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INSIDE

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Work Opportunity Tax Credit (WOTC) expanded to benefit rural employers

On May 25, 2007, the President signed into law the Small Business and Work Opportunity Act of 2007 (Act).[1] The Act makes several amendments to the WOTC (I.R.C. §51), but perhaps the most important change to the WOTC from agriculture's standpoint is that the WOTC now has expanded application for employers that hire new employees in a "rural renewal county."

The WOTC

For many years, federal tax law has provided employers with a tax credit for hiring disadvantaged workers such as those that qualify for food stamps or SSI recipients.[2] The credit is fairly significant – generally, a maximum of $2,400 for each eligible employee that is hired (credit of 40 percent of the first $6,000 of wages paid to an eligible employee who works for at least 400 hours during the first year of employment). But, a significant problem with the credit has been that the type of eligible employee required by the statute is often not available for the type of employment that exists in many small towns and rural areas. That issue has been addressed by the Act.

Credit available for hiring a "designated community resident" living in a "rural renewal county"

The Act amends the WOTC to expand its availability to businesses in rural communities that hire a "designated community resident."[3] That is a person who is at least 18 years of age, but under age 40 as of the date they are hired and who has their principal place of residence established in a "rural renewal" area—a county outside of a metropolitan statistical area that has experienced net population declines from 1990-1994 and 1995-1999.[4] IRS has identified 31 states that have counties with the required population decline on page four of the instructions to Form 8850.[5]

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Judge concerned that alfalfa may be a little rascal—and other legal news

In recent years, federal district courts have found environmental statute violations in the way that the Animal and Plant Health Inspection Service (APHIS) regulates genetically engineered (GE) plants. A federal judge recently fashioned an unusual remedy for a violation: he placed a permanent injunction on an APHIS-approved cultivation of a GE crop.

The case began in June 2005 when APHIS issued a Finding of No Significant Impact and approved Monsanto Company's petition requesting nonregulated status for GE Roundup Ready© alfalfa. Opponents to deregulation stressed the possibility that bee pollination could transfer the GE alfalfa's glyphosate tolerance gene to conventional alfalfa. Nonetheless, APHIS concluded that growers of conventional or organically-grown crops could emplace reasonable quality control measures to ensure that their crops did not include any GE alfalfa.

Alfalfa growers, the Sierra Club, and other farmer and consumer associations filed a lawsuit, alleging that APHIS' deregulation of GE alfalfa violated the National Environmental Policy Act. Cultivation of GE alfalfa would result in spread of the glyphosate tolerance gene to natural alfalfa, they contended, an event that would create a significant environmental impact.

Charles R. Breyer, a judge in the U.S. District Court for the Northern District of California, agreed with the plaintiffs. APHIS had effectively concluded, according to the judge, that any environmental impact would be insignificant, because organic and conventional farmers bore the responsibility to prevent genetic contamination. Despite

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Other eligibility and filing requirements

For an employer to claim the credit, an employee must also be certified at or near the time of hire by the state workforce agency for the employer's location. If the employee is not certified at the time of being hired, an employer has only 28 days after the employee begins working to submit a certification request to the state workforce agency via IRS Form 8850. Once the Form is submitted, the agency will send the employer a certification letter. In addition to filing Form 8850, the employer must file either an ETA Form 9062 (Conditional Certification Form) or an ETA Form 9061 (Individual Characteristics Form) with the employer's state WOTC coordinator for the state workforce agency.[6]

The employee must not have previously worked for the employer or be the employer's dependent or a related party to the employer, and must work at least 120 hours for any portion of the credit to be claimed. But, the employee need not be a low-income person or be in a disadvantaged category. The employee only needs to reside in a rural renewal county and remain living there until having been paid $6,000 wages (for the full credit to be available). Thus, employees at all income levels can qualify the employer for the credit.

A key point for agricultural employers is that wages that can be taken into account for purposes of the credit must be subject to FUTA tax. That means that wages paid in kind (i.e., commodity wages) do not count.

Amount of the credit

For the employer to be entitled to any portion of the credit, the employee must work at least 120 hours over the first 12 months after being hired. If the employee works more than 120 hours, but less than 400 hours during the first year, the credit is 25 percent of the first $6,000 of wages paid to the employee. For qualified employees who work 400 hours or more, the credit is 40 percent of the first $6,000 of wages paid.

Claiming the credit

The employer claims the credit on IRS Form 5884 and attaches it to the employer's income tax return.

Summary

The re-tooled WOTC, effective for persons hired after May 25, 2007, and before September 1, 2011, has the potential to be a significant benefit to employers in rural renewal counties. The credit will definitely result in tax reduction when it is claimed. That is the case because the credit, for tax years beginning after 2006, offsets both regular tax and the alternative minimum tax.[7]

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[1] H.R. 2206, 110th Cong., 1st Sess. 2007. Sec. 8211. Sec. 8211 is part of a larger bill known as the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007.

[2] I.R.C. §51.

[3] Act, §8211 (b), *amending* I.R.C. §51(d).

[4] *Id.*

[5] The five states with the most counties designated as "rural renewal counties" are: Texas, North Dakota, Kansas, Nebraska, and Iowa.

