

# Agricultural Law Update

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## INSIDE

- *Federal Register* in brief
- Conference Calendar
- Agricultural law bibliography
- Agrarian reform in Mexico
- State Roundup

## IN FUTURE ISSUES

- Lobbying Congress

## President Clinton's "Vision of Change for America" and agriculture

On February 17, 1993, President Clinton released a report entitled *A Vision of Change for America* describing his comprehensive national economic plan. The plan has three basic components: economic stimulus, long-term public investments, and deficit reduction. Each of the basic components contemplates actions that will directly or indirectly affect American agriculture.

The deficit reduction component of the plan is likely to attract considerable attention because it contemplates the elimination or reform of certain programs and the reorganization of parts of the USDA. For example, the plan proposes to eliminate the USDA's Economic Research Service, and, beginning with the 1996 crop year, it calls for ending price support payments to honey producers and the 0/92 and 50/92 programs for wheat, feed grains, cotton, and rice. Subsidies on most Rural Electrification Administration loans would be eliminated by increasing rates to Treasury rates.

Program reforms intended to reduce the deficit include a proposal to change federal crop insurance to "area-yield" insurance that "would set premiums and pay indemnities based on an area's (e.g. a county's) performance, rather than that of an individual farmer." Direct farm loans from the Farmers Home Administration would be reduced by twenty-five percent and replaced with an equal amount of subsidized guaranteed loans.

A variety of new or increased fees are proposed. New user fees are proposed for the Federal Grain Inspection Service, the Agricultural Marketing Service, and the Agricultural Cooperative Service. Meat and poultry slaughterhouses and processing plants with overtime shifts will be asked to pay the full cost of federal inspections. The 1994 inland waterway fuel tax will be increased in stages to \$1.19 per gallon. The Secretaries of Interior and Agriculture will be given authority to negotiate increases in grazing fees on public lands, and a federal irrigation water surcharge is proposed for water sales to reclamation projects throughout the West, except for the Central Valley Project in California where a surcharge is already in effect.

The plan also contemplates significant changes in the basic commodity programs through an increase in the "non-payment" acres under the "triple base" concept initiated in the 1990 Omnibus Budget Reconciliation Act. Non-payment acres would rise from the current fifteen percent to twenty-five percent beginning with the 1996 crop year. Asserting that the increase in non-payment acres favors "non-program" crops such as sugar, tobacco, honey, peanuts, soybeans, wool, and mohair, the plan also proposes to increase assessments on those crops to provide "equitable treatment

*Continued on page 2*

## FmHA debarment of bank did not violate constitutional rights

The Eleventh Circuit Court of Appeals has affirmed a lower court ruling that officials of the Farmers Home Administration did not deprive the Bank of Jackson County of liberty or property rights or First Amendment rights when the officials debarred the bank from obtaining new FmHA loan guarantees in Florida. *Bank of Jackson County v. Cherry*, 980 F.2d 1362 (11th Cir. Fla. 1993). The dispute between the northern Florida bank and the FmHA arose when the bank foreclosed on an FmHA guaranteed loan made to a Florida dairy farm couple, Elmer and Shirley Ferris. Upon learning that the Ferrises were secretly removing their cattle from Florida, the bank took possession of dairy cows that secured the loan. The bank and the FmHA sold the cows and deposited the sale proceeds into a joint account. Subsequently, the bank notified FmHA that the bank had begun applying funds from the joint account to the bank's

*Continued on page 3*

of all subsidized crops." The plan states that "[t]hese assessments will be designed so as to avoid, to the extent possible, any serious impact on small family farmers."

Two federal farm program payment limit changes are proposed. First, the wool and mohair payment limits would be reduced from the current limit of \$150,000 to \$50,000. Second, persons with off-farm adjusted gross income of \$100,000 or more would be ineligible for any Commodity Credit Corporation price support loans and income support payments. The plan predicts that the off-farm income limit "would cause an estimated 1-2 percent of program participants to drop out of USDA farm programs."

