Agricultural Law Update

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INSIDE

IN FUTURE ISSUES

*FmHA foreclosures report**

On October 26 and November 4, 1987, Judge Van Sickle issued new orders in the *Coleman v. Lyng* national class action lawsuit against FmHA. Neither order changed the position FmHA farmer borrowers are in as a result of the May 7 and June 2, 1987 orders.

In its October 26 order, the court did not approve FmHA's revised Form 1924-26 because FmHA had not made all of the revisions required by the May 7, 1987 order, [Editor's note: See the December issue of the *Agricultural Law Update* for a discussion of the May 7 and June 2 orders.] Therefore, according to the court's June 2, 1987 order, FmHA still cannot begin reprocessing under the "Notice of Intent to Take Adverse Action" procedure those borrowers who received the defective Form 1924-26. Also, FmHA is still prohibited from continuing with existing or initiating new foreclosure or liquidation actions against any farmers who received the defective Form 1924-26 and whose accounts were accelerated before May 7, 1987.

In the October order, Judge Van Sickle also dealt with the farmers' request for an appointment of a special master to review requests from farmers who had received the defective Form 1924-26 for loan servicing, appeals of loan servicing denials or adverse action decisions, voluntary sales or conveyances, or debt settlement.

After the farmers filed their request for appointment of a special master, FmHA changed its procedures for processing such requests for FmHA services. Judge Van Sickle dismissed the farmers' request for a special master in order to allow time to determine whether FmHA's new "September 1, 1987" procedures will work. The court did allow the farmers to refile their request if those new procedures do not work.

Judge Van Sickle also ruled on the farmers' request that additional protections be given to FmHA borrowers whose loans were accelerated before May 7, 1987.

(continued on next page)

Security interest attaches to harvested crops

The opinion in *U.S. v. Smith*, 832 F.2d 774 (2d Cir. 1987), addresses the distinction between growing and harvested crops. FmHA had taken a security interest in "all crops . . . now planted, growing or grown, or which are hereafter planted" on certain described parcels. The crops in question, however, were not grown on the designated lands. The security agreement also listed other types of collateral: "Crops, livestock, supplies, other farm products and farm and other equipment." Did the FmHA security interest attach once the crops were harvested?

In approaching the problems presented, the Second Circuit recognized that the case arose under a federal lending program and that federal law must be applied. However, following the guidelines set forth in *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27 (1979), the court determined that nondiscriminatory state law (here the New York Uniform Commercial Code) could be adopted as the federal rule of decision.

The Second Circuit reviewed the district court holding that the FmHA security interest had failed to attach both to growing and harvested crops. The Second Circuit agreed and FmHA conceded that the failure to comply with U.C.C. section 9-203(1)(a) (real estate description requirement in security agreement) and with U.C.C. section 9-402(1) & (5) (real estate description requirement in financing statement) resulted in no attachment to crops *growing* on undesignated lands. However, the Second Circuit disagreed as to attachment to the crops once harvested. Crops, once harvested, are no longer subject to the special requirements of sections 9-203(1)(a) and 9-402(1) and (5). Severed crops are not growing crops, but another category of farm products. Accordingly, once the crops were harvested, the security interest of the FmHA automatically attached. The Second Circuit likened

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The request asked the court to require two separate actions: (1) that farmers with accelerated loans be automatically reprocessed under the revised Form 1924-26 procedures; and (2) that such reprocessing must be completed before FmHA could cut off releases of farm production income needed for payment of essential family living or farm operating expenses, or take ASCS or FCIC payments by administrative offset. The court denied this request. However, Judge Van Sickle did indicate that he might require that borrowers with accelerated loans be notified of their rights under the *Coleman* orders once a revised Form 1924-26 is approved by the court.

Any further attempts to obtain additional protection for borrowers whose accounts were accelerated before May 7, 1987, will have to be done through federal court actions filed by the individual farmers.

In the November 4, 1987 order, Judge Van Sickle made it clear that FmHA could not proceed with foreclosures or liquidations of any farmers' accounts because its revised form had not yet complied with the court's May 7, 1987 order. The court did say that FmHA could appeal the court's decisions before it complied. However, if the appeal were taken, FmHA would not be able to proceed against farmers who had received the defective Form 1924-26 until the appeal was completed.

On November 5, 1987, FmHA did appeal to the Eighth Circuit Court of Appeals. It appears that FmHA will not be able to proceed against farmer borrowers for several more months.

On January 6, 1988 the Agricultural Credit Act of 1987 was signed by the President. Under the Act, FmHA is prohibited from starting any new foreclosure actions until it offers farmers the opportunity to apply for a new debt restructuring program. By February 20, 1988 FmHA must also send a notice to all borrowers whose loan accounts were accelerated between November 1, 1985 and May 7, 1987, advising them th they may apply for the new debt restruc turing program. The farmer must respond to this notice within thirty days by requesting debt restructuring. Once such request is made, the farmer may again get releases of crop and livestock sales checks to pay for essential living and operating expenses.