[6] ETA Form 9061 is available from the employer's local public employment service office or at www.doleta.gov/business/Incentives/opptax.

[7] Act. §8214. The credit will, however, reduce the employer's wages paid deduction that is claimed on Schedule C.

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Alfalfa/Cont. from p. 1

APHIS' conclusion, Judge Breyer could find no evidence that the agency had investigated if farmers could actually protect their crops from genetic contamination.

On February 13, 2007, the judge held that APHIS had failed to take a "hard look" at the environmental impacts of its deregulation decision, a step required by the National Environmental Policy Act. He granted plaintiffs' motion for summary judgment on the claim that APHIS must prepare an Environmental Impact Statement (EIS).

On March 2, the plaintiffs filed a request for a permanent injunction to block APHIS' deregulation of the GE alfalfa until the agency performed its environmental review. The judge granted plaintiffs' request on May 3. First, the judge vacated APHIS' June 2005 determination of nonregulated status for the GE alfalfa. Then, the judge instructed the agency to prepare an EIS and reconsider the deregulation petition. APHIS must complete its EIS and again decide to deregulate before farmers can plant Roundup Ready alfalfa.

Meanwhile, farmers had planted 220,000 acres of GE alfalfa before the ban. Judge Breyer decided that the alfalfa may be grown, harvested, and sold under certain conditions. For instance, farmers must apply APHIS-approved procedures to clean farm equipment used in GE alfalfa production to minimize the risk of the spread of GE alfalfa seed and hay. Harvested GE alfalfa must be stored in designated and clearly labeled containers. And in the most controversial condition, APHIS must gather information about the locations of GE alfalfa seed production sites and GE alfalfa hay fields and reveal this information to the public. This would enable producers of conventional or organically-grown alfalfa to decide if they should test their crops for contamination.

APHIS has requested that the judge amend the conditions, including the widespread disclosure of specific locations of GE alfalfa fields. Previous disclosures of GE crop locations, the agency noted, triggered vandalism and intimidation of farmers.

USDA spokeswoman Rachel Iadicicco told the Associated Press that the court-imposed environmental study could take up to two years to complete. Monsanto Company announced that the company is reviewing its options, including the possibility of an appeal.

EPO makes a meal of soy patent, while court issues toxic verdict

In another unusual May 3 decision, the European Patent Office (EPO) revoked Monsanto's patent EP301749B1 with claims for the genetic modification of soybean plants. The EPO took this action 13 years after the patent's grant.

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Federal Roundup

Clean Water Act

The defendants were cited for violation of the Clean Water Act for filling wetlands. The defendant argued that the wetlands were not under the jurisdiction of the CWA because the wetlands were not "waters of the United States" as defined by the CWA. The case had been remanded to the trial court for a determination using the holding of *Rapanos v. United States*, 126 S.Ct. 2208 (2006). The court examined *Rapanos* for the proper standard to be applied and held that a wetland would meet the definition of waters of the United States if the wetland met either the plurality decision or the Justice Kennedy standard of *Rapanos*. The court then proceeded to determine whether the defendant's wetlands met either standard. The court held that the wetlands were waters of the United States under the plurality standard in that the wetlands had a continuous surface connection with nearby waters of the United States, noting that the wetlands had a significant impact on the water flow and quality of the nearby creeks. The court also held that the wetlands were waters of the United States under the Justice Kennedy standard in that the wetlands had a significant nexus to the creeks in providing ecological improvement functions for the creeks. The court held that the defendant's wetlands were subject to the jurisdiction of the CWA as waters of the United States. ***United States v. Cundiff*, 2007 U.S. Dist. LEXIS 22832 (W.D. Ky. 2007)**.

Taxation of employee benefits

The taxpayers, husband and wife, owned and operated a farm. The wife was also employed off the farm. The taxpayers entered into an employment agreement under which the wife was to be paid a monthly salary in compensation for tasks completed on the farm. The court found that the wife did perform those tasks and the monthly salary, less withholding, was paid. The husband obtained a medical reimbursement plan under AgriPlan through AgriBiz which obtained health insurance for the taxpayers and children. The husband paid the premiums for this policy. The taxpayers incurred medical expenses in one tax year and the husband included deductions for the insurance premiums and the medical expenses on Schedule F as employee benefit program expenses. The court held that the insurance premiums did not qualify for the deduction because the insurance policy was not obtained by the husband for the wife as an employee. The court also held that the medical expenses were also not deductible because the taxpayers failed to provide credible evidence that the expenses were incurred by the wife and paid by the husband as an ordinary and necessary expense of the farm business. See Harl, "Can Section 105 Plan Costs Be Deducted on Schedule F," 18 *Agri. L. Dig*. 105 (2007). ***Albers v. Comm'r*, T.C. Memo. 2007-44**.

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Alfalfa/Cont. from page 2

In July 1988, Agracetus filed the patent application, which describes particle bombardment methods for genetically altering soybean plants. The EPO granted the patent in March 1994 with claims to genetic engineering methods, and soybeans and seeds that contain a genetic alteration. Monsanto acquired Agracetus in 1996 and became the owner of the soybean patent.

