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OKLAHOMA'S 2009 RIGHT-TO-FARM AMENDMENT: EXTENDING NEW PROTECTIONS TO OKLAHOMA'S PRODUCERS

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I. INTRODUCTION

Right-to-farm laws exist in all fifty states.¹ The laws were enacted to provide existing farms with a statutory defense to a state's nuisance law claims against the agricultural operation.² By limiting a state's nuisance law, agricultural operations are allowed to continue with their traditional practices and limit the likelihood of success of a nuisance suit from neighboring landowners.³ There is no model right-to-farm law; each state has enacted its own view of a right-to-farm law. Each state's courts

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¹ See Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-To-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87 (2006); Jennifer L. Beidel, Comment, *Pennsylvania's Right-To-Farm Law: A Relief For Farmers or an Unconstitutional Taking?*, 110 PENN ST. L. REV. 163, 164 (2005).

² See Centner, *supra* note 1, at 87-88.

³ See *id.* at 88.

have interpreted the law to provide protections to agricultural operations consistent with that state's prior precedents.⁴

In 1980, the Oklahoma Legislature passed, and then Governor George Nigh signed into law, Oklahoma House Bill 1707, which became Oklahoma's Right-to-Farm Act ("the Act") which became effective October 1, 1980.⁵ The Act gave Oklahoma agricultural producers protections from urbanization and the threat of nuisance suits.⁶ Except for minor changes in 2000, the Act remained relatively unchanged until the 2009 legislative session.⁷

In 2009, the Oklahoma Legislature passed, and Governor Brad Henry signed into law, Oklahoma House Bill 1482 amending Oklahoma's Right-to-Farm Act.⁸ These amendments represent substantial changes to the Act, and are intended to offer the state's agricultural producers ever-greater protection. For example, when the amendments took effect on November 1, 2009, agricultural producers received the protection of an attorney fee provision and a statutory period in which nuisance suits must be brought against a producer.⁹

This Article will explore the changes to the Act made by the amendments in House Bill 1482. Part II of this Article will explain the additions made to the current law.¹⁰ Part III will explore the statutory time period in newly enacted Paragraph C, and will address whether Oklahoma case law would view Paragraph C as a statute of limitations or a statute of repose.¹¹ Part IV will explore the relationship between Paragraph C and the "coming to the nuisance" defense already found in Paragraph B.¹² Finally, Part V will determine whether Oklahoma's amended

⁴ See generally Harrison M. Pittman, Annotation, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R.6th 465 (2005) (an overview of each state's right-to-farm law and court decisions interpreting it); National Agricultural Law Center, Agriculture and Urbanization Reading Rooming, <http://nationalaglawcenter.org/readingrooms/urbanization/> (last visited Jan. 13, 2010) (providing a collection of legal materials on the issues faced by agriculture from urbanization forces).

⁵ OKLA. STAT. tit. 50, § 1.1 (2010); see also Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & LAW 99, 127 (1988).

⁶ See § 1.1.

⁷ See Okla. H.B. 2306, 47th Legis., 2d Sess. (Okla. 2000), reprinted in 2000 Okla. Sess. Law Serv. ch. 300 (West).

⁸ Okla. H.B. 1482, 52d Legis., 1st Sess. (Okla. 2009), reprinted in 2009 Okla. Sess. Law Serv. ch. 147 (West); see also Michelle Seeber, *New Law Protects Producers*, THE WOODWARD NEWS, May 17, 2009.

⁹ See H.B. 1482.

¹⁰ See *infra* notes 14-32 and accompanying text.

¹¹ See *infra* notes 33-96 and accompanying text.

¹² See *infra* notes 97-106 and accompanying text.

Act will protect agricultural producers against potential plaintiffs that sue in trespass, rather than nuisance.¹³

II. CHANGES TO OKLAHOMA'S RIGHT-TO-FARM ACT

Before the 2009 amendments, Oklahoma's Right-to-Farm law had remained unchanged since its amendment in 2000.¹⁴ The pre-2009 amendment version of Oklahoma's Right-to-Farm law, which was in effect until November 1, 2009, states the following:

A. As defined in this act:

1. "Agricultural activities" shall include, but not be limited to, the growing or raising of horticultural and viticultural crops, berries, poultry, livestock, grain, mint, hay, dairy products and forestry activities;
2. "Farmland" shall include, but not be limited to, land devoted primarily to production of livestock or agricultural commodities; and
3. "Forestry activity" means any activity associated with the reforestation, growing, managing, protecting and harvesting of timber, wood and forest products including, but not limited to, forestry buildings and structures.

B. Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety.

If that agricultural activity is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.¹⁵

During the 2009 legislative session, amendments that greatly expand the protections already in the Act were passed by the Oklahoma Legislature and signed into law by Governor Brad Henry.¹⁶ These amendments, found in House Bill 1482 ("H.B. 1482"), were effective November 1, 2009.¹⁷ The changes expand the definition of "agricultural activities" in section 1.1(A)(1) to include aquaculture and expansions or improvements to existing "agricultural activities."¹⁸ If an operator decides to

¹³ See *infra* notes 107-176 and accompanying text.

¹⁴ To view the changes made to the law in 2000, see 2000 Okla. Sess. Law Serv. ch. 300 (West).

¹⁵ OKLA. STAT. tit. 50, § 1.1 (2010).

¹⁶ See Seeber, *supra* note 8.

¹⁷ For the text of Oklahoma House Bill 1482.

¹⁸ See, House H.B. 1482. Expansions or improvements will include and not be limited to "new technology, pens, barns, fences, and other improvements designed for the sheltering, restriction, or feeding of animal or aquatic life, for storage of produce or feed, or for storage or maintenance of implements." *Id.* Some may have already viewed the

expand an existing operation, the expansion is not required to be contiguous with the existing operation, and the operator is still afforded the protections of the Act.¹⁹

The next change is in the addition of Paragraph C to the Act, which provides:

No action for nuisance shall be brought against agricultural activities on farm or ranch land which has lawfully been in operation for two (2) years or more prior to the date of bringing the action. The established date of operation is the date on which an agricultural activity on farm or ranch land commenced activity. If the physical facilities of the agricultural activity or the farm or ranch are subsequently expanded or new technology adopted, the established date of operation for each change is not a separately and independently established date of operation and commencement of the expanded activity does not divest the farm or ranch of a previously established date of operation.²⁰

This addition, as will be discussed later, introduces a statute of repose to the Act.²¹ Paragraph C will effectively cut off any alleged nuisance action if the agricultural activities have been in operation for two or more years.²² After two years, the agricultural operator could no longer be sued for nuisance, even if the alleged nuisance action did not arise within the first two years of operation.²³ An agricultural operation would not lose its "establishment date," for the purposes of the two-year period, by expanding the operation or adopting new technology under Paragraph C.²⁴ Finally Paragraph C creates some possible conflict with Paragraph B, which was not changed by the amendments in H.B. 1482.²⁵

Newly enacted paragraph D gives agricultural operators additional protection that had been missing from the Act. Paragraph D provides:

In any action for nuisance in which agricultural activities are alleged to be a nuisance, and which action is found to be frivolous by the court, the defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in connection with defending the action, together with a reasonable amount for attorney fees.²⁶

definition of "agricultural activities" as expansive in the current version of the law. The current version included the phrase "but not limited to," which could be seen as an expansive view of the definition of "agricultural activities." The amendment retains similar language, but adds additional examples of "agricultural activities."

