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The truth is found when men are free to pursue it.

— *Franklin D. Roosevelt*

Court denies growers' attempt to participate in futures profits of sugar company

The Tenth Circuit U.S. Court of Appeals has ruled that several thousand sugar beet growers who entered into contracts with Great Western Sugar (GWS) for the sale of their beet crop may not participate in GWS profits from trading in sugar futures. The plaintiffs/growers in *Strey v. Hunt International Resources Corp.*, 749 F.2d 1437 (10th Cir. 1984), were organized into regional growers' associations, and on a year-to-year basis, would negotiate sales contracts in which the growers agreed to deliver and sell their crop to GWS. The growers delivered their beets to GWS at harvest, completing the sale, and would be paid a portion of the ultimate price at that time. The remainder of the sales price was to be paid by GWS at the end of its sales year for refined sugar, with the total contract price fixed by a formula which determined an average net return to GWS on refined sugar sales.

GWS was purchased by Hunt International at about the time the sugar beet crop was delivered under the contracts at issue. Although GWS had not previously been a participant in the futures market, the new owners became active futures traders in sugar, metals and other products. After a period of large fluctuations in sugar prices, in which record high prices were recorded, the growers, as GWS creditors for the balance of the sales price of the crop, brought an action seeking to participate in GWS sugar futures trading profits.

In federal district court, the growers successfully argued that the sales contracts created a fiduciary duty on the part of GWS to the growers, and the jury included in its damages award an element for the breach of this duty. However, the court of appeals rejected this notion, stating that the contracts were nothing more than sales contracts with a long-used formula for price computation, and that there was nothing in the contracts to create a fiduciary duty or confidential relationship. Furthermore, the appeals court stated that no conflict of interest was demonstrated on the part of the company as to its role of selling the refined sugar and simultaneously trading sugar futures.

The district court jury also awarded the growers damages based on the claim of breach of implied duty of good faith by GWS in the performance of the sales contracts. The growers had argued that the sugar was not sold at the best times in the sales year, and that there were delays in the execution of sales decisions caused by the individual defendants, including N. Bunker Hunt and W. Herbert Hunt. However, the court of appeals also set aside this part of the case, but remanded the good faith issue for a new trial, stating that in the original trial the evidence on good faith and fiduciary duty (a basis for relief which the appeals court rejected) were necessarily mixed, and that the trial court erred in its jury instruction regarding the good faith claim.

(Separately, in February of this year, GWS and Hunt International's two other sugar-refining subsidiaries filed for protection under Chapter 11 of the U.S. Bankruptcy Code. In the same month, GWS missed the deadline for sugar beet crop payments to farmers in five states. In late March, subject to the approval of the bankruptcy court, GWS agreed to sell six of its 13 beet-sugar refining plants to British-owned Tate & Lyle Inc., of Yonkers, N.Y.)

— *Thomas M. McGivern*

Congress adopts new recordkeeping rules

The Tax Reform Act of 1984 included new "get-tough" rules for keeping records on the use of automobiles, computers and other items that are likely to be used for both business and personal activities. The rules increased the amount of recordkeeping that was required and imposed new penalties on both the taxpayer and the tax preparer if deductions were claimed for which the required records were not kept. The rules required contemporaneous records which may have meant that a farmer was required to log each trip in the pickup truck from the corncrib to the barn. For other businesses, the requirement was equally onerous. Taxpayer outcries convinced Congress that it had gone overboard. Consequently, the House of Representatives and Senate have each passed H.R. 1869, which is a compromise version of bills passed earlier by the two houses.

In general, H.R. 1869 repeals the effect of the Tax Reform Act of 1984 on recordkeeping. Specifically, taxpayers are not required to keep trip-by-trip logs and the penalties on tax-

(continued on next page)

payers and tax preparers for claiming deductions for which the required records were not kept were repealed. The new rules are effective Jan. 1, 1985 for property that was subject to the 1984 Act rules. Therefore, no property is subject to the 1984 Act rules.

Repeal of the "get-tough" rules does not mean taxpayers do not have to keep records. Prior to the 1984 Act, taxpayers were required to keep records to justify expenses they claimed as deductions for business use of vehicles and other property. The committee reports that explain the legislator's reasons for the new rules specifically say "a taxpayer's uncorroborated statement as to the business use of an automobile or other ... property does not alone have sufficient probative value to warrant consideration by the Internal Revenue Service (IRS) or the courts."

A taxpayer may be able to justify an expense for which there is no written record if the claim can be corroborated by oral testimony from a disinterested, unrelated party. However, the committee report makes it clear that the legislators believe oral evidence has considerably less probative value than written evidence. Therefore, the chances of being able to justify an expense are increased and the likelihood of an argument with the IRS are decreased if a taxpayer keeps a written record of the business use of vehicles and other property that is subject to personal use, such as computers.