For years, opponents fought against the patent, alleging that it gave Monsanto de facto control over all GM soybeans. The patent's adversaries realized one victory in 2003 when the EPO struck a claim to a method of genetically altering any kind of plant with particle bombardment. The agency decided that the patent lacks sufficient disclosure for such a broad claim and limited claims to soybean plants.

Now, the EPO has revoked the soybean claims on the basis that the claims lacked novelty. An EPO spokesman said that the decision is final with no further appeals available. Since the patent would have expired in 2008, elimination of the soybean claims should yield limited practical effects. However, the legal basis for the decision may significantly impact the abgiotech industry. The EPO will publish an explanation of its decision by the end of the year.

Battles over *Bacillus thuringiensis* technology continue. In July 2002, Syngenta filed a lawsuit claiming that Monsanto and other companies infringed at least one of U.S. Patent Nos. 6,075,185; 6,320,100; and 6,403,865. These patents include claims to synthetic Bt toxin genes designed for increased expression in corn and claims to transgenic corn plants resistant to insects.

In December 2004, Judge Sue L. Robinson of the Delaware District Court held that defendants had not infringed Syngenta's '185 and '100 patents as a matter of law. These patents focus on methods for optimizing codons for more efficient expression of Bt insecticidal proteins in corn. The judge decided that the codon usage of defendants' products does not fall within the scope of the '185 and '100 patent claims. A jury then found the '865 patent invalid on the grounds of obviousness and lack of written description.

Syngenta appealed the jury verdict to the U.S. Court of Appeals for the Federal Circuit. On May 3, the Federal Circuit affirmed.

The relevant claims of the '865 patent cover transgenic corn plants that produce a Bt protein encoded by a recombinant gene that has a G+C content of at least about 60%. The key prior art reference presented to the jury for an obviousness consideration was a published patent application of Kenneth A. Barton and Michael J. Miller, a U.S. Patent Application Publication No. 2001/003849. The document teaches that Bt genes have a high proportion of codons rich in A+T, while plants generally have codons rich in G+C. Barton and Miller describe a method for enhancing Bt toxin expression in GE plants by selecting codons that reflect the G+C bias.

While conceding that the general notion of substituting codons rich in G+C may have been obvious, Syngenta insisted that the idea to modify the coding sequence of the Bt toxin gene to increase the G+C content to more than 60% would not have been obvious. In one line of argument, Syngenta asserted that the patent application focused on GE tobacco plants and that the same codon substitution strategy could not reasonably be expected to succeed in corn.

The court pointed out, however, that the application includes a scorched earth statement: "there is good reason to believe and expect that the increased efficiency of expression achieved in tobacco through the use of the method and coding region of the present invention will be equally applicable in other plant species, as it is in tobacco." The Federal Circuit found substantial evidence to support the jury's verdict on obviousness.

—Phill Jones

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USDA administrative appeals – it's more than going through the motions

By Thomas A. Lawler, Erin C. Herbold, and Roger A. McEowen

A great deal of governmental regulation of agriculture is conducted via administrative agencies that promulgate regulations and make decisions. This is particularly true concerning the regulation of agricultural activities. Usually, a farmer or rancher's contact with an administrative agency is in the context of participation in an agency-administered program, or being cited for failure to comply with either a statutory or administrative rule. Consequently, it is critical for agricultural clients to have a general understanding of how administrative agencies must first be dealt with in accordance with the particular agency's own procedural rules before the matter can be addressed by a court of law. This is known as exhausting administrative remedies.[1] But, does the exhaustion of administrative remedies by completing the administrative appeal process also require that legal issues must be raised during the administrative process so as to be preserved for judicial review? That issue was recently addressed in a case involving converted wetlands.

The facts of *Ballanger*[2]

The plaintiff is an Iowa resident who owns and operates farmland in Missouri. Upon his purchase of the farmland at issue in 1996, the seller informed the plaintiff that the farm did not contain any wetlands and no wetland delineation had been made. The plaintiff cleared woody vegetation and other plants from approximately five acres of the property for conversion to crop production and then enrolled the property in the farm program. In 2002, the local Farm Service Agency (FSA) sought a determination from the Natural Resources Conservation Service (NRCS) that the plaintiff's farm, for crop year 2000, was in compliance with the highly erodible and wetland provisions of the 1985 Farm Bill.[3] The wetland provisions of that legislation prohibit the conversion of "wetlands" to crop production on land enrolled in the farm program.[4] NRCS made field visits to the plaintiff's farm in 2002 and again in late 2003, ultimately concluding that the plaintiff had converted 4.5 acres of wetlands.[5]

The plaintiff appealed the NRCS' decision to the county FSA, specifically stating that he had not sought an exception for "good faith"[6] or pursued mitigation.[7] Apparently, the plaintiff believed that doing so would have amounted to his agreement (or acquiescence) with the NRCS wetland determination.[8] The county FSA affirmed the NRCS' determination, and the plaintiff filed an administrative appeal with the USDA's National Appeals Division (USDA NAD). USDA NAD affirmed the county FSA's decision, and the plaintiff further appealed administratively to the USDA Deputy Director. The Deputy Director likewise affirmed. After exhausting all administrative appeals, the plaintiff filed suit in federal district court.[9]

