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INSIDE

IN FUTURE ISSUES

Cargill enjoined

The United States Court of Appeals for the Eleventh Circuit has affirmed an order granting several Florida poultry growers preliminary injunction against Cargill, the Minnesota-based international agricultural conglomerate. *Baldree v. Cargill, Inc.*, 925 F.2d 1474 (11th Cir., January 29, 1991) (Case No. 90-3396), 1991 U.S. App. LEXIS 1414.

The district court had ordered Cargill to reinstate the poultry growing arrangement with Arthur Ray Gaskins, president of the Northeast Florida Broiler Growers' Association; to not terminate or refuse to enter into a growing arrangement with poultry growers affiliated with the Association; and to not discriminate against any poultry grower because of his or her affiliation with the Association or because he or she seeks redress of grievances against Cargill. 758 F. Supp. 704, 1990 WL 264600.

Gaskins had grown poultry for Cargill since the early 1970's and was a founding member of the Association, having been its president for all but two years since 1973. The Association membership included approximately seventy of Cargill's 103 growers for the Jackson processing plant; each of the plaintiffs is a member of the Association.

In November 1988, Cargill allegedly admitted to its Jacksonville growers that live poultry had been accidently misweighed at the processing plant. Although Cargill apparently reimbursed the growers to some extent, thirty-eight current and former growers (hereinafter "Plaintiff Growers") filed suit against the company in March 1989 alleging that its misweighing of poultry and its reimbursement calculations were fraudulent. The Plaintiff Growers' amended complaint asserted common law claims as well as statutory claims under 18 U.S.C. § 1961 (RICO); 7 U.S.C. § 309 (Packers and Stockyards Act) (hereinafter PSA); and 7 U.S.C. § 2303 (Agricultural Fair Practices Act) (AFPA).

In August 1989, Cargill terminated its poultry growing arrangement with Plaintiff Growers Gaskins and Larry Sigers, president and vice-president, respectively, of the Association. In October 1989, the Plaintiff Growers filed a motion for preliminary injunction under applicable RICO, PSA, and AFPA provisions, seeking an order to prevent Cargill from terminating its growing arrangement with any Plaintiff Growers, except for good cause; refusing to deal with any grower because of the grower's connection with the civil action or with the Association; and harassing or threatening to refuse to deal with any grower because of the grower's connection with

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Eleventh Circuit holds that FIFRA preempts state tort claims based on inadequate labeling

In *Papas v. Upjohn Company*, 1991 WL 25740, 926 F.2d 1019 (11th Cir. 1991), the Eleventh Circuit affirmed the United States District Court for the Middle District of Florida holding that the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C.A. §§ 136-136y (FIFRA) impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides to the extent such actions are based on claims of inadequate labeling.

Minas Papas had filed a diversity action in United States District Court alleging that while working for a humane society he had applied certain pesticides manufactured by Upjohn and co-defendant Zoecon to dogs to rid the dogs of flees, ticks and other pests. Papas alleged that the chemical products had caused health problems and asserted claims in negligence, strict liability and breach of warranty. The principal factual claims of the complaint were based, in whole or in part, on claims

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the civil action or the Association.

On November 17, 1989, Cargill responded to the motion by asserting that the contract between the growers and the company justified termination without cause on twenty-days notice.

On December 18, 1989, the United States filed a complaint seeking declaratory and injunctive relief against Cargill under the PSA and the AFPA for its termination of Gaskins. The district court consolidated the government's and growers' motions for preliminary injunction. The district court found that the preliminary injunction should be issued for the following reasons:

(1) There is a substantial likelihood that the Plaintiff Growers will succeed in proving that Cargill violated the PSA and the AFPA by discriminating against Association members and by terminating certain Plaintiff Growers without economic justification;

(2) The growers have no adequate remedy at law, and will suffer irreparable injury if Cargill's alleged unlawful conduct is not enjoined;

(3) The balance of hardships favors the Plaintiff Growers since Cargill will suffer no cognizable injury from continuing a poultry growing arrangement with a productive grower;

(4) The Plaintiff Growers and the public will suffer if Cargill is able to undermine both this lawsuit and the enforcement capabilities of the USDA;

(5) Reinstatement is an appropriate form of relief in this case.

Baldree v. Cargill is an important case not only because of the government's support of the Plaintiff Growers, but also because the district and appeals courts have rejected Cargill's claim that growing arrangements can be terminated without cause. The district court's apparent assertion that Cargill must have economic justification prior to terminating a growing arrangement could have important implications for growers.