H.R. 1869 requires the IRS to request certain information from the taxpayer on the tax return. For vehicles, the IRS will ask for the total mileage a vehicle was driven during the year, and how many of those miles were for business, commuting and other personal activities. The IRS will also ask what other vehicles were available for after-work use and whether or not written records were kept regarding the business use of the vehicle. This information will be used by the IRS to decide which tax returns to audit.

H.R. 1869 exempts certain vehicles that are not likely to be used for personal activities from the substantiation requirement. Included in the list of vehicles are tractors and combines. For those vehicles, a farmer will be allowed to deduct expenses without written records of the business use and without corroborating evidence.

By relaxing the recordkeeping requirement, Congress expects to lose revenue. To compensate for the lost revenue, the amount of depreciation and investment tax credit that can be claimed on vehicles has been reduced. Depreciation on automobiles is limited to $3,200 in the year the vehicle is purchased and $4,800 in subsequent years. The investment credit that can be claimed on an automobile is limited to $675.

— Philip E. Harris

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Tax Court upholds co-op's patronage dividend allocation scheme

The Tax Court has upheld a co-op's patronage dividend allocation scheme as it relates to dividends the co-op received as a member of four regional co-ops, which it in turn distributed to its members and deducted under section 1382 of the tax code. In *Kingfisher Cooperative Elevator Association v. Commissioner,* 84 T.C. No. 39 (April 2, 1985), a grain and farm supply co-op (Kingfisher) filed its 1981 tax return under non-exempt status. As in the case of many local cooperatives, Kingfisher was a member of four large regional co-ops, including two — Union Equity and Farmland — from which it received patronage dividends in 1981. The dividends from Union Equity were based on Kingfisher's frequent grain sales to that co-op, and the Farmland dividends emanated from Kingfisher's purchases from Farmland of equipment, fertilizer, seed, feed and other farm supplies which were resold to Kingfisher members.

The Union Equity and Farmland dividends received by Kingfisher in part reflected commercial transactions between the regional co-ops and Kingfisher in 1979, and also reflected patronage dividends received by Union Equity and Farmland from co-ops in which they were members based on business from prior years. In computing the patronage dividends it paid to its members, King-fisher divided its operation into seven separate allocation units. The co-op allocated most of its Union Equity dividend to its wheat marketing allocation unit, and the Farmland dividend was allocated to Kingfisher's ammonia fertilizer, other fertilizer, and feed, seed and farm supply allocation units. This allocation scheme had been approved by the co-op's five-member board of directors and had been in use since 1973.

The Internal Revenue Service (IRS) disallowed as deductions the amount of Kingfisher dividends attributable to Union Equity dividends, and similarly disallowed almost 60% of the amount representative of Farmland dividends. The IRS contended that the Kingfisher dividends were computed incorrectly due to the fact that the Union Equity and Farmland dividends earned on business done by past members were allocated to current year patrons, and further stated that the equitable allocation requirement for patronage dividend distributions required the co-op to allocate dividends to past members who shared in earning them.

However, Tax Court Judge Cohen, citing *Lamesa Cooperative Gin v. Commissioner,* 78 T.C. 894(1982), ruled that Kingfisher's allocation of dividends was equitable and fit within the definitions found in section 1388 of the code. The court noted that a key factor in its decision was the stability of Kingfisher's membership — less than 5% turnover per year — and also cited the fact that Kingfisher members had approved of the allocation scheme. In addition, the court found that the formula advanced by the IRS to allocate the Union Equity and Farmland dividends was "simplistic," "ignored the realities of the cooperative way of business," and failed to demonstrate that it would result in a more accurate and equitable allocation of Union Equity and Farmland dividends to Kingfisher members. The court thus settled a long-ranging dispute between cooperatives and the IRS over this increasingly litigious issue.

— Thomas M. McGivern

Jurisdiction over suits against Farm Credit System banks and associations

Efforts to litigate in federal district court against Farm Credit System banks and associations suffered another setback in *Birbeck v. Southern New England Production Credit Association,* 606 F.Supp. 1030 (D. Conn. 1985). In *Birbeck,* the borrowers made transfers of real and personal property in lieu of foreclosure to the Southern New England Production Credit Association (PCA). The transfers were made subject to prior security in favor of the Federal Land Bank (FLB) of Springfield. PCA agreed to release borrowers from virtually all deficiency judgment liability. When the PCA liquidated the property, it generated some $605,000 in excess of the total PCA and FLB debt of $3,150,000. Borrowers sued PCA and FLB either to set aside the transfers or to obtain payment of the excess amount. Grounds alleged included fraud and misrepresentation, mutual mistake, taking in violation of the Fifth Amendment, breach of alleged fiduciary relationship, unjust enrichment and unconscionability of the settlement agreement. The district court dismissed the complaint for lack of federal subject matter jurisdiction.

