Agricultural Law Update

VOLUME 4, NUMBER 8, WHOLE NUMBER 44 MAY 1987

Official publication of the American Agricultural Law Association

INSIDE

IN FUTURE ISSUES

- Disclaimer of joint tenancies
- Farmland protection and rural zoning
- Patent rights in biotech developments
- No notice sale of cattle

It usually takes a hundred years to make a law, and then, after it has done its work, it usually takes a hundred years to get rid of it.

— Henry Ward Beecher

Supreme Court approves California regulation of Federal land

The United States Supreme Court, in *California Coastal Commission v. Granite Rock Co.*, 107 S.Ct. 1419 (1987), held that the California Coastal Commission may require the Granite Rock Company to obtain a coastal development permit prior to mining unpatented claims on federal lands.

The Court's holding, which seemed to disregard traditional notions of pre-emption analysis, was limited to the unique factual situation presented.

In 1980, pursuant to Forest Service regulations, Granite Rock submitted a five-year plan outlining its contemplated limestone mining operation in the Los Padres National Forest. After the plan was modified according to Forest Service recommendations in 1981, Granite Rock began to extract limestone.

The California Coastal Act, passed in response to the federal Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*, permits mining in California's coastal zone only after securing a permit from the California Coastal Commission. In 1983, the Commission informed Granite Rock of this requirement.

Before any further Commission action, Granite Rock filed suit in United States District Court seeking declaratory relief and an injunction. Granite Rock's motion for summary judgment was denied and the action was dismissed.

The United States Court of Appeals for the Ninth Circuit reversed the lower court decision and held that the Commission's permit requirement was pre-empted by the Mining Act of 1872 and Forest Service regulations.

(continued on next page)

Water Pollution and Federal common law of nuisance

At one time it seemed that the federal common law of nuisance offered a useful deviee for resolving disputes whieh were inadequately addressed by federal environmental statutes. The existence of a federal common law which could give rise to a claim for abatement of a nuisanee caused by interstate water pollution was acknowledged by the Supreme Court of the United States in *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

But in a series of recent decisions the Supreme Court of the United States has signifieantly reduced the potential of this remedy, at least as applied to the interstate pollution of air and surface waters.

In *Milwaukee v. Illinois*, 451 U.S. 304 (1981), the State of Illinois sued the City of Milwaukee in federal distriet court, eomplaining that inadequate treatment of sewage by Milwaukee was allowing pollutants to enter Lake Michigan, creating a health threat to its citizens. Five months later, Congress enacted the Federal Water Pollution Control Aet Amendments of 1972, establishing a national water pollution regulatory scheme.

On appeal from a district court judgment favorable to Illinois, the Supreme Court reversed and held that the federal water pollution legislation had superseded any federal common law remedies for the type of pollution of which Illinois was complaining, *i.e.*, direet discharges of sewage into Lake Michigan from treatment plants operated by the City of Milwaukee.

The test for determining when federal common law has been supplemented is *not* the same as that used in deciding if federal law preempts state law. First, it is assumed that it is for Congress, not the courts, to articnlate the appropriate standards to be applied as a matter of federal law. In this case the Court found that Congress had not left the formulation of water pollution control remedies to the courts, but instead had "...occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."

(continued on next page)

CONTINUED FROM PAGE 1

The Supreme Court viewed the case as a facial challenge to the permit requirement since the action had been commenced before Granite Rock tried to obtain a permit. Thus, Granite Rock's argument was that the state permit requirement, regardless of the conditions of the permit, was *per se* pre-empted by federal law. Granite Rock argued that:

(1) the federal government's environmental regulation of unpatented mining claims in national forests, under authority of the Mining Act of 1872 and applicable Forest Service regulations, pre-empted the state permit requirement;

(2) the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.*, and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1914, taken together, pre-empted the state permit requirement as an impermissible state land use regulation; and

(3) the Coastal Zone Management Act (CZMA) excluded federal lands from the coastal zone.

The Court noted that state law will be pre-empted if Congressional intent to solely occupy a given field is evident or if the state law actually conflicts with the federal law.

Neither the Mining Act of 1872 nor the Forest Service regulations promulgated by the Secretary of Agriculture were determined to contain the requisite Congressional intent.

The FLPMA and the NFMA, taken together, presented the Court with a more difficult problem. The Court assumed for purposes of discussion that such a combination would pre-empt the extension of state land use plans onto unpatented mining claims in national forest lands. However, since the justices were not asked to rule on a specific permit, they reasoned that a permit could be issued which would amount to environmental regulation rather than land use planning. As such, the permit would not be *per se* pre-empted by federal law.

The Court had an easier time dispensing with the assertion that the CZMA pre-empted the state permit requirement because federal lands are excluded from its purview. The Court found a clear statement of Congressional intent to not diminish state authority through federal pre-emption in the legislative history of the CZMA. Hence the Court concluded that all state regulation pursuant to such land is not automatically pre-empted.

Dissenting opinions of Justices Powell, Stevens, Scalia, and White generally disagreed with the distinction between environmental regulation and land use planning.

The Court's decision in *Granite Rock Co.* is consistent with *California v. United States*, 438 U.S. 645 (1978). The California State Water Resources Control Board issued a multiple-conditioned permit, whereas the Coastal Commission had yet to issue a permit. In addition, both cases upheld the principle that state regulation of federal land is authorized as long as it is not inconsistent with clear Congressional directives.