Attorneys for the Plaintiff Growers are still conducting discovery in the original civil suit. At this writing, Cargill has not petitioned the Supreme Court for certiorari on the preliminary injunction.

—H. Clay Fulcher, Nixon, Fulcher, and Smith, Fayetteville, AR.

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11TH CIRCUIT HOLDS FIFRA PREEMPTS STATE TORT CLAIMS/CONT FROM P. 1

of inadequate labeling in light of the alleged dangers arising from exposure to the pesticides.

The Eleventh Circuit declined to follow the decision of the United States Court of Appeals for the D.C. Circuit in *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir. 1984), which had concluded that FIFRA did not preempt state common law tort suits based on inadequate labeling.

In its opinion, the Eleventh Circuit observed that the imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause of the United States constitution. The court noted that the critical question in considering whether state law is preempted by federal law is congressional intent. *See* WL Op. at 5. In reviewing FIFRA's legislative history, the court found that Congress intended to establish a comprehensive regulatory scheme.

Having reviewed the legislative history and the specific language of FIFRA regarding the authority of the states, the court declined to find express preemption and instead held that common law tort claims were impliedly preempted by FIFRA and the labeling regulations promulgated under it.

In reaching its holding, the Eleventh Circuit gave broad consideration to the role of the Environmental Protection Administration (EPA) in the administration of FIFRA's comprehensive regulatory scheme. Noting that the EPA Administrator was responsible for determining whether to register a pesticide and, if so, under what circumstances, the court emphasized that the control of pesticides requires a careful balancing of benefit against risk.

Based on the express language of the Act, upon the legislative history, and upon the detailed nature of the federal regulations implementing FIFRA, the Court concluded that "the Federal Government had occupied the entire field of labeling regulation, leaving no room for the states to supplement Federal law, even by means of state common law tort actions." *See* WL Op. at 8.

Therefore, the Court held that jury awards of damages in such tort actions would result in direct conflict with the congressional intent that the EPA Administrator determine the reasonableness of the risks to man and the environment posed by pesticides, at least with respect to the labeling of pesticides.

The Fifth Circuit's holding in *Papas* stands in contrast to the D.C. Circuit's 1984 holding in *Ferebee v. Chevron*, *supra*, and leaves the federal circuits divided or the issue. The United States District Courts are also split on the issue. Cases finding preemption include *Hurt v. Dow Chem. Co.*, No. 90-0783-C(3) (E.D. Mo. Sept. 28, 1990); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla.1989); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo.1989); *Herr v. Carolina Log Bldgs., Inc.*, No. EV 85-262-C (S.D. Ind. Sept. 22, 1989); *Watson v. Orkin Exterminating Co.*, No. JFM-88-2427 (D. Md. Nov. 8, 1988); and *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich.1987).

Cases in which federal district courts have found no preemption include *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474 (D. Colo. 1990); *Evenson v. Osmose Wood Preserving, Inc. & American Wood Preservers Inst.*, No. IP 87-383-C (S.D. Ind. Sept. 18, 1990); *Stewart v. Ortho Consumer Products*, 1990 WL 36129 (E.D. La.1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa.1989); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill.1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill.1988); and *Wilson v. Chevron Chem. Co.*, 1986 WL 14925 (S.D. N.Y.1986).

—Winthrop A. Rockwell, Faegre & Benson, Minneapolis, MN

Pilot project for the provision of legislative support services

At the Board of Directors' meeting held in conjunction with the 1990 conference in Minneapolis last October, the directors approved a pilot project for the provision of certain legislative support services. The committee undertaking this project is now seeking member input for both support service ideas and individual membership expertise. This article explains the concept behind AALA's potential legislative support role, outlines the plans for the pilot project, and asks members who are interested for input and assistance.

1. **Introduction**

Agricultural law attorneys are all too familiar with the problems associated with ambiguous language in agricultural statutes and commercial law statutes that fail to adequately address the eccentricities of agriculture. For some time, many in the AALA have considered whether providing analysis and drafting assistance to address these problems would be an appropriate role for the Association. Although it has long been agreed that the membership would be well suited for the task, fear of divisiveness, partisanship, and other political ramifications made some leery of assuming such a role. Nevertheless, a committee was appointed to study the issue and to make a recommendation on the appropriateness of a support function.

The committee suggested a specific and controlled procedure for evaluating possible legislative support activities and a similarly specific procedure for taking legislative support action. The committee further advised that these procedures be tested by an initial pilot project to determine whether the process was workable, and whether it could be accomplished without leading to division among the membership. The committee's recommendations were approved by the Board, and the new committee is now in the process of implementing the pilot project.