– Lynn A. Hayes

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AALA Editor . Linda Grim McCormick
855 4th Ave N , Apt 102
Kent, WA 98032

Contributing Editors Linda A Malone, University of Denver Law School; Lynn A Hayes, Farmers Legal Action Group, Donald B Pedersen, University of Arkansas Law School, H W Hannah, Texico, IL; Linda Grim McCormick, Kent, WA, Terence J Centner University of Georgia; Michael B Thompson, University of South Dakota

State Reporter Gerald Torres, Minnesota

For AALA membership information, contact Mason E Wiggins Jr , Heron, Burchette, Ruckert and Rothwell, Suite 700, 1025 Thomas Jefferson St N W , Washington, D C 20007

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SECURITY INTEREST TO HARVESTED CROPS / CONTINUED FROM PAGE 1

this to attachment of a security interest in after-acquired property.

The Second Circuit also held that perfection of the security interest in harvested crops was not dependent upon a land description in the financing statement or upon filing such financing statement in the county where the crops were grown. Filing in the county of debtor-farmer's residence was sufficient.

The Second Circuit found support for its analysis in *Matter of Nave*, 68 Bankr. 139 (Bankr. S.D. Ohio 1986); *In re Klipfes*, 62 Bankr. 290 (Bankr. S.D. Ohio 1986); and, *In re Roberts*, 38 Bankr. 128 (Bankr. D. Kan. 1984).

While the facts in *Smith* did not involve a priority conflict between two secured parties, the court recognized that such a situation could exist. Conceivably, a second lender could have taken an attached and perfected security interest in debtor's growing crops – and in harvested crops. In this hypothetical situation, the FmHA security interest would still attach on harvest. Presumably FmHA could then argue that its security interest has priority under U.C.C. section 9-312(5) – the first to file rule. The court in dictum points out that the second lender in this situation could seek to protect itself by structuring its security interest to achieve the special priority awarded to crop financers under U.C.C. section 9-312(2). The Second Circuit declined to state expressly whether this special priority continues after the crops are harvested. However, it seems u likely that any court would eviscerate the limited protection afforded by U.C.C. section 9-312(2) by terminating the special priority once growing crops are harvested.

– Donald B. Pedersen

FCIC: some bars to recovery

In the June, 1986, issue of the *Agricultural Law Update*, Don Pedersen reported that in *Ward v. Federal Crop Insurance Corp.*, 627 F. Supp. 1545 (E.D. N.C. 1986), the Wards failed to recover for the loss of corn, soybean, and peanut crops because they did not make timely acreage reports as required by their insurance contract. This same result was reached forty-two years earlier in *Felder v. Federal Crop Insurance Corp.*, 146 F.2d 638 (4th Cir. 1944) where the claimant failed to file his proof of acreage loss within thirty days as required by the contract. The court said that strict compliance was a condition precedent to recovery.

Following are other cases in which the insured failed to recover. In *Frier v. Federal Crop Insurance Corp.*, 152 F.2d 149 (5th Cir. 1945), *cert. denied*, 328 U.S. 856 (1946), claimant did not recover because he did not prove that the county committee had accepted his application, though a clerk told him he was covered. The court said that he had a duty to ascertain if he had been accepted and that the word of the clerk was not sufficient.

In *Federal Crop Insurance Corp. v. Merrill*, 68 S.Ct.1 (1947), the claimant did not recover because he sought payment for loss of a spring wheat crop reseeded on a failed winter wheat crop. Regulations published in the *Federal Register* precluded recovery under these circumstances, and the court said the claimant was presumed to know the regulations. The court said that assurance by an agent that he was covered was not binding because unless the law so provides, a government agency is not so bound.

In *Brown v. Federal Crop Insurance Corp.*, 738 F.2d 428 (4th Cir. 1984), the claimant did not sign the application as required. He was held to be not covered despite the representation by the age that he was covered. In *Mann v. Federa Crop Insurance Corp.*, 710 F.2d 144 (4th

(continued on page 6)

Immunity of FmHA officials

In the case of *Childress v. Small Business Admin.*, 825 F.2d 1550 (11th Cir. 1987) the Childresses had, in 1979, 1980, and 1981, been the recipients of emergency farm loans from FmHA and as of January, 1981, were indebted to FmHA in the amount of $1.4 million. In July, 1981, the Childresses sought another emergency loan of $19,500, which was approved by local FmHA officials. The local FmHA officials then received evidence that the Childresses had violated their Farm and Home plan by failing to account for income received from the sale of their potato crop.

Although the loan disbursement check arrived from Washington, the local officials refused to complete the loan, and instead orally informed the Childresses that no money would be disbursed until they properly accounted for the potato crop sales.

