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INSIDE

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- Wetlands regulation in Washington state

Block voting for marketing orders

The Ninth Circuit in the case of *Cecelia Packing Corporation et al vs USDA et al*, 93 D.A.R. 14782 (1993) has determined that section 608(c) of the Agricultural Marketing Agreement Act (AMAA) to be constitutional in the context of challenges based on the First and Fourteenth Amendments.

In April of 1991, Sunkist Growers, Inc., announced that its board of directors had unanimously decided to support continuation of marketing order programs for navel and Valencia oranges. In June of 1991, Sunkist cast its block vote in favor of the continuation of the marketing orders. Because of Sunkist's large voting block, accounting for eighty percent of the navel orange and eighty-five percent of the Valencia orange votes, both marketing orders were continued. Challenges to the continuation of the marketing orders were raised by disagreeing members of the Sunkist Cooperative and by other producers primarily on the basis that the block voting provision did not allow lobbying of Sunkist Growers; and that the block voting provisions of section 608c violated the equal protection clause of the Fourteenth Amendment.

The AMAA was passed during the Depression primarily because of unstable market conditions and a Congressional desire to promote both interstate and foreign commerce in specified agricultural commodities. During that same period, Congress also enacted the Capper-Volstead Act, 70 U.S.C. section 291, essentially removing anti-trust proscriptions against cooperatives fomed by agricultural producers. Under the acts' provisions, the Secretary of Agriculture has the authority to issue marketing orders that in effect limit the quantity of the agricultural commodity that can be shipped into an identified market. The AMAA contains specific procedures for notice, and an opportunity for a hearing on any proposed action by the Secretary. 7 U.S.C. section 608c(3). Generally the marketing order becomes effective upon approval by eighty percent of the orange handlers and/or producers of two thirds of the oranges. Should such an order become ineffective and obstruct the policy of the AAMA of stabilizing market conditions and promoting effective merchandising of the agricultural commodity, the Secretary may terminate the order.

The First Amendment challenge was as follows: (1) that Sunkist Producers who disagree with the block vote were effectively denied a vote; (2) the disagreeing Sunkist Producer's were forced to subsidize the voting position of Sunkist with which they

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Worker protection standards, today and tomorrow

Congress recently enacted legislation which delays implementation of some but not all of the Worker Protection Standards [WPS] until January 1, 1994. The new law in essence, provides the agricultural community with more time to learn about the WPS and to prepare for implementation.

The following information is a summary of the key WPS provisions, especially those that are required to be implemented in 1994, and those that can be deferred until January 1, 1995. Most of the WPS requirements appear on the labels of the pesticides used on agricultural establishments (farms, forests, nurseries, greenhouses) where employees work. There are two types of WPS provisions on the label: those that are fully spelled out, and those that are merely referred to but not thoroughly described on the label.

During 1994, one must comply with the WPS requirements that are spelled out on the label. These include the label requirements for personal protective equipment (PPE), the restricted-entry interval (REI), and the requirement for "double notification," if this requirement is on the label. Double notification requires both oral warning and posting warning signs at entrances to treated areas.

It is not necessary to comply with the 'referenced' requirements until January 1,

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disagreed; and (3) that non-Sunkist producers would be denied the ability to lobby Sunkist Producers to vote against the continuation of the marketing order.

With respect to the first challenge, the district court held and the Ninth Circuit affirmed that there was no denial of a right to vote because the disagreeing Sunkist producers could either withdraw from the cooperative or act within the Sunkist Cooperative's governing structure to affect the position of Sunkist. The disagreeing Sunkist producers' second challenge that they were compelled to subsidize Sunkist positions likewise failed because any disagreeing producer shareholder has a right to withdraw at any time for any reason. The "critical distinction" was the ability to withdraw and thus, there was no subsidization of the Sunkist position.

The third argument by non-Sunkist producers who disagreed with the marketing order was that they were unable to effectively lobby the Sunkist producers to vote against continuation of the orders because of the block voting provisions. 7 U.S.C. section 608c(12). The court of appeals affirmed that section 608c(12) did not limit participation in the debate over the merits of a marketing order. There was nothing in section 608c(12) that affected the non-member producers' rights to lobby Sunkist Growers prior to the referendum on the secretary's proposed order. While acknowledging that lobbying a governing body could be more difficult than lobbying individual producers, the court of appeals found that there was no "impingement" upon the right to participate in the referenda process.

