

Agricultural Law Update

VOLUME 15, NUMBER 3, WHOLE NUMBER 172

JANUARY 1998



Official publication of the
American Agricultural
Law Association

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

IN FUTURE ISSUES

- State agricultural pesticide disposal programs

The Animal Agriculture Reform Act

Senator Tom Harkin, D-Iowa, recently introduced the Animal Agriculture Reform Act, S-1323. The bill is co-sponsored by Senator Paul David Wellstone, D-Minnesota. The bill proposes to require livestock growers covered by the bill to prepare detailed animal waste management plans to be approved by the Secretary of Agriculture.

The bill covers concentrated animal feeding operations (CAFOs) with an approximate one-time capacity above 1,300 hogs; 57,000 chickens; 270 dairy cattle; or 530 slaughter cattle, although none of those figures appear in the bill. Instead, the bill defines a CAFO as a facility with an animal weight capacity of more than 400,000 pounds for cattle and of more than 200,000 pounds for other animals. A CAFO can be a totally roofed facility or one that is not roofed. As to those facilities that are not roofed, the Secretary of Agriculture is to determine whether the number of animals confined in any particular acreage exceeds a level established by the Secretary for the protection of surface and ground water from animal waste pollution.

The proposed act appears to be a radical departure from the CAFO definition in the Federal Clean Water Act (CWA). The CWA contains an exception from the CAFO definition for animal feeding operations in which crops are grown over a portion of the facility and animal waste is applied as a nutrient for the crops. One unanswered question is whether the bill eliminates the CWA's exception, and if so whether the exception is eliminated as to all animal feeding operations or just to those defined as large under the bill.

The act applies to operators of the facilities subject to the act. An operator is defined as a person who owns or controls a CAFO. If the CAFO's operator is not the same person as the animal owner, the operator is to be considered the animal owner's agent, regardless of the provisions of any contract or agreement between the owner and the operator.

The bill defines "animal waste" as excreta, or other associated animal waste, including litter, bedding, a dead animal, a composted animal carcass, or other residual organic matter from a CAFO. The animal waste management plan is a written statement detailing the manner in which the CAFO will handle animal waste.

If the bill passes, the Secretary of Agriculture will establish the required elements of an animal waste management plan along with the technical standards. The foregoing will be established in consultation with the Administrator of the Environ-

Continued on page 2

Forest Service amendments to Land and Resource Management Plans

The Ninth Circuit Court of Appeals affirmed the Arizona District Court's summary judgment in favor of the Forest Service to challenges brought by Forest Guardians and others on the basis that amendments to Land and Resource Management Plans (LRMPs) in June of 1996 should be applied retroactively to existing permits and contracts for the use of forest resources. *Forest Guardians v. U.S. Forest Service*, No. 97-16206 (9th Cir. 1997)(97 Daily Journal D.A.R. 15077).

Management of national forests is conducted pursuant to a statutory framework created in the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.* The NFMA authorizes the Secretary of Agriculture to develop LRMPs in order to sustain the yields of the national forest system and to provide for multiple uses of forest resources. 16 U.S.C. § 1604(e). In June, 1996, the LRMPs for the southwestern region of the United States were amended to provide new guidelines and standards for management of Mexican spotted owls, northern goshawk, grazing, and old growth. 97 D.A.R. 15078. The Forest Service chose to apply the new guidelines and standards only to "new permits, new contracts, and other new instruments for the use and

Continued on page 2

mental Protection Agency.

The plan must be accompanied by a map indicating the CAFO's general layout along with the direction and degree of all grades within the property line, the location and flow of any surface water, and information necessary to determine the land area required for the application of animal waste and any crop or cover schedule specified in the plan.

The plan must contain an estimate of the CAFO's annual animal production and annual quantity of waste produced. The plan must describe the CAFO's nutrient management methods, procedures and practices to be used; and methods, structures, or practices to prevent or minimize soil loss, surface water pollution, ground water pollution, and odors caused by animal waste during collection, storage, and application.

The plan must specifically describe the CAFO's operation, monitoring, mainte-

nance, and inspection of its animal waste storage facilities. The plan must also describe contingency measures to be used by the CAFO to minimize environmental pollution resulting from an unexpected waste leak or discharge.

Containment systems for wet waste operations will be required to install emergency shutoff devices to contain animal waste in the event of an unexpected leak or discharge. The plan must also provide for failsafe structures to contain, in the event a containment structure breaches or overflows, a minimum quantity of animal waste equal to the maximum quantity loaded into the containment structure in any 48-hour period.

