A CHANGING AGRICULTURAL LAW FOR A CHANGING AGRICULTURE

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I. INTRODUCTION

The theme of our conference this year and of my remarks is "A Changing Agricultural Law for a Changing Agriculture." My goal today is to give some meaning to this somewhat ambiguous title. I would like to do this by reviewing with you some of the developments of recent years both within the structure and operation of the food and agricultural system and within the nature of agricultural law. In this review we can identify a number of the significant issues which provide the foundation and content of our professional work in agricultural law and consider how that work is evolving. To help do so, I will first look back at several of the issues identified in a somewhat similar talk at the 1996 conference in Seattle, titled

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"Plowing New Ground: Emerging Policy Issues in a Changing Agriculture."[1] I will also look more closely at a series of important agricultural law-related developments, all of which happened during September 1998, and consider the implications of those developments for our profession.[2] Finally, I will close with some thoughts on what these changes may mean for the practice and refinement of agricultural law issues within society.[3]

II. LOOKING BACK TO "PLOWING NEW GROUND" AND WHAT HAS EMERGED

Often when one gives a talk about what may happen in the years ahead, there is never the occasion to look back and consider whether your insights had any relation to what has in fact transpired. The opportunity to speak again this year on a related theme to 1996 creates the possibility to consider what was identified, not necessarily to glory in any level of accuracy achieved, but as much to see if there can be a value in trying to predict and prepare for what may be coming ahead. I am pleased to report that on a number of the issues identified, there have been important developments—in some cases ones which have moved more rapidly than we might have expected. On other topics the results or progress are less clear. Consider this brief review of some of those topics and what the developments may indicate for the future of agricultural law.

A. *Farm Finance, Farm Programs, and Exports*

The first topic identified in 1996 was the need to "Continue the Work of the 'Old' Agricultural Law: When to Expect the Next Wave of Bankruptcy and Farm Finance Issues."[4] Of all the topics identified in 1996, it is this one that may have the most significance for our profession in the immediate future. Few could have predicted the depths of the current financial crisis unfolding in agriculture, or the rapidity with which it has set upon us during the fall of 1998. But as anyone who works in rural America knows, the current farm crisis is real and may be severe. The combination of low prices for all major commodities makes the current situation in midwestern states such as Iowa and Ohio especially threatening. Economists are predicting significant declines in net farm incomes, with drops of over sixty percent in some states, and the near term projections for price increases are bleak.[5] The

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1. Those comments can be found in the article Neil Hamilton, *Plowing New Ground: Emerging Policy Issues in a Changing Agriculture*, 2 DRAKE J. AGRIC. L. 181 (1997).
2. *See* discussion *infra* Part III.
3. *See* discussion *infra* Part IV.
4. Hamilton, *supra* note 1, at 182.
5. *See* George Anthan, *Farmers Face 3 Bad Years: Incomes in Iowa Dive with Prices*, DES MOINES REG., Oct. 3, 1998, at 1A (reporting the projections of economists at Iowa State University's

severity of the current situation will be largely determined by how long the period of low prices exists, but on this question there is little agreement.

The current economic situation has any number of contributing causes and perhaps an equal number of proposed solutions. One main contributing factor has been the 1996 Freedom to Farm program that removed any controls on plantings and which removed most of the government programs to provide a floor under prices.[6] These changes, which led to increased plantings, when combined with a significant downturn in foreign demand for American farm exports, stimulated in large part by weakness in the Asian economy, have exacerbated the depths of the financial downturn.[7] The resulting financial crisis has led to calls in Congress for additional "disaster" relief for agriculture and even reforms of the much heralded 1996 farm bill.[8] Congress has agreed to a $4 billion package of relief, in the form of disaster assistance and additional market transition payments, but the President vetoed the package because it was less than the $7.3 billion relief proposed by Senator Harkin of Iowa, which would include modifications of the price support system to help increase commodity prices.[9] The debate has featured allegations that the current problems result from our failure to expand exports markets, as reflected in proposals for "fast track" authority for the President to negotiate trade agreements and providing additional funding to the International Monetary Fund (IMF).[10]

Both of these issues were identified in a 1996 talk regarding exports under the topic "Expanding International Trade for U.S. Agriculture: Will New Trade Agreements Reap a Harvest of Sales or Conflict?" and farm programs under the topic "Living in a Post-Farm Programs Era: Will the Public Desire for Soil Stewardship Be Achieved Through Regulation."[11] The current situation has clearly raised the issue of the role of international agreements and the impacts of foreign trade. As anyone from the northern plains states will quickly tell you, some farmers see the source of part of their problems coming from Canadian agriculture. The

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Center for Agriculture and Rural Development (CARD) that net farm income in Iowa will decline from $4 billion in 1996 to $1.8 billion in 1999).

