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Agricultural Law Update

VOLUME 14, NUMBER 6, WHOLE NUMBER 163 APRIL 1997

Official publication of the American Agricultural Law Association

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

IN FUTURE ISSUES

- Why production flexibility contracts?

Administrative mandamus and mineral rights

In January of 1997, the United States Court of Appeals for the Ninth Circuit determined in the case of *Independence Mining Company, Inc. v. United States Department of the Interior*, 97 D.A.R. 829 (January 24, 1997) that the Secretary of the Interior could not be compelled to issue mineral patents through the use of the Mandamus and Venue Act of 1962 [MVA], 28 U.S.C. § 1361 or the Administrative Procedures Act [APA], 5 U.S.C. § 706.

At varying times from February, 1991 through September, 1992, the Independence Mining Company, Inc. [IMC] filed with the Department of the Interior several applications for mineral patents. By the end of August, 1994, no patents had been issued for any of the claims filed by IMC. *IMC* at 97 D.A.R. 829.

IMC brought an action against the Department of the Interior and the Bureau of Land Management, seeking an order of mandamus to compel the Secretary of the United States Department of Interior [Secretary] to make a determination on the claims within ninety days, pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361. Alternatively, IMC sought to compel the Secretary to make a determination pursuant to the Administration Procedures Act, 5 U.S.C. § 706. Because of the relief sought by IMC in its action, the motion was treated as a motion for summary judgment. The government filed a cross-motion for summary judgment. The district court ruled for the government on both the initial motion for summary judgment and IMC's subsequent motion for reconsideration. IMC appealed.

The court of appeals, in reviewing the procedures available under both the MVA and APA noted that although the exact interplay between the two statutory schemes was not one which had been thoroughly examined by the United States Supreme Court, the MVA claim was, in essence, the same as the one for relief under the APA. *IMC* at 830 citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). Accordingly, the court decided to analyze the facts under the APA.

In determining whether an agency's action was "unlawfully withheld or unreasonably delayed" [5 U.S.C. § 706(1)], the court applied a six-factor test announced in *Telecommunications Research & Action v. F.C.C.*, 750 F.2d 70, 79-80 (D.C.Cir. 1984). These factors were:

1. The rule of reason governs the time agencies may take to make decisions;
2. Indications of speed, with which Congress expected agency action to be taken, from the enabling statutes or where an actual timetable has been provided;
3. Reasonable delays in the area of economic regulations versus situations where

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Jailing Oprah won't sell more beef: proposed agricultural defamation law threatens civil debate

Food and water are the most important items we must obtain each day to survive. Producing safe food and preserving fresh water should be Iowans' highest goals. Unfortunately, a bill introduced in the General Assembly would cast an unnecessary and intolerable chill over public discussion about the safety of our food and the effect of agricultural practices on society and the environment.

The bill, House File 390, is innocuously labeled the "Iowa Agricultural Food Products Act," but the law would do little to promote Iowa agriculture and instead would threaten our image as a reasoned and open society. The proposal is patterned after laws enacted in other states, such as Florida, Texas, Alabama, Georgia, and Colorado. But there are many reasons why Iowans should resist the deceptive temptation to enact this law in the misguided belief we are helping farmers.

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human health and welfare are at stake;
4. Impact of expedited action on agency activities of a greater or competing priority;
5. Interest prejudiced by the delay; and
6. Impropriety by the agency in the delay. (See *IMC* at 833, fn. 7).

In reviewing these factors, the court also looked to Congress' direction to the Secretary in the *Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Pub. L. No. 104-134, 110 Stat. 1321, which sets forth a requirement that ninety percent of all pending applications be determined within five years of the enactment of the Act.

IMC asserted that an absolute right to the mineral patents vested upon its application and that the duty of the Secretary to issue the patents was ministerial in nature. *IMC* at 830. The court noted that this argument created two separate but related questions. *IMC* at 830. To be decided was whether any right to the patent vested upon the filing of the application and whether the issuance of a patent was a function that was ministerial in nature.

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

Contributing Editors: Thomas P. Guarino, Fresno, CA; Drew L. Kershen, Norman, OK; Neil D. Hamilton, Des Moines, IA; Linda Grim McCormick, Alvin, TX

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

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With respect to rights vesting upon the filing of an application, the court noted the recent decision in *Swanson v. Babbitt*, 3 F.3d 1348, 1350-1354 (9th Cir. 1993). Until such time as a patent is actually issued, the government retains broad authority to manage public lands and until such time as a patent is actually issued, the government retains its authority to remove the lands from consideration for mining patents. *IMC* at 97 D.A.R. 830-831 citing *Swanson* at 3 F.3d 1352. Therefore, the rights to a patent do not vest upon the filing of an application if the Secretary contests the validity of the patent and thus delays its issuance. *IMC* at 97 D.A.R. 730-31 citing *Swanson* at 3 F.3d 1354.

With respect to the second issue, whether the issuance of the patent was really ministerial, the standard for determining whether an act is ministerial has been defined as a "clear, non-discretionary agency obligation to take a specific affirmative action, which obligation is positively commanded and so plainly proscribed as to be free from doubt." *IMC* at 97 D.A.R. 831 citing *Azurin v. Von Raab*, 803 F.2d 993, 995 (9th Cir. 1986), *cert. denied* 483 U.S. 1021.