The deficit reduction component also includes "streamlining" Foreign Agricultural Service programs, freezing funding for the Market Promotion Program at 1993 levels, and examining "earmarked" research projects such as those funded by the Cooperative State Research Service to determine whether they could be funded by the agribusinesses they benefit. Additional savings are projected by consoli-

dating the operations of the Agricultural Stabilization and Conservation Service, the Soil Conservation Service, and the Farmers Home Administration in the proposed Farm Service Agency and continuing the reform of ad hoc disaster payments begun in the 1990 farm bill.

The economic stimulus component of the plan includes a rural development initiative involving rural water and wastewater loans and grants, Farmers Home Administration low-income housing repair loans and grants, Soil Conservation Service watershed projects, Agricultural Research Service facility maintenance, and the addition of meat and poultry inspectors. The plan also proposes the expenditure of an additional \$94 million to accelerate about thirty Army Corps of Engineers projects for flood control, inland waterway and deep-draft harbor transportation, and other purposes. In addition, an \$81 million expenditure is proposed for the modernization of National Weather Service and National Oceanic and Atmospheric Administration data systems, the improvement of weather prediction technologies, and climate and atmospheric research. The Environmental Protection Agency would receive \$47 million to reduce non-point source water pollution.

The public investment component of the plan includes some of the same fea-

tures as the economic stimulus component, including the expenditure of funds to assist municipalities in complying with the Safe Drinking Water Act, to reduce Army Corps of Engineer maintenance backlogs, to modernize the National Weather Service systems, and to increase Rural Development Administration rural water and waste water loans and grants. Farmers Home Administration direct loans for community facilities would be increased, and Rural Development Administration loans would be provided to rural businesses. To promote the research and development "needed to assure the continued competitiveness of U.S. agricultural products in global trade, ensure the food supply's safety and quality, and sustain natural resources," the plan also proposes national research initiative grants in agriculture.

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*Editor's note: To obtain a copy of "Vision of Change for America" you may send \$7.50 to Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954. A summary is available for \$1.00. The document may be charged to Mastercard or VISA by calling 202-783-3238. To order the document on computer disks, call 202-482-1986 (\$12.00).*

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*Continued from page 1*

debts. The FMHA objected to this use of the funds. In July, 1986, FmHA officials informed the bank that they would not negotiate further over the ownership of the funds until the bank had restored to the joint account the amounts it had withdrawn.

The bank and the FmHA had no further dealings until two years later when the FmHA refused to guarantee a Bank of Jackson County loan to a local Florida farmer. The Florida chief of FmHA farmer programs, Raymond G. Naeyaert, instructed the FmHA supervisor in Holmes county not to conduct further business with the bank because of the unresolved dispute over the Ferris cow funds. Furthermore, upon advice from legal counsel, the Florida state director of the FmHA, L. James Cherry, informed the bank that the Florida FmHA office would not enter into any new loan guaranties submitted by the bank. The Florida FmHA office also terminated its Treasury Limited Account with the bank. These actions effectively debarred the bank from doing new business with the Florida FmHA. The Florida FmHA did continue to honor existing loan guaranties. In addition, the FmHA Alabama office continued to issue guaranties for new Bank of Jackson County loans.

During subsequent settlement nego-

tiations with the bank concerning proceeds from the Ferris cows, the acting Florida Director of the FmHA, indicated that resumption of normal relations between the bank and the Florida FmHA offices depended on the bank's acceptance of the FmHA's settlement offer. The settlement negotiations failed, and in 1988 the FmHA sued the bank over the Ferris proceeds. During litigation, the Florida FmHA continued to use the loan guaranty program as a lever to force the bank to settle the dispute. In April, 1990, the District Court for the Northern District of Florida resolved the Ferris dispute, finding that the bank was entitled to \$25,000 and the FmHA to \$62,000 from the sale of the cows. The FmHA did not resume business with the bank after this judgment.

