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INSIDE

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IN FUTURE ISSUES

- Developments in hedge to arrive

Prejudgment interest ordered in long-disputed farm program case

The United States Court of Appeals for the Federal Circuit recently ruled that a Minnesota farmer who litigated successfully against the Department of Agriculture (USDA) was entitled to interest from the date that the government's obligation first occurred. *Doty v. United States*, 109 Fed.3d 746 (Fed. Cir. 1997). This ruling came in a case that has been in litigation since 1990 and has produced numerous reported decisions, generally in favor of the farmer, James Doty.

The Doty case first arose as a dispute involving the Dairy Termination Program, a milk price support program that paid farmers to eliminate their dairy herds. *Doty v. United States*, 24 Cl. Ct. 615, 631 (1991). James Doty participated in this program, signing his DTP contract in April 1986. Pursuant to this contract, Doty agreed to either slaughter or export all of his dairy cattle by August 31, 1987 in exchange for $99,841.96 in DTP payments. In October of 1987, Doty certified that all of the cattle had been properly disposed of. During the following year, however, the ASCS began to investigate whether, in fact, Doty had disposed of all of the cattle. Relying on the uncorroborated testimony of a former employee of Doty's, the ASCS, in March of 1989, sent notice to Doty that he had violated his contract. After proceeding through the internal ASCS appeal process then in existence, the Deputy Administrator for State and County Operations (DASCO) decided against Doty. DASCO held that Doty had erroneously represented that the entire herd had been destroyed and ordered that the entire payment under the contract be forfeited and that Doty be assessed a civil penalty of $10,000.00 ($5,000 per cow allegedly not destroyed).

Doty appealed the DASCO decision by bringing an action in the Court of Federal Claims. The court ruled in favor of Doty and was particularly critical of the ASCS/DASCO review process. *Doty v. United States*, 24 Cl. Ct. 615, 631 (1991). A fundamental issue was Doty's frequent inability to obtain information about the accusations against him and the unwillingness of the agency to allow him to cross-examine his accuser. The court noted that:

> [i]n a case such as this where there are conflicting versions of the facts and testimony which is in direct conflict, in order to discern the truth as accurately as possible, agency discretion to permit or deny cross-examination of a pivotal witness is subject to abuse to a much greater extent than in most other aspects of informal hearings." *Id.* at 630.

Continued on page 2

Wetland easements challenged in North Dakota: United States v. Johansen

The recent decision of the Eighth Circuit in *United States v. Johansen*, 93 F.3d 459 (8th Cir. 1996), may have set the stage for considerable controversy and uncertainty regarding about eleven thousand federal wetland easements in North Dakota. The affected easements were conveyed prior to 1976 and were intended to preserve waterfowl habitat in the prairie pothole region.

By way of historical background, the Migratory Bird Conservation Act of 1929 authorizes the Secretary of the Interior to acquire land for migratory bird sanctuaries. In 1934, the Migratory Bird Hunting and Conservation Stamp Act was passed to fund the acquisitions. That Act was amended in 1958 to authorize the acquisition of wetland easements on privately owned parcels to serve as "waterfowl production areas." When the funds available under the Act proved insufficient, additional funds were made available under the Wetlands Loan Act of 1961. The Wetlands Loan Act conditioned the acquisition of wetland easements within each state on the consent of the state's governor or the appropriate state agency.

From 1961 to 1977, the succeeding governors of North Dakota consented to the acquisition of easements covering 1.5 million acres. The consents specified the

Continued on page 2

The court held that DASCO had abused its discretion by refusing to call Siekmann (Doty's former employee) as a witness despite Doty's specific, timely requests for Siekmann's presence before both the state committee and DASCO. The court remanded the case for additional proceedings. *Id.* at 631. As is frequently the case when the court remands a case to the agency, however, DASCO reached the same determination as it had previously. Following the remand, the case proceeded back to the Court of Federal Claims on several occasions.

The history of the case up to April of 1995 is summarized in the appellate opinion in *Doty v. U.S.*, 53 F.3d 1244 (1995). In that case, the Court of Appeals for the Federal Circuit was asked to review the post remand determination against Doty, and once again, the agency was chastised, this time, both for its procedures and for the substance of its determination. As to the procedure followed, the court stated that:

> [t]he agency's refusal to permit and assist in Doty's attempts to confront his accuser, the withholding of the evidence on which the agency purported to rely, and the continuing violations of the orders of the Court of Federal Claims, were not only egregiously removed from the fairness required of an agency in its administrative responsibilities, but also contrary to the purpose and spirit of the agency's regulations that provided for administrative review.... The totality of the agency's actions leave us with the unavoidable conclusion that there has been a violation of the fundamental principles of fairness ....