6. There is a great debate in American agriculture over the merits of the Freedom to Farm Program, with advocates worried that any attempt to reform the plan will threaten a return to government controls of the 1980s and proponents of government actions, such as reopening the farmer owned reserve, arguing that failing to do so will result in thousands of farmers going out of business. *See, e.g.*, George Anthan, *Peterson: The System Gives Money to Farmers Without Old Planting Restrictions*, DES MOINES REG., Aug. 16, 1998, at 1FC (featuring respective pro and con arguments by Robert Peterson, President of the National Grain Trades Council, and Dr. Neil Harl, noted Iowa State University agricultural economist).

7. *See* Sam Howe Verhovek, *Northwest Farms and Industry Pinched by Asia's Fiscal Crisis*, N.Y. TIMES, Oct. 1, 1998, at A1.

8. *See, e.g.*, *$7.3 Billion Farm Aid Plan Is Rejected by GOP*, DES MOINES REG., Sept. 29, 1998, at 4A.

9. *See id.*

10. *See id.*

11. Hamilton, *supra* note 1, at 185, 190.

situation has become so tense that officials in the Dakotas have stopped Canadian trucks to check for compliance with American laws, actions which have led the governments to agree to further talks to resolve the problems.[12] The current situation has clearly placed the issues of the future of farm programs and the appropriate role for the federal government back on the policy agenda. Further refinement and resolution of both these topics will require the involvement and efforts of our profession, and will help shape the future of our work.

Exploring the causes and solutions to the current financial problems in the farm sector are beyond the scope of this Article, although these topics will be the work of many sessions of this conference. But there are observations we can make. First, we cannot forget the need to understand and use the traditional legal tools developed for addressing farm indebtedness and related matters. Many here today spent the last half of the 1980s working with these laws, and they may be the work of the future as well.

Second, the appropriate role for the federal government in setting the economic foundation for the farm economy is still open for debate. The effects of the current situation, which will be felt in declining land values, farm foreclosures, and probably even bank closings, all reveal that reforming federal farm programs is not as simple as we made it look in 1996.

Third, the ability of the United States to rely primarily on the "free market" and the promise of ever expanding growth in exports for the health of the farm economy is seriously flawed. The United States cannot control the economic factors that influence demand for American farm products. Policies based solely on these ideas will continue to place at risk both the families involved in agriculture and the land and other resources on which agriculture relies. This result does not mean we have to change the policies, but we should at least acknowledge the potential impacts of the choices we make.

It is important to recognize that if agriculture does slide into a period of serious financial stress, this time around there are several things which will be different. One important tool, Chapter 12 bankruptcy, may no longer be available because Congress let the law sunset at the end of September.[13] In addition, agricultural lawyers will need to deal with the overlay of production contracts, marketing arrangements, and complicated business organization structures which have proliferated in American agriculture in recent years. How well these various arrangements will function once they are subjected to the pressures of financial problems and changing market prices is open for debate and, no doubt, litigation. If only a fraction of the rumors one hears in the countryside are true—rumors about

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12. *See U.S., Canada Agree to Agriculture Talks*, STAR-TRIB. (Minneapolis-St. Paul), Oct. 3, 1998, at A12.

13. *See* Kevin O'Donoghue, *Farmers' Bankruptcy Law Expires*, DES MOINES REG., Oct. 1, 1998, at 12S.

unilateral changes in contract payment terms and the ability of various businesses to meet their financial obligations—there will be sufficient demand to keep us busy.

B. *Industrialization, New Technologies, and Food Safety*

Another topic identified in the 1996 talk concerned "Confronting the Forces of Industrialization: How to Address Public Concerns About Concentration in the Food Sector?"[14] This topic is also an issue on which there has been much development, both economic and legal, in the intervening two years. Anyone who lives in a state where swine are produced is well aware of the evolving nature of the swine industry and the related legal and social issues. In many parts of the country, including my state of Iowa, there is perhaps no more acrimonious or contentious issue. The debate is made especially difficult to address because of the overlay of legal, economic, and policy issues involved, and the societal impacts of how they are resolved. The appropriate role of government regulations for environmental protection, the involvement of local governments in locating facilities, the application of nuisance law, and the effect of legislative protections such as "right-to-farm" laws are all issues involved in the debate. But the matter does not stop there because other questions such as the integrity and transparency of the marketplace,[15] United States Department of Agriculture (USDA) proposals for mandatory price reporting, the role of packers and "captive supplies," the application of state anti-corporate farming laws,[16] and legislative protections for contract producers, all come into play as well. While there have been important developments on many of these issues, several examples of which will be discussed shortly, the underlying structural concentration of pork production has continued. The October 1998 issue of *Successful Farming* includes an annual review, "Pork Powerhouses," which lists the fifty largest swine operations in the nation.[17] The article reports that these fifty largest producers now own 2.6 million sows and by 1999 will market one-half of the pigs sold in the United States.[18] Regardless of your own position or involvement in this arena, the rapid increase in the level of market concentration will be a factor affecting how the law develops.