The bank then filed a Bivens action for damages against FmHA officials Cherry and Naeyaert alleging that the termination of the business relationship by these officials deprived the bank of its constitutional rights. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The bank complained specifically that the FmHA officials failed to follow debarment procedures required by FmHA's own regulations and that the officials' actions deprived the bank of liberty and property without due process of law. The bank

*Continued on page 7*

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## Agrarian reform in Mexico

Julia K. Bailey

John Merryman wrote "[a]grarian reform is a legal response to a group of social, economic and political issues."<sup>1</sup> The social issues, Merryman explains, are normally problems that derive from a shockingly unfair distribution of the proceeds of production. The economic issues are problems of inefficiency and an inability to produce enough food to feed the population. Finally, the political issues are the instabilities which result from the social and economic problems.<sup>2</sup>

Any country's need for agrarian reform is a response to one or several groups of social, economic, or political issues. In Russia, for example, the most pressing problems are the economic issues.<sup>3</sup> In Poland, the continuously changing political issues are and have been the most troublesome.<sup>4</sup> In Mexico, the social issues have been the most influential in affecting reform.<sup>5</sup>

Mexico's President Carlos Salinas de Gortari has shown the way internationally in privatizing agricultural land. While the world watches closely to the tedious details of the former Soviet Union's privatization of its farm collectives, Salinas has bravely ended the country's eighty year socialist agrarian reform, which began after the Mexican Revolution of 1910, the first of the major socialist revolutions of the twentieth century.

### The Mexican Revolution under General Zapata

Before the Mexican Revolution of 1910, land was held predominately by the wealthy land-owning classes and the government who secured their power by controlling the countryside. This control by the government began in Mexico's colonial era. After the Spanish Conquest in 1521, a majority of Mexicans were subjected to a feudal system of land tenure. Almost four hundred years later, most Mexican peasants had no land of their own and instead worked on large estates. Most of Mexico's land was controlled by a small group of landowners, a scenario that resembled that of black sharecroppers and tenant farmers in the American South shortly after the Civil War. The poor, landless Mexicans, the peasantry, lived in incessant indebtedness to the landowners, who used that indebtedness

to tie their workers to the land.<sup>6</sup>

The Mexican Revolution of 1910 through 1917 was caused primarily by this abusive tenure system and the peasants' demand for land. In 1910, Porfirio Diaz, who had ruled Mexico for over thirty years, was overthrown by a group of revolutionary generals. The most influential of these generals was Emiliano Zapata, who won his strong following from the landless peasants in the southern part of the country. Zapata became the most vocal advocate for the redistribution of land.<sup>7</sup>

Zapata's most important accomplishment was the passing of the Agrarian Reform Act in 1915, which set the tone for Mexico's agricultural policy for the next seven decades.<sup>8</sup> Within this legislation was a government commitment to redistribute the land to the peasants. Subsequently, in 1917, a new constitution was written by the new revolutionary government that guaranteed this principle of land redistribution. Article 27 of this new Mexican Constitution granted to each citizen a right to land and required the government to provide it. This article also gave the government the right to confiscate unused or under-utilized lands and distribute them to Mexicans who petitioned the government for land. The government was given extensive discretion as to the regulation of all aspects of the *campo*.<sup>9</sup>

Instead of giving land to individual farmers in this redistribution program, the government established the *ejido*, or communal farming system. The government divided land into parcels that were to be owned communally by the *ejido* even though the parcels may be cultivated individually or collectively. The state, however, retained ownership of the land itself. The state saw private ownership of land as "unsuited" to Mexico's agricultural traditions, and the *ejido* as more in line with socialism, which was favored by the Mexican government at that time.

Consequently, this communal or *ejido* definition of land was written into the Constitution in 1917. The *ejido* system provided the ruling party, the Partido Revolucionario Institucional (PRI), with greater control over the land and the peasantry.<sup>10</sup>

### The Eighty Year Agrarian Reform

Land given to the *ejido* was received by one of three methods: 1) as an outright grant from the government; or 2) as restitution for land that was previously possessed by the community and then deter-

mined to have been illegally appropriated by individuals or groups prior to the revolution; or 3) as a confirmation by the government of titles to land that it already held in its possession. An *ejido* consisted of twenty individuals, usually heads of families, who were eligible to receive land in accordance with the Agrarian Code, together with the members of their immediate family.<sup>11</sup>

