

EMERGING ISSUES OF 21ST CENTURY AGRICULTURAL LAW AND RURAL PRACTICE

*Neil D. Hamilton*¹

I.	Introduction – Thinking About the Future of Agricultural Law & Rural Practice.....	79
II.	The Value of Thinking about the Future of Agricultural Law and Rural Practice.....	81
III.	Five Candidates for New Opportunities in 21 st Century Agricultural Law.....	81
	A. Rural Development and the Role of Lawyers in Developing U.S. Rural Policy	82
	B. Regional Food Systems and Local Food Identity – Using Food as a Form of Rural Economic Development.....	84
	C. Natural Resource Conservation and Recreation Based Opportunities to Support Economic Development for Farmland Owners and Rural Communities.....	89
	D. Developing a Performance Based and Integrated Approach to Soil and Water Conservation, Using Federal Farm Programs and Public Support for Environmental Protection to Provide Consistent Financial Incentives for Sustainable Agriculture.....	94
	E. Alternative Energy Policy and the Effect on Agriculture.....	97

I. INTRODUCTION – THINKING ABOUT THE FUTURE OF AGRICULTURAL LAW & RURAL PRACTICE

The future of legal practice for those involved in representing agricultural and rural clients will be full of promise, challenges, and opportunities. In thinking about the legal and political issues which shaped agricultural law over the past twenty-five years it seems clear that in 1980 few of us could have predicted all that unfolded. The farm crisis of the early 1980s, the development of environmental concerns, the rate of industrialization and consolidation of farms and agricultural businesses, the reorientation and scale of farm programs—these

1. Director of the Agricultural Law Center, & Dwight D. Opperman Chair of Law, Drake University Law School, Des Moines, Iowa.

are just a few of the key developments that have shaped agricultural law and rural practice during the existence of the American Agricultural Law Association (“AALA”). Other trends such as the continuing decline in farm numbers, the increased scale of many remaining operations, and the emergence of new communities of farmers and rural landowners influence agricultural law and rural practice. While each trend or development was not entirely unexpected, what could not be predicted with accuracy was the actual shape they took, the timing of their development, and their effect on relations within agriculture and rural America.

In looking to the future of agricultural law and rural practice—and there will definitely be such a future—one challenge is to think strategically about the trends and innovations that will shape the opportunities faced by attorneys and the clients and communities we serve. In my mind the future can be divided into three categories. First is the continuation of current legal rules and relations, such fundamental issues as estate and tax planning, business organizations, and compliance with state and federal rules for farm programs and environmental law. No doubt there will be changes in these areas, such as the possible repeal of the federal estate tax or new rules on confined animal feeding operations, but these developments will in many ways reflect incremental evolution of existing issues. The second category is the unknown or unpredictable developments which might arise, perhaps on a parallel with the BSE and animal identification issues of recent years. In this regard since the issues are difficult if not impossible to predict, the best preparation is the refinement of a broad set of legal skills and tools to make lawyers flexible and nimble in responding to emerging issues. Consider how much we had to learn in the early 80s about Article Nine as the burgeoning farm crisis put all of agriculture on a crash course in secured financing and bankruptcy. The third category, and the one I want to spend some time on, concerns the trends and opportunities looming ahead, some already peaking over the horizon, and others poised to emerge depending on other economic, social, and political developments.

It is always dangerous to dabble as a futurist predicting what might be ahead, partly because of the pretensions inherent in such an approach, and partly due to the risks of being wrong. But in looking over my twenty-five years as a professor of agricultural law, much of my work appears to have a futurist cast, so why stop now. The choice is eased somewhat by the fact the dangers of being wrong in predicting the future are usually smaller than the glory of getting at least a few things right!

II. THE VALUE OF THINKING ABOUT THE FUTURE OF AGRICULTURAL LAW AND RURAL PRACTICE

Before subjecting you to some of my predictions, it is worth taking a moment to consider why the exercise might be of value. Here are some thoughts in this regard, or perhaps stated differently, my goals in writing this article.

1. Taking a broader view of “agricultural law,” especially to include the discussion of food and rural development issues, is essential if the discipline is to evolve and not be constrained by the declining number of traditional farms or limited to issues such as the future of federal farm programs.

2. The exercise can help identify some of the key practice issues and the types of expertise rural attorneys need, for example working with community foundations and non-profits, or understanding the application of conservation issues to non-agricultural rural landowners.

3. Considering future issues allows us to focus on the type of leadership roles attorneys can, and must, play with clients in terms of being aware of potentially innovative programs, and as leaders in building the institutional arrangements in our communities, such as local economic development groups.

4. Many of the “new” issues we face today are “agricultural” only because they are land based. What may actually be *new* is dealing with the new set of relationships between landowners and land operators and the different motivations and desires of each. Recognizing owners’ goals will make it easier to appreciate alternative ownership structures for the land like conservation easements, and other agreements such as energy leases.

5. Similarly, many of the new issues are “agricultural” because they deal with food. But what may truly be *new* are the food products or the types of processing and marketing involved in their creation and distribution. The extension of agriculture into food processing and marketing will require understanding a variety of legal and regulatory issues involved in food processing, institutional purchasing, food safety, and labeling.

6. The primary value in thinking about the future is recognizing the possible changes and legal issues they will bring, such as opportunities for service, for acquiring new skills and knowledge, and for being leaders.

III. FIVE CANDIDATES FOR NEW OPPORTUNITIES IN 21ST CENTURY AGRICULTURAL LAW

The following discussion identifies five areas of legal practice or policy development for agricultural and rural practitioners to know as we progress further into the 21st Century. The discussion is brief rather than expository, but provides examples of laws, cases, or other developments.

