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- Eighth Circuit rules on Ch. 12 requirements for livestock operation
- The Farm Bill reviewed

Farm Credit System right of first refusal considered by Fourth Circuit

The Fourth Circuit has held that the Agricultural Credit Act of 1987 requires that former owners of real estate acquired by Farm Credit System institutions be given the right to purchase that property at appraised value before it is offered at a public auction. *Payne v. Federal Land Bank of Columbia*, 916 F.2d 179 (4th Cir. Oct. 16, 1990)(1990 U.S. App. LEXIS 18206).

The district court had held that auction sales need not be preceded by an opportunity for the former owner to buy the property at its appraised value. *Payne v. Federal Land Bank of Columbia*, 711 F. Supp. 851, 859-60 (W.D.N.C. 1989). In vacating the district court's decision and remanding the matter for further proceedings in the district court, the Fourth Circuit expressly found that the Farm Credit Administration's regulations, which fail to provide that former owners are to be given a thirty-day period within which to purchase the property at its appraised value prior to a public offering, were not a sufficiently reasonable interpretation of the statute to be accepted by a reviewing court. *See* 12 C.F.R. § 614.4522.

The Fourth Circuit's conclusion regarding the sequence of the right of first refusal offerings required under 12 U.S.C.A. section 2219a (West 1989) is consistent with the conclusions reached in *Leckband v. Naylor*, 715 F. Supp. 1451, 1455 (D. Minn. 1988), *appeal dismissed*, Nos. 88-5301 MN, 89-5141 MN (8th Cir. May 5, 1989), and *Martinson v. Federal Land Bank of St. Paul*, 725 F. Supp. 469 (D. N.D. 1988), *appeal dismissed*, No. 88-5252 ND (8th Cir. May 5, 1989). *See also In re Jarrett Ranches, Inc.*, 107 Bankr. 969, 975-76 (Bankr. D.S.D. 1989)(invalidating the particular bidding process used by a Farm Credit Bank under the public offering provisions of the right of first refusal).

Significantly, in resolving the claim before it that the right of first refusal provisions of the 1987 Act had been violated, the Fourth Circuit did not address the issue of whether the Act implies a private right of action. Other circuits, including the Eighth Circuit, have held that the 1987 Act does not imply a private cause of action for its enforcement. *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990)(*en banc*); *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990); *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 867 (1990).

—*Christopher R. Kelley*

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Pre-enforcement review of CWA section 404 compliance orders precluded

The Fourth and Seventh Circuits have recently held that Congress intended to preclude pre-enforcement review of compliance orders issued by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344. *Southern Pines Associates v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. E.P.A.*, 902 F.2d 567 (7th Cir. 1990). These are cases of first impression.

The Clean Water Act prohibits the discharge of pollutants, without a permit, into waters of the United States. 33 U.S.C. § 1311(a). "Waters of the United States" includes wetlands adjacent to navigable waters. 33 C.F.R. § 328.3(a)(7). The Corps issues permits for the discharge of dredged or fill material pursuant to section 404. 33 U.S.C. § 1344. Both EPA and the Corps may issue compliance orders directing that the

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filling of wetlands without a permit cease. 33 U.S.C. § 1319(a). EPA may also bring an enforcement action in district court to enjoin violations of the Act. 33 U.S.C. § 1319(b).

Potential consequences for Clean Water Act violations are severe. Penalties include fines of up to $25,000 per day for each violation and imprisonment for up to three years. 33 U.S.C. § 1319(d) & (c)(2)(B). *See, e.g. United States v. Key West Towers, Inc.*, 720 F. Supp. 963 (S.D. Fla. 1989).

Farmers are concerned with wetland regulation because much agricultural land can be classified as wetlands subject to the Corps' section 404 jurisdiction. Section 404 does contain an exemption from permit requirements for normal farming activities. 33 U.S.C. § 1344(f)(1)(A). The exemption, however, is limited by a recapture provision. A permit is still needed if the discharge activities bring an area into a new use, for example clearing trees to increase cropland. 33 U.S.C. § 1344(f)(2). Farmers may encounter section 404 problems when they engage in activities such as levee construction. *See, e.g., McGown v. United States*, ___ F. Supp. ___, 1990 WL 153223 (E.D. Mo. 1990). On September 26, 1990, the Corps limited its section 404 jurisdiction by stating that wetlands cropped before December 23, 1985, are not subject to section 404 permit requirements. Such prior converted cropland has been altered to the extent that it no longer exhibits important wetland values. The Corps will continue to exercise jurisdiction over farmed wetlands. Farmed wetlands are wetlands that were altered and cropped before December 23, 1985, but continue to exhibit important wetland values. *See* Regulatory Guidance Letter, No. 90-7, "Clarification of the Phrase 'Normal Circumstances' as it pertains to Cropped Wetlands" (Sept. 26, 1990).