Doty, 53 F.3d at 1251. Reviewing the substance of the DASCO determination, the court was equally critical. It stated that:

> [o]n the merits of Doty's claim, it remains undisputed that the only evidence against Doty was the unsworn, unsigned, and uncorroborated statement of Siekmann. In this appeal the government continues to refer to the statement of Siekmann as the factual basis for its position. That statement was correctly excluded by the Court of Federal Claims, for every aspect thereof was contradicted by the consistent testimony of witnesses, of quality and weight as to thoroughly impeach the unsworn statement of Siekmann. Siekmann himself admitted that he lied in two successive statements, and he did not sign his third statement. There was no other evidence against Doty, and a good deal of evidence supporting Doty. The Court of Federal Claims found that there were "four disinterested sources of evidence (James St. Aubin, Lawrence St. Aubin, Christianson, and Gniffke) before the State Committee, which refuted the accuracy of Siekmann's written statement and which supported Doty's position and Siekmann's first (oral) statement." *Doty v. United States*, 24 Cl. Ct. 615, 621-22 (1991).
>
> No discrepancies were found during the ASCS inspection by Gniffke, and it is not disputed that Doty's herd was destroyed, in accordance with the verified count. We do not know whether the two branded cattle were switched by Siekmann, as Doty speculates. The government argues that all factual inferences must be drawn against Doty. However, inferences must have an evidentiary basis. On the record as a whole, the agency's conclusion that Doty acted in bad faith and violated his contract was arbitrary and capricious, in that the only evidence on which the agency relied was not properly before it.

Doty, 53 F.3d at 1252. The court ordered that the penalty could not be assessed against Doty and ordered that the "contract price of $99,841.96 shall be paid to Doty, with interest in accordance with law." *Id.* The case was remanded to the Federal Court of Claims for calculation of interest.

In November 1995, the Court of Appeals for the Federal Circuit ordered that the government pay the attorneys fees and expenses incurred by Mr. Doty under the Equal Access to Justice Act. *Doty*, 71 F.3d 384, 386 (Fed. Cir. 1995). The court stated that:

> We need not repeat the discussion in *Doty v. United States* of the lapses of due process, fundamental fairness, and failure to comply with the orders of the Court of Federal Claims. Although the government continues to argue that it should have prevailed on the merits of the appeal, the government has not met its burden under the EAJA. Nor does the government point to any special circumstances that might make the award of attorney fees unjust.

Doty, 71 F.3d at 386.

One might have thought that this was the end of the Doty litigation. However, the Dotys were again in court in 1997 to complain that the government had not paid the judgment as ordered. In addition, the Court of Federal Claims had ruled that there was no entitlement to prejudgment interest, and the Dotys sought review of this determination. *Doty*, 109 F.3d at 747 (Fed. Cir. 1997) (citing *Doty v. United States*, No. 90-CV-491 (Fed. Cl., August 12, 1996)).

On the basic issue of payment of the judgment, the government argued that the Dotys had not asked to be paid. The court noted that this was "incorrect" and referenced the letter written by Dotys' counsel, dated July 14, 1995, requesting payment of the base judgment of $99,841.96. *Id.*

The government also alleged that it had not paid the judgment because it does not pay "partial judgments," and because interest was still in dispute, payment of the base amount alone would constitute a partial payment. The court rejected this argument as well, for two alternative reasons. First, the court held that the judgment itself was not "partial" even though the interest amount due was in dispute, and, second, the court held that the payment of partial judgments is authorized under 28 U.S.C. § 2517. *Id.*

On the issue of prejudgment interest, the government's arguments fared no better. The Dotys alleged that pre-judgment interest was authorized under the Prompt Payment Act, 31 U.S.C. §§ 3901-07. As the court noted, this act was made expressly applicable to farm programs by amendments passed by Congress in 1988. After reviewing the legislative history behind these amendments, the court confirmed that "[o]ne of the purposes of these Amendments was to reduce the burden on the farmer of governmental delay in

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making payments to which the farmer is entitled." *Id.* These amendments provided that:

> [i]n the case of a payment to which producers on a farm are entitled under the terms of an agreement entered into under the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.), an interest penalty shall be paid to the producers if the payment has not been made by the required payment or loan closing date. The interest penalty shall be paid—
> (i) on the amount of payment or loan due; and
> (ii) for the period beginning on the first day beginning after the required payment or loan closing date and ending on the date the amount is paid or loaned.

Id. at 747-48. (citing 31 U.S.C. § 3902(h)(2)(A)). This provision was made applicable "with respect to all obligations incurred on or after January 1, 1989." *Id.* at 748 (citing Pub. L. No. 100-496 § 14(c), 102 Stat. 2455, 2465).

The government argued that § 3902(h)(2)(A) did not apply to the Doty's contract because the contract was entered into before January 1, 1989. The court rejected this as immaterial; the relevant date was the date that the payment obligation under the contract arose. It was not disputed that the specific payment obligation in dispute occurred after January 1, 1989. The court found no ambiguity in the words of the statute and held that "obligations incurred" was not limited by the date that the underlying contract was agreed upon. The court held that the government incurred its obligations to make payments to the Dotys when the Dotys performed in accordance with the contract's terms. *Id.* at 748 (citing *Winstar Corp. v. United States*, 64 F.3d 1531, 1545 (Fed.Cir.1995) (en banc) ("When the plaintiffs satisfied the conditions imposed on them by the contracts, the government's contractual obligations became effective .... "), aff'd, ___ U.S. ___, 116 S.Ct. 2432 (1996)). These events occurred on or after January 1, 1989. As such, the court held that the Prompt Payment Act entitled the Dotys to interest from the date that the payment obligation was incurred.