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14. Hamilton, *supra* note 1, at 184.

15. The increase in the use of production contracts in the production and marketing of livestock has created new challenges for the ability of the marketplace to serve as an effective price discovery mechanism for those not involved in these arrangements. *See, e.g.*, Steve Marberry, *Swine Producers Push Price Transparency*, FEEDSTUFFS, Sept. 7, 1998, at 5.

16. The most significant debate over the need for state "anti-corporate" farming legislation during 1998 is taking place in South Dakota. *See* Judith Graham, *South Dakota Leads Change on Corporate Farming*, NEWS & OBSERVER, Dec. 16, 1998, at B6. A campaign to pass a constitutional initiative, Amendment E, which would prevent the use of business organization except general partnerships for non-family members, is being led by the South Dakota Farmers Union. *See id.*

17. *See* Betsy Freese, *Pork Powerhouses 1998*, SUCCESSFUL FARMING, Oct. 1998, at 19, 21.

18. *See id.* at 21.

However, swine production is not the only area of American agriculture that has experienced rapid consolidation in ways which raise important legal and policy issues. Most notably, from a farmer's standpoint, the recent consolidations in the seed, chemical, and biotech sector have created a changing landscape. Perhaps most striking has been the recent drive by Monsanto to expand its reach in the seed and biotech industry.[19] The acquisition of major seed companies, such as DeKalb, Holdens, and Delta & Pine Land Co., and the marketing arrangements with other companies such as Cargill, have positioned the company to be a formidable supplier or competitor to those in agriculture. But Monsanto has not been the only company involved in such mergers, as evidenced by DuPont's purchase of twenty percent of Pioneer, and the formation of the joint venture Optimum Quality Grains.[20]

From the standpoint of farmers and lawyers, it is important to consider the factors driving these mergers and arrangements. They are based on a belief that the biotechnology era of agriculture has arrived and that the companies which have the capacity to develop and market improved production technologies and end products will thrive. The ability to use intellectual property protections such as patents is a key element of this development. But the ability to control the use of new transgenic biotechnologies, such as the "technology protection system," dubbed the "Terminator gene" by some, recently patented by USDA and Delta & Pine, is a major consideration.[21]

The implications of these changes for the legal profession are significant. First, lawyers will need to stay on top of the new and evolving set of governmental regulations which will accompany these changes.

Second, some of us will be called on to develop the documents that create these emerging business structures, while others will need to understand how these evolving legal arrangements effect the ability of their farm and business clients to survive. Identifying how these changes may affect the "public interest" and acting on those concerns will be another task in part filled by our profession. In that regard, one prime example of the relation of these changes to the public interest can be seen in questions of food safety.

Third, we must accept that the great majority of people are indifferent to the underlying changes in the structure of agriculture or the production technologies

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19. *See, e.g.*, Cath Blackledge, *The Green Revolution: Part Two*, THE EUROPEAN, May 18-24, 1998, at 20; Anne Fitzgerald, *DeKalb Shakes Up Seed Industry*, DES MOINES REG., Feb. 15, 1998, at 4G.

20. *See, e.g.*, Anne Fitzgerald, *Biotechnology Hailed at Joint-Venture Start*, DES MOINES REG., Jan. 22, 1998, at 10S; Anne Fitzgerald, *Pioneer's Pursuit: Teamwork, Profits*, DES MOINES REG., Feb. 1, 1998, at 1G.

21. For a discussion of some of the background on the "Terminator technology" see Greg Hillyer, *The Terminator Gene*, PROGRESSIVE FARMER, July 1998, at 36; Michael Howie, *Delta & Pine, USDA Receive Patent*, FEEDSTUFFS, March 9, 1998, at 5; *USDA at War with Farmers over Use of Crop Seeds*, NUTRITION WEEK, May 8, 1998, at 5.

employed until they believe the changes may somehow impact them personally.[22] The most direct contact Americans have with agriculture is through the food they eat and their perceptions of whether it is healthy or safe for them. We are all familiar with the evolving nature of food safety debate in our country, whether reflected in the USDA's promotion of Hazard Analysis and Critical Control Points (HACCP) based inspections systems[23] or the recent reforms of the Food Quality Protection Act, which replaced the Delaney clause and set the stage for a major review of the safety of various pesticides. Clearly, the work on these and related issues is far from complete and will demand the involvement of lawyers on all sides of the debates.