2. **The Process**

AALA members as well as non-members can contact the legislative support committee to suggest possible topics for AALA input. Requests may involve the review of existing legislation, with analysis of problems relating to the statutory language; the analysis of proposed legislation; or the drafting of statutory language (e.g. a model statute).

A decision on whether to take on any given request will be made by the committee in its sole discretion based on the following factors:

1. Significance of the legislation in terms of its impact on the agricultural community;

2. Timeliness of the request, that is, can action be taken in time to be useful;

3. Assurance of political neutrality, with requests refused if taking a position on an issue is likely to be divisive to the membership;

4. Interest and expertise of the membership.

In order to discern the "interest and expertise of the membership," the committee has requested that AALA members contact them with regard to their areas of special interest. This contact will **not** commit the member to any sort of committee work or analysis, but will simply let the committee know who would like to be contacted when a specific request is considered.

If the committee determines that action should be taken on a request, and if time and space permit, this decision will be published in the next available issue of the *Update*. Association members will be encouraged to serve on an ad hoc subcommittee formed for the sole purpose of evaluating and taking action on the request. This ad hoc committee will be responsible for the preparation of a report addressing the request. Depending upon the nature of the request, this report may include recommended statutory language. If specific statutory language is requested, and if alternative positions are apparent, the preparation of alternative language may be appropriate, along with a brief explanation of the different results.

The report will be submitted to the full committee for its approval. Upon approval, the committee will submit the report to the AALA Board of Directors, which will have the authority to affirm or veto the report. Upon Board approval, the language will be submitted to the appropriate legislative body or other appropriate entities on behalf of the AALA.

As is apparent from the process outlined above, it is essential that Association members express their interest and expertise in the various categories of agricultural law topics, so they can be contacted when a relevant request is received. The categories into which requests will be divided are listed as follows:

1.Personal Property Financing and Leasing Issues

2. Real Estate Financing and Leasing Issues

3. Agriculture and the Environment

4. Agricultural Production and Marketing

5. Agricultural Labor Law Issues

6. Federal Farm Programs

7. International Agricultural Trade

8. Business Entities and Structure in Agriculture

9. Agricultural Taxation

10. Food Safety

11. Animal Welfare

12. Biotechnology/Agricultural Research and Development

Association members who are interested in any of the categories, should indicate their interest in writing to Susan A. Schneider at the National Center for Agricultural Law Research and Information, Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

Similarly, in order to get the pilot project off the ground, it will be necessary for legislative support requests to be sent to the committee. Members are encouraged to submit requests and to encourage others to do so as well. Requests should be submitted in writing to Susan A. Schneider at the address listed above.

—*Susan A. Schneider*, NCALRI, Fayetteville, AR

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Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* in March 1991.

1. USDA; Highly erodible land and wetland preservation; proposed rule. 56 Fed. Reg. 9258.

2. USDA; Implementation of the Program Fraud Civil Remedies Act of 1986; final rule; effective date 4/8/91. 56 Fed. Reg. 9581.

3. ASCS; CCC; Agricultural Resources Conservation Program; proposed rule. 56 Fed. Reg. 9293.

4. FmHA; Debt settlement; final rule; effective date 4/10/91. 56 Fed. Reg. 10145.

5. FmHA; Leaseback/buyback provisions of the Food, Agriculture, Conservation and Trade Act of 1990. 56 Fed. Reg. 11350.

6. FmHA; Guaranteed loans; increase in guarantee fees; effective date 3/19/91. 56 Fed. Reg. 11502.

7. EPA; Pesticide programs; endangered species program; may affect determinations. 56 Fed. Reg. 10886.

8. CCC; Commodity certificates; subsequent and original holders; final rule; effective date 3/21/91. 56 Fed. Reg. 11914.

9. IRS; Income from discharge of indebtedness—acquisition of indebtedness by person related to debtor; comments due May 20, 1991. 56 Fed. Reg. 12135.

—*Linda Grim McCormick*

The Cheyenne Bottoms: A case study of water conflicts in the 1990's

John C. Peck

In 1541, the Spanish explorer Coronado, after failing to find the Seven Cities of Cibola, began looking for Quivira, supposedly in what was later to become west central Kansas. He wrote to the King of Spain extolling this part of Kansas: "[T]he soil [is] the most suitable that has been found [and] it is well watered by arroyos, springs and rivers." Baughman, R.W., *Kansas in Maps*, the Kansas State Historical Society, at 11 (1961). Contrast that statement with one by Dr. Arthur Hertzler, the pioneer doctor who established medical clinics in Halstead, Kansas, in the late 1800's:

> One of the most perplexing situations I ever found myself in was one night I awakened to find my team following the bed of a dry stream. Kansas, I may say, has many streams, just in case it should rain. These 'streams,' except on rare occasions, are without water....