— Michael B. Thompson

Agricultural Law Update

VOL. 4, NO. 8, WHOLE NO. 44 MAY 1987

AALA Editorial Liaison: Linda Grim McCormick, 855 4th Ave. N., Apt. 102, Kent, WA 98032

Editor: Nancy Harris, Century Communications Inc.

Contributing Editors: Terence J. Centner, University of Georgia; John H. Davidson, University of South Dakota, Ann Kanter, Law Firm of Kanter, Marin, Dicksteni and Kirk in Sacramento, CA; Linda Grim McCormick, Kent, WA; Donald Pedersen, University of Arkansas; Michael B. Thompson, University of South Dakota; Donald L. Uchtmann, University of Illinois-Urbana; Tei Yukimoto, University of California at Davis

State Reporters: John C. Becker, Pennsylvania; Charles H. Cook, South Carolina; Kenneth J. Fransen, California; Daniel M. Roper, Georgia; Gerald Torres, Minnesota.

For AALA membership information, contact Terence J. Centner, University of Georgia, 315 Conner Hall, Athens, GA 30602.

Agricultural Law Update is owned exclusively by **Century Communications Inc.** and published in conjunction with the American Agricultural Law Association. Publication office: Century Communications Inc., 6201 Howard Street, Niles, IL 60648; (312) 647-1200. Philip C. Miller, president; Marilyn M. Miller, vice president; Lynn O. Henderson, vice president; Christine A. Waligorski, secretary. Copyright 1987 by Century Communications Inc. All rights reserved. First class postage paid at Skokie, IL 60077.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Views expressed herein are those of the individual authors and should not be interpreted as statements of policy by the American Agricultural Law Association, nor by Century Communications Inc.

Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editorial Liaison, 855 4th Ave., N., Apt. 102, Kent, WA 98032.

Agricultural Law Update is edited for those with a professional interest in agricultural law including attorneys, farm managers, agricultural lenders and agricultural land owners. Subscription: $75.00 in U.S., Canada and Mexico; $100.00 to all other countries. Back copies, when available, are $9.00 each for U.S., Canada and Mexico. All other countries add $6.00. All U.S. funds. Payment must accompany order.

CONTINUED FROM PAGE 1

Further, this conclusion was particularly compelling because the legislation provided very clear controls, through effluent limitations and point source permits, over the activity complained of. The Court emphasized that the legislation specifically required a state pollution permit-granting agency to insure that any state whose waters may be affected by the issuance of a permit receive notice and the opportunity to participate in a public hearing. *See* 33 U.S.C.A. § 1342(b)(3).

Shortly after *Milwaukee*, the Supreme Court issued *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), a suit filed by organizations whose members harvested fish and shellfish off the coast of New York and New Jersey. The complaint alleged that sewage and other waste materials were being discharged into the ocean, causing the plaintiffs' industry to collapse. Among other claims, the plaintiffs sought damages for nuisance arising out of federal common law. The Supreme Court rejected the federal nuisance claim, stating that "...the federal common law of nuisance in the area of water pollution is *entirely preempted by the more comprehensive scope of the FWPCA...*", 453 U.S. 1, 2B (emphasis added).

The language in *Sea Clammers* may interpret *Milwaukee* more broadly than is justified. It can be argued that *Milwaukee* did not hold that the federal common law of nuisance was fully preempted by the FWPCA. There the Court held that Congress had spoken directly to the question, which was the regulation of pollution by sewage from municipal waste treatment facilities. In *Sea Clammers*, the issue is the availability of private damage remedies, a topic not touched upon in the federal legislation. Nonetheless, the broad sweep of the *Sea Clammers* language leads to a tentative conclusion that there is Congressional pre-emption as to surface waters.

A number of questions survived the decisions in *Milwaukee* and *Sea Clammers*. One is whether any effect should be given to Section 505(e) of the federal water legislation which states: "(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." 33 U.S.C.A. § 1365(e).

Two, is whether to give effect to Section 510, 33 U.S.C.A. Section 1370 which reads in part: "Except as expressly provided..., nothing in this chapter shall...be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

Further, there emerged the issue whether one state can evoke its own common law of nuisance to control interstate pollution. If it can, then in what state can it pursue its remedy?

In *International Paper Co. v. Ouellette*, 107 S.Ct. 805 (1987), Vermont residents who owned property on Lake Champlain had invoked Vermont's common law of nuisance in an action for damages and injunctive relief against a polluting paper mill located across the lake in New York state. The Supreme Court held that when a court considers a state-law claim concerning interstate water pollution that is subject to the

Federal Register in Brief

The following is a selection of proposed rules, notices, and corrections that have been published in the *Federal Register* in the last few weeks:

1. CCC. Export Credit Guarantee Program (GSM-102) and Intermediate Export Credit Guarantee Program (GSM-103); Proposed Rule. 52 Fed. Reg. 8605. Proposed rule to permit freight cost and marine and war risk insurance to be covered by the payment guarantees.

2. CCC. Targeted Export Assistance Program; Notice. 52 Fed. Reg. 10915. April 3, 1987.

3. INS. Implementation of the Immigration Reform and Control Act; Proposed Rules; Multiple Parts. 52 Fed. Reg. 8740.

4. INS. Control of Employment of Aliens; Correction to 52 Fed. Reg. 8762. 52 Fed. Reg. 10187.

5. INS. Immigration Reform and Control Act; Notice to Employers and Persons Desiring Work Authorizations; Proposed Court Dismissal of Classwide Work Authorization Claims; Informational Notice. 52 Fed. Reg. 11567.