Exhaustion of administrative appeals in wetlands cases

The plaintiff clearly exhausted his administrative remedies before filing suit in federal district court – there was no administrative body remaining that could hear an appeal. So, the plaintiff was entitled to move his case to federal court. However, at the district court, the plaintiff raised several issues that had not been raised during the administrative appeal process. The plaintiff argued that NRCS improperly relied on data from field visits that occurred at times outside of the crop growing season; that NRCS did not follow the proper wetland determination methodology; and that NRCS failed to determine whether his conversion activities had a minimal effect on wetland functions. The court ruled that it could not consider these issues because the plaintiff had not raised them during the administrative appeal process—it was insufficient for the plaintiff to merely exhaust administrative remedies. Instead, the court ruled that the plaintiff must also raise and exhaust legal issues in the administrative process (known as "issue exhaustion) in order to preserve them for further review in the judicial process. The plaintiff appealed.

The United States Court of Appeals for the Eighth Circuit affirmed.[10] The court noted that the U.S. Supreme Court, in *Sims v. Apfel*,[11] established the rule that issue exhaustion applies in administrative appeal proceedings if required by statute or, if no statute applies, if the proceeding is adversarial in nature.[12] In applying the *Sims*[13] rule to this case, the court noted that while no statute requires issue exhaustion in the context of wetland appeals, the applicable regulations (after the filing of an appeal) prohibit ex parte communications between NAD officers or employees and interested persons,[14] provide for the subpoenaing of evidence and witnesses[15] and generally describe a process that is similar to a trial.[16] In addition, the regulations state that the party challenging an agency decision bears the burden of proof to establish by a preponderance of the evidence that the agency decision was erroneous.[17] The regulations also specify that the NAD is independent from all other USDA agencies and offices at all levels.[18] Based on these factors, the court reasoned that the USDA administrative appeal process (at least as applied to wetland determinations) was adversarial in nature, and that the plaintiff had a duty to develop the administrative record and preserve legal issues for eventual judicial review.[19] The court also noted that it had previously required issue exhaustion in a wetland determination case.[20]

The preserved issue – wetland manipulation

The plaintiff did preserve the issue of whether the removal of woody vegetation from a wetland, by itself, constitutes an illegal manipulation of a wetland. The plaintiff claimed that USDA also had to prove that the removal of woody vegetation from a wetland had an *actual impact* on the wetland or reduced its water flow. The applicable statute defines a "converted wetland" as a "wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible…".[21] The governing regulation similarly defines a converted wetland as a "wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose or to have the effect of making possible the production of an agricultural commodity…".[22] The trial court ruled that the parenthetical language in the statute merely illustrated the type of activity that could qualify as a wetland manipulation. The plaintiff, however, argued that the parenthetical language of the regulation impermissibly expanded the scope of the statute. The trial court disagreed, as did the Eighth Circuit. Under the standard of deference that is generally granted to agency interpretations of statutory language,[23] and agency interpretation of its own regulation,[24] the court upheld the agency's determination that the removal of woody vegetation from a wetland for the purpose of bringing the land into crop production is an illegal manipulation, and that separate proof of an impact on water flow is not required.[25]

Handling administrative agency appeals

Clearly, the lesson of *Ballanger*[26] is that producers must take care to preserve evidence, all disputed factual issues, and raise all potential legal issues during the administrative process that could help their case upon eventual judicial review. While it is not the rule that issue exhaustion automatically applies in administrative appeal proceedings, it is the general rule. As such,

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agricultural producers should seriously consider retaining legal counsel at the beginning of the administrative appeal process, and practitioners should communicate to clients the need and rationale for representation.

[1] *But see*, *Gold Dollar Warehouse, Inc. v. Glickman*, 211 F.3d 93 (4th Cir. 2000) (plaintiff not required to exhaust administrative remedies before challenging imposition of personal liability for violation of tobacco market quotas where plaintiff made facial challenge to regulation).

[2] *Ballanger v. Johanns*, No. 06-3889, 2007 U.S. App. LEXIS 18245 (8th Cir. Aug. 1, 2007).

[3] *See* 16 U.S.C. §3821.

[4] "Converted wetland" is defined as "wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible…". 16 U.S.C. §3801(a)(6)(A).

[5] The 4.5 acres were determined to be wetlands due to the presence of hydric soil, hydrophytic vegetation, wetland drainage patterns and oxidized root channels in the upper foot of soil – all wetland characteristics. See 16 U.S.C. §3801(a)(18). The finding resulted in the plaintiff being ineligible for USDA farm program payments as of the 1996 crop year, and triggered repayment of all amounts the plaintiff had received since that time, plus interest.

[6] Under the 1996 Farm Bill, a "good faith" exemption is provided to producers who inadvertently drain a wetland. Under the rule, if the wetland is restored within one year of drainage, no penalty applies. See 16 U.S.C. §3822(h)(2).

[7] Under the 1996 Farm Bill, a farmed wetland located in a cropped field can be drained without sacrificing farm program benefit eligibility if another wetland is created elsewhere. See 16 U.S.C. §3822(f)(2).

[8] The plaintiff was represented by counsel only during a portion of the administrative process.

