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INSIDE

IN FUTURE ISSUES

FIFRA preemption of common law tort claims

Two recent state court opinions illustrate the continued uncertainty and confusion concerning the question of whether the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) impliedly preempts state common law tort claims arising from inadequate labeling. The Arkansas Supreme Court in *Ciby-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992), concluded that common law tort claims for inadequate labeling are neither expressly nor impliedly preempted by FIFRA. The Supreme Court of Nevada reached the opposite conclusion in *Davidson v. Velsicol Chemical Corporation*, 834 P.2d 931 (Nev. 1992), in which it held that FIFRA impliedly preempts such claims although the court found no express preemption of state tort actions.

The Arkansas court followed the line of cases illustrated by the D.C. Circuit decision in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert denied*, 469 U.S. 1063, 105 S. Ct. 545 (1985). The Nevada court reached a decision consistent with *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991) and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992); for a list of all cases on the issue, see Note, Papas v. Upjohn Co. - *The Possibility that FIFRA Might Preempt State Common-Law Tort Claims Should be Exterminated*, 45 Ark. L. Rev. 727 (1992).

The Arkansas case involved a corn farmer whose crop was severely injured by the herbicide Dual SE following heavy moisture after planting. The farmer, Alter, alleged that Ciba-Geigy failed to adequately warn of risks associated with the use of the herbicide although the dual label has met with EPA approval. Ciba-Geigy argued that by imposing certain labeling requirements on pesticide manufacturers, Congress had impliedly preempted state tort claims based on the inadequacy of the labels. The Arkansas court disagreed with the manufacturer's position and indicated that Ciba-Geigy had failed to overcome the strong presumption that Congress intended to leave intact a state's ability to compensate citizens for pesticide injury. The federal scheme was not so pervasive as to leave no room for common law tort claims. The court accepted the *Ferebee* rationale that a manufacturer could comply with federal requirements by simply petitioning EPA to allow the label to be made more comprehensive.

In the Nevada case, homeowners sued for personal injuries allegedly suffered from the termiticide Gold Crest Termide, which had been "broadcast sprayed" on the ground in an area intended for the crawl space under their partially constructed home. The Nevada court rejected the *Ferebee* analysis and, instead, followed the *Arkansas-Platte* reasoning that Congress had occupied the entire field of pesticide labeling regulation and that an award of jury damages under tort theories would result in a direct conflict with FIFRA. The Nevada court agreed that there was no express preemption in FIFRA of such tort claims.

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Eighth Circuit rejects challenge to farm program yield determinations

For failure to exhaust administrative remedies, the Eighth Circuit affirmed the dismissal of an action brought by several Missouri farmers challenging the ASCS's refusal to calculate separate irrigated and non-irrigated yields in Missouri, as it did in seven other states, in determining established federal farm program payment yields during the 1981-85 period. *Penner v. Madigan*, 974 F.2d 993, 1992 WL 213949 (8th Cir. Sept. 9, 1992).

Farm program diversion and deficiency payments are partially based on the farm's annual crop yields as determined by the ASCS. Prior to 1986, a farm's program payment yields were either the estimated "established yield" assigned by the local ASC county committee or the "proven yield" determined from the farm's actual yields during the previous five years. A farmer could administratively appeal an unaccept-

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The Arkansas court of May 1992 disagreed with the *Arkansas-Platte* and *Papas* analysis concerning implied preemption and recognized that no case had held that Congress had expressly preempted common law tort claims. The Nevada decision, in August 1992, followed the *Arkansas-Platte* rationale but carefully approached the preemption question by addressing the *implied* preemption claim after concluding that FIFRA does not *expressly* preempt such claims. The court indicated its reasoning for this approach was to be consonant" with *Cipollone v. Leggett Group, Inc.*, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), in which the U.S. Supreme Court announced that if there was a determination of express preemption it was not necessary to infer Congressional intent. *Cipollone* involved the Public Health Cigarette Smoking Act of 1969 and the question of whether claims against cigarette manufacturers were preempted by the federal law.

The Nevada court indicated that *Cipollone* was not instructive on the question of whether FIFRA preempts tort claims but exercised caution in light of the U.S. Supreme Court's action in *Papas*. Prior to the Nevada decision (but after the Arkansas decision) the U.S. Supreme Court granted certiorari in *Papas* but vacated the judgment and remanded it to the Eleventh Circuit in light of *Cipollone*. [See *Papas v. Zoecon Corp.*, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992).] The U.S. Supreme Court may have felt the *Papas* court had contravened the analysis set forth in *Cipollone* by failing to determine whether FIFRA *expressly* preempts state tort claims.

If this is a correct reading of the Supreme Court's reason for vacating the *Papas* decision, the issue remains unsettled as illustrated by the Arkansas and Nevada decisions, both of which found no express preemption in FIFRA but then reached opposite conclusions regarding the issue of implied preemption.