The Fourteenth Amendment challenge of the disagreeing producers was that the equal protection clause was violated by permitting a cooperative to block vote its entire membership. The court of appeals applied the law in Fourteenth Amendment cases under the implicit equal protection clause of the Fifth Amendment, which applies to the federal government. The contention of the disagreeing producers was that section 608c(12) should be subjected to "strict scrutiny" examination because it impinged upon fundamental voting rights. The Ninth Circuit while acknowledging the fundamental nature of the right to vote, distinguished the "right to vote" in situations not including "general governmental power." 93 D.A.R. at 14786 citing *Burdick v. Takushi*, 112 S.Ct. 2059 (1992), *Ball v. James*, 451 U.S. 355 (1981). The Ninth Circuit found that the appropriate test is whether the scheme of the statute is rationally related to the legitimate government purpose. 93 D.A.R. at 14786 citing *Salyer Land Company v. Tulare Lake Basin and Water Storage District*, 410 U.S. 719 (1973)(water storage district elections) and *Mountain Water Company v. Montana Dept. of Public Serv. Reg.*, 919 F.2d 593 (1990). Under a rational relationship test, permitting the secretary to count a cooperative's block vote as a vote for all of its member producers is rationally related to Congress' encouragement of orange producers to join such cooperatives and promote a vital interest in an efficient marketing system.

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1995. These requirements include pesticide safety training for agricultural workers and handlers, decontamination sites, notification of workers about pesticide applications (except the "double notification" requirement described above), display of information about pesticide applications, emergency assistance, and display of a safety poster.

The legislation also provides optional PPE requirements for some irrigation workers in 1994 and excludes crop advisors from WPS coverage until January 1, 1995.

The following questions and answers address some of the major WPS provisions and the recent legislative changes:

1. When will product labels change to include the WPS requirements?

By April 21, 1994, pesticide manufacturers must change the labels of their agricultural use pesticides to include the WPS requirements. Products with new labels are currently moving into the channels of trade.

Between now and October 23, 1995, products with both old and new labels will be available for sale. After October 23, 1995, pesticide dealers cannot sell or distribute products without the WPS label. Whatever label, old or new, is on the product, one must follow the instructions on that label. When products with old and new labels are combined, follow the more restrictive worker protection requirements.

2. What are the WPS requirements on pesticide labels and when must one comply with each?

The WPS labels have several new features.

Personal protection equipment (PPE) for pesticide handlers: The new labels standardize the PPE requirements for pesticide handlers. The PPE is specified in the precautionary statements portion of the label.

Compliance: During 1994, employers must ensure that handlers use this PPE. Starting January 1, 1995, there are additional employer duties for providing, cleaning, and maintaining the PPE.

Application requirements: The new labels also include a statement permitting only protected handlers to be in the area during application, and requires that the product be applied in a manner that will not result in contact to workers or other persons. This statement usually appears in the directions for use section of the label.

Compliance: Employers and pesticide applicators must comply with this requirement during each pesticide application in 1994 and beyond.

Agricultural use requirements box: The most obvious new feature of the new labels is a box with the heading "Agricultural Use Requirements." The box includes:

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* The product-specific Restricted-Entry Interval (REI).

Compliance: Required both in 1994 and beyond.

*Early-entry personal protective equipment (PPE) — the PPE that must be used by workers who must enter a treated area during the REI and contact anything that has been treated with the pesticide.

Compliance: In 1994, employers must provide the PPE to early-entry workers in clean and operating condition. Also, in 1994, employers can provide optional PPE to early-entry irrigation workers. Starting January 1, 1995 there are additional employer duties for providing, cleaning, and maintaining the PPE.

* The WPS reference statement — a general statement referring to the WPS and requiring employers to provide their pesticide handlers and agricultural workers with all WPS protections. These protections include:

- Pesticide safety training for agricultural workers and pesticide handlers.
- Provision of decontamination sites for workers and handlers.
- Notification of workers about pesticide applications.
- Display of information about pesticide applications.
- Emergency assistance.
- Display of a safety poster.

Compliance: Delayed until January 1, 1995.

*"Double Notification" requirement — a requirement included only on the labels of the most toxic pesticides. For these products, employers must notify their agricultural workers about applications by giving them an oral warning and by posting entrances to treated areas.

Compliance: Required in 1994 and beyond.

3. What are the restricted-entry interval (REI) requirements?

Under the WPS, each agricultural pesticide label will specify a restricted- entry interval, usually ranging from 12 to 72 hours. Some labels may specify a longer REI. The REI begins immediately after pesticide application. You must keep workers out of a treated area during the REI, except in the following situations:

No contact early entry: After any applicable inhalation exposure level or ventilation criteria has been met, workers may be permitted to enter a treated area during an REI (early entry) if they will not touch or be touched by any pesticide residues on plants, in soil, in water, or in the air. If there is no contact, there are no PPE requirements and no time limitations.

Compliance: The exceptions to early-entry limitations for no contact early entry applies in 1994 and beyond.