Landowners have challenged the Corps' assertion of section 404 jurisdiction by seeking injunctive and declaratory relief in district court. Landowners assert that immediate review of compliance orders is necessary to determine if wetlands exist. If the land does not contain wetlands, the Corps is without jurisdiction and a permit is not required. Landowners argue that this issue must be resolved before proceeding further. Otherwise, a landowner is faced with the choice of complying with the order and suffering economically or continuing the activity, subject to penalties. Prior to the Fourth and Seventh Circuit decisions, it was unclear whether judicial review of compliance orders is available before EPA has commenced an action to enforce the compliance order.

The Administrative Procedure Act provides that judicial review is available except to the extent that statutes preclude review. 5 U.S.C. § 701(a)(1). The Clean Water Act does not expressly preclude review of compliance orders. However, the language of a statute, its structure, objective, and history may impliedly preclude pre-enforcement review. *See, e.g., Block v. Community Nutrition Institute*, 467 U.S. 340, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984).

In *Hoffman Group*, the plaintiff discharged fill material into wetlands without a section 404 permit, and EPA subsequently issued a compliance order. The plaintiff filed suit in district court seeking to enjoin EPA from enforcing the compliance order. The district court dismissed the action for lack of subject matter jurisdiction. *Hoffman Group, Inc. v. E.P.A.*, 29 Env't Rep. Cas. (BNA) 1180 (N.D. Ill. 1989).

The Seventh Circuit affirmed, holding that Congress has impliedly precluded review of Clean Water Act compliance orders. First, the court focused on the enforcement provisions in the Clean Water Act. Following detection of a violator, EPA has the option of issuing a compliance order or commencing a civil action for appropriate relief. EPA need not issue a compliance order before bringing an enforcement action. The court determined that pre-enforcement review of a compliance order effectively eliminates EPA's option of bringing an enforcement action. The Seventh Circuit decided that Congress did not intend such a result. Instead, compliance orders will be reviewed when and if EPA brings an enforcement action. Further, if an administrative penalty is assessed, a landowner may seek judicial review as provided by statute. 33 U.S.C. § 1319(g)(8). Thus, the court found implied preclusion from the structure of the enforcement provisions.

The Seventh Circuit also relied on cases that held that pre-enforcement review of compliance orders under the Clean Air Act (CAA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is impliedly precluded. In 1986, Congress expressly precluded pre-enforcement review under CERCLA. 42 U.S.C. § 9613(h).

In *Southern Pines Associates v. United States*, 20 Envtl. L. Rep. (Envtl. L. Inst.), 20,003 (E.D. Va. 1987), the plaintiff sought pre-enforcement review of a compliance order. The district court dismissed the action for lack of subject matter jurisdiction. On appeal, the Fourth Circuit followed *Hoffman Group*, finding clear and convincing evidence that Congress intended to preclude pre-enforcement review of compliance orders. Specifically, the Fourth Circuit cited legislative history to demonstrate that the enforcement provisions in the Clean Water Act were modeled after the enforcement provisions in the CAA. *See, e.g.*, S. Rep. No. 92-414, 92d Cong., 1st Sess. 53 (1971), *reprinted in* U.S. Code Cong. Admin. News 3730 (1972). Since pre-enforcement review is impliedly precluded under the CAA, it follows that such review is impliedly precluded under the Clean Water Act.

The Fourth Circuit held that the structure of the Clean Water Act, the CAA, and CERCLA indicates that "Congress intended to allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation." 912 F.2d at 716.

Finally, the court rejected the plaintiff's claim that failure to give notice and opportunity to be heard prior to the issuance of the compliance order was a denial of fifth amendment procedural due process. The court found that the plaintiff is not subject to penalties or injunction until EPA brings an enforcement action, at which time the plaintiff will be afforded judicial review.