Perhaps, the issue regarding implie preemption will be resolved once the Eleventh Circuit considers *Papas* again. If the Eleventh Circuit still finds implied preemption in FIFRA, as has the Tenth Circuit in *Arkansas-Platte*, then the stage may be set for resolution by the Supreme Court given the earlier D.C. Circuit opinion in *Ferebee* in which the Supreme Court denied certiorari. Obviously, lower courts deserve some guidance on this important question.

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able determination.

The Food Security Act of 1985 froze program payment yields for the 1986 and 1987 crop years. A farm's "frozen" yield was based on the average of its '81 through '85 annual program payment yields, excluding the highest and the lowest yields. The Act gave the Secretary the authority to extend the freeze through the 1990 crop year. The Act did not permit farmers to use proven yield in lieu of frozen established yield, and it did not provide a means for farmers to increase frozen established yields by challenging a yield previously established for the '81-'85 period.

From 1981 through 1985, the ASCS calculated separate irrigated and non-irrigated yields in seven states when determining established yields. In those states, farmers who irrigated received higher established yields per acre, and, as a result, usually received higher diversion and deficiency payments than farmers who did not irrigate.

Missouri was not one of the seven states because the ASCS elected to base established yields on irrigated yields only in areas where irrigation was "a normal and continuing farming practice and yields are substantially increased due to irrigation."

The *Penner* plaintiffs were four Missouri farmers who had irrigated their cropland since 1980. Consistent with the ASCS's policy during the '81-'85 period of not calculating separate irrigated yields in Missouri, the plaintiffs were assigned established yields that did not take into account the results of their irrigation.

Prior to commencing their litigation in 1987, the plaintiffs in *Penner* had not administratively appealed the established yields that they received for the '80-'85 crop years nor had they sought to have their program payment yields based on their proven yields. Only one of the plaintiffs, Penner, had administratively appealed his 1986 yield determination.

The district court dismissed the plaintiffs' challenge on two grounds. First, the plaintiffs' request for declaratory relief was barred by the CCC's protection from injunctions under 7 U.S.C. § 714b(c) because, even though the CCC was not a party to the litigation, the diversion and deficiency programs are "conducted by" the CCC. Second, the plaintiffs had not exhausted their administrative remedies.

Without deciding the "difficult issue whether the CCC anti-injunction statute bars [plaintiffs'] claims for declaratory relief," the Eighth Circuit affirmed the dismissal of the action on the grounds that the plaintiffs had not exhausted their administrative remedies. With regard to plaintiff Penner, who had appealed his 1986 cro year yield determination, the Eighth Circuit held that its earlier decision in *Madsen v. USDA*, 866 F.2d 1035 (8th Cir. 1989), "precludes Penner from raising any issue other than the application of the statutory formula used to calculate his 1986 yield, an issue he failed to raise in the administrative appeal." The Eighth Circuit noted that a collateral attack on the '81-'85 program payment yields would be inconsistent with the 1985 Act because the "1985 Act provided no authority to change or adjust yields established for the 1985 or previous crop years."

Finally, the Eighth Circuit noted, without deciding, a "serious jurisdictional issue" presented by the plaintiffs' notice of appeal, which was captioned "'Franz Penner, et al. v. Edward Madigan, et al.,'" and stated that "'all of the plaintiffs hereby appeal.'" As the Eighth Circuit explained, the U.S. Supreme Court held in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that "'et al.' is insufficient to confer appellate jurisdiction over parties not specifically named in the notice of appeal." The Eighth Circuit "caution[ed] counsel for multiple parties who wish to appeal from a district court order or judgment that naming each appealing part in the notice of appeal is the only way t guarantee that we have jurisdiction over all of them under *Torres*."

—Christopher R. Kelley, Of Counsel, Arent Fox Kintner Plotkin & Kahn

Cash lease to family member not a qualified use under section 2032A

The Ninth Circuit Court of Appeals in the ase of *Williamson v. Commissioner Internal Revenue Service*, 974 F.2d 1525, 92 Dailly Journal DAR. 12652 (Sept. 15, 1992) determined that a cash lease of an inherited farm to the nephew of a decedent, by the decedent's son, was ineligible for the special use valuation of 26 U.S.C. section 2032A because the qualified heir no longer used the property as an active farming business.

In 1983, Beryl Williamson inherited his mother's (Elizabeth Williamson) farm. In filing the estate tax return, Beryl elected the special use valuation for the property as provided in 25 U.S.C. section 2032A. Prior to his mother's death, Harvey Williamson, Beryl's nephew and Elizabeth's grandson, had operated the property as a family farm under a crop share lease with his grandmother.

Beryl raised two issues in challenging the Notice of Deficiency: (1) that the cash lease to Harvey did not constitute a cessation of qualified use pursuant to section 2032A(c)(1)(B), and (2) that the cash lease to Harvey was a sufficient disposition of his interest to make Harvey the qualified heir. § 2032A(e)(1), *Williamson*, at 12653.

To qualify for the special use valuation under section 2032A, the farm must (1) be real property within the United States, 2) which is acquired or passed from a decedent (3) to a qualified heir, and (4) such property must have been used for a qualified use by the decedent or a member of the decedent's family at the date of the decedent's death. §2032A(b)(1).