Non-hand labor early entry: One may allow workers to enter treated areas before the REI is over to perform non-hand labor jobs that will involve contact with pesticide residues. These tasks include operating, moving, or repairing irrigation or watering equipment but does not include such tasks as harvesting, weeding, pruning, cultivating, etc., which are considered hand labor tasks.

One must make sure that non-hand labor early-entry workers do all of the following:

(1) Wear the early-entry PPE specified on the label. Note: In 1994, it is required to provide the early-entry PPE to the worker, and it must be in clean and operating condition. Starting January 1, 1995, there are additional employer duties for providing, cleaning, and maintaining the PPE.

(2) Wait at least four hours after the pesticide application is completed before entering the area.

(3) Wait at least until any inhalation exposure level listed on the label has been reached.

Compliance: During 1994, there are no time limitations to non-hand labor early entry. Starting January 1, 1995, early-entry work under this exception is limited to short-term tasks and usually not allowed to exceed one hour per worker each day.

4. What are the double notification requirements?

Labels for some pesticides — the most toxic ones — require notifying workers both orally and with signs posted at entrances to the treated area. For these products, the Agricultural Use Requirements box on the label includes this statment: "Notify workers of the application by warning them orally and by posting warning signs at entrances to treated areas."

Compliance: This "double notification" must be provided to workers in 1994. During 1994, it is permissible to use any warning sign that clearly tells workers to keep out and the oral warning must tell workers the location/description of the treated area, when entry is restricted, and not to enter the treated area until after the REI. Starting January 1, 1994, one must use the WPS field warning sign and follow specific WPS requirements for the timing and content of the oral notification. One may begin using these procedures in 1994.

5. Are crop advisors covered by the WPS?

Crop advisors are not covered by the WPS until January 1, 1995. The agency is currently reviewing the requirements for crop advisors, and may allow some flexibility after January 1, 1995.

6. If pesticide handlers and agricultural workers already have received WPS basic safety training, with the delay in the WPS training requirement until January 1, 1995, must these employees be trained again?

If the employees were properly trained, the WPS safety training already provided in valid. The WPS requires that they be retrained every five years, counting from the end of the month in which the initial training was completed.

—***Winand K. Hock, Penn State***

Conference Calendar

1994 Drak[illegible] Agricultural Law [illegible]

June 1[illegible]-16: [illegible] taxation and bus[illegible] — Prof. Jim Monroe

June 20-2[illegible] and seasonal farm[illegible] [illegible] Clark

June [illegible] and agriculture — [illegible] Looney

July [illegible] agricultural trade [illegible] Lorvellec

July 11-14: [illegible] insurance: analysis of [illegible] comprehensive liab[illegible] — Prof. John D. Copeland

July 1[illegible] in industrialization of [illegible] — Prof. Neil Hamilton

For more information, call Prof. Neil Hamilton, ([illegible]) [illegible]-2065.

The 1995 Farm Bill: time for a change?

By Christopher R. Kelley

"It reminds me of an old neighbor who farmed with mules," says a southern Corn Belt farmer. "He had to raise hay for the mules, and then because he grew hay, he needed the mules. We're in the same vicious circle today. We farm for the government so the government will pay us to farm." John Russnogle, *$50,000 limit backs off the big boys*, Farm J., May 1987, at 24, 26.

Since the 1930s, the federal government has participated in the farm economy by supporting commodity prices and farm income. The Agricultural Adjustment Act of 1938, the cornerstone of federal commodity policy, offered a variety of justifications for federal intervention in the farm economy, including the need to conserve natural resources; to develop domestic and export markets; to ensure an "orderly, adequate, and balanced flow" of commodities through these markets; to provide farm income "parity;" and to assist consumers in obtaining an "adequate and steady supply of . . . commodities at fair prices." 7 U.S.C. § 1282 (1988). Thus, at its inception, federal farm policy implicitly promised something for everyone. Congress assured conservationists, commodity traders, farmers, and consumers alike they would all be beneficiaries of a policy primarily designed to stabilize and support farm income.

In the 1930s, the policy was compelling. "Because farming was such a significant portion of the economy at the time — accounting for about eight percent of the gross national product and employing almost twenty percent of the total civilian labor force — restoring prosperity to agriculture was seen as a first and important step toward revitalizing the national economy." Kristen Allen & Barbara J. Elliott, *The Current Debate and Economic Rationale for U.S. Agricultural Policy in* U.S. Agriculture in a Global Setting: An Agenda for the Future 9, 17-18 (M. Ann Tutwiler, ed., 1988). Nevertheless, "policymakers emphasized that the measures taken were not implemented to establish the foundational superstructure for a permanent policy of income support for agriculture." Gordon C. Rausser & David Nielson, *Looking Ahead: Agricultural Policy in the 1990s*, 23 U.C. Davis L. Rev. 415, 419 (1990).

