

PLOWING NEW GROUND: EMERGING POLICY ISSUES IN A CHANGING AGRICULTURE

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- I. Continuing the Work of the “Old” Agricultural Law: When to Expect the Next Wave of Bankruptcy and Farm Finance Issues?
- II. Confronting the Forces of Industrialization: How to Address Public Concerns About Concentration in the Food Sector?
- III. Expanding International Trade for U.S. Agriculture: Will New Trade Agreements Reap a Harvest of Sales or Conflict?.....
- IV. Agriculture in Transition: Can Lawyers Help Transfer Farm Businesses and Create New Institutional Structures?
- V. New Technologies and Intellectual Property: Who Owns Which Gene and What Information?.....
- VI. Living in Post-Farm Programs Era: Will the Public Desire for Soil Stewardship Be Achieved Through Regulation?.....
- VII. Farmland Preservation: Will the Public Act to Protect the Base of Agriculture?.....
- VIII. Water Allocation: Can Agriculture’s Claim to a Precious Resource Be Protected?
- IX. Modernizing Food Safety Laws: Will HACCP and Post-Delaney Food Safety Inspection Standards Protect Consumers?.....
- X. Building the New Agriculture: Can Law Create Opportunities and Community in the Food System?

The theme for this conference is “Serving Agriculture in the 21st Century.”¹ This focus provides the opportunity to step outside the range of current issues occupying agricultural lawyers and consider what new matters may face agriculture in the years ahead. In attempting to do so we are of course somewhat constrained by the current legal and policy environment. Lawyers will not be writing on a clean slate in the next decade, but rather will carry forward much of the body of law and

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policy the agricultural law community has spent the past twenty years developing. Issues emerging today as possibly important tomorrow are in many cases the direct result of legal and legislative decisions already in place. But while the foundation may exist, the exact shape of how these issues evolve will be influenced by the actions of the legal community. This article identifies ten major legal topics that will provide the basis for the work of agricultural lawyers in the years ahead. Many of the issues are new, while others are simply refinements of traditional questions. Part of the challenge in thinking about the issues is to consider how the agricultural law profession can be best prepared and equipped to help clients and society meet them.

I. CONTINUING THE WORK OF THE “OLD” AGRICULTURAL LAW: WHEN TO EXPECT THE NEXT WAVE OF BANKRUPTCY AND FARM FINANCE ISSUES?

The first topic concerns agricultural finance issues, such as bankruptcy, debt enforcement, and secured lending. For many lawyers these were the primary issues handled for agricultural clients during the 1980s. In recent years, as other matters such as environmental law and business planning have emerged to assume new importance, the legal significance of farm finance topics has diminished. But the issues did not go away, instead for many they just stepped into the background. The time may soon come when they will emerge for an encore. While not wanting to appear overly pessimistic, consider how the following factors might contribute to the return of farm finance questions to the agricultural law agenda:

- a) the natural cycle of agricultural economic fortunes, while prices may now be high for many commodities those prices most likely will not continue;
- b) the increased reliance on export markets and the political and economic vulnerability of several of the major buyers of U.S. farm products;
- c) increasing costs and decreasing margins for many traditional forms of agricultural production necessitating larger investments to expand the scale of operations;
- d) continuing financial difficulties for many farmers and lenders, that were patched over during the 1980s;
- e) the eventual removal of much of the base of federal support for farm incomes and the increased price variability and instability this may cause;
- f) variation in producer circumstances, performance, and use of risk protection and marketing devices; and
- g) rapidly increasing land prices and rental rates.

These factors, especially as foreshadowed by the current run-up in land values, could help return agriculture to the times of the 1980s.