The definition of "qualified heir" under section 2032A(e)(2) includes lineal descendents; thus, both Beryl and Harvey were qualified heirs meeting the third requirement of section 2032A(b)(1). The property's use as a farm at Elizabeth's death clearly fulfilled the "qualified use" of the fourth and final requirement of section 2032A(b)(a). Cf. section 2032A(b)(2). Therefore, it would appear that the property met the eligibility criteria for special use valuation under section 2032A. However, the Ninth Circuit determined that there was a fifth element of qualification— that the qualified heir personally conduct (actively use) the qualified use of the property. *Williamson* at 12654, *Cf. Martin v. Commissioner*, 783 F.2d 81, 83 (7th Cir. 1986).

The court found that section 2032A expressly provides for the "triggering of the recapture tax" when *the* "qualified heir ceases to use for the qualified use the qualified property." *Williamson* at 12654 iting section 2032A(c)(1)(B). The court also held that *the* qualified heir was Beryl, not Harvey.

The court found this requirement by reviewing the legislative history of section 2032A and the 1981 and 1988 amendments to the section which permitted cash leases by a deceased's spouse to family members. *Williamson* at 12654-55. The Ninth Circuit believed that this history "in no uncertain terms" prohibited the passive rental of the the property. *Id.* at 12654. The court also cited authority that a qualified heir's cash lease to a non-family member did not equal a qualified use in support of this conclusion. *Id.* at 12655, citing *Martin v. Commissioner*, 783 Fed. 2d 81, 83 (7th Cir. 1986).

The intent of section 2032A, as the court saw it, was to entice and reward qualified heirs for accepting the financial risks of family farming. Id. at 12655. Because the risk in this case was shifted to the nephew, the cash lease was a "scheme" to shield Beryl from financial risk and thus not permissible. *Id.* at 12655-56. Interestingly, the court hints that the use of a crop share lease may avoid the passive nature of a cash lease. *Id* at 12657, footnote 5. The rationale of the court appears to be that the "risks and vicissitudes of family farming" would be sufficient utilizing a crop share lease to overcome the passive and "scheme"-like nature of a cash rent lease and therefore fulfill the requirements for a "qualified use" of the property.

The majority also found unpersuasive Beryl's argument that the cash lease was a disposition of this property within the scope of the provisions of section 2032A(e)(1) for transfer of property to a family member. *Id.* at 12657.

The majority felt Congress' enactment of the 1988 amendments to section 2032A, in which section 2032A(b)(5)(A) authorized cash leases by surviving spouses, demonstrated a viewpoint that cash leases did not constitute a disposition sufficient to accomplish a complete transfer because the 1988 amendment implicitly included that conclusion that the "lessor/surviving" spouse remained the qualified heir. *Id.* at 12656. Therefore, Beryl's "short-term transfer of a limited property interest" did not equal a disposition under section 2032A(e)(1).

The dissent presented two points in opposition to the majority. First, the "qualified use" by *a* qualified heir is what is necessary, not by *the* qualified heir. (The dissent focuses on section 2032A(c)(6)). Second, the "*any* interest language of § 2032AA(e)(1) includes a lease for a term of years to a family member. *Id.* at 12660-61, 12662 footnotes, 12 13.

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

AG LAW CONFERENCE CALENDAR

Farmers First
January 7-8, 1993, Brownstone Hotel, Raleigh, NC.
Topics include: The basics of Community Supported Agriculture, value-added production, health food and gourmet markets; family farming and the revitalization of farmers' markets
Sponsored by The Southern Sustainable Agriculture Working Group
For more information, call Betty Bailey (919) 542-1296.

Environmental Law
February 11-13, 1993, Hyatt Regency, Washington, D.C.
Topics include: Eminent domain and "takings" developments, Clean Water Act and wetland developments
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For more information, call 1-800-CLE-NEWS

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
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Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* in the months of October and November, 1992. The days missing from October as reported in the November *Update* are included herein except October 12. November 11 is missing.

1. Foreign Agricultural Service; Special provisions for fresh fruit and vegetable imports under the US-Canada Free-Trade Agreement. 57 Fed. Reg. 48785.

2. APHIS; Accreditation of veterinarians; final rule; effective date 11/23/92. 57 Fed. Reg. 54906

3. PSA; Amendment to certification of central filing system; Idaho; 11/19/92. 57 Fed. Reg. 55506.

4. FmHA; Borrower training in farm and financial management; proposed rule. 57 Fed. Reg. 55473.

5. IRS; Election, revocation, termination and tax effect of Subchapter S status; effective date 11/25/92. 57 Fed. Reg. 55445.