In the instant action, the Secretary had no ministerial duty to issue a patent. Prior to the issuance of a patent, there must be a validity determination. Until such time as the Secretary determines that all conditions for issuance of a patent have been met, the application was not at the point where the remaining act of the Secretary would be purely ministerial in nature, *i.e.*, the issuing of a patent. *See IMC* at 831.

The recent enactment by Congress of a five-year time period now supplies an exact time frame within which the Secretary is required to act. *IMC* at 831; Pub. L. No. 104-134, 110 Stat. 1321. Based on the foregoing, the court rejected applying any other time frame.

In applying the third and fifth factors from the *Swanson* case, IMC also argued that the delay discouraged capital investment because it "cast a cloud of uncertainty" regarding IMC's mining claims. IMC further contended that it employed 600 people whose jobs were threatened by the delay and that such delay threatened public welfare and essentially the local economy. However, it was undisputed that IMC's mining operations could continue even without the patents. Further, the court of appeals noted that IMC also estimated that it had an on-going 23 million dollar payroll and that this payroll had continued through the period of time during which the mining claims had been pending.

In discussing the fourth and sixth *Swanson* factors, IMC further contended that the administrative changes of the Secretary purportedly intended to comply with Pub. L. No. 104-134 demonstrated an intent to delay and bad faith in the processing of its patent claims. While the court questioned whether the Secretary would be free to utilize administrative changes to defeat the intent of the law, *i.e.* slowing the process down, in this case IMC could not show that it would be entitled to mandamus type of relief when Congress had supplied a specific time frame in which the Secretary had to act, and the Secretary was apparently complying with Pub. L. No. 104-134 in filing the plan for processing applications.

In conclusion, the Ninth Circuit therefore confirmed that mandamus relief was not available.

—*Thomas P. Guarino, Myers and Overstreet, Fresno, CA*

Federal Register in brief

The following items were published in the *Federal Register* from February 14 to March 11, 1997.

1. Farm Service Agency; Commodity Credit Corporation; Conservation Reserve Program—long-term policy; final rule; effective date 2/12/97. 62 Fed. Reg. 7602.
2. Farm Service Agency; Implementation of the direct and guaranteed loan-making provisions of FAIRA 96; interim rule with requests for comments; effective date 3/24/97; comments due 5/12/97. 62 Fed. Reg. 9351.
3. Farm Service Agency; Implementation of the delinquent account servicing provisions of the FAIRA 96; interim rule with requests for comments; effective date 3/14/97; comments due 5/13/97. 62 Fed. Reg. 10118.
4. Farm Credit Administration; Federal Agricultural Mortgage Corporation; receivers and conservators; proposed rule. 62 Fed. Reg. 8190.
5. APHIS; Revision of the International Plant Protection Convention; notice and solicitation of comments; comments due 4/10/97. 62 Fed. Reg. 8210.
6. APHIS; National Poultry Improvement Plan and auxiliary provisions; proposed rule; comments due 5/12/97. 62 Fed. Reg. 11111.
7. CCC; Notice and request for comment for an approval of a new information collection procedure; effective date 4/25/97. 62 Fed. Reg. 8216.
8. NRCS; Proposed changes in the NRCS National Handbook of Conservation Practices for review and comment; effective date 4/28/97. 62 Fed. Reg. 8925.

—*Linda Grim McCormick, Alvin, TX*

JAILING OPRAH/Cont. from page 1
The premise of the bill is relatively simple—stop people from saying bad things about food or farmers unless they can back it up with scientific data. The bill's findings state: "it is imperative to protect the vitality of the agricultural economy of this state by providing a cause of action for producers, researchers, and industries involved in agriculture and to hold persons criminally liable for the defamation of Iowa producers, researchers, or industries and their agriculture products."

How will we achieve this goal? By creating a new crime of agricultural defamation and subjecting the criminals who question the safety of a food or the impact of a "generally accepted agricultural or management practice" to a court action for civil damages. The idea finds its roots in the frustration farm groups feel when news stories or public comments affect their markets. The 1989 story on CBS's "60 Minutes" about the risk of Alar sprayed on apples and Oprah Winfrey's shock to the beef market last fall are oft cited examples. But the Iowa bill goes much further than the simple and easily ridiculed "don't bad-mouth broccoli" laws passed in other states. Iowa's bill also protects producers and industries from challenges to their commonly used practices.

While the anger farmers may feel over the effect of "uninformed" opinions on markets is understandable, trying to put Oprah in jail for speaking her mind or threatening anyone who questions the current dogma of agriculture with a lawsuit is not going to sell more products. Do we think the way to promote Iowa agriculture is to prevent people from expressing opinions? Do we have that much faith in "scientific facts," undefined by the bill, that we will substitute them for the marketplace of open debate. This view of science assumes we know all there is to know.

You might be wondering, can this bill really be this bad or is the professor just over-wrought today? You decide. Let's take a test. Consider these five statements and ask youself how many you have heard, or read, or thought, or, heaven forbid, even believe:

-spraying liquid hog manure on fields next to another's house can cause obnoxious odors and is being a bad neighbor.

-eating food raised without chemicals is probably safer for you than eating food produced with pesticides.

-leaking animal waste storage pits may pollute groundwater and make the water unsafe to drink.

-chemical residues on food, even at legal levels, may cause as yet unknown health problems.

-there is a connection between the increase in drug-resistant bacteria and the common practice of feeding antibiotics to animals so they will gain weight faster.