The plan must describe the practices and procedures to be used by the CAFO, detailing compliance with the plan and any additional requirements necessary to comply with applicable federal, state, and local laws (including regulations). The operator, furthermore, must maintain at all times records sufficient to demonstrate compliance.

The bill states that the Secretary, in consultation with the EPA's Administrator, will eventually establish maximum permitted levels for nutrients, minerals, metals, or other substances found in animal waste whose presence in land above those levels could pose a significant threat of environmental pollution or soil toxicity. In the future, the Secretary will also establish minimum distances that must be maintained between CAFOs and environmentally sensitive locations. Environmentally sensitive locations include surface waters, water supply wells, wetlands

not used for water treatment purposes, floodplains and the drainage areas, drainage wells, drainage ditches, drainage lines, and subsurface drainage inlets.

The bill does not preempt the right of state or local governments to impose and enforce stricter regulations on CAFOs.

If the bill passes, new CAFOs cannot be constructed, or existing facilities expanded, without the Secretary's prior approval of the operator's animal waste management plans. Whenever a plan is approved, construction or expansion of a facility must be completed within one year after the approval date. If the construction deadline is not met, the approval automatically terminates. Existing CAFOs will have only 18 months after the bill's enactment to formulate and obtain the Secretary's approval of their waste management plans. Approval of a plan may be effective for a period not to exceed five years. Renewal applications must be submitted to the Secretary at least 15 days before the date on which the approval expires.

CAFOs that violate approved animal waste management plans will be subject to severe penalties. Violators will face fines up to \$50,000 per violation per day. In addition, their operating permits will be revoked and they will forfeit all USDA benefits.

—John D. Copeland, Director
National Center for Agricultural Law
Research and Information
Fayetteville, AR
This article is reprinted from *Midwest
Farm and Livestock Director*.

Agricultural Law Update

VOL. 15, NO. 3, WHOLE NO. 172 January 1998

AALA Editor.....Linda Grim McCormick
Rt. 2, Box 292A, 2816 C.R. 163
Alvin, TX 77511
Phone/FAX: (281) 388-0155
E-mail: hcxb52a@prodigy.com

Contributing Editors: Charles L.E. Wage, Paul Smith's College; John C. Becker, The Dickinson School of Law; John D. Copeland, NCALRI Director, Fayetteville, AR; VA; Linda Grim McCormick, Alvin, TX.

State Roundup: Scott Wegner, Bismarck, ND.

For AALA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701.

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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

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Forest Service/Cont. from page 1

occupancy of national forest lands in the southwestern region. 97 D.A.R. 15078.

Forest Guardians contended that the consistency provisions of the NFMA required that projects approved prior to the 1996 amendment of the LRMPs be updated to comply with the new standards and guidelines. 97 D.A.R. 15079, 16 U.S.C. § 1604(i). Section 1604(i) essentially requires that permits, contracts, and other agreements for the use of forest resources be consistent with the LRMP. Section 1604(i) also requires revision of existing plans as soon as practicable.

The Forest Service's position was that the Secretary of Agriculture has discretion in determining how amendments will be implemented. The Forest Service relied upon the language of section 1604(f)(4), which expressly states that the Secretary of Agriculture could amend existing LRMPs "in any manner whatsoever."

Administrative rules and Congressional enactments are not construed to have a retroactive effect unless required to do so by the language of the enactment or rule. 97 D.A.R. 15079; *Chenault v. United States Postal Service*, 37 F.3d 535, 537 (9th Cir. 1994). Relying on language at §1604(i), the district court held that retroactive application was not mandated where to do so would result in the impairment of existing permits, contracts, or other rights. 97 D.A.R. 10579.

The Ninth Circuit determined that retroactive application of 1996 LRMP amendments would result in the impairment of existing rights of permit holders and others. Accordingly, since § 1604(i) does not prohibit the Secretary from implementing the plan amendments prospectively only, the "prospective only" application of the 1996 amendments to the LRMPs was appropriate. 97 D.A.R. 15079.

—Thomas P. Guarino
Myers & Overstreet, Fresno, CA

—State Roundup—

NORTH DAKOTA. *Conviction for plowing section line.* In *State v. Brossart*, 565 N.W.2d 752 (N.D. 1997), the North Dakota Supreme Court reversed a farmer's jury conviction for plowing a section line in violation of state law.

