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

IN FUTURE ISSUES

- Trespassing livestock and murder convictions: could a deficient fence lead to a prison term for a livestock owner?

Draft Guidance Manual *for CAFOs available for public comment*

On August 6, 1999 EPA published its draft *Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations (CAFOs)* pursuant to the recently released *USDA/EPA Unified National Strategy for Animal Feeding Operations.* While this draft guidance has no legal effect, it explains EPA's approach to enforcing existing law and regulations governing CAFOs. EPA has requested that written public comments on the draft guidance be submitted to Gregory Beatty, 401 M Street, S.W., Mail Code 4203, Washington, D.C. 20460 or by e-mail at: beatty.gregory@epa.gov. The closing date for public comments is October 6, 1999. The draft guidance may be found at:

http://www.epa.gov/owm/afo.htm

The draft guidance clarifies the definition of a CAFO by specifying both the manner by which EPA will count days and determine the applicable 12-month period. It also distinguishes between pasture and grazing land on the one hand and lots with no or minimal vegetation on the other. EPA also indicates that it will apply the holdings in *CARE v. Southview Farm*, 34 F.2d 114 (2d Cir. 1994) and *CARE v. Sid Koopman Dairy*, 1999 U.S. Dist. LEXIS 8348 (E.D. Wash. 1999)[Editor's note: see "CAFOs as point sources" on page 3] as these decisions apply to land application of wastes. The draft guidance clarifies other definitional issues such as EPA's approach to calculating the size of the animal feeding operation (AFO).

The draft guidance states EPA's belief that virtually all AFOs with more than 1,000 animal units are CAFOs that require NPDES permits. The draft guidance indicates that the burden of proof is on the AFO to show that discharges occur only in the event of a 25-year, 24-hour storm event. The procedure by which an AFO must prove this is to apply for a NPDES permit and provide the required technical documentation in the permit application. The draft guidance states EPA's position that most if not all AFOs with more than 1,000 animal units cannot meet this burden.

The draft guidance states EPA's position that AFOs with 301 to 1,000 animal units may be CAFOs if any one of three discharge conditions are met. These three methods of discharge include 1) discharges into waters of the United States through man-made ditches, flushing systems, or other similar man-made devices, 2) discharges directly into waters of the United States that originate outside the facility and pass

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Upholding the New York Right to Farm Law

In 1992, the state of New York enacted the New York Right to Farm Law. N.Y. Agriculture & Markets Law § 308 (McKinney 1999). The law was the result of the legislature's desire to protect farmland and farmers threatened by non-agricultural farm development and the peril of private nuisance suits. The Right to Farm Law specified that the commissioner of agriculture and markets shall, in consultation with the state advisory council on agriculture, issue opinions upon request from any person as to whether particular agricultural practices are sound. If the Commissioner determines that a practice is sound, that practice shall not constitute a private nuisance. The decision is final unless a person affected by the opinion institutes article 78 of the New York Civil Practice Laws and Rules (CPLR) requesting review of the opinion.

In *Pure Air and Water of Chemung County (PAW) v. Donald Davidsen, as Comissioner of Agriculture and Markets,* State of New York Supreme Court, County of Albany, Index Number 2690-97 (May 21, 1999), the defendant, Donald Davidsen, is the Commissioner of Agriculture and Markets for the State of New York. On April 23, 1996, Joseph Trengo submitted a request pursuant to section 308(1) for an opinion regarding the soundness of the livestock housing and manure spreading practices at the Trengo farm with respect to odor. The Trengo Feedlot is a hog farm,

Continued on page 3

over, across, or through the facility or otherwise come into direct contact with the confined animals, or 3) discharges to groundwater with a direct hydrological connection to surface water. AFOs with up to 300 animal units may be CAFOs only by designation of a regulatory authority. CAFOs so designated are not subject to the 25-year, 24-hour storm event exemption. Such an AFO must be inspected by a regulatory authority before such a designation can be made. Regulatory authorities may grant AFOs of up to 1,000 animal units "good faith" exemptions to the NPDES permit requirement if they have a Comprehensive Nutrient Management Plan (CNMP) in place. Note, however, that the draft guidance states that the existence of a CNMP does not constitute compliance with the CAFO rules.

The draft guidance clarifies that it is the responsibility of the operator of the AFO to apply for the NPDES permit. Where the AFO is substantially controlled by another company (the draft guidance does not use the term integrator; however, it is fairly clear that it is EPA's intent to include integrators in this definition), that company must apply with the operator as a co-applicant for the NPDES permit.

Effluent Limit Guidelines (ELGs) are discussed in the draft guidance. The ELGs apply only to CAFOs with more than 1,000 animal units. For smaller CAFOs, effluent limits will have to be developed on a case-by-case basis. The ELGs apply only to feedlots and not to the land application of manure and wastewater. The EPA anticipates developing effluent limits for land application of manure and wastewater.

The EPA notes that where a CAFO controls the land upon which manure and wastewater are applied, that operation must be included in its NPDES permit application. Where the recipient of manure does not have a CNMP, it may be required to apply for a NPDES permit. General NPDES permits are encouraged except where the draft guidance indicates otherwise. CAFOs that require individual permits include exceptionally large operations, operations undergoing significant expansion, operations with a history of compliance problems, operations that have significant environmental concerns, and new CAFOs. Smaller CAFOs are encouraged to upgrade so that they can exit the NPDES regulatory program. Coordination with total maximum daily loads (TMDLs) is required. The draft guidance provides details on other issues not included in this summary.