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *infra* notes 33-96 and accompanying text.

²² See Okla. H.B. 1482.

²³ See *infra* notes 33-96 and accompanying text.

²⁴ Okla. H.B. 1482.

²⁵ See *infra* notes 97-106 and accompanying text.

²⁶ Okla. H.B. 1482.

This amendment will give the agricultural operator the right to collect court costs, reasonable expenses incurred, and reasonable attorney fees.²⁷ Currently the Act provides protection from nuisance suits, but if a nuisance suit is brought in direct violation of the Act's protection, the operator cannot collect the court expenses and attorney fees incurred to defend the suit.²⁸ Paragraph D will afford the operator needed protection by allowing the operator to recoup expenses and legal costs incurred to defend against a frivolous suit.²⁹

Finally, H.B. 1482 adds Paragraph E which provides, "This section does not relieve agricultural activities of the duty to abide by state and federal laws, including, but not limited to, the Oklahoma Concentrated Animal Feeding Operations Act and the Oklahoma Registered Poultry Feeding Operations Act."³⁰ This addition removes the protections of the Act when a duty is found in another state or federal law that regulates agriculture.³¹ Paragraph E takes away doubt that a person would still be able to enforce the duties owed by a farm regulated under state or federal law, such as a concentrated animal feeding operation.³²

III. NEW PARAGRAPH C IS A STATUTE OF REPOSE

Black's Law Dictionary simply defines a statute of repose as "[a] statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury."³³ Oklahoma statutes are littered with examples of limitation periods found to be statutes of repose.³⁴ Comparing Oklahoma's amended Act to these examples provides a sound argument that this amended statute would be interpreted as a statute of repose. As this section will explain, Oklahoma's amended Act contains language similar to other statutes of re-

²⁷ *See id.*

²⁸ *See* former OKLA. STAT. tit. 50, § 1.1 (2009), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?citeid=455184>

²⁹ *See* Okla. H.B. 1482. A discussion of the application of Paragraph D is beyond the scope of this article.

³⁰ *Id.* *See* for the Oklahoma Concentrated Animal Feeding Operations Act, OKLA. STAT. tit. 2, §§ 20-40 through 20-64 (2010); and for the Oklahoma Registered Poultry Feeding Operations Act, OKLA. STAT. tit. 2, §§ 10-9 through 10-9.12 (2010).

³¹ *See* Okla. H.B. 1482.

³² *See id.*

³³ BLACK'S LAW DICTIONARY 1451 (8th ed. 2004).

³⁴ *See* OKLA. STAT. tit. 12, § 109 (2010) (allowing no tort recovery on construction and improvement to real property "more than ten years after substantial completion of such an improvement"); OKLA. STAT. tit. 68, § 2373 (2010) (taking away right to recover tax refund if filed more than three years after the taxes where paid).

pose. Part A will provide a survey of Oklahoma's case law on statutes of repose, and Part B will apply that case law to the amended Act.

A. Oklahoma's View of Statutes of Repose

Early decisions considered all time bars created by statutes to be statutes of repose.³⁵ In an Oklahoma Territory Supreme Court decision, the court stated,

The statute of limitations is what is known in law as a statute of repose. It is a statute enacted as a matter of public policy to fix a limit in which an action must be brought, or the obligation will be presumed to have been paid. The statute is intended to run only against those who are neglectful of their rights, and fail to use reasonable and proper diligence in the enforcement thereof.³⁶

Statutes of repose were considered a subset of statutes of limitations until courts began to use the "discovery rule" and extend the statutory period to bring an action.³⁷

Today, statutes of limitations and statutes of repose are often confused with one another. They both provide a potential defendant with repose, but they also have a significant difference.³⁸ The difference is related to "the time at which the respective periods commence."³⁹ Normally, a statute of limitations "governs the time within which legal proceedings must be commenced after the cause of action accrues."⁴⁰ On the other hand, a statute of repose "limits the time within which an action may be brought and is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered."⁴¹ A statute of limitations bars actions "not brought within a certain time period," while

³⁵ See *Reynolds v. Porter*, 760 P.2d 816, 819-20 (Okla. 1988).

³⁶ *Barnes v. Turner*, 78 P. 108, 109 (Okla. 1904). See also *City of Sulphur v. Oklahoma*, 162 P. 744, 747 (Okla. 1916) (citing *Barnes v. Turner*); *Martin v. Goodman*, 258 P. 871, 874 (Okla. 1927) (citing *Lewis v. Marshall*, 30 U.S. 470 (1831); finding that "[s]tatutes of limitations have been emphatically and justly denominated statutes of repose. The best interests of society require that causes of action should not be deferred an unreasonable time.").

³⁷ See *Reynolds*, 760 P.2d at 820. The "discovery rule" is defined as "[t]he rule that a limitations period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim." BLACK'S LAW DICTIONARY 498 (8th ed. 2004). The "discovery rule" appears to have been adopted in Oklahoma in *Continental Oil Co. v. Williams*, 250 P.2d 439, 441 (Okla. 1952) (holding that "[i]t is fundamental that the statute of limitation did not begin to run until the damage was apparent and this brought the damages complained of within the two year limitation").

³⁸ See *Reynolds*, 760 P.2d at 820.

³⁹ 54 C.J.S. *Limitation* § 5 (2009).

⁴⁰ *Id.*

⁴¹ *Id.*

“a statute of repose prevents a cause of action from arising after a certain period.”⁴²

The Oklahoma Supreme Court has found that the time period “prescribed by a statute of repose runs from a specific negligent act or event regardless of when the harm or damage occurs.”⁴³ The court has also found that “[a] limitation period runs from the time the elements of a cause of action arise. It may or may not allow for the plaintiff’s discovery of the injurious event.”⁴⁴ Simply stated, a statute of limitations requires the elements for a cause of action to accrue before time starts to run.⁴⁵ A statute of repose begins to run upon the completion of a specific act or event, like the completion of a construction project, and may extinguish a cause of action before it accrues.⁴⁶

The Oklahoma Supreme Court has set forth an analysis to determine when a statutory time period is a statute of repose.⁴⁷ In *Neer v. Oklahoma ex rel. Oklahoma Tax Commission*, 982 P.2d 1071 (Okla. 1999), the court was presented with the question of whether the three-year period specified in Title 68, section 2373 of the Oklahoma Statutes was a statute of repose or a statute of limitations.⁴⁸ The Neers were claiming a credit against their 1991 Oklahoma income taxes based on tax liability owed to the state of New York, but the credit was not claimed until 1995, beyond the three-year period.⁴⁹ The Tax Commission denied the refund based on section 2373, and the Court of Civil Appeals affirmed the denial of the refund.⁵⁰ On appeal, the Neers argued that the three-year period, when read with section 2357(B)(1), was a statute of limitations that did not begin to run until they paid the New York taxes.⁵¹ The court disagreed and found section 2373 to be “akin to a statute of repose.”⁵²

⁴² *Id.*

⁴³ *Reynolds*, 760 P.2d at 820; *See also* *Consol. Grain & Barge Co. v. Structural Sys., Inc.*, 212 P.3d 1168, 1171-72 (“[A] statute of repose prescribes a time period within which an action may be initiated and that time period begins to run from a specific act or event, such as substantial completion of construction.”).

