protect itself or its vital resources. Those legal precedents already exist.

Editor's note: Professor Hamlton provided this list of his works addressing in more depth various topics from this article.

Books

A Farmer's Legal Guide to Production Contracts, January, 1995. Farm Journal, Inc.

Iowa Soybean Associations's Environmental Law Guide. November, 1994.

Iowa Crop Producer's Environmental Law Guide, 1992, Drake University.

A Livestock Producer's Legal Guide To: Nuisance, Land Use Control and Environmental Law, 1992, Drake University.

What Farmers Need to Know About Environmental Law: Iowa Edition. 1990, Drake University.

Articles

Agriculture Without Farmers?: Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?, 14 N. Ill. U. L. Rev. 1 (1995).

State Regulation of Agricultural Production Contracts, 25 Mem. L. Rev. 1 (1995).

Why Own the Farm If you can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Protections for Grain Crops, 73 Neb. L. Rev. 48 (1994).

Who Owns Dinner: Evolving Legal Mechanisms for International Control and Use of Plant Genetic Resources, 28 Tulsa J. Int'l L. 587 (Summer 1993).

The Value Of Land: Seeking Property Rights Solutions To Public Environmental Concerns, 48 J. Soil and Water Conservation 280 (July/August 1993).

Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law, 72 Neb. L. Rev. 210 (Spring 1993).

Essay: Issues Shaping the Future of Agricultural Law, 19 Wm. Mitchell L. Rev. 265 (1993).

State Roundup

DELAWARE. *Inspection rights of members of dairy cooperative.* In *Shaw v. Agri-Mark, Inc.*, 1995 Del. LEXIS 289 (Del. 1995), the Delaware Supreme Court held that members of a dairy cooperative had no right to inspect the firm's financial books and records. Under Delaware's General Corporation Law, stockholders of a Delaware corporation have the right to inspect the firm's financial books and records. In this decision, the Delaware Supreme Court found that such rights do not extend to member-owners of cooperative corporations.

Defendant Agri-Mark, Inc. is a cooperative stock corporation organized under the corporate laws of Delaware. From its headquarters in Massachusetts, Agri-Mark purchases, processes, handles and markets milk and other dairy products throughout the Northeast. Its member-owners are dairy farmers in New England and New York who operate under member marketing agreements with the cooperative. The marketing agreements are standard cooperative producer contracts, providing that each member will sell all raw milk to Agri-Mark in exchange for the cooperative selling processed dairy products to the public.

Member-owners receive no stock certificate from Agri-Mark when they execute the marketing agreements. Under its by-laws, Agri-Mark issues stock only to persons elected to the Board of Directors. When a new director is elected, he or she purchases an Agri-Mark stock certificate for one dollar. The Agri-Mark bylaws require the director to sell the share back when the director leaves the board at the end of the term. The bylaws also state that only share holders may vote at annual or special meetings.

Plaintiffs, dairy farmers in Vermont, became members by signing marketing agreements with Agri-Mark. They were not on the Board of Directors and never served as directors for Agri-Mark. The plaintiffs filed the action seeking access to the Agri-Mark membership list and salary information of Agri-Mark executives. Plaintiffs contended Delaware's codified right to inspect a corporation's book did not replace the common law right of inspection, but only augmented that right. In support of the argument, plaintiffs cited *Fleischer Development Corp. v. Home Owners Warranty Corp.*, 647 F. Supp. 661 (D.D.C. 1986), *mod.* 670 F. Supp. 27 (D.D.C. 1987), *aff'd in part*, 856 F.2d 1529 (D.C. Cir. 1988), a case that held members of a non-stock corporation possess a common law right to inspect financial records.

The Deleware Supreme Court refused to follow *Fleischer* because that decision dealt with a non-stock corporation. The court acknowledged a common law right of inspection exists, but the codified right specifically applies to stock corporations in Delaware. Although the plaintiff-members belonged to Agri-Mark, they were not stockholders and thus had no right of inspection. The plaintiffs' second argument that their membership status made them the true "owners" of Agri-Mark was also rejected by the court. The plaintiffs entered the marketing agreements knowing they were ceding their ownership rights to the Board of Directors. An equitable expansion of the scope of inspection rights would undermine the purpose of the statute.