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Law review articles on agricultural law

The following is a listing of recent law review articles relating to agricultural law.

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Lake & Newberry, *Current Labeling Issues Concerning Dairy Products*, 45 Food Drug Cosm. L.J. 273-377 (1990).

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Chapter 12

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Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 Hamline J. Pub. L. & Pol'y 321-345 (1989).

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Fruits and vegetables

Himmelberg & Stabbe, *The 1984 PACA Amendments After Six Years: Producing Seller's Trust and Lenders' Disgust*, 43 Ark. L. Rev. 523-572 (1990).

Hunting

Sands & Bedecarré, *Convention on International Trade in Endangered Species: The Role of Public Interest Non-governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban*, 17 B.C.L. Envtl. Aff. L. Rev. 799-822 (1990).

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Hammonds, *A U.S. Perspective on the EC Hormones Directive*, 11 Mich. J. Int'l. L. 840-844 (1990).

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Oshio, *Indigenous Land Tenure and Nationalization of Land in Nigeria*, 5 Land Use & Envtl. L. 685-701 (1990).

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Water rights: agriculturally related

Looney, *An Update on Arkansas Water Law: Is the Riparian Rights Doctrine Dead?*, 43 Ark. L. Rev. 573-630 (1990).

Note, *Water Law —Quantification of Federal Reserved Indian Water Rights — "Practically Irrigable Acreage" Under Fire: The Search For a Better Legal Standard.* [In re the General Adjudication of All Rights to Use Water in the Big Horn River System, *753 P.2d 76 Wyo. 1988* aff'd mem. sub nom. Wyoming v. United States, *109 S. Ct. 2994, 1989*], 25 Land & Water L. Rev. 417-434 (1990).

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Weber, *Effects of Water Transfers on Rural Areas: A Response to Shupe, Weatherford and Checchio*, 30 Nat. Resources J. 428-430 (1989).

Anyone desiring a copy of any of these articles should contact the law school library nearest them.

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Section 1631: developments in farm products

by Drew L. Kershen and J. Thomas Hardin***

Introduction

On December 23, 1986, 7 U.S.C. section 1631 became effective and preempted the farm products exception of U.C.C. section 9-307(1). After its effective date, section 1631(d) provided that farm products buyers, commission merchants, and selling agents throughout the United States take free of any security interest unless secured parties give actual notice to farm products buyers, commission merchants, or selling agents of their security interests.

Section 1631 sets forth two methods by which secured parties can give this actual notice. First, secured parties can directly notify buyers, commission merchants, and selling agents of security interests through the pre-sale notification system (PNS). Second, secured parties can give notice through an effective financing statement (EFS) filed with a centralized notification system (CNS) created by state legislatures. If a state adopts a CNS, the state's secretary of state (or designee) operates the CNS by accepting EFS's and compiling them into master lists for distribution to CNS registrants. Both the PNS and the CNS chosen by various states must comply with detailed and stringent statutory requirements as set forth in section 1631.[3] This article reports on developments that have occurred in farm products financing resulting from section 1631.

In summary, section 1631 has instigated significant legislative activity as states decided to create CNS's. Section 1631 has not created, however, significant case law. This judicial inactivity likely is a consequence of the better economic climate in agriculture in the late 1980's for it was from farm and ranch failures that the conflicts arose about farm product security interests between lenders and buyers, commission merchants, and selling agents. On the other hand, cases take time to ripen and it may be that section 1631 cases are just now being filed or beginning to work their way from trial courts to appellate levels. Despite the judicial inactivity thus far, section 1631's PNS's and CNS's exist and must be considered in any farm products financing transaction. Moreover, if economic hardship once again becomes prevalent in farming and ranching communities, section 1631 litigation will assuredly become a prominent feature of the agricultural law landscape.

State responses to section 1631

Section 1631 permits states the choise of creating a centralized notification system. However, if a state does not create a CNS, then section 1631 automatically mandates that buyers, commission merchants, and selling agents take free of security interests in farm products unless secured parties give a pre-sale notification system notice.