⁴⁴ *Id.*; *see also* *Consol. Grain & Barge Co.* at 1171-72 (“A statute of limitation prescribes a time period within which an action may be initiated, and that time period begins to run when the cause of action accrues.”)

⁴⁵ *See* *Consol. Grain & Barge Co.*, 212 P.3d at 1171.

⁴⁶ *See id.* at 1171-72.

⁴⁷ *See* *Neer v. Oklahoma*, 982 P.2d 1071 (Okla. 1999).

⁴⁸ *See id.*; OKLA. STAT. tit. 68, § 2373 (2010).

⁴⁹ *See* *Neer*, 982 P.2d at 1072-74. The tax credit was claimed under OKLA. STAT. tit. 68, § 2357(B)(1) (2010).

⁵⁰ *See* *Neer*, 982 P.2d at 1075.

⁵¹ *See id.* at 1076. Section 2357(B)(1) reads:

There shall be allowed as a credit against the tax imposed by Section 2355 of this title the amount of tax paid another state by a resident individual, as defined in

In finding section 2373 to be a statute of repose, the court looked to the legislative intent to interpret sections 2373 and 2357(B)(1).⁵³ Finding the statutes to have no inconsistencies, ambiguities, or uncertainties, the court turned to the “plain meaning rule” to interpret the two sections.⁵⁴ Examining section 2357(B)(1), the court found that under the clear language of the statute the tax credit was not available until 1995 when the Neers paid the New York taxes.⁵⁵ Turning to section 2373, the court found that “the Legislature, by unmistakable language, intended section 2373 to act as a substantive limitation on the right to recover *any* amount as a refund when the claim for refund is filed more than three years after the date on which Oklahoma income tax is paid.”⁵⁶ The clear intent was to create an outer boundary beyond which the right to a tax refund would not exist.

In prior decisions, the court had labeled section 2373 a statute of limitations, but *Neer* clarified that it was a statute of repose.⁵⁷ The court articulated three reasons why section 2373 was a statute of repose.⁵⁸ First, the prior decisions foreshadowed that section 2373 clearly limited a refund to taxes that were “overpaid within three years preceding the date of the refund claim.”⁵⁹

The second reason was that the relevant language in section 2373 was more similar to language found in other statutes of repose, and did not “fit the mold of legislative language utilized in a ‘true’ statute of limitation.”⁶⁰ The plain language of section 2723 read “much more like the

paragraph 4 of Section 2353 of this title, upon income received as compensation for personal services in such other state; provided, such credit shall not be allowed with respect to any income specified in Section 114 of Title 4 of the United States Code, 4 U.S.C., Section 114, upon which a state is prohibited from imposing an income tax. The credit shall not exceed such proportion of the tax payable under Section 2355 of this title as the compensation for personal services subject to tax in the other state and also taxable under Section 2355 of this title bears to the Oklahoma adjusted gross income as defined in paragraph 13 of Section 2353 of this title.

OKLA. STAT. tit. 68, § 2357(B)(1) (2010).

⁵² *Id.*

⁵³ *See Neer*, 982 P.2d at 1078.

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *Id.* (emphasis in original).

⁵⁷ *See id.* at 1079.

⁵⁸ *See Neer*, 982 P.2d at 1079.

⁵⁹ *Id.*

⁶⁰ *Id.* (comparing the language of OKLA. STAT. tit. 12, § 95 and the general statute of limitations for many civil actions, which states, “Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards . . .”).

language used in a statute of repose because the three year time period starts to run or commences from the date of payment of Oklahoma tax—a specific event—irrespective of whether or not all the elements of a viable refund claim are then existent.”⁶¹ Comparing section 2373 to Title 12, section 109 of the Oklahoma Statutes, a section the court has repeatedly found to be a statute of repose, the court found both to “expressly commence with specific events”⁶² Under section 109, “the period commences whether or not all of the elements necessary to support a viable tort action then exist.”⁶³ Under section 2373, “the clock starts running whether or not all the elements necessary to support a viable refund claim are then present.”⁶⁴ Finding the language to clearly be that of a statute of repose, the court turned to the third factor weighing in favor of finding section 2373 to be a statute of repose.

The third reason given by the court was that its view was consistent with case law from other jurisdictions interpreting tax refund limitation periods.⁶⁵ The court pointed to a United States Supreme Court decision that did not extend equitable tolling to similar limitation periods for filing for a federal tax refund.⁶⁶ In that decision, the Supreme Court did not expressly hold the federal statute to be a statute of repose, but cited other federal court decisions that expressly made the analogy.⁶⁷ The court also discussed decisions by the Supreme Court of Colorado and the Oregon Tax Court that expressly held their state refund statutes to be similar to a statute of repose and not a statute of limitations.⁶⁸ Based on this analysis, the court found that the Neers’ refund claims were barred because they were not filed within three years of the date the taxes were paid.⁶⁹

⁶¹ *Neer*, 982 P.2d at 1079.

⁶² *Id.* at 1080. “No action in tort to recover damages . . .” arising from defective design, planning, supervision or observation of construction or from the construction of an improvement to real property “shall be brought . . . more than ten (10) years after substantial completion of such an improvement.” *Id.* at 1080 (quoting OKLA. STAT. tit. 12, § 109).

⁶³ *Neer*, 982 P.2d at 1080.

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *See id.* (citing *United States v. Brockamp*, 519 U.S. 347 (1997)).

⁶⁷ *See Neer*, 982 P.2d at 1078.

⁶⁸ *See id.* at 1080-81.

⁶⁹ *See id.* at 1081.

*B. Application of Neer to Amended Title 50, Section 1.1 of the
Oklahoma Statute*

On November 1, 2009, Paragraph C of Oklahoma's Act took effect.⁷⁰ Paragraph C provides, "[n]o action for nuisance shall be brought against agricultural activities on farm or ranch land which has lawfully been in operation for two (2) years or more prior to the date of bringing the action."⁷¹ When considered in light of the court's reasoning articulated in *Neer*, this language indicates that Paragraph C is a statute of repose, and should be interpreted as such when an Oklahoma court is presented with the issue. The *Neer* court stated that in the dicta of prior opinions the court had "unmistakably foreshadowed an understanding" that section 2373 was a statute of repose.⁷² Because Paragraph C is newly enacted, we have no such foreshadowing by the court.⁷³ Therefore, the first reason from *Neer* would offer no help to a party arguing that Paragraph C is a statute of repose.