So, how did you do? The statements are controversial, but I expect there may be one or two with which you agree. Even if not, you can no doubt get a good debate going about them—either in the coffee shop, in the classroom, or on the opinion page. But are they true? Are they supported by the "scientific facts or scientific data" required under the proposed law? Would you be willing to risk a year in jail to speak them? Surely statements like these "reflect upon the character or reputation of an aggrieved party or upon the quality, safety, or value" of their products. Couldn't saying them harm a "reputation or cast suspicion" on someone's "character in the estimation of the community" or deter others from "doing business" with them. Surely they may "cast an aggrieved party in a negative light in the eyes of the general public." Those are the legal standards for committing the crime proposed in the House File 390. If it passes, don't expect to hear comments like these—that is unless the speaker is brave enough to face a one-year jail sentence and a $10,000 fine plus a civil suit for damages by the producer or industry "defamed."

You might be puzzled why we need this law; you probably think we already have laws on defamation. Of course we do—but that is the point—under existing laws these statements are most likely not defamatory but instead are fair comment or protected opinions. They are the type of comments the First Amendment, remember it, is designed to protect. The bill is an attempt to criminalize the open debate we accept and expect in society, all in a perverted attempt to "protect" agriculture.

How could our respect for the value of civil discourse have sunk so low or our trust in science have risen so high? Do we have such little faith in the common sense of people or in the quality of our products or in the integrity of our farming practices? How could an agricultural sector that rails against the proliferation of laws and bemoans the intrusion of government into its business believe the defense of its economic future rests on creating a new crime to threaten those who question it? It doesn't matter that the law is most likely unconsitutional and would be struck down or that cases brought under it will be thrown out of court as was the suit against "60 Minutes." This is a foolish idea that deserves to be rejected by anyone who cares about food, farmers, or freedom of speech.

—Neil D. Hamilton, Ellis and Nelle Levitt Distinguished Professor of Law, Director, Agricultural Law Center, Drake University, Des Moines, IA. This article appeared in the March 17, 1997 Des Moines Register.

CAST documents

The Council for Agricultural Science and Technology (CAST) is a private research organization that prepares reports concerning food and fiber, environmental, and other agricultural issues. CAST interprets scientific research concerning these agricultural issues for legislators, regulators, the media, and the public for use in public policy decision-making. While the CAST reports are more technical and scientific than legal, CAST has produced reports that are extraordinarily informative to the agricultural lawyer.

Four examples include Wetland Policy Issues (1994), Waste Management and Utilization in Food Production and Processing (Oct. 1995), Integrated Animal Waste Management (Nov. 1996), and Grazing on Public Lands (Dec. 1996). Agricultural lawyers should be aware of CAST and its research expertise relating to agriculture. CAST, 4420 West Lincoln Way, Ames, Iowa 50014-3347; Ph. (515) 292-2125; FAX (515) 292-4512. If you are interested in its publications, CAST has a full list of its publications and order information on the World Wide Web at http://www.netins.net/showcase/cast

—Drew L. Kershen, University of Oklahoma, Norman, OK

Conference Calendar

Agricultural Law Symposium
May 15-16, 1997, Garden City, Kansas Plaza Inn
Topics include: Farm estate and business planning (Prof. Neil E. Harl); ag law update (Prof. Roger A. McEowen); farm programs (Steven L. Davis); litigating damages in an agricultural law case (Hon. Robert J Schmisseur); agricultural coops (James B. Dean); UCC (Prof. Drew L. Kershen); water law (Prof. James B. Wadley); ethics (Philip D. Ridenour).
Sponsored by: Kansas State University-Southern Plains.
For more info, call 913-532-1501.

1997 Drake Law School Summer Agricultural Law Institute
Drake Law School, Des Moines, IA
June 2-5, Formation of "new wave" farmer cooperatives, Sarah Vogel.
June 9-12, Business planning for farm operations, Prof. Jim Monroe.
June 16-19, Migrant and seasonal farmworker law, Beverly A. Clark.
June 23-26, Water law and agriculture, Prof. Jake Looney.
July 7-10, Law and the new agricultural: organic production, farmers' markets, CSA's, urban gardening, cooperatives, and farmland preservation, Prof. Neil Hamilton.
July 14-17, The World Trade Organization and agriculture, Prof. Louis Lorvellec.
For more info., call Neil D. Hamilton, 515-271-2065.

Property rights: competing visions in rural America*

By Drew L. Kershen

The term "property rights" has become a rallying cry for farmers and ranchers. As demands and restrictions upon land use increase, farmers and ranchers counter by asserting their property rights. No better expression of this counter-revolution exists than in the property rights legislation that many states have enacted in the recent past.[1]

The property rights movement is widespread and politically powerful. Yet, farmers and ranchers asserting property rights assume that the term has the same meaning for everyone in rural America. In this article, I will probe this assumption and argue that competing visions of property rights exist in rural America. I will identify four competing visions, describe their different perspectives, and give examples of the legal conflicts to which these competing visions give rise. I will write in an overly broad, sweeping, stereotypical style. However, I hope that what I write accurately reflects the perspectives discussed and provides worthwhile insights about property rights in rural America.

The agricultural perspective compared to the environmental perspective

The property rights movement has its origin in the conflict between the agricultural sector and the environmental movement in American society. When I wrote of competing visions of property rights, most readers probably thought of this conflict between agriculture and environmental laws.

