Agricultural Law Update

VOLUME 23, NUMBER 5, WHOLE NUMBER 270 MAY 2006

Official publication of the American Agricultural Law Association

INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

NOMINATIONS FOR ANNUAL SCHOLARSHIP AWARDS

The Scholarship Awards Committee is seeking nominations of articles by professionals and students for consideration for the annual scholarship awards presented at the annual conference. Please contact Jesse Richardson, Associate Professor, Urban Affairs and Planning, Virginia Tech, Blacksburg, Virginia 24061-0113,(540) 231-7508 (phone) (540) 231-3367 (fax) email: jessej@vt.edu

Tax increase prevention and the Reconciliation Act of 2005

On May 17, the President signed into law the "Tax Increase Prevention and Reconciliation Act of 2005" (H.R. 4297).[1] On May 9, House-Senate conferees reached an agreement on the bill and the House passed it the next day by a vote of 244 to 185. The Senate passed the bill by a 54-44 margin on May 11. The bill is estimated to reduce taxes by $70 billion over the next decade. The major provisions of the bill extend the current rates for capital gains and dividends as well as the enhanced expense method depreciation amount. Also included is an extension of relief from the alternative minimum tax and a special provision involving conversion of a traditional IRA to a Roth IRA.

The following is a selected summary of the major provisions of H.R. 4297:

Title I – Extension and Modification of Certain Provisions

The enhanced expense method depreciation amount under I.R.C. §179 (presently $108,000) remains in place through 2009 (instead of ending after 2007).[2]

The favorable tax rates under present law for capital gains and qualified dividend income remain in place through 2010 (instead of ending after 2008).[3]

Title II – Other Provisions

The "active business requirement" under I.R.C. §355 (with respect to tax-free corporate spin-offs) is simplified such that all corporations in the distributing corporation's and the spun-off subsidiary's respective affiliated group are considered in determining if the active-business test is satisfied. The provision is effective for distributions occurring after May 17, 2006, though December 31, 2010.[4]

At the taxpayer's election, the sale or exchange of musical compositions or copyrights in musical works created by the taxpayer's personal efforts is treated as the sale or exchange of a capital asset, resulting in a capital gain or loss. The provision is effective for sales or exchanges in tax years beginning after May 17, 2006, and ending before January 1, 2011.[5]

Music publishers may elect to amortize over five years the advanced payments they make to songwriters. Before the rule change, the income-forecast method had to be utilized. The provision is effective for expenses paid or incurred with respect to property placed in service in taxable years beginning after December 31, 2005.[6]

Title III – Alternative Minimum Tax (AMT) Relief

For 2006, the AMT exemption amount for married taxpayers increases to $62,550 and for unmarried individuals to $42,500 (instead of dropping to $45,000 and $33,750, respectively).[7]

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Open letter to the membership - AALA communications

This letter began as an email to the members of the AALA Communications Committee in preparation for a conference call on communications issues. As Chair of that Committee, I was taking to heart our charge from AALA President, Don Uchtmann. He had asked us to consider "how the AALA can best communicate with its members in the information age (most are rural practitioners) in ways that are exceptionally beneficial to our members." He asked us to serve as a "think tank" in this important area, noting that "[s]o much has changed since AALA came into existence 25 year ago. It's an ideal time to think about our communications strategy as we move into our second quarter century."

The more I thought about our charge, the more I was convinced that the committee's work would be enhanced by as much direct input from the membership as we could get. Hence, my letter shifted from an email to the committee to this open letter to the membership. Here are the issues as they occur to me. Please share your comments with me, and I will pass them on to the committee members as listed at the conclusion of this letter.

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For 2006, nonrefundable personal tax credits (such as the dependent care credit, elderly and disabled credit, Hope Credit, and Lifetime Learning Credit) may be claimed to the full extent of being allowed only to the extent that regular tax liability exceeds tentative minimum tax – i.e., they had been disallowed when determining the AMT.[8]

Title IV – Corporate Estimated Tax Provisions

The schedule of estimated tax payments for corporations with assets of at least $1 billion is modified such that payments due in July, August and September of 2006 are increased to 105 percent of the payment otherwise due, and the next required payment is reduced accordingly. Payments due in July, August and September of 2012 are increased to 106.25 percent of the payment otherwise due, and the next required payment is reduced accordingly. Finally, payments due in July, August and September of 2013 are increased to 100.75 percent of the payment otherwise due, and the next required payment is reduced accordingly.[9]

For corporate estimated tax payments due on September 15, 2010, 20.5 percent is not due until October 1, 2010, and for September 15, 2011, 27.5 percent is not due until October 1, 2011.[10]

Title V – Revenue Offset Provisions

Effective for tax years beginning after 2005, the bill increases the age of minors from 14 to 18 for purposes of subjecting the minor's unearned income to tax at the parents' tax rate (the so-called "kiddie tax). An exception applies for a child who is married and files a joint return for the tax year, and for distributions from certain qualified disability trusts.[11]