The second reason from the *Neer* decision was that the relevant language "does not fit the mold of legislative language utilized in a 'true' statute of limitation."⁷⁴ The relevant language from Paragraph C reads, "agricultural activities on farm or ranch land which has lawfully been in operation for two (2) years or more prior to the date of bringing the action."⁷⁵ The *Neer* court compared the language of section 2373 to a true statute of limitations and a true statute of repose.⁷⁶ A similar comparison of the Act to a true statute of limitations and a true statute of repose indicates that a court would reach the same conclusion.

Oklahoma's general statute of limitations reads, "Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards"⁷⁷ Paragraph C contains none of the language found in a true statute of limitations. The language of Paragraph C, similar to the language of section 2373, does not fit the mold that the Legislature uses to create a true statute of limitations.

⁷⁰ See H.B. 1482.

⁷¹ *Id.*

⁷² *Neer*, 982 P.2d at 1079.

⁷³ See *id.*

⁷⁴ *Id.*

⁷⁵ H.B. 1482, at Paragraph C.

⁷⁶ *Neer*, 982 P.2d at 1079.

⁷⁷ OKLA. STAT. tit. 12, § 95 (2010).

The language of Paragraph C matches the language used in Title 12, section 109 of the Oklahoma Statutes, which has been found to be a statute of repose by the Oklahoma courts.⁷⁸ Section 109 provides:

No action in tort to recover damages . . . shall be brought against any person owning, leasing, or in possession of such an improvement or performing or furnishing the design, planning, supervision or observation of construction or construction of such an improvement *more than ten (10) years* after substantial completion of such an improvement.⁷⁹

Similar to section 109, the time period in Paragraph C begins to run on the completion of a specific event—substantial completion of improvements on real property. The two-year time period in Paragraph C begins to run upon the operation of “agricultural activities” on the farm or ranch land.⁸⁰ As the *Neer* court found, “the period commences whether or not all of the elements necessary to support a viable tort action then exist.”⁸¹ Under Paragraph C, the time period would commence whether or not all the elements necessary to support a viable nuisance claim exist.

The final reason provided in *Neer* was “that section 2373 is analogous to a statute of repose, or a legislatively crafted outer limit time boundary beyond which a taxpayer’s right or ability to recover a refund no longer exists, is consistent with case law from other jurisdictions in the area of interpreting tax refund limitation periods.”⁸² Similar to *Neer*, the view that Paragraph C is analogous to a statute of repose would be consistent with the case law from other jurisdictions interpreting similar provisions in their states’ right-to-farm laws.

The Indiana Court of Appeals held that a nuisance action against a dairy was barred by Indiana’s right-to-farm statute.⁸³ Although not holding the section in question to be a statute of repose, the court found that the statute barred claims if the operation had continually operated for more than one year.⁸⁴ In that case, the dairy had been in operation for

⁷⁸ OKLA. STAT. tit. 12, § 109 (2010).

⁷⁹ OKLA. STAT. tit. 12, § 95 (emphasis added). See *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915 (Okla. 1989) (emphasis in original) (holding section 109 to be a statute of repose).

⁸⁰ What constitutes “agricultural activities” is defined in OKLA. STAT. tit. 12, § 1.1(A)(1). H.B. 1482 will also broaden this definition when it takes affect on Nov. 1, 2009.

⁸¹ *Neer*, 982 P.2d at 1080.

⁸² *Id.*

⁸³ See *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1255 (Ind. Ct. App. 2009).

⁸⁴ See IND. CODE ANN. § 32-30-6-9(d) (West 2009) (“An agricultural or industrial operation or any of its appurtenances is not and does not become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or

eighteen months before the plaintiffs brought their nuisance claim.⁸⁵ Without calling the section a statute of repose, the court found that the plaintiffs' nuisance claims were barred because they were not brought within the required one-year statutory period.⁸⁶ The court of appeals gave the same effect to the limitations period that a statute of repose would have had.⁸⁷

In *Holubec v. Brandenberger*, 111 S.W.3d 32, 38 (Tex. 2003), the Texas Supreme Court held that a similar provision in Texas's right-to-farm law was a statute of repose.⁸⁸ The language in question provided that "[n]o nuisance action may be brought against an agricultural operation that has lawfully been in operation for *one year or more* prior to the date on which the action is brought"⁸⁹ The court rejected the plaintiff's argument that the section was a statute of limitations that required the occurrence of a nuisance before the one-year period could run.⁹⁰

Looking at the differences between the two judicial bars and the history of the statute, the Texas Supreme Court held section 251.004(a) to be a statute of repose.⁹¹ The court found that discovery of the conditions or circumstances constituting the nuisance action were not required for the one-year period to begin running.⁹² According to the court, "the relevant inquiry is whether the conditions or circumstances constituting the basis for the nuisance action have existed for more than a year."⁹³ The court stated that "[i]n light of this history and the Act's stated purpose, we conclude that the defense in section 251.004(a) was intended to bar a nuisance action against a lawful agricultural operation one year after the commencement of the conditions or circumstances providing the basis for that action."⁹⁴

industrial operation, as the case may be, has been in operation continuously on the locality for more than one (1) year[.]").

⁸⁵ See *Lindsey*, 898 N.E.2d at 1259.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ *Holubec v. Brandenberger*, 111 S.W.3d 32, 38 (Tex. 2003).

⁸⁹ TEX. AGRIC. CODE ANN. § 251.004(a) (Vernon 2009) (emphasis added).

⁹⁰ See *Holubec*, 111 S.W.3d at 37.

⁹¹ See *id.* at 36-38; § 251.004(a).

⁹² See *Holubec*, 111 S.W.3d at 38.

⁹³ *Id.*

⁹⁴ *Id.* The Texas Court of Appeals has consistently held this view that § 251.004(a) is a statute of repose and adopting the reasoning of *Holubec*. See *Aguilar v. Trujillo*, 162 S.W.3d 839, 853-54 (Tex. App. 2005); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App. 2004).

Using the analysis set forth in *Neer*, an Oklahoma court should find newly enacted Paragraph C to be a statute of repose.⁹⁵ Although a court has not “foreshadowed” Paragraph C’s interpretation as a statute of repose in a prior decision, the other reasons weigh heavily in favor of finding Paragraph C to be a statute of repose. The language of Paragraph C would more clearly fit the mold of a statute of repose than that of a statute of limitations. The language is more akin to section 109, a true statute of repose, because both are predicated on specific events.⁹⁶ Finally, this view would be consistent with other jurisdictions’ interpretations of similar statutes; the language in Paragraph C clearly matches that of Texas’s and Indiana’s provisions that have been found to be statutes of repose.