—Theodore A. Feitshans, North Carolina State University

Prevented planting interpreted

In *Snell v. Glickman*, No. 98-2190, 1999 U.S. App. LEXIS 6034 (10th Cir. Apr. 2, 1999), the plaintiff was a dryland wheat farmer in New Mexico in a region that had been affected by drought conditions for the previous three to four years. The plaintiff did not plant a wheat crop after determining that the moisture level in the soil was too low and would likely cause a wheat crop to not mature and the land to suffer wind erosion. The plaintiff's neighbors did plant wheat and their crops failed to mature resulting in severe wind erosion to their land. The plaintiff applied to recover crop insurance benefits on the basis that the drought prevented him from planting his wheat crop. Coverage under the policy was provided for "prevented plantings," defined in part as the inability "to plant the insured crop due to an insured cause of loss that is general in the area (*i.e., most producers in the surrounding area are unable to plant due to similar insurable causes*)."

The local Farm Service Agency denied the plaintiff's claim, and the plaintiff appealed to the USDA's National Appeals Division (NAD). The NAD hearing officer denied the claim, noting that the plaintiff's concern for conservation was secondary with respect to the terms of the crop insurance policy. Because the plaintiff's neighbors were able to and did plant wheat, the plaintiff did not meet the insurance criteria for "prevented plantings." The hearing officer's decision was upheld in a subsequent administrative appeal.

On appeal to the Tenth Circuit, the plaintiff claimed that the "prevented planting" provision in the policy was unreasonable because it required the plaintiff to violate sound conservation practices to be eligible to recover under the policy. The court upheld the administrative findings on the basis that the plaintiff had not demonstrated that the insurance program's general reliance on what other farmers do as a measure for determining whether planting is "prevented" was unreasonable or not in accordance with law.

—Roger A. McEowen, Kansas State University

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eds., 1979).

[46] *See, e.g.*, John Casagrande, *Acquiring Property Through Forced Partition Sales: Abuses and Remedies*, 27 B.C. L. Rev. 755 (1986); Christopher R. Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Actions—A Partial Solution*, 1995 Ark. L. Notes 35.

[47] Hurt, *supra* note 36, at 332. *See generally* Jack Temple Kirby, Rural Worlds Lost: The American South, 1920-1960 (1987).

[48] Hurt, *supra* note 36, at 332-33.

[49] Anthony Walton, Mississippi: An American Journey 224-25 (1996).

[50] Saloutos, *supra* note 42, at 179-99.

[51] Hurt, *supra* note 36, at 333.

[52] United States Commission on Civil Rights, *Equal Opportunity in Farm Programs* (1965).

[53] *E.g.*, United States Commission on Civil Rights, *Cycle to Nowhere* (1970).

[54] *The Minority Farmer: A Disappearing American Resource: Has the Farmers Home Administration Been the Primary Catalyst?*, House Committee on Government Operations, H.R. 101-984, 101st Cong., 2d Sess., 1990, at 41.

[55] Wood & Gilbert, *supra* Note 1, at 2.

[56] *Id.* at 2, 4.

[57] *Id.* at 9.

[58] *See* Effland et al., *supra* note 1, at 19.

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CAFOs as point sources

Since the *Southview Farm* case in 1994 (34 F.3d 114 [2d Cir. 1994]), counselors have contemplated the meaning of point source pollution governed by the Clean Water Act. A recent case from a federal district court in Washington considered issues concerning point sources and the definition of confined animal feeding operations (CAFOs) under a motion for partial summary judgment. *Community Association for Restoration of the Environment v. Koopman Dairy*, Case No. CY-98-3003-EFS (1999 U.S. Dist. LEXIS 8348).

The Koopman defendants, including separate dairies, admitted that portions of their dairy operations were point sources but argued that issues for the trier of fact remained as to the specific portions that were point sources. The court agreed and found genuine issues of material fact as to the extent to which the defendants' lands, operations of facilities, and actions of manure-spreading equipment are point sources.

On the issue of what parts of defendants' lands were part of a CAFO, the court was able to grant plaintiffs partial summary judgment. The court determined that the defendants' CAFOs included confinement areas, lagoons and systems used to transfer the animal wastes to the lagoons, and equipment which distribute and/or apply animal wastes produced at the confinement area to fields outside the animal confinement area.

The court declined to grant summary judgment on whether the drains, ditches, and canals at issue were considered to be within the Clean Water Act's definition of "waters of the United States." [33 U.S.C. §§ 1311(a), 1362(12), 1362(7)].

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

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which houses up to 1,000 pigs. After an investigation and examination had been conducted at the Trengo Farm, Opinion Number 97-1 was issued on January 8, 1997. The Opinion concluded that the livestock housing and manure spreading practices on the Trengo Farm as they relate to odor were sound.