Brossart had regularly plowed across an unimproved section line running between two sections he farms. Brossart's reasons for plowing the section line were to control weeds and make it more passable for travel. Although informed of township regulations against such action, Brossart continued to plow and seed the section line. Consequently, Brossart was criminally charged with obstructing a highway in violation of N.D. Cent. Code section 24-12-02. The two relevant subsections of the statute provide that no person may: "[w]illfully and knowingly obstruct or plow up, or cause to be obstructed or plowed up, any public highway or right of way..." or "[p]low up a section line in a manner so as to obstruct usual travel on the section line."

On appeal, Brossart maintained that plowing a section line was not a crime unless actual obstruction resulted, while the state argued that the statute allows plowing only on section lines not normally traveled. Finding that the two statutory subsections are ambiguous when read together, the supreme court held that the legislature did not intend to punish a farmer for plowing a section line as long as no obstruction resulted. The court reversed Brossart's conviction and remanded for a new trial as to whether

Brossart, by parking machinery or taking other action, obstructed travel on the section line.

—Scott D. Wegner, Bismarck, ND

New publications

Doane Agricultural Services Company has published two new books by Dr. Neil Harl on the Taxpayer Relief Act of 1997. One, *Analysis of the 1997 Tax Law—Its Implications to Agricultural Producers*, is a 28-page booklet reviewing all of the key changes in the tax code as they apply to farmers/ranchers. The other, *Supplement to the 13th edition of Farm Estate and Business Planning*, includes 45 changes to this leading reference book on farm/ranch business organization and generational transition planning.

For information on ordering, Doane invites you to call Judith Knoll at 800-535-2342.

Conference Calendar

7th Annual Agricultural and Rural Law Institute

February 13, 1998, Minnesota Landscape Arboretum, Chanhassen, MN.

Topics include: rural business law on startups, expansions, and growth; small business taxation update; estate planning update; field/barn labor update.

Sponsored by: Minnesota CLE.

For more info, call 612-227-8266 or 800-759-8840.

Federal Register— in brief

The following is a selection of items that were published in the *Federal Register* from November 17 to December 23, 1997. December 18 was missing.

1. APHIS; Availability of Horse Protection Strategic Plan. 62 Fed. Reg. 63510.

2. CCC; P.L. 480 agreements with the private trade; proposed rule; comments due 2/2/98. 62 Fed. Reg. 63694.

3. Farm Credit Administration; Loan policies and operations; loan sales relief. 62 Fed. Reg. 63644.

4. Farm Credit Administration; Interest rates and charged; final rule. 62 Fed. Reg. 66816.

5. NRCS; Technical assistance; proposed rule. 62 Fed. Reg. 64174.

6. Ag Marketing Service; Information about legislative changes in civil penalties for a misrepresentation or misbranding violation under PACA; notice; effective date 12/10/97. 62 Fed. Reg. 65058.

7. Ag Marketing Service; National Organic Program; proposed rule; comments due 3/16/98. 62 Fed. Reg. 65850.

8. FCIC; Common crop insurance regulations; basic provisions; various crop insurance provisions; final rule; effective date 12/4/97. 62 Fed. Reg. 65130.

—Linda Grim McCormick, Alvin, TX

TIMBER TRESPASS/Cont. from page 7

involving trespass to forest resources investigated by the Pennsylvania Game Commission or Fish and Boat Commission officers. These officers are already trained to investigate matters involving natural resources and, though their choice of professions, have shown an interest in matters involving enforcement of environmental and natural resource laws. These individuals may be better suited to carry out investigations involving theft or trespass to forest resources than the County Sheriff or the State Police.

Another potential solution is to amend Title 18, section 1108 of the Crimes Code and section 8311 of Title 42, the criminal and civil provisions respectively. These amendments would add the remedy of an injunction prohibiting the "repeat offender" from any further harvesting of forest products in the Commonwealth until the outstanding judgments against them have been satisfied in full.

Alternatively, enforcement could be

possible through collateral legislation that already exists. Examples would be modification of the Clean Streams Law so that the actual harvesting operator is the party liable for the fines and penalties under the act. The "repeat offender" would then have to pay the fines and penalties, install the erosion and sedimentation control measures, and pay all restitution, or suffer further more stringent penalties as criminal sanctions for failure to do so. Additional collateral legislation may potentially be prosecution under the racketeering laws, potentially both state and federal level. This would require more than one individual to be involved in the theft.

