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WHAT IS AGRICULTURAL LAW? PROPOSING PRODUCTION AGRICULTURE AS THE CORE[1]

by Drew Kershen*

Teaching Agricultural Law – Personal History

I taught my first course in Agricultural Law in 1975 as a seminar that covered a very broad range of subjects related to agriculture – commercial, environmental, international trade, farm programs, cooperatives, taxation, estate planning, and others since forgotten. I adopted this approach because I considered agricultural law to be the study of how laws and legal institutions affected agriculture as a sector. I did not think of agricultural law as dealing with a "subject matter" – contrasting, for example, to torts, or civil procedure, or contracts. This first seminar and the several seminars that followed showed the breadth of the subject matter that could fit within the ken of agricultural law.

While this breadth of subject matter is an accurate vision of agricultural law, I ultimately found this breadth to be unsatisfactory because the breadth did not seem to provide a sufficient focus that would allow the development of a discipline called agricultural law. I found that
(cont. on page 2)

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BEGINNING FARMERS AND RANCHERS: PREPARING FOR THE "NEXT GENERATION"

by Janie Simms Hipp*

The 2008 Farm Bill contains many new programs and provisions recognizing the importance of our "next generation" farmers and ranchers. As the average age of farmers and ranchers continues to climb, the importance of providing proper estate planning and farm business succession planning has never been greater.

According to studies based on surveys of farmers and ranchers, only a small percentage of producers have adequate, if any, personal estate planning and/or farm business succession strategies in place.

According to the Beginning Farmer Center with Iowa State University Extension (John Baker) almost 46% of Iowa farmers intend to at least semi-retire and approximately 40%
(cont. on page 5)

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focus in the early 1980s when I began to teach a 3-hour "Agricultural Law" course using Keith Meyer, Donald Pedersen, Norman Thorsen, and John Davidson, AGRICULTURAL LAW: CASES and MATERIALS (West Publishing Co., 1985).[2]

What greatly appealed to me about the AGRICULTURAL LAW casebook is that the authors had identified three unique themes for agricultural law. Theme One involved the critical roles that land and the biological cycles of crops and livestock play in agriculture and how law and legal institutions influence and shape the use of these resources in agriculture. Theme Two involved the fact that agriculture is a highly regulated industry. I called this the bifurcated nature of the economics of agriculture – a regulated industry within a fairly pristine free-market oriented sector. Theme Two emphasized the unique nature of the regulation of agriculture – often to protect against competition and to provide exemptions for agriculture from labor, antitrust, environmental, and other laws applicable to other sectors of the American economy. Theme Three involved the structural issues of agriculture –implicitly raising the question: what is agriculture? These structural issues provided the underlying policy issues and debates about who will or should control U.S. agriculture. These structural issues were implicitly and explicitly pervasive in all the courses that I presented within the discipline of agricultural law.

I used the AGRICULTURAL LAW casebook for eighteen years (through academic year 2001-2002) to teach a course built around the first theme of the book – how law and legal institutions influence and shape the use of resources (land, crops, and livestock) in agriculture. My "Agricultural Law" course explicitly built upon the first year curriculum of contracts, property, and torts to educate students about how these foundational private law courses applied in practical terms in the agricultural sector.[3] The course focused on farmers and their use of these resources to produce food and fiber, which I considered the raison d'être for American agriculture. If I were to begin an agricultural law course today, I would begin with this "Agricultural Law" course that I taught for eighteen years.

While I considered my "Agricultural Law" course as the core (the course taught every year once a year), I also considered Theme Two – agriculture as a regulated industry – to be essential to agricultural law as a discipline. Hence, I ultimately developed two additional courses taught alternating every other year – Agricultural Environmental Law[4] and Agricultural Biotechnology Law and Policy.[5]

In "Agricultural Environmental Law," my materials focus on the environmental and conservation provisions from the various farm bills – e.g. Swampbuster, Sodbuster, Conservation Reserve Program – and the application of environmental laws – most particularly the Clean Water Act – to wetlands, point source, and nonpoint source pollution arising from agricultural practices. In "Agricultural Biotechnology Law and Policy," my materials focus on the meaning and impact of science and technology upon American farmers and their production methods while emphasizing the passionate public policy debates that have erupted about modern agriculture's embrace of science and technology.

While the subject matter emphasis of these two courses obviously differs, in my mind I have been asking myself and the students very similar questions. How can farmers use their land, crop and livestock resources to produce food, fiber, and (more recently) energy under the laws, cases, regulatory regimes, and public policy debates connected to the environment and biotechnology? What constraints upon production do these laws, regulatory regimes, and public policy debates impose? What incentives for production do these create? How can these environmental and biotechnology legal regimes coexist with the agronomic, economic, social, and technological demands that farmers face? Do these regimes intensify or ameliorate these demands? Do these regimes respond realistically or unrealistically to these demands? How do environmental and biotechnology laws and legal institutions influence and shape – for better or worse — a sustainable intensive agriculture?