IV. PROTECTION FOR AGRICULTURAL ACTIVITIES ESTABLISHED FOR LESS THAN TWO YEARS

As explained in the previous section, Paragraph C would be considered a statute of repose by an Oklahoma court.⁹⁷ While Paragraph C would end potential liability after an agricultural activity has been established for two years, the “coming to the nuisance” defense found in Paragraph B would protect agricultural activities that have been established for less than two years.

Paragraph B is a codification of the common law “coming to the nuisance” defense.⁹⁸ Since the Act went into effect in 1980, Paragraph B has provided protection to those agricultural operations that were established before the complaining non-agricultural activities arrived.⁹⁹ This defense is of special importance with the addition of Paragraph C.

Oklahoma has always been a state dominated by agriculture.¹⁰⁰ Many of Oklahoma’s farms have been in operation since the first land run settled the Oklahoma Territory.¹⁰¹ Today, 83,300 farms are in operation in

⁹⁵ See *supra* notes 35-69 and accompanying text.

⁹⁶ See OKLA. STAT. tit. 12, § 109 (2010).

⁹⁷ See *supra* notes 33-96 and accompanying text.

⁹⁸ Because no Oklahoma court has reported a decision on the Act in its twenty-nine year history, Paragraph B has never been held to be a codification of the “coming to the nuisance” defense. For more discussion on codification of the “coming to the nuisance” defense in states’ Right-to-Farm laws, see Centner, *supra* note 1.

⁹⁹ Oklahoma Statutes title 50, section 1.1 became effective on October 1, 1980.

¹⁰⁰ See Economic Research Service, *Oklahoma Fact Sheet* (Dec. 9, 2009) available at <http://www.ers.usda.gov/statefacts/OK.HTM#PIE>.

¹⁰¹ The first land run took place on April 22, 1889 and the last unassigned lands were sold by auction in December of 1906. See Oklahoma Land Openings 1889-1907, <http://okgenweb.org/~land/> (last visited July 3, 2009). For a list of farms that have been

Oklahoma.¹⁰² Paragraph C would clearly protect farms in existence since November 1, 2007, and any cause of action would be extinguished as of November 1, 2009. Although still vital, an established agricultural operation defending a nuisance suit would want to use the protections afforded by Paragraph C before turning to those offered by Paragraph B's "coming to the nuisance" defense.

Paragraph B would offer protection to agricultural operations that have been established for less than two years and prior to non-agricultural activities moving to the area.¹⁰³ The "coming to the nuisance" defense does not require that the agricultural operation be established for a certain period of time.¹⁰⁴ The only requirement is that it comes before the non-agricultural activity.¹⁰⁵ Paragraph B will fill in the gaps that have been created with the enactment of Paragraph C, and offer protection to newer operations that have not yet been established long enough to receive the protection of Paragraph C.¹⁰⁶

V. WOULD THE AMENDMENTS PROTECT AGAINST TRESPASS?

A. *Comparison of Nuisance and Trespass*

A right-to-farm law typically attempts to preserve farmland by limiting nuisance.¹⁰⁷ As discussed earlier, Oklahoma's current Act adopts a "coming to the nuisance" defense.¹⁰⁸ The amended Act which took effect on November 1, 2009, includes not only the "coming to the nuisance" defense, but also a two-year statute of repose defense for nuisance actions.¹⁰⁹ Operators involved in Oklahoma agriculture appear to have protection against nuisance suits. The amended Act is less clear regarding protection from trespass suits that could be used to circumvent the Act's

operating for at least one hundred years, see Centennial Farm & Ranch Program, <http://www.okhistory.org/shpo/frrecips.htm> (last visited July 3, 2009).

¹⁰² Nat'l Agric. Statistics Serv., *2007 Census of Agriculture State Profile Oklahoma* (2007), http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/County_Profiles/Oklahoma/cp99040.pdf

¹⁰³ See OKLA. STAT. tit. 50, § 1.1(B) (2010).

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ Paragraph B's protections are lost, however, if the agricultural activity "has a substantial adverse affect on the public health and safety." *Id.* This article does not address whether Paragraph C allows nuisance suits when they represent a public nuisance, and, if Paragraph C does not have such an exception, whether it would be an unconstitutional taking. Such a discussion is beyond the scope of this article.

¹⁰⁷ Centner, *supra* note 1, at 88.

¹⁰⁸ See *supra* notes 96-105 and accompanying text.

¹⁰⁹ See *supra* notes 33-95 and accompanying text.

protection from nuisance suits and be just as costly to agricultural producers.

The Act and its recent amendments may offer no protection to Oklahoma agriculture from trespass liability. Oklahoma courts define trespass as “an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession.”¹¹⁰ A continuing trespass, as defined by the Oklahoma courts, occurs when a “trespasser remains on the land of the rightful owner while such land is in the possession of the rightful owner.”¹¹¹ The Oklahoma courts, and other legal authorities, provide many examples of trespass: a defendant entering a plaintiff’s property, as well as entry of pollutants, water, and other foreign substances.¹¹²

Although nuisance and trespass may be similar in some respects, and may occur at the same time, nuisance and trespass are distinguishable torts.¹¹³ According to the Oklahoma Supreme Court, “[a] nuisance, public or private, arises where a person uses his own property in such a manner as to cause injury to the property of another. On the other hand, trespass involves an actual physical invasion of the property of another.”¹¹⁴ Because of this distinction, an Oklahoma agricultural producer may have protection under the Act and the recent amendments from nuisance liability, but may still be vulnerable if the actions meet the criteria for a cause of action in trespass. The Act’s protections and rights would disappear if the potential plaintiff brought a trespass suit against the agricultural producer.

B. Treatment of Trespass by Other States in Their Right-to-Farm Laws

Right-to-farm laws typically do not protect against trespass, but at least one state court has interpreted that state’s right-to-farm law to pro-

¹¹⁰ *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998) (citing *Fairlawn Cemetery Ass’n v. First Presbyterian Church*, 496 P.2d 1185 (Okla. 1972)).

¹¹¹ *Russell v. Williams*, 964 P.2d 231, 235 (Okla. Civ. App. 1998) (citing *Restatement (Second) of Torts* § 162 cmt. c (1965)).

¹¹² See 87 C.J.S. *Trespass* § 13 (2009) (finding trespasses “by projecting anything into, over, or upon the land.”); 75 Am. Jur. 2d *Trespass* § 27 (finding that trespass can be accomplished by a tangible object); *Schaeffer v. Schaeffer*, 743 P.2d 1038, 1039 (Okla. 1987) (finding, in dicta, trespass from “unpalatable organic vapors” and “the trespass of unsanitary fluids . . .”); *Coop. Refinery Ass’n v. Young*, 393 P.2d 537 (Okla. 1964) (finding that salt water spilled on land was a trespass).

¹¹³ See 66 C.J.S. *Nuisance* § 8 (2009).