The Dotys' right to post-judgement interest was not contested. One additional issue, however, remained. When the government improperly terminated the Dotys' contract, it used setoff to retrieve the payments it had already made to the Dotys. In so doing, it also assessed interest against the Dotys for the period the Dotys were in possession of these payments. This assessment of interest was also executed by setoff against other payments owed the Dotys under other farm contracts. The government argued that it did not need to return that interest. The court rejected this argument and summarily stated that "[t]he government has no right to retain the interest that was improperly collected." *Id.*

The final order of the court provided that the Dotys be paid: the judgment of $99,841.96; $28,942.42 in recovered interest; interest of $10,427.21 on the three installments remaining to be paid when the contract was canceled, calculated from the dates on which the installments were due to June 30, 1995; interest of $24,407.57 on the amounts recovered from the Dotys by setoff; post-judgment interest of $9,966.24 on the total amount payable to the Dotys on June 30, 1995 ($162,714.14) for the period from June 30, 1995 to June 30, 1996; and post-judgment interest of $33.12 per day for each day after June 30, 1996 through the date full payment is made in accordance with this Order. The court ordered that these amounts be paid within twenty-four days after the date of the court's order, viz. by April 14, 1997 and that in the event that a further dispute would arise, payment not be delayed pending its resolution.

Perhaps this will finally be the last of the litigation in this case.

—Susan A. Schneider, Hastings, Minnesota

WETLAND EASEMENTS/*Cont. from page 1*
maximum acreage that could be acquired in each county. *Id.* at 461.

In the mid-1960s, the Department of Interior's Fish and Wildlife Service (FWS) purchased easements on three tracts of farmland located in Steele County, North Dakota. The land was later acquired by Kerry Johansen and Michael Johansen, its current owners. The easement instrument obligated the owners of the land to maintain the lands subject to the easement as waterfowl production areas by, among other things, not draining "any water ... now existing or reoccurring due to natural causes ..., by ditching or other means...." *Id.* at 461-62.

As was the case for all of the standard easement instruments used by the FWS prior to 1976, the easement instruments pertaining to the land owned by the Johansens described the entire acreage of each parcel, a total of 1,033 acres. However, corresponding "Easement Summaries" indicated that the FWS had purchased a total of 101 acres of wetlands on the three parcels.

The Easement Summaries were neither part of the conveying instrument nor were they recorded; instead, they were administrative documents containing the tract description, the tract acreage, the wetlands acreage, the cost per wetland acre, and other information. Some of the information contained in the Easement Summaries, including wetland acreage, was also contained in annual reports subsequently prepared by the FWS. For easements conveyed since 1976, the FWS has recorded a map locating the covered wetland acres as a part of the easement instrument.

In 1995, the Johansens faced their second consecutive wet spring. Kerry Johansen wrote to the FWS to explain his problems with excess water and to ask "'what water [he could] contain to get back to [his] normal farming practices.'" *Id.* at 462. In response, the FWS expressed sympathy, but advised the Johansens that "'unless your roads or farmstead is in danger of being flooded, no drainage can take place.'" *Id.*

The Johansens defied this admonition and dug ditches that drained some wetland areas on the three parcels. That action resulted in their being charged under 16 U.S.C. § 668dd(c) with the criminal offense of damaging National Wildlife Refuge System property.

In their defense, the Johansens sought to introduce the Easement Summaries and evidence indicating that their ditching did not diminish the wetland acreage shown on the Easement Summaries for each parcel. The district court granted the government's motion in limine to exclude that proffered evidence and the defense it supported. The Johansens entered conditional guilty pleas and appealed to the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit viewed the case as revolving around the interpretation of the easements. For its part, the government claimed that the easements' restrictions applied to all the wetlands found at any given time on the parcels described in the easement instrument. In other words, there were no "'uncovered wetlands.'" *Id.* at 463. The government based its contention on the fact that the Easement Summaries were not recorded with the easement instruments and on the assertion that the Easement Summaries did not reflect the intentions of the parties to the easements.

The Johansens, on the other hand, maintained that the easement instruments' language limiting the drainage of wetlands to those "now existing or reoccurring due to natural causes on the above-entitled land" meant that only the wetland acreage in existence at the time of the conveyance were covered. Their primary contention, however, was that the Easement Summaries indicated the wetland acreage subject to the easements' restrictions.

The Eighth Circuit sided with the Johansens. It held "that the federal wetland easements are limited to the acreage provided in the Easement Summaries." *Id.* at 466. In part, the Eighth Circuit premised its holding on the United States

Continued on page 7

"Frosting on the cake": why production flexibility contract payments?

By Christopher R. Kelley

The past year was a good year financially for many farmers. In fact, a Federal Reserve Bank of Kansas City economist recently proclaimed 1996 a "banner year" for crop producers. Mark Drabenstott, *Wild Ride for Agriculture Not Likely to Continue*, Feedstuffs, May 19, 1996, at 38. This year may be even better. At least one private sector economist "is considering whether to raise his forecast of net cash farm income by $2 billion to $54 billion for 1997." Scott Kilman, *Farm Economy Healthier Than Expected*, Wall St. J., Apr. 1, 1997, at A2.

In part, the strength of the agricultural economy springs from relatively high crop prices, low interest rates, better than expected yields, and other economic and agronomic factors. While these factors account for most of the agricultural economy's current strength, the nation's taxpayers are also directly contributing to farmer wealth. In fiscal year 1996, over $5 billion of appropriated and other funds were paid to farmers through production flexibility contracts authorized by the 1996 farm bill. Over the next six fiscal years, about $30 billion more in production flexibility payments will be made to farmers.