The authors and one state attorney general take the position that CNS and PNS are mutually exclusive systems. If this position is correct, once a state adopts a CNS, then PNS is no longer an available alternative for giving notice with regard to security interests against farm products produced in that state. By contrast, the United States Department of Agriculture and some other commentators take the position that the two systems are concurrent alternatives through which secured parties can give buyers, commission merchants, and selling agents actual notice of security interests against farm products. These two positions on interpreting Section 1631 present an area of potential litigation about farm products financing.[4]

CNS states and PNS states

As of October 1, 1990, seventeen states had a CNS. These states are: Alabama, Idaho, Louisiana, Maine, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, West Virginia, and Wyoming. In these states, secured parties must file EFS's claiming a security interest in described farm products produced in that state with the state CNS. Failure to file EFS's with CNS means that secured parties cannot hold buyers, commission merchants, or selling agents liable for security interests in farm products produced in that state.

Reflecting section 1631's purposeful recognition of federalism, the seventeen states' CNS's are not identical. To become a CNS state, the secretary of state must apply to the USDA for certification of the CNS as enacted by the state. Section 1631(c)(2) sets statutory criteria to gain certification, but states have significant discretion as to the precise structure and details of a CNS. Hence, while each state CNS has a similar pattern, each state CNS is also unique.

The remaining thirty-three states and the territories of the United States are PNS states. In these states, secured parties must give actual notice directly to buyers, commission merchants, and selling agents of farm products produced in the PNS states. Section 1631 provides the statutory scheme of PNS because states have not acted to substitute CNS for PNS. Section 1631, rather than state law, is the common governing statute. Consequently, except for the preemptive impact section 1631 has upon state laws in PNS states, PNS is identical in all thirty-three states.[5]

Arkansas had a CNS from December 23, 1986 (when section 1631 became effective) to July 1, 1989. For various reasons, Arkansas repealed its legislation creating a CNS. After July 1, 1989, Arkansas became a PNS state. Of the seventeen states with CNS, none are likely to emulate Arkansas and switch from CNS to PNS.

West Virginia has a certified CNS. However, as of October 1, 1990, no buyers, commission merchants, or selling agents had registered with CNS to receive master lists of EFS's filed with the secretary of state. Consequently, despite the West Virginia CNS being in existence since June 20, 1989, the secretary has not created or distributed a master list.

On October 1, 1990 Colorado had a CNS application under review by USDA for certification. Texas has bills pending before its legislature to create a CNS. The Texas legislature will consider these CNS bills during the 1991 legislative session. Indiana has a legislative committee studying the adoption of CNS with a report due when the 1991 legislature meets. Thus, within the next few months, it is possible that these three states might change from PNS states to CNS states. Of course, other states could also take action in 1991 to change from PNS to CNS.

CNS states: all farm products or a specified list

Even if a state enacts a CNS, the USDA has determined that a state may establish CNS for a specified list of farm products while leaving other farm products under PNS.[6] Because section 1631 allows states discretion whether to adopt a CNS, the USDA correctly interpreted section 1631 to allow states to adopt a CNS limited to specified farm products.[7]

In response to the USDA interpretation

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of section 1631, six states (Alabama, Idaho, Louisiana, Nebraska, New Mexico, and Oklahoma) have CNS's that apply only to a specified list of farm products. While the lists in these states are extensive, covering the major farm products produced in the state, if a farm product is not on the list, secured parties can protect a security interest in an unlisted farm product only by giving PNS notice to buyers, commission merchants, and selling agents.[8]

Nine states (Maine, Mississippi, Montana, New Hampshire, North Dakota, Oregon, Utah, Vermont, and West Virginia) have CNS's that cover all farm products. Two states (South Dakota and Wyoming) have CNS's that cover all farm products except timber to be cut. The South Dakota and Wyoming exception for timber to be cut raises the question as to whether timber is a farm product and whether forestry is a farming operation under section 1631.[9] Other states have also listed products that raise questions as to whether they are section 1631 farm products.[10]

States can apply to the USDA to add farm products to the specified list.[11] Similarly, states can apply to the USDA to change from a specified farm products CNS to a CNS covering all farm products.[12] This latter right is important to states that have discovered that they must seek USDA approval each time they want to add a farm product to their CNS system.

Impact of technology on CNS

Technology has made the section 1631 law-in-action quite different from the section 1631 law-in-theory as passed by Congress. Three examples make this clear.