Hertzler, A.E., *The Horse and Buggy Doctor*, at 74 (1938).

The debate over the study area for this paper still rages, with this primary question in mind: how much water is there in the stream? One dispute set in a small river basin in west central Kansas hardly represents a microcosm of the agricultural water problems of the U.S. in the 1990's. But it does display many of the legal problems that have been brewing in the West for decades, and it poses a number of questions that have been raised by law professors in their writings— questions about 1) efficient agricultural water use; 2) the interconnection of groundwater and stream water; 3) water use preference lists that place agricultural use over uses for wildlife; 4) the constitutionality of forced reductions in water use; and 5) retardation of run-off by soil conservation measures. Absent from this study area are Indian and federal agency claims, but the U.S. Endangered Species Act may be relevant.

This paper describes the Cheyenne Bottoms water dispute, with a view towards focusing attention on some of these agricultural water issues in the 1990's. I will summarize Kansas water law, describe the geography and hydrology of the basin in question, lay out the legal and factual events leading to the dispute, and summarize the legal questions raised.

I must reveal at the outset that I have been working as a consultant to the irrigation interests in the dispute, but I consider myself a naturalist. I own "Woodpecker Hill," a small piece of pristine, oak/hickory forest (very similar to the Ozark Mountain forests) near the city of Lawrence, Kansas.

Kansas water law

In 1945, the Kansas legislature adopted the water appropriation act, establishing a first in time, first in right principle for both streams and groundwater. Kansas became what is known as a "California Doctrine" state since it recognized two types of rights: vested rights, those pre-existing the appropriation act and based on water use at the time of the act; and the new rights based on the appropriation system. Both of these rights are given real property status in the statute.

The appropriation act retained the pre-1945 statutes' "preference list" of uses of water: domestic, municipal, irrigation, industrial, recreational, and water power. Wildlife preservation is not listed as a separate use; rather it is included in the recreation category. However, the listing is followed by the statement that, still, first in time is first in right, and that senior uses can be lost only by condemnation. I think that this statute means that in times of shortage first-in-time will prevail, but that a user with condemnation power, such as a city, can condemn a water right that is lower on the preference list, even though senior in time, but cannot condemn one that is higher on the list. The preference list could conceivably take on added meaning, however, in the near future.

The Cheyenne Bottoms/Walnut Creek area

Kansas is split into two large river basins: the northern half of Kansas lies in the Kansas River Basin, a part of the larger Missouri River Basin, itself a part of the even larger Mississippi River Basin; the southern half lies in the Arkansas River Basin.

Walnut Creek is a small tributary of the Arkansas River. The Walnut Creek Basin includes approximately 1600 square miles. Several small towns dot the map in the basin. At the eastern terminus lies the city of Great Bend, with a population of approximately 16,000.

North and east of the city is the Cheyenne Bottoms Wildlife Area. The Cheyenne Bottoms Area is about seven miles by ten miles, comprising approximately 40,000 acres. This area is very flat compared to the surrounding area— a natural depression, a marshy area. Historically, when heavy rains put water in the Bottoms, it became a gathering place for migratory water fowl.

The annual precipitation at Great Bend is approximately twenty-five inches. These is a question about the flow of Walnut Creek. It is not as full as the explorer Coronado had implied rivers were in this part of Kansas. It may be an intermittent stream, or even an ephemeral stream— that is, it does not normally run unless there has been a recent rain.

Because of great interest in maintaining and enhancing the Cheyenne Bottoms as a wildlife area, the Kansas Forestry, Fish and Game Commission began a study project in the late 1920's and early 1930's. It conceived of the idea of diverting water from both Walnut Creek and the Arkansas River by running a canal from the Arkansas River to Walnut Creek, then from Walnut Creek to the Bottoms.

Meanwhile, there was some irrigation in the Walnut Creek in this period from the 1920's through the 1940's, primarily from the stream itself, and then generally when there was water following rains— from deep holes in the bottom of the river. Later in the 1940s, because this stream water supply was too unpredictable, irrigators began drilling wells in the Walnut Creek alluvium— i.e., water that may be interconnected to the Walnut Creek. Cities like Great Bend and Hoisington also took water from wells in the area.

Developments in the law and in water use since the 1940's

The water appropriation act required all persons desiring to use water to apply for a permit from the Chief engineer of the Division of Water Resources. Under the act, early "senior rights" would be protected against later "junior rights" in cases of shortage.