The plaintiff was Pure Air and Water, Inc. of Chemung County (PAW). PAW represented the interests of various nearby residents who were concerned with the environmental and other impacts of the Trengo Farm. PAW alleged that deficient practices employed by the Trengo Feedlot have resulted in severe air quality degradation that has jeopardized the health and quality of life of nearby residents. PAW wanted the courts of New York to declare the New York Right to Farm Law unconstitutional because it deprives PAW's members of property without compensation and due process by allowing a private party to unreasonably interfere with their properties. PAW claimed that the New York Right to Farm Law violated the State and Federal Constitutions, and the decision from Commissioner Davidsen was illegal and unconstitutional.

In a prior suit *(Matter of Pure Air and Water Inc. of Chemung City v. Davidsen,* 246 A.D.2d 786, appeal dismissed 91 N.Y.2d 955), involving the same parties and similar challenges, PAW denominated the suit as an article 78 procedural due process proceeding. The court dismissed the article 78 challenge and PAW amended its complaint to seek only a declaration that section 308 and the Opinion rendered thereunder was unconstitutional.

The issue in this case is whether New York's Right to Farm Law is unconstitutional because it authorizes an easement on the property of neighbors, which amounts to an unconstitutional taking prohibited by the Fifth and Fourteenth Amendments of the U.S. Constitution, and the New York State Constitution?

PAW relied heavily on *Bormann v. Board of Supervisors in and for Kossuth County, Iowa*, 584 NW2d 309, *cert denied* 119 S. Ct. 1096, a recent Iowa case that involved a takings challenge to a provision in Iowa's Right to Farm Law. The Iowa statute gave the County Board of Supervisors the power upon application to designate land as an "agricultural area," and allow such activities as the creation of noise, odor, dust and fumes. Iowa Code Ann. § 352.6. Once designated, the statute provided that "a farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation." Iowa Code § 352.11(1)(a).

The Iowa Court declared the latter portion of the section unconstitutional, reasoning that the immunity given resulted in the Board's taking of easements in the neighbors' property. The court found that "the easements entitled applicants to do acts on their property, which, if not for the easement, would constitute a nuisance... amounting to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. *Bormann*, 584 NW2d at 316.

Unlike the Iowa statute, section 308 of the New York Agricultural and Markets Law does not provide for blanket authorization of agriculture practices based on location; rather, the Commissioner provides an assessment of a given agricultural practice when rendering an opinion on a case by case basis. Only after extensive consultation and investigation, and if the Commissioner determines that the practice is sound, will it be found not to constitute a nuisance. *Matter of Pure Water and Air*, 246 AD2d at 787, appeal dismissed 91 NY2d 955; Agricultural and Markets Law § 308.

And most significantly, unlike section 325.11(1)(a) of the Iowa Code, the issuance of an opinion by the Commissioner under section 308 does not provide immunity from suit. There is nothing to prevent a plaintiff from bringing suit and presenting proof to overcome the defense provided for in the Right to Farm Law, nor is there any barrier in the statute preventing an aggrieved party from commencing a CPLR article 78 proceeding to challenge the Commissioner's opinion. In fact, section 308-a of the Agricultural and Markets Law provides for the recovery of fees and expenses in certain private nuisance actions.

The court held that New York's Right to Farm Law does not confer immunity against nuisance suits, or permit the willy-nilly maintenance of a nuisance. The Right to Farm Law does not create a property right (i.e., easement), or constitute a compensable taking under the Fifth Amendment of the U.S. Constitution or Article I, § 7 of the New York State Constitution. The court ruled in favor of the Commissioner and declared New York's Right to Farm Law constitutional.

—Jeff Feirick, Grad. Research Asst., J.D. student, Ag. Law Research and Education Center Pennsylvania State University, Dickinson School

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[59] Wood & Gilbert, *supra* note 1, at 6.

[60] Effland et al., *supra* note 1, at 19.

[61] USDA, Econ. Research Serv., *Rural Conditions and Trends*, Feb. 1999, at 111. A "limited resource farm" is "any small farm with (1) gross sales less than $100,000, (2) total farm assets less than $150,000, and (3) total operator household income less than $20,000." *Id* at 108.

[62] Donna F. Abernathy, *A Legacy Lives On: Cooperative Approach Helps Black Growers Succeed,* Rural Cooperatives (USDA, Rural Bus.–Coop. Serv., May-June 1998) at 4.

[63] Donald Washington & Kurt Seifarth, *Federation of Southern Cooperatives Makes Big Move To Become an International Player*, AgExporter (USDA, Foreign Agric. Serv., May 1999) at 4.

[64] *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

Notes on African American farmers

By Christopher R. Kelley

With estimates of the current numbers of African American farmers as low as 15,000,[1] it is ironic that Africans were brought to and held in this country for their "ability to work the land...."[2] Although blacks have been closely attached to the land for much of their history in America, American farming today is overwhelming dominated by whites. "American agriculture's entrepreneurial class is roughly ninety-eight percent white–a higher concentration of whites than in almost any other economic endeavor in the United States."[3] Moreover, while the numbers of farmers who are members of other under-represented groups, including Hispanics and women, have stabilized or increased, the number of black farmers continues to decline.[4]

That blacks have labored on farms since they were first brought to America as slaves is well-known.[5] Less well-known is the fact that blacks have operated their own farms for almost as long. Since no other group of farmers has faced greater obstacles to their advancement in this country, the history of this nation's black farm operators is extraordinary. The notes that follow offer a brief chronology of the gains and losses of black farmers in America.