Registered versus unregistered status

1. Section 1631 in theory. Once a secured party has filed an EFS with CNS, buyers, commission merchants, and selling agents are automatically accountable for that filed EFS unless they have registered with the secretary of state to receive CNS master lists compiled from filed EFS's. If they register for such CNS master lists, buyers, commission merchants, and selling agents are responsible only for security interests that are reported on master lists and only after the lists are received. Thus, registered buyers, commission merchants and selling agents must eceive actual notice of farm products security interests. By contrast, if buyers, commission merchants, and selling agents fail to register, they are accountable for all filed EFS's through constructive notice. The distinction between registered status and unregistered status in CNS is very important because it is the difference between being held liable based on actual, rather than constructive, notice of filed EFS's.

Section 1631's legislative history indicates that Congress assumed that most buyers, commission merchants, and selling agents in CNS states would register to receive CNS master lists. The assumption was sound because, by registering, buyers, commission merchants, and selling agents avoid the burdens of having to search for filed EFS's before engaging in farm products transactions.

Congress realized, however, that some buyers, commission merchants, and selling agents would not register. For these unregistered buyers, commission merchants, and selling agents, Congress mandated in section 1631(c)(2)(F) that each CNS have a query system whereby unregistered buyers, commission merchants, and selling agents can promptly learn about filed EFS's. When Congress passed section 1631 in 1985, Congress assumed that states would adopt query systems that allowed queries by mail and/or telephone.

2. Section 1631 in action. Computer technology has challenged Congress' assumption in some CNS states. If a CNS state offers direct computer access as a query method option, unregistered buyers, commission merchants, and selling agents can instantaneously access the CNS database 24 hours per day, 7 days per week. Constructive notice with its attendant obligation to search for filed EFS's is not so burdensome if EFS information is available at all times from any office with a personal computer. Moreover, if the cost of direct computer access is cheaper than the cost of receiving CNS master lists, buyers, commission merchants, and selling agents have an economic incentive to remain unregistered with CNS. Because of computer technology, secretaries of state (as CNS operators), buyers, commission merchants, and selling agents (in deciding to register or not register) are changing section 1631's CNS from an actual notice system (registrants) to a constructive notice system (nonregistrants) in states offering direct computer access.

3. Secretary of state responses to computer technology. Section 1631 prohibits direct computer access as a CNS master list distribution format for those who register with CNS because section 1631(c)(2)(E) requires that CNS registrants receive the CNS master lists in a tangible format (e.g., paper, microfiche, computer disk).[13] This tangible format requirement has been troublesome for secretaries of state who do not understand how section 1631 can permit, for registrants, CNS master list distribution through a computer diskette, but not CNS access through computer telecommunications. At the same time, section 1631(c)(2)(F) permits states to create direct computer access as a query system option for nonregistrants who have constructive notice of all EFS's filed with a particular state CNS.[14] In other words, section 1631 permits buyers, commission merchants, or selling agents to decide whether they desire to be accountable through actual notice based on CNS master lists received in a tangible format or to be accountable constructively for all filed EFS's while protecting themselves through CNS queries. Section 1631 allows buyers, commission merchants, or selling agents to so choose by being registrants or nonregistrants in CNS.

The USDA, secretaries of state, and commentators are just now realizing that computer technology makes the distinction between registrant and nonregistrant status very important.[15] As this legal fog clears, the following responses exist:

- Five states (Louisiana, Montana, South Dakota, Utah, and Wyoming) have created CNS direct computer access query options that the USDA has approved.
- Three states (Alabama, Mississippi, and Nebraska) have direct computer access affiliated with their CNS systems. However, these three states have not clearly understood that direct computer access is a CNS query system option for nonregistrants rather than a CNS master list distribution format for registrants. These states need to make this distinction clear.
- Two states (Oklahoma and Oregon) wanted to develop direct computer access for registrants but stopped its development when the USDA correctly objected that direct computer access was not a legally permissible CNS master list distribution format in lieu of tangible master lists. Once these two states realize that direct computer access is permissible as a nonregistrant query method, they may reapply to the USDA to add direct computer access as a query system option in their CNS's.
- Seven states (Idaho, Maine, New Hampshire, New Mexico, North

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Dakota, Vermont, and West Virginia) have shown no major inclination to create a direct computer access component in their CNS's.

Central filing vs. local filing with notice to the Secretary of State

Section 1631(c)(2) requires that a CNS be a statewide system. Hence, section 1631 expressly prohibits local filings maintained solely in local offices. At the same time, section 1631(c)(2)(A) also expressly allows local EFS filings if notice of the local EFS filings are sent to the secretary of state for inclusion in the statewide system.