In 1948, the Kansas Forestry, Fish and Game Commission filed for a permit for 20,000 acre feet per year of water from Walnut Creek— a surface water right. It also filed for a permit for 30,000 acre feet per year of water from the Arkansas River to be diverted by the canal described above. This total of 50,000 acre feet represents a very large amount of

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water from this area.

The Commission used water as it could get it from both sources. In 1955, a year with slightly higher than average precipitation, the Forestry, Fish and Game Commission showed that it could get approximately 20,000 acre feet of water from Walnut Creek, and its right was eventually certified in an amount of 19,175 acre feet. During many years since 1955, however, it has been unable to get that much water.

Developments in both the Walnut Creek Basin and in the Arkansas River Basin from the early 1950's to the 1980's, as well as developments in the United States as a whole, may have drastically changed the water supply and demand picture for this small basin in west central Kansas. The following things occurred from the 1940's to 1991:

1. Irrigation water rights from wells in the Walnut Creek alluvium increased from approximately 7,700 acre feet in 1946 to about 62,000 acre feet in 1985. Currently with over 715 water rights of various kinds in the basin, most of these rights are from alluvial groundwater, and most are for irrigation. Most of these irrigation rights are junior to the Cheyenne Bottoms right, which is a situation reversed from many cases in the West like the Mono Lake case (*National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983)) where the water right for wildlife is either junior or non-existent and must be found using other principles of law— but factual and legal questions exist here on whether the alluvial groundwater is connected to the stream water.

2. A watershed district was formed, and a number of watershed structures such as small dams were constructed, in part with federal subsidies, and generally in the 1980's. In addition, soil conservation practices by individual farmers such as construction of farm ponds and terraces and use of various low-tillage practices have tended to keep water on the land longer and to reduce runoff into Walnut Creek.

3. In the early 1970's Kansas enacted a groundwater management district law, which established the possibility of local control and management of groundwater resources. To date, five such districts have been established, and one is located just east of and includes part of the Walnut Creek Basin. As part of that act, the chief engineer was empowered, in cases of "excessive" decline of groundwater levels or in other cases where the public interest demands, to consider setting up "intensive groundwater use control areas" (IGUCA's). If the chief engineer establishes an IGUCA, he then has extraordinary statutory powers, one of which is the power to reduce the "permissible withdrawal of groundwater rights by any one of more appropriators thereof." Kan. Stat. Ann. § 82a-1038 (1989). In addition, a catch-all phrase gives him power to impose additional requirements in the public interest, which arguably authorizes a re-ordering of priorities, including those of surface water users.

4. Precipitation has fluctuated from the 1940's to the present about like it has since statehood: there have been very wet years, like 1951 and 1959, and there have been very dry years, like 1952 to 1954, and like 1988 and 1989. There is no evidence, however, that a major change in climate has occurred over the last century.

5. Water levels in various observation wells in the eastern portion of the basin show fluctuations that have corresponded roughly with precipitation. In recent years, however, there have been drops in the water levels. Since 1944, four observation wells show declines ranging from five feet to fifteen feet.

6. The bed of Walnut Creek has changed over the decades, from a sandy, permeable bed early in the century and into the 1920's to a bed having a two to three foot thick layer of less permeable silt more recently. The silt buildup, presumably caused in part by soil erosion from plowed fields and in part by flood events, makes recharge of the alluvial aquifer more difficult even when water is present, and the reverse may also be true— discharge from the aquifer into the stream may also be impeded by the silt.

7. Wetlands areas in the central United States have decreased dramatically in the last few decades. Losses elsewhere have made Cheyenne Bottoms much more important to migratory shore birds than it had been before.

8. In 1989, the Kansas Supreme Court was given the opportunity to adopt the pubic trust doctrine in a case involving the public's use of non-navigable streams. It declined, stating that this question was one for the legislature. *State, ex rel. Meek v. Hays*, 246 Kan. 99 (1990).

9. The Cheyenne Bottoms diversion has not been without its own environmental costs. Its unlined canals may lose from 20 to 80 percent of the water diverted. Landowners below the Bottoms in Cow Creek complain of periodic high flows and of brackish water that were not there prior to the diversion, causing a loss of fishing and of a stock water source.

In summary, we have a situation where there may be too many water rights for a basin, too little precipitation, a strong agricultural economy that is built of irrigation, cities that need water for their domestic and industrial use, increasingly less run-off due to conservation practices, a groundwater resource that is declining in volume, and a nearby wetland that has achieved national and international importance because of its location on the migration path of various species (some endangered) and because of the loss of other wetlands suitable for these birds as stopover places.