The Fifth Amendment limits the power of government, rather than the freedom of action of individuals. *Birbeck* holds that Farm Credit System banks and associations are private corporations without sufficient governmental involvement to support a cause of action under the Fifth Amendment. Thus, jurisdiction does not arise under 28 U.S.C. § 1331, which states:

> The District Court shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Any vague suggestion to the contrary in *Schlake v. Beatrice Production Credit Association,* 596 F.2d 278, 280-82 (8th Cir. 1979), is specifically rejected. The *Birbeck* court found support in *DeLaigle v. Federal Land Bank of Columbia,* 568 F.Supp. 1432 (S.D. Ga. 1983). *Birbeck* also noted the language at 28 U.S.C. § 1349:

> The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

Farm Credit System banks and associations, of course, are borrower-owned.

Birbeck also rejects any suggestion that the claims of borrowers arise under the Farm Credit Act of 1933, as amended in 1971, 12 U.S.C. § 2001 et seq. Federal jurisdiction under 28 U.S.C. § 1331 cannot be based simply on the fact that Farm Credit System banks and associations are federal instrumentalities — that is, federally chartered. *Birbeck* also holds that statutes authorizing Farm Credit System banks and associations to provide technical assistance to borrowers, including financially-related services, do not suggest that Congress intended to create a federal cause of action for damages against a system bank or association for bad advice or breach of "fiduciary obligation." "The relief that plaintiffs seek rests on principles of state contract law." *Birbeck* at 1038.

Birbeck also rejects the argument that plaintiffs' case arises under federal common law, thereby activating § 1331 as a basis for federal jurisdiction. In addition to relying on *Boyster v. Roden,* 628 F.2d 1121 (8th Cir. 1980), *Birbeck* reviews the legislative history of the Farm Credit Act of 1971 and subsequent amendments and concludes that state law, not federal "common law," governs the dealings of Farm Credit System banks and associations with their borrowers. *Birbeck* also observes that none of the tests set forth in *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975), to determine the existence of an implied federal cause of action are met.

Because there is no basis to claim state action, *Birbeck* concludes that plaintiffs failed to allege a claim under 42 U.S.C. § 1983 (Civil Rights Act of 1871). Thus, this effort to show federal jurisdiction under 28 U.S.C. § 1343 failed.

The Tucker Act, 28 U.S.C. § 1346(a)(2), deals with the jurisdiction of the U.S. Claims Court and the district courts in certain non-tort cases against the United States. For various reasons, including the fact that this case was not against the United States, the *Birbeck* court held that the Tucker Act does not provide a basis for federal district court jurisdiction.

— *Donald B. Pedersen*

Cooperatives and termination of members

In the July 1984 *Agricultural Law Update,* we reported on a 9th Circuit Court case in which the expulsion of a member by a cooperative was found to constitute a group boycott or concerted refusal to deal, which mandated per se invalidation under Section 1 of the Sherman Antitrust Act. This decision has been reversed by the U.S. Supreme Court in *Northwest Wholesale Stationers Inc. v. Pacific Stationery & Printing Co.,* 53 U.S.L.W. 4733 (June 11, 1985). The Court concluded that cooperative arrangements allow participating members to achieve economies of scale, thereby increasing economic efficiency and rendering markets more competitive. It was also noted that the enforcement of reasonable rules by a cooperative was necessary in order for the business to function effectively. Absent market power or exclusive access to an element essential to effective competition, the conclusion that expulsion of a cooperative member is always likely to have an anti-competitive effect is not warranted. An expelled member must allege an anti-competitive animus in order for the group action to constitute a per se violation. Otherwise, the activity should be evaluated under the rule-of-reason analysis.

— *Terence J. Centner*

Field sanitation standard nixed

On Jan. 2, 1985, Occupational Safety and Health Administration (OSHA) filed an affidavit in the U.S. District Court for the District of Columbia indicating that it would not meet the Feb. 16, 1985 deadline for action on a proposed field sanitation standard. See June 1984 *Agricultural Law Update.* On April 16, 1985, OSHA announced that it did not intend to promulgate a field sanitation standard at this time. 50 Fed. Reg. 15086 (1985). As part of a lengthy explanation, OSHA stated at 50 Fed. Reg. 15087 (1985):

> OSHA has carefully examined the rulemaking record, weighed the role of the states in public health and the preemptive effects of a federal standard, considered its available enforcement mechanisms, taken into account other health and safety demands on OSHA's resources, and evaluated the most effective way to protect field workers from relevant hazards as well as other relevant factors, and has determined that a federal field sanitation standard will not be issued at this time.

On May 6, 1985, the Farmworker Justice Fund, on behalf of many parties, petitioned the U.S. Department of Labor to reconsider its decision. In the meantime, it should be noted that field sanitation standards of varying stringency do exist at the state level in California, Colorado, Connecticut, Florida, Idaho, Illinois, New Jersey, New York, North Carolina, Oregon, Pennsylvania and Texas.