Currently, in order to be able to convert from a traditional IRA to a Roth IRA, the taxpayer's adjusted gross income (AGI) for the year must not exceed $100,000 (for married persons filing jointly).[12] The bill eliminates the $100,000 AGI limit on conversions, effective for tax years beginning after December 31, 2009. For conversions in 2010, unless a taxpayer elects otherwise, the amount includible in gross income as a result of the conversion is included ratably (in equal amounts) in 2011 and 2012. However, if the converted amounts are distributed before 2012, the amount included in the year of the distribution is increased by the amount distributed, and the amount included in income in 2012 (or 2011 and 2012 in the case of a distribution in 2010) is the lesser of: (1) half of the amount includible in income as a result of the conversion; and (2) the remaining portion of such amount not already included in income.[13]

For tax years beginning after May 17,

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VOL. 23, NO. 5, WHOLE NO. 270 MAY 2006
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Agricultural Law Update is published by the American Agricultural Law Association, Publication office: County Line Printing 6292 NE 14th Street, Des Moines, IA 50313. First class postage paid at Des Moines, IA 50313.

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The Agricultural Law Update

The *Ag Law Update* has served as our primary communication service since the early days of the AALA. I anticipate that it will continue to serve this function, although for a variety of reasons, now is a good time to evaluate what our members want from this publication and to consider changes to better meet member needs.

Does the *Ag Law Update* continue to serve as a useful resource to members?

If so, what features are most useful?

If not, should it be replaced with a different form of communication?

Is the format, with several medium length articles and one "In Depth" article still the preferred format?

Should the "look" or design be updated, or is the current look a tradition that serves as a symbol of the association?

What additional features should be added? Possibilities include resurrecting the prior "State Round-up" feature which included short state updates; adding shorter information "blurbs;" and adding links to other resources.

Should the "In Re: AALA" feature be resurrected? This feature provided news from the membership - firm changes, announcements, and other individual member developments.

Other suggestions??

Aside from "updating the *Update*," the committee will also be addressing recent problems in obtaining contributions to that publication. In recent years, it has sometimes been difficult for our editor to find authors willing to contribute articles. This has made her job more difficult and has sometimes disrupted timely publication.

What are the barriers that limit member contribution to the *Update*?

What can the association do to increase member input?

Alternatively, should the *Update* change from a member-based publication to a service that would be prepared for mem-

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Conference Calendar

This Is Not Your Grandpa's Farm Law: Cutting Edge Legal Issues in Agriculture Today
June 12, 2006, Landmark Center, Saint Paul, Minn.
Sponsored by Farmers' Legal Action Group. Keynote speaker: Thomas C. Goldstein.
Topics include: The relevance of family farms today, antitrust and agriculture: impact of the loss of competitive markets; the dilemmas of contracting: risk management or risky business?; new agricultural markets: back to the future; disaster assistance and crop insurance: policies, programs, and persistent problems; Hmong farmers: in the market and on the move; farm loss in the African American and Native American communities.
For information, contact: www.flaginc.org

International Biotech Roundtable
June 27, 2006, Danforth Plant Science Center, St. Louis, MO.
Co-sponsored by the American Bar Association, Section on Environment, Energy & Resources in cooperation with the Council for Agricultural Science & Technology and the American Agricultural Law Society.
The focus of the meeting will be upon the regulation of commodities exports under the 2003 Cartagena Protocol on Biosafety.
For information, contact: A. Bryan Endres, Phone: 217.333.1828.

Energy in Agriculture: Managing the Risk
June 27-28, 2006, Hilton Kansas City Airport, Kansas City.
Co-sponsored by USDA Risk Management Agency, USDA Office of Energy Policy and New Uses, and the Farm Foundation
Register at the Farm Foundation web site, www.farmfoundation.org

Agricultural law bibliography: first quarter 2006

Bankruptcy

Farmers

General

Schneider, *Are You a Debt Relief Agency? You Might Be Surprised and You Should be Concerned*, 23 Agric. L. Update 4-7 (2-2006).

Schneider, *Who Gets the Check: Determining when Federal Farm Program Payments Are Property of the Bankruptcy Estate*, 84 Neb. L. Rev. 469-505 (2005).

Biotechnology

Endres, *Revising Seed Purity Laws for Successful Identity Preserved Production*, 10(#2) ABA Agric. Mgmt. Committee Newsl. 12-15 (2-2006).

Marchant, *Biotechnology and the Precautionary Principle: Right Question, Wrong Answer*, 4 Int'l J. Biotech., 34-45 (2002).

Nelkin & Marden, *The StarLink Controversy: the Competing Frames of Risk Disputes*, 6 Int'l J. Biotech. 20–42 (2004).

Walters, Crime, *Bio-Agriculture and the Exploitation of Hunger*, 46 Brit. J. Criminology 26-45 (2006).

Walters, *Criminology and Genetically Modified Food*, 44 Brit. J. Criminology 151-167 (2004).

Corporate farming (restrictions on corporate farming/family farm preservation)

McEowen & Harl, *Federal Court Strikes Down Nebraska Corporate Farming Law*, 23 Agric. L. Update 4-6 (1-2006).

Environmental issues

Comment, *When (Moving) Dirt Hurts: How the Ninth Circuit in Borden Ranch Partnership v. United States Army Corps of Engineers Could Have Better Justified its Decision to Protect Wetlands (Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99, 2002 [Borden III]), 27 U. Hawaii L. Rev. 417-439 (2005).