6. FCIC; Mutual consent cancellation criteria; interim rule; effective date October 1, 1992. 57 Fed. Reg. 56436.

—Linda Grim McCormick, Toney, AL

Feeding our future: philosophical issues shaping agricultural law

Neil D. Hamilton

While every period of history has seen the agricultural system change and adapt to new technologies, new markets, and new social conditions, an argument can be made that the agriculture of recent years and that will evolve and emerge over the next decade is being shaped by unprecedented economic, social, and political pressures. These pressures have the potential to dramatically change agriculture. Rapid changes in the demographics of farming and rural communities, shifts in public attitudes and perceptions of farming, continued concentration and vertical integration in both food production and marketing, and new technologies such as genetic engineering, will combine to shape the agriculture of tomorrow.

The goal of this article is to discuss some of the trends, developments and emerging issues the legal community of agriculture needs to recognize and address. Lawyers and legal institutions will play a major role in shaping the future of agriculture as they have in the past, creating opportunities for legal activism both in representing individual farmers and in developing policies and law, at the local, state, national, and international levels on these issues. The article considers several of the philosophical questions shaping the future of agricultural law. [Editor's Note: For a more detailed discussion of these and other issues, the reader is referred to Drake University Law School's White Paper 92-3, which is anticipated to be published in the Nebraska Law Review, Volume 72, No. 1, May/June 1993.]

What is agriculture

An increasingly important issue may be whether some food producing operations lose their status as agriculture if they reach a certain size or are organized in certain ways. Two developments may redesign the shape of agriculture and, in so doing, drastically alter how the public views farming. Those developments are the rapidly advancing industrialization of American agriculture and the sharply declining number of farmers and the related structural shifts in the agricultural system.

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Industrialization of agriculture

American agriculture is becoming more concentrated, more technically advanced, and more integrated with the input and marketing sectors. Thomas Urban, president of Pioneer Hi-Bred International, Inc., the world's largest supplier of hybrid seed, while not advocating the industrialization of agriculture, views the development optimistically, noting it will maximize uniformity and predictability in agricultural production, allowing for branding of food and marketing of "identity preserved" products. He believes it will attract capital to agriculture and lead to more rapid adoption of new technologies. He is also optimistic it will create new opportunities — possibly giving rise to a new family farm — one that is "dependent as much on financial management skills and contract marketing as on production and agronomy know-how" — a "super farmer" who will respond quickly to new opportunities to increase income and reduce risk.[1]

Critics of industrialization identify concerns about the economic and social health of family farms and rural communities, the stewardship of the land, and the effect on the cost and quality of our food.[2]

Declining farm numbers and related structural issues

The 1990 Census data contained startling news for agriculture and agricultural lawyers reflecting the body count of declining farm numbers inflicted by the farm financial crisis of the 1980's. The implications of changing demographics are clear — fewer farms, larger operations, and concentrated land ownership. Legal challenges accompanying these trends may include:

- increased farm tenancy and separation of land ownership from management, meaning an issue of historical legislative concern in connection with land stewardship, may assume greater significance in years ahead;
- creating systems to link older and retiring landowners with young farmers who want a start in agriculture. In Nebraska, the innovative Center for Rural Affairs operates the Land Link program to connect older farm owners with those desiring to start farming, and Iowa has recently instituted a version called "Farm On;"[3]
- continued division of American agriculture into two segments, large scale commercial farms producing most of our grain, meat and fiber and a larger sector of small and part-time farms, which will require laws and policies sensitive to the differing needs of each;
- a changing farm labor market has led to increased use of seasonal and migrant labor to perform functions, such as detasseling seed corn traditionally performed by local youth. The use of seasonal and migrant labor brings with it the obligation to comply with the regimen of federal and state labor laws protecting workers.[4] In August, 1992, the Environmental Protection Agency (EPA) proposed new worker protection regulations concerning handling and safety garment requirements to reduce worker on-the-job exposures to pesticides.[5]

Is there a right to farm?

The question for society is, should farmers be given special protections to carry on activities that have adverse social consequences? Passage of right-to-farm laws and right-to-spray laws indicates society has answered the question affirmatively, at least for now. But the change to an industrialized agriculture may mean the question of whether there is a right to farm is reopened for legitimate inquiry.

Agricultural property use conflicts

Restrictions on the use of farm property represent an area of tension between the agricultural community and society's concerns. The subject involves not just the constitutional taking issue but also conflicts over traditional agricultural activities and restrictions on land use. Four examples illustrate the issues:

- land use restrictions on livestock production;
- agricultural water rights;
- grazing permits on public land; and
- the protection of endangered species.

The first example concerns set-back and distance separation requirements in state regulations on animal feeding and waste disposal. As states have acted to deal with the wastes and potential odors associated with large confined animal feeding operations, some have established set-back requirements to separate livestock facilities from neighboring residences. For example, Arkansas regulations on disposal of liquid animal waste, implemented July 24, 1992, require a minimum of 500 feet separate animal facilities from neighbors and for larger units the distance is one quarter mile.[6]

In June 1991, the Illinois Pollutior Control Board capped five years of work by enacting regulations concerning odors from livestock facilities. The rules require new facilities be located at least one-half

mile from populated areas and at least one-quarter mile from non-farm homes.[7] While the rules may be necessary to accommodate non-farm residents and protect public health, they represent a modern limitation on the tradition of engaging in farming wherever desired.