Conclusion

Across Pennsylvania, the value of forest resources is considerable. Forest resources have played an important role in the economic growth in the Commonwealth in the past and will continue to do

so in the future.

The issues involved in timber trespass and theft have existed as long as the industry has been present. However, the problem is becoming more and more prevalent with the great increase in the price of forest products in the last ten to fifteen years. The authors have attempted to identify the problem, identify the cause of the problem, and give potential solutions through suggestions on how a landowner may attempt to avoid becoming a victim.

The Commonwealth must take action to address the matter before more forest landowners fall victim to the "repeat offenders." The solutions must come from the landowners and the industry for their own preservation as a credible and viable entity within society. The best solution may be a proactive landowner in the management of their forest resource and involves the proper professionals when implementing management practices upon his or her property.

Timber trespass and theft

By Charles L.E. Wage and John Becker

Across Pennsylvania, the value of timber resources in rural areas in considerable. Pennsylvania's forest resource has played an important part in the economic growth that occurred in the Commonwealth throughout its history. Although these assets are a valuable resource, their value also poses the problem of how to most effectively utilize it. What type of market price and resource management information is available to assist an owner in deciding if the present is the right time to sell that resource? How should the terms be set with those with whom the property owner must interact to fully utilize the resource? Although an important decision itself, the issue is broader than simply which trees should be cut and removed. What is the best way to accomplish the goal and gain the maximum advantage?

In addition to maximizing economic benefits of the transaction, other issues can attract a property owner's attention. For example, what can property owners do to protect their assets from other people whose accidental or intentional acts threaten their interests as owners of property? The vast expanses of rural areas often make such areas easy targets for those who show little or no respect for property boundaries, or the lawful rights of property owners. As disappointing as that might be to someone searching for positive aspects of rural living, it remains an important fact of life that in rural areas there is a need to protect one's assets from others who might want to deprive an owner of them.

There has never been a better time for theft of forest products. The market value of all forest products has increased greatly over the last decade. Ownership of rural land has seen a transformation from the owner residing on the property to a higher percentage of absentee ownership. The market value of all forest products has increased nearly three to four times over the last fifteen years, depending on location of the market.

The United States Forest Service esti-

mated the market value of sawtimber stumpage moved in 1994 exceeded \$10 billion dollars. The average market price values of four of the highest value species in Northeast Pennsylvania and the Southern Tier of New York for the years 1983 to 1997 are shown in the table below.

Vener logs of the above species are presently bringing as much as \$4,500.00 per one thousand boardfeet stumpage value.

It is the great increase in the value of trees, the high demand for quality hardwood trees, the lack of knowledge and experience in the forest products market of the average forest property owner, and the increasing number of absentee landowners that have created a great opportunity for theft of forest products. Stolen trees represent 100 percent profit potential to the criminal taking them.

Criminal and civil law considerations

Criminal charges

In Pennsylvania, civil and criminal law provisions protect a property owner's interests in the natural resources that lawfully belong to that person. For example, section 3921 of the Pennsylvania Criminal Code (Title 18 Pa. Cons. Stat. Ann. § 3921) provides that a person who unlawfully takes cut timber from someone's

land or who unlawfully cuts standing timber from another's land may be found guilty of theft by unlawful taking or disposition. For a conviction to be obtained for this offense, the prosecution must prove that the actor performed the act with intent to benefit himself or someone else who is not entitled to it and, furthermore, with the intent to deprive the lawful owner of the benefit of his or her property. If a person is convicted of such an offense, in addition to the general penalties that are afforded for theft by unlawful taking, a convicted person may be sentenced to pay restitution in the amount of twice the value of the timber taken. Title 18 Pa. Cons. Stat. Ann. § 1107.