Minan, *The Clash Between Farmers and the Endangered Species Act: "Whose Water Is It?"* 37 Urb. Law. 371-379 (2005).

Noble, *Conservation Reserve Program Long-Term Policy*, 22 Agric. L. Update 4-7 (12-2005).

Note, *Open Field Burning of Grass Residue: An Injury Without a Remedy?* (*Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 9th Cir. 2004), 32 Ecology L. Q. 603-645 (2005).

Special Issue on Concentrated Animal Feeding Operations, 10 ABA Agric. Mgmt. News. 1-34 (9-2005).

http://www.abanet.org/environ/committees/agricult/newsletter/home.html

Noble, *Update on Confined Animal Feeding Operations and Federal Air Emission Regulation*, 12-16

Janzen, *Decision in Waterkeeper May Have Significant Impact on Farmers*, 16-18

San Martin, *CAFO Regulations in Flux: Kansas Regulations are No Exception*, 18-20

Aiken, *The Nebraska Hog Wars*, 21-25

Janzen, *CFOs, AFOs, CAFOs and NPDES: Navigating the Waters of Indiana's Animal Feeding Regulations*, 26-28

Redick, *State Environmental Management Initiatives for CA*FOs, 28-30

Dougal, *Update on CAFO Permitting and Litigation in Texas*, 32-34

Farm labor

Collective bargaining

Gordon, *Law, Lawyers, and Labor: the United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. Pa. J. Lab. & Employment L. 1-72 (2005).

Food and drug law

Degnan, *Rethinking the Applicability and Usefulness of the GRAS Concept*, 46 Food Drug Cosmetic L. J. 553-582 (1991).

Merrill, *Regulating Carcinogens in Food: A Legislator's Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act*, 77 Mich. L. Rev. 171-250 (1978).

Note, *"Got Milk?" ... Not Today: The Third Circuit Defends First Amendment Rights for Small Dairy Farmers* (*Cochran v. Veneman*, 359 F.3d 263, 3d Cir. 2004, vacated and remanded by *Johanns v. Cochran*, 125 S. Ct. 2512, 2005), 50 Vill. L. Rev. 1237-1263 (2005).

Forestry

Comment, *Seeing the Forest and the Trees: The Natural Capital Approach to Forest Service Reform*, 80 Tulane L. Rev. 683-711 (2005).

Hunger & food issues

Zerbe, *Feeding the Famine? American Food Aid and the GMO Debate in Southern Africa*, 29 Food Pol'y 593-608 (2004).

Hunting, recreation & wildlife

Blumm & Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl. L 673-720 (2005).

Goble, *Three Case/Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 Envtl. L. 807-853 (2005).

Iraola, *The Wild Free-Roaming Horses and Burros Act of 1971*, 35 Envtl. L. 1049-1079 (2005).

International trade

Comment, *Battle of the Beef, the Rematch: An Evaluation of the Latest E.C. Directive Banning Beef Produced with Growth Hormones and the U.S. Refusal to Accept the Directive as WTO Compliant*, 21 Am. U. Int'l. Rev. 221-276 (2005).

Comment, *WTO Agreements Mandate that Congress Repeal the Farm Bill of 2002 and Enact an Agriculture Law Embodying Free Market Principles*, 20 Am. U. Int'l. L. Rev. 1211-1249 (2005).

Comment, *Serious Prejudice: The Decline and Fall of Agricultural Subsidies after the World Trade Organization's Upland Cotton Decision (United States-Subsidies on Upland Cotton*, Aug. 9, 2004, WT/DS267/17), 24 Pa. St. Int'l Rev. 237-255 (2005).

Conference Proceedings: *Canada and U.S. Approaches to Trade in Agriculture* 31 Canada-US L. J. 93-134 (2005).

Smith, *Introduction*, 93

Brosch, *Canada and U.S. Approaches to Trade in Agriculture—U.S. Speaker*, 95-105

McLandress, *Canada and U.S. Approaches to Trade in Agriculture—Canadian Speaker*, 107-123

Discussion, 125-134

Note, *The Cartagena Protocol and the WTO: Will the EU Biotech Products Case Leave Room for the Protocol?* 16 Fordham Envtl. L. Rev. 261-288 (2005).

Land use regulation

Land use planning and farmland preservation techniques

Comment, *Avoiding the Next Hokulia: The Debate over Hawaii's Agricultural Subdivisions*, 27 U. Hawaii L. Rev. 441-467 (2005).

Note, *The Forgotten Intent of the Williamson Act: The Regulation of Noncontracted Lands within Agricultural Preserves*, 12 Hastings W.-NW. J. Envtl. L. & Pol'y 37-69 (2005).

Patents, trademarks & trade secrets

Burrell & Hubicki, *Patent Liability and Genetic Drift* (*Schmeiser v. Monsanto Canada, Inc.* [2004] SCC 34, The Supreme Court of Canada), 7 Envtl. L. Rev. 278-286 (2005).

Chen, *The Parable of the Seeds: Interpreting the Plant Variety Protection Act in furtherance of Innovation Policy*, 81 Notre Dame L. Rev. 105-166 (2005).