[9] While the farmland at issue was in Missouri, the plaintiff resided in Iowa. Hence, jurisdiction was properly with the federal district court for the district of the plaintiff's residence – in this instance, the Federal District Court for the Southern District of Iowa. The lead author began representing the plaintiff after the administrative appeal process had been exhausted.

[10] *Ballanger v. Johanns*, No. 06-3889, 2007 U.S. App. LEXIS 18245 (8th Cir. Aug. 1, 2007).

[11] 530 U.S. 103 (2000).

[12] In a non-adversarial agency proceeding, the administrative agency is responsible for identifying issues and developing the record. In an adversarial proceeding, each party must develop the factual bases for its claims and raise those desired to be preserved for any future appeal. Issue exhaustion was not required in *Sims* (involving a social security proceeding) because an administrative law judge served an investigative role and was required to develop the record. As such, the administrative proceedings were inquisitorial and not adversarial.

[13] 530 U.S. 103 (2000).

[14] 7 C.F.R. §11.5.

[15] *Id*. §11.8(a)(2).

[16] *Id*. §11.8(c)(5)(ii).

[17] *Id*. §11.8(e).

[18] *Id*. §11.2

[19] The U.S. Supreme Court, in *Sims*, also noted that issue exhaustion is *not* disfavored and that it is required as a general rule.

[20] *Downer v. United States*, 97 F.3d 999 (8th Cir. 1996) (alternative holding of court was that plaintiff, at the administrative appeal stage, failed to present evidence concerning the existence or non-existence of natural wetlands on his property, and failed to carry the burden of proof). While not referenced by the court, issue exhaustion was also required in another wetlands case. *See Holly Hill Farms Corp. v. United States*, 447 F.3d 258 (4th Cir. 2006) (government's failure to make minimal effects determination (16 U.S.C. §3822(f)(1)) not plain error; landowners raised minimal effects exemption for first time on appeal).

[21] 16 U.S.C. §3801(a)(6)(A).

[22] 7 C.F.R. §12.2(a).

[23] *See, e.g.*, *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006).

[24] *See, e.g., Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994). The party challenging an administrative agency's regulatory interpretation of statutory language must show that the agency's interpretation is arbitrary, capricious, and not otherwise in accordance with the law. *See, e.g.*, *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[25] The plaintiff cited a proposed regulation (67 Fed. Reg. 19699, 19701 (2002)) to support his argument that the government had to separately prove that the wetland's water flow had been impaired. But, the court refused to apply the regulation as an expression of the USDA's interpretation of the statute because the regulation had not been finalized, and because the regulation would not have, in any event, applied to the plaintiff (the plaintiff made no argument that he removed the woody vegetation in order to restore the land to a more natural, properly functioning wetland state).

[26] No. 06-3889, 2007 U.S. App. LEXIS 18245 (8th Cir. Aug. 1, 2007).

Liability insurance coverage cases

The following three cases from Kansas, New Hampshire and Iowa each address liability insurance coverage.

In *Judd Ranch, Inc. v. Glaser Trucking Service, Inc.*, 2007 U.S. Dist. LEXIS 37628 (D. Kan. 2007), the plaintiff purchased cattle feed which was delivered by one of the defendants. The plaintiff alleged that the defendant had failed to properly clean the trailer before loading the cattle feed and that some aluminum fragments were mixed into the cattle feed, causing damage to the plaintiff's cattle when it ate the feed. The defendant sought to recover any damages from its liability insurance company. The insurance company refused to agree to pay any damages which might be awarded because the insurance policy excluded coverage of damages caused by the discharge of pollutants by the defendant trucking company. The plaintiff and trucking company argued that the policy was ambiguous in its definition of pollutant and that aluminum fragments were not a pollutant. The court found that the pollutant exclusion in the policy was clear and unambiguous and was broad enough to cover aluminum fragments which were negligently mixed in with the cattle feed. The court granted summary judgment to the insurance company relieving it of any liability for damages that could be awarded to the plaintiff.

In *Carter v. Concord General Mutual Ins. Co.*, 2007 N.H. LEXIS 87 (N.H. 2007), the plaintiff was injured during a "hay ride" on a farm when the wagon ran over the plaintiff's foot. The plaintiff sued the defendant insurance company after the insurance company denied coverage because the farm wagon was not a trailer as defined in the insurance policy. The policy provided a definition of trailer as something that could be towed behind an automobile or pickup. The farm wagon was being pulled by a tractor and the defendant argued that the tractor-pulled wagon did not meet the policy definition of trailer. The court examined the photographs of the wagon and noted that the wagon had no lights, fenders, fender guards, or flaps; therefore, the wagon was not suited for towing by an automobile or pickup on the highway and was not a trailer as defined by the policy.

Finally, in *Bituminous Casualty Corp. v. Sand Livestock Systems, Inc.*, 728 N.W.2d 216 (Iowa 2007), the plaintiff was employed by a livestock company and died from carbon monoxide poisoning as a result of an improperly installed propane power washer. The defendant livestock company sought indemnity and legal defense from its insurance company. The insurance company refused both requests, citing an exclusion in the commercial insurance policy for bodily injury caused by pollution. The policy defined pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The issue was submitted to the state supreme court as a certified question from the federal district court. The Iowa Supreme Court held that the insurance policy exclusion for injury caused by pollutants applied to carbon monoxide gas emitted from machinery. See also *Bituminous Casualty Corp. v. Sand Livestock Systems, Inc.*, 2005 U.S. Dist. LEXIS 12276 (N.D. Iowa 2005).