III. CONSIDERING HOW RECENT AGRICULTURAL LAW DEVELOPMENTS ILLUMINATE THE FUTURE

While other developments in agriculture reflect on topics raised in the 1996 talk, it is time to consider how several recent agricultural law decisions will shape our profession and consider how the changes in agricultural production may lead to changes in agricultural law. To demonstrate this theme, let us examine four important examples of "agricultural law," all of which occurred during the month of September 1998. The following examples are not exclusive, but they are a convenient vehicle for considering the future of our profession: (1) the Iowa Supreme Court's ruling in *Bormann v. Board of Supervisors*,[24] that one of the state's three right to farm laws is an unconstitutional taking of private property;[25] (2) the decision by Congress to allow Chapter 12 of the Bankruptcy Code to expire at the end of September (Congress reconsidered this decision in early October);[26] (3) the Fifth Circuit decision in *Sierra Club v. Glickman*[27] that the USDA must comply with the consultation requirements of the Endangered Species Act in developing farm price support and conservation programs;[28] and (4) the proposal by the USDA and Environmental Protection Agency (EPA) to issue a "unified national strategy for animal feeding operations" and the expansion of federal regulatory control over

22. *See, e.g.*, Constance L. Hays, *Allergic Reactions to Nuts Are Dangerous to Millions: As Awareness Grows, A Scramble to Cope*, N.Y. TIMES, Feb. 22, 1998, at A10.

23. *See Salmonella Detection Declines*, DES MOINES REG., Sept. 23, 1998, at 7A. The early results from the adoption of the HACCP approach in the meat industry may be promising as the USDA's Food Safety Inspection Service reports that after the first six months of use the incidence of salmonella contamination in chickens has dropped by nearly one-half. *See id.*

24. Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998) (en banc), *cert. denied*, 119 S. Ct. 1096 (1999).

25. *See id.* at 311.

26. *See* O'Donoghue, *supra* note 13, at 12S.

27. Sierra Club v. Glickman, 156 F.3d 606 (5th Cir. 1998).

28. *See id.* at 618.

livestock production.[29] Each of these actions will be examined to identify any insights which can be drawn.

A. *Are Right-to-Farm Laws Unconstitutional?*

All fifty states have at least one law providing some form of legislative protection from nuisance suits for qualifying agricultural operations. These laws are a popular and accepted part of the agricultural law landscape, even though, as discussed at the 1997 conference in Minneapolis, they are not immune from criticism or attack.[30] One of the potential avenues of attack that had not been explored until this year concerns the interplay between such laws and constitutional protections for private property. In light of the political escalation of "taking" concerns in recent years, it was predictable that such a challenge would be made; however, the result was not as predictable. The challenge has happened, and we now have an answer from the first state high court to examine the issue. For many involved in agriculture the answer may be uncomfortable.

1. *The Ruling*

On September 23, 1998, in *Bormann v. Board of Supervisors*, the Supreme Court of Iowa ruled the nuisance suit "immunity" in Iowa Code section 352.11(1)(a), the "agricultural areas" law, was unconstitutional under the Fifth Amendment of the U.S. Constitution, and article I, section 18 of the Iowa Constitution.[31] The decision came in the appeal of a district court ruling that rejected the claims of neighbors who had opposed the county's approval of an agricultural area adjacent to their land.[32] The challenge was a facial attack on the law, as there was no allegation of an actual nuisance.[33] The plaintiffs argued the effect of the county granting the nuisance protection was to take their private property for public use without compensation, in violation of the state and federal constitutions.[34] The plaintiffs' theory, adopted by the Supreme Court of Iowa, was that the county's grant of an agricultural area and the accompanying "immunity" from certain nuisance suits gave the applicants the right to create or maintain a nuisance over the neighbors' property.[35] This act, in

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29. Unified National Strategy for Animal Feeding Operations, 63 Fed. Reg. 50,192, 50,192 (1998) (notice and request for comments).

30. *See* Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 105 (1998).

31. *See* Bormann v. Board of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998) (en banc), *cert. denied*, 119 S. Ct. 1096 (1999).

32. *See id.* at 321.

33. *See id.* at 312.

34. *See id.* at 313.