A meeting was held between local FmHA officials and the Childresses, which resulted in an FmHA finding that the crop proceeds had been used for unsanctioned purposes. As a result, the $19,500 loan was cancelled and the Childresses were orally informed of this decision. At that time, FmHA regulations (7 C.F.R. § 1900.531 and § 1945.83(f)(2) (1981)) required written notice of the decision and appeal rights.

The Childresses brought a *Bivens*-type suit against the FmHA officials, making two allegations: one, the local FmHA officials by approving their loan request, had created a property interest which could not be taken without due process of law; and, two, this property interest had been denied them without due process of law, when local FmHA officials failed to follow the mandates of federal regulation.

The local FmHA officials asserted in opposition that they were entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) since their conduct did not "violate *clearly established* statutory or constitutional rights."

The United States District Court for the Northern District of Alabama held that the local FmHA officials were not entitled to qualified immunity for their actions in contravention of FmHA regulations.

The Eleventh Circuit reversed. The court assumed, without decision, that the Childresses had a property right in not having their loan vetoed without due process of law. Nonetheless, the court decided that qualified immunity could not be withheld on the basis of a showing that FmHA officials had failed to heed the unequivocal command of FmHA regulations.

Additionally, the court found that the Childresses need not have been precisely advised of their right to appeal. Instead of further defining how unprecise the advisement could be, the court reasoned that "we need not hold that minimum due process does not include such a right to notice but only recognize, as we must, that such a right has not been clearly established as a constitutional minimum." 825 F.2d 1550, 1553 (citing *Culbreath v. Block*, 799 F.2d 1248, 1250 (8th Cir. 1986)).

- Michael Thompson

IRC section 521 qualifications

A significant tax court decision provides a favorable ruling for cooperatives on a question of qualification as an Internal Revenue Code section 521 cooperative. *Farmers Cooperative v. Commissioner*, 89 T.C. 3680 (Sept. 1987).

The United States Tax Court, responding to a mandate from the Eighth Circuit Court of Appeals, considered the issue of a fifty percent patronage requirement for cooperative members under I.R.C. section 521(b)(2). *See*, 4 *Agric. L. Update* 1-2 (Aug. 1987).

The issue concerned the interpretation of the "substantially all" requirement. The Service argued that the phrase "substantially all" modified marketing and purchasing activities by shareholders. For a marketing cooperative, this would require shareholders to market more than fifty percent of their products through the cooperative before they qualified as producers.

The tax court disagreed. The court found that the Congressional intent of the "substantially all" requirement was to facilitate the non-profit or conduit-like quality of the cooperative. This intent is served by requiring at least eighty-five percent of a cooperative's shareholders to be producers. Such intent did not concern the members' business activities with other organizations. Thus, section 521 does not require shareholders to transact a majority of their business with the cooperative.

– Terence J. Centner

AG LAW CONFERENCE CALENDAR

Ninth Annual AALA Conference and Annual Meeting.
Oct. 13-14, 1988. Crown Westin Center, Kansas City, MO.
Annual meeting and educational conference of the American Agricultural Law Association. Details to follow.
Reserve these dates now

Environmental law.
Feb. 11-13, 1988. Hyatt Regency, Washington, D.C.
Topics include: environmental litigation developments; NEPA and municipal "little NEPAs"; Clean Water Act developments.
Sponsored by the Environmental Law Institute and The Smithsonian Institution.
For further information, call 215-243-1639 or 1-800-CLE-NEWS.

9th annual immigration law conference.
Mar. 17-18, 1988. Loew's L'Enfant Plaza Hotel, Washington, D.C.
Sponsored by the Federal Bar Association.
For more information, call Phyllis Kornegay at 202-638-0252.

Fourteenth annual seminar on bankruptcy law and rules.
Mar. 24-26, 1988. Marriott Marquis Hotel, Atlanta, GA.
Topics include: lender liability, Chapter 12, and partnership bankruptcies.
Sponsored by the Southeastern Bankruptcy Law Institute, Inc.
For further information, contact Myra Bickerman, 404-396-6677.

Ag law seminar.
Feb. 11, 1988. Holiday Inn, Forrest City, AR.
Topics include: ASCS practice and farm program benefits, payment limitations; and farm bankruptcy proceedings.
Sponsored by the Arkansas Institute for CLE and the Arkansas Bar Association.
For more information, call 501-375-3957

Symposium on agricultural and agri-business credit.
Feb. 11-12, 1988. Hyatt Regency, Dallas, TX.
Topics include: reducing agricultural lender risks; dealing with agricultural environmental problems; and banking farm program benefits
Sponsored by Coalition on Agricultural and Agri-Business Credit, ABA.
For more information, call 312-988-6200.

Ag Credit Act of 1987

Text of the Agricultural Credit Act of 1987 can be found in the December 18, 1987 issue of the Congressional Record. H.R. 3030, 100th Cong., 1st Sess., 133 Cong. Rec. 11,814-11,863 (1987).