The competing visions between the agricultural sector and the environmental movement became a pressing issue in the early 1970s with the enactment of the major federal environmental laws. Agriculture was successful initially in gaining important exemptions, either statutory or administrative, from these laws. Beginning in the mid-1980s, however, the environmental movement convinced Congress to reduce or eliminate these agricultural exemptions and to create new environmental demands upon agriculture.[2] Consequently, in the 1990s, farmers and ranchers felt as if they were facing the full brunt of environmental laws, giving rise to the present strength of the property rights movement.

From the perspective of the agricultural sector, the most salient property-rights fact is that farmers and ranchers are the owners or the lessees of the land. Farmers and ranchers have traditional common law real estate interests in the land as fee owners and leaseholders. Farmers and ranchers correctly speak of the land as their land, their property. Moreover, farmers and ranchers perceive themselves to be the Jeffersonian yeomen who have made the land productive and who have the greatest interest in preserving the land as a productive asset. To assure that the land remains a productive asset, farmers and ranchers consider themselves stewards of the land. They can ill-afford to harm the land upon which they depend for their livelihood and identity. While farmers and ranchers will readily concede that a few farmers and ranchers abuse the land, these abusers are the exception, not the rule. As owners and stewards of the land, farmers and ranchers perceive governmental regulations and public demands upon their land as unwanted, undesirable, and, in their intrusive forms, takings of property for which compensation must be paid under federal or state constitutions.

From the environmental perspective, the land, air, and water of America is the common heritage of American citizens towards which the government holds and should exercise a public trust for the American people. Individnal farmers and ranchers may have special claims to the land and water resources, but environmentalists insist that farmers and ranchers cannot think of the land and water as "theirs" to tbe exclusion of the American public. The environmental movement fears that farmers and ranchers who claim the land as "theirs" become plunderers and destroyers of the land and water through erosion, pollution, and chemical abuse. If the land is a common heritage of all Americans, governments rightly use the police power to regulate farm and ranch activities for the health, safety, and well-being of the American public. Far from a taking of property, these governmental regulations assure that farmers and ranchers avoid environmentally destructive actions or, at least, internalize the costs of the pollution that their operations generate.[3]

The competing visions of property rights between the agricultural sector and the environmental movement have given rise to well-known legal disputes, primarily under federal environmental laws and regulations, during the past twenty-five years. As examples, the agricultural sector and the environmental movement have clashed over the following:

- Wetlands—their jurisdictional definition, their physical identification and delineation, the scope of the exemption for allowable agricultural activities within wetlands, the Section 404 Dredge and Fill permit process, and the violations and their sanctions for wetlands conversion in violation of the Swampbuster provisions of the 1985 and 1990 Farm Bills;[4]
- Concentrated animal feeding operations (CAFOs)—the scope of the exemption from the Section 402 National Pollutant Discharge Elimination System (NPDES) permit, feedlot NPDES permit conditions and requirements, and waste disposal management;[5]
- Nonpoint source pollution—the distinction between point and nonpoint source pollution, the governmental level controlling nonpoint source pollution programs, the voluntary or mandatory nature of nonpoint source pollution programs, and the identification and implementation of best management practices (BMPs) for the control of nonpoint source pollution.[6]

These three examples—wetlands, CAFOs, and nonpoint source pollution—typify the legal disputes arising from the competing visions of property rights held by the agricultural sector and the environmental movement under environmental laws. While these examples are the best known property rights disputes in rural America, the clash between the agricultural sector and the environmental movement is not the only property rights clash occurring in rural America.

The rural perspective (country) compared to the urban perspective (cities and urbanized counties)

Differing visions of property rights have existed for quite a while between farmers and ranchers, and urbanites. These differing visions have existed since Americans began to identify themselves either as country dwellers or city dwellers. Indeed, farmers and ranchers and urbanites agree that the conditions of urban life require that neighbors relate to one another in ways that are quite different from the ways rural neighbors relate to one another.[7] Urbanites accept restrictions on property rights as tbe price of living close to others in the urban setting. In the past, Americans cbose to live either in the country or in the city and accepted the vision of property rights that came with the territory. However in recent years, these differing visions of property rights, which have ordinarily coexisted peacefully, have become clashing visions as the conflict between the city and the

Drew Kershen is Earl Sneed Centennial Professor of Law, University of Oklahoma College of Law, Norman, OK.

country over geographical territory and land use intensifies.

From the perspective of rural residents, urban restrictions on property rights are unnecessary and unwanted in those areas where the freedom to live and the freedom to conduct one's business as one sees fit are valued attributes of country living. Freedom, not accommodation with others, is the primary value of country living. Consequently, farmers and ranchers ordinarily have opposed zoning unless they can see direct benefits from rural zoning for farmland preservation and property tax reduction. Even regarding these two zoning benefits, farmers and ranchers are wary because they view their land base as their major source of wealth. Farmers and ranchers want the freedom to sell their land for income and retirement security even if that means selling the land for non-agricultural development. Moreover, farmers and ranchers value independence highly. They want to make their own decisions about how to farm or ranch. They do not want to be told what farming techniques, particularly crop selection and horticultural practices, they may use in their operations. Freedom to farm may be a newly emphasized value in the 1996 Farm Bill but it is an old value in the hearts of America's farmers and ranchers.