35. *See id.* at 315.

effect, created an easement in favor of the applicants. The court ruled that under Iowa law the right to maintain a nuisance is an easement.[36] The court said:

> This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operation the applicants would be allowed to generate 'offensive smells' on their property which without the easement would permit affected property owners to sue the applicants for nuisances.[37]

The court determined that easements are property interests subject to the just compensation clause of the Fifth Amendment of the U.S. Constitution.[38] On the question of whether a taking had occurred, the court relied on the U.S. Supreme Court's line of cases that hold a physical invasion of property by government action is a "per se" taking.[39] While the easement did not result in a physical invasion, the court reasoned that the government's action resulted in an interference with the neighbor's right to enjoy their property.[40] The court determined that the power of the legislature to regulate nuisances is not unrestricted and that the legislature had no power to authorize the maintenance of a nuisance which would injure private property without just compensation.[41] The Supreme Court of Iowa ruled:

> Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards*, holding that 'while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking.'[42]

2. *Effect of the Ruling*

The most direct effect of the decision is to remove the nuisance protection for operations within the more than 680 agricultural areas existing in Iowa.[43] It also places in serious doubt the legal viability of the other two Iowa laws, which involve similar legislative grants of nuisance immunity.[44] The decision increases the

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36. *See id.* at 316.
37. *Id.*
38. *See id.* at 321.
39. *See id.* at 316-19.
40. *See id.* at 321.
41. *See id.*
42. *Id.* at 319-20 (quoting Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1993)).
43. *See* IOWA CODE § 352.11 (1997).
44. *See id.* §§ 172D.2, 657.11(2).

likelihood that nuisance suits may be filed against livestock feeding operations by neighbors who have had their right to bring nuisance suits restored, and it may create concern and uncertainty on the part of some farmers about the possible threat of nuisance suits and the need to defend such actions. The case also expands the court's rulings on takings and private property, representing a victory for those who argue for restricting the reach of government regulations on land use.

3. *Future Actions and Observations*

There are a number of observations that can be made about the effect the *Bormann* ruling may have on this body of law. First, it is doubtful there is room for a "legislative fix" to the decision, as the court has clearly spoken on the constitutionality of the legislature providing nuisance protections without compensating private neighbors. It may take further litigation for the Iowa courts to determine the exact impact on Iowa's other two right-to-farm laws, but for now, the burden is on those operations which would rely on the laws to show their viability.

Second, because the ruling is the first state appeals court to examine the takings implications of a right-to-farm law, it is now likely that similar challenges will be made to laws in other states. While it is impossible to predict the results of those cases, to the extent right-to-farm laws do not incorporate a prior existence requirement—for example, the coming to the nuisance defense—they may be especially subject to challenge.

Third, it is also important to consider what the ruling does not do. The ruling does not answer whether any operation is in fact a nuisance. The courts will have to determine whether the facts demonstrate a substantial and unreasonable interference with the neighbor's property. The ruling does not alter the various factors courts may consider in resolving nuisances, including the character of the area, priority of location, and the alleged injury.

Fourth, in some ways, the Iowa Supreme Court's ruling can be read as sending a message about the changing structure of Iowa livestock production. Consider this passage:

> The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.[45]

45. *Bormann*, 584 N.W.2d at 322.

The court's use of the word "strangers" rather than "neighbors" is noteworthy, not that the word choice would have changed the legal ruling. The court was aware of the substantial "political and economic fallout" that would accompany the ruling but saw its constitutional duty as clear.[46]

Finally, this ruling is just one example of an increasing number of recent cases and state regulatory actions related to the changing nature of livestock production in the United States. For example, a North Dakota district court recently ruled in a "citizen suit" that a large swine facility is not a farm operation but rather a "pig factory" that must meet industrial waste handling standards.[47] Court cases such as these will continue to scrutinize the nature of the agricultural system being created and will test how traditional legal rules apply to this evolving system.

B. *Does the Possible Demise of Chapter 12 Mean Farm Financial Concerns Are Passé?*

As discussed earlier, many observers believe the current financial crisis facing much of American agriculture may be as severe as the crisis of the 1980s, at least in terms of the number of farmers being forced out of business. The experience in recent years in the Dakotas provides some preview of what may come to other states—in particular, the impact of these problems on the younger generation of operators. In light of these concerns, it seems especially ironic that just as American agriculture may be sliding into an extending period of economic stress, Congress had trouble deciding whether to act to extend the protections available under Chapter 12 of the Bankruptcy Code. While the U.S. House of Representatives included language in the recent consumer bankruptcy reform legislation to make the provision permanent, the Senate did not include a similar provision in the version it passed.[48] While the Senate had earlier enacted separate legislation to make Chapter 12 permanent, observers believe it is unlikely the House will consider the issue separately.[49] As a result, Chapter 12 was allowed to sunset at the end of September 1998. However, all may not be lost because the headlines on October 8, 1998, announced the conference version of the consumer bankruptcy act was modified to include a six month extension of Chapter 12.[50]

It is difficult to know exactly what to make of this chain of events. First, while Chapter 12 may not have died an active death, at a minimum it seems to have suffered from neglect. A number of factors may have contributed to this. One factor

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46. *See id.* at 321.