When section 1631 was passed in 1985, the option for states to create a CNS with local filings that were thereafter sent to the secretary of state did not seem promising. If EFS's were filed locally, most people thought that the local clerk would thereafter have to send the filed EFS by ordinary mail to the secretary of state. Such mailing involved extra time, extra expense, and extra risk that the locally filed EFS would be misplaced or lost and never included in the statewide system. Locally filed EFS's that failed to reach the secretaries of state were ineffective against buyers, commission merchants, and selling agents.[16]

Nebraska, however, developed a CNS that has EFS's locally filed with the county clerks who are all connected through interactive computers with the secretary of state's office. Hence, as soon as an EFS is entered into the county clerk's filing system, the EFS is also instantaneously transmitted to the statewide CNS operated by the secretary of state.[17] By so designing its CNS, Nebraska not only allows local filings, but Nebraska concurrently permits CNS nonregistrants to query CNS by going to the local county clerk's office for information. By this local filing notice system, Nebraska provides widespread, easy access to CNS for both secured parties and buyers, commission merchants, and selling agents. At the heart of the Nebraska CNS, of course, is computer technology that allows the instantaneous transmission of data to and from county clerks and the statewide CNS at the secretary of state's office.

Beginning January 1, 1991, Louisiana is changing from a CNS in which EFS's are filed centrally with the Louisiana Department of Agriculture to a CNS patterned after the Nebraska CNS. After January 1, 1991, Louisiana too will use an interactive computer system that connects the local parish filing offices with the statewide CNS operated by the secretary of state.[18] North Dakota has a bill pending before its legislature for action during the 1991 legislative session that changes its CNS from a centrally filed system into a CNS with local filings that are sent to the secretary of state through a computer network. The North Dakota proposed legislation also uses the Nebraska CNS as a pattern.

Facsimile filing

In 1989, Montana became the first state to allow EFS filings through facsimile technology.[19] Although section 1631 allows a facsimile document to be an EFS document, the Montana law requires that the original document be filed within five working days of the facsimile copy.[20] If the original arrives within five working days, then the date of filing is the date the facsimile copy arrived; if the original arrives after five working days, the date of filing is the date the original EFS arrives.

Subsection 1631(c)(4)(A) defines an EFS as a statement that is an original or reproduced copy thereof. Subsections 1631(c)(4)(B) and 1631(c)(4)(C) require that EFS's be signed by the debtor and the secured party. Consequently, section 1631 allows facsimile filing as a reproduced copy so long as the signatures of the debtor and secured party are legible on the facsimile document. Hence, the Montana requirement that an original EFS document be filed within five days of the facsimile filing may not be a necessary requirement.

Louisiana and Oregon are presently considering facsimile filing. Louisiana is likely to require only that the facsimile document be filed. Other states undoubtedly will adopt some variant of facsimile filing.

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[1] 7 U.S.C. §§ 1631(c)(2) (CNS requirements), 1631(c)(4) (EFS requirements), 1631(e)(1) (PNS requirements).

[2] For a fuller discussion of these two positions, see D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ¶¶ 7.05, ND.03, OK.04[1] (1990).

[3] There is one exception. For both CNS and PNS, section 1631(f) says, "What constitutes receipt, as used in this section, [§ 1631] shall be determined by the law of the State in which the buyer resides." For the meaning and impact of section 1631(f), see D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ch. 6 (1990).

[4] 9 C.F.R. § 205.206 (1988).

[5] D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ¶ 8.03[2] (1990). Professors Keith Meyer (Kansas) and Don Pedersen (Arkansas), in conversations with the author, have expressed reservations about whether section 1631 is properly interpreted to allow CNSs limited to specified farm products. They wonder whether congressional intent was to allow states to adopt CNS in an "all or nothing" fashion.

[6] For example, if cattle and horses are on the specified list, then secured parties must file EFS's on cattle and horses. If bull semen or stallion semen is not on the specified list, then secured parties must give PNS notice to protect security interests in these semen farm products.

[7] *See*, D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ¶ VT.03 (1990).

[8] Louisiana listed, among others, alligators, oysters, shrimp and crabs as farm products. *See*, D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ¶ LA.03[4][c] (1990). Oklahoma listed grass forage. *Id.* at ¶ OK.03[4].