By the questions I ask, one can see that the common theme in all three of my agricultural law courses is the theme of production agriculture. What is the justification for that theme?

Production Agriculture as the Core of Agricultural Law

Food, fiber, and energy are basic needs of human beings. Human beings have met these basic needs for thousands of years through plant (primarily domesticated crops) and animal (primarily domesticated livestock) agriculture. From the beginning of agriculture, production of food, fiber, and energy has been and is the raison d'être for agriculture. To my mind, it is simply obvious that without production the justification for agriculture ceases. Human beings using land, plants, and animals without a productive intent are engaging in human activity, but they are not engaged in the human activity of agriculture. From my perspective, agriculture as production is a tautological statement.

And production still matters. First and foremost, production matters because of human population. Agriculture provides the basic needs for food, fiber, and (to a much lesser extent) energy that human populations place upon it. Human populations continue to grow, particularly in developing countries, and hence the demands upon agriculture to meet these basic needs also grow. It has been the shame and moral indictment of generations for generations that fellow human beings are hungry and malnourished. Second, production matters because as human beings improve their well-being, as they move from subsistence agriculture to modern agriculture, as they move from rural to urban living, human beings change their dietary preferences. Human beings seek to feed, clothe, and power themselves with quantities and qualities of agricultural produce that increase the productivity demands placed upon agriculture. These basic facts about human beings and agriculture are not likely to change: in meeting basic human needs, agriculture is productivity.

And production still matters for additional reasons. While Australia-New Zealand, Europe, North America, and some countries of South America have very productive agricultural sectors, the agricultural sectors of many nations, especially in sub-Saharan Africa and Southeast Asia, are unproductive. Many nations of the world desperately need to have agricultural sectors that are vastly

(cont. on page 3)

more productive. While many ways exist to improve agricultural productivity, modern agriculture with its adoption of science and technology for seeds, nutrients, tillage, labor, transport, storage, and processing is a model well worthy of consideration and emulation. In a recent newspaper article about food security and food shortages, Thomas Lumpkin, Director of the International Wheat and Maize Improvement Center in El Batán, Mexico (better known by its Spanish initials, CIMMYT) was quoted as saying, "We need science to come back to farming."[6]

Unless productivity improves in many nations of the world, food trade (backstopped by food aid) will be a primary source of food and fibre for the urban poor, especially, of developing nations. Unless productivity improves, rural subsistence farmers, who are outside the markets for food and (often) outside the reach (physically or politically) of food aid, will remain in subsistence poverty with its attendant chronic malnutrition and frequent seasons of hunger. Far better to reduce food shortages, enhance food security, improve food nutrition, and promote domestic tranquility in developing nations by assisting them to intensify agricultural productivity both for rural farmers and their families directly and for urban consumers through domestic markets.[7]

And production matters to the Red Queen. The Red Queen Principle can be stated thus: "For an evolutionary system, continuing development is needed just in order to maintain its fitness relative to the systems it is co-evolving with."[8] To my mind, the Red Queen Principle means that farmers must keep adapting to the biotic and abiotic conditions affecting their agricultural production.[9] If farmers do not select improved seeds, control pests and weeds more effectively, conserve soils more healthfully, and manage weather (i.e. droughts, floods, frosts) more wisely, farmers' productivity over time will not only not increase but will likely decline. Hence, for agriculture to be productive, agriculture must change in order just to maintain its fitness and must improve to gain productivity advances. For agriculture whose first unique trait is its use of land, plant, and animal resources (evolutionary systems all), standing still is not a viable option.

What do these claims for why productivity matters mean for agricultural law? I posit that the singular importance of productivity for agriculture means that production agriculture should be (must be) the core of agricultural law. I have previously described my preferred first course as focusing on how private law and legal institutions influence and shape the use of resources in agriculture. I have also described briefly two other courses that, while focusing on environmental or biotechnological issues, also ask very similar questions about how farmers use their agricultural resources to produce food, fiber, and energy.

As the years have passed, I have come to name the agricultural production that I place at the core of my agricultural law courses as sustainable intensive agriculture.[10] I have described the challenges of sustainable intensive agriculture as follows:

> In the coming decades, agriculture faces three significant challenges. While these challenges will manifest themselves in ways unique to the cultural, socio-economic, and political conditions of different countries, developed and developing nations alike will face these challenges. ...
>
> Agriculture faces an agronomic challenge ... an environmental challenge ... an economic challenge....
>
> Agriculture must face these challenges in the coming decades in a manner that creates complementary, not conflicting, synergies between and among [these challenges]. As quickly as possible, agriculture must become agronomically sophisticated, environmentally protective, and economically sound."[11]

To my mind, the core of agricultural law should be how laws (e.g. cases, statutes, regulations, decrees, and international agreements) and legal institutions (e.g. administrative agencies, financial systems, marketing structures, and educational and extension services) influence and shape – for better or for worse – a sustainable intensive agriculture.[12] This is what I mean by proposing production agriculture as the core of agricultural law.