Comment, *Geographical Indications of Origin: Should They Be Protected and Why?—An Analysis of the Issue from the U.S. and E.U. Perspectives*, 22 Santa Clara Computer & High Tech. L. J. 315-349 (2006).

Farnese, *Patently Unreasonable: Reconsidering the Responsibility of Patentees in Today's Inventive Climate*, 6 Tul. J. Tech. & Intell. Prop. 1-31 (2004).

Gutierrez, *Geographical Indicators: A Unique European Perspective on Intellectual Property*, 29 Hastings Int'l & Comp. L. Rev. 29-50 (2005).

Liu, *Now the Wolf Has Indeed Come! Perspectives on the Patent Protection of Biotechnology Inventions in China*, 53 Am. J. Comp. L. 207-259 (2005).

Note, *Cured Meat and Idaho Potatoes: A Comparative Analysis of European and American Protection and Enforcement of Geographic Indications of Foodstuffs*, 11 Colum. J. Eur. L. 623-664 (2005).

Note, *High Plains Drifting: Wind-Blown Seeds and the Intellectual Property Implications of the GMO Revolution*, 4 NW. J. Tech. & Intell. Prop. 1 (2005) http://www.law.northwestern.edu/journals/njtip/v4/n1/1/

Venbrux, *When Two Worlds Collide: Ownership of Genetic Resources Under the Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights*, 9 Pittsburgh J. Tech., L. & Pol'y 1-35 2005 http://tlp.law.pitt.edu/articles/Vol_9_Venbrux.pdf

Pesticides, herbicides, insecticides, fungicides, fertilizers

Klass, *Pesticides, Children's Health Policy, and Common Law Tort Claims*, 7 Minn. J. L. Sci. & Tech. 89-146 (2005).

Public lands

Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 Envtl. L. 721-806 (2005).

Johnston, *The Rule of Capture and Economic Dynamics of Natural Resource Use and Survival under Open Access Management Regimes,* 35 Envtl. L. 855-898 (2005).

Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 Envtl. L. 1005-1047 (2005).

Rural development

O'Brien, Hamilton, & Luedeman, *The Farmer's Legal Guide to Producer Marketing Associations* (National AgLaw Center Publications) 2006 http://

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The area of potential effect under regulations promulgated by the American Council for Historic Preservation

By Andrea J. Kirk

Those scattered piles of arrowheads lying about your property, exposed by the elements or turned up by the plow blades, may present a problem for any land use changes. The arrowheads, and the culture they represent, may be protected by the National Historic Preservation Act (NHPA) of 1966, the Native American Graves and Repatriation Act of 1990, the Archeological Resources Protection Act of 1979 and their accompanying regulations and amendments.

The NHPA requires federal agencies involved in an undertaking to consider the effects of that undertaking upon historic properties and allow the Advisory Council on Historic Preservation (ACHP) an opportunity for comment and review. An undertaking includes the issuance of any license or permit or the disbursement of federal funding. The NHPA defines an undertaking as a project, activity, or program that is funded wholly or in part under the direct or indirect jurisdiction of a federal agency and specifically includes the following circumstances: activities, programs or projects carried out by or on behalf of the agency; activities, programs or projects carried out with Federal financial assistance; activities, programs or projects requiring a Federal license, permit or approval; and activities, programs or projects subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

If there is an undertaking pursuant to the NHPA, the federal agency must adhere to rigorous procedures set forth in 36 CFR 800. There are three primary components of the review process. First, an agency must consider the effects of its actions upon historic properties or sites. Second, the agency must allow the ACHP, the State Historic Preservation Officer and any Tribal Historic Preservation Officer, a reasonable opportunity to comment on the undertaking and its effects. Third, the agency must seek means of avoiding, minimizing or mitigating any adverse effects suffered by historic properties pursuant to its activities.

The scope of agency review and opposition to this review become pertinent to agricultural producers considering a change in land use or an expansion of operations. Any activity requiring a permit or license pursuant to the Clean Water Act, the Clean Air Act or any other federal statute triggers the requirements of the NHPA. The NHPA defines an undertaking as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including: (A) those carried out by or on behalf of the agency; (B) those carried out with federal financial assistance; (C) those requiring a federal permit, license, or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. The Advisory Council regulations under CFR 800 also include this language. There is one crucial difference however, between the NHPA and the regulations. The regulations replace the phrase "on behalf of a federal agency" with the phrase "on behalf of the agency" in subsection (A).

Traditionally, an area of potential effect (APE) has been defined as the footprint of a project or the immediate geographic area that involves direct physical impacts. This definition has been broadened by the ACHP to include the geographic area where an undertaking causes alterations in the character of historic properties, whether those changes are the result of direct or indirect impacts. The permit area proscribed by federal agencies is often less expansive in scope and application than the broad definition proposed by the ACHP. As a result of this dichotomy, the scope of agency review during the permit process has come under recent fire. Expanded development and urban sprawl have agitated and exacerbated the problem. Native American groups and their representatives have become increasingly aware of and active in the review process and frequently challenge agency findings of "no direct effects" upon historic properties within the APE. The most frequent challenges to agency determinations of "areas of potential effect" involve increased noise levels and visual blight.