For many producers the farm financial problems of the 1980s never disappeared. For some the matters have continued into the courts.² For others they

². For vivid evidence that farm financial issues have not disappeared from the legal agenda, see the extensive review of recent cases in Gordon W. Tanner & Kristi L. Helgeson, *Annual Review of*

were just deferred, and the bills, in the form of refinanced balloon payments and other debts, will now come due in a period of increased price and income variability. This helps explain why calls to farm crisis hotlines continue at levels of the 1980s and why state mediation programs such as the Iowa Mediation Service remain busy.³

But if a new farm financial collapse should occur, there will be at least one new factor to add to the equation: the impact of any financial collapses experienced by the companies now industrializing agriculture. Certainly the Chapter 11 bankruptcy filing of Premium Standard Farms⁴ or the collapse of John Morken's Spring Grove Livestock Exchange⁵ are warnings of what could come, as are the recent failure of an Iowa seed buyer⁶ and the "hedge-to-arrive" aftermath in all its litigious beauty.

The recent debacle with the overuse and misuse of hedge-to-arrive contracts in many midwestern states has resulted in increased regulatory scrutiny for many new generation marketing devices, which do not fit well into the traditional structure of grain warehouse and dealer regulation.⁷ This situation has challenged the ability of public bodies, most notably the Commodities Futures Trading Commission (CFTC) and state grain regulators, to respond adequately and has created rifts between cooperatives and their members, and between farmers and communities.⁸ Hopefully,

Agricultural Law: Commercial Law Developments, published in this issue of the *Drake Journal of Agricultural Law*. See also, Gordon W. Tanner, *Annual Review of Agricultural Law: Commercial Law Developments*, 1 DRAKE J. OF AGRIC. L. 73 (1996).

³. See, e.g., Jerry Perkins, *Mediators Offer Hope Amid Turmoil*, DES MOINES REG., July 28, 1996 at J1 (reporting that the Iowa Mediation Service still handles 2,000 cases per year).

⁴. See, e.g., Jerry Perkins, *Premium Standard Files for Bankruptcy: Voluntary Reorganization*, DES MOINES REG., July 3, 1996, at 8S; Steve Marberry, *PSF Fails to Meet Payments, Goes Private*, FEEDSTUFFS, May 6, 1996, at 1.

⁵. See, e.g., *Farm Credit Gets Cattle Case Funds*, OMAHA WORLD HERALD, Sept. 3, 1996, at 14 (reporting that the federal bankruptcy judge in Minneapolis handling the case awarded \$10.6 million to the Farm Credit Services of Southern Minnesota, giving it priority over Firststar Corp. of Milwaukee, in a dispute over filing secured claims to the cattle).

⁶. See Jerry Perkins, *Beans Being Sold to Pay Strayer Debt: Now in Chapter 7*, DES MOINES REG., May 18, 1996, at 12S.

⁷. See, e.g., Charles House, *Bill on 'Exotic' Contracts Passes Indiana Hurdle*, FEEDSTUFFS, Feb. 19, 1996, at 3 (discussing attempts in Indiana to enact legislation which would curb the use of grain marketing contracts like the hedge-to arrive: arrangements). For a discussion of this issue from an industry perspective, see David C. Barrett, Jr., *Hedge-To-Arrive Contracts*, published in this issue of the *Drake Journal of Agricultural Law*.

⁸. For a series of articles about the HTA debate and the lawsuits which have been filed, see, Anne Fitzgerald, *Fear Rises as CFTC Questions Contracts*, DES MOINES REG., May 18, 1996, at 12S; Doris Frankel, *Grain Contracts Prompt Lawsuits*, DES MOINES REG., May 25, 1996, at 12S; Anne Fitzgerald, *Co-op Sues over Undelivered Grain*, DES MOINES REG., June 5, 1996, at 8S; Anne Fitzgerald, *Co-ops Suing Farmers with HTAs*, DES MOINES REG., July 11, 1996, at 10S. See also Anne Fitzgerald, *Iowans Watch HTA Ruling in Wisconsin*, DES MOINES REG., Aug. 7, 1996 at 9S (reporting on a recent decision by a federal district judge ordering a farm family to deliver 180,000 bushels of corn to a local elevator). For a discussion of the underlying legal issues involved in the HTA debate, see Roger A. McEowen, *Marketing Agricultural Commodities Through Use of Hedge-to-Arrive Contracts May Violate CFTC Rules*, AGRIC. L. UPDATE, May 1996 at 4 and Christopher R. Kelley, *CFTC Issues "Hedge-to-Arrive" Contract Policy and Guidance Statements*, AGRIC. L. UPDATE, June 1996 at 4.