A. Rural Development and the Role of Lawyers in Developing U.S. Rural Policy

The topics of rural development and rural policy are not new to the nation, yet efforts to develop and articulate policies effective in addressing the unique challenges of rural America—and distinct from agricultural issues—have proven extremely difficult. The continuing demographic shifts in rural areas to an ever-increasing non-farming population make the need for such work timely.² While it is clear that agriculture and food production are primarily rural economic activities and must be at the forefront of rural policy, it is critical to recognize “rural” and “agriculture” are not the same thing. In 2005 and 2006 I taught a one-credit course called “The Law of Rural Development,” and assembled a 600 page set of readings for the topic. I was surprised to find the broad diversity of organizations and institutions working on issues of rural poverty, housing, education, and economic development. Many of these groups face significant legal issues in operation, funding, and project implementation, meaning rural lawyers can be important resources to their work. Some of the representative issues in this are include:

1. The work of community foundations as a source of economic support for charitable causes and local economic development and entrepreneurship. This topic is being addressed by the federally-funded Center for Community Vitality at Iowa State University.³ Iowa implemented a unique state funding mechanism as part of a recent expansion of casino licenses; the political concern was that counties without casinos were missing out on the substantial infusion of charitable funds being given out by gaming-based foundations. As a result, the state implemented the Endow Iowa program which allocates an annual pool of funds to one eligible community organization in each of the 85 counties without gaming facilities.⁴ Passage of the law and the creation of this funding stream stimulated the creation of these organizations in all the counties without existing gaming based foundations.

2. Challenges caused by wealth transition and other demographic shifts in rural America. The critical issue of wealth transfer results from the decline in farm numbers and the exodus of farm heirs out of agriculture and rural America

2. According to the USDA’s Economic Research Service, about 50 million people live in rural areas but only around 24 million people are employed in farming or farm-related production. *See* USDA, State Fact Sheets - 2006 U.S. Summary, <http://www.ers.usda.gov/StateFacts/US.htm>; USDA, ERS, U.S. Farm and Farm-Related Employment, 2002, http://www.ers.usda.gov/Data/FarmandRelatedEmployment/ViewData.asp?GeoAreaPick=STAUS_United%20State.

3. *See* Community Vitality Center, <http://www.cvcia.org> (last visited June 3, 2007).

4. IOWA CODE § 15E.303(4) (2007).

in recent decades. This means the ownership, control, and economic benefits of farmland ownership are flowing largely to people who do not reside on the land or even in the state where it is located. This separation of ownership from operation has any number of policy implications in, for example, land tenancy practices and the resulting economic shift of where the benefit of the wealth is experienced. Valuable legal and policy work is needed to identify ways a portion of this wealth can remain or be harnessed in local initiatives, such as investments in ethanol plants or other forms of economic development, or better yet, making it possible for heirs to return to rural America, either for retirement or to pursue new economic opportunities.

3. The role of attorneys in rural communities working through the various USDA Rural Development programs. Many attorneys in rural America have worked with communities applying for federal funding for traditional infrastructure improvements of sewer and water, as well as for newer forms of development assistance like broad-band access. The USDA Rural Development offers a broad array of programs offering grants, loans, training, and other services for rural businesses and communities.⁵ The diversity of these programs is surprising, and the levels of funding available is impressive, which means any lawyer practicing in rural America needs to be familiar with the work of USDA Rural Development - especially to stay on top of new programs and initiatives developed by the agency. Rural development will be one of the most critical aspects of the next farm bill scheduled for consideration in 2007.

4. Greater use of micro-enterprise loan programs to support entrepreneurship and business development. The idea of "micro-enterprise" financing is to provide loans at a scale smaller than traditional commercial lending, often to borrowers with non-traditional business ideas and credit histories. The Senate version of the 2002 farm bill included authorization for such a micro-enterprise lending program, and it is predictable that such approaches will be considered for inclusion in future efforts.⁶ The relative low cost of micro-finance programs and the flexibility in their design and operation make it likely the tool will see more significant use in the United States in years ahead.

5. Producer marketing associations of various types, especially as operated within food-based businesses. Cooperatives and other forms of joint pro-

5. See USDA, Rural Development, <http://www.rurdev.usda.gov> (last visited June 4, 2007).

6. See Geoffrey S. Becker & Jasper Womach, Congressional Research Service, The 2002 Farm Bill: Overview and Status (2002), CRS-22, available at <http://fpc.state.gov/documents/organization/11277.pdf> (noting that "[t]he Senate-passed bill also required a number of operational and administrative changes in FSA farm lending programs. Among other things, the bill altered certain eligibility and benefit provisions, including provisions to make loans more available to beginning farmers.").

ducer action have been a historic strong suit of rural America and farmers. Today, the proliferation of business opportunities in agriculture and the evolution of business forms provide an overwhelming range of options for producers to consider and decipher. Regardless of the business form chosen, if it involves cooperative efforts of several individuals then a common set of issues must be addressed such as ownership and control, decision making, liability, and financing.⁷

B. Regional Food Systems and Local Food Identity – Using Food as a Form of Rural Economic Development

One of the most important forces creating opportunities for small-scale and alternative farmers is the steady increase in demand for locally-grown food. Efforts to diversify the types of crops grown by farmers and to broaden the array of marketing opportunities available to them, have been common ingredients in most efforts to promote sustainable agriculture. The belief is that broader crop diversity makes agriculture more resilient, opens opportunities for new producers, and helps meet consumer demand. Alternative marketing systems, typically involving some form of direct marketing, can result in higher farm prices and in farmers retaining a larger share of the consumer's food dollar. The Leopold Center for Sustainable Agriculture at Iowa State University has provided valuable national leadership on this issue through Rich Pirog and the Marketing and Food Systems Initiative.⁸ In 1999, the Agricultural Law Center published a SARE funded book titled *The Legal Guide to Direct Farm Marketing*, which remains a popular seller.⁹ Today the increased demand for organic food and related developments (such as the continued expansion of farmers' markets and other efforts to put a face on our food), combine to make alternative production and marketing an important aspect of agriculture and our food system. I have written extensively about the developments of local food systems and how this trend is part of a larger set of forces, I have labeled Food Democracy.¹⁰

One indicator of the growth in the local-foods movement can be seen in farmers' markets. In 2005, Congress appropriated one million dollars for the USDA to provide farmers' market promotion grants, as authorized by the 2002

7. DOUG O'BRIEN, NEIL D. HAMILTON & ROBERT LUEDEMAN, NAT'L CTR. OF AGRIC. LAW, *THE FARMER'S LEGAL GUIDE TO PRODUCER MARKETING ASSOCIATIONS* (2005), available at http://www.nationalaglawcenter.org/assets/articles/obrien_producermarketing_book.pdf.

8. Leopold Center for Sustainable Agriculture, Marketing and Food Systems Initiative, <http://www.leopold.iastate.edu/research/marketing.htm> (last visited June 4, 2007).