From the perspective of cities and urbanized counties, their primary obligation is to protect the health, safety, and welfare of their urban residents. Cities and counties have no greater responsibility than to provide good water to their residents. Consequently, cities and counties have annexed rural areas and sought other legal means to protect their water supplies. In addition, cities and counties have become increasingly concerned with urban development and urban planning. They want to control their growth and to surround the core urban area with low-intensity development and greenbelts that provide aesthetic and health benefits to their residents. By controlling development and creating greenbelts, cities and counties protect their citizens from odors, dust, and traffic generated by agricultural production. What cities and counties view as sensible protection of water supplies and reasonable restrictions on development, farmers and ranchers likely view as intrusions into the freedom and independence they associate with country living.[8]

In light of these differing property rights perspectives in rural and urban areas, several legal conflicts are likely to occur with increasing frequency in the coming years:

· Water rights disputes—the competing claims to rights in surface and ground water resources, and the reallocation of water rights from the agricultural sector to the urban sector;[9]

· Pollution protection for municipal water supplies—the delineation of the boundaries of protected areas, the identification of pollution sources including agricultural nonpoint source pollution, and the establishment of management plans for the protection of municipal water supplies;[10]

· Land use planning and zoning—the municipal annexation of surrounding rural areas, the creation of farmland preservation districts and greenbelts, and the authorization of zoning powers and their accompanying regulations for counties or metropolitan districts that are outside the boundaries of incorporated cities and towns.[11]

The two competing perspectives on property rights that I have identified thus far have the agricultural sector pitted against a non-rural entity—the environmental movement in the first conflict and the urban sector of American society in the second. The final two competing perspectives on property rights pit the agricultural sector against fellow occupants of rural areas. These latter two conflicts may ultimately be more significant and more intractable for farmers and ranchers.

The production resident perspective compared to the rural resident perspective

Demographic change is occurring in many rural counties of the United States. While the number of production farmers and ranchers fell in the last decade, the number of rural residents rose during the same period. Demographic patterns predict that the number of non-farm rural residents will continue to rise in the coming years. These demographic changes seem driven by three facts: the desire of many Americans to escape the congestion and the hurriedness of urban life; the telecommunication revolution that allows people to work from anywhere regardless of geographical location; and the affluence of Americans who can afford a second home or a retirement home in the country. Rural America is no loug just the home of farmers and ranchers, along with the small town business people and professionals who provide agriculture's supporting infrastructure. Rural America is becoming the home of choice of Americans who are urban in attitude and, most importantly, urban in income.

From the perspective of the production resident, land, water, air, plants, and animals are natural resources to be used in a stewardship manner, but these are resources to be used nonetheless for production. Farming and ranching involve great economic risk that forces farmers and ranchers to concentrate on efficiency in order to survive in agriculture. Farmers and ranchers generally cannot relate to the natural resources with an overtly aesthetic or preservationist attitude. Moreover, while rural life has its advantages of freedom and independence, bucolic peacefulness and relaxation are myths that do not apply to farmers and ranchers who make a living from the land. Farmers and ranchers expect hard work that makes them dirty and smelly. Farmers and ranchers become accustomed to sights, sounds, feels, and smells that urbanites find offensive. The production of food and fiber necessarily involves the creation of dust and odors. The production of food and fiber necessarily involves the taming of the land, the water, the air, the plants, and the animals to human ways. By definition, farming and ranching involve the domestication of the natural environment.

From the perspective of the rural residents, the natural resources that farmers and ranchers view as productive assets are the environmental resources that rural residents want to preserve because these make country life appealing. To rural residents, fresh air, clean water, natural landscapes, native plants, and wildlife are the property values of their rural homesites. Rural residents are primarily and overtly interested in non-economic values—aesthetic, bucolic, recreational. Indeed, rural residents left the cities and moved to the country precisely to gain the cleanliness, peacefulness, and relaxation that they associate with country living. The property values that rural residents find in their country homes are diminished or ruined if production agriculture creates foul odors, foamy waters, worked landscapes, monocultured fields, and hunted wildlife. Production agriculture's blowing dust, roaring tractors, squealing animals, and rumbling trucks bring upon rural residents the congestion and the hurriedness that they meant to escape when they moved to the country.[12]

In light of these differing property rights perspectives between production agriculture and rural residents, nobody should be surprised that production agriculture and rural residents are increasingly involved in legal conflict. Indeed, with the changing demographics, one can expect that these legal conflicts will increase in the coming years. Several examples of the types of legal conflicts likely to occur between production agriculture and rural residents include:

· Nuisance suits and "right-to-farm" defenses—the establishment and the expansion of production operations, the odor-noise-dust-runoff-traffic generated by

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PROPERTY RIGHTS/*Continued from page 5*

farming operations and the health debates about these agricultural practices, and the enforcement of fence laws;[13]

· Habitat, wildlife, predators—the definition of and protection of threatened and endangered species, the right to hunt and hunting seasons, and the control of predators, including pets, in rural areas;[14] and

· Political conflicts between and within governmental agencies—Departments of Agriculture versus Departments of Wildlife & Conservation, and struggles involving the political control of agricultural agencies, conservation districts, farm program committees, and research agendas for governmental funds in the rural sector.[15]

In the past, farmers and ranchers knew that their rural neighbors shared the property rights perspective of production agriculture. Today, that knowledge is outdated. Rural residents do have a strong sense of property rights but their property rights arise from home-ownership and country-living, not production agriculture. Our society faces significant challenges in achieving a satisfactory accommodation between these two rural populations—production agriculture and rural residents.