¹¹⁴ *Fairlawn Cemetery Ass’n v. First Presbyterian Church*, 496 P.2d 1185 (Okla. 1972). Also see, 66 C.J.S. *Nuisance* § 8; 87 C.J.S. *Trespass* § 4 (2009); 58 Am. Jur. 2d *Nuisance* §§ 5-7 (2009); 75 Am. Jur. 2d *Trespass* § 86 (2009).

tect farmers and ranchers against trespass liability.¹¹⁵ Another state has taken the opposite approach and interpreted that state's right-to-farm law to allow suits for trespass.¹¹⁶ The state does this by exempting agricultural activities from private nuisance actions, but does not impair the "right to sue for damages."¹¹⁷

1. Washington's View: *Buchanan v. Simplot Feeders Limited Partnership*¹¹⁸

Answering a certified question, the Washington Supreme Court found that Washington's right-to-farm law allowed for the recovery of damages in causes of action other than nuisance, such as trespass.¹¹⁹ The Buchanans filed a federal lawsuit against IBP and Simplot complaining of negligence, trespass, and nuisance from manure dust, flies, and odors from the defendants' meat processing plant and feedlot next to the Buchanans' farm.¹²⁰ After granting summary judgment on some of the plaintiffs' claims, the United States District Court for the Eastern District of Washington withheld ruling on other claims because of uncertainty regarding the interpretation on Section 7.48.305 of the Revised Code of Washington.¹²¹ The federal court certified to the state supreme court a question to interpret the passage, "[n]othing in this section shall affect or impair any right to sue for damages."¹²²

Before the Washington Supreme Court, Simplot and IBP argued that

[s]ince the first two paragraphs of the statute bar the nuisance claim itself, the damages sentence must refer to damages in other causes of action. The Buchanans' bifurcated causes of action aptly illustrate Defendants' interpretation of the damages sentence: While the Right-to-Farm Act allegedly prevents the Buchanans' nuisance action,[sic] it does not preclude the Buchanans from seeking damages under their separate trespass claim.¹²³

¹¹⁵ See *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC*, 123 Cal. Rptr. 2d 479, 481-82 (Cal. Ct. App. 2002).

¹¹⁶ See *Buchanan v. Simplot Feeders L.P.*, 952 P.2d 610, 611 (Wash. 1998).

¹¹⁷ WASH. REV. CODE ANN. § 7.48.305 (4) (West 2008).

¹¹⁸ *Buchanan v. Simplot Feeders L.P.*, 952 P.2d 610 (Wash. 1998).

¹¹⁹ See *id.* at 618. For a discussion of other states finding their right-to-farm laws do not protect against trespass actions see also *Wyatt v. Sussex Surry, LLC*, 482 F.Supp.2d 740, 744 (E.D. Va. 2007) (finding that "since the Right to Farm Act limits only nuisance claims, it would not affect the negligence or trespass causes of action alleged by the Plaintiffs.").

¹²⁰ See *Buchanan*, 952 P.2d at 611.

¹²¹ See *id.* at 612.

¹²² *Buchanan*, 952 P.2d at 612 (citing Revised Code of Washington Annotated § 7.48.305(West 2009)).

¹²³ *Buchanan*, 952 P.2d at 612. The first two paragraphs of the statute state:

The Buchanans, on the other hand, argued that the damages clause in Section 7.48.305 preserved nuisance actions for damages, and only was a prohibition against injunctive relief.¹²⁴ In the Buchanans' brief, they argued that "[t]he first two paragraphs of RCW 7.48.305 create an exemption from nuisance actions for certain agricultural activities. The third paragraph, however, limits that exemption by expressly preserving actions for damages."¹²⁵

The state supreme court rejected the Buchanans' interpretation of the damages clause.¹²⁶ Looking to the statute, the court found that the first two paragraphs of Section 7.48.305 set out certain agricultural activities and conditions that, if met, would not constitute a nuisance.¹²⁷ The court could not ignore the statutory directive that, if the statutory conditions were met, "a nuisance action cannot survive whether the remedy sought is an injunction or damages."¹²⁸

Finally, adopting the Buchanans' view would end any protection the right-to-farm law afforded farmland. According to the court, "[f]ew farms could afford the cost of defending against nuisance actions seeking damages every two years If a jury's damages award was large enough, a farm could easily be forced out of business and into bankruptcy."¹²⁹ In the court's opinion, if the legislature had meant to adopt such an outcome, it would have altered the legislative purpose of the law when it amended the law to include the damages provision.¹³⁰

Looking to a case decided before the damages clause was added to the law, the court found that the legislature was merely adopting the reason-

Notwithstanding any other provision of this chapter, agricultural activities conducted on farmland and forest practices, if consistent with good agricultural and forest practices and established prior to surrounding nonagricultural and nonforestry activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity or practice has a substantial adverse effect on public health and safety.

If those agricultural activities and forest practices are undertaken in conformity with all applicable laws and rules, they are presumed to be good agricultural and forest practices not adversely affecting the public health and safety for purposes of this section and RCW 7.48.300. An agricultural activity that is in conformity with such laws and rules shall not be restricted as to the hours of the day or day or days of the week during which it may be conducted. § 7.48.305.

¹²⁴ *See Buchanan*, 952 P.2d at 616.

¹²⁵ *Buchanan*, 952 P.2d at 616 (citing Brief of Plaintiffs at 6, *Buchanan v. Simplot Feeders L.P.*, No. 65298-8 (Wash. Aug. 13, 1997)).

¹²⁶ *Buchanan*, 952 P.2d at 617.

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

ing of the court in that decision.¹³¹ In that decision, the appellate court found that damages and injunction were appropriate for irrigation runoff that damaged a neighboring urban development.¹³² The appellate court found the irrigation water to be a physical trespass and thus avoided the state's right-to-farm statute.¹³³ The court found that the legislature endorsed that view when it added the "damages provision" to the law in 1992.¹³⁴ In conclusion, the court held, "the language merely refers to a plaintiff's ability to seek damages in other causes of action, such as trespass."¹³⁵

2. California's View: *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC*¹³⁶

In hearing an appeal for the granting of a motion for summary judgment in favor of an avocado farmer, the Fourth District Court of Appeals for California affirmed the trial court's decision that California's Right-to-Farm law protected against trespass.¹³⁷ In *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC*, 123 Cal. Rptr. 2d 479 (Cal. Ct. App. 2002), the plaintiff was a developer who owned property below the property of the defendant avocado farmer.¹³⁸ In mid-1999, the developer noticed water running down into various lots.¹³⁹ The water was found to be from the defendant's irrigation practices.¹⁴⁰ The developer sued the avocado farmer under varying causes of action, including trespass and nuisance.¹⁴¹ The avocado farmer moved for summary judgment and asserted an affirmative defense of California's Right-to-Farm law, and the trial court entered judgment in favor of the farmer.¹⁴²

On appeal, the developer argued that the literal language of the statute "does not apply to trespasses or other causes of action arising from the

¹³¹ *Buchanan*, 952 P.2d at 618 (citing *City of Benton v. Adrian*, 748 P.2d 679 (Wash. Ct. App. 1988)).