An example of this dilemma is evidenced in the recent controversy over a strip mine permit being issued in the vicinity of Blair Mountain, West Virginia. Blair Mountain was the site of the single largest demonstration for unionization in 1921. Thousands of coal miners confronted the United States Army in an attempt to unionize the coal mining industry. The National Trust for Historic Preservation recognized this site as one of the most endangered historic sites in the country. The strip mining permit itself does not include Blair Mountain. However, it includes a geographic area in extremely close proximity to the site and those who oppose the permit do so based upon the noise, dust and negative visual impact the mining operation will have upon the site. Opponents of the permit emphasize the lack of adequate buffers from the mining operation and the negative impact the mining will have upon the aesthetic and historic value of Blair Mountain as a heritage and tourist attraction.

A recent challenge to a finding of "no direct effects" involved the impact of a federally permitted project upon a viewshed that included properties eligible for listing on the National Register. The challenge involved an historical community in the vicinity of Cincinnati known as Sayler Park. The Army Corps of Engineers issued a permit for the installation of a barge docking facility within sight of the historic community. The residents of the historic community challenged the validity of both the permit and the review process and claimed that the visual impact of the docking facility would decrease the property value in Sayler Park. In this instance, the court agreed with the challengers and issued an injunction against further construction.

On November 16, 1990, President George Bush signed the Native American Graves Protection and Repatriation Act into law. This Act addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony with which they are affiliated. The regulations promulgated by the Department of the Interior in support of this Act pertain to the identification and appropriate disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony that are:

(i) In Federal possession or control; or

(ii) In the possession or control of any institution or State or local government receiving Federal funds; or

(iii) Excavated intentionally or discovered inadvertently on Federal or tribal lands.

Associated funerary objects are funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency. Associated funerary objects are also those funerary objects that were made exclusively for burial purposes or to contain human remains. Unassociated funerary objects are those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to

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living descendants or other individuals are not considered unassociated funerary objects. Sacred objects are items that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many things might be sacred in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony. Inadvertent discovery means the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands. Arrowheads unearthed by the plow would be an inadvertent discovery.

In 1979, preservationists successfully lobbied for enactment of the Archaeological Resources Protection Act (ARPA). This statute expanded the provisions of the 1906 Antiquities Act and established major criminal and civil penalties for violators. The ARPA was amended in 1988. The amendments made prosecutions easier and made the intent to loot a felonious offense. Many state governments have adopted statutes structured upon the federal legislation in an effort to protect archaeological resources and regulate archaeological investigations on state lands.

The ARPA defines an "archaeological resource" as "any material remains of past human life or activities which are of archaeological interest" [Sec. 3(1)]. Compromises made during the drafting led to the following exemptions:

(1) Artifacts must be at least 100 years old.

(2) Paleontological resources are exempted unless found within an archaeological context.

(3) Arrowheads found on the ground surface are exempted, while those found beneath the surface are protected.

(4) Collection of rocks, coins, bullets, or minerals for private purposes does not require a permit unless they are within an archaeological site.

The ARPA allowed these exemptions in order to distinguish casual surface collections from commercial looting. Still, other general provisions of federal law prohibit removal of surface arrowheads, coins, etc. Public lands covered: ARPA protects archaeological resources on "public lands," which include all lands which the United States holds in fee, including the National Park system and the National Forest system. Lands under the jurisdiction of the Smithsonian Institution and lands on the outer continental shelf are excluded. Indian lands fall under ARPA jurisdiction if they are held in trust by the United States or are subject to restriction from transfer or ownership.

ARPA requires anyone interested in excavating or removing archaeological resources to obtain a permit from the relevant Federal land manager. Any excavation on Indian lands must obtain permission of a tribal agent. Felony and misdemeanor sanctions may be applied in three cases: 1) for illegal excavation, removal, damage, alteration, or defacing of any archaeological resource or attempt to do same; 2) for sale, purchase, exchange, transport, or receiving of any archaeological resource or offering any of same; 3) for sale, purchase, exchange, transport, receiving, in interstate or foreign commerce, of any archaeological resource removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under state or local law.

This last provision offers ARPA protection to archaeological resources illegally removed from even private or non-federal lands so long as they were moved in interstate or foreign commerce. In the case of the GE Mound (*U.S. v. Gerber*, 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994). Arthur Gerber was found guilty of violating ARPA when he looted artifacts from a large Hopewell site on property owned by General Electric corporation in Indiana. Even though the site was on private property, not on public lands, ARPA had jurisdiction because the artifacts were removed in violation of state property laws and transported across state boundaries.

If you discover Native American artifacts on your property it behooves you to seek assistance from your state historic preservation officer. The state historic preservation officer will be able to determine whether or not the artifacts are protected by federal and state laws and can supervise a method of disposal or excavation.