— *Donald B. Pedersen*

Pesticide assessment: the administrative process and expert testimony

by Michael T. Olexa

Introduction

Following a surge in the development and usage of pestieides during and after World War II, Congress re-examined and repealed the Insecticide Act of 1910 and enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) of 1947.[1] Under this forerunner of the present day FIFRA, the United States Department of Agriculture (USDA) was charged with the promulgation of registration and labeling regulations of pesticides.

Opposition to the USDA's role in pesticide regulation first occurred in 1959 when the USDA came under sharp criticism for its fire ant eradication program.[2] Also in that year, the Act was amended to include defoliants, dessicants, nematocides and plant regulators.[3] As public awareness of pesticide usage increased, another amendment of FIFRA followed in 1964[4] giving the Secretary of Agriculture authority to refuse to register new pesticides and authorizing him to "remove from the market any product whose safety or effectiveness was doubtful."[5] Shortly thereafter, the USDA again came under criticism, this time from the General Accounting Office for lax enforcement of the Act.[6] Pressures exerted by both government and the environmental movement over pesticide usage and allegedly lax enforcement served as a catalyst for the establishment in 1970 of the Environmental Protection Agency[7] (hereinafter EPA or the Agency) to which responsibility for FIFRA was subsequently transferred. Continued concern resulted in yet further amendment of the Act in 1972.[8] Subsequent amendments in 1975, 1978 and 1980 clarified duties and responsibilities of the EPA.

FIFRA provides for registration with EPA of all pesticides distributed, sold, offered for sale, held for sale, shipped, delivered for shipment, or received and (having been so received) delivered or offered for delivery, to any person.[9] The manufacturer must demonstrate to the Agency that the use of the pesticide does not have an unreasonably adverse effect on the environment.[10] If EPA determines that a pesticide presents no unreasonable hazard to the environment, the agrichemical is registered. However, if the Agency resolves that a pesticide may present an unreasonable risk to the environment, a proeedure for assembling information, review and decision-making is initiated. The same proeedure will be triggered if EPA determines that an existing registration should be cancelled.

One aspeet of this procedure was known as rebuttable presumption against registration (RPAR),[11] but is now known as "special review." The rebuttable presumption arises if certain types of data suggest that the pesticide is acutely or chronically toxic or if no effective emergency treatment is available for numans. During "special review," the applicant may be required to furnish additional information about the pesticide in question. Other interested persons may also furnish information. The USDA primarily provides information in the form of "pesticide use and impact assessment reports." These reports are prepared by teams of experienced agricultural scientists who may be private individuals or employees of USDA, EPA or state agricultural extension, research or regulatory agencies. The reports become part of the body of information used by EPA in determining whether to register, reregister, withdraw from registration or place additional restrictions on the use of a pesticide.

If EPA decides that the "presumption against registration" is rebutted, the pesticide will be or will continue to be registered for its labeled uses. If EPA determines that the presumption against registration is not rebutted, the pesticide is presumed to present an unreasonable risk to the environment. For previously registered pesticides, if it thus appears to the administrator that "a pesticide or its labeling or other material required to be submitted does not comply with the provisions of [the Act] or when used in accordance with widespread and commonly recognized practice, generally causes unreasonable, adverse effects on the environment,[12] the administrator may issue a notice of his intent either —

1. To cancel its registration or to change its classification together with the reasons (including the factual basis) for his action, or
2. To hold a hearing to determine whether or not its registration should be cancelled or its classification changed."[13]

The registrant and any person adversely affected by the notice of intent may request a hearing pursuant to FIFRA's section 6(b). The hearing is conducted in accordance with Section 556 and 557 of the Administrative Procedure Act.[14] The proeedures employed are set out in the regulations promulgated under FIFRA.[15]

Agrieultural Experts

Agricultural personnel generally have performed well in assessing the physical, biological and economic aspects of pesticides. However, if these personnel are to cope adequately with the legal aspects of pesticide registration and provide effective testimony as witnesses in the administrative hearing, they must understand the administrative machinery and the impact of effective testimony within the pesticide regulatory process. This paper was written to foster such an understanding.

The Administrative Law Judge

An administrative law judge (ALJ) is appointed to oversee the hearing process, and may, at any time, withdraw from the proceedings. Additionally, any party may request the ALJ to disqualify himself if the party feels the ALJ has prejudged the facts or may be biased.

Prehearing Procedures: Discovery

Unless unnecessary or impracticable, the ALJ must order at least one prehearing conference. The conference is designed to streamline the (actual) hearing. No transcript is made unless a party requests one and such request is approved. However, the ALJ must prepare a written report of the actions taken, stipulations, all rulings and appropriate orders. This report becomes part of the record.