Black farmers before the Civil War

Until the end of the Civil War, farm ownership by blacks was almost exclusively limited to blacks who were free. Though the number of free blacks was always relatively small, the path from slavery to freedom was never entirely blocked. The first blacks imported as slaves in this country during the seventeenth century were brought to the southern mainland British colonies, initially Maryland, Virginia, and South Carolina, and later North Carolina and Georgia. Few in number, "they were allowed a large measure of autonomy" working on small farms or "isolated cowpens."[6] Some were able to use this autonomy to acquire cash and to purchase themselves. In the Virginia colony, some of the first blacks to arrive apparently came to the colony as indentured servants, and they received their freedom after serving their indenture. Others were freed by their masters or had their freedom purchased by missionary and religious organizations or previously freed relatives.[7]

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By the 1650s, a small number of free blacks in Virginia had become landowners. Notably industrious, they raised tobacco, corn, wheat, vegetables, and livestock and used the proceeds to acquire more land. Some also acquired slaves and were not hesitant to assert their rights as property owners and slaveholders. For example, in 1655, Anthony Johnson, a black owner of a 250-acre Virginia farm successfully sued his white neighbor for the return of a runaway slave.[8] In the 1660s, after Virginia began to restrict the activities of free blacks, he moved his family to Maryland. There, both his son and his grandson acquired farms. By 1677, "fifty-eight years after the arrival of the first slaves on American soil," the Johnson family could boast of three generations of farm ownership.[9]

As illustrated by Mr. Johnson's willingness to sue a white neighbor, free "black farmers in early Virginia considered themselves equal to white colonists."[10] As more slaves arrived, however, whites became increasingly fearful of freed slaves, and in 1691 the Virginia Assembly prohibited future manumissions. Thereafter, the number of free blacks declined in Virginia and elsewhere in the South. By 1770, only 1.5 percent of Southern blacks were free.[11]

The American Revolution reversed this decline. Both during and following the Revolution, a substantial number of slaves gained their freedom. Some were freed by the British while others were freed for fighting the British. In 1782, Virginia repealed its prohibition against private manumissions and over the next eight years over 12,000 Virginia slaves were freed. Slaves were also freed elsewhere in the South, but in substantially smaller numbers in the Lower South. Nonetheless, by 1800, "the number of free blacks had grown an astonishing 1,700 percent; one out of every twelve blacks in the South was free."[12]

In the 1780s and 1790s, freed slaves began acquiring land in the Lower South. Some even acquired large plantations. By 1786, for example, James Pendarvis, a former slave, had acquired a 3,250 acre plantation in South Carolina and owned 113 black slaves, placing him "among the largest individual black slave owners in American history."[13] Like Pendarvis, whose father was a white planter and his mother a black slave, most of those who acquired farms in South Carolina "were direct descendants of whites who had granted them large tracts of land...."[14] Freed slaves, usually of French or Spanish and black ancestry, also entered the planter class in Louisiana.[15]

Prior to the end of the Civil War, however, most blacks remained slaves. Rarely were slaves able to acquire land, though many acquired livestock and other personal property through the widespread practice of allowing slaves to tend a portion of their masters' lands for their own use. While this practice began to permit slaves to supplement their meager diet, in some locations it expanded into a "domestic slave economy" that allowed slaves to produce cash crops which were sold to the slaves' masters or local merchants.[16]

Livestock and other property was also acquired through self-hire. "Self-hire had a long tradition in American slavery, stretching back to the earliest colonial period when some slaves, usually the most skilled and trustworthy, were allowed to contact a potential employer, make arrangements for wages and working conditions, and secure their own food and lodging."[17] Despite laws forbidding self-hire throughout the South, the practice persisted because both slaves and masters benefitted from it. Even though self-hired slaves usually paid their master a portion of their earnings, the arrangement gave them a degree of autonomy as well as income. Slave masters benefitted because they "did not have to pay for the slave's clothing or lodging and also saved the 5 to 8 percent fee charged by a hiring broker as well as the aggravation of taking care of the matter themselves."[18]

Some black farm operators were "quasi-free," or "virtually free" slaves. While still nominally slaves, "quasi-free" slaves included those who were illegally manumitted or simply left unsupervised by their owners.[19] Most of these slaves resided in cities and towns where it was easier to avoid detection, but a few occupied and farmed land owned by their masters or took up residence on deserted farms.[20] A small number of "quasi-free" slaves acquired land by posing as free.[21]

Despite laws prohibiting property ownership by slaves throughout the South, by the eve of the Civil War "considerable numbers of slaves had become property owners."[22] The ownership of livestock was particularly widespread. Indeed, in commenting on the General Sherman's confiscation and consumption of most of the livestock his army encountered in its advance on Georgia, an historian has observed that "little did he realize . . . that some of the possessions and livestock being seized [by his troops] belonged to the very slaves he had marched to the sea to liberate."[23]