By 1988, the year President Salinas took office, rural Mexico was poorer than it had ever been.<sup>12</sup> Despite efforts by the government to fulfill its constitutional mandate to distribute land, the promises of the revolution to the peasants had not been fulfilled. Three million petitions for land were on file but little unused arable land remained to be confiscated. Over 70 million acres had been seized for redistribution to *ejidos* during the previous twenty years alone, totalling over 246 million acres since the Revolution.<sup>13</sup>

As to the land that was successfully redistributed, most Mexican farms were under-capitalized mostly because of the *ejido*'s encumbered property rights to the land and because of the size of the redistributed lots, which were too small to be productive. Twenty-five percent of Mexico's estimated 30 million work force were farmers, yet they produced less than ten percent of Mexico's total gross national product.<sup>14</sup> According to the World Bank, 11 million of the 27 million rural Mexicans live in extreme poverty.<sup>15</sup>

Because the peasants grouped in an *ejido* could neither sell nor rent the property, farmers had little incentive to invest in and improve the land they worked. The lack of capital and market incentives impeded modernization and mechanization. Steadily, government control increased over all aspects of the agricultural system from the regulation of prices to the establishment of monopolies for purchasing and supplies.<sup>16</sup> Government found that overseeing the farming activities of the *ejido* farmers became more necessary as they grew to be more and more grossly inefficient. This increase in government control, however, meant worsening results.<sup>17</sup> Even if an *ejido* farmer had the desire to improve his land, Article 27 of the Constitution prohibited them from mortgaging their land or using it as collateral for loans, thus making it difficult to obtain private credit. This lack of monetary resources led to few efforts to irrigate land.<sup>18</sup> An *ejido* farmer could not even lease the land in order to derive income. Most Mexican *ejido* farmers have

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not been able to make an income sufficient to feed themselves and their families, and, consequently, have fled to the large cities or over the United States border for jobs.<sup>19</sup>

### The Re-revolution Under Salinas

In order to compete with the United States and Canada after the North American Free Trade Agreement becomes law, Mexico had to reform its agricultural system. In February, 1992, the Mexican Congress adopted Salinas's free market reform package. In this package, Salinas proposed to reduce the government's role in agriculture, establish private property rights, integrate the agricultural sector into the larger market economy and thus bring it into the 20th century. The changes, found in a new Article 27 of the Mexican Constitution, are as follows:

rect obligation to provide it. The government also lost the power to expropriate lands it deemed "unused or underused." In addition, the agency governing land confiscations and distributions, the Secretariat of Agrarian Reform, was reduced in size and much of its authority taken away.

Under the new law, individual ejido farmers will be given title to their land. They also will be able to sell it, rent it to their ejido associations or private corporations, use the land as collateral for loans, and pass the land on to their heirs. Limits on acreage have been relaxed. Formerly, individual ejido farmers were not allowed to "own" more than 247 acres of irrigated land, 496 acres of non-irrigated land, or 1,976 acres of forests. The new law allows the creation of corporations or associations that legally can own twenty-

five times that limit: 6,175 irrigated acres, 12,350 non-irrigated acres, or 49,400 acres of forest. This will improve agricultural efficiency by creating economies of scale where association and corporations can pool resources for credit equipment purchases.

The prohibition on foreign ownership renting of farmland of any type has also been removed. This is especially important for the growth of agribusiness. The new legislation also establishes independent

rights, creating a system where corruption and abuse were common.

In addition to denying private rights to farmers, the old Article 27 gave the government extensive power over both private and ejido land and the agricultural system in general. As a consequence, the Mexican government created enormous government-owned monopolies to supply Mexican farmers with credit, fertilizer, seeds, irrigation equipment, and water. The government also became the purchaser and marketer of food production, using price supports and production requirements to regulate the market. The result was the creation of a rigid system, guided more by political and bureaucratic requirements than market forces. This system told farmers what to grow, restricted the private sector from providing farmers with necessary supplies and equipment, and effectively limited private-sector financing.