this painful and ruinous episode will teach us many lessons.⁹ Farmers might learn simply to read and understand the contracts before signing. Elevators might consider the downside of using marketing devices (or gimmicks) to chase volume and business. Unfortunately much of this episode can be chalked up to greed and a serious case of too many people being too smart for their own good - but this does not help resolve the resulting difficulties. Perhaps in the future when someone advises farm clients to sell multiples of their annual production and allegedly agrees to pay their marketing costs, a red flag or two of caution will go up. Perhaps they will even be wise enough to consult their lawyers for advice. But that is in the future. For now, courts across the Midwest will decide who bears the most blame in a fiasco with plenty to go around.

The real challenge for lawyers and their farm clients, both the traditional and new generation of agriculturalists, will be to find the opportunities that might emerge if a time of farm financial misfortune arrives. Whether it will be the chance to acquire land as large holdings are broken up or to develop new markets as supply chains are broken, there can always be opportunity in times of trouble.

II. CONFRONTING THE FORCES OF INDUSTRIALIZATION: HOW TO ADDRESS PUBLIC CONCERNS ABOUT CONCENTRATION IN THE FOOD SECTOR?

The increased legalization and regulation of the industrialized portions of agriculture will be a second component of agriculture's legal future. The process of industrialization of agriculture is well under way in our nation and can be seen in the changing attitude of the public and a shift in regulatory treatment of some forms of production.¹⁰ Concentrated livestock production, which has drawn the ire of neighbors and the attention of state environmental officials and legislators, is one example but there are others.¹¹ Many independent livestock producers are concerned about the level of concentration in the meat packing industry and the effect of captive

⁹ See, e.g., Neil E. Harl, *Perspective: Avoid a Replay of Hedge-To-Arrive*, TOP PRODUCER, Aug.-Sept. 1996, at 43.

¹⁰ For discussion of these issues, see Neil D. Hamilton, *Reaping What We Have Sown: Public Policy Implications of the Industrialization of Agriculture and the Legal Implications for a Changing Production System*, 45 DRAKE L. REV. 289 (1997) and Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613 (1994).

¹¹ The increased public and legislative attention to the potential environmental dangers caused by large scale swine facilities can be seen across the nation. The series *The Power of Pork* in the Raleigh News and Observer won the 1996 Pulitzer Prize for Public Service. (RALEIGH NEWS AND OBSERVER Feb. 19, 21, 22, 24, 26, 1995) (Reprint of series on file with *Drake Journal of Agricultural Law*). See also Jeff Selingo, *S.C. Passes Tough Hog Rules, Encourages Environmentalists*, WILMINGTON (N.C.) MORNING STAR, June 18, 1996; Wes Smith, *Huge Hog Farms Drawing Squeals from Neighbors*, CHI. TRIB., Aug. 22, 1996, at 1; and Jerry Perkins, *Yet Another Scrap over Big Pork*, DES MOINES REG., Sept. 1, 1996, at 4G.

supplies of packer fed or controlled livestock on the functioning of the market.¹² Recent action by USDA, though limited, to address livestock producer concerns by seeking voluntary reporting of contract pricing transactions from packers is one indication of increasing public scrutiny of large companies.¹³ The ongoing criminal investigation of price fixing in the feed ingredient market is another.¹⁴ One result of this increased concern will be attempts to enact laws to control the power of agricultural businesses. State efforts to regulate the use of production contracts,¹⁵ such as the recent enactment vetoed by the governor of Mississippi,¹⁶ will continue. A legal issue concerning agricultural labor will become increasingly significant with industrialization questions “such as whether workers are employees or independent contractors.”¹⁷

From the standpoint of rural attorneys, the challenges are many. Two of the most significant might be who will be your clients and what types of issues will concern them? Lawyers who practice in rural America know that issues in a changing rural economy are much broader than just agricultural.¹⁸ Questions of how to serve a broadened client base with better access to knowledge and technology will be one result from concern over “who will be clients” and “who will be the farmers.” Increased societal attention to issues of farm structure will reflect what is happening

12. See, e.g., Jay P. Wagner, *Producer-Packer Ties Eyed: Critics Question Deal Involving Large-Scale Hog Lot*, DES MOINES REG., Mar. 29, 1996, at 9S; *Slaughter Industry Probe Sought*, DES MOINES REG., Jan. 12, 1996, at 10S, (concerning a request by the American Farm Bureau Federation for a Congressional investigation of concentration in livestock slaughter); George Anthan, *Low Livestock Prices: Who's to Blame?* DES MOINES REG., Sept. 24, 1995, at 1G.