9. See NEIL D. HAMILTON, *THE LEGAL GUIDE TO DIRECT FARM MARKETING* (1999).

10. See, e.g., Neil D. Hamilton, *Food Democracy and the Future of American Values*, 9 *DRAKE J. AGRIC. L.* 9 (2004); Neil D. Hamilton, *Food Democracy II: Revolution or Restoration?* 1 *J. FOOD L. & POL'Y* 13 (2005).

farm bill.¹¹ In January 2006, the agency published guidelines for the grants and in May it received over 360 applications from 48 states totaling over \$20 million in requests.¹² From a legal perspective, the main opportunities for lawyers and rural practitioners in regard to local-foods initiatives relate to providing farmers and other clients with information and contacts to the programs and resources designed to promote local foods. These opportunities include:

1. Expanding on the idea of “value-added agriculture.” This term has become a commonly used, perhaps overused term, in farm states, but it is an important issue—especially if it can be broadened to focus on what values are being added and what part of the added value is being retained by farmers and rural communities. One of the most important provisions of the 2002 Farm Bill was section 6401, which created the value-added agricultural product market development grant program.¹³ This popular program, administered by the USDA Rural Development, has provided millions of dollars to fund hundreds of projects through the country.¹⁴ It is an outstanding example of how a targeted grant program can be the catalyst for economic development involving food and alternative energy. A critical opportunity associated with value-added agriculturfunding is considering the programs in a context larger than the interests of the farmers involved and recognizing how food processing and distribution can be important forms of rural economic development, bringing new jobs and business activities to rural communities. In September 2006, the USDA announced the newest round of grants, awarding over \$22.6 million to 194 applications in forty states.¹⁵

2. Developing various forms of direct and higher value marketing efforts. Part of the increased attention to locally-grown and farm-fresh food is a function of the quality and taste values of the foods. The attention to food quality provides an important way for consumers, chefs, and other food marketers to make the connection between food quality and the existence of a farming sector to produce the food. A variety of programs have been developed in recent years to connect consumers with producers and to build on the creation of local food

11. See USDA, AMS Farmers Market, Farmers Market Promotion Program (FMPP), <http://www.ams.usda.gov/fmpp/> (last visited June 4, 2007).

12. Press Release, USDA, Johanns Awards 20 Grants Under the Farmers Market Promotion Program (Sept. 8, 2006), <http://www.ams.usda.gov/FMPP/FMPP/FY-06/FMPP-06-Awards.pdf>.

13. 2002 Farm Bill, §6401, available at <http://www.ers.usda.gov/Features/farmbill/2002FarmAct.pdf>

14. Cf. USDA, Rural Business and Cooperative Programs, Value-Added Producer Grants (VAPG), <http://www.rurdev.usda.gov/rbs/coops/vadg.htm> (last visited June 4, 2007).

15. See USDA, RURAL DEVELOPMENT, VALUE-ADDED PRODUCER GRANT PROGRAM FISCAL YEAR 2006 AWARDS (2006), <http://www.rurdev.usda.gov/rbs/coops/VAPG%202006%20Recipient%20List.pdf>.

identities as a form of economic and social development. Efforts such as the “Buy Fresh Buy Local” program underway in Iowa and twenty-six other states illustrate this idea.¹⁶ In Minnesota, publication of *Renewing the Countryside*, an effort led by the Institute for Agriculture and Trade Policy, has helped give form to the extensive network of food related economic developments taking place across the state.¹⁷ This publication has led to similar efforts in other states including a 2005 *Renewing the Countryside: Iowa*.¹⁸ Other initiatives include *The Edible Communities* publication series that now includes an *Edible Twin Cities*.¹⁹ One of the most educational and helpful initiatives was the 2005-2006 calendar “Minnesota Cooks: A Farm to Table Tour” featuring Minnesota food and agriculture efforts, produced as a joint effort by the Minnesota Farmers Union, Food Alliance Midwest, and *Renewing the Countryside*.²⁰

3. Identifying how state and local governments can support local-food initiatives. State and local governments have, in many instances, been the most fertile ground for developing and experimenting with efforts to support new markets for farm and food products. The current success of ethanol, a product which was for many years primarily the dream of state commodity promotion efforts, is evidence of this role. For several years the Drake Agricultural Law Center partnered with the USDA Risk Management Agency to support the creation of state and local food policy councils in over a dozen states. In the last year alone, several states have created such councils, providing a mechanism for the systematic study of local food opportunities,²¹ including Maine, where the governor recently signed LD 2107, adding Chapter 8-A on Food Policy to the state code.²² The Iowa Food Policy Council, which I chair, has worked for six years to develop and promote state policies to improve the opportunities in Iowa’s food and agriculture system.²³ The Council’s most recent initiative was a joint pilot project be-

16. See FoodRoutes.org, *Where Does Your Food Come From?*, <http://www.foodroutes.org/> (last visited June 19, 2007).

17. See *Renewing the Countryside*, <http://www.renewingthecountryside.org> (last visited June 4, 2007).

18. Iowa Natural Heritage Foundation, *New Book about Rural Iowa Offers ‘Scripture for the Future,’* (Mar. 2005), <http://www.inhf.org/renewingbook.htm> (last visited Jun. 4, 2007) (providing a link for readers to order their own copy of the book).

19. See *Edibles Twin Cities*, <http://www.edibletwincities.net> (last visited June 4, 2007).

20. *Renewing the Countryside Market*, <http://store.rtcmarket.org/micoca20.html> (last visited Jun. 4, 2007).

21. See *The State and Local Food Policy Project, State, Local and Native American Tribal Food Policy, Council Profiles*, <http://www.statefoodpolicy.org/profiles.htm> (last visited Jun. 4, 2007) (discussing different state and local food policy council efforts).

22. *Food and Food Policy Act* § 216, Me. Rev. Stat. Ann. tit. 7, § 218 (2005).