Each party must make available to the other parties at the conference, or otherwise before the hearing, the names of all witnesses expected to be called, together with a brief summary of the expected testimony and a list of all documents and exhibits the party expects to introduce. Further prehearing discovery shall also be permitted if it:

1) Will not unreasonably delay the proceedings,

2) The information sought is not otherwise obtainable, and

3) Such information has significant probative value.

At the prehearing conference(s), parties may request to have questions of scientific fact submitted to a committee of the National Academy of Sciences. If the ALJ decides that this referral is necessary or

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desirable, the ALJ will submit appropriate questions. The committee's response must be made public and becomes part of the record.

On all issues arising in connection with the hearing, the ultimate burden of persuasion lies with the party seeking registration.

Presenting Evidence/Witnesses

Evidence (including pesticide assessment documents and other material developed and submitted during the RPAR phase) which is relevant and material to the issues raised in the objections filed by the party or parties, or to the statement of issues if the administrator called for the hearing, is admissible.[16]

The parties may call their own witnesses and cross-examine adverse witnesses. Upon a showing of relevance and materiality, any party may request the ALJ to subpoena any person to compel testimony or to produce documents.

Parties must be given an opportunity to show that facts officially noticed by the ALJ are erroneous by presenting evidence to the contrary.

An expert witness may testify either orally or through preparation of a written assessment, referred to as "written direct testimony." A written assessment is the best way to introduce into the record factual information (evidence) necessary to establish the witness's qualification as an expert and to present factual material concerning the issue(s). The degree of consideration (evidentiary weight) given to testimony by the ALJ when reaching a decision is determined by the perceived credibility of the testimony. If, under cross-examination, a witness appears confused and unsure, such testimony (evidence) may be accorded little evidentiary weight in the ALJ's decision and in any appeals.

Cross-Examination of the Agricultural Scientist

Reliable Information. Frequently, the cross-examining attorney seeks to discredit the witness's testimony by establishing or implying that those who generated the data presented by the witness employed unsound scientific methodology, generated data of limited applicability, omitted relevant variables, or were biased.

When any of these conditions are established or implied, the witness's conclusions submitted as evidence may be rendered worthless or at least suspect. Thus, less weight is given the witness's testimony. Additionally, the witness's credibility will be adversely affected.

Example: Through written direct testimony, the witness concluded that fatal poisoning incidents involving the pesticide under review were extremely rare.

Cross-examination:

Q: Did you, in the course of your conclusion, check with the HEW Poison Control Center in Atlanta?
A: No, I didn't.

Q: Did you ever check with EPA, which has a computer printout of pesticide injuries from all over the country?
A: No.

Q: Did you check with your state Department of Agriculture, which is primarily responsible for enforcing pesticide laws, for statistics on injuries to workers?
A: No.

It is usually the inference, not an actual demonstration of unreliability, that reduces the weight given the testimony. These problems can be avoided or mitigated and submitted testimony strengthened, however. In determining if the information to be presented in direct testimony is reliable, one should ask: Was the scientific methodology valid? Were all relevant factors considered in generating such information? Do the sources of information appear to be, or are they in fact, biased? Were the data verified by replication? Were the data reviewed and accepted by competent peers? Does the information represent conditions present in relevant crop production areas?

Multiple Sources of Information. Reliable information should be gathered from as many relevant sources as possible. Unless all sources are tapped, the evidentiary weight given the witness's conclusions may be adversely affected. Frequently, the cross-examining attorney seeks to show that the witness's conclusions are based on biased, inaccurate, irrelevant or incomplete information. By establishing that information is available from more sources than were consulted, especially if untapped sources appear to be primary sources, the cross-examining attorney lowers the evidentiary weight given to conclusions. The implications are that:

1) the witness is not adequately prepared,
2) the witness's conclusions might have been altered had other relevant data been used, and
3) the witness's conclusions are of limited value.

Where information comes from, who generated it, when and why it was generated and the methodology employed are all important considerations in assigning evidentiary weight to statements and conclusions based on such information. These same factors are important in determining the witness's credibility. Did the witness generate the information, estimate it, or extrapolate it out of context? When it is advantageous to soften the impact assigned to the conclusions, the cross-examining attorney will strive to establish or imply some of these factors.

Bridging the Terminology Gap. The scientist's use and understanding of terminology are not always similarly perceived and understood by the witness's attorney, the cross-examining attorney and the decision-maker.

The attorney's concern with the legal implications of terms differs from the scientist's concern in using terms to convey research results. The witness is working within a legal setting and must communicate clearly with the witness's attorney, the cross-examining attorney and the decision-maker. This does not mean that the witness must thoroughly understand and use "legalese." Confusion or lack of clarity in terminology can, however, dilute the full impact of the witness's statements, lessen the credibility accorded the witness's conclusion, and create an air of confusion among the witness's attorney, the cross-examining attorney and the decision-maker.