47. *See* North Dakota v. Dakota Facilities, LLC, No. 98-C-00724 (D. Grand Forks, N.D., Sept. 24, 1998).

48. *See* Kevin O'Donoghue, *Bankruptcy Bill Includes Farm Shield*, DES MOINES REG., Oct. 8, 1998, at 1A.

49. *See id.*

50. *See id.*

may be the relative economic euphoria of the 1990s (up to 1998) that Freedom to Farm and expanding farm exports had brought a return to the glory days of farm profitability and Chapter 12 was unnecessary. This view, when coupled with the expansion of various "risk protection" devices such as crop insurance and various marketing options, may be seen as giving farmers all the protection they need. Another factor could be the continuing erosion of political and public support for the view that farmers are somehow unique and thus worthy or deserving of special legal treatment such as Chapter 12.

Second, whatever the reasons, the reality is that at a time when Chapter 12 may be an especially valuable tool for farmers to force creditors to consider refinancing options, the tool may no longer be available.

Third, the stress this situation may place on financially-troubled farmers will be heightened by other changes in government policies toward farm loans. For example, the former Farmers Home loans are now administered by the Farm Services Agency (FSA) of the USDA, and in 1996, the law was changed to limit the agency's ability to refinance farmers.[51] In addition, many of the "shared appreciation mortgages" farmers entered into with USDA to refinance loans in the late 1980s are now coming due. The challenge for lawyers representing farmers will be to identify what other protections are available for stressed borrowers and to explore whether other legal tools or planning devices may be an adequate substitute for Chapter 12 if it does disappear.

C. *Does the Endangered Species Act Endanger Traditional USDA Farm Programs?*

In 1996, a federal district court ruled the USDA was required under the terms of § 7(a)(1) and (2) of the Endangered Species Act (ESA)[52] to consult with the U.S. Fish and Wildlife Service (FWS) in its design and implementation of farm and conservation programs, including "production flexibility contracts" under the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), also known as "Freedom to Farm."[53] The ruling came in a lawsuit filed by the Sierra Club, which was concerned about how the USDA's programs were impacting a number of endangered species dependent on the Edwards aquifer in Texas.[54] The Sierra Club argued the USDA had to consult with the FWS to consider how conservation

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51. For an excellent guide to the continued availability of USDA supported financing for farmers see FARMERS' LEGAL ACTION GROUP, INC., FARMER'S GUIDE TO GETTING A GUARANTEED LOAN (1998). The legal authority limiting the ability of the USDA to provide financing to anyone who had been granted any form of debt forgiveness by the government is found at 7 U.S.C. § 2001 (1994). *See id.* at 28.

52. *See* 16 U.S.C. § 1536(a)(1), (2) (1994).

53. Sierra Club v. Glickman, 156 F.3d 606, 611 (5th Cir. 1998).

54. *See id.* at 610.

programs and even FAIR Act payments could be used to limit the pumping of water from the aquifer and thus benefit the "Edwards-dependent species."[55] The USDA resisted the idea of having to consult with the FWS on several grounds, including: that it did not have discretion to alter how FAIR Act payments could be made, that the ESA did not apply to it, and that the Sierra Club had no standing.[56] The district court rejected the USDA's arguments, and on September 19, 1996, the court entered a judgment requiring the agency to act, although not enjoining its payments to farmers.[57] The USDA appealed the judgment to the Fifth Circuit, and the Sierra Club filed a motion to dismiss arguing the USDA had since complied with the district court order to consult with the FWS.[58] The Fifth Circuit heard arguments on both issues in December 1997, and issued its decision in September 1998.[59]

The court's decision, which ruled with the Sierra Club and rejected the arguments of the USDA, is important to consider because of the variety and importance of the issues it addressed.[60] To begin, the court ruled the Sierra Club did have standing to sue the USDA under both the citizen suit provisions of the ESA and the Administrative Procedures Act (APA).[61] As part of the analysis on the injury experienced by the "Edwards-dependent" species, the court rejected the USDA's claim that it did not have the power to influence the pumping actions of the farmers in the Edwards aquifer.[62] The court also rejected the USDA's claim that under the ESA it had only a generalized duty to develop programs to protect endangered species, and this generalized duty was insufficient to provide the basis for standing for the Sierra Club to protest its actions or lack of action.[63] The court concluded that when read in the context of the ESA as a whole, "we find that the agencies' duties under § 7(a)(1) are much more specific and particular."[64] The court ruled, "we conclude that Congress intended to impose an affirmative duty on each federal agency to conserve each of the species listed pursuant to § 1533. In order to achieve this objective, the agencies must consult with FWS as to each of the listed species, not just undertake a generalized consultation."[65]