[9] 54 F.R. 52,837 (Dec. 11. 1989) (Oklahoma added 30 products); 55 Fed. Reg. 28,791 (July 13, 1989) (Oklahoma added four products).

[10] 54 Fed. Reg. 35,517 (Aug. 18, 1989) (Oregon changed from a specified list of farm products to all farm products in CNS).

[11] D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ¶ 9.06[3] (1990).

[12] D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ¶ 9.04[5] (1990).

[13] Secretaries of state are rapidly adopting computer technology to perform many tasks assigned to them by their legislatures. In addition to CNS's, secretaries of state are computerizing UCC filings. Computerization of the UCC and the CNS often occur simultaneously. For example, Louisiana has had a CNS since January 1, 1987 and a UCC Article 9 system since January 1, 1990. Both Louisiana systems are being fully computerized in separate but compatible systems.

[14] D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ¶ NE.08[3] (1990).

[15] Neb. Rev. Stat. § 52-1307(2) (Supp. 1988).

[16] La. Rev. Stat. Ann. §§ 3:3652(2), 3:3652(4), 3:3652(7), 3:3652(17), 3:3656(A)(1) (Cum. Pocket Part 1991). Note that when Louisiana moves to a CNS with local filings that the CNS system operator changes from the Department of Agriculture to the secretary of state.

[17] Mont. Code Ann. §§ 30-9-403(1)(b) to 30-9-403(1)(e) (Cum. Supp. 1989).

[18] D. Kershen & J. Hardin, *Farm Products Financing and Filing Service* ¶ MT.07[1] (1990).

CRP applicants and the three-year rule

On September 12, 1990, the Eighth Circuit Court of Appeals held that judicial review is not available under the Administrative Procedure Act (APA) (5 U.S.C. §§ 701-706) for decisions of the Secretary of Agriculture denying waiver of the three-year ownership requirement for entry into the Conservation Reserve Program (CRP). *State of North Dakota, ex. rel. Board of University and School Lands v. Yeutter*, 914 F. 2d 1031, 1990 WL 130155 (8th Cir. N.D. 1990). As reported in the September 1989 *Agricultural Law Update*, the District Court of North Dakota had ruled that while no judicial review would be permitted, the Secretary was required to "promulgate procedural and substantive regulations implementing" the waiver provisions of the statute. 711 F. Supp. 517 (D. N.D. 1989). The Eighth Circuit reversed the ruling that regulations were required, and allowed the Secretary to establish standards by proceeding on a case by case adjudication.

In order to enter the CRP, a landowner is required to have owned the cropland for three years prior to entering the CRP. (16 U.S.C. § 3835(a)(1)). Current law

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STATE ROUNDUP

MINNESOTA. *Commodities contracts disputes require arbitration or mediation.* Minnesota has enacted a law requiring contracts involving agricultural commodities to contain "language providing for resolution of contract disputes by either mediation or arbitration." Minn. Stat. §§ 17.90 and 17.91 (Aug. 1, 1990). The term "agricultural commodity" is broadly defined in the new statute, and is believed to apply both to the sale and purchase of agricultural commodities. Therefore, country elevators that sell feed to farmers or buy grain would be required to include mediation or arbitration clauses in their contracts.

—David C. Barrett, Jr., Nat. Grain and Feed Association, Washington, D.C.

VERMONT. Fence law. The Vermont Supreme Court decided in the case of *Choquette v. Perrault*, 569 A.2d 455 (1989), that part of Vermont's fencing law was unconstitutional. The court found that it was unconstitutional for the state to require property owners, who do not own livestock, to pay for part of a division fence.

The Vermont case involved a dispute between two landowners over the erection and maintenance of a fence along their common border. One of the landowners was a dairy farmer; the other landowner used his property primarily as a residence.

Pursuant to Vermont's fencing law, 24 Vt. Stat. Ann. tit. 24, § 3801 et seq., the farmer requested that the town fence viewers divide the fence between the two landowners. The adjoining residential owner refused to erect the portion of the fence assigned to him by the fence viewers, and the farmer erected the fence and brought an action to collect his costs.

The trial court found for the farmer and rejected the constitutional claims of the residential owner.