Description of the current dispute

Recently, environmental groups have expressed concern at the drying up of Cheyenne Bottoms. Private groups such as the Kansas Wildlife Federation and the Kansas Audubon Society, as well as the U.S. Fish and Wildlife Service, requested that the state agency holding the Cheyenne Bottoms water right seek to enforce the right against the irrigators pumping out of the alluvium by an administration of the water right— i.e., to shut down junior appropriators totally in inverse order of their permit dates. Administration of water rights can be done in Kansas, either by requesting the chief engineer to perform such administration or by bringing suit against junior water right holders. However, unlike other Western states where these conflicts are routine and where sufficient personnel exist in state agencies or water courts to handle them, Kansas has seldom administered water rights, and there are few court cases.

Proceeding under the IGUCA procedure was chosen over administration of the water right. That procedure involves calling a public hearing on whether there has been a serious decline in the groundwater level, what the cause of the decline, if any, is, and whether the IGUCA should be established. If an IGUCA is then established, the chief engineer would have to decide what control measures should be adopted.

The public hearing on the proposed IGUCA began in early December 1990. Twelve parties, each represented by counsel, are involved. A few parties do not even have water rights— the Audubon Society, the Wildlife Federation, and the

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Kansas Farm Bureau. The hearings have involved over eighteen days of testimony and cross-examination. After the hearings are completed, the chief engineer will make his decisions.

Evidence for the environmental side focused on the alleged decline of the water level in the Walnut Creek alluvium and the relationship of that decline to stream water, the causes of that decline, and the importance of the Cheyenne Bottoms as a migratory bird stopover point.

The irrigation side countered the evidence of the interconnection of the surface water and the alluvial groundwater and stressed the importance of the agricultural economy to the region and to the state as a whole. The soil conservation interests stressed the positive effects on flood control and the proposition that, given time, the water retention structures will slowly recharge the aquifer. The IGUCA hearing has aroused great interest in the Kansas environmental and agricultural communities, the latter claiming that it is the ultimate environmentalist.

Legal and policy issues involved

The IGUCA case involves numerous legal and policy issues, most of which are not novel to the West, but are novel to Kansas. These include the following:

1. Is the part of the IGUCA statute constitutional that provides that the chief engineer is empowered to reduce water quantities of existing water rights regardless of priority date?

2. Will the chief engineer enforce the priorities where the rights involve both surface water and possibly interconnected groundwater?

3. Can the chief engineer reduce the authorized water right of a surface water user, namely the right for the Cheyenne Bottoms, under his control powers in the IGUCA, since the statute focuses on problems among groundwater users and does not mention interconnected surface water? Or could he apply the preference list, which favors agriculture over wildlife use?

4. What rights do senior appropriators have against upstream landowners and watershed districts whose structures retard runoff from reaching the stream?

5. What is the meaning of the Kansas use preference list? If it means that higher users with condemnation power can condemn lower users, can a city with a higher use (municipal) condemn a lower use (recreation [wildlife]) held by a state agency?

6. Philosophically, is Kansas truly a prior appropriation state like those Western states that have had the appropriation doctrine since statehood or before and which were founded on the mining law of first in time, first in right? Or does Kansas have a more pioneer attitude, one of sharing, despite the prior appropriation doctrine's being on the books since 1945.

7. How will the chief engineer, who is a part of the Kansas Board of Agriculture, deal with this first big conflict between agricultural and wildlife water use?

8. Should irrigators be forced to cut back on water use to protect a wildlife preserve that has gained importance because of the diminution of wetlands in general?

9. If the chief engineer reduces the Cheyenne Bottoms right, can the holder of the right, a state agency, claim an unconstitutional taking?

10. What relevance do federal acts such as the Endangered Species Act and the Migratory Bird Treaty Act have on this conflict? Since no federal agency is involved, section 7 is not implicated. But section 9, which prohibits "takings" of endangered species by any "person" could theoretically be brought into play against numerous parties here— state agencies and irrigators with junior water rights.

11. If an IGUCA is established and water rights are affected by control measures, can water right holders still sue other holders for impairment, or does the IGUCA pre-empt the field?

Summary

This case is an important one for Kansas and perhaps other Western states in showing a state's attitude toward a number of water law issues facing agriculture in the 1990's. The outcome of this case as well as further progress in this problem area between agriculture uses and wildlife preservation will be important to both interests in the next decade.