Black farmers following the Civil War

Notwithstanding the extraordinary rise

of some blacks from slaves to farm owners during the antebellum period, most blacks were landless at the end of the Civil War. In 1880, 75 percent lived in the former Confederate states and were primarily engaged in agricultural work as sharecroppers or tenants.[24] Though the distinction between a sharecropper and a tenant is sometimes blurred in accounts of both, sharecroppers were wage laborers. "The courts in every southern state came to the same conclusion: the cropper was a wage laborer, his wages being a portion of what he produced paid *to* him *by* the landlord. The tenant was a renter who paid *to* the landlord for use of the land; it did not alter the relationship if the rent was a portion of the crop produced...."[25] In theory at least, sharecropping offered the possibility of higher income than fixed wages.[26] While the question of whether this theory matched reality remained subject to debate, sharecropping predominated in places like the Arkansas Delta until World War II.[27]

Even those blacks who had the capital to purchase farmland found that whites, who "looked upon land as their only important capital investment, ... were reluctant to sell land to blacks, whom they did not want to enjoy the power that came from the ownership of land in the South."[28] Remarkably, however, some blacks were able to work up the "agricultural ladder," a phrase used to describe the transition form "landless laborer to sharecropper to renter to landowner."[29] The patterns of black farmland ownership varied across the South, but almost invariably blacks were able only to acquire land deemed undesirable by whites:

> [t]he proportions of black farmers who owned land were greatest in the Upper South, along the coastal regions, and in the trans-Mississippi states. Very few blacks owned land in the Black Belt that cut across the region. Black landowning was the greatest, in other words, where the concentration of cotton was lowest and where blacks made up a relatively small part of the population. Blacks owned farms where land was cheap, where railroads had not arrived, and where stores were few; they got the "backbone and spare ribs" that white farmers did not value.[30]

Black landownership in 1910 embraced an estimated 15 million acres.[31] Most of that land was in the South, where 91 percent of all African Americans lived.[32] In 1910 blacks constituted one-half of the South's population, and owned 158,479 farms. Southern whites, on the other hand, owned 1,078,635 farms.[33] Black-operated farms totaled 212,972.[34]

The number of black-operated farms stood at about 926,000 in 1920. Black farmers, including sharecroppers and tenants, constituted one-seventh of all of the nation's farmers.[35] However, nearly one-half of all farms in the South in 1920 were less than fifty acres. "Tenancy remained a 50 percent for the white farmers, and tenancy rates for African-American farmers reached as high as 90 percent in some areas."[36]

Though the peak of black landownership roughly coincided with World War I, "[t]he outbreak of World War I marked the beginning of the long and tragic decline of black agriculture and land tenure in the South."[37] When European nations ceased importing cotton, cotton prices collapsed. "The cotton disaster of 1914 ruined many thousands of black and white farmers, and affected agriculture for years to come."[38] The boll weevil was even more destructive, since few black sharecroppers or owner-operators could afford insecticides.[39] Added to these problems were worsening race relations, soil erosion and depletion, and the monopolistic control that white planters and their allies held over credit and other factors of agricultural production.[40] "Given the structure of the domestic economy, it was inevitable that black farmers would be forced off the land and evicted from their homes to work at factory jobs in the cities of the New South and the urban ghettos of the North."[41]

The farm programs of the New Deal did little to help black farmers. Some successes were achieved by the efforts of the Resettlement Administration and the loan programs administered by the Farm Security Administration,[42] although the successes of these programs were diluted by racial discrimination in their administration.[43] In the main, however, the New Deal programs worked against black farmers by protecting white planters and shifting the risks to tenants, white and black:

> [U]nder the [Agricultural Adjustment Act (AAA)] the government actually assumed most of the landowners' risks and shifted them to tenants. The owners were protected from overproduction by fixed quotas with rents for their retired lands, while the tenants, whose share was pitifully small or nil carried most of the reduced acreage burden. The risks of price fluctuation for the owners was met with loans of ten cents a pound or more to help maintain prices; and the government credit production corporations and the [Farm Credit Administration] offered them credit at a rate unavailable to the tenant unless the landlord waived his first lien on the crop. The owner's likelihood of losing the equity in his farm also was lessened by the opportunities available to him to refinance and scale down debts owed them by croppers and share-tenants. The only way a tenant could escape assuming risks under the AAA and the existing system, in other words, was by becoming a landowner.[44]

In the years following the Great Depression blacks lost their land for a host of reasons, including "legal trickery perpetuated by southern white lawyers, land speculators, and county officials taking advantage of unsophisticated rural blacks."[45] The failure to devise land by will also resulted in the loss of land by making it vulnerable to sale through forced partition actions.[46] Tax sales, eminent domain, and voluntary sales also eroded black farmland ownership.