The Act which was signed by the President on January 6, 1988, contains titles on the Farm Credit System, the Farmers Home Administration, state mediation programs, agricultural mortgage secondary markets, and others.

Analyses of pertinent portions of the Act will appear in upcoming issues of the Update.

- Linda Grim McCormick

Swampbuster, sodbuster, and conservation compliance programs – fi

by Linda A. Malone

On September 17, 1987, final regulations were published in the *Federal Register* for the swampbuster, sodbuster, and conservation compliance programs of the 1985 Farm Bill. Pub. L. No. 99-198, provisions, codified at 16 U.S.C. §§ 3801-3823 (West Supp. 1987). The new rules, published in 52 Fed. Reg. 35194-35208 (September 17, 1987), will be published in the *Code of Federal Regulations* as 7 C.F.R. Part 12. The changes made in the final rule from the interim rule are significant and extensive.

The 1985 Farm Bill contained several conservation provisions that were new to agricultural programs, among which were the so-called sodbuster, swampbuster, conservation compliance, and conservation reserve programs. The basic purpose of the sodbuster, swampbuster, and conservation compliance provisions is to ensure cross-compliance between conservation programs of the USDA and financial support programs of the USDA.

Under these provisions, a person receives no USDA program payments, that is, price and income supports, disaster payments, crop insurance, CCC storage payments, farm storage facility loans, Farmer's Home Administration loans (if the proceeds are used for a purpose that will contribute to excessive erosion of highly erodible land or conversion of wetland), and all other USDA production payments, unless the person is in compliance with the conservation provisions. Until these provisions in the 1985 Farm Bill, soil conservation had been based primarily on voluntary initiatives.

Swampbusting

Under the swampbuster provision, any person who converts wetlands after December 23, 1985, the effective date of the 1985 Farm Bill, will be ineligible for price and income supports and other USDA program payments for *any* agricultural commodities produced by that person during that crop year. 16 U.S.C. § 3821. The application of a conservation plan to the converted wetlands, in contrast to the sodbuster provision, is irrelevant to eligibility.

Under the final rule, a wetland is defined as land that has a predominance of "hydric soils" and that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that "under normal circumstances" does support, a prevalence of "hydrophytic vegetation" typically adapted for life in the saturated soil conditions. 52 Fed. Reg. at 35202. An exception from the definition of "wetland" is made for lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils. *Id.* at 35202. "Under normal circumstances" is explained in the final rule as referring to "the soil and hydrologic conditions that are normally present, without regard to whether the vegetation has been removed." *Id.* at 35207.

A person is ineligible for program payments under the swampbuster provision if all or a portion of the field is converted wetland, and the ASCS has determined that the person was entitled to share in the crops available for the land or the proceeds thereof, and the ASCS has determined that the land is or was planted to an agricultural commodity during the year for which the person is requesting benefits. *Id.* at 35202. Converted wetland means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated to make possible the production of an agricultural commodity without further application of the manipulations described, if such production would not have been possible but for the action and before such action the land was wetland and was neither highly erodible land nor highly erodible cropland. *Id.* at 35201.

In determining if wetland has been converted, the following factors are to be considered: (1) where the altering activity is not clearly discernible, comparison of other sites containing the same hydric soils in a natural condition to determine if the wetland has been converted; and (2) where woody hydophytic vegetation has been removed, and wetland conditions have not returned as a result of abandonment, the area is to be considered converted wetland. *Id.* at 35207. Also, potholes, playas, and other wetlands flooded or ponded for extended periods will not be considered converted based upon activities occurring prior to December 23, 1985, and further conversions may result in loss of eligibility unless determined to have a minimal effect on wetland values. *Id.*

There are several exemptions that may relieve a person from the requirements of the act. If conversion of the wetland was commenced or completed before December 23, 1985, the person producing an agricultural commodity on the land continues to be eligible for program payments. 16 U.S.C. § 3822.

The final rule has been revised at length to clarify when conversion is considered to have been "commenced" before December 23, 1985. Conversion was "commenced" before that date if: (1) draining, dredging, filling, leveling or other manipulation (including any activity that results in impairing or reducing the flow, circulation, or reach of water) was actually started on the wetland; or (2) the person applying for benefits has expended or legally committed substantial funds either by entering into a contract for the installation of any of the above activities or by purchasing construction supplies or materials for the primary and direct purpose of converting the wetland. 52 Fed. Reg. at 35203.