¹³² *Buchanan*, 952 P.2d at 618.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC*, 123 Cal. Rptr. 2d 479 (Cal. Ct. App. 2002).

¹³⁷ *See id.* at 481. California's Right-to-Farm law is found at California Civil Code section 3482.5 (West 2009).

¹³⁸ *See Rancho Viejo, LLC*, 123 Cal. Rptr. 2d at 483.

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

discharge of irrigation water onto another's land."¹⁴³ The court disagreed with the developer's argument and examined the legislative intent to construe the Right-to-Farm law.¹⁴⁴

According to the court, the developer's argument was flawed because California nuisance law "is not limited to intangible intrusions upon land."¹⁴⁵ The state's nuisance law was a creature of statute, and was defined to include "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."¹⁴⁶ Thus many activities could be classified as both a nuisance and a trespass "if they result in the violation of a person's right of exclusive possession of land, and also constitute an unreasonable and substantial interference with the use and enjoyment of the land."¹⁴⁷ Because of this overlap, the court rejected any attempt to distinguish nuisance and trespass based on damage to property and physical invasion to circumvent the Right-to-Farm statute's protection.¹⁴⁸

Turning to the legislative history, the court found nothing to adopt the developer's narrow view that the statute did not protect against those agricultural activities amounting to a nuisance, but pleaded as a trespass.¹⁴⁹ In looking at the legislative history, the court found that the legislature had intended broad protections for agricultural practices "when neighboring properties are developed into residential or urban use."¹⁵⁰

With the legislative intent in mind, the court rejected the developer's narrow reading of the statute, and adopted a broad view "that would further the preservation of ongoing, standard agricultural practices."¹⁵¹ The court held that "[i]f commercial agricultural activity qualifies as a nuisance and otherwise falls within section 3482.5, a plaintiff cannot avoid the immunity provided by the statute by simply recharacterizing or relabeling the conduct in the guise of trespass to bring it outside the ambit of the statute."¹⁵²

¹⁴³ *Rancho Viejo, LLC*, 123 Cal. Rptr. 2d at 484.

¹⁴⁴ *See id.* at 485. Quoting *Lungren v. Deukmejian*, 755 P.2d 299 (Cal. 1988), the court stated that "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."

¹⁴⁵ *Rancho Viejo*, 123 Cal. Rptr. 2d at 486.

¹⁴⁶ *Id.* (emphasis in original) (citing *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1136 (Cal. Ct. App. 1991) and California Civil Code section 3479 (West 2009)).

¹⁴⁷ *Rancho Viejo*, 123 Cal. Rptr. 2d at 486.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 487-88.

¹⁵⁰ *Id.* at 488.

¹⁵¹ *Id.*

¹⁵² *Rancho Viejo*, 123 Cal. Rptr. 2d at 488.

Finally, the court rejected the developer's assertions that the Washington Supreme Court's reasoning in *Buchanan v. Simplot Feeders Ltd. Partnership* should be followed.¹⁵³ The court found the two Right-to-Farm laws to be substantially different.¹⁵⁴ Washington's law included a damages savings clause, while California's law did not include such a clause.¹⁵⁵ California's nuisance law also expressly defines nuisance to include "those activities that intrude upon and cause physical damage to property."¹⁵⁶ The court of appeals declined to adopt the Washington court's reasoning¹⁵⁷ and affirmed the judgment of the trial court.¹⁵⁸

C. How Would An Oklahoma Court Decide the Issue?

It is unclear how an Oklahoma court would decide the issue of whether the amended Act also protects an agricultural producer against trespass liability. Oklahoma's law does not have a similar "damages clause" like the one found in Washington's law. But at the same time, Oklahoma's nuisance law might be similar to California's nuisance law, and an Oklahoma court may be willing to adopt similar protection for trespass.¹⁵⁹

Washington's Right-to-Farm law includes a so-called damages provision that states, "[n]othing in this section shall affect or impair any right to sue for damages."¹⁶⁰ As shown in *Buchanan*, the Washington Supreme Court found that this language allowed for damages to be awarded in suits other than nuisance, such as trespass.¹⁶¹ The Act does not contain a similar "damages clause" that would allow for damages in trespass. This lack of a "damages clause" could be a factor that favors an Oklahoma court finding that the amended Act also protects against trespass damages.

The "damages clause" may not be the factor that allows a court to find that a Right-to-Farm law offers no protection for trespass damages. In *Buchanan*, the court cited *City of Benton* and its decision to allow damages caused due to flooding from irrigation water.¹⁶² According to the

¹⁵³ See *id.* at 489. For a discussion of *Buchanan*, see *supra* notes 118-135 and accompanying text.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *Rancho Viejo*, 123 Cal. Rptr. 2d at 490.

¹⁵⁸ See *id.* at 482.

¹⁵⁹ See OKLA. STAT. tit. 50, § 1 (2010) and CAL. CIV. CODE § 3479 (West 2009).

¹⁶⁰ WASH. REV. CODE ANN. § 7.48.305 (West 2009).

¹⁶¹ See *Buchanan*, 952 P.2d at 618; see also *supra* notes 118-135 and accompanying text.

¹⁶² See *id.*

Buchanan court, “it is likely the Legislature added the damages sentence to endorse *City of Benton*’s approach to the problem: If an agricultural activity interferes with the use and enjoyment of adjoining property, it is properly characterized as a nuisance and the activity may be protected under the Right-to-Farm Act.”¹⁶³ An Oklahoma court could take the *City of Benton*’s narrow approach and limit the amended Act’s protection to just nuisance causes of action.¹⁶⁴ Under this view, the amended Act would offer no protection for trespass damages.¹⁶⁵

Nuisance law is either a creature of statute, like in California, or a creature of the common law, like in Oklahoma.¹⁶⁶ In *Rancho Viejo*, the California Court of Appeals rejected a narrow view of its Right-to-Farm law that would distinguish “between trespass and nuisance theories on the basis of physical invasion and damage to property.”¹⁶⁷ Oklahoma and California share the same definitions for trespass and nuisance: “A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession.”¹⁶⁸

These shared views on nuisance and trespass may be enough to persuade an Oklahoma court to reject a narrow view of the amended Act, and allow the amended Act to have broad protections for agricultural activities. This broad view, similar to California’s view, would allow protection when the agricultural activity qualifies as a nuisance and falls within the protections of the amended Act, and stop a potential plaintiff from reclassifying the agricultural activity as a trespass to remove it from the scope of the amended Act.¹⁶⁹

¹⁶³ *Id.*

¹⁶⁴ *See Adrian*, 748 P.2d at 681.

¹⁶⁵ If a case is ever decided that interprets the amended Act’s protections for trespass damages, this view also forces the Oklahoma Legislature to amend the Act, yet again, to either adopt the court’s view or reject the court’s view. This future decision could be years down the road, and whether politics would allow the legislature to adopt a view that offers protection to agricultural producers is uncertain.