Although the criminal law sanction for theft of timber is a powerful deterrent for many people, there are technical requirements that must be met in order for a conviction to be obtained and upheld. Under the Criminal Code, an actor must have specific intent when the criminal activity occurs. This may be difficult to prove in many situations, particularly the case of two adjoining property owners who dispute the location of the property lines that separate their properties. A second technical requirement is to prove that the trees in the possession of the accused are indeed trees that were growing on the property owner's land. Proving

Average Dollar Market Value Per 1000 Boardfeet Based on Doyle Log Scale for 1000 Boardfeet as Trees Stand in the Woods

	1983		1997		
	1983	1997	Highest Value Level Reached In Each Year	1983	1997
White Ash	125	350	200	570	
Hard Maple	90	560	130	890	
Black Cherry	125	740	190	1150	
N. Red Oak	140	530	190	780	

The increases in the same species for the one year period from January 1996 to January 1997 based upon the average Doyle Log Scale price are as follows:

	1996	1997
White Ash	379	426
Hard Maple	270	463
Black Cherry	805	1022
N. Red Oak	454	565

(Prices Obtained From Market Price Reports Completed By New York State Dept. of Environmental Conservation Division of Lands & Forests and The Pennsylvania State University School of Forest Resources Cooperative Extension Service).

Charles L.E. Wage is Associate in Applied Science in Forestry, Paul Smith's College; B.S., M.S. (Forestry) West Virginia University, J.D., Duquesne University. John Becker is Director of Research, The Agricultural Law Research and Education Center, The Dickinson School of Law, The Pennsylvania State University, Carlisle, PA. B.A. LaSalle College, J.S. The Dickinson School of Law.

ly that the trees are of the same species may not be sufficient to establish that trees of the same species in possession of the accused are trees from the owner's land. As some owners are not familiar with the species of trees on their property, it is likely that an owner who has not previously considered this identification problem may have few available ways to make a connection between logs in possession of an accused and stumps that remain on the owner's land. Even eyewitness testimony as to an accused removing logs from an owner's property is likely to be questioned closely, searching for uncertainty and doubt as to the identity of the cut timber. In criminal cases the prosecution's burden to prove all elements of a crime beyond a reasonable doubt is a very heavy burden indeed. Absent sufficient evidence to support that burden, the accused can increase chances of an acquittal by stressing one or many reasonable doubts that arise from the prosecution's evidence.

Civil actions

As an alternative to criminal law sanctions and penalties for timber theft, Pennsylvania law also provides a civil law action for conversion of timber. Under section 8311 of the Judicial Code (Title 42, Pa. Cons. Stat. Ann. § 8311) a person who cuts or removes timber of another person without that person's consent will be liable to pay the timber owner damages for the loss that the property owner has suffered. The owner of the timber is entitled to usual and customary cost of establishing the timber that was cut or removed, including the cost of an erosion and sedimentation control plan that the property owner must put in place. Title 25 Pa. Code § 102. In addition, if the cutting or removal is proved to be a deliberate act, the property owner is entitled to three times the market value of the timber cut or removed. Title 42 Pa. Cons. Stat. Ann. § 8311(1)(2)(i). If it is determined that the cutting or removal was the result of a negligent act, then the property owner would be entitled to two times the market value of what was cut or removed. Title 42 Pa. Cons. Stat. Ann. § 8311(a)(2)(ii). If the person accused of cutting or removing the timber is determined to have a reasonable basis for believing that the land on which the cutting or removal occurred was his own land or that of someone for whom he was working, or by whose direction the cutting or removing of timber was done, the property owner will be entitled to the market value of timber cut and removed from his property. Title 42 Pa.

Cons. Stat. Ann. §(a)(2)(iii). If the property owner receives a restitution damage award under the criminal law provision described above, then the restitution award will offset these civil damages. This offset will apparently apply only where the actor acted deliberately (as described in section 8311(a)(2)(i)) to cut or remove timber from the owner's land and did so with the intent that section 3921 requires.

In addition to a wider variety of situations that create liability for damages, the civil law provisions have other important benefits. Unlike the criminal law burden of proof, "beyond a reasonable doubt," the civil law burden of proof is a "preponderance of the evidence standard" (i.e., is it more likely than not that the accused cut or removed timber of another person without the other person's consent), which generally results in a lower threshold to meet in order to get the case to a jury for decision.

The second difference concerns the nature of the evidence that must be presented. In the civil damages situation, the levels of conduct are either deliberate, negligent, or that of a reasonable belief. Each of these levels requires introduction of different kinds of evidence, and the standard differs considerably between deliberate action on one hand and the other categories that examine the reasonableness of actions taken or opinions formed by the defendant in the course of acting to cut or remove the logs in question. The issue of whether the logs in a defendant's possession actually came from a plaintiff's land, however, is still an issue that a plaintiff must address, albeit at a lower level of proof needed to get a dispute to jury for decision.