Even if the criteria for "commencement" conversion before December 23, 1985 are not satisfied, the person may request a commencement determination from the ASCS upon showing that undue economic hardship will result because c substantial financial obligations incurred prior to December 23, 1985, for the primary and direct purpose of converting the wetland. *Id.*

Under the final rule, activities of a water resource district, drainage district, or similar entity are attributable to all persons within the jurisdiction of the entity who are assessed for its activities. *Id.* A separate rule applies to determine when conversion by such an entity was "commenced" before December 23, 1985. *Id.*

A person seeking a determination of conversion commencing before December 23, 1985, must request the determination before September 19, 1988, must demonstrate that the conversion has been actively pursued, and must complete the conversion by January 1, 1995. *Id.* at 35203.

Conversion of a wetland is considered to have been completed before December 23, 1985, if any of the above described conversion activities were applied to the wetland and made the production of an agricultural commodity possible without further manipulation where the production would not otherwise have been possible.

Another revision clarifies that converted wetlands are presumed to have been converted by the person applying for benefits unless the person can show

that the conversion was by an unrelated third party and that there has been no involvement in a scheme or device to avoid compliance. *Id.* If there was acquiescence in, approval of, or assistance to acts of the third party, the person applying for benefits is subject to the scheme or device restrictions and may lose eligibility. If, however, the conversion was in fact done by an unrelated third party, the person applying for benefits may continue to produce agricultural commodities on the converted wetland and retain eligibility if there are no further improvements to the drainage, or if the SCS determines further improvement will have a minimal effect on wetlands values. *Id.* However, any further drainage improvement on such land by the party is not permitted without loss of eligibility for USDA program payments, unless the SCS determines that further drainage activities applied to such lands would have minimal effect on any remaining wetland values. *Id.*

An artificial lake, pond, or wetland created by excavating or diking non-wetland to collect and retain water for purposes such as water for livestock, fish production, irrigation, a settling basin, cooling, rice production, or flood control is not subjected to the provisions of the act. *Id.* An area is considered an artificial wetland if such area was formerly non-wetland or wetland on which conversion was started or completed before December 23, 1985, but meets the wetland criteria "due to the actions of man." *Id.* at 35207. A wet area created by a water delivery system, irrigation or irrigation system is also not covered as wetland under the act. *Id.* at 35203.

Wetland on which production of an agricultural commodity is possible as the result of a natural condition and without action by the person that destroys a natural wetland characteristic is not wetland that is covered by the act. *Id.*

Converted wetland may also be exempt if the SCS has determined that the actions of the person with respect to the production of the agricultural commodity, individually and in connection with all other similar actions authorized by SCS in the area, would have only a minimal impact on the hydrological and biological aspect of wetlands. *Id.* Although this exception might seem to be a broad one, the legislative history makes it clear that this is intended to be a very limited exemption. A request for such a determination must be made prior to the beginning of activities that would convert the wetland. *Id.* at 35208.

Sodbusting

Under the sodbuster provision, a producer is ineligible for USDA program payments for agricultural commodities if there is production without an approved conservation plan or system on a field in which highly erodible land is predominant. *Id.* at 35201.

In the final rule, many of the definitions in the interim rule have been revised. The definition of "highly erodible land" encompasses land that has an "erodibility index" of eight or more. *Id.* at 35201. "Erodibility index" is a numerical value that expresses the *potential* erodibility of a soil in relation to its soil loss tolerance value *without consideration of applied conservation practices or management.*" *Id.* (emphasis added). Therefore, land that may actually be eroding at an acceptable rate, but with an unacceptable potential rate of erosion in relation to the acceptable soil loss tolerance, will be considered highly erodible land. Also, the definitions of "conservation plan" and "conservation system" have been revised to be more specific about their contents. *Id.*

Highly erodible land is predominant in a field if one-third of the field is highly erodible or fifty or more acres of the field are highly erodible. *Id.* at 35206. Highly erodible land that was planted to an agricultural commodity in any year from 1981 through 1985, or that was set aside, diverted, or otherwise not cultivated in any such crop year under a program administered by the Secretary to reduce production of an agricultural commodity, is exempt from the sodbuster requirement. *Id.* at 35202.

In response to a statutory amendment on April 24, 1987 (Pub. L. No. 100-28), persons who had alfalfa in a crop rotation during each of the 1981 through 1985 crop years based on a conservation plan have an extension until June 1, 1988 to fully apply a conservation system to retain eligibility. *Id.* at 35202. If the person has not fully implemented an approved conservation plan by that date, the person shall be deemed to be ineligible for the 1988 crop year and for every following year that an agricultural commodity is produced without an approved conservation plan or system. *Id.* A person is not ineligible for program payments as a result of production on highly erodible land without a conservation plan if it was done in reliance on a determination by SCS that the land was not highly erodible land when the production was made. The exemption does not apply to any agricultural commodity that was planted on highly erodible land after the SCS determines that such land is highly erodible land and the person is so notified. *Id.* at 35203.

For the first time, under the final rule persons are allowed to exchange certain crop acreage bases for crops that have a high residue base if the high residue crop is recommended by SCS as being essential for the conservation plan and the SCS's recommendation is approved by the ASCS. *Id.* at 35204.