The second example concerns conflicts between agriculture, especially irrigators, and others over water rights. New attention has focused on creating legal mechanisms to allow marketing of water as some California farmers have done. Shortages have also renewed focus on the social utility of using scarce and valuable water supplies to irrigate low value crops, produced in surplus elsewhere.

The third example concerns the ongoing dispute over grazing on public land and Congressional efforts to increase the fees for grazing permits. New demands for "multiple uses" of public land mean the conflict between what permit holders see as an historic right to graze public land and what environmentalists see as abuse of public land by a small number of permittees promises to continue.

A final example of conflict between public policies and agiculture concerns the Endangered Species Act and its effect on agriculture.[8] The Act has not been a major issue for the agricultural community, but recent controversies concerning the spotted owl and protection of the Snake River sockeye salmon have caused some farm groups to reexamine the possible effect on agriculture. The main fears are expanding lists of endangered and threatened species and a concern the discovery of an endangered species may lead to restrictions on using the farmland which is habitat for the species.[9] In March 1992 a coalition of agricultural and business groups called on Congress to amend the law when it is reauthorized, in order to reduce its impact on agriculture.

Is there a duty of stewardship attached to ownership and use of farmland?

As society tries to protect the environment and natural resources for future generations a fundamental issue has developed — do landowners have a legal duty to protect the land and water they use? The question is often addressed in terms of stewardship.

The covenant of good husbandry in farm leases as a stewardship duty

The fact that close to one half of American farm land is under some form of tenancy raises concerns about the impact the separation of ownership from management may have on how the land is farmed. The trend to increased rates of tenancy and the potential for more land moving into tenancy as a result of an aging and declining farm population, means issues concerning farm leases will become an increasingly important topic foragricultural lawyers. One question relevant to the discussion is whether the common law establishes a stewardship duty in farm leases.

When the parties use a written form lease including specific clauses on proper husbandry and care of the soil, there is little doubt the reasonableness and impact of the tenant's farming practices are subject to judicial scrutiny. A related but perhaps more difficult issue is whether there exists an implied covenant of good husbandry to care for the soil when a lease does not specifically provide one, such as when the agreement is oral.

The general view in American common law is an implied covenant of good husbandry does exist in the lease of farm land, a rule which finds its origins in the doctrine of waste.[10] Several cases illustrate the proposition that all tenants are required to care for the land regardless of the terms of the lease.[11]

The rulings show authority exists in the common law for courts to scrutinize farming practices employed by tenants. In cases where the practices are demonstrably injurious to the land or raise concerns about the impact on public health, such as by threatening water supplies, the courts may have authority, with or without a specific lease term, to find a tenant's actions violate a covenant of good husbandry or are a nuisance. Growing concern over the impact of conventional farming on the environment may create more opportunities for the courts to address the issue of the covenant of good husbandry.

Mechanisms for implementing a duty of stewardship

A discussion of whether agricultural land ownership and use is subject to a duty of stewardship is not complete until the legal mechanisms for implementing such a duty, if one exists, are considered. In addition to enforcing a covenant of good husbandry, several other legal mechanisms have potential for implementing a duty of stewardship:

- using the regulatory authority of local soil and water conservation districts;
- relying on economic incentives, as in federal conservation programs;
- creating systems of producer education and certification; and
- harnessing the economic power of research on sustainable agriculture.

• *Regulatory authority of the Soil and Water Conservation Districts*

One of the more intriguing issues in the nation's effort to establish a long range policy on soil and water conservation is the potential to employ the over 3,000 local soil and water conservation districts as a regulatory mechanism to develop and implement environmental policies. The districts were originally created under state laws to carry out federal soil conservation programs and represent one of the most significant innovations in American soil conservation policy.[12] By combining federal, state, and local administration and funding, the districts have provided a familiar, locally controlled method for implementing soil conservation laws on the nation's farms. Administering non-regulatory conservation efforts remains an important function of the districts even as they adapt to changing environmental issues.

The Standard State Soil Conservation Districts Act, developed in 1936, was the basis for laws enacted in every state. The Act recognized the potential need to have districts play a regulatory role in implementing soil conservation and provided for district enactment and enforcement of local land use control regulations. However, district use of this authority has been limited and many states have deleted the language. In the two dozen states retaining it, use of regulatory authority by local districts has been limited to a handful of districts. But this limited experience with districts regulating environmentally harmful activities has done little to weaken either their potential, or the interest of conservation policy makers searching for ways to reinvigorate the districts as a front line player in the nation's environmental protection effort.

There are notable examples of innovative programs in which local districts or their equivalents are controlling water pollution caused by livestock facilities or use of fertilizers.[13] To date, the examples of local regulatory approaches are more the exception than the rule. The conservation district system remains firmly committed to voluntary programs of education and financial assistance, both as a function of the political beliefs of district leadership and as a reflection of past successes. The reliance is not necessarily misplaced if the districts can successfully implement effective resource protection using these approaches; however, the time may come when the regulatory potential of the local districts, as foreseen by their creators over fifty years ago, must be tapped if agriculture is to develop an effective system of locally designed and administered environmental protection.