Following World War II, changes in Southern agriculture caused it to lose its distinctiveness and to become "more like farming elsewhere in the nation . . . [with an emphasis] on capitalization, mechanization, and labor efficiency."[47] This change had a profound effect on black farmers. As one observer has noted, "most black farmers were forced off the land by technology in the form of cotton pickers and tractors, science in the form of herbicides, and government programs that favored landowners. They simply were not needed in the fields anymore."[48] The migration that followed this change in Southern agriculture was captured in a remark attributed by Anthony Walton to his father. Noting that the tracks of the Illinois Central Railroad run through the agricultural lands of the Mississippi Delta, Mr. Walton recounts that his father used to say, "It wasn't Lincoln who freed the slaves, it was the Illinois Central...."[49]

Discrimination by the USDA also impeded the ability of many black farmers to flourish or even to survive as farmers. In addition to the USDA's lack of attention to black farmers during the New Deal,[50] much of the public agricultural infrastructure largely ignored the plight of the black farmer for decades thereafter:

> [d]uring the late twentieth century, the USDA, agricultural colleges, and state experiment stations remained devoted to helping the most capital-intensive and economically viable farmers, and those agriculturalists were invariably white. The USDA ignored black farmers because they had neither the land nor capital to maintain productive, efficient, and profitable agricultural operations, nor did the agency provide educational and developmental programs to help those unneeded and often displaced farmers to build a new life.[51]

For its part, the USDA compounded its

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inattention to black farmers by discriminating against them. In 1965, the U.S. Civil Rights Commission concluded that the USDA treated white and black farmers differently, to the disadvantage of black farmers.[52] Subsequent reports of the Commission found that the USDA had not made significant improvement.[53] In 1990, following hearings, the House Government Operations Committee found that as many as two-thirds of all black farmers received loans from the USDA and concluded that discrimination by the USDA in its loan programs had been "a catalyst in the decline of minority farming."[54]

Between 1920 and 1969, a 90 percent decrease in the number of black farmers had occurred. By 1992, this decrease had risen to 98 percent. The number of white farmers also decreased, but for the same period, 1920 to 1992, the decline of white farmers was 65 percent.

The decline in the number of black farmers can only be described as dramatic. For every decade following World War II, the loss of black farmers approached 50 percent. That race was a factor is supported by the finding that "[b]lack-operated farms have decreased at a faster rate than white-operated farms regardless of size. . . ."[55]

Black farmers today are mostly Southern farmers. In 1992, 94 percent of all black-owned farms were in seventeen Southern states. The largest number were in Texas (2,861), followed by Mississippi (2,480); North Carolina (1,866); South Carolina (1,765); Alabama (1,381); Virginia (1,298); Louisiana (1,097); and Georgia (1,080). These eight states accounted for 75 percent of the nation's African American farmers. The remaining Southern states had fewer than 1,000 black-owned farms.[56]

"[M]ost black-operated farms engage primarily in livestock production, with some field crops and cash grains."[57] Livestock production appears to be favored because of its relatively flexible labor requirements that allow time for an off-farm job.[58]

Most black-operated farms are smaller than 140 acres and generate gross sales less than $10,000. In the eight Southern states accounting for 75 percent of all black farmers, the average farm size in 1992 was 117 acres, up seven acres from the 1987 average of 110 acres. Except in North Carolina and Virginia, the majority of the income of black farm operators is derived from off-farm sources.[59]

In 1992, the overwhelming majority of black farmers were male, and their average age was 59. Thirty-eight percent of all black farmers were 65 years or older.[60]

Based on 1966 data, black farm households have an average household income of $19,600. This figure is substantially lower than the average household income of white farmers, $52,300. About 43 percent of black farmers operate limited resource farms, compared to13 percent of white farmers.[61]

The future of black farmers in America is uncertain. Some promise is offered by the success of cooperatives such as the Indian Springs Farmers Association in Mississippi which helps its black farmer members market their fruits and vegetables,[62] the efforts of the Federation of Southern Cooperatives/Land Assistance Fund to expand its marketing efforts into the international arena,[63] and the recent settlement of a discrimination action against the USDA.[64] The trend represented by the decline in the numbers of black farmers, however, is not favorable to the survival of black farming in this country. By all accounts, the emergence of black farm operators before and after the Civil War is a tribute to their collective industriousness and skill. Whether this industriousness and skill will remain a part of this nation's agricultural sector is a question faced by all who ponder the full scope of the future of American agriculture.

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[1] Spencer D. Wood & Jess Gilbert, *Re-entering African-American Farmers: Recent Trends and a Policy Rationale* (Land Tenure Center, Univ. of Wis., Mar. 1998) at 2 [Wood & Gilbert]. The most recent USDA estimates indicate that in 1992 there were 18,869 black farmers. Anne B. W. Effland et al., *Minority & Women Farmers in the U.S.*, Agric. Outlook (USDA, Econ. Research Serv., May 1998) at 16, 16 [Effland et al.]

[2] Peter Kolchin, American Slavery: 1619-1877, 29 (1993) [Kolchin].

[3] Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 Vand. L. Rev. 1261, 1306-07 (1995)(footnotes omitted)(also noting that "[t]he civilian occupations with the most comparable racial profiles are geologists and geodesists." *Id.* at 1307 n. 324).

[4] Effland et al., *supra* note 1, at 16. In 1992, there were 20,956 Hispanic farm operators and 145,156 female farm operators. *Id.* at 20. A current trend in American agriculture is an increase in the number of immigrants from Asia and elsewhere who have become farmers. *See* Scott Kilman & Joel Millman, *Field of Dreams: Immigrants Find Hope In a Life of Farming As Others Sour On It*, Wall Street J., Aug. 12, 1999, at A1.

[5] Also well-known is the considerable contribution of black slaves to the development of American agriculture. Less well known is that the slave trade stimulated the growth of agriculture in coastal Africa in response to the need for supplies for slave ships and slave prisons. *See* Hugh Thomas, The Slave Trade 796 (1997).