Conservation compliance

The requirement of conservation compliance is applicable to highly erodible land as defined in the sodbuster provision. By the later of January 1, 1990 or the date two years after the SCS soil survey is completed, a person must be "actively applying" an approved conservation system or plan for highly erodible cropland that was in production or set aside in USDA programs for any year from 1981 to 1985. *Id.* at 35202. A person is "actively applying" a plan if the plan "is being applied according to the schedule specified in the plan and the applied practices are properly operated and maintained." *Id.* at 35206. By 1995, the person must have fully complied with the plan. *Id.* at 35202. Revisions in the final regulation indicate that the soil survey that must be completed is that which applies only to the cropland portion of the tract or farm, not the plan for the entire farm. *Id.*

A conservation plan for purposes of the sodbuster and conservation compliance provisions is defined as a document containing the decisions of a person with respect to the location, land use, tillage systems and conservation treatment measures as scheduled which, if approved, must be or have been established on highly erodible cropland in order to control erosion on the land. *Id.* at 35201. A conservation system means the part of cropland resource management system applied to a field or group of fields that provides for cost effectiveness and practical erosion reduction based upon the standards contained in the SCS Field Office Technical Guide. *Id.*

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A new section dealing exclusively with the conservation plans and systems encourages persons who require SCS assistance in developing a plan or installing a system to request assistance well in advance of deadline dates for compliance. *Id.* at 35206. Conservation districts approve or disapprove conservation plans and systems as in conformance with the SCS Field Office Technical Guide. If the conservation district fails to act without due cause within 45 days of the request for approval, the SCS will approve or disapprove the plan or system. *Id.*

Sections 12.9 and 12.10 are revised in the final rule to expand the ineligibility of landlords for tenants' actions. Under the final rule, landlords are ineligible for benefits not only when noncompliance is required in the contract with a tenant, but also if the landlord has acquiesced, approved, or assisted in the noncomplying activities of the tenant. *Id.* at 35205.

Persons who wish to participate in the USDA programs are responsible for contacting the appropriate agency in the USDA well in advance of the intended participation date to assure that determinations regarding highly erodible land, wetland, and conservation plans or systems are scheduled in a timely manner. *Id.* at 35202. The final rule applies to crops planted after September 17, 1987, and to all determinations made after or pending on that date. *Id.* at 35193.

Bueno v. Mattner *Affirmed*

In a significant decision under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the Sixth Circuit upheld a refusal to apply the Act's family business exemption to a particular family. *Bueno v. Mattner*, 829 F.2d 1380 (6th Cir. 1987), *aff'g* 633 F.Supp. 1446 (W.D. Mich. 1986). The district court decision is discussed at 4 *Agricultural Law Update* 3 (Dec. 1986).

Family farms are subject to the regulatory provisions of MSPA – other than the registration requirement – unless they can claim the family business exemption:

> Any individual who engages in a farm labor contracting activity on behalf of a farm, processing establishment, seed conditioning establishment, cannery, gin, packing shed, or nursery, which is owned or operated exclusively by such individual or an immediate family member of such individual, *if such activities are performed only for such operation and exclusively by such individual or an immediate family member*, but without regard to whether such individual has incorporated or otherwise organized for business purposes.

29 U.S.C. § 1803(a)(1) (emphasis added). Immediate family is limited to spouses, children, stepchildren, foster children, parents, step-parents, foster parents, and siblings. 29 C.F.R. § 500.20(o).

In *Bueno* the farmer employed a field boss for the 1983 strawberry harvest. The field boss, not a member of the farmer's immediate family, recruited part of the harvest crew with the farmer's knowledge and acquiescence. Farmer argued that the mere hiring of persons recommended by the field boss did not rise to the level of farm labor contracting activity, but the court disagreed, noting that a farm labor contracting activity can consist solely of recruiting. Accordingly, the activities of the field boss on behalf of the farmer destroyed the availability of the family business exemption.

Given the unavailability of the exemption, farmer was a regulated party under the Act. Farmer failed to comply with various MSPA worker protection requirements including making required disclosures at recruitments, posting specified notices, keeping certain wage records, and providing workers with itemized statements at each pay period.

Because the farmer was a regulated party under the Act, he owed the indicated duties to all migrant and seasonal harvest workers, not just those recruited by the field boss. Those workers may pursue a private statutory cause of action under MSPA to recover actual or statutory damages. 29 U.S.C. § 1854(c)(1). A finding of an intentional violation is a prerequisite to such recovery. The court noted that even though the farmer may have had no actual knowledge of the MSPA requirements, an intentional violation could occur. It is the deliberateness of the conduct that is pertinent, not specific intent to violate the law. Thus, a farmer may intentionally violate the Act whether or not he was aware of the existence or the applicability of the statute. *Accord, Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), *cert. denied*, U.S., 106 S.Ct. 1245, 89 L. Ed.2d 353 (1986).