6. Packers and Stockyards Administration. Amendment to Certification of Central Filing System; Nebraska. 52 Fed. Reg. 8938. Mar. 17, 1987.

7. ASCS. Payment Limitation. Proposed Rule. 52 Fed. Reg. 9302.

8. ASCS and CCC. Marketing Quotas and Acreage Allotments and Special Programs; Referenda Challenges or Disputes, Tobacco, and Commodity Certificates, in Kind Payments and other Forms of Payment; Final Rule. 52 Fed. Reg. 10725. Effective date: April 2, 1987.

9. IRS. Certain Elections Under the Tax Reform Act of 1986; Corrections to Temporary Regulations. 52 Fed. Reg. 10085. March 27, 1987.

10. IRS. Income Taxes; Information Reporting on Real Estate Transactions; Temporary Regulations. 52 Fed. Reg. 10742. Applies to real estate transactions closing after December 31, 1986.

11. APHIS. Animal Welfare; Definition of Terms. 52 Fed. Reg. 10292. "...amendments to USDA regulations under the Animal Welfare Act, including one that would require research facilities to create special committees to assure humane care and treatment of laboratory animals regulated under the Act. Other proposed changes... involve registration and recordkeeping, identification of animals, methods of obtaining animals, licensing procedures, and an increase in license and application fees..." [summary adapted from USDA news release]. Written comments due by June 1, 1987.

12. FmHA. Property Management and Security Servicing; Proposed Rule. 52 Fed. Reg. 10577. Comments due June 1, 1987.

13. FmHA. Servicing and Collections; Final Rule. 52 Fed. Reg. 11456. Provides borrowers of loans under Consolidated Farm and Rural Development Act an annual detailed statement of account on request. Effective date April 9, 1987.

14. FCA. Personnel Administration; Conflict of Interest; Notice of Proposed Rulemaking. 52 Fed. Reg. 11080. Comments due June 5, 1987.

15. FCA. Loan Policies and Operations; Borrower Rights; Final Rule. 52 Fed. Reg. 12143.

16. FCA. Farm Credit System Capital Corporation; Organization; Final Rule. 52 Fed. Reg. 12135.

17. EPA. Concept Paper for the Implementation of Title II and VI of the Water Quality Act of 1987. 52 Fed. Reg. 12249. Available through May 20, 1987.

18. Bureau of Reclamation. Acreage Limitation Rules and Regulations. Final Rulemaking. 52 Fed. Reg. 11938. Effective date: May 13, 1987.

— Linda Grim McCormick

Cooperative Taxation

Two recent Technical Advice Memoranda from the IRS discuss issues of cooperative taxation.

In LTR 8641003 (June 26, 1986), the Service concluded that a nonexempt cooperative may not net patronage losses from its marketing function against net income from transactions with nonmembers.

Both LTR 8641003 and LTR 8641005 (June 30, 1986) addressed the issue of the applicability of IRS § 277 and concluded that this section precluded nonexempt farmers cooperatives from carrying back losses attributable to member-patrons to prior years but allowed losses to be carried forward to the succeeding taxable year.

— Terence J. Centner

federal water pollution control act, the court must *apply the law of the State in which the point source is located.* The reason for this rule is that "...if affected states were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" 107 S.Ct. at 812.

The Court recognized, however, that nothing in the federal legislation bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* state. Thus, Vermont residents can bring an action in federal court in Vermont against a New York polluter, so long as the court applies the nuisance law of the state of New York.

Ouellette is significant because it recognizes that state nuisance claims have survived enactment of the FWPCA and presents a theory for resolution of interstate pollution disputes.

— John H. Davidson

AG LAW CONFERENCE CALENDAR

Forest Taxation.
May 20-22, 1987, Westin Peachtree Plaza, Atlanta, GA.

Topics include: property and related taxes, federal and state death taxes, and the new income tax law.

Sponsored by the Society of American Foresters and the Forest Products Research Group. For more information, call: 608/231-1361.

Summer Institute in Agricultural Law.
Drake University Agricultural Law Center, Des Moines, IA.
June 8-11: income tax reform and agriculture.
June 15-18: federal farm programs.
June 22-25: workouts and bankruptcy
June 29-July 2: biotechnology and agriculture.
July 6-9: commodity futures trading.
July 13-16: agriculture and the environment.
July 20-23: lender liability.

For more information, call 515/271-2947.

The Public Lands During the Remainder of the 20th Century.
June 8-10, 1987, The University of Colorado, Boulder, CO.

Sessions concerning timber, rangeland, minerals, wildlife recreational uses, preservation, and water.

Sponsored by the Natural Resources Law Center. For more information, call 303/492-1288

Water as a Public Resource: Emerging Rights and Obligations.
June 1-3, 1987, The University of Colorado, Boulder CO.

Topics include: recreational uses of water, public's rights in water allocation and use, and public's interest in water quality

Sponsored by the Natural Resources Law Center. For more information, call 303/492-1288.

Agricultural Finance: How Lawyers Can Help Lenders and Borrowers.
May 28-29, 1987, The Westin, Denver, CO.

Topics include: shared appreciation mortgages, law practice involving government programs, and Chapter 12.

Sponsored by ABA Sections and the Illinois Farm Legal Assistance Foundation. For more information, call 312/988-6200.