Aesthetic Farming as a Competing Vision

In my personal history of teaching agricultural law, I recalled how I used the Meyers, Pedersen, Thorson, and Davidson AGRICULTURAL LAW casebook for eighteen years until 2001. Their casebook provided my core agricultural law course. By 2001, however, the casebook was too outdated for continued use. The authors never took the casebook into a second edition for many reasons related to time, effort, and potential reward. Thus, I faced the choice of updating (rewriting) the book at significant effort for a small student demand or discontinuing the course. For practical reasons relating to my own commitments, energy, and projected rewards (that I suspect reflected consideration very similar to those made by the original authors), I chose not to update the casebook with my own materials. I discontinued the course I considered core – my "Agricultural Law" course.

Underlying my decision to discontinue the course, however, may have been a deeper concern that production agriculture had faded as the paradigm for agricultural law. Although I believed in the 1970s and have posited in this presentation that production agriculture should be the core of agricultural law, the paradigm for agricultural law may well have shifted. The new paradigm may be aesthetic[13] farming.

Clearly I am not the best person to defend aesthetic farming because I consider the concerns of aesthetic farming to be at the margins of agricultural law. Indeed, I believe that aesthetic farming, by abandoning production for agriculture, may well have abandoned the raison d'être for agriculture itself. In my opinion, aesthetic farming has abandoned the beauty of bountiful harvests and multiplying and fattening herds – the beauty found in production agriculture – with a new definition of beauty based, charitably, in bucolic sentimentalism and agricultural illiteracy. As I sketch aesthetic farming, aesthetic farming finds its beauty in assumptions such as the following:

Nature is to be revered because nature is assumed to be good and bountiful. With this reverence, aesthetic farming introduces

(cont. on page 4)

raw milk as a preferred product and agro-tourism as a preferred experience for consumers of the agricultural landscape.

Ecology and the environment are viewed as balanced, pristine, almost steady-state conditions. Preservation of these conditions is the goal and agriculture, as a human activity, must have as minimal impact as possible in order to protect the pure and uncontaminated state of nature.

Small is beautiful because it involves personal physical labor and personal physical management. Family farmers become romanticized icons whose daily labor is song and whose daily sweat is like drops of dew on sun-kissed faces.

Creatures great and small possess an inherent dignity that agriculture must respect. Alongside their enlightened farm owners, animals too gain standing to assert legal rights to life, liberty, and the pursuit of happiness.

Marketing is more important than production because created images are more appealing than sensory reality. Niche markets for organic products, grass-fed beef, and local foods become the drivers of agricultural policy.

Science is anti-human and alienating from nature and our true selves. Heirloom seeds and the well-manured furrow become the cutting-edge of agricultural progress and ambition.

Technology is a treadmill that grinds humans into anonymous ciphers and enslaved servants of machines. Aesthete farmers step off the treadmill into the haute couture of hand-crafted products made from time-treasured recipes and in traditional ways.

I understand and certainly feel the emotional tug of each of these statement – these assumptions – about the world of farming. Yet, I do not assent to these assumptions because each one is either wildly inaccurate or fundamentally incorrect, particularly if – and this is a big "if" – agriculture is to produce the food, fiber, and energy that sustains and enhances human welfare – the welfare of the farm laborer, the farm owner, rural communities, urban populations, and consumers among the peoples of the world in developed and developing countries.[14]

Of course, if agriculture is not about production for human welfare, there are other possible solutions, including the on-line reader comment to Shreya Maheshwari, supra note 6, where the reader posted: "The solution to world hunger is simple. Forced sterilization to populations that are not able to feed themselves. There is no food shortage or water shortage only an over abundance of hungry mouths. The country of Niger for example averages 8 babies per female. That is unsustainable. Giving food = giving life = more babies = morally bankrupt." While these assumptions appear so appealing in a country like the United States where seemingly assured food abundance makes elites no longer see any personal benefits from production agriculture,[15] these assumptions remain – and will remain in the future – wildly inaccurate or fundamentally incorrect with regard to the facts of the physical and biological reality of the world.

Conclusion

Having posited production agriculture as the core of agricultural law, I also admit that the paradigm for the discipline seems to be tilting towards aesthetic farming. The tilt towards this new paradigm may best explain why the AGRICULTURAL LAW casebook had no second edition and why "Agricultural Law" courses, like the one I taught for twenty plus years, have disappeared from law school course lists.