Despite the apparent benefit of substantial damages to punish a responsible defendant, plaintiffs who obtain judgments often do not collect the full amount due them. Judgment-proof defendants who have no assets, who have far more claims against their assets than the assets are worth, whose assets are owned by companies that are not involved with the acts that caused liability or whose principal assets are located in other states are common situations in which simply having a judgment is not enough to convert the judgment to cash. Intentional acts to hide assets or to mask their true ownership can lead to additional liability and protection, but proving such an allegation is difficult at best.

How to manage the program

The owners of forested property can

take many steps to protect themselves from timber trespass or theft. The distinction between theft and trespass, in simple terms, is that trespass can occur through a non-intentional act, these being the accidental cutting of trees over a boundary line or with misbelief or misunderstanding as to ownership. Theft is an intentional act that occurs when the party committing the act harvests the trees with full knowledge that he or she holds no type of title in the trees being cut. Trespass is technically always included in theft, but theft may or may not be involved in every trespass.

Proactive property management practices

A landowner can prevent trespass and increase the chances of receiving a significant damage award if a trespass does occur by practicing proactive property management practices. These include such things as:

- Completing a survey of the property and having all boundary lines blazed and painted. Inspecting the lines every few years to make certain the blaze marks remain obvious.
- Completing periodic inspections for evidence of adverse possession or trespass of any type or nature, not just timber trespass. This will reveal whether any neighbors or other individuals may believe they have an ownership interest in your property. If you are an absentee owner, professional land management companies can perform complete inspections and prepare reports of their findings for small fees. These reports are valuable evidence if anyone ever attempts to make an adverse possession claim on the property.
- Developing a close relationship with neighbors and, even though the land is rural, forming "neighborhood watch" programs to assist each other with policing your properties.

Selling forest products and forestry consultants

When selling forest products, the landowner may want to utilize the services of a forestry consultant. A forestry consultant is a professional forester who represents the interests of the landowner during the sale of the forest products. The consultant will generally inventory the trees to be sold, identify which ones are being sold, advertise the sale and solicit sealed bids from reputable harvesting companies. The consultant should complete inspections and administer the sale

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contract during the harvest to make certain no breach of contract is occurring.

Certified timber harvesting companies

The landowner should also make certain that only reputable harvesting companies are utilized to complete the harvest. There are companies listed as "certified" or cooperating timber harvesting companies through the New York State Department of Environmental Conservation and the Pennsylvania Department of Environmental Protection. Many harvesting companies operate in several states, and bordering state agencies may be a valuable source of information. There are reputable harvesting companies that are not on the state agency lists. The best protective measure is for the landowner to fully research the harvesting company prior to contracting.

Sales contract terms

The landowner should always obtain assistance in preparing sound sales contracts. A point to be made is that even though a contract may exist between the parties and the harvester cuts only trees located upon the property of the seller, a theft may still occur if the true intentions of the harvester is to commit fraud upon the unsuspecting seller/landowner. This occurs most often with the "pay as you take" contracts. Under these agreements, the harvester is to cut and haul the forest products from the landowner's property and is to pay a stated percentage to the landowner of every payment received from the sawmill or other forest products manufacturing company. What may actually occur is that the harvester delivers the material to several different mills without telling the landowner. The landowner cannot keep track of all the material leaving the property. Thus, the harvester only ever reports a small proportion of the material actually harvested and sold to the landowner, and the landowner actually receives only a small portion of the monies due under the agreement. There have been instances where the harvester has disappeared without ever paying the landowner any of the monies due.

Understanding the sale transaction variations

There are complex wood flow patterns that the average landowner does not have any knowledge of. A few are as follows (list is non-exclusive):

- The company harvests and hauls the material.
- The company harvests and an independent contractor hauls the material.
- The subcontractor harvests and hauls the material.
- Various products harvested from the

property all go to different manufacturing facilities (i.e., sawmill, veneer buyer, pulp mill, etc.).

Need for personal inspection

The landowner, even when having hired a professional to assist, should still complete inspections and assist in monitoring the harvest contract. The professional cannot possibly be present on site at all times. Therefore, making a personal inspection will assist in preventing potential fraudulent activity.

A landowner should always insist upon being paid one-hundred percent of the purchase price prior to the harvester commencing the harvesting activity. This will assure that the landowner receives all the monies that are due. The "pay as you take" contract should only be utilized under very limited situations. This would include close professional supervision with tight controls on wood flow, with trusted harvesters that either the landowner knows or with a professional who has a long history of successfully working with the landowner.