Immigration Reform Provisions and Agriculture: An Overview

by Ann Kanter and Tei Yukimoto

Introduction

The Immigration Reform and Control Act of 1986 (IRCA) became law on November 6, 1986. The Act is intended to increase control over illegal immigration by increasing funds for enforcement of immigration laws, by imposing sanctions on employers who hire undocumented aliens, and by legalizing certain classes of undocumented aliens. At this writing, proposed regulations have been published in 52 Fed. Reg. 53 (1987).

It is doubtful that IRCA would have passed without agreement on a Special Agricultural Worker (SAWs) Program. Congress recognized that growers of perishable crops have a continuing need for foreign labor. Several provisions of the Act provide favorable treatment for agricultural employers and workers. The keystone is the SAWs program, which attempts to legalize the current workforce during an 18-month application period by providing temporary resident status for seasonal agricultural workers who had at least 90 days of qualifying employment between May 1, 1985 and May 1, 1986.

Other provisions benefitting agricultural employers are the expanded H-2A program [IRCA § 301], which expedites procedures for temporary labor certification for foreign workers, and the general exemption from employer sanctions during the 18-month application period for the SAWs program [IRCA § 274A]. If the SAWs and H-2A programs do not result in a sufficient supply of agricultural workers, a Replenishment Agricultural Worker (RAWs) Program will go into effect in 1990 [IRCA § 303]. A new limitation on INS enforcement authority was also added to the new law: immigration officers are no longer permitted to enter on agricultural land without a warrant or the owner's consent [IRCA § 116].

Employer Sanctions [IRCA § 274A; Proposed 8 CFR 274Aa.1-274a.13]

Employers will be sanctioned if either of two provisions in Section 274A is violated. Section 274A(a) makes it unlawful for a person or other entity to hire, recruit, or hire aliens for a fee for employment in the United States knowing that the alien is an unauthorized alien. An employer who knowingly uses a contractor to hire unauthorized aliens will be in violation of Section 274A(a). Section 274A(b) requires employers to comply with an employment verification system. Employees hired prior to November 7, 1986 will be exempt from the verification process while employed by the same employer.

The Attorney General will defer enforcement of IRCA for violations regarding any employment of individuals in seasonal agricultural services during an 18-month period beginning on June 1, 1987 [IRCA § 274A(i) (3) (A)]. This grace period will allow agricultural workers who are eligible to receive lawful permanent status to apply for legalization. IRCA § 274A(i) (3) (B) (i) is an exception to the deferment of employer sanctions during the application period. Any person or entity involved in recruiting unauthorized aliens from abroad to perform agricultural services in the United States can be sanctioned during the application period.

Employment Verification Requirements [IRCA § 274A(b); Proposed 8 CFR § 274a.2]

Under Section 274A(b), employees are required to provide their employers with documents verifying their identity and authorization to work. One document may be presented to satisfy both requirements, such as a U.S. passport, a certificate of citizenship, or certificate of naturalization. To establish employment authorization only, a social security card, a certificate of birth, or a valid work permit may be used. For establishing identity, a valid driver's license or an identification card issued by the state can be presented. Special Agricultural Workers are not required to present documents establishing work authorization until after September 1, 1987 [Proposed 8 CFR § 274a.11].

An employer or any person or entity recruiting or referring for a fee will be required to prepare Form I-9 at the time of hiring. The form lists the documents presented and also requires a formal attestation that the employee is eligible for employment [Proposed 8 CFR § 274a.2(a)].

Employers must complete Form I-9 within three business days of hiring. An employer who hires an employee for a duration of less than three business days must be in compliance with the verification requirement before the end of the employee's first working day. A recruiter or referrer for a fee must complete Form I-9 at the time of recruitment or referral [Proposed 8 CFR § 274a.2(b)].

The term "hire" is defined as the actual commencement of employment of an employee for wages or other remuneration [Proposed 8 CFR § 274a.1(c)]. An employer who hires a previously employed individual within a one-year period need not request additional verification or complete a new Form I-9 if, upon inspection of the original Form I-9, the individual is authorized to work [Proposed 8 CFR § 274a.2(c)].

An employer, recruiter, or referrer for a fee in violation of the verification process may assert good faith compliance as a rebuttable affirmative defense. This defense will apply if the employer retains the verification forms for a requisite period and the documents submitted by the employee appear to be reasonably genuine on their face [Proposed 8 CFR § 274a.4].

Retention of Verification Forms [IRCA § 274A(b) (3); Proposed 8 CFR § 274a.2(b) (2)]

An employer who hired an individual must keep the verification form for three years from the date of hiring or one year after the employment is terminated, whichever is later. A recruiter or referrer for a fee must retain the forms for three years from the date of recruitment or referral. The person or entity must present Form I-9 within three days whenever requested by an Immigration Officer or an officer from the Department of Labor. These officers are not required to obtain a warrant, subpoena, or give any advance notice prior to inspecting the forms.

Penalties [IRCA § 274A (e) (4); Proposed 8 CFR 274.10]

For violations under Section 274A(a), civil penalties for the first offense range from $250-$2,000. For the second offense, the penalties range from $2,000 to $5,000. For violations of Section 274A(b), the penalties range from $100-$1,000. Criminal penalties may be imposed under Section 274A(a) for any person or entity that engages in a pattern or practice of violations of the employer sanctions provision. In addition, a civil fine of $1,000 will be imposed on any employer or entity requiring employees to provide financial security to indemnify the employer against any potential liability [Proposed 8 CFR § 274a.8].