Example: The witness testified to contamination of well water and stated that a substantial portion of wells were contaminated with the pesticide under review.

Cross-examination:

Q: What do you mean by "substantial?"
A: It cannot really be quantified precisely.

Q: [But] what do you mean by "substantial?" 51%? 30%?
A: What I think is that it can only be used subjectively.

Q: I'm asking what your understanding is, what you mean by the term.
A: Let's put at least 70% under the range of substantial for the sake of a number to get by this issue.

Generalities should be avoided when possible and clarified when necessary. Such general terms as "substantial," "severe," "a few" and "widespread evidence"

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should be given a quantifiable percentage or range, and why this percentage or range is meaningful should be explained. When hard data for establishing such a quantitative statement are lacking, why such an assessment would be meaningless should be explained. The weight accorded a witness's testimony is enhanced when the scientist and the lawyer can communicate clearly.

The Field of Expertise. One of the most damaging areas encountered by the scientist/witness on the stand is that of testifying to matters outside the field of expertise. The witness is not qualified and generally not prepared to defend or discuss such matters at an expert level, and the credibility of the overall testimony, including that part supportable from within the area of expertise, is affected.

Confining conclusions to matters within the field of expertise means that cross-examination is limited to that field. Questions posed outside that field can be objected to successfully, and a witness has the right to respond, "I am not qualified as an expert in that field." This prevents misleading or possibly erroneous statements from becoming part of the record.

The cross-examining attorney's goal of minimizing the weight of the witness's testimony on the record is simplified when the witness "offers" opinions that cannot be defended. If the witness must make statements outside the area of expertise, those conclusions should be supported by sufficient scientific data that are fully understood by the witness.

Responding to Cross-Examination. The expert witness should always strive for clarity and accuracy in responding to cross-examination. Answers to the cross-examiner's questions affect the weight of clarified submitted testimony.

When questioned about statements made in submitted written direct testimony, the witness may request that the cross-examining attorney cite the page and line from which the question was generated. The witness who answers without first examining the specific statement in written direct testimony runs the risk of making inconsistent statements and having the testimony mischaracterized. Additionally, the witness should seek clarification if the cross-examining attorney's question is vague or misleading. If a witness answers without knowing the true nature of the question, misleading evidence may be placed on the record.

When the witness's attorney objects to a question during cross-examination, the witness should not answer until and unless the objection is overruled. Frequently, a proper foundation has not been laid for the question, the witness is not qualified to answer, irrelevant information is sought, or the question goes beyond the scope of direct examination. Grounds may exist for the ALJ to sustain the objection. If the witness answers before the ALJ rules, unnecessary testimony may become part of the record. Such "volunteered" testimony may adversely affect the case.

Preparation. Credibility as a witness is directly affected by knowledge of submitted written direct testimony, especially when submitted testimony includes data generated by others and the witness's conclusions are based on that data. A witness unfamiliar with the submitted data or other materials submitted as written testimony conveys the impression of being inadequately prepared and possibly inconsistent.

The Accelerated Decision

The ALJ, at any time, may render a decision in favor of the Agency as to all or any portion of the proceedings, including dismissal of the action supporting registration or opposing cancellation. This decision will become the final agency order with respect to registration or cancellation unless it is appealed or the administrator orders its review.

The Initial Decision

The ALJ makes an initial (recommended) decision with respect to registration within 25 days of the close of the hearing. The initial decision must be based on the substantial weight of the evidence on the record as a whole. The hearing record includes: all pleadings, all written motions, intermediate rulings, all evidence received — including all exhibits and documents introduced as well as all (written and oral) testimony, all objections and rulings thereon, a statement of matters officially noticed, and each party's (if it so files) proposed orders, findings of facts, conclusions of law and briefs in support of its positions. The initial decision will become the final agency order unless it is appealed or the administrator orders its review.

Appeal and Review

Within 20 days after the ALJ's initial decision is filed, any party may take exception to any matter set forth in the decision, or to any adverse ruling or order to which it objected during the hearing, and appeal these exceptions to the administrator.

If no exceptions are timely filed, the hearing clerk must notify the administrator of this fact within 30 days from the date the ALJ filed an initial decision. Within 10 days of such notice, the administrator must issue an order either declining to review, or expressing an intent to review, the ALJ's final decision. If the ALJ's initial decision is reviewed by the administrator, a party who filed exceptions and briefs may make oral argument before the administrator. During review, the administrator may determine that additional exceptions should be argued.

At any time before the administrator issues the final order, any party may move to re-open the hearing so that further evidence may be introduced. This motion must state briefly the nature and purpose of the evidence to be adduced, show that it is not repetitive, and set forth reasons why the evidence was not offered at the hearing. If the motion is denied, the motion and the ruling thereon becomes part of the record for purposes of judicial review.