The forest products sales contract

A contract for the sale of standing timber is considered a sale of goods for UCC purposes (Uniform Commercial Code, Title 13 Pa. Cons. Stat. Ann. § 2107(a)) and therefore, would be subject to the UCC Statute of Frauds requirement of section 2201 which requires contracts for the sale of goods for the price of \$500.00 or more to be in writing to be enforceable. Title 13 Pa. Cons. Stat. Ann. § 2201(a). In addition to memorializing the agreement of the parties in a written document, the following checklist of items to include in the agreement is offered for consideration by both parties:

- Full identification of the property owner and the buyer of the timber should be provided.
- Identify the species being sold by type, by mark and location, i.e., "all white oak trees that are marked with an orange circle in the 3-acre tract of land located at the southeast corner of intersection of Routes 550 and 233 in Hopewell Springs Township, Central County, Pennsylvania."
- Identify the terms of sale, i.e., if a consultant is to solicit bids from potential buyers, include terms and conditions in the bid requirements that bidders must meet to be acceptable.
- The buyer should identify who will actually cut the trees. Is it the buyer or the buyer's subcontractor?
- Require the seller be added as an "additionally insured" to a buyer's comprehensive liability insurance coverage.

- Require proof that buyer or buyer's subcontractor has workers' compensation coverage. All liability arising from performance of the contract should be assigned to the buyer who agrees to hold the seller harmless from all liability, costs and expenses and agrees to indemnify the seller from such liability and expenses.

- Require that the buyer or buyer's subcontractor provide prior notice of starting timber harvesting operations under the contract.

- Require a buyer to obtain all permits and approvals that may be required from federal, state or local agencies before performance of the contract begins.

- Have a buyer agree in writing to be responsible for the development and implementation of an erosion and sedimentation control plan that is required under 25 Pa. Code section 102 of the Clean Streams Law.

- Have the seller reserve the right to suspend the timber harvesting operation if the terms and conditions of the agreement are violated, or weather or environmental conditions are not satisfactory to the continuation of the harvesting operation.

These elements of the contract are recommended for inclusion in the forest products sales contract, however, they are intended to be all encompassing for every contract. A seller of forest products should consult a professional forester and attorney prior to executing any forest products sales contract with a forest products harvesting company. A prudent landowner, prior to hiring any consultant, attorney, or forest products harvesting company, should always check credentials and request references.

Reporting timber theft or trespass

If a landowner should experience an incident of theft or trespass to his or her forest resources, the following steps should be followed:

- Contact the proper law enforcement authority to have the situation investigated for potential criminal prosecution.

- Contact the State Forester to investigate the matter. The forester more than likely will not have any authority to arrest a suspected thief. However, the State Forester will be familiar with what is involved, and may be able to assist you in collecting relevant facts needed by legal authorities or others.

- Make notes on the following:
 - Who was involved. Get names, addresses, telephone numbers and how each individual was involved.
 - If a company was involved, get the name, address, and name and address of the immediate person in charge of the operation.

tion, and the company officials with authority to address the matter.

- Identify what was taken. Include, as accurately as possible, the number of trees taken by species and the area (in acres) from which the trees were harvested.

- Note where the theft/trespass occurred and the approximate time the incident occurred (by date and hour).

- Note any other facts or elements that exist and which appear to be relevant.

- Obtain professional assistance from a professional forester in preparing a damage report so the harm suffered and its extent can be clearly identified.

- Take the findings to an attorney for assistance in collecting the appropriate damages and to make certain full recovery is obtained.

Information to be included in damage report

The damage report that a professional forester prepares should contain at a minimum the information set forth below. This information is necessary to make the report credible and to provide sufficient information for the attorney and other parties involved to clearly understand what the damages are and how the values were derived. It may be subject to eventual review and analysis by a defense attorney and judge during litigation.

Identify parties

The report should have an introduction setting forth the parties involved, their addresses, and how they are involved, that is, whether they are landowners, the trespasser, or otherwise. After identifying the parties, the report should state its purpose and identify the party for whom it was prepared for so the person reviewing it knows which party's interests the preparer is representing.