Special Agricultural Worker (SAWs) Program [IRCA § 210; Proposed 8 CFR §§ 210.1-5]

A Special Agricultural Worker program is created to legalize certain agricultural workers. The application period for the SAWs program is from June 1, 1987 to November 30, 1988, an 18-month period. Once a worker's application is approved, the

Ann Kanter is an attorney practicing immigration law in Sacramento, CA and is currently a Visiting Lecturer at the University of California at Davis. Tei Yukimoto is a legal research assistant at U.C. Davis.

alien's status will be adjusted to temporary and finally to permanent residency status. To qualify for adjustment of status, the worker must provide proof regarding qualifying employment, residence, and general admissibility.

Applicants will be classified as Group 1 or Group 2, depending on their duration of employment in seasonal agricultural services. Group 1 aliens must have worked in seasonal agricultural services for a minimum of 90 "man-days" in each of the following 12-month periods: May 1, 1983 to May 1, 1984; May 1, 1984 to May 1, 1985; and May 1, 1985 to May 1, 1986 [Proposed 8 CFR § 210.1(e) and (f)]. Only 350,000 aliens will be granted temporary resident status from Group 1. Aliens who would have otherwise qualified under Group 1 will be classified as Group 2 aliens. There is no set limit on aliens who may adjust their status in Group 2 [Proposed 8 CFR § 210.2(a) (3)].

Performance of Seasonal Agricultural Services [IRCA § 210 (h); Proposed 8 CFR § 210.1(n)]

Workers in seasonal agricultural services will be eligible to apply. IRCA defines qualifying agricultural employment as seasonal work related to planting, cultural practices, cultivating, growing, and harvesting of fruits, vegetables and other perishable commodities as defined by the Secretary of Agriculture.

The proposed regulations specify that the following types of work will not constitute seasonal agricultural services: field work related to products other than fruits, vegetables, or other perishable commodities as defined by the Secretary of Agriculture; packing, sorting of agricultural products at other than field site; and processing or distribution of agricultural products, equipment maintenance, or administrative duties.

A confidential draft prepared by the Department of Agriculture broadly defines "other perishable commodities" (N.Y. Times, Apr. 6, 1987 at 1, col.1). The definition includes "Christmas trees, cut flowers, herbs, hops, horticultural specialties, spanish reeds, spices, sugar beets and tobacco." In the draft regulations, "horticultural specialties" includes shrubs, seedlings, fruit and nut trees, vines, potted plants, flower bulbs, and other nursery crops, whether grown in fields, greenhouses, or containers. The definition of "other perishable commodities" will exclude livestock, poultry, dairy products, cotton, earthworms, fish, oysters, rabbits, hay, honey, horses, soybeans, wool and sugar cane. *Id.* at 11, col. 2.

"Man-day" is defined as any day in which at least one hour of qualifying seasonal agricultural work was performed [Proposed 8 CFR § 210.1(h)]. The drafters of the proposed regulation indicate, however, that an applicant premising eligibility for SAWs on 90 hours of work during a 90-day period will be viewed as being highly suspect. Any day on which any amount of piece rate was performed shall count as a "man-day" if hourly employment records are not available.

Residency Requirement [Proposed 8 CFR § 210.1(e)]

In addition to proof of qualifying employment, the proposed regulations require proof of residency in the United States. Group 1 aliens must have resided in the United States for an aggregate period of six months in each of the one-year periods ending on May 1, 1984, 1985, and 1986. Group 2 aliens are required to meet a three-month residency requirement in the United States for the one-year period ending May 1, 1986. However, this requirement is satisfied through proof of 90 "man-days" of seasonal agricultural employment.

Admissibility Requirement [IRCA § 210(c) (2)]

Applicants for the SAWs program must also establish that they are not excludable from the United States under Section 212(a) of the Immigration and Naturalization Act. Several of the exclusionary grounds listed in the statute will not apply to SAWs applicants. Grounds not to be applied include Section 212(a) (14) (lack of labor certification), Section 212(a) (20) (lack of entry documents), Section 212(a) (21) (improperly issued visa), Section 212(a) (25) (illiterates), and Section 212(a) (32) (foreign medical graduates).

Grounds of exclusion that may not be waived are Section 212(a) (9) and (10) (criminals), Section 212(a) (15) (public charges), Section 212(a) (23) (drug convictions except for a single offense of simple possession of thirty grams or less of marijuana), Section 212(a) (27) (prejudicial to the public interest), Section 212(a) (28) (political subversives), Section 212(a) (29) (espionage), and Section 212(a) (33) (Nazi persecution). All other grounds may be waived for humanitarian purposes to assure family unity, or when it is otherwise in the public interest.

Proof of Eligibility [IRCA § 210(b) (3); Proposed 8 CFR § 210.3]

A SAWs applicant must submit evidence with the completed application to establish proof of identity, performance of qualifying employment, residency, and admissibility. The applicant has the burden of proving by a preponderance of the evidence that the alien qualifies for the SAWs program. All evidence submitted will be subject to verification. The drafters of the proposed regulations project that a significant number of SAWs applicants may present fraudulent documents. Applicants will therefore be required to submit original documents unless otherwise specified in the proposed regulations [Proposed 8 CFR § 210.3(c)].

An applicant who used an assumed name must submit any evidence that identifies the name used with the applicant. A photo identification card or any document with a detailed description of the applicant issued under the assumed name may be presented. An affidavit by anyone other than the applicant attesting that the affiant knows the applicant by the assumed name may also be sued [Proposed 8 CFR § 210.3(c) (2)].