¹⁶⁶ *See Rancho Viejo*, 123 Cal. Rptr. 2d at 486 (finding that “California nuisance law is a creature of statute”); *Nichols v. Mid-Continent Pipe Line Co.*, 933 P.2d 272, 276 (Okla. 1996).

¹⁶⁷ *Rancho Viejo*, 123 Cal. Rptr. 2d at 487.

¹⁶⁸ *Id.* at 487 n.5. *See also* *Fairlawn Cemetery Association v. First Presbyterian Church*, 496 P.2d 1185, 1187 (Okla. 1972) (expressing a similar definition for trespass under Oklahoma law, and finding that a “trespass involves an actual physical invasion of the property of another.”). Oklahoma has adopted the same definition for private nuisance as California from the Restatement (Second) of Torts § 821D (1972). *See Nichols*, 933 P.2d at 277 n.15.

¹⁶⁹ *See Rancho Viejo*, 123 Cal. Rptr. 2d at 488.

An Oklahoma court appears to have two options when deciding if the amended Act protects against trespass suits. The court could take a narrow view and interpret the Act literally, only allowing for protection against nuisance suits. The court could also take a broader view and not distinguish between nuisance and trespass. A broader view, much like California's view, would protect only those trespasses that also qualify as nuisances. This would protect the agricultural producer from a potential plaintiff reclassifying a suit as trespass just to avoid the protection of the amended Act. Oklahoma agricultural producers are left with uncertainty until a case comes along in which the Oklahoma courts must decide which option they will choose.

D. Amending the Act to Protect Against Trespass Suits

One way to circumvent the problem of waiting for the courts to determine if the amended Act offers protection to agricultural producers from trespass suits is to amend the law to expressly include that protection. The legislature that passed H.B. 1482 will be the same legislature that begins its second session of the Fifty-Second Legislature on February 1, 2010. This next session of the Oklahoma Legislature might be receptive to a measure that includes protection from certain trespasses.¹⁷⁰

The amended language would simply include the intent of the Legislature to protect agricultural producers against trespass damages. At the end of Paragraph D in Section 1.1, the following language could be added:

No action for trespass shall also be brought against agricultural activities on a farm or ranch which has lawfully been in operation for two (2) years or more prior to the date of the action. No action for trespass will be limited to cases where the agricultural activities is following good agricultural practices, and shall not include trespasses by the farmer or rancher himself/herself, livestock owned by the farmer or rancher, or the employees of the farmer or rancher. For agricultural activities not following good agricultural practices, trespass damages will be available to the party bringing such an action. The established date of operation is the date on which an agricultural activity on farm or ranch land commenced activity. If the physical facilities of the agricultural activity or the farm or ranch are subsequently expanded or new technology adopted, the established date of operation for each change is not a separately and independently established date of operation and commencement of the

¹⁷⁰ I use the phrase "limited trespasses" because a neighboring landowner would still want protections from physical trespass from a neighboring agricultural producer, the producer's employees, and livestock and equipment.

expanded activity does not divest the farm or ranch of a previously established date of operation.¹⁷¹

This language would manifest clear intent to protect agricultural operators from potential trespass suits that could be just as costly as potential nuisance suits that the producer already has protection from.

Other states' right-to-farm laws could also provide examples on how to draft for trespass protection. Oregon's Right-to-Farm law would provide an example of how to draft the law to provide for protections against trespass suits.¹⁷² Oregon's law explicitly limits "nuisance or trespass" causes of actions by not impairing "the right of any person or governmental body to pursue any remedy authorized by law that concerns matters other than a nuisance or trespass."¹⁷³

Another example would be to include in the definition of "nuisance" the word trespass. This is the route taken by Hawaii in its right-to-farm law. Hawaii's law defines nuisance to include "all claims that meet the requirements of this definition regardless of whether a complainant designates such claims as brought in nuisance, negligence, trespass, or any other area of law or equity[.]"¹⁷⁴

Finally, both Hawaii's right-to-farm law and Arkansas's right-to-law provide for liberal interpretation of their right-to-farm laws.¹⁷⁵ Both provide that "[t]his chapter is remedial in nature and shall be liberally construed to effectuate its purposes."¹⁷⁶ Providing for liberal interpretation may be enough to signal to an Oklahoma court to liberally interpret the word "nuisance" to include actions in trespass. These examples from other states may provide the Oklahoma legislature with guidance in amending the law to include protections for potential trespass suits.

VI. CONCLUSION

On November 1, 2009, Oklahoma agricultural producers have new protections to combat potential nuisance suits. In the twenty-nine years since the enactment of the Act, no reported decision has interpreted the law.¹⁷⁷ This lack of reported decisions could be seen as a positive sign,

¹⁷¹ This is my thought on what ideal language should read to protect an agricultural producer from potential trespass suits.

¹⁷² See OR. REV. STAT. §§ 30.930 to 30.947 (2009).

¹⁷³ OR. REV. STAT. § 30.940 (2009). Oregon also provides other cases where nuisance and trespass actions are limited. See OR. REV. STAT. §§ 30.932, .934, .935, .936 (2009).

¹⁷⁴ HAW. REV. STAT. ANN. § 165-2 (Michie 2009).

¹⁷⁵ See HAW. REV. STAT. ANN. § 165-6 (Michie 2009) and ARK. CODE ANN. § 2-4-108 (Michie 2009).

¹⁷⁶ *Id.*

¹⁷⁷ See OKLA. STAT. tit. 50, § 1.1 (2010).

or it could be that Oklahoma has simply not yet faced the pressures on agriculture from urbanization as other states have. It seems unlikely that another twenty-nine years will pass without a reported decision involving the Act.

At some point in the future, an Oklahoma court will be called upon to interpret the provisions of Section 1.1, including newly enacted Paragraph C. Barring a major change in Oklahoma case law, newly enacted Paragraph C is a statute of repose under Oklahoma law, and would bar alleged nuisance actions two years after the establishment of the producer's agricultural activity, regardless of when the potential plaintiff discovers the harm.

Other legal outcomes, such as barring trespass suits, are not certain for agricultural producers or their attorneys. They will have to wait until the Oklahoma court system has been called upon to interpret the Act to determine the limit of its protection in trespass suits. If the interpretation negates application of the Act against a trespass action, the opened floodgates could drive many producers out of business, the very result that the Act was intended to prevent. After such an adverse decision, the Oklahoma Legislature could attempt to amend the Act to bar trespass suits, but whether the legislature would favor such an amendment in the future is uncertain.

Remarkably the Oklahoma Supreme Court or Oklahoma Court of Civil Appeals has not interpreted Oklahoma's right-to-farm law since the law's enactment in 1980. As this article has shown the recent amendments bring new legal protection to Oklahoma agricultural producers. Although some of the new provisions appear to have clear interpretations under Oklahoma's case law, such as Paragraph C, protections, such as a defense for causes of action in trespass, will require either the clarification of the Oklahoma Supreme Court or by the Oklahoma Legislature. As Oklahoma continues to see areas urbanize aspects of the right-to-farm law could see legal challenges to answer how to interpret the law.