13. For information about USDA's request for more voluntary reporting on closed cattle sales by packers, see Heather C. Jones, *USDA Unveils Price Reporting Initiatives*, FEEDSTUFFS, Aug. 5, 1996, at 1 (discussing Secretary Glickman's announcement of several voluntary measures designed to improve the reporting on terms for cattle traded under contract sales). USDA also has announced an internal review of the current enforcement practices under the Packers and Stockyards Act. *Id.* See also Anne Fitzgerald, *Unprecedented Outcry Gets Action: USDA Presses Issue of Market Access--Though Not Too Hard*, DES MOINES REG., Feb. 4, 1996, at 4G.

14. The ongoing investigation of the international market for lysine, which has focused on Archer Daniels Midland, recently resulted in an agreement by some of the conspirators to settle criminal charges, see, e.g., Kurt Eichenwald, *3 Giant Feed Companies Agree to Settle Price-Fixing Charges*, N.Y. TIMES, Aug. 28, 1996, at C1.

15. For a discussion of recent state actions in this area, see Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051 (1995).

16. In April 1996, the Mississippi legislature passed House Bill 783, the Mississippi Poultry Producers Protection Act, only to have Governor Kirk Fordice veto the legislation, citing his belief that “new government regulation of this important industry is not the right thing to do.” See Steve Marberry, *Mississippi Governor Skewers Poultry Farmers*, POULTRY GROWER NEWS, Mar./Apr. 1996, at 1. See also Steve Marberry, *Mississippi Fair Poultry Practices Act Vetoed*, FEEDSTUFFS, May 6, 1996, at 1.

17. For a recent discussion, see John C. Becker and Robert G. Haas, *The Status of Workers as Employees or Independent Contractors*, 1 DRAKE J. OF AGRIC. L. 51 (1996).

18. See, e.g., Ronald Smothers, *Small-Town Practice Proves Attractive for Rising Number of Lawyers*, N.Y. TIMES, July 2, 1995, at C16.

in rural America. When the small town attorneys have fewer clients, and the state farm bureau federations search for farmer members, then the changing farm structure, the need to create opportunities for new independent family farms, and recognition of the social impacts of an industrialized agriculture may become real to more people. Rather than discredit these concerns as the nostalgic longings of traditionalists who do not understand modern agriculture, perhaps more of society will come to understand the realities of modern agriculture and find it not at all to their liking. Agriculture and the rural communities it supports must be willing to consider alternative futures. As leaders in society lawyers will have a role to play in this process.

III. EXPANDING INTERNATIONAL TRADE FOR U.S. AGRICULTURE: WILL NEW TRADE AGREEMENTS REAP A HARVEST OF SALES OR CONFLICT?

According to many officials, we are now entering a period of unprecedented opportunity for international sales of agricultural products.¹⁹ This may well be true. Export sales are now at records levels and projected to continue to increase.²⁰ But have we not been down this road before, when reliance on export salvation, the mantra of the 1970s, helped fuel the bust of the 1980s? Perhaps things will be different this time and the current strength in exports will continue. Major differences this time may be the new international trade agreements, such as NAFTA and the Uruguay Round Agreement creating the World Trade Organization, and the new rules for promoting free trade and resolving disputes.

The new trading rules represent an important challenge and opportunity for the agricultural law profession.²¹ Lawyers will need to absorb and understand what the rules mean to help clients capture the opportunities they create. A related development also presents lawyers with a challenge is the matter of implementing the new procedures to see whether they work.²² The inevitable plea will be the agreements are not working like they were advertised and that our foreign partners are not playing fair.²³ These complaints already are being heard in the current

¹⁹. See, e.g., Michael R. Gordon, *U.S. Chickens in Russian Pots*, N.Y. TIMES, Jan. 18, 1996, at C1.