US/USSR Conference on Agriculture Law

The first ever conference involving agricultural law specialists from the Soviet Union and the United States will convene at Iowa State University in early September 1991. The three-day conference, set for September 5-7, is being sponsored by the Center for International Agricultural Finance at Iowa State University, the Agricultural Law Section of the Iowa Bar Association, and the American Agricultural Law Association.

The objectives of the conference include providing the Soviet participants with insights as to how the United States has developed a legal system to guide economic activity in agriculture, and giving U.S. participants a greater understanding of the problems faced by the agricultural sector in the Soviet Union in transitioning toward a market economy.

The conference will focus on property law, commercial law, environmental law, antitrust law, business organization law, bankruptcy and government regulation, all in the context of agriculture's unique needs.

The conference will be held in the Scheman Building on the Iowa State University campus. Additional information on the conference and registration forms may be obtained from the Center for International Agricultural Finance, 478 Heady Hall, Iowa State University, Ames, Iowa 50011.

—Philip E. Harris, University of Wisconsin-Madison

AG LAW CONFERENCE CALENDAR

1991 Summer Agriculture Law Institute at Drake University
June 3-6: Analysis of the farmer's comprehensive liability insurance policy; June 1-13: International agricultural trade law; June 17-20: Current tax issues in agriculture; June 24-27: Wetlands protection law and agriculture (swampbuster and section 404); July 9-11: Legal aspects of livestock production and marketing; July 15-18: The 1990 Farm Bill and federal farm programs.
Sponsored by Drake University Agricultural Law Center.
For more information, contact Prof. Neil D. Hamilton, (515) 271-2065.

Innovation in Western Water Law and Management
June 5-7, 1991, University Memorial Center, University of Colorado School of Law.
Topics include: Designing dispute resolution systems for water policy and management; federal regulatory interests in water; can conjunctive use and the priority system co-exist?
Sponsored by: Natural Resources Law Center.
For more information, call (303) 492-1297.

Environmental Law Institute
May 29-30, 1991; Holiday Inn International, Bloomington, MN.
Topics include: USDA environmental programs; sale and development of contaminated property.
Sponsored by Minnesota Institute of Legal Education.
For more information, call (612) 339-6453.

Real Estate Defaults, Workouts, and Reorganizations
May 30-June 1, 1991, Philadelphia.
Topics include: hazardous waste, lender liability, and insolvent lenders.
Sponsored by ALI-ABA.
For more information, call 1-800-CLE-NEWS.

State Roundup

COLORADO. *Agistor's lien.* In the case of *La Junta Production Credit v. Schroder*, 800 P.2d 1360 (Colo. App. 1990), the PCA foreclosed on a security interest in cattle, which were then sold. After foreclosure was initiated, but before sale, agistor recorded a lien pursuant to state "agistor's lien" statute, Colo. Rev. Stat. § 38-20-102(1)(a). The court gave the agistor's lien priority over the UCC security interest.

—John H. Davidson, The School of Law, The University of South Dakota, Vermillion, SD

INDIANA. *Right to Farm Law Changes in Operation.* An Indiana District Court considered two changes in agricultural operations and ruled that one of the changes may constitute a new operation under the Indiana Right-to-Farm Act. *Laux v. Chopin Land Associates, Inc.*, 550 N.E.2d 100 (Ind. App. 1990).

Neighbors in *Laux* sought to abate a hog operation under nuisance law. The plaintiff, Chopin Land Associates, Inc., owned approximately 113 acres of rural land that it wanted to develop. The defendants, Laux, were owners of ten acres that were being used for a hog operation. Defendants claimed the court could not enjoin them from raising hogs because of the statutory anti-nuisance protection of the Indiana Right-to-Farm Act.

The Indiana Right-to-Farm Act was recognized as a non-claim statute limiting nuisance actions in situations where activities or property uses came to the nuisance. Indiana Code §§ 34-1-52-4(f). An agricultural operation that was not a nuisance when commenced which has been in existence for more than one year will not become a nuisance due to the fact that neighboring property uses have changed.

Although normal changes in agricultural operations are permitted, significant changes in the type of operation commence a new date of an agricultural operation under Indiana law. The court examined the two changes of agricultural operations; first, a change from grain farming to hog raising, and second, an increase in the number of hogs from 29 to over 300 hogs together with a new building.

The court found that the change from grain farming to a hog raising operation constituted a significant change in type of operation. Thus, raising hogs commenced a new agricultural operation; the right-to-farm protection afforded to grain farming did not apply to the hog operation.