The court also rejected the USDA's claim that neither the citizen suit provisions of the ESA nor the APA provided a basis for the Sierra Club to have standing.[66] The USDA had argued that its actions under the ESA are not subject to

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55. *See id.*
56. *See id.* at 610-12.
57. *See id.* at 612.
58. *See id.*
59. *See id.* at 607.
60. *See id.* at 613-16.
61. *See id.*
62. *See id.* at 614-15.
63. *See id.* at 615-16.
64. *Id.* at 615.
65. *Id.* at 616 (footnote omitted).
66. *See id*.

judicial review because "there is no law to apply."[67] However, this theory was based on the USDA's argument that the ESA imposed no specific duty on any agency—a theory the court had just rejected.[68] The USDA also argued that its actions under the ESA were not subject to judicial review because it enjoys a substantial amount of discretion in making program decisions.[69] The court concluded that this amounted to the USDA arguing it had total discretion to ignore the requirements of the ESA altogether, an argument the court characterized as "entirely without merit."[70] The USDA also argued there was no standing under the APA because there was no final agency action for the Sierra Club to challenge.[71] The court rejected this argument, ruling that "[c]learly the passage of over 25 years without any action whatsoever with respect to any endangered or threatened species qualifies as 'final agency action.'"[72] As a final procedural step, the court agreed with the Sierra Club that the USDA's effort to seek review of the district court's ruling under § 7(a)(2) of the ESA requiring the agency to consult with the FWS was moot because the USDA had in fact consulted as required by the district court.[73] The court rejected USDA's argument the case fell under the capable of repetition but evading review exception because it was the action of the USDA that had ended the review.[74]

So what does this lengthy and somewhat technical decision mean for the USDA and agriculture? The USDA's attorneys are still considering that question as well as the possibility of further appeal, but there appears to be several observations that can be drawn from the decision.

First, the ESA may apply to the USDA in its implementation of various farm programs, ranging from those programs that provide payments to farmers to conservation programs such as the Conservation Reserve Program (CRP) and the Wetlands Reserve. The applicability of the ESA does not necessarily mean the USDA will change how the programs are designed or administered, but it may require the agency to consult with the FWS and consider the impact of its programs on endangered species.

Second, the case is a clear illustration of the increasing interest environmental groups have in how "agricultural" programs are developed and implemented. The result illustrates the potential influence environmental issues can have on the design of the programs.

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67. *Id.* at 617.
68. *Id.*
69. *See id.*
70. *Id.*
71. *See id.* at 618 n.7.
72. *Id.*
73. *See id.* at 620.
74. *See id.*

Third, by extending the impact of the ESA into the design of farm programs, the ruling will be another argument agricultural groups can use in efforts to reform or limit the ESA.

D. WILL FEDERAL EFFORTS TO REGULATE LIVESTOCK PRODUCTION BETTER PROTECT THE ENVIRONMENT?

One issue in the debate over the growth and expansion of the livestock feeding sector has been the ability of state environmental regulators to adequately protect water quality and other resources. One argument heard in recent years is that the federal government should play a more significant role in establishing and enforcing a minimum set of environmental standards to protect water quality from the possible impacts of livestock feeding and animal waste handling practices. Part of the support for this approach comes from those who believe states may be poorly equipped to address the environmental impacts of large concentrated feeding operations, or that some states will use their less aggressive enforcement postures to attract operations from states more diligent in protecting the environment. As part of the President's Clean Water Action Plan announced in February 1998, the USDA and the Environmental Protection Agency (EPA) recently issued a draft of a "Unified National Strategy for Animal Feeding Operations."[75]

"The draft strategy establishes a national performance expectation for all AFOs (animal feeding operations) to be met by developing and implementing Comprehensive Nutrient Management Plans (CNMPs) on AFOs."[76] The draft strategy is an interesting document that provides the basic philosophy and the guiding principles of the USDA and EPA as they proceed to develop an expanded federal effort in this area. The strategy is based on several premises, including that, "[f]or the vast majority of AFOs, voluntary efforts will be the principal approach to assist owners and operators in developing and implementing CNMPs, and in reducing water pollution and public health risks associated with AFOs."[77] A second premise is that the "EPA has in the past, and will in the future, assume that discharges from the vast majority of agricultural operations are exempted from the NPDES program by this provision of the Act."[78] However, another premise is that "[t]he existing provisions of the CWA (Clean Water Act) and related EPA regulations provide authority for including a significant number AFOs in the permit

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75. Unified National Strategy for Animal Feeding Operations, 63 Fed. Reg. 50,192, 50,192 (1998).