In light of the current strength of the agricultural economy, production flexibility contracts have been described as "'frosting on the cake.'" Dan Miller, *Are Land Prices Too Hot?*, Progressive Farmer Midwest, May 1997, at 18 (quoting Dean Glock, chief real estate officer for Farmers National). If American taxpayers are now being called upon to "frost the cake" for farmers, the obvious question is "Why?" This article briefly explores that question and the related question of whether taxpayers who do not hold production flexibility contracts gained anything from buying the "frosting."

Production flexibility contracts defined

Production flexibility contracts are a remarkably simple and straightforward way of transferring income to farmers. The term "farmers" is used here loosely, for virtually any owner of land enrolled under a production flexibility contract can receive payments if the owner is "at risk" for whatever agricultural crop, including a cover crop, is produced on that land. Thus, a lawyer-owner of enrolled land who rents the land on a crop-share basis can receive payments even if she never sets foot on the land. Landowners, whether they actually farm their land or not, have always been the primary beneficiaries of farm programs. *See generally, e.g.*, Daniel A. Sumner, *Targeting and the Distribution of Program Benefits*, *in* Agricultural Policies in a New Decade 125, 127 (Kristen Allen ed. 1990). Production flexibility contracts carry on that tradition.

During a one-time enrollment period that ended on August 1, 1996, land that would have had a wheat, corn, sorghum, barley, oats, upland cotton, or rice acreage base in 1996 under the now defunct acreage reduction programs was eligible for enrollment under production flexibility contracts. In general, persons "at risk" for the production on enrolled land are eligible to receive payments during the seven-year contract period. Individual farm payment amounts are based on several factors. In general, as was the case for deficiency payments made under the repealed acreage reduction programs, the larger the farm's eligible base, the greater the production flexibility contract payments.

Production flexibility contract payments are made irrespective of crop prices. Thus, they represent a dramatic departure from the acreage reduction programs that transferred income to farmers only when crop prices were low.

Moreover, the payments that will be paid to farmers are essentially fixed for the duration of the seven-year contract period. For each of the fiscal years 1996 through 2000, the 1996 farm bill contemplates that funds in excess of $5 billion will be appropriated to fund the payments. In fiscal years 2000 and 2002, the amounts decline to just over $4 billion. When the authority for production flexibility contract payments expires, longstanding, but now suspended, parity-based price support authority again becomes effective, assuming Congress allows that to happen. *See generally* Wayne Watkinson & John Sheely, *The Federal Agriculture Improvement and Reform Act of 1996*, Agric. L. Update, July 1996, at 4.

In return for production flexibility contract payments, farmers must comply with the "sodbuster" and "swampbuster" requirements, abide by certain limitations on the planting of fruits and vegetables on contract acreage, use the contract acreage for an agricultural or related activity, and obtain catastrophic level crop insurance for each crop of economic significance or waive disaster assistance. These requirements, however, have no impact whatsoever on farmers whose farms do not contain highly erodible lands or wetlands, who do not intend to plant fruits or vegetables, who intend to farm the contract acreage or plant a cover crop on it for the seven-year contract period, and who are willing to pay the nominal administrative fee to acquire catastrophic level crop insurance or to waive disaster assistance.

The beneficiaries

Farm programs have been characterized as a way for members of Congress "to show they care about an embattled class of taxpayer citizens." David Rapp, *How the U.S. Got into Agriculture and Why It Can't Get Out* 60 (1988). That "embattled class of taxpayer citizens" is, of course, the family farmer—"the paragon of the nation's cultural identity." *Id.*

Unlike past farm bill debates, however, the 1996 farm bill debate did not focus on the family farmer as an "embattled class." Instead, the debate focused on the federal deficit and farmers' "fair share" of federal subsidies. Implicit in the debate was that farmers should get something; the only question was how much and under what terms. Nonetheless, since the state of the family farm and the wealth of family farmer always influences farm policy, two observations are in order.

The first observation is that "family farms are holding their own in terms of both share of farm numbers and share of farm products." Robert A. Hoppe, *A Close-Up of Changes in Farm Organization*, Agric. Outlook, Mar. 1996, at 2, 2 [hereinafter Hoppe]. The overwhelming majority of American farms are "family farms," at least if that term is used to include partnerships and family-held corporations. Of the nation's 1.9 million farms, only 8,039 are owned by nonfamily-held corporations. *Id.* at 3.

As farms grow larger and fewer and as management and capital demands increase, however, the organizational structure of family farms is changing. Family farm corporations are increasing in number and product sales, from 2 to 3.4 and 15.1 to 21.1% over the last five years, respectively. Like corporations, partnerships permit families to pool resources. "Partnerships' share of farm numbers fell slightly [in the last five years], but their sales grew. Only the sole proprietorship

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category registered a decrease in share of both farm numbers and product sales." *Id.* at 2.

On the other hand, one of the perceived threats to the family farm, the nonfamily corporation, "comprised a relatively stable and minor share (0.4%) of total U.S. farm numbers between 1978 and 1992, while their share of total farm product sales actually fell slightly, from 6.5% in 1982 to 6% in 1992.... Nonfamily corporations that operate farms also tend to have a small number of stockholders; only 14% of nonfamily corporations had more than 10 stockholders in 1992, accounting for just 2% of all farm product sales." *Id.*

The second observation is that the farm economy is doing relatively well. Demand for commodities is strong. Prices for wheat, feed grains, rice, and soybeans reached record highs in 1997. Also, "[a]sset values are increasing more rapidly than debt, so farm equity continues to rise. Debt-to-asset and debt-to-equity ratios are well below levels of a decade ago when the farm sector was under severe financial pressure." Frederic Surls, *The Ag Sector: Yearend Wrap-Up*, Agric. Outlook, Dec. 1995, at 2-3.