Federal Register Summary from April 22, 2006 to May 19, 2006

DISASTER PROGRAMS. The FSA has issued interim regulations establishing disaster relief programs for agricultural producers who suffered losses in Hurricanes Dennis, Katrina, Ophelia, Rita and Wilma in Alabama, Florida, Louisiana, Mississippi, North Carolina and Texas. The regulations also provide for grants to states to assist aquaculture producers who suffered losses from the hurricanes. 71 Fed. Reg. 27188 (May 10, 2006).
GUARANTEED LOANS. The FSA has issued proposed regulations which amend the guaranteed farm ownership and operating loan programs to change the amount of interest charged and collected on the loans. The one-time origination fee for guaranteed farm ownership loans will be increased from 1 percent to 1.5 percent. In addition, an annual continuation fee of 0.75 percent will be charged for lines of credit for farm operating loans. Such fees will not be collected where the fees are prohibited by statute, e,g, loans to beginning farmers and ranchers under the State Beginning Farmer Program under 7 U.S.C. § 309. 71 Fed. Reg. 27978 (May 15, 2006).
MAD COW DISEASE. The APHIS has issued a report of an analysis of the prevalence of bovine spongiform encephalopathy (BSE) in the United States. The analysis may be viewed on the APHIS web site at http://www.aphis.usda.gov/newsroom/hot_issues/bse/bse_in_usa.shtml. 71 Fed. Reg. 26019 (May 3, 2006).
MILK. The AMS has issued proposed regulations which amend the National Organic Program (NOP) regulations to comply with the final judgment in the case of Harvey v. Johanns, Civil No. 02-216-P-H (D. Me. June 9, 2005), and to address the November 10, 2005, amendment made to the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq., the OFPA), concerning the transition of dairy livestock into organic production. The proposed regulations also amend the NOP regulations to clarify that only nonorganically produced agricultural products listed in the NOP regulations may be used as ingredients in or on processed products labeled as "organic" or "made with organic (specified ingredients or food group(s))." In accordance with the final judgment in Harvey, the revision emphasizes that only the nonorganically produced agricultural ingredients listed in the NOP regulations can be used in accordance with any specified restrictions and when the product is not commercially available in organic form. The proposed regulations amend the NOP regulations to eliminate the use of up to 20 percent nonorganically produced feed during the first nine months of the conversion of a whole dairy herd from conventional to organic production. The proposed regulations also allow crops and forage from land included in the organic system plan of a dairy farm that is in the third year of organic management to be consumed by the dairy animals of the farm during the 12-month period immediately prior to the sale of organic milk and milk products. 71 Fed. Reg. 24820 (April 27, 2006).
MEAT AND POULTRY PRODUCTS. The FSIS has extended the comment period

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Aglaw biblio/Cont. from page 3
www.nationalaglawcenter.org

Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 Wis. L. Rev. 969-1032.

Student article, *Between the Market and the Commons: Ensuring the Right to Water in Rural Communities*, 33 Denv. J. Int'l L. & Pol'y 585-607 (2005).

Sustainable & organic farming

Jillian, *Federal Regulation of Organic Food: A Research Guide for Legal Practitioners and Food Industry Professionals* (National AgLaw Center Publications) 2006 http://www.nationalaglawcenter.org

Taxation

Feitshans, *Unresolved Issues Raised by the Tobacco Transition Payment Program (TTPP, also called the 'Tobacco Buyout')*, 22 Agric. L. Update 4-7 (11-2005).

van der Hoeven, *Tobacco Quota Buyout Tax Considerations*, 22 Agric. L. Update 4-7, 10-11 (9-2005).

Torts and insurance

Comment, *It's Not Easy Being Green–Holding Manufacturers of Genetically Modified Bentgrass Liable under Strict*

Products Liability, 14 Penn. St. Envtl. L. Rev. 111-130 (2005).

Kershen, *Proposed Liability Legislation for Transgenic Crops*, 10 (#2) ABA Agric. Mgmt. Committee News. 7-11 (2-2006).

Uniform Commercial Code

Article Seven (Documents of Title)

Kershen, *Article 7: Document of Title – 2004 Developments*, 60 Bus. L. 1709-1713 (2005).

Water rights: agriculturally related

Adams & Winterton, *Navigability in Oregon: Between a River Rock and a Hard Place*, 41 Willamette L. Rev. 615-654 (2005).

Note, *The Problem of Reallocation in a Regulated Riparian System: Examining the Law in Georgia*, 40 Ga. L. Rev. 207-251 (2005).

If you desire a copy of any article or further information, please contact the Law School Library nearest your office. The National AgLaw Center website < http://www.nationalaglawcenter.org > http://www.aglaw-assn.orghas a very extensive Agricultural Law Bibliography. If you are looking for agricultural law articles, please consult this bibliographic resource on the National AgLaw Center website.

— Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Tax increase prevention/Cont. from page 3
2006, the bill modifies the wage limitation rule for purposes of the manufacturer's deduction (I.R.C. §199) that was created as part of the 2004 Jobs Bill. As originally enacted the manufacturing deduction was limited to 50 percent of a business' employee wages reported on Form W-2. In other words, the limitation had been 50 percent of those wages that were deducted in arriving at qualified production activity income. As modified, taxpayers are able to include only those amounts that are properly allocable to domestic production gross receipts. That could limit the availability of the deduction for businesses that use a significant amount of independent contractors or rely on the wages of executives and management personnel (who are not involved in actual production activities). In addition, the rule that places a limitation on wages treated as allocated to partners or shareholders of pass-through entities is repealed. This provision is also effective for tax years beginning after May 17, 2006.[14]