—Robert P. Achenbach, Jr. AALA Executive Director

STATE ROUNDUP

NEBRASKA. *Partnership property.* The plaintiff and defendant were brothers who formed a partnership with another brother to operate a farming business. The partners purchased a farm on auction, paying 10 percent of the purchase price but the farm was titled in the name of their mother who financed the remainder of the purchase price through a loan. The partnership made improvements on the farm, operated the farm, paid taxes but no rent for the first eight years. After eight years, the partnership made rent payments which were sufficient for the mother to make the loan payments and taxes. The property was not listed as partnership property on the local tax rolls. The mother testified that she considered the farm to be hers. The court held that the presumption applied that property purchased with partnership funds was partnership property unless the presumption was rebutted with significant evidence of a contrary intention. The court held that the evidence of the mother's ownership was not sufficient to show that the parties intended the farm to be solely her property. ***Mogensen v. Mogensen*, 729 N.W.2d 44 (Neb. 2007)**.

INDIANA. *State personal property tax.* The taxpayer was a turkey producer/processor which raised turkeys from eggs produced in its own breeder facility. The young poults are raised by independently-owned growing facilities and eventually shipped to processing facilities owned by the taxpayer. The taxpayer claimed that 94 percent of the turkey products were shipped out-of-state and claimed an interstate commerce exemption from state personal property tax on 94 percent of its inventory, including turkeys at the growing facilities. The state rejected most of the exemption claim, ruling that the turkeys were not part of the processing operation inventory until they arrived at the processing plant. The court held that Ind. Code § 6-1.1-3-11 defined processor inventory as property that "will be used" in the processing operation; therefore, because the taxpayer remained the owner of the turkeys while the turkeys were at the growing facilities and the turkeys were intended for the processing operation, the turkeys were eligible for the interstate commerce exemption from personal property tax. ***Perdue Farms, Inc. v. Boone Township Assessor*, 2007 Ind. Tax LEXIS 46 (Ind. Tax Ct. 2007)**.
Robert

MINNESOTA. *State use tax.* The taxpayer was a Minnesota corporation that sold and installed grain drying systems. The taxpayer purchased some of the components from an Indiana company and used the components in new systems or as additional parts of existing systems owned by customers. The state assessed a use tax on the grain bin components purchased in Indiana and the taxpayer argued that the components were exempt from the use tax, under Minn. Stat. § 297A.01, as products "used in the processing, drying and/or handling of a grain commodity." The state argued that grain bins were not exempt and the use of the grain bins in a grain drying system did not make the bins themselves exempt from the use tax. The court noted that the statute also specifically declares that grain bins were not farm machinery and held that the grain bins were subject to the use tax when purchased by the taxpayer and that the purpose or use of the grain bins as part of a grain drying system was irrelevant to the taxable nature of the bins themselves when purchased by the taxpayer. ***Custom Ag Service of Montevideo, Inc. v. Comm'r*, 728 N.W.2d 910 (Minn. 2007)**.

MONTANA. *Contract barter provision.* The plaintiff entered into a contract to purchase a horse from the defendant. The oral sales contract provided for an initial payment of $1500 and for the plaintiff's son to provide farm labor for the remaining $1500 purchase price. The contract also provided for the horse to remain with the defendant until all payments were made, with the costs of feed and veterinary services to be paid by the plaintiff. The son worked the required hours and submitted a bill for the wages but the defendant refused to pay. The son filed a wage and hour claim with the state and obtained a judgment for the back wages. The defendant allowed delivery of the horse but refused to execute a bill of sale for the horse because $568 in feed and veterinary expenses were not paid. The plaintiff offered $1500 to settle but the defendant refused. The plaintiff sued for the bill of sale. The trial court held that the barter provision voided the entire contract but the appellate court held that the trial court properly excised the void barter provision and enforced the remaining provisions of the contract. ***Wolfe v. Newman*, 2007 Mont. LEXIS 348 (Mont. 2007).**

WYOMING. *Adverse possession—fence*. The two properties had once been part of the same ranch. The plaintiffs purchased their parcel from the ranch owner and their parcel was enclosed by a single fence which they treated as the boundary to their land. The plaintiffs planted the land with blue spruce trees, including the area in dispute on the north side of the southern boundary. The defendants purchased their parcel from someone who had purchased the parcel from the ranch owner. A survey was performed, showing the true boundary line north of the fence so the defendants had the fence removed and built a new fence on the true boundary. The plaintiffs filed suit to quiet title and for damages for the trees removed on the disputed strip by the defendants. The fence was in disrepair and did not follow a straight line but wandered with the topography of the land. The evidence also showed that the fence served only as a pasture division fence on the original ranch and never served as a boundary line. The trial court entered judgment for the defendants because the fence was insubstantial and was a fence of convenience creating a permissive use of the disputed strip by the plaintiffs. **Addison v. Handrich, 2007 Wyo. LEXIS 119 (Wyo. 2007).**