The increase in the number of hogs was more troublesome. The court decided that the increase from 29 hogs to over 300 hogs and the construction of a hog-raising facility were not sufficient "to support a conclusion that there had been a significant change in the type of operation." 550 N.E.2d at 103. Thereby, if the 29 hogs were protected against nuisance claims under the right-to-farm law, then the 300 hogs and new building were also protected.

—Terence J. Centner The University of Georgia, Athens, GA

CALIFORNIA. *Producer's lien not released by existence of specified payment arrangement.* The U.S. Court of Appeals for the Ninth Circuit, in *In re T.H. Richards Processing Co.*, 910 F.2d 639 (1990), has reversed a lower court decision that held that the producer's lien provided by sections 55631-55653 of the California Food and Agricultural Code was released as a matter of law by the producer's acceptance of a specified payment plan. Since most contracts to deliver produce in the California fruit and vegetable industry contain an agreement as to price and time of payment, the district court decision would have rendered the producer's lien statute a virtual nullity. By reversing the district court's decision, the court of appeals has preserved an important statutory scheme enabling producers to obtain relief "when processors have defaulted on *agreed-to* payments." (Emphasis in original.)

The producers in *T.H. Richards* were twenty-three tomato growers, twelve pear growers, and a peach grower who had contracted to deliver produce to the T.H. Richards Processing Company. The tomato and pear contracts obligated the processor to pay fifty percent of the agreed-to price within one week of delivery of the produce and the remaining fifty percent one year after delivery, without interest. The pear contract contained a demand-payment provision under which the processor would hold money owed until the producer or his bank requested a partial payment. Before any deferred and demand payments were made, however, the processor filed for Chapter 11 relief in bankruptcy court. The growers then initiated an action to enforce their liens in the same forum.

The defendants in the enforcement action included several banks that were creditors of the processor and a group of "bill and hold" companies that had contracted to purchase, but had not taken delivery of, the tomatoes and pears in their processed forms. The growers asserted claims to the standard warehouse inventory of the processor and the "bill and hold" inventory. The banks and the "bill-and-hold" companies answered that the growers had released their liens by agreeing to the deferred payment and demand-payment arrangements. Their answer was based on language in the lien statute stating that "[a]ny producer may release any lien... upon arrangements being made for... payment which are satisfactory to the producer." They maintained that under this provision any specified payment plan would automatically release the lien.

The bankruptcy court agreed and, on appeal, the district court affirmed. The lower courts construed the words "producer may release any lien" to mean that the producer would necessarily make a release by simply agreeing to a payment plan.

The court of appeals concluded otherwise. It found the statutory interpretation of the lower courts to be contrary to canons of construction generally applied in California and inconsistent with the intentions of the California legislature. First, the court of appeals noted that "may" does not mean "shall." Under the accepted canon of construction, "may" is a term of permission. Thus the court of appeals held that the release-of-lien provision does not mandate a release upon agreement to a payment plan. Instead, it merely permits a producer to release the lien upon agreement to a plan. This is the only logical meaning of the statute's language.

Second, the court of appeals noted that any other interpretation "would permit the release-of-lien provision to swallow the lien." The lien would survive only in those instances in which there is delivery to the processor without agreement as to the price or the time of payment. In the California fruit and vegetable industry such instances are rather rare. Indeed, the court of appeals noted that the legislative history of the producer's lien statute shows that a significant amount of California produce is delivered under contracts providing for final payment by the processor as long as a year after delivery. If mere agreement to a payment plan were enough to extinguish the lien, the statute would be nearly ineffectual. The court of appeals held that such a result would conflict with the presumption that statutory lien provisions should be construed to effectual their purposes.

—John S. Harbison, San Diego, CA

Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Eighth Annual Writing Competition

The AALA is sponsoring its eighth annual Student Writing Competition. This year, the AALA will award two cash prizes in the amount of$500 and $250. Papers must be submitted by June 30, 1991, to Prof. Leon Geyer, Virginia Tech, Blacksburg, VA 24061-0401 (703) 231-4528.

Topics include, but are not limited to, agricultural law, agri-business, environmental, and tax issues in agriculture.

AALA Distinguished Service Award

The AALA invites nominations for the Distinguished Service Award. The award is designed to recognize distinguished contributions to agricultural law in practice, research, teaching, extension, administration, or business.

Any AALA member may nominate another member for selection by submitting the name to the chair of the Awards Committee. Any member making a nomination should submit biographical information of no more than four pages in support of the nominee. The nominee must be a current member of the AALA and must have bneen a member for at least the preceding three years. Nominations should be sent to Prof. Leon Geyer, Virginia Tech, Blacksburg, VA 24061-0401 (703) 231-4528.