Since private property rights are meaningless when dominated by government monopolies, Salinas cut back the role of the state. Most importantly, he reduced the power and budget of the state food distribution monopoly *Compania Nacional de Subsistencias Populares* (CONASUPO). Formerly, CONASUPO set prices on most food commodities and was the monopoly purchaser and distributor for most foodstuffs. Today, CONASUPO supports artificial prices for only two commodities: beans and corn, which are staples of the Mexican diet.<sup>21</sup>

These reforms will have far-reaching effects on the agricultural sector beyond the ejido. In the past, land confiscations had a detrimental effect on private farmers, even on those whose land was not seized. Since both small and large private property owners could find their land taken at any time, Mexican landowners had little incentive to improve their plots, never knowing when future confiscations would wipe out their investment. The small farmers were disproportionately affected because they had neither the money nor the political connections to prevent their lands from being confiscated. Now that the prospect of confiscation is gone, private farmers will have greater incentives to invest in long-term production and improvement of their land.<sup>22</sup>

With these changes, Salinas hopes to compete with the United States and Canada after the North American Free Trade Agreement becomes law. In the past, Mexico's farmers had to rely heavily

Article 27 before Salinas	Article 27 with Salinas:
1. Government obligated to provide land to every Mexican	1. Mexicans have no constitutional "right" to receive land from the government.
2. Government has power to expropriate land to distribute to farmers	2. Mexican government under no obligation to expropriate lands to give to farmers.
3. Only Mexican nationals or associations have the right to own land or acquire rights to water	3. Foreigners can own agricultural lands and acquire rights to water
4. Renting of ejido farms is prohibited	4. Ejido groups have the right to own the land or rent it to other private groups
5. Ejido farmers prohibited from using ejido land as collateral for loans.	5. Ejido farmers can use farm as collateral or mortgage farm land to buy farming equipment, fertilizers, and seed.
6. Ejido farmers prohibited from associating with commercial groups in joint ventures.	6. Ejido groups can form associations or joint ventures with commercial groups. Non-ejido commercial groups (including foreigners) allowed to purchase ejido lands.
7. Children of ejido farmers prohibited from receiving rights to land the parents farmed.	7. Ejido farmers can own their lands, and exercise full property rights to the land, including the transfer of land titles to future generations.
8. Legal system to protect farmers' rights is controlled by the executive branch that decides property ownership in the first place.	8. New tribunals established to decide land disputes will be independent of the executive branch.

tribunals that will adjudicate land disputes over ownership rights to farmland. Formerly, the executive branch operated as rule-maker, enforcer, and judge of land

<sup>20</sup>

These changes included amending the Constitution to remove the automatic "right" to land and the government's di-

on the subsidies paid to them for their production. Now, with virtually no barriers to trade between Canada, the United States and Mexico, Mexico's farmers will have to be efficient to compete. Also, now that land is unencumbered by the threat of a government seizure, joint ventures with foreign organizations are possible. These joint ventures, coupled by the chance for foreigners to own agricultural lands and water rights, could fuel local economies and help to provide immediate improvements to the country's farming infrastructure.<sup>23</sup>

Although Zapata's agrarian reform promised to be a social reform for its people to be able to share in the wealth once owned by the land classes, it turned out to be a barrier to a better lifestyle. Absent the freedom to control their own produce and true ownership to land, farmers lacked incentive to improve the land. Salinas's changes, at the very least, will help to create these social incentives. Although the Mexican farmer is not guaranteed land for production, he is almost certainly guaranteed a better standard of living in the future.

<sup>1</sup> John H. Merryman and David S. Clark, *Comparative Law: Western European and Latin American Legal Systems* (1978).

<sup>2</sup> *Id.* at 955.

<sup>3</sup> Daniel Snider, *Private Farming Gains Trenchhold in Russia*, *The Christian Science Monitor*, November 12, 1992.

<sup>4</sup> *Solidarity: End of the Road?*, *The Warsaw Voice*, July 5, 1992.

<sup>5</sup> *A Survey of Mexico*, *The Economist*, February 13, 1993.

<sup>6</sup> Wesley R. Smith, "Salinas Prepares Mexican Agriculture for Free Trade," *The Heritage Foundation Reports* (The Heritage Foundation), October 1, 1992.