Though they may be "the paragons of the nation's cultural identity," farmers are not the poorest members of our society. To the contrary, "[p]er capita income of farmers has exceeded per capita income of non-farmers every year since 1986.... Farm wealth is impressive. Net worth averaged $407,186 per farm in 1991 compared with median wealth of $78,807 for U.S. households headed by college graduates. Net worth of commercial farms with sales of $100,000 to $250,000 averaged $751,000 in the same year." Luther Tweeten & Lynn Foster, *Looking Forward to Choices for the 21st Century*, Choices, Fourth Quarter 1993, at 26, 28. By one account, "the average farm household is estimated to have 26% higher income than nonfarm households in 1991." Bruce Gardner, *Demythologizing Farm Income*, Choices, First Quarter 1993, at 22, 23. By another account, the "average income for the two groups [farmers and nonfarmers] are roughly equal" when income received by vertical integrators and other "nontraditional" farmers is excluded. Mary Ahern, *Letters: An Exchange About "Demythologizing Farm Income,"* Choices, Fourth Quarter 1993, at 40, 40.

The overall economic health of the farm sector, coupled with the financial strength of the major farm lenders, is reflected in farm lending activity. In response to "[c]ontinued economic growth, high grain prices, expanded farm acreage for some crops, and stable farm income," farm borrowing increased in 1995 and is expected to do so in 1996. Jerome Stam & James Ryan, *Farm Debt Expansion To Continue in 1996*, Agric. Outlook, May 1996, at 21, 21. Commercial lenders have increased their total market share of farm loans to 40% in 1995, while the FSA market share fell to 6.9% in 1995 from a high of 16% in 1987. *Id.* at 23. In part, the decline in the FSA's share was due to a downsizing of FSA lending programs. *Id.*

Yet at a time of relative prosperity, American agriculture finds itself at "the intersection of two trends. The first is industrialization of commercial agriculture and the second is the drive toward a balanced federal budget." Susan Offult, *Subsidizing Agriculture: The Road Ahead*, Choices, Second Quarter 1996, at 30, 30-31 [hereinafter Offult]. As to the former,

> [t]he focus of attention on the industrialization phenomenon really means focus on the approximately 15 percent of farms that produce about 85 percent of commercially sold domestic foodstuffs. These farm firms look more and more like firms in other sectors of the American economy, both in terms of the size of the business unit and in its organization as reflected in its contractual and financial relationships. These 250,000 or so large farms are the main beneficiaries of the programs today and will likely remain so even as the form of subsidy changes.

Id. See also Hoppe, *supra*, at 3 ("Only 11 percent of farms had any type of [production or marketing] contract, but these farms accounted for a hefty 40 percent of product sales.").

As for the federal budget and the agricultural sector's impact on it, a Congressional Budget Office (CBO) report on 1995 federal spending "found that $14 billion of $28 billion in federal subsidies and programs for all industries went to agriculture, as did $1 billion of the $2.2 billion in credit program outlays (representing the estimated cost of defaults and interest rate subsidies). However, only $1 billion of the $32 billion in tax breaks for industry accrued to agriculture. In other words, agriculture accounted for almost one-half of all direct federal spending on industry and at least one-third of all credit program costs, but was the beneficiary of only about 3 percent of all tax expenditures [measured by foregone revenues, i.e., revenue losses to the federal government]." Offult, *supra*, at 31-32. The CBO also "compared the subsidies received to each sector's contribution to Gross Domestic Product and found that subsidies to agriculture represented 11 percent of its GDP contribution while the comparable figure for the next most extensively subsidized industry, utilities, equaled only 2 percent." *Id.* at 32.

Policy arguments

Given this setting, Congress bestowed upon certain farmers the opportunity to add to their wealth through production flexibility contract payments. Why? The most often recited explanation is that Congress is in the process of "transitioning" agriculture to a time when income transfers to farmers will end. Paying farmers $36 billion dollars over seven years will, so it is said, spare the farm economy the precipitous decline in income and farm asset values that a sudden end of payments would produce. Of course, in 2002 farmers will still face the loss of over $4 billion in income transfers in the following year. Should the farm economy be weak that year, memories of the "frosting on the cake" in earlier years are likely to be faint.

Another common explanation is that Congress wanted to continue its tradition of subsidizing farmers, but at lower cost to the taxpayer. If that is the case, will production flexibility contracts save the taxpayer any money? The answer is probably not.

Over $36 billion in production flexibility contract payments will be paid over seven years. During the seven years preceding 1996, about $38.6 billion was paid to farmers, primarily through deficiency payments under the various acreage reduction programs. USDA, *Federal Agriculture Improvement and Reform Act of 1996: A Description of U.S. Farm Commodity Programs Under the 1996 Farm Bill*, Apr. 1996, at 12. Thus, when compared with "traditional" farm program payments over the seven years preceding 1996, production flexibility contract payments will save about $2.5 billion.