23. Iowa Food Policy Council, <http://www.iowafoodpolicy.org> (last visited June 4, 2007).

tween the Governor's office, the Department of Administrative Services, and the Drake University Agricultural Law Center to study institutional purchasing.²⁴ Drake employed a food system specialist who spent months studying the operation of the state's food purchasing system. His research is now being finalized and will serve as the basis for a recommendation on how more Iowa-grown and processed food can be utilized. At the county level, in 2006 the Woodbury County Board of Supervisors enacted several innovative food related policies, one offering a property tax break to any landowner converting land to organic production and another requiring a set percentage of food purchased by the county to be locally grown organic food.²⁵

4. Considering how existing regulatory approaches might apply to efforts to promote local-food marketing. A recent case from Minnesota concerned the application of custom meat processing rules to people involved in direct marketing; the case illustrates the role the law and lawyers will play in efforts to expand marketing opportunities for locally-grown foods. In *State v. Hartmann*, a divided Minnesota Supreme Court considered whether a constitutional provision protecting the right of farmers to sell farm products without obtaining a license²⁶ protected a farm couple from prosecution for selling custom-processed meat in violation of Minn. Stat. § 31A.10(4) of the Minnesota Meat and Poultry Inspection Act.²⁷ The Court's majority concluded that while the constitutional provision protects farmers from needing a license to sell meat, the provision did not prohibit the state from imposing a requirement that the meat be processed in a state-inspected facility licensed for such sales.²⁸ While custom processed meat can be consumed at home and sold in portions *prior* to the animal being processed, such custom-processed meat cannot be sold in individual cuts or at retail.²⁹ The dissent held that the state had not shown that sales of custom-processed meat presented a public health risk and that applying the inspection rule eviscerated the constitutional exemption from licensing.³⁰

24. See Letter from Thomas J. Vilsack, Governor, State of Iowa, to Neil D. Hamilton, Director, Agricultural Law Center (Jan. 20, 2005), *available at* <http://www.iowafoodpolicy.org/04response.pdf> (discussing future state plans based off recommendations by the Institutional Purchasing Task Force).

25. Brian DeVore, THE LAND STEWARDSHIP LETTER, *Putting the Rural Development Pieces Together*, Apr./May/June 2006 *available at* http://www.woodbury-ia.com/departments/EconomicDevelopment/April_May_June%202006%20LSL.pdf (For more information contact Rob Marqusee, Director, Rural Economic Development, 712-278-6609).

26. MN Const. art. 13, § 7.

27. *State v. Hartman*, 700 N.W.2d 449 (Minn. 2005).

28. *Id.* at 454-55.

29. *Id.* at 456, 458.

30. *Id.* at 461.

5. Utilizing existing federal nutrition programs to support expanding markets for locally-grown food. Various federal food assistance programs can be an important source of financial support for direct farm marketing operations. Two examples of these programs are the WIC farmers' market nutrition coupon program and the Seniors farmers' market coupon program, both which provide eligible recipients in participating states supplemental food assistance benefits to be redeemed at farmers' markets.³¹ But three other developments concerning the delivery of public food assistance create the opportunity to expand the ability of small farmers to participate in these programs. The first development concerns the shift in the delivery of food assistance benefits, formerly known as food stamps, to an electronic format using EBT or electronic benefits transfer technology.³² The shift to EBT has made the use of food assistance easier (and with less stigma), but the shift has also made it difficult for marketing venues without access to EBT technology to participate. As a result, many states are experimenting with pilot programs, often using hand held devices, which can allow the use of food assistance EBT cards in settings such as weekly farmers' markets. In Iowa, the Department of Human Services has partnered with the Farm Bureau and other groups on a pilot project to make EBT technology available in markets around the state;³³ specifically, in late September 2006, the agency sponsored a national conference on using EBT to expand farmers' marketing opportunities.³⁴ The second development concerns the USDA's recent proposal to significantly revamp the nutrition guidelines for the food benefits provided to WIC participants. The Food Nutrition Service is proposing to reduce the amount of dairy and eggs allocated and replace this with access to fresh fruits and vegetables.³⁵ The shift could add several billion dollars to market demand for fresh produce,

31. See USDA, AMS, Farmers Market Facts, WIC Farmers Market Nutrition Program (FMNP), <http://www.ams.usda.gov/farmersmarkets/WIC.htm> (Discussing the farmers market program aimed at assisting WIC recipients); See also USDA, Food & Nutrition Service, Senior Farmers' Market Nutrition Program, <http://www.fns.usda.gov/wic/SeniorFMNP/SeniorFMNPoverview.htm> (discussing the farmer's market program aimed at low-income seniors).

32. See USDA, Food and Nutrition Service, Frequently Asked Questions About EBT, <http://www.fns.usda.gov/fsp/eft/FAQ.htm> (last visited June 5, 2007) (explaining how the EBT system works and what benefits are provided by this system).

33. See Iowa Department of Human Services, Fresh. Made Easy!, http://www.dhs.state.ia.us/dhs2005/dhs_homepage/financial_support/farmers_market/farmersmarket.html (last visited June 5, 2007).

34. See USDA, Food and Nutrition Service, EBT Farmers' Market Projects Status Report, http://www.fns.usda.gov/fsp/eft/eft_farmers_markstatus.htm (last visited June 5, 2007).

35. Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Revisions in WIC Food Packages, 71 Fed. Reg. 44784-01 (Aug. 7, 2006) (to be codified at 7 C.F.R. pt. 246).

and if a state chooses to do so, farmers' markets can be classified as eligible WIC vendors.³⁶ The rules concerning how states address vendor selection criteria are found at 7 CFR 246.12(g)(3).³⁷ The third development is the USDA's new departmental regulation, 9700-001, issued August 3, 2006, establishing a policy for small farms and beginning farmers and ranchers.³⁸ The policy articulates the Department's respect for the importance of small farms and creates several inter-agency mechanisms for insuring how the interests of small and beginning farmers are addressed in the development of USDA programs.

C. Natural Resource Conservation and Recreation Based Opportunities to Support Economic Development for Farmland Owners and Rural Communities

Two of the most significant changes occurring on the land in rural America are inter-related. The first concerns the gradual but not insignificant shift of portions of land to non-farm uses with a primary focus on natural resource protection and outdoor recreation enhancement. The second concerns a new group of landowners who are becoming a force driving the market for farmland and shaping the look and economies of some regions. Both developments present challenges and opportunities for rural lawyers.