—Kyle W. Lathrop, Dept. of Ag Economics, University of Georgia, Athens, GA

GEORGIA. *Tenant estopped from claiming life estate. Eslinger v. Keith*, No. A95A1294, 1995 ML 512517 (Ga. App., Aug. 30, 1995).

Neal, owner of 300 acres of farmland, entered into a series of leases with Eslinger, whereby he lived on the farm and received a percentage of the crops harvested. When the last ten-year lease expired in January, 1994, Neal asked Eslinger to vacate the farm. After Eslinger refused, Neal, through her attorney-in-fact Keith, filed a dispossessory proceeding against Eslinger to vacate the farm. Eslinger appealed following a grant of summary judgment to Neal.

Eslinger claimed that prior to entering into the last lease, Neal had orally granted him a life estate in 200 acres of the farmland. The court of appeals disagreed, noting that if Eslinger held a life estate, there would have been no reason to enter into a lease for the entire 300 acres, since, as holder of a life estate, Eslinger would be entitled to profits from crops sowed by him during his life. Ga. Code Ann. § 44-6-85. Affirming the trial court, the appellate court held that by signing the lease, Eslinger expressly recognized Neal's full title interest as a matter of law and is estopped from claiming a life estate in 200 acres of the farmland. "The tenant may not dispute his landlord's title ... while he is performing any active or passive act or taking any position whereby he expressly or impliedly recognizes his landlord's title, or while he is taking any position that is inconsistent with the position that the landlord's title is defective." Ga. Code Ann. § 44-7-9.

—Scott D. Wegner, Lakeville, MN

KANSAS. *Kansas does not require strict compliance with the notice provisions of 7 U.S.C. section 1631.* The Supreme Court in *First National Bank and Trust v. Miami Co. Co-op Ass'n*, 257 Kan. 989, ___ P.2d ___ (1995), decided that a secured creditor's strict compliance is not required to satisfy the requirements stated in the Food Security Act of 1985 concerning direct notification to buyers of farm products. Here, the plaintiff bank had loaned operating money to a farmer and gave direct notice of the security interest in crops to potential buyers including the Miami County Cooperative Association.

When the debtor-farmer sold grain to the Co-op, the Co-op offset the sale proceeds against debts owed to the Co-op by the farmer. When the bank learned of the offset, a demand was made on the Co-op for payment to the bank. In response, the Co-op claimed the direct notices given by the bank were defective because of a failure to describe the real estate where the crops were produced and a failure to identify the particular type of grain that was covered by the security interest. The Co-op admitted receiving notice of the security interest from the bank but claimed it was ineffective because of the bank's failure to strictly comply with the notice required in 7 U.S.C. section 1631.

The court held that "[c]ontrary to the Co-op's assertion that the bank's notices of its security interests were insufficient, the bank's notices substantially complied with the Act's direct notice requirements and were sufficient to place the Co-op on notice of its security interests in the crops." 257 Kan. at 1002.

—Van Z. Hampton, Dodge City, Kansas

KANSAS. *Depreciation must be considered in determining child support obligation of a farmer.* The Kansas Court of Appeals has recently ruled on the calculation of income to establish the child support obligation of farmers in Kansas. The court in *In re Marriage of Lewallen*, 21 Kan. App. 2d 73, ___ P.2d ___ (1995) held that a district court abused its discretion by totally disregarding depreciation when calculating gross income for determination of child support. The court of appeals remanded this case to the district court so that the district court could determine whether any of the depreciation was "reasonably necessary for production of income."

—Van Z. Hampton, Dodge City, Kansas

Conference Calendar
Issues in Iowa and Federal Agricultural Law
November 17, 1995, University Park Holiday Inn, West Des Moines, IA.
Topics include: Iowa's new swine confinement law; legal issues in developing manure management plans; the 1995 Farm Bill and the Clean Water Act.
Sponsored by: The Agricultural Law Center, Drake University.
For more information, contact: Prof. Neil D. Hamilton, 515/271-2065.

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

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