Yet, despite the apparent shift in paradigms, I remain convinced that sustainable intensive agriculture is the way forward for agriculture as a sector and for agricultural law as an academic discipline. I have no crystal ball to predict the future outcome of the struggles between these competing visions for agriculture. However, I do sense that I will learn the outcome when the term "sustainable" acquires an agreed upon meaning.[16] If production agriculture attains the adjective "sustainable," production agriculture – as changed and different as it is likely to be from the past and present – will be at the core of agriculture and agricultural law. If aesthetic farming captures the adjective "sustainable," production agriculture will move to the margins of agriculture and agricultural law. If aesthetic farming becomes the "sustainable" paradigm, I would be hesitant to call that human activity "agriculture" and I would be reluctant to label the study of that aesthetic farming as agricultural law.[17]

ENDNOTES

[1] This essay was presented January 9, 2009 at the Association of American Law Schools (AALS) meeting in San Diego.

[2] Drew Kershen, Book Review, Agricultural Law: Cases and Materials, 34 *U. Kan. L. Rev.* 99 (1985). This book review gives a clear statement of the evolution of my thinking about agricultural law from 1975 through 1985. The personal history I am presenting in this paper builds upon this book review.

[3] More specifically, I used the first eight chapters of the AGRICULTURAL LAW casebook as the coverage of my "Agricultural Law" course. Those eight chapters are:

Chapter 1 – Introduction to Agricultural Law;

Chapter 2 – Financing the Ownership of Agricultural Law;

Chapter 3 – Farm Leases;

Chapter 4 – Warehouses;

Chapter 5 – Operational Financing and Related Issues;

Chapter 6 – Insolvent Warehouses and Buyers;

Chapter 7 – Animals;

Chapter 8 – Commodity Futures Contracts.

For many years, I also used North Central Regional Extension Publication 32, Who Will Control U.S. Agriculture? (Univ. of Ill., Urbana-Champaign, Special Pub. 27, Aug. 1972). I used this Illinois publication in conjunction with Chapter One of the AGRICULTURAL LAW casebook to raise the structural issues that would be pervasive throughout the course.

[4] I taught "Agricultural Environmental Law" for the first time in the late 1980s, using materials developed by Neil Hamilton (Drake University) and Martha Noble (at that time, National Center for Agricultural Law, Research & Information, Fayetteville). Professors Hamilton and Noble called their materials "Environmental Agricultural Law." I revised these materials through the years so that today the materials I use for "Agricultural Environmental Law" are my own set of materials. My "Agricultural Environmental Law" course is 2-credit hours.

[5] Beginning in 1995, I taught a course entitled "Agricultural Public Law," using materials of the same name developed by Jim Chen (at that time, University of Minnesota). Professor Chen's book was a broad ranging book that asked explicitly "What is agriculture?" Professor Chen explored that question by presenting cases, statutes, and administrative regulations that focused on the inclusion or exclusion of agriculture from various substantive bodies of law – e.g. antitrust, intellectual property, and food law. Of course, the inclusion or exclusion depended upon how one defined "agriculture."

By 1999, I had transformed Professor Chen's materials into the course titled "Agricultural Biotechnology Law and Policy" – 3 credit-hours having a one hour component on intellectual property, another hour on comparative biotechnology regulations (the U.S. and the European Union), and a third hour on related international conventions about genetic resources and biotechnology. While I have transformed Professor Chen's materials to emphasize agricultural biotechnology, my transformed materials retain much of the public policy flavor and analysis that Professor Chen created in his materials for his 1994 "Agricultural Public Policy" course.

(cont. on page 5)

[6] Javier Blas, The End of Abundance: Food Panic Brings Calls for a Second 'Green Revolution', Financial Times (London) (June 3, 2008).

For a particularly compelling account of the need for science in agriculture, read Robert Paarlberg, STARVED FOR SCIENCE: How Biotechnology is Being Kept Out of Africa (Harvard Univ. Press, 2008). Dr. Robert Paarlberg is a professor of political science at Wellesley College and a former research fellow in Science. Technology, and Globalization at the Harvard Belfer Center for Science and International Affairs.

[7] Shreya Maheshwari, Africa's Growing Food Crisis: The need to balance food aid with long-term agricultural investment, Harvard Political Rev. (Nov. 5, 2008); Robert Paarlberg, It's Not the Price that Causes Hunger, International Herald Tribune (Apr. 22, 2008).

[8] Red Queen, http://en.wikipedia.org/wiki/Red_Queen (12/ 9/2008).

[9] For a tour-de-force about the needs for and difficulties of achieving improved crops, read Jonathan Gressel, GENETIC GLASS CEILINGS: Transgenics for Crop Biodiversity (Johns Hopkins Press, 2008). Professor Jonathan Gressel is a Professor Emeritus, Department of Plant Sciences, Weizmann Institute of Science.