If the initial or accelerated decision is reviewed, the administrator must render a final decision, unless otherwise agreed to by the parties, within 90 days after the close of the hearing or from the filing of an accelerated decision. This decision must be based on the substantial weight of the evidence on the record as a whole. In rendering this final decision, the administrator may accept or reject all or part of the ALJ's decision.

Within 10 days of service of the final order, a party may move to rehear, re-argue the proceedings, or to reconsider the final order. These motions must briefly and specifically state the matters claimed to have been erroneously decided. If the motion is granted, the final decision is set aside, pending the rehearing or re-argument of the proceedings, or reconsideration of the final decision. If the motion is denied, the motion and the resulting ruling are placed on the record for purposes of judicial review.

Any party adversely affected by the final order may seek judicial review of that order. If judicial review is granted, the order is not put into effect until judicial review is completed.

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1. *Pub. L. No. 80-104*, § 16, 61 Stat. 163 (1947) (Amended 1959).

2. The extensive use of Dieldrin and Heptachlor did not eradicate the fire ants, but did cause losses of fish, wildlife, livestock and poultry. See R. Rudd, *Pesticides and the Living Landscape* (Wisconsin, 1964).

3. 7 U.S.C. § 135(g-j) (Supp II, 1959-60).

4. Act of May 12, 1964, Pub. L. No. 88-305, § 3, 78 Stat 190 (1964) (Amended 1972).

5. Lovins, *Pesticide Regulation: Risk Assessment and Burden of Proof*, 45 Geo. Wash. L. Rev. 1066, 1068-69 (1977).

6. Megysey, *Governmental Authority to Regulate the Use and Application of Pesticides: State v. Federal*, 21 S.D.L.Rev. 653.

7. Reorg, Plan of 1970, 35 Fed. Reg. 15,623 (1970).

8. Pub. L. No. 92-516, 86 Stat. 973 (1972) (Amended 1975).

9. 7 U.S.C. § 136a (1982). There are exemptions for experimental and emergency use.

10. 40 C.F.R. Pt. 164 (1984).

11. 40 Fed. Reg. 28,242 (1975).

12. 7 U.S.C. § 136d(b) (1982). The notice of intent to hold a hearing may be issued without RPAR being invoked. *Id.*

13. 7 U.S.C. § 136d(b)(1), (2) (1982).

14. 5 U.S.C. § 551 et seq. FIFRA § 136d(d) triggers the applicability of the APA.

15. 40 C.F.R. §§ 164.20-164.111 (1984).

16. Evidence which is unduly repetitious is not admissible. Strict common law rules of evidence do not apply, nor do the Federal Rules of Evidence.

Recapture of special use valuation benefits if land cash rented

The statute, the committee reports and a series of private letter rulings have made it clear that cash rental of farmland after death (except for the two-year grace period immediately after death) would lead to recapture of special use valuation benefits. It is necessary for each qualified heir to have an equity interest in the farm operation. Several private letter rulings have acknowledged that a crop share or livestock share lease would meet the test inasmuch as the qualified heir or heirs would be bearing the risks of production. A major question has been the effect of cash rental of only a portion of the land — such as pasture and hay land — with crop share rental of the rest.

A recent Tax Court case, *Mary Jean Martin, 84 T.C. No. 40 (1985)* involved a 209-acre farm, of which 166 acres were cash rented. The balance of the acreage was in woodland, ditches and the residence. The court held that the cash rental had triggered recapture of special use valuation benefits. The court noted that recapture would not occur if the cash rented portion was a relatively small part of the entire property and a nexus could be shown between the leased part and the conduct of the active business of farming. That dictum would seemingly permit cash rental of pasture and hay land incidental to a crop share lease where the pasture and hay land were an integral part of the farming operation.

Ltr. Rul. 8508081, Nov. 28, 1984, also addressed the issue of what is required for the qualified use test to be met. In the facts of that ruling, the qualified heirs, as lessors, received 25% of the calf crop in a ranching operation and paid 7.5% of the operating expenses of the ranch. The Internal Revenue Service agreed that the qualified use test had been met.

— Neil E. Harl

Income tax protest

In the event that you have a farm client who has ideas about not paying federal income taxes as a form of protest, you might assign *Martin v. C.I.R.,* 756 F.2d 38 (6th Cir. 1985), as required reading.

During a four-year period, a family farmer filed annual returns that provided no information regarding his income. The 6th Circuit Court assures us that a farmer is a taxpayer, that the Internal Revenue Code (IRC) is constitutional and that no right to jury trial exists with respect to assessment of taxes. Using the bank deposits and expenditures method of reconstruction, the commissioner determined that farmer-taxpayer received over $160,000 in taxable income in the years in question. The 6th Circuit Court affirmed the assessment of over $49,000 in back taxes, over $12,000 for failure to file returns under IRC § 6651(a)(1), and approximately $4,300 in penalties under IRC §§ 6653(a) and 6654(a). Double costs were also assessed against farmer-taxpayer under Rule 38 of the Federal Rules of Appellate Procedure.