In recent years, a considerable amount of land has shifted from annual row crop production to more environmentally friendly long-term uses. Examples include the restoration of tens of thousands of acres of wetlands under the Wetland Reserve Program, the continuing retirement of millions of acres under the Conservation Reserve, the utilization of new Natural Resource Conservation Services (NRCS) initiatives such as the grassland reserve or the wildlife habitat improvement program, or the private restoration of prairies and woodlands. These developments mean rural landowners have been taking increasing amounts of land out of farming. Some changes are being made by the farmers who own the land, but many of the shifts in use are being made by a new generation of landowners. In many cases the new owners have purchased the land with the intention of using it for non-crop production purposes. Whether they are hunters who want a place to bag a buck, or nature lovers who want to restore prairies and wetland to increase wildlife and their opportunities to enjoy nature, this new crop of

36. *Id.* at 44799 (discussing the proposed rate change which, as might be expected, is welcomed by the produce industry and opposed by the dairy and egg lobby).

37. 7 C.F.R. § 246.12(g)(3) (2007).

38. USDA, Office of the Chief Economist, Small Farms and Beginning Farmers and Ranchers Policy, Departmental Reg. 9700-001, Aug. 3, 2006, available at <http://www.ocio.usda.gov/directives/doc/DR9700-001.pdf>.

owners often have different goals and priorities than farmers trying to maximize annual yields.

This shift in demand for farmland and its use can have several effects. First, it can strengthen demand for farmland resulting in higher land prices – good news if you are a seller but perhaps not so good if you are the neighboring farmer wanting to expand. Second, the desire to use the land for non-crop production may take land out of production and off the rental market, both with possible impacts on local economies. Third, the personal desire to use the resource, such as for hunting opportunities, may create conflicts between other landowners and local hunters who have historically used the property for these purposes. Similar conflicts can occur when current owners decide to close property to open use and instead lease it for private hunting or other fee-based approaches. A recent article detailed the growth in fee hunting in Iowa.³⁹

There are many implications of these trends for rural practitioners, the most important include:

1. Learning how to work with land trusts. Today there are over 1500 land trusts in operation in the U.S.⁴⁰ These are non-profit organizations created for the purpose of holding some form of interest in land with the goal of protecting or preserving certain natural or historic values.⁴¹ Land trusts can be focused locally on a particular site, or can operate on a state-wide or national basis.⁴² I serve on the board of the Iowa Natural Heritage Foundation, which has been in existence for over 25 years.⁴³ It has protected over 90,000 acres of land in more than 650 projects all across the state.⁴⁴

There are a number of reasons why rural attorneys should be familiar with the work of land trusts. First, it is likely a land trust operates in your area or soon will. Second, the trusts often have the need for legal advice and counsel. Third, land trusts can be important allies in helping to carry out the objectives of landowning clients, especially those who wish to protect some natural features on their property. Finally, land trusts have considerable expertise on structuring land transaction and can provide alternative methods to fund unique land protection efforts. The Iowa Natural Heritage Foundation has published a helpful

39. Jerry Perkins, *Hunters Gaining Ground*, DES MOINES REG., May 20, 2006, at D1.

40. Land Trust Alliance, About Us, <http://www.lta.org/aboutlta/index.html> (last visited June 5, 2007).

41. See Land Trust Alliance, Frequently Asked Questions, <http://www.lta.org/faq/> (last visited June 5, 2007).

42. See Land Trust Alliance, <http://www.lta.org> (last visited June 5, 2007) (providing general information on land trusts).

43. See Iowa Natural Heritage Foundation, Frequently Asked Questions, <http://www.inhf.org/faq.htm> (last visited June 5, 2007) (The INHF was created in 1979).

44. See *id.*

guide, *The Landowners Options: A Guide to the Voluntary Protection of Land in Iowa*.⁴⁵

2. The increased use of conservation easements to develop flexible approaches to land protection. One of the most valuable legal tools for protecting various natural resource features of property is the conservation easement. Conservation easements function by separating the ownership of the fee interest from the right to use the land so as to protect some feature or use subject to the easement. Conservation easements typically work to prevent more intensive uses from interfering with the conservation objective, such as preventing home development in order to protect farmland. Anyone who has enrolled land in the Wetland Reserve Program has encountered a conservation easement in the form of the perpetual restriction the USDA and NRCS require for use of the site as a wetland.⁴⁶ Conservation easements are typically authorized under state law. For example Iowa Code Chapter 457A provides the authority for the creation and acceptance of conservation easements:

457A.1 ACQUISITION BY OTHER THAN CONDEMNATION.

The department of natural resources, soil and water conservation districts as provided in chapter 161A, the historical division of the department of cultural affairs, the state archaeologist appointed by the state board of regents pursuant to section 263B.1, any county conservation board, and any city or agency of a city may acquire by purchase, gift, contract, or other voluntary means, but not by eminent domain, conservation easements in land to preserve scenic beauty, wildlife habitat, riparian lands, wetlands, or forests; promote outdoor recreation, agriculture, soil or water conservation, or open space; or otherwise conserve for the benefit of the public the natural beauty, natural and cultural resources, and public recreation facilities of the state.⁴⁷

The chapter contains provisions defining conservation easements and establishing the procedure for recordation.⁴⁸ Iowa law requires the easements be “inventoried,”⁴⁹ which is a process whereby the physical resources being addressed in the easement are evaluated and identified. In 1984, Iowa law was amended to include section 457A.8 allowing private organizations to hold conservation easements.⁵⁰ It reads:

45. See Iowa Natural Heritage Foundation: The Landowner’s Options, <http://www.inhf.org/forlandowners.htm> (last visited June 5, 2007) (discussing the publication entitled, *The Landowner’s Options*).

46. USDA, Natural Res. Conservation Serv., Farm Bill 2002, Wetlands Reserve Program (Apr. 2007) <http://www.nrcs.usda.gov/PROGRAMS/wrp/2007WRPKeyPoints.pdf>.

47. IOWA CODE § 457A.1 (2007).

48. *Id.* §§ 457A.2, 457A.3.

49. *Id.* § 457A.3.

50. *Id.* § 457A.8.

457A.8 PRIVATELY HELD EASEMENTS.

A conservation easement may be held by a private, nonprofit organization for public benefit if the instrument granting the easement or the bylaws of the organization provide that the easement will be transferred either to a public body or another private, nonprofit organization upon the dissolution of the private, nonprofit organization. A conservation easement meeting these requirements acquired after July 1, 1984 is transferable and perpetual as provided in section 457A.2.⁵¹

This provision is the authority for land trusts such as the Iowa Natural Heritage Foundation to accept and hold conservation easements.⁵²

3. Using land conservation and outdoor recreation as a form of rural economic development. In some states the history of rural development has been a convergence of agricultural development and an appreciation for natural resources such as lakes and forests. But some farming states, such as Iowa, have not been as blessed with natural resources offering rich inherent recreation potential. As a result, many regions are now considering how their existing natural resources (or those which can be restored) may serve as the basis for outdoor recreation and natural resource based development. The Upper Mississippi Bluffslands is an excellent example of how attractive physical beauty combined with efforts to expand recreation and other economic opportunities can help bring new vigor and residents to a region.