However, a comparison with projected payments over the next seven years under traditional mechanisms produces an altogether different result. In 1996 alone, production flexibility contract payments cost the taxpayer $4 billion more than "traditional" payment mechanisms (i.e., deficiency payments) would have, thus consuming all of the savings and more that were "realized" from a comparison between production flexibility contract payments and payments over the last seven years. C. Edwin Young & Paul C. Westcott, *1996 Farm Act Impacts: An Early Assessment*, Agric. Outlook, Aug. 1996, at 22, 24 [hereinafter Young & Westcott]. More troubling from a budget savings perspective, based on current USDA projections, production flexibility contract payments could cost the taxpayer over $20 billion more than would have been expended under the 1990 farm bill over the next seven years. *Id.* at 23.

If the USDA's projection turns out to be correct, what, if anything, will the taxpayer receive for this income-transfer over and above what farm subsidies would

Continued on page 6

have cost under the 1990 farm bill? For starters, can one convincingly argue that the taxpayer will receive a more "competitive" agricultural sector? Again the answer is probably not.

"At the aggregate level, normal flex acreage [under the 1990 farm bill] provided enough planting flexibility for market signals to encourage production of specific crops when their prices rose and to discourage it when they declined." Young & Westcott, *supra*, at 22. On the other hand, "[t]he impacts of the 1996 act are expected to be more significant at the farm level than in the aggregate" because "[g]reater planting flexibility under the 1996 act will permit farmers to alter their production practices to reduce risk." *Id.* at 22-23. Presumably, however, the taxpayer is more concerned about the aggregate level; hence, production flexibility contract payments do not provide "competitive" gains over what would have been provided under a continuation of the 1990 farm bill, at least when measured by planting flexibility.

Whether the taxpayer receives any "environmental goods" from the production flexibility contract payments is debatable. On the positive side, greater flexibility at the farm level may increase crop rotations and thus increase longer-term soil productivity. *Id.* at 23. At the aggregate level, however, "planting and production levels for wheat, feed grains, and soybeans will likely be about the same as they would have been if the previous law had been extended." *Id.* at 22. Increased plantings will be dictated by demand and land coming out of the CRP, not program payments. *Id.* Moreover, cotton acreage is expected to be slightly higher because of the suspension of the ARP authority; only rice production is expected to decline. *Id.* Cotton is not an environmentally-"friendly" crop, requiring as it does the use of defoliants and as many as six or seven pesticide applications in a single growing season. Also, corn production could intensify in some parts of the Corn Belt as a result of the natural economic advantages of the area. *Id.* at 23. If this intensity means continuous corn, production flexibility contracts will not produce any changes from the 1990 farm bill in that regard.

The 1996 farm bill weakened the "sodbuster" and "swampbuster" provisions from the environmentalist's perspective (i.e., they were made more "flexible"). Whether it matters that the swampbuster provisions were weakened is debatable for the swampbuster provisions have suffered from lack of enforcement. *See generally* Anthony N. Turrini, *Swampbuster: A Report from the Front*, 24 Ind. L. Rev. 1507 (1991). Given the politics of 1996, the swampbuster provisions probably would have been weakened irrespective of the method chosen for transferring income to farmers.

The 1996 farm bill, however, did produce one potential environmental gain—land does not have to be farmed to be eligible for production flexibility contract payments; land in a cover crop is eligible for payments. There is no incentive to idle land, however. Instead, farmers simply are not penalized for doing so.

Aside from whatever environmental gains the investment of over $36 billion produces, the taxpayer also receives "certainty." Barring a legislative change, it is certain that farmers will be paid for each of seven fiscal years, and it is certain the total amount they will be paid is over $36 billion.

What did farmers gain? First and foremost, they gained government payments at a time of high crop prices. In articles in Choices magazine, three economists contend that it "was *rising market prices* during 1995-96 more than a new reform consensus or budget constraints that drove farm policy toward decoupled payments and less interference in field-crop production." David Orden et al., *A Farm Bill for Booming Commodity Markets*, Choices, Second Quarter 1996, at 13, 13 (emphasis added). In other words, "the political competition remained focused on how to be generous to farm interests (and others), not on how to cut farm programs." *Id.* at 15. "[E]ven the budget-conscious, reform-minded 104th Congress has proven responsive to agricultural interests. Allies to enact farm programs can still be found, and farm sector advocates have now proven adept at obtaining benefits from Congress under either party." *Id.* at 16. *See also* David Orden et al., *Can Farm Policy Be Reformed?*, Choices, First Quarter 1996, at 4, 5 ("Inside the 104th Congress, the move toward FFA [Freedom to Farm Act] came neither from committed reformers nor from budget cutters, but instead from traditional agriculturalists who have always favored generous support for farmers. When commodity prices began a steep rise, the best way to maximize this support in the short run under the congressional budget process was to make a switch in policy instruments away from traditional deficiency payments and toward guaranteed decoupled payments. FFA's adoption by Congress last November resulted more from accounting quirks and suddenly favorable market conditions than from either budget pressure or the dominance of a new policy reform consensus.").

Another way of characterizing the gains to farmers is that their crop acreage base established under the now-defunct annual, voluntary acreage reduction programs was "bought out" by the Congress for the sum of $36 billion. This characterization, however, assumes that Congress actually believed that farmers had acquired at least a morally enforceable compensable interest in their base.