²⁰. See Priscilla Joseph, *Home on the Range No More: Animal Product Exports on Global Drive*, USDA AGEXPORTER, June-July 1996, at 4 (reporting that export of animal products have now exceeded \$11 billion).

²¹. See, e.g., Kristin Mueller, *Note: Hormonal Imbalance: An Analysis of the Hormone Treated Beef Trade Dispute Between the United States and the European Union*, 1 DRAKE J. OF AGRIC. L. 97 (1996). For a discussion of the new Uruguay Round GATT agreement from the perspective of European farmers, see Louis Lorvellec, *Back to the Fields After the Storm: Agriculture in the European Union After the Uruguay Round Agreements*, 2 DRAKE J. OF AGRIC. L. (forthcoming 1997).

²². See, e.g., Ian Elliott, *U.S. Takes EU Hormone Ban to WTO for Review*, FEEDSTUFFS, Feb. 5, 1996, at 1.

²³. See, e.g., Charles House, *Trade Agreements Fail to Stifle Sanitary Barriers*, FEEDSTUFFS, July 22, 1996, at 1.

dispute in which the United States has alleged that Canadian tariffs on imports of poultry, dairy, eggs, and barley violate NAFTA.²⁴ The release of information that the panel decision will support Canada's actions has led some U.S. politicians to argue the agreement should be abandoned if it cannot be renegotiated.²⁵ Another recent ruling by the International Trade Commission, reached a similar conclusion, holding that imports of foreign vegetables are not to blame for U.S. farmers' problems.²⁶ If the results of the first major set of trade disputes filed by the U.S. under the new international agreements go against American interests, then the debate will be renewed about the need for further trade reforms. Helping implement the new agreements so that farmers can reap their promised benefits will provide employment for trade officials and lawyers as well.

IV. AGRICULTURE IN TRANSITION: CAN LAWYERS HELP TRANSFER FARM BUSINESSES AND CREATE NEW INSTITUTIONAL STRUCTURES?

One of the most significant challenges facing agriculture today is the need to facilitate the transition of farm businesses and assets from the current owners and operators to the next generation of farmers. Agricultural lawyers traditionally have played a critical role in assisting the farm sector in making these transitions. The current demographics and structure of farming and farmland ownership reveal an aging population of farmland owners holding a large percentage of the land. The transfer of existing farms and assets will become a more critical element of agricultural law in the years ahead. This will involve the traditional role of lawyers providing estate planning for families but also will require lawyers to engage in innovative efforts to transfer farm assets to non-family members and to create new business forms. One of the key challenges for lawyers, regardless of the form of transfer involved, will be the need to recapitalize the farm assets. In recent years there has been increased interest at the state level in the development and funding of beginning farmer financing programs to help identify and start the new crop of farmers.²⁷ Important aspects of these are matching programs, such as "Land Link,"

²⁴. See, e.g., Ian Elliott, *Canada Wins Dairy, Poultry, Egg Dispute*, FEEDSTUFFS, July 22, 1996, at 1.

²⁵. See *U.S. Loses First NAFTA Dispute-Is It Over?* AGRI-PULSE, Aug. 19, 1996, at 2 (reporting on a pending decision by a NAFTA dispute resolution panel rejecting the U.S. claim that Canada's tariffs on dairy and poultry violated the treaty). See also Ian Elliot, *NAFTA Dairy and Poultry Panel Delays Final Report*, FEEDSTUFFS, Aug. 19, 1996, at A (noting the release of the report has now been delayed until at least Sept. 15, 1996).

²⁶. See *U.S. Growers Dealt Blow over Trade*, DES MOINES REG., July 3, 1996, at 3A. See also Charles House, *Trade Agreements Fail to Stifle Sanitary Issues Barriers*, FEEDSTUFFS, July 22, 1996, at 1.