Livestock owners perspective compared to the animal rights perspective

The competing perspectives about property rights between livestock owners and the animal rights movement is the most recent conflict about property rights to emerge in American society. Indeed, many farmers and ranchers do not acknowledge that this conflict exists. Farmers and ranchers either ignore animal rights activists or consider them members of a fringe movement that has little strength in the American society. Even when acknowledged, most farmers and ranchers find the animal rights movement very perplexing. The conflicting property rights perspectives between farmers and ranchers and the animal rights movement is so chasmal that farmers and ranchers have difficulty understanding its tenets or any bases for mutual discussion. Yet, the animal rights movement has attracted significant attention and significant membership in the United States and other parts of the world. The animal rights perspective on property rights is a perspective that must be understood and discussed.

From the perspective of livestock owners, they own livestock because these animals produce products desirable for food, clothing, and other human needs. Livestock are part of the farming and ranching operation as production assets, not companions or pets. Consequently, livestock owners want to provide the animals with a clean and healthful environment for utilitarian reasons relating to efficient production and quality products. Livestock owners, however, are not providing these animals a rest-relaxation-retirement home. Livestock owners recognize that gratuitous cruelty to animals should be avoided, but livestock owners draw a sharp distinction between animals and humans. Animals are the property of their owners; humans have rights. Animals live in a world of instinct; humans live in a world of morality. Moreover, livestock owners view livestock production as an intelligent use of natural resources that is both compatible with and protective of the balance of nature. In the minds of livestock owners, animal rights claims are often naive, technologically backward, and economically unsophisticated or protectionistic.

From the perspective of the animal rights movement, many common livestock production practices—e.g. castration, confined feeding, branding—are unnatural and cruel.[16] In addition, modern animal production methods—using antibiotics, growth hormones, and biotechnology—create substantial and unnecessary health risks for the American consumer. At a minimum, animals must be treated humanely. More significantly, the animal rights movement holds that animals themselves have legal rights, such as the right to be free-roaming, that human beings must respect. Consequently, many animal rights activists compare the agricultural sector's treatment of animals as property to the agricultural sector's treatment of African-Americans as property for 250 years of American history. In the minds of animal activists, livestock producers, particularly corporate farms, have built a culture of greed and destruction. To counter this immoral culture, animal rights activists propose vegetarianism as an alternative, ethical culture that allows humans and animals to live in respectful harmony with one another.[17]

In light of these differing perspectives about animals and property rights, livestock producers and animal rights activists are likely to have legal conflicts of which the following are examples:

· Livestock handling methods—requirements that only licensed veterinarians perform certain procedures (such as castration, branding, tattooing) with anesthesia, the prohibition of intentionally inflicting injury upon animals for performance or behavioral reasons, the specification of livestock care and handling requirements, and controls on the sale of certain animals (such as wild horses and burros) for slaughter;[18]

· Food labeling disputes—the consumer's "right-to-know" about feed additives and livestock production techniques for reasons of the consumer's health and moral beliefs, creation and implementation of organic food and fiber standards, allowable pesticide and hormone residues in meats and meat products, and the implied and express health claims of livestock producers about their products;[19]

· Biotechnology—the economic and social desirability of biotechnology in agriculture (such as rSBT and cloning), the environmental and health impacts of biotechnology upon the individual animals and species diversity, the ethical and intellectual property limits of biotechnology in living organisms, and international trade issues involving genetically-modified organisms.[20]

The conflicting perspectives about animals and property rights held by livestock producers and animal rights activists also reflects a fundamental divergence in attitudes toward the modern world. This fundamental divergence is best expressed in the following question: Is biotechnology, which is a reflection of a technologically-oriented world, a blessing or a curse for humankind? Livestock producers and their conventional agricultural allies view biotechnology first and foremost as a blessing—to feed humankind, to protect fragile environments, and to increase the living standard of the people of the world.[21] Animal rights activists and their environmental and economic allies view biotechnology first and foremost as a curse—to dominate animals, to decimate species, to dislocate rural communities, to indulge human arrogance, to subject ecosystems to degradation, and to subject humankind to physical and reproductive health risks.[22]

America is embarked on a prolonged, contentious, and pivotal debate about property rights. Rather than the property rights movement espoused by American farmers and ranchers being the end of this debate, the property rights movement is but one perspective among many.

** This article is an expanded version of a speech Professor Kershen delivered to the Region 6 EPA Nonpoint Source Conference in Austin, Texas on March 3, 1997.*

[1] See generally, Organ, *Understanding State and Federal Property Rights Legislation*, 48 Okla. L. Rev. 191 (1995).

[2] Cf. Kershen, *Agricultural Water Pollution: From Point to Nonpoint and Beyond*, 9 Nat. Resource's & Env't. 3 (Winter 1995)

[3] For a fuller comparison of the agricultural and environmental perspectives, see Zinn & Blodgett, *Agriculture Versus the Environment: Communication Perspectives*, 44 J. Soil & Water Conservation 184 (1989)

[4] For fuller discussion of wetlands and agriculture, see Braswell & Poe, *Private Property vs. Federal Wetlands Regulation: Should Private Landowners Bear the Cost of Wetlands Protection*, 33 Am. Bus. L.J. 179 (1995); Comment, *Saving the Wetlands from Agriculture: An Examination of Section 404 of the Clean Water Act and the Conservation Provisions of the 1985 and 1990 Farm Bills*, 7 J. Land Use & Envtl. L. 299 (1992); Lamunyon, *Wetlands and the Swampbuster Provisions: The Delin-*

eation Procedures. Options, and Alternatives for the American Farmer, 73 Neb. L. Rev. 163 (1994); Torres. Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property, 34 U. Kan. L. Rev 539 (1986).