Six decades have passed since the enactment of the Agricultural Adjustment Act of 1938, and it is probably safe to say that conservationists, commodity traders, farmers, and consumers are not altogether satisfied with the federal farm policy that has evolved from that Act. Perhaps a certain amount of the dissatisfaction can be explained as ritualistic and as an inevitable byproduct of a policy with mixed aspirations:

> Farm groups, from the radical American Agriculture Movement to the rock-ribbed conservative American Farm Bureau Federation, condemn federal agricultural programs as a matter of ritual, and nearly every congressional hearing on agriculture commences with a rendition of how horribly the government treats the farmer. This is partly because agricultural programs are a philosophical jumble. Containing elements of free-market risk and federal bailouts, capitalist entrepreneurship and socialist central planning, they do not reinforce anyone's world view.

Gregg Easterbrook, *Making Sense of Agriculture*, Atlantic, July, 1988, at 63, 65.

Conservationists question whether federal price and income support has done more harm than good to the environment by promoting input-intensive, specialized production practices and by discouraging the adoption of alternative crops and cropping practices. The ecological shortcomings of the farm programs have been summarized as follows:

> The farm programs support crops that tend to require high agrichemical inputs and are associated with high rates of soil erosion. Other less-erosive and less-agrichemical-dependent crops receive little government support. The programs reward farmers for specializing in program crops year after year, resulting in further soil depletion and pest problems, which in turn lead to a greater need for agrichemical inputs. The programs tend to discourage farmers from planting other crops and from using more diversified crop rotations.

U.S. Gen. Accounting Office, Alternative Agriculture: Federal Incentives and Farmers' Options 3 (Pub. No. PEMD-90-12, Feb. 1990).

Commodity traders challenge the trade distorting effects of government supported prices and the production lost through acreage reduction programs. For example, the National Grain and Feed Association, an association of grain handlers, shippers, and merchants, asserts that the removal of land from production through the acreage reduction program (ARP) and the conservation reserve program (CRP) has "led to a cumulative total of grain production foregone by the United States of more than 350 million tons," a production loss equal to "lost employment of 120,000 jobs and lost economic activity of $42 billion." Nat'l Grain & Feed Ass'n, U.S. Agriculture 2020: An Economic Growth Plan for U.S. Agriculture, July 1992, at 4.

Farmers criticize the increasing complexity of the program rules and the programs' failure to improve prices. Indeed, the federal farm programs sometimes work at cross-purposes in influencing commodity prices. For example, "[s]et asides are designed to control supplies and increase market prices, but price supports induce farmers to increase supply, and by so doing, to depress market prices." Robbin A. Shoemaker, A Model of Participation in U.S. Farm Programs 14 (U.S. Dep't Agric., Econ. Res. Serv., Tech. Bull. No. 1819, Aug. 1993).

Finally, consumers question the cost to the federal treasury of income transfer to farmers. Income transfers to farmers ranged from $4.6 billion to $16.7 billion from 1984 through 1989. U.S. Gen. Accounting Office, Financial Audit: Commodity Credit Corporation's Financial Statements for 1989 and 1988 9 (Pub. No. AFMD-9105, July 1991). Total program expenditures, including price support loans and other costs, were higher, exceeding $26 billion in 1986 and $22 billion in 1987. U.S. Gen. Accounting Office, Farm Programs: Price and Income Support Programs for Fiscal Years 1987-89 7 (Pub. No. RCED-88-144FS, Apr. 1988).

Income transfers to farmers also provoke disputes over farmers' wealth. One view is as follows:

> Per capita income of farmers has exceeded per capita income of nonfarmers every year since 1986. Historically, farm income was below nonfarm income per capita except for the unusual years of 1973 and 1974. In the future, per capita incomes of farmers, from all sources, will be above that of nonfarmers.
>
> 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 Forster, *Look-*

Christopher R. Kelley, Lindquist & Vennum, Minneapolis, MN *ing forward to choices for the 21st century*, Choices, Fourth Quarter 1993, at 26, 28; *see also* Bruce Gardner, *Demythologizing farm income*, CHOICES, First Quarter 1993, at 22, 23 (asserting that "the average farm household is estimated to have 26 percent higher income than the nonfarm household in 1991"). Others believe that the "average income for the two groups are roughly equal, not that farmers' income is more than 20 percent greater," because the higher income attributed to farmers included receipts of vertical integrators and other "nontraditional" farmers. Mary Ahearn, *Letters: An exchange about "Demythologizing farm income,"* Choices, Fourth Quarter 1993, at 40; *see also* U.S. Gen. Accounting Office, Net Farm Income: Primary Explanations for the Difference Between IRS and USDA Figures (Pub. No. RCED-93-113, June 1993) (explaining why the IRS showed net farm income in 1989 at $4.2 billion, while the USDA reported it at $49.9 billion).