²⁷. See e.g., Jerry Perkins, *New Farm Loan Program Fills Niche*, DES MOINES REG., March 17, 1996 at 4G (reporting on a new loan participation program by the Iowa Agricultural Development Authority under which qualified borrowers will be able to borrow both state funds and money from

“Farm-On,” and “AgConnect,” private and state efforts to facilitate the transfer of farms as ongoing businesses between non-related parties.²⁸ In Iowa a number of government agencies, institutions, and farm organizations have joined efforts to form the Agricultural Transition Alliance with the mission “to assist people entering and existing Iowa agriculture.”²⁹ Part of the challenge to be more creative in financing the capitalization of farm assets to the next generation may include experimentation with community or public financing of land ownership, as already seen in the work of some land trusts to fund farmland preservation programs.³⁰ These ideas reflect the growing awareness that without more assertive efforts, the next decades could lead to a drastic decline in the number of farmers and rural residents.

A second aspect of the work of lawyers in the transition of farm businesses will be the creation of new business structures and institutions for those involved in farming. In recent years there has been a resurgence in the use of farmer owned cooperatives in states such as North Dakota and Minnesota.³¹ Many of the new cooperatives have been developed to allow farmers to enter new markets for their products, such as the bison processing cooperative created by North Dakota’s bison ranchers.³² Others, such as the “new wave” cooperatives in Minnesota, are using new approaches, including closed membership and limited outside investment to develop large scale swine production facilities and ethanol processing plants. These efforts have been stimulated by support from state agricultural officials and assisted

private lenders). The IADA will buy up to 30% or \$50,000, whichever is less, of an eligible loan and take a junior claim to collateral behind the bank.

²⁸. The first matching program was the “Land Link” program developed by the Center for Rural Affairs in Nebraska, but innovative programs are now being developed in many states to help create these linkages. See Michael A. Lev, *Finding New Blood for Farms*, DES MOINES REG., Feb. 19, 1995, at 3G (discussing the operation of the matching programs and the role of the Center for Rural Affairs in initiating the programs).

²⁹. Letter from Steve Ferguson, Executive Director of the Iowa Agricultural Development Authority and John Baker, the Director of Farm-On, a program of Iowa State University Cooperative Extension Service, to Neil D. Hamilton, Professor of Law and Director of the Agricultural Law Center, Drake University (Aug. 12, 1996)(on file with *Drake Journal of Agricultural Law*)(announcing a report of the ATA steering committee and an Aug. 29, 1996, meeting).

³⁰. See, e.g., Ken Brekke, *Preserving Green Space at Core of Conservancy*, LACROSSE TRIB., Aug. 27, 1995, at 1 (reporting on the work of the Wisconsin Farmland Conservancy which is a land trust using conservation easements to protect farmland and transfer farms to new operators). See also *Land Trust Learning to Deal with Farming Operations*, 6 FARMLAND PRESERVATION REP. 2, Nov.-Dec. 1995, at 1.

³¹. See, e.g., Randall Torgerson, *Co-op Fever: Cooperative Renaissance Blooming on Northern Plains*, FARMER COOPERATIVES, USDA, Sept. 1994, at 12; *The Carrot and the Stick: A Conversation with Bill Patrie, the Man Who Helped Spark Co-op Fever*, FARMER COOPERATIVES, USDA, Aug. 1995, at 17; Dan Campbell, *Temperature Rising: Co-op Fever is Still Sizzling Across North Dakota; But Will the First Failure Cause it to Dissipate?* FARMER COOPERATIVES, USDA, Aug. 1995, at 10.

³². See James Brooke, *North Dakota Ranches Riding High on the Return of the Buffalo*, N.Y. TIMES, Aug. 19, 1996, at A6 (reporting on the growth and marketing success of North Dakota buffalo producers who have formed the North American Bison Cooperative to process and market their meat).

by new innovations in cooperative law.³³ The increased role of farmer owned businesses is also reflected in a number of current developments where midwestern farmers, both livestock producers and grain farmers, are forming businesses to invest in processing facilities.³⁴