For proof of qualifying employment, the applicant must submit certified copies of employment records. Government employment records or records maintained by agricultural producers, farm labor contractors or collective bargaining organizations will be acceptable [Proposed 8 CFR § 210.3(c) (3) (i)].

If employment records are not available from employers or other organizations, the applicant must provide any evidence tending to corroborate performance of qualifying employment. Such evidence includes union membership cards, pay stubs, piece work receipts, W-2 Forms, or copies of income tax returns. Any person who has specific knowledge of the applicant's employment may submit an affidavit made under oath. The affiant must identify the employee, indicate the crop and type of work performed by the employee, and the period of employment [Proposed 8 CFR § 210.3(c) (3) (ii)].

The alien must establish as a matter of "just and reasonable inference" that the alien worked the requisite number of "man-days" [Proposed 8 CFR § 210.3(b)]. The manner of proof was adopted from the Fair Labor Standards Act. The drafters of the regulations intend to utilize the cases and standards under the Fair Labor Standards Act whenever precise records of the number of hours worked is lacking. Courts interpreting the Fair Labor Standards Act have dealt with situations involving employee loss of records, destruction or falsification of records by employers, and other difficult circumstances that may apply to SAWs applicants.

The standard of "just and reasonable in-

(continued on next page)

CONTINUED FROM PAGE 5

ference" will only apply to the amount of employment that was performed, and cannot be used to help establish that qualifying employment was in fact performed. The leading cases under the Fair Labor Standards Act interpreting the standard for "just and reasonable inference" are *Anderson v. Mt. Clemens Pottery Co.*, 66 S.Ct. 1187 (1946), and *Beliz v. W.H. McLeod Co.*, 765 F.2d 1317 (5th Cir. 1985).

Application Procedure [IRCA § 210(b) (1) and (2); Proposed 8 CFR 210.2]

Applications may be filed with qualified voluntary organizations and other state, local community, farm labor organizations and associations for agricultural employers as designated by the Attorney General. Only aliens who entered before November 6, 1986, and who thereafter remained in the United States or who departed and re-entered with service authorization may file applications in the United States. All others must file applications for adjustment of status outside the U.S. [Proposed 8 CFR § 210.2(c) (1)].

The files and records prepared by the designated entities are confidential. The information furnished by the applicant for the SAWs program shall not be used by the Attorney General or the Department of Justice for any purpose other than adjudication of the application or enforcement of penalties for false statements [Proposed 8 CFR § 210.2(f) (1)-(3)].

An applicant will be subject to a fine or imprisonment of up to five years and will be found inadmissible under Section 212(a) (19) of the Immigration and Nationality Act for knowingly and willfully falsifying, concealing, or covering up a material fact or making a false or fraudulent statement or using false documents [Proposed 8 CFR § 210.2(f) (1)-(3)]. Deportation proceedings may also be implemented as an enforcement measure.

Temporary Residence [IRCA § 210(a) (1)-(5); Proposed 8 CFR § 210.4]

Once a SAWs applicant acquires temporary status, the alien's status may be terminated only upon determination that the alien is deportable. The alien will also have a right to travel abroad and shall be granted work authorization as for any alien lawfully admitted for permanent residence [Proposed 8 CFR § 210.4(b)]. An alien under temporary status will have the same rights and benefits as a lawful permanent resident but may not petition for relatives. The status of a Group 1 temporary resident will be adjusted to that of an alien lawfully admitted for permanent residence as of December 1, 1989. The status of a Group 2 temporary resident will be adjusted to that of a lawful permanent resident as of December 1, 1990 [Proposed 8 CFR § 210.5(a) (1) and (2)].

Replenishment of Agricultural Workers Program (RAWs) [IRCA § 303].

RAWs program will go into effect from fiscal year 1990 to fiscal year 1993 if the Secretary of Agriculture and the Secretary of Labor find that a labor shortage exists. The number of persons admitted under the program is limited by the number of SAW workers [IRCA § 210A (b)]. If an employer can establish "extraordinary, unusual and unforeseen circumstances," an emergency procedure exists to increase the number of RAWs [IRCA § 210A(a) (7)].

RAWs applicants are subject to the same requirements as aliens under the SAWs program. They must establish admissibility as immigrants and the same exclusion grounds and waivers apply. They will also be granted temporary status as set out in IRCA Section 210. Persons who qualify as replenishment workers must work 90 "man-days" in agriculture for each of the three years after they are granted temporary resident status. Three years after temporary resident status is granted, the alien may apply for lawful permanent resident status.

H-2A Temporary Workers Program [IRCA § 301]

The House amendment created a new nonimmigrant category, H-2A, for admission of foreign temporary agricultural workers. The H-2A program is a revision of the former H-2 program. For the H-2A program to be utilized, the Secretary of Labor must find that there are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services involved in the petition [IRCA § 216(a) (1) (A)]. However, the H-2A program will not be implemented whenever a strike or lockout exists.

The Secretary must also establish that employment of aliens will not adversely affect the wages and working conditions of United States workers [IRCA § 216(d)]. The Attorney General in cooperation with the Secretary of Agriculture and Secretary of Labor will provide new regulations to be published no later than seven months after the date of enactment.