Of course, criticism of the federal farm programs is not new. The federal farm programs have withstood years of criticism. Venerated or not, the programs have endured:

> During more than half a century, the commodity programs have been built into land values, mortgaged indebtedness, living levels, community services, and expectations. Their abrupt termination would be exceedingly harsh to many individuals and communities. Even some who regret that the programs have continued are reluctant to terminate them. Some say we have passed the point of no return. Perhaps the main reason for continuing them is the undoubted pain of their discontinuance. We are hooked on them; they are a form of addiction.

Don Paarlberg, *Sources and Uses of Agriculture's Political Power*, 37 Drake L. Rev. 175, 180 (1987-88); *see also* C. Ford Runge, *Economic Implications of Wider Compensation for "Takings" or, What If Agricultural Policies Ruled the World?*, 17 Vt. L. Rev. 723, 737-38 (1993) ("The overall effect of these subsidies is to create a system of entitlements in which it is expected, even demanded, that government continue to regulate the agricultural sector.... Given the rent seeking behavior of the powerful commodity groups, the only check on such spending in recent years has been general budget deficits."). Yet, perhaps more so now than the prospects for the current programs' long-term continuation are uncertain. The reasons for that uncertainty are numerous, and they arise from forces operating both within and without the agricultural sector.

Stated broadly, the external forces working against the programs' long-term continuation include the nation's increasing urbanization and the attendant loss of political support for commodity programs. Whatever ability agriculture previously had to control its own policy destiny is not there today, and federal farm policymaking is no longer the exclusive province of the agriculture sector and the congressional agriculture committees.

Federal budgetary constraints and demands to use available funds to meet needs other than supporting farm income will continue to lead to a reduction in income transfers to farmers. For example, the freezing of program crop yields in the 1985 farm bill and the "triple-base option" in the Omnibus Budget Reconciliation Act of 1990, reflect the farm programs' increasing vulnerability to competing demands for federal funds. The trend to reduce farm program costs is likely to continue even though, based on estimated fiscal 1993 farm program outlays of $17 billion, "completely eliminating CCC outlays would at best reduce the projected 1993 deficit by 5 percent assuming no increase in other federal outlays or decrease in federal receipts as a consequence of the program elimination." James D. Schaub & Daniel A. Sumner, *The deficit and agriculture*, Choices, First Quarter 1993, at 10, 11, 32

Even in the competition for funds for rural America, farmers will not necessarily prevail. The linkage between farmer prosperity and the economic well-being of rural America is increasingly being questioned. "Agriculture is no longer the major source of employment in rural America, and it is no longer the major source of income for the majority of farmers." Karl N. Stauber, *The Diversity of Rural America*, AGRIC. OUTLOOK, Jan.-Feb. 1994, at 23. Preliminary estimates of farm operator income in 1992 show an average income of $40,068, with almost ninety percent coming from off-farm sources. Even "commercial" farms with gross farm sales of at least $50,000 depend heavily on off-farm income:

> The 54 percent of farm operator households in the group of viable commercial farms are viable because of their success in off-farm occupations. These households lost an average of $817 farming in 1992, but their off-farm income brought average household income to over $50,000.

Janet Perry & Bob Hoppe, *Off-Farm Income Plays Pivotal Role*, Agric. Outlook, Nov. 1993, at 3, 4. As the relative economic significance of agricultural production continues to decline even in rural counties, strategies to promote rural development are less likely to continue to be premised on transferring income to farmers. In other words, the following may become the prevailing view:

> The myth of rural dependence on farming is not only inconsistent with the socioeconomic realities of most rural areas; it also serves as an obstacle to the emergence of nonfarm rural development programs. Continuing the myth affords legitimacy to commodity programs that have little impact on most rural people. It also hides or plays down the existing transformation of the rural economy and society. The trailer park and the manufacturing plant are more characteristic of rural people's lives and livelihood than are family farms. To the extent that a large population of farm families rely on off-farm income, we are now missing the best opportunity for helping that plurality by facilitating the development of more viable nonfarm rural economies. What we urge is a simple understanding: farm policy should be taken for what it is, namely, industrial policy with some economic benefits for farmers and their industrial partners.

William P. Browne, Jerry R. Skees, Louis E. Swanson, Paul B. Thompson & Laurian J. Unnevehr, Sacred Cows and Hot Potatoes: Agrarian Myths in Agricultural Policy 35 (1992).