V. NEW TECHNOLOGIES AND INTELLECTUAL PROPERTY: WHO OWNS WHICH GENE AND WHAT INFORMATION?

One constant in agriculture is the changing nature of technology.³⁵ This is apparent in U.S. farming today, both in the form of the new genetically engineered seeds that are finding their way to the market³⁶ and in the development of new production technologies, such as precision farming, that are arousing the interest of so many agricultural businesses.³⁷ The changes in agricultural technology have associated with them a variety of important and unique legal questions. One important issue many producers will encounter concerns the intellectual property rights of the companies marketing the technologies and limitations placed on the ability of producers to use the products. This issue is most commonly confronted in relation to plant genetics and the ability of farmers to save and replant seeds. Seed company concerns over the impact of farmer sales of saved seed led Congress to amend the Plant Variety Protection Act (PVPA) effective April 1995.³⁸ The most

³³. In 1996 the 76th Iowa General Assembly enacted Senate File 2135, which added Iowa Code Chapter 501 authorizing what are referred to as "value-added" cooperatives. See IOWA CODE § 501 (1997).

³⁴. See, e.g., Dale Johnson, *Farmers Form Soybean Processing Cooperative to Add Value to Crop*, IOWA FARM BUREAU SPOKESMAN, Aug. 31, 1996, at A4; *Farmers Are Forming Beef Cooperative*, DES MOINES REG., Aug. 15, 1996, at 8S.

³⁵. See, e.g., Ian Elliott, *Science Leaps Forward with Biotechnology, But Society Balks at Lead*, FEEDSTUFFS, Apr. 15, 1996, at 1. Part of the debate over the use of biotechnology concerns the safety of these technologies, which is still in question. See, e.g., Warren E. Leary, *Gene Inserted in a Crop Plant Quickly Spreads to Weeds, a Study Shows*, N.Y. TIMES, March 7, 1996, at A8.

³⁶. See, e.g., Anne Fitzgerald, *Genetically Altered Seeds Usher in a New Era in Nation's Agriculture*, DES MOINES REG., March 31, 1996, at 4G.

³⁷. See, e.g., William Ryberg, *Deere Invests in 3 Research Firms: Companies Are in Forefront of 'Precision Farming' Movement*, DES MOINES REG., Dec. 16, 1996, at 8S. For a discussion of precision farming and how it might relate to small farmers and efforts to promote sustainable agriculture, see Brian DeVore, *Buck Rogers Puts on a Seed Corn Cap*, LAND STEWARDSHIP LETTER, July-Aug. 1996, at 1.

³⁸. In October 1994, the President signed into law Pub. L. No. 103-349 amending the provisions of the PVPA, Pub. L. No. 91-577, and restricting the rights of farmers to sell saved seed. The bill was a main priority of the American Seed Trade Association which sought to outlaw brown bag sales by farmers and to bring U.S. law on breeders rights into line with the terms of the 1991 UPOV agreement. See *Congressional Passage of New PVP Law a Triumph for Seed Industry*, 10 DIVERSITY 3, 34, 34-35 (1994). The new law makes a number of changes in the Plant Variety Protection Act 7 U.S.C. 2321. The text of the law can be found at 140 CONG. REC. H8026-8034 (daily ed. Aug. 12, 1994)(statement of Rep. De La Garza).

important change from the standpoint of farmers was repeal of the provision allowing farmers to sell “saved seed” to other farmers. This practice, commonly known as “brown bagging,” had become increasingly controversial in the U.S. seed industry and led to Asgrow pursuing infringement actions. In January 1995 the U.S. Supreme Court issued a decision that held farmers could not raise PVPA protected seed for the purpose of selling it to others.³⁹ Under the new law farmers may save new varieties of PVPA protected seed and use it for planting future crops but they can not sell it as seed unless they have obtained the permission of the owner of the variety.⁴⁰

As new forms of improved genetic materials come to the market, producers will need to be aware of the intellectual property rights of the sellers when they acquire technologies.⁴¹ These rights can vary depending on whether the seed is subject to a patent, protected by the PVPA, or is being sold under a unique marketing agreement. Perhaps the best example of a company using a specialized marketing contract to impose intellectual property right claims was the experience of farmers who wanted to plant Monsanto’s new Roundup Ready soybeans in 1996. Producers who purchased the seeds were required to pay an extra technology fee of \$5 for each fifty-pound bag.⁴² Producers also were required to sign a contract which provided they could not save and reuse any of the beans for future plantings (a restriction which goes further than the PVPA) or sell the seed to anyone else for that purpose.⁴³ The most controversial aspect of the contract was probably the provision that gave Monsanto the right, for the next three years, to enter a producer’s farm to test any soybean fields to determine whether Monsanto seed had been saved and used.⁴⁴

It is only natural that companies which have invested millions in developing new technologies will take whatever steps are necessary to protect these investments.