Given the decision in *Bueno*, a farmer is at risk under MSPA if he hires protected workers who, with his knowledge and tacit consent, have been recruited, solicited, transported, or furnished by a non-family member. This is true even though the non-family member is not compensated for these services. *Bueno* can even be read to cover those situations where the farmer is aware of and acquiesces in his present and past employees referring new workers to the farm. In such cases, the farmer should be prepared to fully comply with the worker protection provisions of MSPA.

Bueno also involved violation of the Fair Labor Standards Act recordkeeping and minimum wage requirements. 29 U.S.C. § 206; 29 C.F.R. §§ 516.2(a)(7), 516.6(a)(1). The farmer clearly did not enjoy the 500 man-days exemption. The farmer failed to keep adequate individual pay records, a violation of the recordkeeping requirements of FLSA. In addition, minimum wage violations were established. The workers were entitled to the equivalent of the minimum wage even though they were paid on a piece rate. Because the farmer did not have adequate pay records, the plaintiff workers needed only to establish their entitlement to relief by a preponderance of the evidence. Then the burden shifted to the employer to go forward with evidence rebutting the inferences drawn from the plaintiffs' evidence. Here the farmer's records were inadequate to rebut plaintiffs' evidence that they had been underpaid. Liability under FLSA is in addition to liability under MSPA.

– *Donald B. Pedersen*

FCIC *(continued from page 2)*

Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984), the question was not about coverage but about the amount which should be paid. The policy provided that the "average quota support price" would be paid. The claimant sold for more than the support price and maintained that this should be the evaluation for his loss. The court ruled with the Corporation.

In one case won by the claimant, the claimant had a policy which required that tobacco stalks not be destroyed before the Corporation could inspect. The claimant destroyed the stalks before they could be inspected. The court held that this was not a condition precedent to recovery and did not work a forfeiture of his benefits. *Howard v. Federal Crop Insurance Corp.*, 540 F.2d 695 (4th Cir. 1976).

The moral in these cases would appear to be one that has been emphasized many times about insurance – namely, read the policy, understand it, and abide by its terms, particularly those which set time limits and require the formal execution of documents.

– *H.W. Hannah*

Editor's note: A recent case of similar nature is *Hill v. Federal Crop Insurance Corp.*, 669 F.Supp. 928 (1987) wherein rice farmers failed to give the required written notice of damage or loss as required by the F.C.I.C. policy, relying instead on an oral notification to their private insurer. Additional bases for denial of coverage included failure to follow good farming practices and failing to reseed, both requirements of the policy.

Federal Register *in brief*

The following is a selection of matters that have appeared in the *Federal Register* in the last few weeks.

1. FmHA. Deht settlement; final rule. Effective date: Dec. 7. 1987. "FmHA amends its debt settlement and administrative appeal regulations to allow the detor to appeal any debt settlement which has been rejected." 52 Fed. Reg. 46348.

2. ASCS. Cotton warehouses; definitions, financial statements, bonding and net asset requirements, warehouse bonds and transfer of stored cotton; proposed rulemaking. 52 Fed. Reg. 47009.

3. EPA. Water Quality Act of 1987; implementation; Final Guidance availability; "Nonpoint Source Guidance" and "State Clean Water Strategies." 52 Fed. Reg. 47971.

4. USDA. Policy for ground water quality; notice. 52 Fed. Reg. 48135.

– Linda Grim McCormick

Co-op's security interest in crops

An appellate court in Indiana has found that a security interest in crops by a farmer cooperative took precedence over a landlord's interest in the same crops.

In the case of *Montgomery County Farm Bureau Coop. v. Deseret Title Holding Corp.*, 513 N.E.2d 193 (1987), the issue of a superior ownership interest in crops depended upon whether the landlord's lease created a "crop share" type of agreement or a "crop paid as rent" type of agreement.

Under a "crop share" agreement, the landlord and tenant would be tenants in common, and the landlord would own a share of any harvested grain. Under a "crop paid as rent" agreement, title of the grain would be with the tenant so that the landlord would have a lien on the crop governed by state law.

The court found that the provision in the lease granting the landlord a set number of bushels per acre created a "crop paid as rent" agreement. Language in the lease to the effect that the tenant was entitled to deliver fifty percent of the farm production in substitution for the bushel rent in the event of a crop disaster did not change the court's opinion as to the characterization of the lease.

Under Indiana law, the landlord's failure to file a timely notice of an intention to hold a lien on the tenant's crops meant that the landlord's interest was inferior to the security interest of the cooperative.

– Terence J. Centner

State Roundup

WASHINGTON. *Grain elevator injunction.* In a suit by the government to enjoin the sale and movement of wheat by a Washington state grain elevator because of alleged violations of thte Food, Drug. and Cosmetic Act, the Ninth Circuit Court of Appeals held in *U.S. v. Odessa Union Warehouse Co-op.* 833 F.2d 172 (9th Cir. 1987) that the district court applied an erroneous legal standard in denying the injunction.