Public support for new environmental initiatives will add to the programs' vulnerability. Traditional farm programs are no longer universally viewed as the most desirable means of achieving environmental goals. Many believe that instead of conditioning eligibility for farm program payments on compliance with rules designed to promote soil and wetland conservation, such requirements should be made freestanding and applicable to all farmers.

The trend toward a "global marketplace" and the related international trade arrangements, such as the General Agreement on Tariffs and Trade (GATT), will add to the pressure to reduce or restructure the federal government's financial support of agricultural interests. Significantly, the demands to reduce the commodity programs' negative effects on the nation's competitiveness in international markets have come largely from groups within the agricultural sector, particu-

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larly those who handle and market program commodities. These pressures and demands have already reduced the role of farm programs in production decisions for corn, wheat, rice, and upland cotton as farm programs have become more market-oriented through reductions in "payment acres," or base acreage eligible for program payments.

Emerging technologies, especially developments in biotechnology, also may reduce the economic significance of existing farm programs. Biotechnology is likely to lead to more exclusive reliance on private contractual arrangements for the production and sale of crops now supported by the federal commodity programs and sold on public markets. Over time, biotechnology and the structural changes it produces by contributing to vertical integration in agriculture may be among the primary forces leading to the demise of traditional commodity programs. The integration of production agriculture into the processing and marketing phases of food and fiber production is expanding the "industrialization" of agriculture, and this expansion

> will have a significant long-term effect on farm policy. The farmers' safety net, or risk sharing, will come to depend as much on their link to an industrialized system as on federal farm programs. The rationalization for a public system to protect the independent commodity producer—the family farmer—will begin to erode. Such a turn of events will require significant rethinking of our farm policy agenda and a further rationalization for its continuance.

Thomas N. Urban, *Agricultural Industrialization: It's Inevitable*, Choices, Fourth Quarter 1991, at 4, 6.

Finally, farmer dissatisfaction and frustration with the federal farm programs may erode participation and support. Although participation rates remain relatively high, farmer dissatisfaction with the costs in time and money incurred as a result of program participation has increased as the program rules have become more complex. While much attention has been paid to achieving social, economic, and environmental goals through federal commodity programs, very little effort has been made to reduce or simplify program rules. To the contrary, the trend has been to increase the transaction and opportunity costs of federal farm program participation, a trend largely brought about by the efforts of those who desire to limit program eligibility through "means testing" and payment limits.

An emerging question is whether the 1995 farm bill will produce significant changes in federal farm policy. Assuming that any significant changes will be implemented in phases, the real question is whether the 1995 farm bill will alter the operational principles and direction of federal farm policy. Those who think not, stress the Administration's and the Congress' preoccupation with other issues. They also emphasize the considerable strength inertia and the status quo possess in the political process.

Even a "stay the course" approach will likely produce some changes, albeit not fundamental ones. For example, as a measure to reduce budget exposure, the base acreage eligible for program payments may be reduced by as much as ten percent. Such a reduction in payment acres would be accomplished by increasing the current "normal flex acres" from fifteen to twenty percent. Under the current "payment acres" and associated planting flexibility provisions, the maximum acreage allowable for payment is eighty-five percent of the crop acreage base established for the crop, minus acreage "set aside" under the acreage reduction program. The net effect of the resulting "nonpayment acres" is a fifteen percent reduction in potential deficiency payments. *See generally* U.S. Congress, Congressional Budget Office, Farm Program Flexibility: An Analysis of the Triple Base Option (1989). While reducing payment acres can result in budget savings, the amount of those savings is inherently unpredictable from year-to-year because deficiency payments are tied to market prices. Also, the programs' attractiveness to farmers is reduced as payment acres are reduced. Thus, reductions in payment acres tend to work against the programs' supply control and conservation purposes without adding predictability to the budget process.

In recognition of the problems associated with the current farm program mechanisms, various proposals for significantly re-directing federal farm policy are circulating. Some of the proposals have circulated before, such as the "decoupling" of payments from production. In the past, proposals to separate payments from production have been designed to reduce or eliminate the trade-distorting effects of farm income and price support. *See* Agricultural Policy Working Group, Agricultural Policy for the 1990's (1989) (The membership of the Agricultural Policy Working Group includes Cargill, Inc.; Louis Dreyfus Corporation; Monsanto Company; and other commodity traders, input suppliers, and transportation companies).

Also, while usually not called "de-coupling," proposals to "target" program payments or to "means test" potential recipients remain alive. In effect, these proposals would replace or reduce the programs' link to production by limiting eligibility to farmers who met specified individual or farm income criteria. For example, the Clinton Administration has proposed denying program payments to persons with off-farm income of $100,000 or more. Mary Ahearn & Janet Perry, *Change Proposed for Farm Payment Limits*, Agric. Outlook, Apr. 1993, at 25. In part, such proposals are a reaction to the distributional effec of the current programs which tend to favor larger producers who receive the payments and landowners whose wealth reflects the capitalized value of program payments.