[10] The author first read the phrase "sustainable intensive agriculture" in David E. Adelman & John H. Barton, Environmental Regulation for Agriculture: Towards a Framework to Promote Sustainable Intensive Agriculture, 21 *Stan. Envtl. L. J.* 3 (2002).

[11] Drew L. Kershen, Sustainable Intensive Agriculture: High Technology and Environmental Benefits, 16 *Kan. J. Law & Pub. Pol'y* 424, 424-425 (2007).

[12] It is worth mentioning in a footnote, without extended discussion, that placing production agriculture at the core of agricultural law does not presuppose economic protectionism, environmental degradation, or social-structural stagnation. While these issues are certainly part of the debate about agriculture within agricultural law, sustainable intensive agriculture — i.e. production agriculture as productive agriculture — must be agronomically sophisticated, environmentally protective, and economically sound.

[13] Aesthetic: relating to or dealing with aesthetics or the beautiful; appreciative of, responsive to, or zealous about the beautiful. *Webster's Seventh New Collegiate Dictionary* (1963).

Aesthetics: a branch of philosophy dealing with the nature of the beautiful and with judgments concerning beauty; the description and explanation of artistic phenomena and aesthetic experience by means of other sciences (as psychology, sociology, ethnology, or history). *Id*.

[14] Cf., Paul Collier, The Politics of Hunger – How Illusion and Greed Fan the Food Crisis, 87 *Foreign Affairs* 67 (Nov/Dec 2008). Dr. Collier is Professor of Economics and Director of the Center for the Study of African Economies at Oxford University. He is also the author of the book, THE BOTTOM BILLION: Why the Poorest Countries are Failing and What Can be Done about It (Oxford Univ. Press, 2007).

[15] Robert Paarlberg, *supra* note 6, Chapter 1: Why Rich Countries Dislike Agricultural GMOs passim.

[16] Thomas Redick & Shawna Bligh, A Twisting Path Toward a National Standard for Sustainable Agriculture, 25 *Agricultural Law Update* 1, 3-6 (Nov. 2008).

[17] As those reading this essay are likely to realize, I have been greatly influenced by the scholarship of Jim Chen, Dean, Louis D. Brandeis School of Law, University of Louisville. See especially, Jim Chen, The Agroecological Opium of the Masses, 10 *Choices* 16 (Issue 4, 1995). While I do not know if Dean Chen would agree or approve, I think his term "agroecological" is a likely replacement term. Agricultural law would disappear to be replaced by Agroecological Law.

Hipp - BEGINNING FARMERS AND RANCHERS (cont. from p. 1)

of those surveyed indicated they had discussed their plans with no one; approximately 40% indicating they had at least discussed their plans with family members. Around 30% indicated they would never retire. Less than 20% indicated they had consulted lawyers; around 20% reporting they had consulted accountants to discuss their plans. According to the Center, the smaller the farm, the greater likelihood the farmer/rancher had never contacted anyone to discuss plans and the greater likelihood the farmer/rancher considers he/she will never retire. An alarming percentage of farmers/ranchers indicate that the existing farm will provide the bulk of their retirement income.

A Successful Farming survey similarly found that only about 30% of the nation's farmers and ranchers have estate planning in place or have discussed their plans with family members. North Carolina surveys have yielded similar results.

Surveys in Minnesota also reveal the same startling picture. Those with up-to-date estate plans in Minnesota are in the 42% range; those with up-to-date farm transfer plans are only 5% of those surveyed. Minnesota went one step further and began efforts to quantify the total value of Minnesota farms that could be impacted by improving estate planning and farm succession strategies and implementation. According to Minnesota researchers, the total potential impact of improved estate planning and farm succession planning just among the 300+ participants in recent workshops focusing on these issues was over $200 million in potential value affected, or farm values saved.

If these findings hold true in other states, we as members of the agricultural legal community have a very important role to play. We can assist our colleagues in the education community in not only raising awareness of the need for proper estate planning and farm business succession planning, but in improving farmers and ranchers' knowledge of the various legal instruments available to address their planning needs.

Addressing these needs is of vital importance if we are to ensure a "new generation" will be able to own and operate the nation's farms, ranches and working lands in years to come.

A few of the 2008 Farm Bill provisions designed to address beginning farmer and rancher issues are:

*** Beginning Farmer and Rancher Development Program (BFRDP)**. This provision secured $75 million in mandatory funding for a competitive grants program which supports community-based beginning farmer and rancher training, education, and mentoring efforts. Additional discretionary funds were authorized for the program subject to appropriations. The BFRDP is being administered by the Cooperative State Research Education and Extension Service (soon to be re-organized as the National Institute for Food and Agriculture). The anticipated release date of the first RFA for BFRDP is January 2009. The BFRDP is a potential source of funds that could include significant involvement for those in the agricultural law community as resources in education, training, technical assistance and outreach efforts.