<sup>7</sup> *Id.*

<sup>8</sup> At least one source states that this agrarian reform was the model for most agrarian reforms of the twentieth century, including that of Russia, China, and especially the Third World. Daniel James, *Salinas Reforms Agrarian Reform*, *Wash. Times*, December 4, 1991, at F1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Nathan L. Wetten, "Rural Mexico," *Comparative Law: Western European and Latin American Legal Systems*, 988 (John Merryman and David S. Clark eds. 1978).

<sup>12</sup> In 1988, rural Mexico was little better than it had been when Mexico won its independence from Spain in 1821. Smith, *supra* note 8.

<sup>13</sup> Ejidos, by 1992, accounted for almost half of the country's crop land and supported 20 percent of Mexico's population. "Mexican Farm Co-op to be Privatized" (National Public Radio, on *All Things Considered*, March 31, 1992).

<sup>14</sup> James, *supra* note 8.

<sup>15</sup> *Id.*

<sup>16</sup> Smith, *supra* note 8.

<sup>17</sup> Private farmers in Mexico today are, on the average, five times more productive than their counterparts on the government-owned and -controlled ejidos. *Id.*

<sup>18</sup> Today, only 13.8 million of Mexico's 234 million acres of agricultural lands are irrigated. *Id.*

<sup>19</sup> Alan Riding, *Distant Neighbors: A Portrait of the Mexicans* (Alfred A. Knopf ed. 1984).

<sup>20</sup> Smith, *supra* note 6; see also *El Nuevo Derecho Agrario Mexicano* (The New Mexican Agrarian Law), (Academia Mexicana De Derecho Agrario, Zaragoza, Mexico), September 1992; see also Dr. Guillermo Gabino Vazquez, Remarks at the Congreso Internacional E Iberoamericano De Derecho Agrario (September 29-October 1, 1992)(transcript available at University of Arkansas Law School).

<sup>21</sup> Mexico is particularly vulnerable in corn, where yield per hectare is just 1.9 tons, compared with 7.4 in the U.S. Mexico has protected its two million corn farmers by restricting imports, so that Mexican corn prices are double those in the U.S. *NAFTA Casts Shadow On Farm: Mexico's Peasants Loath to Abandon Fight for Land*, *Financial Times*, July 2, 1992, at p. 7.

<sup>22</sup> Damian Fraser, *Salinas Sows Seeds for Economic Benefits/A Look At the Impact of Mexico's Far-Reaching Agricultural Reforms*, *Financial Times*, March 6, 1992.

<sup>23</sup> *Supra* note 11.

## Federal farm program case

In *Olenhouse v. Commodity Credit Corporation*, No. 89-1029-PFK, 1992 U.S. Dist. LEXIS 18927 (D. Kan. Nov. 12, 1992), three Kansas farmers challenged yield reductions determinations made by the ASCS as a result of their planting wheat after the applicable end planting date. They contended that they did not have notice that an end planting date had been established and that the county committee told them that a yield reduction would not apply in their circumstances. The government argued that notification had been mailed to them and that the end planting date was set forth in the *ASCS Handbook*, 5-PA (Rev. 7). Although the district court rejected the argument, the government also contended that the duty imposed on the Secretary of Agriculture by 16 U.S.C. § 590h(b) (1988) to "ensure that information concerning changes in Federal laws ... are communicated in a timely manner to local committees in areas that contain agricultural producers who might be affected by such changes" did not apply to the ASCS. *Id.*, at \*8. The district court, however, held in favor of the government, stating that "[a]lthough plaintiffs raise some persuasive arguments, and may in fact have a stronger basis for their contentions than do defendants, ... [t]here is factual and legal support for the administrative agency's findings, and therefore its findings cannot be considered arbitrary and capricious." *Id.* at \*14.

—Christopher R. Kelley, Washington, Arent, Fox, Washington, DC

## Conference Calendar

### The Next Generation of U.S. Agricultural Conservation Policy

March 14-16, 1993, Westin Crown Center, Kansas City, MO.

Topics include: How current agricultural conservation policies are working and what new approaches might be appropriate for the future.

Sponsored by: Economic Research Service, Extension Service, Soil Conservation Service, Fish and Wildlife Service, EPA, The Joyce Foundation, Deere & Co., Monsanto, Pioneer Hi-Bred International, and AALA.