Newer "de-coupling" proposals, however, have urged that payments be tied to compliance with environmentally responsible farming practices in lieu of being linked to production. In their call for "green payments," such proposals argue for a new premise for transferring income to farmers. That premise, environmental protection, would likely result in a new set of winners and losers among farm program participants, particularly if the protection of coastal waters became a predominant goal or if other goals were weighted in favor of farm proximity to population centers. Among other things, such goals would likely shift payments from the Midwest to both coasts.

Also receiving recent attention is the "revenue guarantee approach." Emanating out of farm group discussions in Iowa,

> [t]his option would generally involve guaranteeing a farmer's return per acre for a given crop at a prespecified level.... Most revenue guarantee designs involve a 'revenue target,' which may be a fixed revenue that does not necessari change from year to year, or a moving average of past revenues. Under most designs, farmers would be guaranteed that revenue per acre would not fall below some fraction of that revenue target.

Joy Harwood, Dick Heifner, Keith Coble, Robert Dismukes & Sam Evans, *Streamlining Farm Policy: The Revenue Guarantee Approach*, Agric. Outlook, Apr. 1994, at 24. Generally recognized as offering the promise of lowered transaction costs, "a revenue guarantee program would not necessarily reduce Federal outlays for farm programs, nor would it necessarily increase farm incomes on average, and it could change the distribution of government payments. Overall, the effect on government outlays would depend largely on the level of the target compared with actual farm revenues." *Id.* at 29.

Whether either "green payments" or "revenue guarantees" will define federal farm policy in the coming decades remains to be seen. Nevertheless, what can be seen in the two proposals is that the only common element they share is the transfer of income to farmers. The two proposals do not agree on why income should be transferred to farmers.

If farm programs are to survive, they must be able to demonstrate their relevance and value to the American people.

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There must be some consensus on why income should be transferred to farmers. In other words, "[m]ore than anything else, agriculture would best be served rough comprehensive policy reform that ,stores a common sense of direction to government's support of the food and fiber system." William P. Browne, *Agricultural Policy Can't Accommodate All Who Want In*, Choices, First Quarter 1989, at 9, 11 ("Agricultural policy cannot be all things to all people and even pretend to address the development and maintenance of an internationally competitive U.S. agriculture.").

Any policy that transfers income to farmers presents three fundamental questions: why should income be transferred to farmers; who should receive the income; and how much should an individual farmer be permitted to receive. In combination, these questions address the equities presented by income transfers to farmers. While the equities involve relationships internal to agriculture, such as whether one group of farmers should be favored over another, the equities that ultimately matter are those between the American farmer and the American public. So long as the American public receives benefits commensurate with its investments in American agriculture, that relationship will be an equitable one.

The challenge presented by the 1995 farm bill will be to decide whether it is e to undertake a thoughtful, thorough examination of what federal farm policy should be for the second half of the decade and beyond. Whether that challenge is confronted will be answered in the coming months. An early indication of the answer may be revealed by an agricultural policy "summit" now in the planning stages in Congress and the Administration. Of course, even if the summit provides new perspectives on the future of federal farm programs and policies, it will fall to Congress to chart the direction of federal farm policy for the 1990s.

Attorney fees in lender liability actions

Under the FmHA's guaranteed loan program, the originating private lender and the FmHA enter into a "Lender's Agreement" wherein the lender is allowed "reasonable liquidation costs." *See* 7 C.F.R. pt. 1980, subpt. A, app. B at 549 (1993). In addition to representing reimbursements to the lender, allowed liquidation costs increase the FmHA's liability as a guarantor because the liquidation costs are deducted from the gross proceeds received from the disposition of collateral. The U.S. Court of Federal Claims has held that "reasonable liquidation costs" do not include the lender's attorney fees and costs incurred in successfully defending against a lender liability claim challenging the validity of the debt guaranteed by the FmHA. *Peoples Nat'l Bank v. United States*, 30 Fed. Cl. 391 (1994).

In *Peoples Nat'l Bank*, the lender filed with the FmHA a claim of loss reflecting attorney fees and costs totaling $273,451.25. The fees and costs were incurred in the lender's protracted, but successful, defense of a lender liability action brought by the borrowers. Alleging a failure of consideration and other claims, the borrowers had sought to cancel and rescind the FmHA guaranteed loan agreements. The FmHA partially rejected the lender's loss claim, limiting the attorney fees and costs to ten percent of the unpaid debt. The agency's position was ultimately upheld by the Director of the FmHA's National Appeals Staff.