* **Beginning Farmer and Rancher Individual Development Account Pilot Program.** This provision established a new 15-state pilot program to assist beginning farmers who lack significant

(cont. on page 6)

Hipp - BEGINNING FARMER AND RANCHERS (cont. from p. 5)

financial resources or assets to accumulate startup savings and financial management skills. This program will require appropriations.

*** Conservation Set-Aside, Payment Rate, and Advance Payment**. This provision reserves 5% of total funds from working lands conservation programs for beginners and 5% for socially disadvantaged farmers and ranchers; it also provides a 90% cost-share rate for beginning, limited resource and socially disadvantaged producers (with a directive that it must be at least 25% higher cost-share than regular contract offers. The Environmental Quality Incentives Program also includes a provision that allows a beginner, limited resource or socially disadvantaged producer to receive 30% of the payment up front (advance payment) to help them meet the costs of putting in the conservation practice.

*** Beginning Farmer and Rancher Down Payment Loans.** This provision enables lower interest rates, better lending terms, and higher maximum purchase price on first-time land purchases for new farmers, plus program expansion to also cover minority farmers.

*** Higher Loan Limits and Credit Program Funding Levels**. This provision creates an increase in per farm loan limits from $200,000 to $300,000 for both direct ownership and direct operating loans, and an increase in the authorization for appropriations for annual lending funds to $350 million and $850 million for direct ownership and operating loans, respectively.

*** Beginning Farmer and Rancher Contract Land Sales Program**. This provision establishes a new permanent, nationwide authority for federal guarantees on private land contract sales to assist transfer of farms from retiring to beginning farmers and ranchers.

*** Conservation Reserve Program Transition Incentives**. This provision authorizes $25 million over 10 years in mandatory funding for a new program that encourages owners of CRP land that is returning to production to rent or sell to beginning and minority farmers.

*** Conservation Loans**. This provision revises the conservation loan program to include priorities for beginning and minority farmers, and for conversion to sustainable and organic farming.

*** Office of Advocacy and Outreach**. This provision creates a new office in USDA to coordinate implementation of small farm and beginning farmer and rancher policies and programs, as well as socially disadvantaged farmer and farmworker policies and programs.

COOL'S IMPLICATIONS FOR LIVESTOCK PRODUCERS - by Cari Rincker, Esq.*

After a decade of dialogue and controversy, country-of-origin labeling ("COOL") is finally in full force. Economists and policy experts can hypothesize about the long-term effects on the livestock business and livestock prices, but it is important to understand COOL's implications for livestock producers.

Background

For many years, voluntary COOL regulations have been in place for beef, lamb, pork, and perishable agriculture commodities and peanuts. Recently, the 2008 Farm Bill amended the Agricultural Marketing Act of 1946 ("AMA") once more by finally making COOL mandatory. See 7 U.S.C. § 1638 et seq. The 2008 provisions added chicken, goat, ginseng, pecans, and macadamia nuts to the list of "covered commodities" under COOL. The interim final rule and request for final public comments was published by the USDA in the Federal Register on September 30, 2008. See 7 C.F.R. Part 65.

Put simply, excluded from COOL are "processed foods" and "mixed foods." For example, raw pork chops will be labeled, but not ham or bacon. Also, COOL is applicable at the retail level only-- not the food service industry or butcher shops. See 7 C.F.R. § 65.300. In other words, the menus at your favorite steak restaurant or local tavern are not required to have COOL. Even so, the hope is that U.S. livestock producers will be able to reap the rewards of this county's reputation with safety and quality.

Labeling Categories

Pursuant to 7 C.F.R. § 65.400(a), "[c]ountry of origin declarations can either be in the form of a placard, sign, label, sticker, band, twist tie, [or] pin tag" labeling that the retail unit is a "Product of USA," "Produce of the USA," "Grown in Mexico," or the labeling may simply be in check box form. That said, there are four major categories for COOL designation for beef, lamb, pork, chicken, and goat meat:

1) United States Only ("Category A"): This category includes meat derived from animals "exclusively born, raised and slaughtered in the United States" (emphasis added). 7 U.S.C. § 1638a(a)(2)(A). As a general rule, to be labeled as a "Product of the U.S.," the animal product needs to have been on U.S. soil from birth to retail. The only exception is meat derived from an animal "born in Alaska and Hawaii and transported through Canada for no more than 60 days." 7 C.F.R. § 65.260.

2) Multiple Countries of Origin ("Category B"): This category includes meat derived from animals "not exclusively born, raised, and slaughtered in the United States [but] born, raised, or slaughtered in the United States, and not imported into the United States for immediate slaughter" (emphasis added). 7 U.S.C. § 1638a(a)(2)(B). Stated differently, the livestock animal spent at least one phase of its life in the U.S. and one phase outside the U.S. (e.g.,"Product of U.S. and/or Canada"). See 7 C.F.R. § 65.300(e)(1)(i).