If farmers gained subsidized income in a time of relative prosperity in the short-run (for many older farmers—and the average American farmer is middle-aged or over—only the short-run matters), where does the 1996 farm bill leave federal farm policy poised to turn in the next decade? On its face, the 1996 farm hill does not "transition" agriculture to anything other than to another farm bill debate in 2001 or 2002. Early predictions on the outcome of that debate vary. Some foresee new subsidized insurance options, including price protection. If the past is prologue, much will depend on economic conditions in 2001 or 2002 and the ability of traditional agricultural interests to maintain a unified appeal to Congress. If anything, the 1996 farm bill may dissolve old alliances as some farmers fare hetter in a "free market" than others. For 1997, however, production flexibility payments may turn out to be "frosting on the cake."

Disaster help guide

Farmers, ranchers, business owners, and others hit hard by the blizzards, cold, and floods of 1997 now have a guide to help them through the maze of government disaster assistance programs.

Farmers' Guide to Disaster Assistance, published hy Farmers' Legal Action Group, Inc. (FLAG) in St. Paul, Minnesota, with funding from FARM AID, provides detailed information about more than a dozen different government programs.

According to FLAG, numerous programs are administered or affected by a variety of federal agencies, including the Farm Service Agency (FSA), the Federal Emergency Management Agency (FEMA), and the Small Business Administration (SBA). Each has its own rules and regulations. With more than 200 pages, the *Guide* describes these programs and their eligibility criteria, deadlines, and application procedures and explains what to do if applicants are turned down.

The *Guide* is available for $18 to farmers, ranchers, and nonprofit organizations. This reduced rate is made possible by grants received from FARM AID, Operation USA, the Northwest Area Foundation, and the Legal Services Advisory Committee. The cost for attorneys, libraries, and others is $40. (Minnesota family farmers who cannot afford the guide may request that FLAG send it to them at no cost. Financially distressed Minnesota farmers may call Farmers' Legal Action Group, Inc. at 1-800-233-4534 for information about their rights.) Orders should be sent to: FLAG, Disaster Guide, 46 East 4th Street, Suite 1301, St. Paul, Minnesota 55101.

—Randi Ilyse Roth, FLAG, Harry Smith, FARM AID, Minneapolis, MN

WETLAND EASEMENTS/*Cont. from p. 7*

Supreme Court's decision in *United States v. North Dakota*, 460 U.S. 300 (1983), and the government's position in that litigation.

United States v. North Dakota involved a challenge to a series of North Dakota statutes intended to restrict the acquisition of waterfowl production area acquisitions. Among other rulings, the Supreme Court in *North Dakota* ruled that the previously granted gubernatorial consents were irrevocable. However, one of the issues before the Supreme Court was whether the easements then acquired had exceeded the gubernatorial consents.

In its brief to the Court, the government asserted that it had gubernatorial consents to acquire about 1.5 million acres. At the time, however, the total area described in the easement instruments exceeded 4 million acres. The government addressed this disparity by maintaining that it had actually acquired easements for only 764,522 acres, the same acreage then shown on the Easement Summaries. For the Eighth Circuit, therefore, the government's position in *North Dakota* was consistent with the Johansens' position in the case before it.

The Eighth Circuit also noted that the Supreme Court had accepted the government's position regarding the easement acreage in *North Dakota*. In its decision, the Supreme Court had stated: "As the easement agreements make clear, ... the restrictions apply only to wetland areas and not to entire parcels.... The fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired.'" *Johansen*, 93 F.3d at 465 (quoting *United States v. North Dakota*, 460 U.S. at 311 n.14).

The Eighth Circuit nonetheless recognized that the Supreme Court did not explicitly limit the wetland easement to the Easement Summary acreage. However, while conceding that the Supreme Court's language permitted an interpretation of the easements to cover all of the wetlands on the parcels described in the easement instrument, the Eighth Circuit concluded that such an interpretation would raise "a host of problems." *Id.* at 466.

One of the problems raised by the Eighth Circuit was that under such an interpretation, the wetland acreage would fluctuate depending on rainfall. That is, in wet years the wetland area would expand; in dry years, it would diminish. This fluctuation, according to the Eighth Circuit, would be inconsistent with the acreage shown on the Easement Summaries.

Moreover, a fluctuating easement could prevent ditching anywhere on the entire parcel if ditching would inhibit the collection of water and thus prevent the formation of a wetland. Extending an easement's restrictions to the entire parcel, said the Eighth Circuit, "was clearly and explicitly rejected by the Supreme Court in *North Dakota*." *Id.*

The Eighth Circuit also opined that a fluctuating easement could result in the acreage exceeding the limits of the gubernatorial consents during wet years. If that occurred, the easements might be subject to being voided on the grounds that the acreage exceeded the gubernatorial consents.

Finally, the Eighth Circuit sought to reconcile its holding with its earlier decisions in *United States v. Vestero*, 828 F.2d 1234 (8th Cir. 1987), and *United States v. Schoenborn*, 860 F.2d 1448 (8th Cir. 1987). In *Vestero*, the Eighth Circuit had ruled that to prove the offense defined in 16 U.S.C. § 668dd(c), the government had "'to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements.'" *Johansen*, 93 F.3d at 467 (quoting *United States v. Vestero*, 828 F.2d at 1242). The government had argued in *Johansen* that this language means that the drainage of any wetlands on a parcel subject to an easement violated section 668dd(c).