Before the Court of Federal Claims, the lender renewed its argument that "reasonable liquidation costs" included the fees and costs incurred in defending against the lender liability action "since those costs were no less necessary to the eventual liquidation than the more immediate costs incurred in a foreclosure action." 30 Fed. Cl. at 394. The court, however, rejected the lender's argument on two principal grounds. First, the court construed the term "liquidation" to mean "a lender's right, arising upon the borrower's default, to terminate the loan contract and reduce its collateral to cash." *Id.* at 395. In other words, "liquidation" referred to the exercise of the "contract remedy" of "obtaining authorization for and in conducting a sale of the debtor's collateral..*d*.

Second, the court found that the FmHA's "secondary obligation" to pay the guaranteed portion of the debt assumed "the existence of a valid and enforceable loan arrangement." *Id.* Because the lender liability litigation involved the issue of "whether there was any enforceable contract at all," the fees and costs incurred by the lender in that litigation were incurred "to affirm the validity and enforceability of [the lender's] loan agreement." *Id.* In other words, "the fees related to the matter of contract liability and not contract remedy." *Id.* For that reason, the fees at issue were not liquidation costs.

The lender also challenged the allowed fees and costs, contending the fees should have been based on a "lodestar" approach instead of a percentage of the unpaid debt. Based on the advice of its counsel, the FmHA had limited the allowed fees and costs to ten percent of the unpaid debt. The court, however, rejected the lender's challenge to the percentage method used by the FmHA to allow fees. The court noted that the lender had not challenged either the method or the specific percentage used in its administrative appeal although it had the opportunity to do so. Finding the FmHA's decision to be supported by the evidence, the agency's decision was allowed to stand. *Id.* at 395-96.

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

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* in the month of April, 1994.

1. USDA; Selection and functions of Agricultural Stabilization and Conservation State, County, and Community Committees; final rule; effective date 4/5/94. 59 Fed. Reg. 15827.

2. USDA; Recordkeeping requirements for certified applicators of federally restricted use pesticides; proposed rule; comments due 6/6/94. 59 Fed. Reg. 16400.

3. FCIC; Program changes improving the actuarial soundness of the Federal Crop Insurance Program. 59 Fed. Reg. 16167.

4. FCIC; Nursery crop regulations; proposed rule. 59 Fed. Reg. 19661.

5. CCC, ASCS; Non-emergency haying and grazing on Conservation Reserve Program grasslands; notice of withdrawal. 59 Fed. Reg. 16780.

6. CCC; Revisions to the upland cotton user marketing certificate program; final rule; effective date 4/12/94. 59 Fed. Reg. 17917.

7. FmHA; Revisions to the direct emergency loan instructions to implement administrative decisions pertaining to the applicant loan eligibility calculation, appraisals, and crop insurance; final rule; effective date 4/8/94. 59 Fed. Reg. 16771.

8. ASCS; NAFTA; end-use certificate system. 59 Fed. Reg. 17495.

9. FCA; Statement of policy on system institution activities involving the potential for nonexclusive territories; comments due 6/13/94. 59 Fed. Reg. 17543

10. PSA; Central filing system; Oklahoma. 59 Fed. Reg. 18098.

11. Forest Service; Range management; grazing fees; proposed rule; comments due 7/28/94. 59 Fed. Reg. 22094.

12. Forest Service; Management of grazing use within rangeland ecosystems; proposed rule; comments due 7/28/94. 59 Fed. Reg. 22079.

—*Linda Grim McCormick, Alvin, TX*

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

It's not too early to begin planning for the Annual Educational Conference — October 21-22 in Memphis, Tennessee

The meeting will be held in The Peabody Memphis, the "South's Grand Hotel," which has recently undergone a $7 million renovation. Also in the downtown area, a new trolley system serves Main Street from the Civil Rights Museum to the Pinch District, an Irish immigrant area. Other area attractions include Graceland, the late? Elvis Presley's Memphis mansion, and Beale Street, known as the home of the blues, which also features boutiques with clothing, arts and crafts, and specialty items as well as walking tours.

The program will feature topics including the Annual Review of Agricultural Law covering substantive issues and government regulations and services; issues in Ag Sales and Ag Production Contracts; Public Agricultural Law; UCC Article 7; Business Organizational Structures; Estate Planning; Rural Enterprise & Empowerment; Environmental Law; UCC Article 7 and International Agricultural Activities. A one hour ethics session will also be presented. We have invited Secretary of Agriculture Mike Espy to be the featured luncheon speaker and ask you to please join us as well in Memphis this fall.

P.S. Election ballots have been mailed to all members whose dues are current. If you have paid your 1994 dues and have not received a ballot, please bring this to our attention as soon as possible.

—William P. Babione, Director, AALA