3) Imported for immediate slaughter ("Category C"): This category includes "meat that is derived from an animal that is imported into the United States for immediate slaughter." 7 U.S.C. § 1638a(a)(2)(C). More specifically, this category is for livestock imported to the U.S. less than two weeks before they are harvested (e.g., "Product of Mexico and the U.S."). See 7 C.F.R. § 65.300(e)(1)(ii). Please note that the U.S. is listed last on the label in this instance because countries are listed in descending order of prominence.

4) Foreign ("Category D"): Finally, this category includes "meat derived from an animal that is not born, raised, or slaughtered in the United States." 7 U.S.C. § 1638a(a)(2)(D). Imported meat products will be labeled according to its origin, "as declared to U.S. Customs and Border Protection (CBP) at the time the product entered the United States, through retail sale." 7 C.F.R. § 65.300(f) (e.g., "Product of Canada").

Interestingly, Congress did not create an "unknown origin" label. From a livestock producer's perspective, if you have livestock whose origin is not verifiable, then those animals will never been eligible for a

(cont. on page 7)

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Category A "Product of U.S." label. If the livestock animal can be proved to be contained within U.S., Canada, and Mexico during their life but harvested in the U.S., such livestock will likely be labeled under Category B or C, depending on time in the U.S. before harvest.

Affidavit

A self-certifying affidavit is considered sufficient evidence to prove the origin of livestock. There are three types of affidavits, each used in different circumstances: (i) producer, (ii) consolidated, and (iii) continuous. Each should be used in different circumstances. If your local salesbarn does not voluntarily offer any of these affidavits make sure to ask them for a copy.

Producer Affidavit. Under the promulgated regulations, a "producer affidavit shall be considered acceptable evidence on which the slaughter facility may rely to initiate the origin claim, provided it is made by someone having first-hand knowledge of the origin of the animal(s) and identifies the animal(s) unique to the transaction" (emphasis added). 7 C.F.R. § 65.500(b)(1). This provision does not require that the person signing the affidavit be an owner or a ranch representative; however, this person must have personal knowledge and be able to identify animals "unique to the transaction" by way of ear tag, number of head, breed and sex, the date of the transaction, and the name of the buyer. To more sharply define, "first-hand knowledge" is knowledge gained from personal observation or experience as distinguished from what someone else has verbally told you. That said, a recently hired ranch hand will likely be precluded from signing the producer affidavit.

Consolidated Affidavit. This type of affidavit is used when transferring livestock to another rancher. To illustrate, a consolidated affidavit would be used if you are a first-level producer raising feeder cattle to sell at weaning or when selling terminal cattle to the feedyard for finishing.

Continuous Affidavit. Some facilities are offering "continuous affidavits" for producers or livestock handlers. After signed once, continuous affidavits are valid into perpetuity until canceled. In other words, if you know you will only be selling cattle born and raised in the United States (or you know you will always be importing cattle from Canada), then you only have to sign this affidavit once instead of signing a producer affidavit every trip to the sale barn. A small caveat, if you sign a continuous affidavit and anomalously have an animal that was born or raised outside your "norm," you must sign a separate producer affidavit for that particular head if your continuous affidavit is still valid. Encourage your local facilities to offer continuous affidavits as they should help with efficiency. The National Cattlemen's Beef Association ("NCBA") has an electronic version of the affidavit online at www.beefusa.org.

Record Keeping

Typically, a self-certifying affidavit will be sufficient evidence to prove the origin of your animal; however, the regulations provide that the USDA will perform tracebacks and random audits. Because of this, all livestock producers must implement an accurate, efficient record-keeping system if one is not already in place. If audited, a livestock producer only has five business days to produce said documentation so requested information must be readily available. The regulations currently allow for either hard or electronic records and only require that the records are "legible." See 7 C.F.R. § 65.500(a). A failure to comply may result in a fine of up to a $1000. See 7 U.S.C. § 1638b(b). Livestock producers are responsible for records for up to one year from the date of the transaction. See 7 C.F.R. § 65.500(b)(3).