The Vermont Supreme Court held that the requirement that a non-livestock owning landowner participate in paying for a fence was constitutionally infirm. The court determined that in the context of the nineteenth century, Vermont's fencing law "served the broad public interest." However, land use patterns had changed since that time and much of the state has reverted to woodlands or has otherwise been developed. "As a result of changing land use patterns, the law more and more often applies to landowners without livestock. In such situations, the fence law is burdensome, arbitrary and confiscatory, and therefore cannot pass constitutional muster."

In reaching this conclusion, Vermont joined a minority of states, including New York (Sweeney v. Murphy, 334 N.Y.S.2d 239 (1972)), which have found it unconstitutional to require non-livestock owners to participate in paying for a division fence.

—William H. Rice, Assistant Attorney General, Vermont

CRP APPLICANTSCONT'D FROM P. 6

provides for an exception where the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was not obtained for the purpose of placing it in the program. 16 U.S.C. § 3835(a)(1)(C).

North Dakota had obtained title to two parcels of land through foreclosure.The Eighth Circuit held that the Secretary's decision that North Dakota had not provided such "adequate assurances" was not subject to judicial review.

North Dakota argued that the Secretary's decision was arbitrary, capricious, and an abuse of discretion. North Dakota maintained and the District Court agreed that the Secretary applied a "bright-line" test in refusing entry of land into CRP. The Secretary's notice of denial to North Dakota stated that "we have established that any land purchased after October 1, 1985 may have been acquired under circumstances that cannot give adequate assurance that the land was not acquired for the purpose of placing it in the CRP.

In denying judicial review, the Eighth Circuit construed the APA's exception to judicial review where agency action is committed to agency discretion by law. 5 U.S.C. § 701(a)(2). While noting that there is a strong presumption that agency actions are reviewable, the court held that the "pragmatic considerations" approach has been rendered invalid by previous rulings in *Webster v. Doe*, 486 U.S. 592 (1988) and *Heckler v. Chaney*, 470 U.S. 821 (1985).

According to the court, after *Webster*, the court is to look only to the statutory language to determine whether there is law for the court to apply in reviewing any agency action.

The court said that section 3835(a)(1)(C) "gives the Secretary extremely broad discretion and supplies no objective criteria for determining the existence of adequate assurance." Thus, there is no law for the court to apply to review the agency's determination.

The court agreed with the Secretary that it was within his discretion to choose case by case adjudication instead of publishing regulations. In rejecting the District Court's characterization of the Secretary's standard as a "bright line test" and referring to it as a rebuttable presumption, the court noted limited instances where land acquired after October 1, 1985 met the "adequate assurances" test.

—Ray Watson, University of Arkansas Graduate Program in Agricultural Law.

Federal Register *in brief*

The following is a selection of matters in the *Federal Register* in October, 1990.

1. DOL; Shortage number determination for SAWs; notice; effective date 10/1/90. 55 Fed. Reg. 39993.

2. FmHA; Farm Labor Housing Loan and Grant Program; loan agreement and income eligibility for domestic farm laborers; proposed rule. 55 Fed. Reg. 39982.

3. FmHA; Servicing accounts of borrowers entering the Armed Forces; final rule; effective date 10/4/90. 55 Fed. Reg. 40645.

4. Bureau of Reclamation; Acreage limitation rules and regulations; proposed rule. 55 Fed. Reg. 40687.

5. FCIC; General crop insurance regulations. 55 Fed. Reg. 40841.

6. IRS; Withholding of tax on nonresident aliens; proposed rule. 55 Fed. Reg. 40875.

7. IRS; Small business corporations; one class of stock requirement; proposed rule; comments due 1/3/91. 55 Fed. Reg. 40870.

8. USDA; PACA; practice rules; reparation actions; nonresident complainants; proposed rule. 55 Fed. Reg. 41094.

9. USDA; Appearance of USDA employees as witnesses in judicial and administrative proceedings; final rule; effective date 10/19/90. 55 Fed. Reg. 42347.

10. PSA; Reparation proceedings; practice rules; final rule; effective date 10/10/90. 55 Fed. Reg. 41183.

11. APHIS; Animal welfare; horse protection; pre-show inspection guidelines for soring horses; 55 Fed. Reg. 41989.

12. ASCS; Cotton warehousemen, licensed; reginned motes; warehouse receipts issuance; proposed rule. 55 Fed. Reg. 43345.

—Linda Grim McCormick

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