In *Johansen*, the Eighth Circuit explained that the *Vestero* standard simply means "that the government did not need to legally describe the confines of each covered wetland under the pre-1976 easements to ensure compliance with the gubernatorial consent limitation, a question already answered by the Supreme Court in *North Dakota*. *Id.* It recast the *Vestero* standard as signifying that "the United States must prove beyond a reasonable doubt that identifiable, covered wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged and that the defendant knew that the parcel was subject to a federal easement." *Id.*

The Eighth Circuit also concluded that its earlier decision on *Schoenborn* was consistent with its holding in *Johansen*. It noted that in *Schoenborn* it had examined evidence that the specific wetlands had existed when the easement had been conveyed. Therefore, according to the Eighth Circuit, *Schoenborn* implicitly acknowledged the limited scope of the wetland easements. *Id.* at 468.

In an article to be published in the *North Dakota Law Review*, Paul D. Odegaard, a student at the University of North Dakota School of Law, offers an excellent analysis and critique of the *Johansen* decision. Mr. Odegaard also identifies several very serious practical problems the FWS may face as a result of the *Johansen* decision and some of the deficiencies in the Easement Summaries:

> The *Johansen* court's requirement that the damaged wetlands be those existing at the time of the conveyance, and as described in the Easement Summary, presents a problem for pre-1976 easements. Nowhere in the administrative Easement Summaries are there descriptions delineating which wetlands are covered or where they are located, as the Easement Summaries contain a description of size only.
>
> As a result, the United States, armed only with the knowledge as to the number of wetland acres purchased, will apparently have difficulty determining exactly what particular wetlands were intended to be covered by the easement. That is, given the nature of prairie region wetlands, it may be difficult, if not impossible, for the United States to establish which wetlands were intended to be covered by an easement, and the extent to which they are covered. The United States maintains that the Easement Summaries may be unobtainable for some parcels of land, which, under the *Johansen* ruling, would make enforcement of the easements impossible. Furthermore, wetland acreage estimates were generally not made from ground inspections, but rather from reviewing aerial photographs, sometimes taken years before acquisition. Often the acreage calculations were merely an estimate of average wetland acreage per square mile for the area. Finally, pre-1976 federal wetland easements did not contain maps locating the wetlands subject to the easements. Therefore, requiring the government to determine the size of the *identifiable* and *covered* wetlands will make the enforcement of these federal wetlands easements nearly impossible.

Paul D. Odegaard, *Waters and Water Courses — Game: What Does the Future Hold for Eleven Thousand Federal Wetland Easements in North Dakota? United States v. Johansen, 93 F.3d 459 (8th Cir. 1996)*, ___ N.D. L. Rev. ___ (1997)(draft manuscript)(footnotes omitted).

—Christopher R. Kelley, Hastings, MN

Federal Register in brief

The following items were published in the *Federal Register* from April 14 to May 6.

1. APHIS; Genetically engineered organisms and products; simplification of requirements and procedures for genetically engineered organisms; final rule; effective date 5/27/97. See also 62 Fed. Reg. 23945; effective date 6/12/97.

2. APHIS; Animal welfare; perimeter fence requirements; proposed rule; comments due 7/7/97. 62 Fed. Reg. 24611.

3. Farm Credit Administration; Cumulative voting by shareholders; proposed rule. 62 Fed. Reg. 20131.

—Linda Grim McCormick, Alvin, TX

Agricultural Law Update
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Des Moines, Iowa 50313

ADDRESS CORRECTION REQUESTED

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1997 Agricultural Law Symposium & CLE • Minneapolis, MN • October 17-18

This year's program will focus on some of **The Legal Dynamics of the Rural Urban Interface,** contain some of the old standbys, such as Ag Law Update, and provide attendees an opportunity to sit in on a roundtable discussion/working session addressing final drafts of UCC Article 9 proposed changes related to agricultural transactions.

IT IS NOT TOO EARLY TO BEGIN PLANNING FOR THE FALL CONFERENCE IN MINNEAPOLIS. To help the following information is provided:

Hotel Information

The Minneapolis Hilton and Towers • *1001 Marquette Ave., Minneapolis, MN 55403*
Rates: $114 Single/$134 Double (Oct. 16 thru Oct. 19). For your convenience, room registrations may be made directly with The Hilton by calling (612) 376-1000 or toll free 1-800-HILTONS. A limited number of rooms are available and **reservations must be made by September 16, 1997**. <u>After September 16, rooms will be booked on a space available basis only.</u> When making reservations, please ask for the group rate for the American Agricultural Law Association.

Airline Information

Northwest Airlines (NWA) is the Preferred Airline for the Minneapolis meeting. Those persons traveling to the meeting on NWA between October 14, 1997 - October 21, 1997 are eligible for the following discounts:

U.S./Canada Originating Passengers

Roundtrip Fare Paid	Discount
Between $200-299 USD/$270-399CAD	$30USD/$40CAD
Between $300-499USD/$400-604CAD	$50USD/$70CAD
$450USD/$605CAD or Greater	$75USD/$100CAD

Any fare less than $200USD/$270CAD does not qualify for discount.
There are three ways to book your travel and to receive discounts:
Refer to WorldFile number NY213 when making your reservations.

1) NWA will provide reservations and ticketing assistance from the World Meeting & Incentive Reservations Desk (1-800-328-1111) M-F 7:30 am - 7:30 pm (CT).
2) Tickets may be purchased at any Northwest ticketing location.
3) Any travel agency. If you do not have a travel agent, we would like to recommend World Wide Travel at 1-888-936-9306 (toll free).