Of course development is not without its own risks, which is one reason a land trust can be of value in helping create mechanisms to identify and protect the resources which help give identity to a place. In Iowa, one of the most exciting efforts to combine large-scale private natural resource protection with regional economic development based on outdoor recreation and tourism is the story of the Whiterock Conservancy near Coon Rapids. The Whiterock Conservancy is a 5,000 acre preserve along five miles of the Raccoon River created by the Garst family, famous for their involvement in seed corn production and agriculturally based diplomacy.⁵³ This initiative is the result of the family's long-term commitment to natural resource conservation and a belief rural Iowa needs to diversify its economic basis to include eco-tourism and opportunities to connect people with the outdoors.⁵⁴ The effort is built on a series of land donations,

51. *Id.*

52. ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* (2d ed. 2005) (published by the Land Trust Alliance and discussing conservation easements in detail).

53. *See* Whiterock Conservancy, History, <http://www.whiterockconservancy.org/history.htm> (last visited June 5, 2007).

54. *See* Whiterock Conservancy, Our Mission, <http://www.whiterockconservancy.org/mission.htm> (last visited June 5, 2007).

conservation easements, and an Iowa “Great Places” initiative.⁵⁵ The management is a partnership between the Iowa Department of Natural Resources, the Leopold Center for Sustainable Agriculture, and the Iowa Natural Heritage Foundation.⁵⁶

One issue in connection with efforts to promote the use of outdoor recreation for economic developments concerns the availability of public funds to acquire land for such uses. In 2006, the Minnesota legislature considered bill S.F. 2734 which in Article 1 would amend the Minnesota constitution to dedicate 1/8 of 1 cent of the sales tax for “hunter and angler access, and for fish and game enhancement purposes.”⁵⁷ In 2006, the Iowa legislature created an interim study committee to study supplemental funding for outdoor recreation and land acquisition.⁵⁸

4. Using eco-system services as a way to broaden the “products” produced by agriculture. “Eco-system services” is probably a term you have yet to encounter. The premise is that if we could place an economic value on the environmental values derived from certain land uses, e.g. the value of clean water coming off a restored wetland, rather than just on the products with an established market value such as a bushel of corn, then we would be better equipped to compare and appreciate the social value of various land uses.⁵⁹ Many law professors, environmentalists and economists are involved in efforts to expand the understanding of eco-system services, which include the valuable exercise of identifying the services land provides.⁶⁰

Clearly agricultural land use produces many services beyond the mere production of commodities; open space, wildlife habitat, aquifer recharge, water

55. See Press Release, Whiterock Conservancy, Coon Rapids – Whiterock Named an Iowa “Great Place,” (Oct. 16, 2005) <http://www.whiterockconservancy.org/Media/101605release.htm> (last visited June 5, 2007); see also Press Release, Whiterock Conservancy, Iowa Garsts Create Large Preserve, Larger Vision (Jan. 7, 2005), <http://www.whiterockconservancy.org/Media/010105release.htm> (last visited June 5, 2007).

56. Whiterock Conservancy, Our Mission, <http://www.whiterockconservancy.org/mission.htm> (last visited Jun. 5, 2007).

57. See Minn. House of Rep., Research Bill Summary, S.F. 2734, Three Constitutional Amendments, <http://www.house.leg.state.mn.us/hrd/bs/84/sf2734ue1.html>.

58. S. Res. 50, Iowa Gen. Assem. (Apr. 27, 2007); see also, Iowa Dep’t of Natural Resources, The Sustainable Natural Resource Funding Advisory Committee, Final Report (Mar. 2007).

59. See Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY L.Q.* 140, 226-28 (1999) (discussing the economic valuation of market and non-market aspects of land).

60. See James Salzman, et al., *Protecting Ecosystem Services: Science, Economics, and Law*, 20 *STAN. ENVTL. L.J.* 309, 327 (2001).

quality improvement, soil conservation, and even carbon sequestration, are all services possible from agriculture. It is important to stress the “possible” because it is also clear that agriculture has the potential to generate many negative impacts such as air pollution through odors or water pollution through over use of nitrogen fertilizers. The key is thinking about how the use of the land impacts its environmental performance. By way of example, the Conservation Reserve Program (CRP) is, essentially, a government program which pays landowners to produce wildlife habitat and soil conservation than for more crop production.⁶¹ The opportunity facing agriculture is how the idea of eco-system services can be incorporated into future policy making such as the 2007 farm bill.

D. Developing a Performance Based and Integrated Approach to Soil and Water Conservation, Using Federal Farm Programs and Public Support for Environmental Protection to Provide Consistent Financial Incentives for Sustainable Agriculture

When the history of 20th Century American farm policy is written, the Conservation Title of the 1985 Farm Bill will earn its place as among the most significant developments and innovations in American farm policy for promoting environmental stewardship with farmers and farmland owners.⁶² Over the last 20 years, NRCS’s implementation of the programs—conservation compliance, swampbuster, sodbuster, and the CRP—have left an indelible stamp on America’s rural countryside and on the practices of landowners.⁶³ Undoubtedly, great progress has been made in conserving soil and water, in creating wildlife habitat, and in protecting fragile lands. But conservation is not something that stays done by inertia; it is a process that requires the continuing involvement and commitment of farmers and landowners as well as public officials in their decisions about how the land is to be used. In recent years, a growing fatigue has become apparent in our commitment to soil conservation, accompanied by a shift in perception the federal conservation provisions no longer serve as active restraints on damaging farming practices. The desire to develop new, more effective approaches to supporting environmental stewardship is in part what led Senator

61. See USDA, Natural Res. Conservation Serv., Conservation Reserve Program, <http://www.nrcs.usda.gov/programs/crp> (last visited June 5, 2007).

62. See Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (1985).

63. See USDA, Natural Res. Conservation Serv., NRCS Conservation Programs, <http://www.nrcs.usda.gov/programs/> (last visited June 5, 2007) (for a comprehensive list of NRCS conservation programs with links to pages describing the programs).