A series of government inspections over several years revealed uncontested violations of the FDCA. In response to the government's filing of the injunction action, the grain elevator sought to improve sanitation at its facilities.

The district court denied the injunction, applying its own standard of review: ". . . a preliminary injunction should issue only when the circumstances truly permit no other course. . . ."

The Ninth Circuit reversed and remanded for reevaluation under the correct standards. First the court noted that the "function of a court in deciding whether to issue an injunction authorized hy a statute of the United States to enforce and implement Congressional policy is a different one from that of a court when weighing claims of two private litigants." Specifically, the agency is not required to show irreparable injury; a presumption to that effect is due the governmental agency. In addition, the district court was not required to make a finding of the goverument's probable success on the merits. Rather the district court need only find "some chance of probable success on the merits."

Further, in balancing the hardships, the district court erroneously considered only the hardship to the grain elevator. not the hardship to the public.

Finally, the evidence of reform efforts by the elevator was not sufficient to deny the injunction.

– Linda Grim McCormick

MINNESOTA. *Written consent not waived.* The Minnesota Appellate Court reversed in part the trial court's decision in *Erlandson Implement, Inc. v. First State Bank of Brownsdale*, 400 N.W. 2d 121 (1987), in holding that an Article Nine secured party does not waive its requirement that written consent be given to authorize the sale of collateral thruugh a course of dealing consisting of the secured party's past failure to object to such unauthorized sales. The secured party, First State Bank of Brownsdale, therefore had a conversion claim against implement dealers who took the collateral, consisting of a John Deere tractor, plow, and cornhead, in partial exchange for a new tractor, plow, and cornhead. The trial court erred in not recognizing the bank's conversion claim as a counterclaim to the implement dealer's claim against the bank for conversion of the new tractor, plow, and cornhead.

The case arose in a Ch. 7 bankruptcy setting. John Deere, which financed the balance of the purchase price of the new implements, held a perfected Article Nine purchase money security interest in the new equipment. John Deere's interest had priority, under U.C.C. section 9-312(4), over the bank's interest in the property arising out of an after-acquired property clause in the bank's security agreement. The bankruptcy trustee abandoned the new equipment at John Deere's request. The bank then repossessed all three pieces of new equipment and sold them.

The trial court correctly held that the bank's repossession and sale of the new equipment constituted conversion, and held the bank liable to the implement dealers to whom John Deere had assigned its claims. The trial court failed however, to recognize the bank's valid counterclaim against John Deere and its implement dealers' for conversion of the old equipment.

The appellate court found that the trial court erred in finding that the bank authorized the sale of the old equipment, thereby releasing the bank's security interest in that equipment.

First, the trial court erred in ruling that the bank's security agreement authorized the trade of the old equipment. The security agreement allowed the debtor farmers to sell inventory collateral in the ordinary course of business, and to consume farm product collateral in the farmers' farming operations. Since the collateral at issue was equipment and not inventory or farm products under U.C.C. section 9-109(2), the security agreement did not authorize the trade-in of the new equipment.

Second, the trial court erred in finding that the bank authorized the release of its security in the old equipment by failing to oversee, control, or object in a timely manner to the debtor farmers' equipment trades. Evidence of the bank's past failure to object to unauthorized sales establishing the parties' course of performance cannot be used to defeat a security agreement expressly providing for prior written consent for all such collateral sales.

Therefore, the bank's security interest in the old equipment continued notwithstanding the trade-in since the exchange was not authorized U.C.C. § 9-306(2). The implement dealers are therefore liable to the hank for conversion damages with respect to the old equipment. The case was therefore remanded to determine the bank's conversion damages, which should be offset against the amount the bank owes the implement dealers for conversion of the new equipment.

– Gerald Torres

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American Agricultural Law Association News

1988 Writing Competition. Professor John Becker, Department of Agricultural Economics, Penn. State University, University Park, PA 16802 is in charge of the 1988 American Agricultural Law Association Writing Competition. Inquiries about the competition should be addressed to him.

1988 American Agricultural Law Association membership renewal. Membership dues for 1988 are due February 1, 1988. For the 1988 calendar year, dues are as follows: regular membership, $45; student membership, $20; sustaining membership, $75; institutional membership, $125; and foreign membership (outside U.S. and Canada), $65. Dues may be paid to Mason E. Wiggins, Jr., Heron, Burchette, Ruckert & Rothwell, Suite 700, 1025 Thomas Jefferson St., N.W., Washington, D.C. 20007.

Membership drive: Note that a membership application form was enclosed with your dues statement. Please give some thought to who among your colleagues would benefit from membership in the American Agricultural Law Association.