76. *Id.* at 50,198.

77. *Id.*

78. *Id.* at 50,200. The National Pollutant Discharge Elimination System program (NPDES) is the agricultural stormwater discharges provision that allows treatment as "nonpoint" rather than "point" source pollution. *See id.* at 50,199.

program beyond those that now have permits."[79] The strategy shows the EPA will give particular attention to certain agricultural practices, including the land application of manure from "concentrated animal feeding operations" (CAFOs) and discharges that are not the result of "proper agricultural practices," such as those not in compliance with a CNMP.[80] The strategy identifies a number of regulatory priorities, one of the most important being a plan to require operations now qualifying as CAFOs that do not have the needed permits to obtain them.[81] The EPA estimates that only about 2000 of the 15,000-20,000 operations qualifying as CAFOs now have permits.[82] In addition, the strategy reflects a two part implementation with Round I involving individualized five-year permits for certain operations and Round II using statewide general permits and watershed general permits.[83]

The implications of the USDA-EPA proposal are clear. First, while the agencies have stated a desire to rely on voluntary and non-regulatory approaches, for many animal feeding operations, it will be a new day. Operations large enough to require NPDES permits as CAFOs will be required to obtain them. In many cases this mandate may require significant changes in the waste handling facilities and practices.

Second, the strategy is going to rely on a performance-based system that will place the responsibility on those owners and operators of AFOs to meet the expectations of disposing of animal wastes so as to not cause water pollution. A major element of the strategy will be the use of USDA assistance, such as the Environmental Quality Incentive Program (EQIP) to help fund such actions. This approach will place a premium on there being sufficient funding available to assist producers.

Third, the possibilities for additional federal regulatory developments and even heightened enforcement activities for current regulations are clear.

Finally, the interplay between the existing sets of state regulatory programs and the relation between state enforcement attitudes and the federal objectives has the potential to create both confusion and conflict.

IV. CONCLUSION

How do these agricultural law developments from September 1998 relate to the theme "A Changing Agricultural Law for a Changing Agriculture?" From one perspective, perhaps nothing more than the happenstance or fate resulted in the four events occurring in September 1998. Clearly they had all been in the works,

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79. *Id.*
80. *Id.* at 50,200.
81. *See id.* at 50,201.
82. *See id.*
83. *Id.* at 50,203-04.

independently so, for quite some time, and there is no clear relation between any of them. At the same time, however, it is possible to draw several common insights from these examples, insights which may make them more than just a collection of random events.

First, several developments reflect the continued industrialization of agriculture, both as to changes in scale and in the public impression of what agriculture is and how deserving it is for special legal consideration.

Second, the increasing role of environmental considerations and environmental issues in shaping agricultural law and policy are a common theme in several of the developments.

Third, the evolving role of the USDA and to some extent its declining influence may be seen in the expanding involvement of other agencies and players in the development of programs and laws directly affecting agriculture.

Fourth, the developments reflect the continued role of "self regulation" for producers and the use of performance based systems of compliance.

What are the implications of the issues and examples cited for the development of agricultural law and for the work of those who practice it? While it may be dangerous to make too much of the theme that agricultural law is changing, there are insights that can be drawn for our profession from the changing nature of agriculture.

First, the continued expansion of issues involved in agricultural law and their complexity make it increasingly difficult to stay current on legal developments, which in turn increases the pressure and even need for further specialization within the field.

Second, it will be important in the effort to stay current, to not forget the lessons and knowledge of yesterday. The rapid return of farm financial difficulties will require many to dust off the laws and skills of the last decade and employ them in new ways.

Third, attorneys may need to be more aggressive or forceful with their clients in offering cautionary advice about the risks of the various contracts and arrangements they are contemplating. While this is only possible approach when consulted in advance, an "interventionist" approach may have merit. Just consider how much more satisfying some cautionary advice, if taken, would be to those now involved in "hedge-to-arrive" (HTA) litigation.

Fourth, the evolving legal environment for swine production and the recent regulatory and court actions indicate how difficult it is to try to insulate a segment of agricultural activity from the pressure of social forces or from the effect of law.

Fifth, recent efforts in regard to farmland preservation and wetland restoration and the use of legal tools such as conservation easements show how legal innovations and lawyers can play important roles in providing workable answers to new social issues.

Finally, the debate about the effectiveness of "Freedom to Farm" and the future role of federal programs in shaping the economic health of agriculture and in providing the basis for conserving soil and water resources, show the continuing need for thoughtful debate about the policies we choose for agriculture.