For more information, call 1-800-THE SOIL.

### Nineteenth Annual Seminar on Bankruptcy Law and Rules

March 25-27, 1993, Marriott Marquis Hotel, Atlanta, GA.

Topics include: Interest rate issues; ethics.

Sponsored by: Southeastern Bankruptcy Law Institute.

For more information, call 1-404-457-5951.

### Oklahoma Water Law: What Every Oklahoma Lawyer Should Know About Water Quality and Water Quantity

April 2, 1993, Holiday Inn at I-40 and Meridian, Oklahoma City, OK

Topics include: Permitting for discharges; non-point source pollution, wetlands, and swampbuster/sodbuster: agriculture and water quality.

Sponsored by: the University of Oklahoma College of Law, Continuing Legal Education.

For more information, contact Drew Kershen at (405) 325-4699.

### Executive Briefing 1993: Labor and Employment Law

March 18, 1993, 643 Magazine Street, New Orleans, LA

Topics include: Avoiding sexual harassment claims; OSHA; privacy issues.

Sponsored by: McGlinchey, Stafford, Lang law firm

For more information, contact Marion Resor (504) 596-2820.

### National Grain and Feed Association 97th Annual Convention

March 21-24, 1993, J.W. Marriott Hotel, Washington, D.C.

Topics include: International trade/agricultural policy; priorities for the 103rd Congress; OSHA's priorities in the Clinton administration.

For more information, call (202) 289-0873.

Continued from page 2

further claimed that the debarment penalized the bank for exercising its First Amendment right to petition the government for redress of grievances in the Ferris dispute. The bank sought damages against the FmHA officials in their individual capacities and injunctive relief in their official capacities. The district court entered summary judgment for the bank on the injunctive claim and ordered that the bank be reinstated as a participant in the Florida FmHA programs. The court found, however, that the debarment did not deprive the bank of liberty or property interests. In the alternative, the district court found that the FmHA officials were immune from suit under the qualified immunity doctrine because their actions did not violate the bank's clearly established constitutional property or liberty interests. The court also held that the FmHA officials did not violate the bank's clearly established First Amendment rights.

The bank appealed the judgment denying damages to the Eleventh Circuit Court of Appeals. The court first addressed the due process claims. The bank had to establish: (1) a constitutionally protected interest in life, liberty, or property; (2) governmental deprivation of that interest; and (3) the constitutional inadequacy of procedures accompanying the deprivation. The court summarily disposed of the bank's claim of deprivation of a property interest by relying on a line of cases holding that suspended or debarred contractors have no property interest in doing business with the government. The court found the question of whether the FmHA had deprived the bank of a liberty interest to be a closer question. The court characterized the bank's interest as a liberty interest in its reputation. In order to prevail on a claim of violation of this interest in reputation, the bank had to show: (1) a stigmatizing allegation by the FmHA; (2) a dissemination or publication of that allegation; and (3) loss of some tangible interest due to publication of the stigmatizing allegation. The court concluded that actions of the FmHA did not violate the bank's liberty interest because the FmHA's allegations about the bank's bad faith or civil fraud concerning the Ferris dispute were not publicized. The court found that communication of the allegations was limited to FmHA attorneys and FmHA officials directly concerned with the dispute. No negative information concerning the bank was disclosed to the public or even to another government agency. In addition, the court found that the limitation on the bank's business activity resulting from the disbarment was not a sufficient injury to result in a violation of the bank's liberty interest. The court noted that only some twenty-five percent of the bank's business was affected by the debarment. The bank could

obtain FmHA loan renewals in Florida and FmHA loan guarantees for new and existing loans in Alabama, as well as doing business with any other government agency.

The bank's First Amendment claims centered on the FmHA's use of summary debarment to force a settlement in the Ferris dispute. The bank contended that this action infringed upon the bank's First Amendment right of access to the courts. The court first noted that the FmHA's actions were clearly in violation of its own debarment regulations. The court, however, determined that in order to establish a Bivens damages claim, the bank must establish that the FmHA officials violated clearly established or constitutional rights of which a reasonable person would have known. Otherwise, the FmHA officials would have qualified immunity from civil liability. The bank relied on cases concerning retaliatory criminal prosecution rather than civil actions. The court made a distinction between criminal and civil actions. Moreover, the court concluded that the government had a reasonable case against the bank in the Ferris dispute and that the bank was able to defend itself in court in that action.