Conclusion

The success or failure of the Immigration Reform Act will rely heavily on the level of cooperation between employers and their employees. The number of successful SAW workers will depend on their ability to provide sufficient documentation to satisfy the standard of proof imposed by the Act.

If the SAWs program proves inadequate to meet labor needs, it remains to be seen whether agricultural employers who were not previously involved in the H-2 program will accept the additional paperwork burden to bring in H-2A workers. These issues, and the impact of employer sanctions on agriculture, will ultimately be addressed by the Commission on Agricultural Workers created under the new law.

Editor's note: As this article went to press, USDA formally announced the proposed rule discussed in this article. 52 Fed. Reg. 13246 (Apr. 22, 1987).

Barn outside curtilage of farmhouse

The Supreme Court has ruled that a barn is not necessarily within the curtilage of the farm home for purposes of the Fourth Amendment's protection against unreasonable searches and seizures.

The Supreme Court overruled the Fifth Circuit in *U.S. v. Dunn*, 55 L.W. 4251 (March 3, 1987). In this case, the respondent manufactured illegal drugs in the barn on his 198-acre ranch. Drug enforcement officers traveled one-half mile from the public road across respondent's fenced property, crossed three interior fences, including one in front of the barn, moved to a position under the eaves of the barn, and using a flashlight, viewed the interior of the barn through netting covering the opening of the barn. Evidence was that from a very few feet, the interior of the barn was not visible.

The Court applied a four-part test to determine that the barn was not within the curtilage of the house: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* at 4253.

The facts that the court relied on were that the barn was 60 feet from the house; that the barn was not included within the fenced-in area that included the house; that the agents had objective data indicating that the barn's use was not related to the "intimate activities of the home," and that the fences were not designed to prevent people from observing what lay inside the enclosed area.

The Court rejected respondent's alternative argument that he possessed an expectation of privacy in the barn as a commercial enterprise, basing their holding on the analysis that the officers viewed the interior of the barn while standing in open fields.

Justices Brennan and Marshall dissented, citing a long line of state and federal cases holding that a barn is within the curtilage of the home. They were also of the opinion that the barn should be entitled to Fourth Amendment protection as a commercial premise.

— Linda Grim McCormick

STATE ROUNDUP

MINNESOTA. *Farm Liability Insurance Coverage.* In *Arndt v. American Family Insurance*, 394 N.W.2d 791 (Minn. 1986), the Minnesota Supreme Court found that an insurance policy excluding coverage for bodily injury arising out of ownership, use, or control of uninsured premises precluded coverage for injuries resulting from operating a cornstalk chopper box on uninsured premises.

Appellant Arndt was seriously injured while helping Kieffer, the insurance policyholder, chop cornstalks in a chopper box. The premises insured under the farm family liability policy did not include the five-acre parcel where the accident occurred.

The supreme court reversed the court of appeals' holding that the exclusionary provisions in the policy did not preclude recovery by Arndt. The exclusion at issue stated: "All coverages under this policy do not apply to any bodily injury or property damages:...arising out of ownership, use or control by or rental to any insured of any premises, other than insured premises."

The supreme court found that the court of appeals correctly determined that for this exclusion to apply, there must be some causal connection between Kieffer's liability and his ownership, use, and control of the property.

The court of appeals incorrectly concluded, however, that no such causal link existed. The appellate court found that Arndt's injuries arose out of Kieffer's negligent use of the chopper box, and not out of his ownership, use, or control of the uninsured portion of the farm. In reversing, the supreme court focused on the fact that Kieffer would not have been negligently using the chopper box on that day but for his desire to provide bedding for the barn located on the uninsured property. Thus, the court concluded that a causal connection existed between Kieffer's liability and his ownership, use, and control of the uninsured premises, therefore, barring recovery against American Family.

In dictum, the supreme court noted that it was not holding that farm liability extends only to the "fence lines of the farm." Rather, the decision holds only that where an insurance policy excludes accidents arising out of uninsured premises, and the insured expands his or her farming operations by purchasing property without insuring the additions, an accident causally related to the insured's ownership of uninsured property is not covered.

A dissenting opinion argued that there was no causal relation between the uninsured premises and the accident.

— Gerald Torres

GEORGIA. *Comparable Sales.* In reevaluation of taxpayer's timberland for ad valorem taxes, evidence of other sales need only include comparable, not identical, real estate. Hence, the land was comparable though not exclusively timberland, as was taxpayer's, since it was sold for agricultural use and therefore its value was not inflated by urban growth. *Hawkins v. Grady County Board of Tax Assessors*, 180 Ga. App. 834,____S.E.2d____(1986).

— Daniel M. Roper

PENNSYLVANIA. *Bankruptcy-Fixtures as Real Estate.* In the case of *In re Hess*, 61 Bankr. 247 (Bankr. W.D. Pa. 1986), items of personal property (barn cleaner, silo unloader and cow trainer) were affixed to real estate, but the lien of the first mortgage did not extend to the items, as there was no expression of the parties' intention that the items be considered real property rather than personal property. The trustee in bankruptcy was allowed to sell the items free of the lien.

— John C. Becker

SOUTH CAROLINA. *Security Interest in Broker's Warehouse Receipts.* The South Carolina Court of Appeals held that a security interest claimed by a creditor of a cotton broker may not attach to warehouse receipts held by the broker when the broker had no ownership in or contractural rights to the receipts.