Effective for amounts paid or incurred after May 17, 2006, the 2-year amortization period for geological and geophysical (G&G) costs is extended to 5 years for certain major integrated oil companies. The 5-year amortization rule for G&G costs applies only to integrated oil companies that have an average daily worldwide production of crude oil of at least 500,000 barrels for the tax year, gross receipts in excess of $1 billion in the last year ending during calendar year 2005, and an ownership interest in a crude oil refiner of 15 percent or more.[15]

Information reporting is required for tax-exempt interest paid on tax-exempt bonds after December 31, 2005.[16]

For IRS offers-in-compromise submitted on or after July 16, 2006, taxpayers must make partial payments to the IRS while the offer is being considered. For lump-sum offers (which include single payments, as well as payments made in 5 or fewer installments), taxpayers must make a downpayment of 20 percent of the amount of the offer with any application. User fees are eliminated for offers submitted with the appropriate partial payment. Submitted offers that are not accompanied with the appropriate payment will be returned as unprocessable and IRS may take immediate enforcement action. Also, an offer is deemed accepted if the IRS does not make a decision with respect to the offer within two years from the date the offer was submitted.[17]

Second tax bill to come

Now that H.R. 4297 has been signed into law, the Congress will turn its attention to a second tax bill (known as the "trailer" bill) that is expected to extend several other provisions that have either expired or will expire soon. It is anticipated that this bill will include a two-year extension of the research credit, the work opportunity tax credit, the deduction for qualified higher education expenses, and the deduction for school teachers who buy supplies for their classrooms. It is also possible that the bill will include an extension of the deduction for state and local sales taxes and numerous charitable-giving reforms – including allowing non-itemizers to deduct charitable donations. It is anticipated that this second tax bill will be included in pending pension reform legislation (H.R. 2830) that congressional leaders had initially hoped to pass before the Memorial Day recess. It now looks like the legislation will move through the House during June.

—Roger A. McEowen, Leonard Dolezal Prof. in Agricultural Law, Iowa State University, Ames, IA.
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[1] Pub. L. No. 109-222.
[2] Act § 101.
[3] Act § 102.
[4] Act § 202.
[5] Act § 204.
[6] Act § 207.
[7] Act § 301.
[8] Act § 302.
[9] Act § 401.
[10] *Id.*
[11] Act § 510.
[12] I.R.C. § 408A.
[13] Act § 512.
[14] Act § 514.
[15] Act § 503.
[16] Act § 502.
[17] Act § 509.

Federal Register/Cont. from page 5
for the following proposed regulations. See 71 Fed. Reg. 11326 (March 7, 2006). The FSIS has issued proposed regulations amending the federal meat and poultry products inspection regulations to provide that the FSIS will make available to the public lists of the retail consignees of meat and poultry products that have been voluntarily recalled by a federally inspected meat or poultry products establishment if product has been distributed to the retail level. FSIS is proposing to post routinely these retail consignee lists on its web site as the lists are developed by the agency during its recall verification activities. 71 Fed. Reg. 27211 (May 10, 2006).

PEAS. The GIPSA has announced that it plans to amend the U.S. standards for Whole Dry Peas and Split Peas to provide a separate standard for feed peas to accommodate the difference in the markets for feed peas and edible dry peas. 71 Fed. Reg. 27672 (May 12, 2006).

PERISHABLE AGRICULTURAL COMMODITIES ACT. The AMS has announced a change in the method of calculating the interest to be charged in PACA reparation awards. Since 1992, reparation

Cont. on page 7

State and federal roundup

Pennsylvania: New ecoterrorism law. In 2005 a group called "Hugs for Puppies" released a DVD to the media showing what they believed to be cruel conditions in hen houses. Kreider farms, in Lancaster County, was their main target and is one of the largest egg producers in the United States. What the DVD did not show was the biosecurity breach and the illegal entry that occurred in order to capture the images. Regardless of personal views on hen house conditions, the fact remains that thousands of chickens were put at risk for disease when the cameramen entered several barns in the same night without permission or precautions.

Charges for trespassing can be brought against the group, but none of the activities in this Hugs for Puppies incident triggered federal eco-terrorism laws. There was no immediate physical damage to the animals or property and any possible animal illness would have to be directly traceable for prosecution.

Those who oppose animal conditions or animal research certainly have the right to use the political process to express their views, but if they destroy property or intimidate as part of their protest, they will be charged under the new law. These persons will receive now additional punishment because their conduct stops lawful activities.

In H.B. 213, Ecoterrorism is defined as a person committing one of a number of "specified offenses against property" with the intent to intimidate or coerce another individual lawfully participating in an activity which involves animals, plants, or natural resources–or the use of an animal, plant, or natural resource facility. Ecoterrorism also includes committing a specified offense against property with the intent to prevent a person from lawfully participating in an activity involving animals, plants or natural resources, or using an animal, plant, or natural resource facility. The specified offenses against property are already crimes in Pennsylvania; however, this bill addresses property destruction that occurs with the intent to intimidate.

Specified offenses against property include certain arson offenses, causing or risking catastrophe, criminal mischief, institutional vandalism, agricultural vandalism, agricultural crop destruction, burglary, if committed in order to commit another specified offense, criminal trespass if the crime is committed in order to threaten or terrorize the owner or occupant of the premises, starting a fire, or defacing or damaging the premises and theft by unlawful taking, theft by deception, forgery, or identity theft.