Although the Eleventh Circuit Court of Appeals denied the bank's claims for damages, the court clearly admonished the FmHA for its failure to follow its own debarment regulations and for its use of the disbarment penalty as a lever to try to force the bank to settle the Ferris dispute.

—Martha L. Noble, Staff Attorney,  
NCALRI, Fayetteville, AR

*This material is based upon work supported by the U.S. Department of Agriculture, National Agricultural Library, under Agreement No. 59 32 U4 8 13. Any opinions, findings, conclusions, or recommendations expressed in the publication are those of the author and do not necessarily reflect the view of the USDA or the NCALRI.*

## Federal Register in brief

The following matters were published in the Federal Register during the month of January.

1. USDA; Food Safety and Inspection Service; nutrition labeling of meat and poultry products; final rule; effective date 7/6/94; 58 Fed. Reg. 632.

2. Department of Health and Human Services; FDA; Food labeling: nutrient content claims, general principles, petitions, definition of terms; final rule; effective date 2/14/94; 58 Fed. Reg. 2302.

3. ASCS; Amendment to the regulations for the Agricultural Foreign Investment Disclosure Act of 1978 regarding land used in forestry production; notice of

## STATE ROUNDUP

PENNSYLVANIA. *Legislative development.* Act 6 amends Act 133 of 1982, popularly known as the "Right to Farm" Law, which is found at 3 Purdon's Statutes, sections 951-957. Act 6 amends section 3 of Act 133 by adding new subsection (b), Pa. Stat. Ann. tit. 3, section 954(b).

New section (b) provides that direct commercial sales of agricultural commodities upon property owned and operated by a landowner who produces not less than fifty percent of the commodities sold are authorized, notwithstanding municipal ordinance, public nuisance, or zoning prohibitions. These direct sales are authorized without regard to the fifty percent limitation under circumstances of crop failure caused by reasons beyond the control of the landowner.

The addition of subsection (b) clarifies that a farm retail market may exist on property owned and operated by a landowner notwithstanding contrary provisions in local ordinance or zoning or nuisance ordinances. Two important conditions to the application of subsection (b) are that the retail outlet must be located on property owned by the farm operator and the operator must produce fifty percent or more of the agricultural commodities being sold. In cases where a crop failure occurs because of reasons beyond the control of the landowner, the fifty percent test can be disregarded.

—John C. Becker, Penn State  
University

proposed rulemaking; 58 Fed. Reg. 3871.

4. CCC; Amendments to the Conservation Reserve Program regulations regarding small wetlands; final rule; effective date 1/13/93; 58 Fed. Reg. 4063.

5. FmHA; Reporting authorities for internal processing of appeals cases; final rule; effective date 1/13/93. 58 Fed. Reg. 4065.

6. APHIS; Animal Damage Control program; supplement to draft environmental impact statement; 58 Fed. Reg. 4404.

7. IRS; Generation-skipping transfer tax; notice of public hearing on proposed regulations; Comments due 3/31/93; 58 Fed. Reg. 3272; Correction 58 Fed. Reg. 6470.

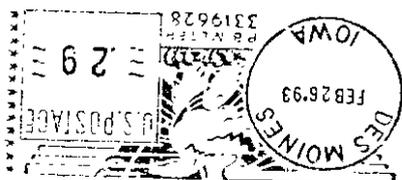
8. Labor Department; Farm labor protective statutes; coordinated enforcement; notice of proposed rulemaking; 58 Fed. Reg. 5168.

9. Farm Credit Administration; Employee responsibilities and conduct; conflict of interests; final rule; 58 Fed. Reg. 5919.

—Linda Grim McCormick

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## AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

### *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 been a member for at least the preceding three years. Nominations should be sent to Patricia Conover, 4255 Arrowhead Rd., Auburn, AL 30830.