The 2008 Farm Bill changed COOL's record-keeping mandate: it states that "[r]ecords maintained in the course of the normal conduct of the business of such person, including animal health papers, import and customs documents, or producer affidavits" will serve as sufficient origin verification. 7 U.S.C. § 1638a(d)(2)(A). The Agricultural Marketing Service ("AMS") has been asked by commentators to provide an enumerated list of required records; yet in the interim final rule, AMS maintained that producers only need such records normally kept in the course of business. Given the current ambiguity of the regulation, it is suggested in that livestock producers be prepared to present the following paperwork to ensure compliance with the industry standard:

(i) health and vaccination records;

(ii) birth and death records as well as records of missing cattle;

(iii) production records including feed documents;

(iv) brand inspection documentation or ear tag (visual or electronic) records;

(v) all transaction records such as purchase receipts, lease records, scale tickets, bills of sale, and closeout records;

(vi) transportation and trucker records;

(vii) breed association registration papers, if available;

(viii) financial records such as balance sheets and income statements;

(ix) pen and pasture information including a site map with capacities; and,

(x) beginning and ending inventory records (e.g., number of bulls, virgin or bred heifers, open or bred cows, weaned lambs, bred ewes, barrows, gilts, etc.).

Under 7 C.F.R. § 65.500(b)(1), those cattle producers participating in the National Animal Identification System ("NAIS") may "rely on the presence of an official ear tag and/or the presence of any accompanying animal markings . . ." in lieu of above listed records. In other words, participating in NAIS could ease your record keeping burden.

Furthermore, a grandfather clause was included in the statutory language so that all livestock residing in the U.S. as of July 15, 2008 that stay in the U.S. will be considered U.S. born and raised; thus, the meat from those animals is eligible under Category A. Documentation is preferred to prove the animals were on U.S. soil before this threshold date. Further, any cattle entering feedlot or finishing units after July 15, 2008 will need some type of record of origin (e.g., health papers, production records, affidavit) to be eligible for sale by U.S. retailers.

Final Thoughts

Only time will tell what the long-term impacts of COOL will be on the livestock business, especially at the production level. It is critical that farmers and ranchers implement an economical yet thorough record-keeping system in their production program. Some states have implemented additional regulations such as specific tag or branding requirements or health provisions. To ensure compliance with both federal and state law, you should contact your Department of Agriculture, state affiliate livestock groups, or visit www.ams.usda.gov/COOL.

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REGULATORY DEVELOPMENTS

—Anthony Schutz, University of Nebraska Law School

On December 29, 2008, the CCC issued an interim rule amending Part 1400 of Title 7 of the Code of Federal Regulations. These regulations deal with payment eligibility and limitation under the bulk of commodity and conservation programs within the farm bill. The changes are numerous, including changes to the way payments are attributed to individuals as farmers and as entity owners, to the financing rules, and to the eligibility of entities and spouses. Under the terms of the 2008 Farm Bill, the interim rule will govern from this point forward, but the CCC has opened a comment period until January 28, 2009. Instructions on how to comment are included in the notice. It begins on 73 Federal Register 79267 (December 29, 2008), and it is available at www.aglaw.blogspot.com (along with a few of this author's comments).

CCC has also issued a final regulation for the Direct and Counter-Cyclical Program as well as the new Average Crop Revenue Election Program. This rule can be found at 73 Federal Register 79284 (December 29, 2008).

From the Executive Director:

MEMBERSHIP RENEWALS - MEMBERSHIP DIRECTORIES

2009 membership renewal letters have been mailed to those who have not already renewed for 2009. Please check your personal information carefully, especially your e-mail address. I can provide current members with an Excel spreadsheet of the current members' directory; send requests to RobertA@aglaw-assn.org.

2008 CONFERENCE HANDBOOK ON CD-ROM

Didn't attend the conference in Minneapolis but still want a copy of the papers? Get the entire written handbook on CD. The file is in searchable PDF with an active-linked table of contents that is linked to the beginning of each paper. Order for $45.00 postpaid from AALA, P.O. Box 835, Brownsville, OR 97327 or e-mail RobertA@aglaw-assn.org. Copies of the printed version are also available for $90.00. Both items can also be ordered using PayPal or credit card using the 2008 conference registration form on the AALA web site.

AALA UPDATE

If you are still receiving the AALA *Agricultural Law Update* in the printed format, remember that the *Update* is available by e-mail, often sent up to a week before the printed version is mailed. The e-mail version saves the association substantial costs in printing and mailing. Please send an e-mail to RobertA@aglaw-assn.org to receive a sample copy and to change your subscription to e-mail.

2009 ANNUAL CONFERENCE

A snafu has occurred with the 2009 conference dates. Please wait for further notice beofre making your travel plans for the 2009 conference. If you would like to help with a presentation, contact Ted at ted_feitshans@ncsu.edu.

NEW ONLINE SURVEY FOR MEMBERS

A new survey has been uploaded on to the AALA web site. This survey focuses on the annual conference issues such as location and extra-conference activities. The AALA board will use the results to guide it in making future conference location choices. You will need to log in as a current member. Please send me an e-mail, RobertA@aglaw-assn.org, if you need a reminder as to your username (your last name) and/or password (your member number).

Robert P. Achenbach, Jr., AALA Executive Director