ARKANSAS. *Adverse possession—fence*. The defendant and successors had owned their land for over 50 years and had fenced their land to include the disputed stip of land. The land was fairly wild and wooded but was used by the defendants for livestock pasturing, horse riding, hunting, harvesting timber, and permissive use by guests and the public. The land was also posted with locally recognized purple paint. The plaintiff purchased the neighboring land in 2004 and a survey indicated that the disputed strip was within the titled land belonging to the plaintiff. The trial court found that the defendant and successors had obtained title to the disputed land by adverse possession because of the long term and varied uses of the land within the fenced area. The plaintiff pointed to the poor condition of the fence, the defendant's failure to object to claims of title to the land when the plaintiff first moved in and to the defendant's questioning of title to real estate brokers. The court held that such actions were relevant to the defendant's hostile intent but insufficient to override the trial jury's finding that the defendant's other actions established open and notorious possession of the land within the fence. ***Stewart v. Morgan*, 2007 Ark. App. LEXIS 512 (Ark. Ct. App. 2007).**

NEW JERSEY. *Searches*. The defendant pled guilty to maintaining a controlled dangerous substance (marijuana) production facility. The defendant moved to suppress evidence obtained when the police flew over the defendant's farm corn field and spotted the marijuana growing in the middle of the field. The court held that the defendant did not have any expectation of privacy for the field from inspection by helicopter. The court held that the first observation of the marijuana was incidental to the locating of the farm by air and that the corn field was not part of the residence so as to be protected by the expectation of privacy associated with the residence. ***State of New Jersey v. Marolda*, 2007 N.J. Super LEXIS 246 (N.J. Super. 2007).**

—Robert P. Achenbach,Jr., AALA Executive Director

Federal Register summary from July 28, 2007 to August 10, 2007

COOPERATIVES. The IRS has adopted as final regulations which provide that all Subchapter T cooperatives must make their income tax returns on Form 1120-C,"U.S. Income Tax Return for Cooperative Associations," or such other form as may be designated by the Commissioner. The information that Subchapter T cooperatives will be required to provide on new Form 1120-C will assist taxpayers and the IRS in determining the appropriate filing deadline. These regulations apply to returns for taxable years ending on or after December 31, 2007. In addition, taxpayers may rely on the regulations in filing returns for taxable years ending on or after December 31, 2006, and before December 31, 2007. 72 Fed. Reg. 41441 (July 30, 2007).

GENETICALLY MODIFIED ORGANISMS. APHIS has announced that, on August 6, 2007, it will begin operating a toll-free telephone number for use by conventional and organic alfalfa farmers and prospective alfalfa farmers to inquire about the proximity of their farms or field to Roundup Ready alfalfa. This action is being taken in compliance with a judgment and order in *Geertson Seed Farms, et al. v. Johanns*, 2007 U.S. Dist. LEXIS 48383 (N.D. Calif 2007). (See related report in this issue of the Agricultural Law Update on page 1.) 72 Fed. Reg. 43222 (Aug. 3, 2007).

LIVESTOCK MANDATORY REPORTING. The AMS has issued proposed regulations reauthorizing and amending the Livestock Mandatory Reporting program as required by the Livestock Mandatory Reporting Act of 1999, as extended by legislation in 2006. 72 Fed. Reg. 44671 (August 8, 2007).

PACKERS AND STOCKYARDS ACT. The GIPSA has issued proposed regulations amending the regulations concerning records to be furnished poultry growers and sellers. The regulations list the records live poultry dealers (poultry companies) must furnish poultry growers, including requirements for the timing and contents of poultry grow-out contracts. The proposed amendments would require poultry companies to timely deliver a copy of an offered contract to growers; to include information about any Performance Improvement Plans in contracts; to include provisions for written termination notices in contracts; and notwithstanding a confidentiality provision, allow growers to discuss the terms of contracts with designated individuals. 72 Fed. Reg. 41952 (Aug. 1, 2007).

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Federal roundup/Cont. from page 3

Oral lease

The debtor entered into a written six-year lease of crop land under which the debtor was to pay one-third of the crop as rent. The debtor remained on the land after the expiration of the lease and filed for bankruptcy. The landlord objected to the debtor's assumption of the lease, arguing that the lease had terminated under a written notice given to the debtor. The debtor claimed that the parties had entered into an oral lease in 2004 under which the landlord agreed to extend the lease for eight years and reduce the rent to one-fourth of the crop in exchange for the installation of a sprinkler irrigation system on the property. The irrigation system was installed and the debtor paid only one-fourth of the crops as rent after the sprinkler system was installed. The court held that the debtor's and landlord's partial performance under the alleged oral lease did not remove the lease from application of the statute of frauds because no misconduct or fraud was alleged on the part of the landlord; therefore, the court denied assumption of the lease by the debtor. ***In re Johnson*, 2007 Bankr. LEXIS 2549 (Bankr. D. Kan. 2007).**