In the case of *A. Lassberg & Co. v. Atlantic Cotton Co., Inc.*, 352 S.E.2d 501 (1986), Mahaffey, a cotton broker and owner of Atlantic Cotton Company, sold cotton for Pecot, Ltd., gave invoices to the buyers, collected payments, and sent the proceeds to Pecot after deducting his commission. If a prospective buyer rejected a portion of a shipment, the warehouse issued a receipt for the rejected goods to Mahaffey. Mahaffey would then attempt to sell the warehouse receipts. If unsuccessful, he would return the receipts to Pecot. Lassberg, holding a security interest in Mahaffey's inventory for a $400,000 debt, claimed his security interest attached to the warehouse receipts in Mahaffey's possession.

The court cited S.C. Code Ann. § 36-9-204 (Law. Co-op. 1976), in stating that a security interest would not attach to the warehouse receipts unless, during the time the receipts were in Mahaffey's possession, he had rights in the collateral. The court found that Mahaffey simply acted as a broker for Pecot and had no ownership in the cotton. Consequently, the court held that Lassberg had no security interest in the warehouse receipts.

— Charles H. Cook

MINNESOTA. *Purchaser Entitled to Crops Though in Breach of Contract.* In Minnesota, in order to dispossess a purchaser for deed of the land and the crops growing thereon, one claiming superior title must proceed through judicial process. In the case of *Mulvihill v. Finseth*, 396 N.W.2d 889 (1986), the vendor of the land was not entitled to treble damages in trespass for crops harvested after the effective date of an option the vendor exercised to repurchase the land. The Minnesota Court of Appeals confirmed the district court's finding that respondents were in peaceful possession of the land throughout the harvest, and were thus entitled to the entire crop.

Appellants appeared on the effective date of the option, ordered respondents off the land, barricaded the entrances to the property, and posted no trespassing signs. The court held that appellants' self-help actions were as a matter of law insufficient to dispossess respondents of the land. To protect their rights, appellants should have instituted an action for breach of the contract for deed, which required respondents to deliver to them a quitclaim deed upon exercise of the option.

The court rejected appellants' argument that respondents abandoned the property since the respondents left the land involuntarily when the appellants appeared and ordered them off the land. Further, evidence that respondents returned two days later to complete the harvest indicates that they did not intend to abandon the premises. The court found it implausible that respondents would plant and partially harvest a crop, and then voluntarily abandon the remainder.

— Gerald Torres

CALIFORNIA. *Privilege Extends to Shooting Dogs — Not Lying About It.* A California statute, Food and Agriculture Code Section 31103, precludes an action for the seizing or killing of a dog which enters property on which livestock or poultry are confined.

Plaintiff's two sheepdogs wandered onto defendant's property and were shot by defendant's employee when the dogs entered the cattle pens. The corpses were left to rot in a ditch on defendant's land.

Plaintiff inquired of the whereabouts of his dogs and defendant denied any knowledge. When plaintiff learned of the dogs' demise, he filed an action for emotional distress, notwithstanding the foregoing statute (remember, this is California).

The California Court of Appeal in *Katsaris v. Cook*, 180 Cal. App. 3d 256 (1986), held that the killing and disposing of the dogs was protected by Section 31103. The defendant's false assertions of ignorance were not protected, however.

The case was remanded to the trial court for determination of plaintiff's claim of intentional infliction of emotional distress.

— Kenneth J. Fransen

Address Correction Requested

Agriculture Update
6201 Howard Street
Niles, IL 60648

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

AALA SECRETARY-TREASURER'S POSITION. The Board of Directors of the American Agricultural Law Association (AALA) is seeking applications for the position of secretary-treasurer for the 1988 membership year. This officer is appointed by the Board and handles all routine secretary-treasurer functions. Some of these duties include: handling all membership applications, receiving all dues payments, writing AALA correspondence, preparing financial reports and budget for the Board and auditor, keeping minutes of Board meetings, managing the election of new officers, and serving as Chairman of the Finance Committee.

It is anticipated the position will require eight to 10 hours of work each week. More detailed information can be obtained from Terence J. Centner, 1986-87 secretary-treasurer, Athens, GA; 404/542-0756. Letters of application for this position should be submitted by Oct. 1, 1987 to James B. Dean, AALA President, 600 S. Cherry St., Suite 640, Denver, CO 80222.

AALA DISTINGUISHED SERVICE AWARD. The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information in support of the nominee. The nominee must be a current member of the AALA and must have been a member thereof for at least the preceding three years. Nominations for this year must be made by June 30, 1987, and communicated to Drew L. Kershen, Chair, Awards Committee, School of Law, University of Oklahoma, 300 S. Timberdell Road, Norman, OK 73069; 405/325-4702.

FOURTH ANNUAL STUDENT WRITING COMPETITION. The AALA is sponsoring its fourth annual Student Writing Competition. This year, the AALA will award two cash prizes in the amounts of $500 and $250.

The competition is open to all undergraduate, graduate or law students currently enrolled at any of the nation's colleges or law schools. The winning paper must demonstrate original thought on a question of current interest in agricultural law.

Articles will be judged for perceptive analysis of the issues, thorough research, originality, timeliness, and writing clarity and style.

Papers must be submitted by June 30, 1987. For complete competition rules, contact Drew L. Kershen, Chair, Awards Committee, School of Law, University of Oklahoma, 300 S. Timberdell Road, Norman, OK 73069; 405/325-4702.

CONVENTION REMINDER. The 1987 AALA Convention will be held Oct. 15-16, 1987 at the Omni-Shoreham Hotel in Washington, D.C.