[5] For fuller discussion of CAFOs, see Comment, Environmental Law: The Clean Water Act — Understanding When a Concentrated Animal Feeding Operation Should Obtain an NPDES Permit. 49 Okla. L. Rev. 481 (1996); Comment. The Eight Million Little Pigs—a Cautionary Tale. Statutory and Regulatory Responses to Concentrated Hog Farming, 31 Wake Forest L. Rev. 851 (1996); Note. Just What is a Concentrated Animal Feeding Operation under the Clean Water Act? (Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 2d Cir. 1994, cert denied, 115 S. Ct. 1793, 1995), 60 Alb. L. Rev. 239 (1996).

[6] For a fuller discussion of nonpoint source pollution, see Davidson. Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture. 34 S.D. L. Rev 20 (1989); Gould. Agriculture, Nonpoint Source Pollution, and Federal Law, 23 U.C. Davis L. Rev. 461 (1990). Note. Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future, 20 Harv. Envtl. L. Rev. 515 (1996).

[7] Readers can easily think of differences between city life and country life relating to property rights. For example, city dwellers cannot own livestock; city dwellers must use city utilities (sewage, garbage, water); city dwellers cannot erect certain buildings or engage in certain occupations outside designated zones. None of these restrictions usually apply to farmers and ranchers living in the country. Of course, readers are probably familiar with the legal disputes between cities and their residents in recent years about what is livestock and what is a pet — pot-bellied pigs, miniature horses, miniature donkeys, exotic chickens, ducks, geese, rabbits

[8] For a fuller discussion of rural perspectives and urban perspectives on land use, see Miller & Wright, Report of the Subcommittee on Innovative Growth Management Measures: Preservation of Agricultural Land and Open Space, 23 Urb. Law. 821 (1991), Wadley & Falk, Lucas and Environmental Land Use: Controls in Rural Areas: Whose Land Is It Anyway?, 19 Wm. Mitchell L. Rev. 331 (1993).

[9] For fuller discussion of disputes between the agricultural sector and the urban sector for water rights, see Comment, The Stagnation of Texas Ground Water Law: a Political v. Environmental Stalemate, 22 St. Mary's L. J. 493 (1990); Comment, Maybe Oil and Water Should Mix—At Least in Texas Law: an Analysis of Current Problems With Texas Ground Water Law and How Established Oil and Gas Law Could Provide Appropriate Solutions, 1 Tex. Wesleyan L. Rev. 207-224 (1994) Jahns, Reforming Western Water Rights: Contemporary Vision or Stubborn Revisionism, 39 Rocky Mtn. Min. L. Inst. 21-1 (1993); MacDonnell & Rice, Moving Agricultural Water to Cities: the Search For Smarter Approaches, 2 West-Northwest 27 (1994).

[10] The Safe Drinking Water Act (SDWA) mandated well-head protection programs in 1986. These well-head protection programs focus on groundwater. In 1994, Congress amended the SDWA to mandate protection for all source waters of public water suppliers, including lakes, rivers, and reservoirs. The Environmental Protection Agency has set a goal of 30,000 community based protection efforts for source waters by the year 2005. For continuously updated information on the SDWA well-head and source water protection programs, see two sites on the WWW: epa.gov/OGWDW/swpfact.html and epa.gov/OGWDW/wellhead.html.

[11] For a fuller discussion of land use planning and zoning in rural areas, see Comment, The Accretion of Cement and Steel Onto Prime Iowa Farmland: a Proposal For a Comprehensive State Agricultural Zoning Plan, 76 Iowa L. Rev. 583 (1991); Holloway & Guy, Emerging Regulatory Emphasis on Coordinating Land Use, Soil Management and Environmental Policies to Promote Farmland Preservation. Soil Conservation and Water Quality, 13 Zoning Plan. L. Rep. 49 (1990); Popp, A Survey of Agricultural Zoning: State Responses to the Farmland Crisis. 24 Real Prop. Prob. & Trust J. 371 (1989).

[12] On the day that the author made these points to the Region 6 EPA Nonpoint Source Conference, Mr. John Gosdin, Director, Natural Resources Management Department of the Lower Colorado River Authority (LCRA) delivered a talk entitled "A Partnership for Conservation, Water Quality and Wildlife." [The LCRA is the governmental agency that manages the Colorado River of Texas, beginning in central Texas above Austin down to where the Colorado River empties into the Gulf of Mexico.] Mr. Gosdin's talk described the successful environmental projects his department has developed in Fayette County, Texas, which is on the Colorado River about 70 miles southeast of Austin.

Mr Gosdin discussed the changing demographics of Fayette County where rural residents, primarily from Austin and Houston, now constitute approximately 45% of the landowners in the county. Mr Gosdin also presented a LCRA survey of "hot topics" that dominate Fayette county conversations in coffee shops, barber/beauty shops, and backyards. Fayette County residents no longer focus their conversations on the price of feed-fertilizer, nor governmental regulations of farming, nor cattle prices, nor drought. The "hot topics" today among Fayette County residents are the deer population, wildlife food plots, native plant restoration projects, and wild animals that visiting grandchildren see. No better expression of the contrasting values and interests of production agriculture from rural residents exists than the findings of this survey.

Professor Kershen has a file copy of the text of Mr. Gosdin's talk.