Originally, an act of ecoterrorism could be classified as a summary offense. However, now if that same offense is committed as an act of ecoterrorism, it will be considered a misdemeanor of the third degree. If the specified offense is already classified as a misdemeanor or a second- or third-degree felony, then, as an act of ecoterrorism, it will be considered one degree higher than it would be otherwise. If the specified offense is already classified as a felony of the first degree, a person convicted under the ecoterrorism statute will be sentenced to a term of imprisonment fixed by the court at no more than 40 years and may also be sentenced to pay a fine of not more than $100,000.

Additionally, a person who is found guilty of ecoterrorism will be ordered to pay restitution in an amount up to triple the value of the damages incurred as a result of the specified offense.

House Bill 213 adds to Title 42 (Judiciary and Judicial Procedure) to provide for civil claims as well. Suit may be brought for compensatory damages, punitive damages, reasonable investigative expenses, reasonable attorneys' fees, and other costs associated with litigation. Damages are to be limited to triple the market value of the property prior to damage and actual damages to the property. The plaintiff may also petition for injunctive relief, in which case the court may issue a temporary restraining order, preliminary injunctions, or permanent injunction.

A person exercising his right of freedom of petition or freedom of speech on public property or with the permission of the landowner and is peaceably demonstrating rights shall be immune from prosecution.

—Isadora Velazquez-Rivas, Penn State Dickinson School of Law, Agricultural Law Center

Federal Register/Cont. from p. 6

awards have included interest at the rate of 10 percent per annum on the basic damage award to provide the injured party the full amount of damages sustained. The Secretary of Agriculture, through the Judicial Officer, will now assess interest in PACA reparation awards consistent with the methodology set forth in 28 U.S.C. § 1961 which sets forth a uniform rate of interest on any monetary judgment in a civil case recovered in Federal District Court, as well as final judgments against the United States in the United States Court of Appeals for the Federal Circuit, and judgments of the United States Court of Federal Claims. 71 Fed. Reg. 25133 (April 28, 2006).

TUBERCULOSIS. The APHIS has adopted as final regulations regarding tuberculosis in captive cervids that extend, from two years to three, the term for which accredited herd status is valid and increase by 12 months the interval for conducting the reaccreditation test required to maintain the accredited tuberculosis-free status of cervid herds. The regulations also reduce, from three tests to two, the number of consecutive negative official tuberculosis tests required of all eligible captive cervids in a herd before a herd can be eligible for recognition as an accredited herd. The regulations also remove references to the blood tuberculosis test for captive cervids, as that test is no longer used in the tuberculosis eradication program for captive cervids. 71 Fed. Reg. 24803 (April 27, 2006).

—Robert P. Achenbach, Jr.

Open letter/Cont. from page 2

bers by paid staff or contractors?

Should dues be increased to pay for an enhanced, professionally written newsletter?

Of course, new services will also be discussed by the committee.

Should *Update* communications be supplemented or supplanted by listserv notices? This could allow members to sign up for an overall membership or specialized practice group emails. Members could post announcements of legal developments as well as posting questions.

What other communication alternatives should the committee discuss?

Finally, your thoughts on what our "communications strategy" should be "as we move into our second quarter century" would be greatly appreciated. For the past twenty five plus years, the AALA has thrived as a membership based association. It is what the members choose to make it. Members, including all new members, what is *your* vision?

I anticipate that our committee will be holding a conference call in the near future to discuss these issues. *Please* offer your comments to me via email at saschneider@earthlink.net, or by fax to 479-575-2224. I will pass your thoughts directly on to the committee. Thank you. I look forward to your input.

–Susan A. Schneider, Chair, Communications Committee, Professor and Director Graduate Program in Agricultural Law, University of Arkansas School of Law

Committee members: Drew Kershen, David Saxowsky, Martha Noble, Linda Grim McCormick (ex-officio).

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

2006 MEMBERSHIP RECRUITMENT PROGRAM. All members are urged to check out the 2006 Membership Recruitment program on the AALA web site. As an extra incentive this year, we are offering new members a sign-up premium of a free copy of the 2005 conference handbook on CD. The CD also contains the archives of the *Update* from 1999-2005. This CD is worth the cost of dues by itself and can make a great incentive for prospective new members. The new member gets the CD and you get a chance to win a free registration to the 2006 annual conference in Savannah, GA. In 2005, all recruiters received at least a $25 gift certificate from Amazon.com so everyone wins.

2006 CONFERENCE. The 2006 conference program has been posted on the AALA web site along with the registration form which can be filled out on your computer. Mark your calendars and plan a trip to "America's First City" for the 2006 Annual Agricultural Law Symposium at the Hyatt Regency on the Savannah riverfront in Savannah, Georgia, October 13-14, 2006. The conference brochures are at the printers and will be sent out by the end of June. If you would like extra copies as a recruitment tool, please contact me at RobertA@aglaw-assn.org.

–Robert P. Achenbach, Jr, AALA Executive Director, P.O. Box 2023, Eugene, OR 97402
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