• *Economic incentives to "encourage" stewardship*

The 1985 farm bill initiated an unprecedented shift in national soil conservation policy by integrating compliance with soil conservation and eligibility for

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federal farm programs. The mechanism used to deliver the programs is the farmer's economic desire, perhaps need, to participate in farm programs, such as price support loans, deficiency payments, subsidized crop insurance, and disaster loans. The potential loss of eligibility for benefits is used to encourage farmers to comply with the programs. The success, of this extortive linkage in making farmers consider soil conservation problems on their land has been dramatic. The 1990 farm bill added several new programs that continue the evolution of federal soil and water conservation policy.[14] Under the Water Quality Initiative Program (WQIP) farmers who adopt multi-year plans to protect water quality will receive federal payments. While the act set a goal of 10 million acres under contract by 1995, unfortunately Congress has provided only limited funding for the WQIP as a pilot program.[15] Failure to adequately fund the progam means the potential to use economic incentives to change farming practices to protect water quality has not been adequately tested. Several other 1990 farm bill initiatives, including the Wetland Reserve Program (WRP), which has a goal of restoring one million acres of drained wetlands by 1995,[16] utilize conservation easements with the public purchasing a long-term interest in farmland in exchange for the owners agreement to protect important environmental resources. But these programs, most notably the WRP, have also suffered from a lack of Congressional funding.

While the new generation of federal conservation programs has led to a significant shift in farmer attitudes, the implementation of the programs has not been without controversy. The earliest concern for environmentalists was the USDA's lowering of the standards for what was required in conservation plans. The most recent concerns are the pace of adoption of plans and fears the agency has been lax in enforcing the conservation requirements.

Regardless of the disputes over the implementation of the soil conservation programs, the good news is the combination of incentives appears to be working. The USDA inventories levels of soil loss every five years, and recent inventories show the average rate of soil loss is declining in Iowa. In 1987 the average loss was 6.5 tons/acre, down from 8.2 in 1982 and 9.9 in 1977. The success of farmers in reducing soil loss should mean several things. First it will reduce pressure for enacting more onerous regulatory approaches and second it should help shore up the public perception of producers as stewards of the land. Most importantly it may indicate the laws have motivated most farmers to recognize and accept a duty of stewardship.

• *Farmer sponsored certification and education*

A third mechanism for implementing stewardship is to create programs whereby producers voluntarily agree to comply with standards of performance, such as best management practices (BMPs) or "generally accepted agricultural practices" (GAAPs). For example, the Minnesota Turkey Growers recently developed BMPs concerning three subjects: locating and maintaining turkey farms, disposal of turkey manure, and handling dead turkeys.[17] In recent months the National Pork Producers Council has launched what it calls a "pro-active" drive to improve environmental quality by urging members to support standardized BMPs for the pork industry.[18] These producer-supported efforts are designed to motivate farmers to address potential environmental concerns, to limit pollution, and to prevent problems from resulting in more aggressive regulatory approaches.

These efforts are a natural outgrowth of the traditional reliance in American agriculture on education and voluntary actions to address resource protection issues. The producer-supported efforts parallel applicator certification and education requirements found in federal and state pesticide laws. Some states are now including producer education and certification programs in other laws. The new Arkansas liquid animal waste rules require all permit holders to provide "certification of satisfactory completion of formal education or training in the areas of waste management and odor control."[19] The law requires four hours of education for issuing a permit and an annual refresher course.

In recent years there has been much clamor for reform in federal agricultural price and income support policies, including the original American proposal in the GATT Uruguay round to eliminate all trade-distorting domestic subsidies within ten years. One concern about such suggestions, given current conservation programs, is what will be the mechanism to achieve resource protection goals if the need to maintain eligibility for farm program benefits no longer exists. While the U.S.' lack of success in promoting radical reform has delayed consideration of the issue, it is not unreasonable to believe farm progam reform will remain on the political agenda. As the farming sector becomes smaller and public pressure to integrate environmental protection with agricultural practices becomes stronger, there may be real opportunities for using producer certification and education as a mechanism for implementing a duty of stewardship. Such an approach could offer an effective way of verifying the "professionalism" of producers and provide a modern basis for public funding of agricultural supports. The idea to support farmers on the basis of how they farm, not necessarily what they grow, can be characterized as an effort to "recouple" farm price support programs with stewardship, as contrasted to suggestions support be "decoupled" from production. One idea is to pay farmers a stewardship fee for how they farm, an idea partially reflected in the WQIP.[20]

• *Harnessing the economic power of research on sustainable agriculture*

The concept of sustainable agriculture is a major development in American agriculture that will have a direct effect on the legal approach chosen to address environmental concerns.[21] Sustainable agriculture is defined in various ways, but in its simplest form, it means agicultural practices that protect the environment while preserving the profitability of farmers. Most federal and state interest in sustainable agriculture has been focused on research and implementing alternative farming practices that reduce impacts on the environment while resulting in cost savings or increased farm income. Substituting natural methods of pest control, using animal wastes for fertilizer, developing alternative practices such as a useable test for nitrogen so farmers apply only what is needed, are examples of sustainable agriculture.