[13] For fuller discussion of these issues, see Centner & Wetzstein, Agricultural Pesticide Contamination of Groundwater: Developing a "Right-to-Spray Law" for Blameless Contamination, 14 J. Agric. Tax. & L. 38 (1992); Grossman & Fischer, Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer, 1983 Wis. L. Rev. 95; Note. Iowa Agricultural Fence Law: Good Fences Make Good Neighbors, 43 Drake L. Rev. 709 (1995); Wheeler, Livestock Odor and Nuisance Actions vs. "Right-to-Farm" Laws: Report by Defendant Farmer's Attorney, 68 N.D. L. Rev. 459 (1992).

[14] For a fuller discussion of these issues, see Agricultural Law/Economics Research Program, Can North Dakota Grazing Survive a Wilderness or Wild and Scenic Designation—Are There Cattle in Nature? 70 N.D. L. Rev. 509 (1994); Barlow, The Proposed Management of the Red-cockaded Woodpecker in the Southern National Forests: Analysis and Suggestions, 17 U. Ark. Little Rock L.J. 727 (1995); Casenote, Wildlife—Private Property Damage Law—Once Upon a Time in Wyoming There Was Room for Millions of Cattle and Enough Habitat for Every Species of Game to Find a Luxurious Existence. In the aftermath of Parker, Can We All Still Get Along? (Parker Land and Cattle Company v. Wyoming Game and Fish Commission, 845 P.2d 1040, Wyo. 1993), 29 Land & Water L. Rev. 89 (1994), Todd, Wolves—Predator Control and Endangered Species Protection: Thoughts on Politics and Law, 33 S. Tex. L. Rev. 459 (1992).

[15] For a fuller discussion of these issues, see Davidson, Commentary: Using Special Water Districts to Control Nonpoint Sources of Water Pollution. 65 Chi.-Kent L. Rev. 503 (1989); De Young, Governing Special Districts: The Conflict Between Voting Rights and Property Privileges, 1982 Ariz. St. L.J. 419; Levy, Written Testimony of Richard E. Levy [on Hellebust v. Brownback, 824 F. Supp. 1506, modified, 824 F. Supp. 1511 (D. Kan. 1993)] Before the House Agriculture Committee, State of Kansas, 42 U. Kan. L. Rev. 265 (1994).

The Center for Rural Affairs in Walthill, Nebraska reports frequently on the competing research agendas of production agriculture, conservation agriculture, sustainable agriculture, and rural development for governmental funding.

[16] See e.g., Animal Legal Defense Fund, Inc. v Provimi Veal Corp, 626 F. Supp. 278 (D Mass. 1986) (confined feeding of calves to produce veal); Humane Society for the Prevention of Cruelty to Animals v. Lyng, 633 F. Supp. 1986 (W.D. N.Y 1986) (hot branding of dairy cows in the Dairy Termination Program).

[17] For a fuller discussion of the animal rights perspective, see Comment. Animal Liberation and the Law: Animals Board the Underground Railroad, 43 Buff. L. Rev. 765 (1995); Comment, Animal Welfare Reform and the Magic Bullet: the Use and Abuse of Subtherapeutic Doses of Antibiotics in Livestock, 67 U. Colo. L. Rev. 407 (1996); Comment, The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law, 17 Whittier L. Rev. 145 (1995), Francione, Animal Rights and Animal Welfare, 48 Rutgers L. Rev. 397 (1996).

[18] For fuller discussion of veterinarian duties, see Hannah. The Impact of Animal Welfare and Animal Anti-cruelty Laws on Veterinarians in J. D. McKean (ed.), Legal Issues Affecting Veterinary Practice, 23 Veterinary Clinics Of North America: Small Animal Practice 1109 (W. B. Saunders Co., Philadelphia 1993)

[19] For fuller discussion of food labeling issues, see Bones. State and Federal Organic Food Certification Laws: Coming of Age?, 68 N.D. L. Rev. 405 (1992); Chen, Food and Drug Administration Food Standards of Identity: Consumer Protection Through the Regulation of Production Information, 47 Food & Drug L.J. 185 (1992); Gillan, Laying Ax to the Delaney Clause: Reform of the Zero-tolerance Standard for Carcinogenic Food Additives, 5 U. Balt. J. Envtl. L 14 (1995); Miller. Time for Government to Get Mooo-ving: Facing Up to the rbST Labeling Problem, 18 Hamline L. Rev. 503 (1995).

[20] For fuller discussion of biotechnology issues, see Downes, New Diplomacy for the Biodiversity Trade: Biodiversity, Biotechnology, and Intellectual Property in the Convention on Biological Diversity. 4 Touro J. Transnat'l L. 1 (1993); Dresser, Ethical and Legal Issues in Patenting New Animal Life, 28 Jurimetrics J. 399 (1988); Withers & Kenworthy, Biotechnology: Ethics, Safety and Regulation, 3 Notre Dame J.L Ethics & Pub. Pol'y 131 (1987).

[21] A leading spokesperson for this position is Dennis Avery. See especially, D. Avery, Saving the Planet With Pesticides and Plastic (1995).

[22] A leading spokesperson for this position is Jeremy Rifkin. See especially, J. Rifkin, Beyond Beef: the Rise and Fall of the Cattle Culture (1992)

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1997 Dues

Dues for 1997 became payable in January. The rates remain the same as last year: $75 Sustaining member, $50 regular member, $125 institntional membership, $20 student member and $65 for overseas members. Operating funds for an Association our size are always tight. We appreciate the extra assistance we received from those persons who were sustaining members this year and ask that you consider becoming a sustaining member in 1997 as well.