Harkin,⁶⁴ and others, to promote the Conservation Security Program (CSP) as perhaps the most significant innovation in the 2002 farm bill.⁶⁵

The key policy opportunity is developing effective methods to integrate traditional conservation type programs such as those administered by the USDA with environmental protection-based programs such as the Clean Water Act. The programs may deal with the same resources but each comes from a different legal orientation. The expansion of funding for the USDA's Environmental Quality Incentives Program (EQIP) to cover waste handling facilities in livestock operations is an example of how integration can occur.⁶⁶ Attorneys working in rural America will play an important role in the development and implementation of new conservation and environmental programs. Helping farm clients understand the laws and designing and refining the tools used to implement the programs will require informed council. Specific opportunities facing rural America in this regard include:

1. Assisting producers enrolling in the Conservation Security Program (CSP)⁶⁷ and supporting efforts to expand the program. The CSP focuses on working lands as opposed to land retirement. It represents the most significant innovation in conservation law since the enactment of the 1985 conservation title. One innovation is using a watershed-based approach for farmer eligibility.⁶⁸ The program makes available a sliding scale of per-acre payments determined by the types of practices the farmer agrees to implement.⁶⁹ The agency is using a one time sign-up by watershed, meaning if a landowner does not apply to participate when eligible, it could be seven or eight years before another opportunity comes along to do so. While the road to funding and implementation of the program has not been smooth, the USDA has worked to develop better mechanisms for the CSP and farmers who have been selected for participation have found it to be a valuable program.⁷⁰ One of the most critical challenges to the future of the CSP

64. 147 Cong. Rec. S5405, 5461-67 (2001) (enacted).

65. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, sec. 2001, §§ 1238, 1238A-1238C, 116 Stat. 134, 223-33 (2002); see USDA, Natural Res. Conservation Serv., Conservation Security Program, <http://www.nrcs.usda.gov/programs/csp> (last visited June 5, 2007).

66. See USDA, Natural Res. Conservation Serv., Farm Bill 2002: Environmental Quality Incentives Program (Oct. 2004), <http://www.nrcs.usda.gov/programs/farmbill/2002/pdf/EQIPKyPt.pdf>.

67. USDA, Natural Res. Conservation Serv., Farm Bill 2002: Conservation Security Program (Mar. 2005), http://www.nrcs.usda.gov/programs/csp/pdf_files/csp_fs3_05.pdf.

68. See *id.* (stating that to be eligible the land must be located within a selected watershed).

69. *Id.*

70. *Hearing on USDA Farm Bill Conservation Programs Before the Subcomm. On Conservation, Credit, Energy, and Research of the H. Comm. on Agric.*, 110th Cong. (2007) (statement of Loni Kemp, Senior Policy Analyst, The Minnesota Project).

will be the political support among farmers and rural communities for Congressional funding.

2. Innovations in the Conservation Reserve Program (CRP) to support the transition to livestock production. Attorneys practicing in rural America know the CRP has been an extremely popular program for farmers and landowners with over 35 million acres enrolled and close to \$2 billion in annual land rental payments.⁷¹ But the CRP has also caused significant shifts in local economies, and is an expensive way to obtain conservation. In recent months the CRP has come under increasing pressure from groups who feel it is suppressing the opportunities to support agricultural production, especially new demands for corn, and the potential for other bio-based crops associated with production of alternative energy. For example, the Iowa Farm Bureau Federation passed a resolution encouraging Congress to end the general CSP, in favor of a more targeted initiative.⁷² Efforts to open CRP ground to some forms of farm use, such as allowing haying and grazing during droughts, can be controversial to those who view the program as environmental protection. But one opportunity the conservation community will continue to explore is how the CRP can be enhanced to reduce its cost but simultaneously retain its conservation values. The potential movement of erosive land out of the CRP back into row crop production is a legitimate worry stimulating the search for alternatives.⁷³ One example is to allow for cattle grazing on the hill country of southern Iowa. While western ranchers grazing subsidized federal rangeland will no doubt oppose the effort, it is an innovation worthy of consideration.

3. Using performance based systems to evaluate producers focusing on conservation compliance and planning. One criticism some observers make of current conservation programs is the apparent unwillingness of the USDA to actively enforce conservation compliance requirements.⁷⁴ While there are some examples of producers losing farm program benefits for failing to implement conservation requirements, their infrequency, along with the general attitude in farm country, makes it appear most producers do not see the risk of losing payments as an incentive for conservation. While it is not necessary for the programs to operate as a whip to be effective, if there is no fear of penalty then their

71. USDA, Farm Serv. Agency, Conservation Reserve Program: Monthly Summary March 2007, http://www.fsa.usda.gov/Internet/FSA_File/mar2007.pdf.

72. Perry Beeman, *Farm Bureau Urges Use of Vacant Land*, DES MOINES REG., Sept. 17, 2006, at B4.

73. Press Release, Iowa Dep't. of Natural Res., Countdown to CRP Ends April 14, ECO NEWS WIRE (Apr. 6, 2006), available at <http://www.iowadnr.net/news/eco/06apr06eco.pdf>.

74. Richard Classen, USDA, Econ. Research Serv., *Have Conservation Compliance Incentives Reduced Soil Erosion?*, AMBER WAVES, June 2004, at 30, 32, available at http://www.ers.usda.gov/AmberWaves/June04/pdf/features_compliance.pdf.

value as a restraint is weakened. One result is a renewed attention among some members of the conservation community to develop more objective performance based indicators as a way to evaluate compliance.⁷⁵ Performance-based indicators might be such things as actually testing water quality or evaluating sediment loads reaching stream segments of watersheds. The premise is that more refined objective measurements will have several benefits – revealing the effectiveness of practices, identifying continued sources of soil loss and water pollution, and creating measurements to reward or penalize landowners for their actions.⁷⁶