Sustainable agriculture could be a powerful influence on American agricultural policy. By focusing on how decisions affect the "sustainability" of agriculture, decisions can be made that incorporate a concern for the environment. More importantly, by combining a concern for the environment with attention to the economics of farming, sustainable agriculture offers a way to harness the producer's natural concern for the economics of farming.

In Iowa the results from sustainable agriculture research funded by the Leopold Center on how to reduce the use of nitrogen fertilizer are already being seen. Recent studies indicate the average rates of nitrogen fertilizer used per acre in Iowa have dropped from 145 lbs. in 1985 to 127 lbs. in 1990 without affecting yields, meaning Iowa farmers are saving $80 million a year in reduced fertilizer costs while reducing the potential for nitrates to enter water supplies.[22]

By merging economics and environmental stewardship, sustainable agriculture holds great potential for the U.S. It may offer a way to reduce the tension between the environmental community and the farm sector, and help preserve consumer confidence in the quality of our food. It may provide a basis for justifying continued public funding of agricultural programs. If farmers adopt new practices

to protect the environment, the negative environmental effects creating public pressure to regulate agriculture should subside.

Conclusion

America has long recognized the fundamental role agriculture plays in building society. Daniel Webster said in 1840, "let us never forget that the cultivation of the earth is the most important labor of man.... When tillage begins, other arts follow. The farmers, therefore, are the founders of human civilization."[23] The function of agricultural law is to protect and preserve the role of agriculture in society by creating relations that encourage both its economic prosperity and its physical sustainability, while satisfying the social obligations placed on it. The historic orientation of American agricultural law toward concentrating on the practical issues facing American farmers and agricultural businesses does not mean the law is not concerned with the theoretical and philosophical issues underpinning the relation of agriculture to society. As the study of agricultural law matures and as the full range of legal issues shaping agriculture are recognized, agricultural lawyers, as scholars and professionals, must devote more time and resources to addressing the fundamental questions facing society in considering the future of agriculture.

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[1] Thomas N. Urban, "Agricultural Industrialization: It's Inevitable," *Choices*, 4th Quarter, 1991, p. 5.

[2] See e.g. George Anthan, "Is industrialization good for U.S. agriculture," *Des Moines Register*, Dec. 15, 1991, p. 2C who compares Urban's talk with Wendall Berry's article, "Living with the land," 46 *J. Soil and Water Cons.* Nov.-Dec. 1991, p. 390, which decries the social ills accompanying industrialized agriculture.

[3] Dan Looker, "Nebraska program comes to Iowa," *Des Moines Register*, April 1, 1992, p. 8S. The idea of linking retiring farmers with new producers has even spawned at least one commercial venture in Iowa. For a fee, Homestead American, will assist beginning farmers in finding financing and farms. Dan Looker, "Firm matches farmers, beginners," *Des Moines Register*, July 17, 1992, p. 8S.

[4] For an excellent review of these laws and a discussion of how America's largest seed corn company deals with potential worker claims, see Beverly Clark, *The Iowa Migrant Ombudsman Project: An Innovative Response to Farmworker Claims*, 68 N.D. L. Rev. 509 (1992).

[5] See 57 Fed. Reg. 38102, August 21, 1992, 40 CFR Parts 156 and 170, and "EPA issues regulations to protect farm workers from pesticides exposures," *Des Moines Register*, August 14, 1992, p. 4A.

[6] State of Arkansas Department of Pollution Control and Ecology, Regulation No. 5, "Liquid Animal Waste Management Systems," section 6(3).

[7] Illinois Pollution Control Board Amendments to 35 Ill. Adm. Code 501, R90-7, June 20, 1991. The rules are discussed in Neil Hamilton, *A Livestock Producer's Legal Guide to: Nuisance, Land Use Control, and Environmental Law*, Drake University (1992) p. 104.

[8] Endangered Species Act of 1973, 16 U.S.C. §§ 131-1544 (1988).

[9] See e.g., Smith, Rod, "Endangered species listings seen as potential threat to livestock producers," *Feedstuffs*, Aug. 26, 1991, p. 4.

[10] See e.g. 49 Am. Jur. 2d, Landlord and Tenant § 230, at 249, § 26 (1970); 2 Walsh, Law on Real Property § 161 (1947); and 4 Thompson on Real Property section 1614 (1940). For a discussion of waste law see 93 C.J.S. Waste, §§ 1-19 (1988). Poor husbandry by itself does not constitute waste but may when it materially affects the rights of the other party.

[11] See, e.g. *Turner v. McNutt*, 197 S.W.2d 143 (Tex. Civil App. 1946), *Schultz v. Ramey*, 328 P.2d 937 (N.M. 1958), *Newberry v. McLaren*, 575 S.W. 2d 438, 440-41 (Ark. 1979), and *Olson v. Bedke*, 555 P.2d 156 (Idaho 1976).