Chapter 12 bankruptcy attorney fees

The attorney for Chapter 12 debtors was approved by the court, but the case was dismissed before a plan was confirmed. The court retained jurisdiction over the case to conclude administration of the estates. The attorney did not seek court approval for attorney's fees incurred during the Chapter 12 case. Instead, the attorney approached the debtors privately and obtained a promissory note for the bankruptcy and non-bankruptcy legal fees. The debtors made several payments on the note. The court held that the promissory note was unenforceable because the attorney failed to obtain permission to charge attorney's fees, as required by Section 330, and to disclose payments on the note, as required by Section 329. The court ordered the attorney to return all payments made on the note. ***In re Brown*, 2007 Bankr. LEXIS 2211 (Bankr. N.D. Okla. 2007).**

Guaranteed loans

The plaintiff bank agreed to loan a tomato growers' cooperative $9 million over three loans and sought to have the loans guaranteed by the defendant, Rural Business-Cooperative Service (the agency). The first two loans were made and guaranteed by the agency but the loans were in default by the time the application for guarantee of the third loan was made. The defendant's loan officer was found to have misrepresented the financial condition of the cooperative in applying for the third loan guarantee and did not disclose that some of the third loan proceeds were used to cure the defaults on the first two loans. All three loans defaulted and the bank sought payment under the guarantees by the agency. The agency argued that the plaintiff bank had violated the terms of the guarantee by failing to monitor the financial affairs of the cooperative, specifically in failing to obtain a required financial audit before making the third loan. In addition, the agency argued that the plaintiff bank had made loans to an ineligible borrower and allowed the borrower to use borrowed funds to pay off prior debts. The district court held that the agency properly denied the claim for payment on the guarantee because of the bank's violation of the regulations, guarantee agreements, and general fiduciary duties. The appellate court affirmed. ***Farmers Bank of Hamburg v. USDA*, 2007 U.S. App. LEXIS 17228 (8th Cir. 2007); aff'g, 2006 U.S. Dist. LEXIS 266193 (E.D. Ark. 2006).**

Migrant agricultural labor

The plaintiffs were workers hired in Texas to detassel and rogue corn in Indiana. The seed corn grower in Indiana hired an independent contractor to obtain workers for the tasks. The contractor told the workers that they would work 72-84 hours per week and receive free housing. However, the plaintiffs worked only 20 hours per weeek and the housing was substandard. The plaintiffs sued the contractor and seed comopany for the lost wages and failure to provide adequate housing. At trial, the seed company was granted summary judgment because the trail court ruled that the seed company was not the employer of the plaintiffs. The court held that the seed company could not be held liable under the Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. sections 1801-72, as an employer for promises made by the independent contractor in Texas beyond what the contractor was authorized by the seed company. However, after the plaintiffs arrived in Indiana and began working, the seed company became their employer and was liable for violations of MSAWPA proven by the plaintiffs. The court noted that the seed company provided all the tools, transportation and housing and the contractor did not have any other clients or business assets. ***Reyes v. Remington Hybrid Seed Co.*, 2007 U.S. App. LEXIS 17231 (7th Cir. 2007).**

—Robert P. Achenbach,Jr., AALA Executie Director

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION

AALA Membership Survey

In an effort to improve membership benefits, the AALA membership committee has created an online survey that gives members a chance to let us know about how members feel about their membership in the AALA. You can access the survey from the AALA web site home page (the first page after the "enter" page). You will need to log on in order to take the survey but responses will be anonymous. Please take the survey before September 15, 2007 to give the membership committee time to digest the results and report findings and recommendations to the AALA board at the October conference board meeting.

New AALA Fax Number

I've been having trouble with receiving faxes on a consistent basis and decided to change to a dedicated fax number. The new AALA fax number is 541-302-8169. The new number will also be displayed on the AALA web site and all AALA correspondence.

2007 Annual Conference

It's less than two months before the 2007 Annual Agricultural Law Symposium at the Westin San Diego Hotel (formerly a Wyndham hotel) in sunny downtown San Diego, CA, October 19-20, 2007. Mark your calendars and plan a trip to enjoy the sights (Gaslight District), sounds (sea gulls and trolley bells), animals (San Diego Zoo and Seaworld) and sunshine. The program has been posted on the AALA web site with a registration form. If you would like extra copies of the conference brochures to distribute in your area, please let me know by e-mail. **Special note**: **The room block expires on September 17, 2007, and the rooms will be then be available only at the regular retail rate.**

A substantial block of rooms has been reserved at the conference rate for Thursday and Friday evenings. However, there is a smaller number of rooms available at the conference rate on Wednesday and Saturday night. So, if you plan to come a day early or stay a day late, you may not be able to get the conference rate for all days. However, if you are prevented from getting the conference rate on Wednesday or Saturday, please let me know and I will try to get an increase in the room blocks for these days. If you seek a reservation that includes these early/late days, the hotel reservation service may tell you that the conference rate is not available because the block is full for one or more of these early/late days. If this happens to you, please contact Ann Gonzalez, reservations manager at the Westin San Diego, at 619-338-3675 and she will help you get your rooms at the conference rate, if at all possible. In any case, the conference rate should still be available for the conference nights (i.e. Thursday and Friday). Room blocks are limited because the association is severely penalized financially if the room blocks are not filled.

Robert P. Achenbach, Jr,
AALA Executive Director