Property identification

The location of the property should be given, setting forth the Township, County, and State. The exact location will be identified upon the accompanying maps. Two maps should be prepared. The first is the vicinity map showing the directions to the property and its location within the township and the road/street upon which the property is situated. The map should be complete enough that a party wishing to view the site will be able to take the map and locate the property on the ground. The second map should be a detailed map of the property showing the location and extent of the trespass/theft as it is situated upon the property. This should give some idea of the area involved in acres. If there is any dispute as to ownership, a

survey performed by a licensed surveyor will be needed.

Appraisal methods used

The next section should set forth the method utilized to complete the appraisal and valuation of the damages. The author should cite authority for the method utilized, setting forth the title, author, page or pages within textual material, and copyright or date of publication for the authority. The type of authority utilized would more than likely be a forest mensuration text book or U.S. Forest Service publication describing how to complete an inventory and appraisal of trees that have been harvested prior to the inventory.

Market price information

The authority for market prices utilized in obtaining the value should be given. Examples of authority appropriate to cite are forest products market reports prepared by government agencies. Examples of these reports include the quarterly reports prepared by Pennsylvania State University School of Forest Resources Cooperative Extension Service or market reports prepared by The State of New York Department of Environmental Conservation, which are published twice a year. These reports are prepared by independent sources and bear greater credibility than prices cited for various species by an individual forester citing a "working knowledge and experience from the field." Independent sources lack a bias to use higher or lower prices depending upon which party the forester represents. Also, the actual documented report can be presented as evidence by either party.

Tabulation

The last section of the damage report should contain tabulation of the results. This section should set forth a table listing the species, number of trees of each species, the boardfeet volume by species, the price per thousand boardfeet by species utilized to derive the value, the total value of each species, the total value of pulpwood or other marketable product harvested and the total value of all forest products harvested.

Reports often will include projected values of the regeneration lost in the operation. However, this usually results in an evidence proof problem caused by speculation on future market prices and the issue of how much regeneration included in the report will actually survive to harvestable maturity. The issue often costs more in legal expenses to make the arguments than the landowner will recover for material. It is better to avoid the

issue.

In addition to the value of the forest products harvested, the report should also include costs and expenses of site restoration and installation of the erosion and sedimentation control measures required by Title 25 Pa. Code section 102 of the Clean Streams Law. Restoration should include grading the skid and haul roads as part of the erosion and sedimentation control plan and costs of removing any tree tops that may have been left across property boundaries, and fell any trees that can be classified as danger trees. Additional matters may include such items as trash removal and site cleanup.

Potential solutions to problem of enforcement

As stated above, there can be substantial problems in the enforcement of any judgment handed down in a timber trespass or theft case. There is more enforcement authority when the prosecution is able to obtain a favorable decision in a criminal action. However, the burden of proof is much higher, and the potential of getting a conviction is not great. A civil case stands a good chance of obtaining a decision in favor of the forest landowner, but collecting the judgment is often very difficult.

This article is not intended to represent that all forest products harvesters are out to steal forest landowner's property. Actual experience is far from that. The great majority of forest products harvesting companies are legitimate businesses attempting to treat everyone fairly in the hope of developing long range relationships that will bring some certainty to future raw material supply needs.

This article is intended to bring light to bear on the problem of the "repeat offender." This is the individual discussed above who establishes himself in a virtual judgment proof position and continues to operate through fraudulent means and methods to defraud forest landowners of the value of their forest lands.

These individuals are not threatened by the double or treble damages provisions because they do not fear judgments. They have no property against which the judgment can be enforced and they continue to operate on the thin line between the criminal and civil conduct. Most prosecutors refuse to treat the matter as criminal because they clearly understand the difficulty of carrying the burden of proof for the conviction. Law enforcement agencies often do not investigate the matter for the same reasons prosecutors fail to pursue them. In the light of this situation, several solutions are offered.

One potential solution is to have cases

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Let us hear from you!

An issue of Re: AALA will be coming out this spring. We would be delighted to share your accomplishments and good news with all the members of the American Agricultural Law Association. Contact Bill Babione at 501-575-7646 to submit your news AALA.

As always, we invite you to submit reports on cases, legislation, CLE conferences, etc. of which you are aware. If possible, include a copy of the case or act with your write-up. Typically we can use articles of 250 to 1000 words for general news items. If you are volunteering to report on a major subject requiring a longer development, please call Linda McCormick at 281-388-0155 to discuss the topic and length requirements. Please send materials to Rt. 2, box 292A, Alvin, Tx 77511.