[6] Loren Schweninger, Black Property Owners in the South, 1790-1915, 11-12 (1997) [Schweninger].

[7] *Id.* at 15.

[8] *Id.* at 16. *See also* Kolchin, *supra* note 2, at 99 (noting that a small number of freed blacks owned slaves and that the "leaders of the Cherokee, Chickasaw, Choctaw, and Creek nations consciously appropriated the culture of white Americans--including the ownership of black slaves").

[9] Schweninger, *supra* note 6, at 16.

[10] *Id.* at 16.

[11] *Id.* at 17.

[12] *Id.* at 18.

[13] *Id.* at 23. James Pendarvis' father was white and his mother was black. Under the so-called "one-drop rule" in effect at the time, he would have been deemed to be black. *See* Jim Chen, *Unloving*, 80 Iowa L. Rev. 145, 159 (1994)(noting that the "one-drop rule" traces its origins to American slave law, which adopted the civil law maxim of *partus sequitur ventrem* (the offspring follows the mother) for defining ownership interests not only in farm animals but also in human slaves").

[14] Schweninger, *supra* note 6, at 20, 23.

[15] *Id.* at 21.

[16] *Id.* at 30-36.

[17] *Id.* at 39.

[18] *Id.*

[19] *Id.* at 44-47.

[20] *Id.*

[21] *Id.* at 47.

[22] *Id.* at 59.

[23] *Id.* at 60.

[24] John Hope Franklin & Alfred A. Moss, Jr., From Slavery to Freedom: A History of African Americans 277 (7th ed. 1994)[Franklin & Moss].

[25] Harold D. Woodman, New South-New Law: The Legal Foundations of Credit and Labor Relations in the Postbellum Agricultural South 68-69 (1995)(footnotes omitted).

[26] Fon Louise Gordon, Class & Caste: The Black Experience in Arkansas, 1880-1920, 66 (1995).

[27] Donald Holley, *The Plantation Heritage: Agriculture in the Arkansas Delta in* The Arkansas Delta: Land of Paradox 238, 251-53 (Jeanine Whayne & Willard B. Gatewood eds., 1993). *See generally,* Jeanine M. Whayne, A New Planation South: Land, Labor, and Federal Favor in Twentieth-Century Arkansas (1996)(discussing sharecropping and tenant farming in Arkansas); H.L. Mitchell, Mean Things Happening in This Land: The Life and Times of H.L. Mitchell, Cofounder of the Southern Tenant Farmers Union (1979) (same).

[28] Franklin & Moss, *supra* note 24, at 277.

[29] Edward L. Ayers, The Promise of the New South: Life After Reconstruction 195 (1992).

[30] Edward L. Ayers, Southern Crossing: A History of the American South, 1877-1906, 35 (1995)(also noting that "[b]lack farmers and their families often had to rent from neighboring planters additional land for cash crops or to work off the farm to bring in enough money to keep the place; black landholding may have been so much higher in predominantly white counties in part because wage-paying jobs for blacks were more plentiful there").

[31] Leo McGee & Robert Boone, *Introduction in* The Black Rural Landowner-Endangered Species, xvii (Leo McGee & Robert Boone eds., 1979)[McGee & Boone].

[32] *Id.* at xviii.

[33] Franklin & Moss, *supra* note 24, at 277.

[34] Manning Marable, *The Land Question in Historical Perspective: The Economics of Poverty in the Blackbelt South 1865-1920, in* The Rural Black Landowner-Endangered Species 3, 3 (Leo McGee & Robert Boone eds., 1979)[Marable].

[35] McGee & Boone, *supra* note 31, at xvii.

[36] R. Douglas Hurt, American Agriculture: A Brief History 225 (1994)[Hurt].

[37] Marable, *supra* note 34, at 15.

[38] *Id.* at 16. World War I was generally a boon for farmers who did not raise cotton. *See* Willard W. Cochrane, The Development of American Agriculture: A Historical Analysis 169 (2d ed. 1993).

[39] Marable, *supra* note 34, at 17.

[40] *Id.* at 18-19.

[41] *Id.* at 19.

[42] Theodore Saloutos, The American Farmer and the New Deal 199 (1982)[Saloutos]. For a discussion of the long-term effects of these programs, see Lester M.

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Published comments by Glickman on the future of agriculture

Some of Secretary of Agriculture Dan Glickman's comments April 29, 1999, at Purdue University follow:

[T]his seemed an ideal place to have a forward-looking discussion about the place agriculture may occupy in American life in the 21st century…. We have to ask and begin to answer—the questions: What might American agriculture look like in the 21st century? And perhaps more importantly: What do we want it to look like?….

Government…will spend $15 billion this year in direct payments to farmers, the highest of any fiscal year on record. But notwithstanding that, with the passage of the 1996 Farm Bill, we are in the process of minimizing the government role, of stripping USDA of many of its authorities to intervene in the market on farmers' behalf and deal with issues of supply and demand. So we have to rely on different tools…. The '96 Farm Bill…offered no hard guidelines. In fact, the part of the bill covering farm programs is called the "American market Transition Act."…[W]e have to start thinking in terms of partnerships rather than supports….Government can no longer assume complete production and marketing risks…. We can and should find sensible ways to strengthen the farm safety net, with a strong crop insurance program and other risk management tools….