E. Alternative Energy Policy and the Effect on Agriculture

Perhaps the most significant “new” issue sweeping across not just rural America but the whole nation concerns the search for alternative, home-grown sources of energy. Anyone even remotely involved with U.S. agriculture knows there is a literal “land rush” today to organize and fund the construction of new farm-based energy projects. The efforts are focused primarily around corn ethanol and soy or bio-diesel production, but there is also a healthy mix of wind related development. In Iowa alone there are over two dozen large scale ethanol plants in operation or under construction and hardly a week goes by without the announcement of a new 50 or 100 million gallon capacity plant being planned somewhere in the state.⁷⁷ Many of the plants are being organized and financed by groups of farmers working in conjunction with a network of large companies. The scale of plants and the level of investments involved are significant. It is not uncommon for groups of producers to raise millions of dollars to fund construction of a local cooperatively-owned ethanol plant.⁷⁸ The legal issues, opportunities, and challenges related to the rapid development and emergence of agriculture as an energy supplier are beyond the scope of this article, but do offer ripe subjects for a much-needed legal research and conference discussion. For exam-

75. Richard Classen, USDA, Econ. Research Serv., *Emphasis Shifts in U.S. Conservation Policy*, AMBER WAVES, May 2007, at 28, available at <http://www.ers.usda.gov/AmberWaves/May07SpecialIssue/PDF/Emphasis.pdf>.

76. Iowa Soybean Assoc., Environmental Programs, <http://www.isafarmnet.com/ep/cemsamission.html> (last visited June 19, 2007).

77. See Iowa Corn, Iowa Dry Ethanol Plants, http://www.iowacorn.org/ethanol/ethanol_8.html (last visited June 6, 2007) (listing current ethanol plants in Iowa as well as those plants currently in the construction or planning phases).

78. Farm Credit Council, *Iowa Farmers Find a New Way to Build an Ethanol Plant*, available at <http://www.fccouncil.com/uploads/CoBank%20Testimonial.pdf>.

ple, the Farm Foundation sponsored a two-day conference in Kansas City in 2006 on "Energy in Agriculture: Managing the Risk."⁷⁹

Rural practitioners will be involved in these alternative energy efforts in various ways: as counsel for the producer groups, as investors, as advisors on funding opportunities, or as lawyers assisting individuals and communities in dealing with the results of such efforts. One practice opportunity relates to grant writing and efforts to obtain project funding; in August 2006, the USDA Rural Development awarded over \$17 million in Section 9006 Renewable Energy and Energy Efficiency grants to 375 recipients in 36 states.⁸⁰

At this point in the process everyone is focusing on the potential and the positives that can come to agriculture and farm communities from new markets for farm products and energy supplies. Some of these economic opportunities are real and represent important new avenues of employment and income for rural America. But anyone who lived through the farm crisis of the 1980s knows that what goes up can come down, and what is now hailed as salvation can in the future trigger pleas for mercy and redemption. Many of the ethanol and bio-diesel initiatives now being formed will succeed and lead to large profits. Reports from farm country indicate this has already been the case.⁸¹ But there have also been incidents of poor planning and deceit leaving some farm investors holding significant losses and bags of empty promises. The shift to energy production in agriculture will provide an important opportunity for the legal community to provide much needed leadership and service to rural America. It is critical that in our push to use farming as an energy source, the economic impacts on farmers, rural residents and communities are addressed and any environmental issues related to this new pressure on the land are considered. The possible legal issues involved in this regard include:

1. Questions of how the economic benefits from ethanol and bio-diesel plants are being allocated, which in part relates to the organizational choices and business structures being used by producers. In September 2006 one Iowa-based

79. Energy in Agriculture: Managing the Risk, Tools for Agriculture to Manage Energy Risks, <http://www.farmfoundation.org/projects/06-34EnergyInAgManagingRisk.htm> (last visited June 6, 2007) (discussing material presented at the Farm Foundation Conference in June 2006).

80. USDA, Rural Development, Renewable Energy and Energy Efficiency Improvement Program Grants, <http://www.rurdev.usda.gov/rd/newsroom/2006/9006grantrecipients.pdf> (last visited June 6, 2007) (providing a list of 2006 grant recipients).

81. See Alexei Barrionuevo, *As Investors Covet Ethanol Plant, Farmers Resist*, N.Y. TIMES, Nov. 2, 2006, at A1; American Ethanol Inc., *The Time Is Now*, <http://www.americanethanol.us/about.php> (last visited June 19, 2007).

ethanol company announced plans to issue a public stock offering but then shelved the idea due to the steep fluctuations in the price of ethanol.⁸²

2. Understanding how the environmental impacts, such as increased water use and air pollution, are being addressed or ignored. Because most of the energy sources are produced from farm commodities, it is important to consider how these new demands may impact soil conservation, water quality, and food supplies.⁸³

3. Addressing how increasing commodity production will affect the structure and operation of existing conservation and environmental protection programs. The key will be ensuring that efforts to make agriculture an energy source aren't used as an excuse to reduce public support for conservation, and don't evolve into another threat to long-term natural resource sustainability.

4. Creating new energy supplies will also implicate the application of existing regulatory systems for utilities and energy distribution. Important policy questions, such as the prices being paid by utilities to the owners of on-farm wind generators, will lead to conflicts such as an Iowa case now in litigation.⁸⁴

5. Managing the economic impacts and market shifts associated with the development of ethanol and bio-diesel facilities, and how the marketing, pricing, delivery, and storage of grain will shift. Higher corn prices due to demand from ethanol plants will have a direct impact on feed prices, thus influencing the economic performance of the livestock sector.⁸⁵ The direct delivery of grain to energy facilities by-passing local or regional grain elevators may result in significant business impacts for elevators.

The key to the future of alternative energy for agriculture and rural communities is whether the system will be built on a structure of access, economic opportunity, and sustainability, or on the exploitive model - often seen with other energy sources such as coal and oil. Rural attorneys will play a critical role in shaping this future.

82. See, e.g., S.P. Dinnen, *Hawkeye Shelves Sale of Stock*, DES MOINES REG., Sept. 19, 2006, at D1.

83. C. Ford Runge & Benjamin Senauer, *How Biofuels Could Starve the Poor*, FOREIGN AFFAIRS, May/June 2007, available at <http://www.foreignaffairs.org/20070501faessay86305/c-ford-runge-benjamin-senauer/how-biofuels-could-starve-the-poor.html>.

84. See *Windway Technologies, Inc. v. Midland Power Cooperative*, 696 N.W.2d 303 (Iowa 2005).

85. See Jerry Perkins, *Pork Producers Try to Keep Ethanol from Hogging Corn*, DES MOINES REG., Mar. 11, 2007, at D4.