— Donald B. Pedersen

STATE ROUNDUP

ARKANSAS. "Sales" under the Arkansas Public Grain Warehouse Law. In *Farm Bureau Mutual Insurance Co. v. Wright,* 285 Ark. 228, _____ S.W.2d _____ (1985), Wright orally sold soybeans to a local elevator. The beans were taken to the local elevator to be weighed and then sold to Continental Grain Co. Continental then paid the local elevator, but the local elevator's check to the farmer was dishonored. The farmer brought suit to collect on the local elevator bond under the Public Grain Warehouse Law and to void the sale to Continental. The trial court held that Farm Bureau, the Harrisburg elevator's bonding company, and Continental were jointly and severally liable. The Supreme Court of Arkansas reversed, holding that under the Act the bond is to protect only the holders of warehouse receipts for stored grain and that the provisions of the Act voiding sales by a public grain warehouseman, unless the owner of the grain has (by written document) transferred title of the grain to the warehouseman, does not apply to situations where the grain is sold outright to the warehouseman.

The Public Grain Warehouse Law was again at issue in *Tucker v. Durham,* 285 Ark. 264, _____ S.W.2d _____ (1985). In *Tucker,* several farmers delivered grain to a public grain warehouse, received warehouse receipts for storage, and received an advance payment on grain delivered. Upon insolvency of the warehouse, the farmers sought to participate in the bond money distribution. Tucker, the public grain warehouse commissioner, contended that the farmers should be denied participation because each of the farmers had received advance payment for grain delivered and had thus sold the grain. The Arkansas Supreme Court disagreed, holding that unless title has been transferred from the farmer to the warehouseman, the grain was delivered for storage regardless of the fact that advance payments had been made and, therefore, the farmers were entitled to protection.

— Kimberly W. Tucker

OHIO. New Brine Legislation. On April 12, 1985, Ohio's new "brine bill," Am. Sub. H.B. 501, took effect, providing stringent regulations for the storage, transportation and disposal of brine from oil and gas wells. The new law addresses the previously inadequate regulation of brine transportation and handling from well site to disposal site. Haulers must be registered and are now legally responsible for proper disposal. Vehicles must be clearly marked and a daily log must be maintained. The brine law also lists permissable methods of disposal, including underground injection, annular disposal in conjunction with "enhanced recovery" of oil and gas reserves, and surface application subject to strict regulations. Improved performance standards for storage on site and for the disposal of drilling muds and other low level wastes are also addressed. New civil penalties range from $2,500 to $4,000, with criminal penalties ranging from $100 to $20,000 and two years imprisonment.

— Paul L. Wright

OHIO. Ground Water Rights. The Ohio Supreme Court has overruled the doctrine dealing with ground water that had been in effect for more than 120 years. *Cline v. American Aggregates Corp.,* 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984). In overruling *Frazier v. Brown,* 12 Ohio St. 294 (1861), the Court rejected the absolute ownership doctrine as it applies to ground water, holding that the "mysterious and occult" description of ground water flow does not describe or recognize the present state of scientific advancement. The Court adopted Section 858, Restatement of the Law 2d, Torts, as the common law of Ohio, having concluded that the restatement's reasonable use doctrine is much more equitable in the resolution of ground water conflicts than the prior English rule of absolute ownership.

— Paul L. Wright

Address Correction Requested

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1985 Annual Meeting

Make your plans now for the 1985 meeting of the American Agricultural Law Association to be held at the Hyatt Regency Hotel, Columbus, Ohio, October 3 and 4. Join your peers for two days of information and discussion. Mark your calendar!

State Reporters

In the June 1985 issue of *Agricultural Law Update,* we announced the appointment of reporters for 32 states. We are pleased to announce the appointment of reporters for four additional states: **LOUISIANA**, Laura Jo Johnson; **NEBRASKA**, Frank A. Kreifels; **SOUTH DAKOTA**, John H. Davidson Jr.; and **WASHINGTON**, Linda Grim McCormick. Appointment of reporters for the remaining states will be announced in future issues. State reporters watch for and report state level agricultural law developments of local and national interest. Most of their submissions will appear in *Agricultural Law Update's* "State Roundup" column.

Address Corrections Requested

Century Communications Inc., publishers of *Agricultural Law Update*, is asking all subscribers to send in any address changes (submit address *label* with correction) to Margaret R. Grossman, 151 Bevier Hall, University of Illinois, 905 S. Goodwin, Urbana, IL 61801. The information should include the address to which the newsletter should be delivered, if a preference between a home or office address exists. This request is to ensure the accuracy of the subscription listing as well as association membership records. Your cooperation in this matter is appreciated.