[T]he National Commission on Small Farms [in its 93 page report, *A Time to Act*, issues January 22, 1998, and containing 146 recommendations] …has…suggested a Beginning Farmer Development Program, which would establish training and assistance centers for beginning farmers; a small farm research initiative; and an entrepreneurial development initiative for small farmers….

[T]o be successful, agriculture must always stay ahead of the consumer curve…. Agriculture can't be taught the way it was in the past…. [W]hat we're seeing goes beyond just farm consolidation. Now, at every link along the food production chain, there are concentrated markets, clusters and alliances, relationships both formal and informal that may present serious challenges to the small and medium-sized producer trying to move goods to market. This is especially true when it comes to livestock processing. In the beef industry, four meatpacking plants now control 80% of the steer and heifer slaughter market…. Since 1967 the number of hog operations has fallen by 90%. Large operators of more than 2,000 hogs represent just under 6% of producers, but account for almost two-thirds of inventory…. [C]oncentration can force producers into accepting lopsided contractual terms…. Most poultry production now operates under contract….

I don't think we want to live under a system of agricultural Darwinism, with survival of the fittest becoming survival of the biggest. We don't want to get to the point where farmers lose control of their economic destiny and are reduced to serfs in a kind of feudal agricultural system… USDA and the Justice Department [are] keeping a watchful eye on some of these major mergers and, within the framework of our authorities, vigilantly monitoring for anti-competitive behavior.

Just a few weeks ago, USDA filed a complaint against Excel Corporation, alleging that the company violated the Packers and Stockyards Act by engaging in unfair pricing practices affecting about 1,200 prodoucers. That case is now in litigation, and it is my belief that more cases will be filed under the Packers and Stockyards Act in the months to come…. If the larger agricultural interests can form clusters and alliances, so too can smaller producers—in the form of cooperatives…

To help co-ops, USDA offers a variety of tools, worth up to $200 million a year, including everything from an initial feasibility study to the implementation of a business plan… In some countries, like Ireland for example, co-ops can become publicly traded entities; by issuing stock, they can increase their capital base and enhance their ability to compete…. When we began collecting data on farmers' markets in 1994, there were only about 1,700 of them in the country. Today, we estimate that there are nearly 3,000. There is the added benefit that it strengthens the relationship between grower and consumer….

There are also niche markets to explore, for example the rapidly growing demand for organic products.…

We believe the [uniform national] standards will improve consumer confidence in organic products and open new opportunities, both domestic and international, for our producers…to an estimated $6.6 billion market in the next year….

Biotechnology can be an indispensable tool as we try to serve global agricultural demand in a sustainable manner…. We cannot be science's blind servant. We have to understand its ethical, safety, and environmental implications…. While people around the world have embraced biotechnology's twin, information technology, the fact is that they're still quite cautious about biotech…. [D]ismissing the skepticism that's out there is not only arrogant, it's also a bad business strategy….[T]he public opinion poll is just as powerful a research tool as the test tube….

USDA extend[s] loans and grants that invest in rural businesses, rural utilities and rural housing. Over 50 rural areas have been targeted for tax incentives and other economic development support as part of President Clinton's Empowerment Zone/Enterprise Community initiative….

We're beginning to see people move to the country in search of a different kind of lifestyle. Rural counties have actually grown by about 3 million in the 1990's…. People who live in rural areas are vested in their community. They know their neighbors; they watch each other's children; they treat each other as extended family. And by living these kind of values, rural towns send a message to and set an example for communities around the country…. If we're going to preserve and cultivate rural America's unique qualities, we have to keep it economically viable…. In addition to clean water and decent housing, rural communities have to have a trained workforce, good schools, first-rate medical care, child care options, adequate telephone and electricity service and Internet connectivity…. [W]e also have to preserve the open spaces and natural resources that make rural life unique and draw people there in the first place….

We cannot and should not approach the future by trying to recapture the past…. In 1900, farmers represented 38% of the labor force… by 1990, farmers made up 2.6% of the workforce. Sixty years of aggressive farm programs have not been able to reverse this trend."

—Paul A. Meints, Reprinted with permission from the May 1999 Agricultural Law, published by the Illinois State Bar Association.

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Salamon, *The Future of Black Land in the South in* The Rural Black Landowner–Endangered Species 167-85 (Leo McGee & Robert Boone eds., 1979). For a discussion of a relatively small program, the Tenant Purchase Program, and its modest success in Claiborne County, Mississippi, see David Crosby, *"A Piece of Your Own": The Tenant Purchase Program in Claiborne County*, Southern Cultures (Summer 1999) at 46.

[43] *See* Farmers' Legal Action Group, Inc., *A Brief Historical Perspective on Discrimination in Farmer Credit Programs at USDA in* USDA Investigator's Standard Operating Procedure Manual: FSA Credit Discrimination (1997)(unpublished internal USDA manual).

[44] Saloutos, *supra* note 42, at 188-89.

[45] Carl H. Marbury, *The Decline in Black-Owned Rural Land; Challenge to the Historically Black Institutions of Higher Education in* The Rural Black Landowner–Endangered Species 97, 101 (Leo McGee & Robert Boone

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