[12] For an historical discussion of the role of soil in the development of civilization and the impact of soil erosion, see Daniel Hillel, *Out of the Earth: Civilization and the Life of Soil*, The Free Press (1991).

[13] For a thorough discussion of a number of innovative district efforts, see, Nancy Bushmiller, Hal Hiemstra, and Sarah Brichford, eds., *Cooperating for Clean Water: Case Studies of Agricultural Nonpoint Source Pollution in the Great Lakes States*, National Association of State Departments of Agriculture Research Foundation (1986).

[14] See, Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990), [hereinafter cited as FACTA] codified in various sections of 16 U.S.C.

[15] The WQIP received $3.5 million in 1991, $6.7 million in 1992, but for 1993 the Senate approved an increase to $15 million. See, Center for Rural Affairs newsletter, August 1992, p. 2.

[16] FACTA, § 1238, codified at 16 U.S.C. § 3837 et seq.

[17] Rod Smith, "Minnesota turkey growers adopt environmental management," *Feedstuffs*, Oct. 14, 1991, p. 18.

[18] Steve Marberry, "NPPC launches pro-active drive to improve environmental quality," *Feedstuffs*, March 23, 1992, p. 1.

[19] State of Arkansas Department of Pollution Control and Ecology, Regulation No. 5, "Liquid Animal Waste Management Systems," § 5(3)(a).

[20] Editorial, "Pay a 'stewardship fee.'" *Des Moines Register*, Sept. 24, 1991, p. 8A.

[21] "Sustainable Agriculture: What's It All About?" *Agricultural Outlook* USDA/ERS, May 1992, p. 30.

[22] Dan Looker, "Iowa farms' nitrogen use drops," Dec. 6, 1991, p. 1A, which reports findings by the Iowa Department of Natural Resources. During the period average rates of nitrogen use increased in Illinois.

[23] Wheeler McMillen, ed., *Harvest: an anthology of farm writing*, Appleton-Century, (1964), quoting Webster at p. 101-02. His comment came in an address given January 14, 1840 at the State House in Boston.

ASCS limited partnership determination upheld

The United States Claims Court has upheld the ASCS's determination that a Nebraska partnership organized and operating as a limited partnership was a limited partnership for eligibility purposes under the Emergency Livestock Feed Assistance Ace of 1988 notwithstanding the fact that each partner was both a general partner and a limited partner and that no partner's liability was limited during the period relevant to the eligibility determination. *Milligan v. United States*, 26 Cl. Ct. 1386, 1992 U.S. Cl. Ct. LEXIS 466 (Cl. Ct. Oct. 9, 1992). In essence, the court upheld "the ASCS's policy [of considering] the entity as a limited partnership where all partners are both limited and general, if that determination is more restrictive." *Id.* at *18.

—Chris Kelley

Entanglement injuries caused by farm equipment

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The National Institute for Occupational Safety and Health (NIOSH) has requested information from anyone knowing of entanglement injuries caused by drive shafts and other moving parts on farm machinery.

NIOSH estimates that from 1980 through 1988 an annual average of 16 U.S. workers age 16 or older were killed by entanglement in the power take-offs (PTOs) or similar rotating drivelines on farm machinery. The agency also estimates that about 148 emergency room admissions for work-related, nonfatal injuries involving PTOs occurred each year from 1982 through 1986.

The NIOSH Agriculture Health and Safety Initiative assesses potential hazards associated with agricultural equipment of all types and manufacture. A component of the initiative is the Occupational Health Nurses in Agricultural Communities project, which supports local surveillance and intervention efforts in 10 states: California, Georgia, Iowa, Kentucky, Maine, Minnesota, New York, North Carolina, North Dakota, and Ohio.

Among programs funded by the project is the Agricultural Health Nurse Program (AHNP) of New York, which recently investigated scalping incidents involving hay balers. AHNP received reports of four incidents in which women suffered traumatic avulsion of the scalp when their hair was caught in the secondary driveline of New Holland hay balers. The balers had inverted U-shaped shields that left the bottoms of the drivelines unguarded. The hay balers involved -- models 54A, 54B, 58, and 62 — were manufactured in the early 1970s, and the company subsequently redesigned its shields. The balers are no longer being manufacturered, but an unknown number of these models remain in use. *Scalping Incidents Involving Hay Balers — New York*, 268 JAMA 707 (1992).

To report or request information on farm-equipment entanglement injuries, write the Division of Safety Research, NIOSH, Centers for Disease Control, Mailstop 115, 944 Chestnut Ridge Road, Morgantown, WV 26505; or call (304) 291-4710.

—submitted by Peter C. Quinn, editor, Products Liability Law Reporter

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

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The Association would recognize members serving on the following committees for the 1993 membership year.

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Membership Announcements
The AALA has a new membership brochure. Please call Bill Babione at 501-575-7389 to receive several to share with colleagues.