³⁹. See *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 192 (1995)(interpreting the “farmer exemption” (7 U.S.C. § 2543 (1995)) of the Plant Variety Protection Act narrowly to limit the amount of seed which can be saved and possibly sold by farmers).

⁴⁰. The new law does not make all brown bag sales illegal, at least not yet. Under the new law, two different systems will be in place depending on when the variety was certified. Under the “transitional” provisions of the law, the amendments, including the sales restriction, apply only to varieties that were certified after April 4, 1995, 180 days after the law became effective. This means farmers have the right to save and sell to other farmers some seed from existing protected varieties, under the terms of *Winterboer*. However, for newly certified varieties there is no sales exception, even for “incidental sales.”

⁴¹. For an example of how Pioneer Hi-Bred International, Inc., is developing a technology with a built in intellectual property protection and marketing it in selected locations, see Charles Johnson, *Hybrid Wheat Goes to Europe*, TOP PRODUCER, Aug./ Sept. 1996, at 42.

⁴². See MONSANTO COMPANY, MONSANTO ROUNDUP READY® GENE AGREEMENT FOR ROUNDUP READY™ SOYBEANS (1996) (on file with author).

⁴³. See, e.g., *Monsanto Announces Roundup Ready Grower Agreement*, SOYBEAN DIGEST, Feb. 1996, at 94.

⁴⁴. “Grower grants Monsanto, or its authorized agents, the right to inspect and test all of Grower’s fields planted with soybeans and to monitor Grower’s soybean fields for the following three years for compliance with the terms of this Agreement.” MONSANTO COMPANY, MONSANTO ROUNDUP READY® GENE AGREEMENT FOR ROUNDUP READY™ SOYBEANS (1996) (on file with author).

Whether farmers will be willing to sign contracts such as Monsanto's will be a function of how well the products perform in the field. Another explanation for development of the new generation of genetically modified seeds, the use of which may be tied to particular chemical products, relates to manufacturers' desires to expand and extend the market for their chemicals after their patents expire.⁴⁵

One unique legal issue that might be associated with the development of precision farming technologies concerns who owns the different forms of field level data on yield and input performance being generated by the technology. The economic advantages of the technology are based upon the acquisition and processing of such data, over time and space. Information on the performance of crops and the need for inputs such as fertilizers and pesticides can be very valuable to agricultural marketers. The legal question may be who owns the information? Is it the landowner's, the farm manager's, or does it belong to the company collecting and processing the information? This issue will present a unique variation on the theme of intellectual property rights and will pose a challenge to agricultural lawyers working with this emerging technology.

VI. LIVING IN POST-FARM PROGRAM ERA: WILL THE PUBLIC DESIRE FOR SOIL STEWARDSHIP BE ACHIEVED THROUGH REGULATION?

As most everyone in the free world is by now aware, Congress enacted, and on April 4, 1996, the President signed, H.R. 2854, the 1996 Farm Bill.⁴⁶ The act, officially known as the Federal Agricultural Improvement and Reform (FAIR) Act of 1996, has set in motion sweeping changes federal support for agriculture. This much delayed and debated farm bill includes the most significant reforms in the structure and operation of federal price and income supports for farmers since the inception of the programs in the 1930s.⁴⁷ The main concept of reform is termed "freedom to farm" and is designed to remove the restraints on what mix of commodities a producer can raise. The trade-off (at least in theory) is the eventual removal of price and income supports in the form of deficiency payments and other price supports. The Agricultural Market Transition Act⁴⁸ portion of the new law began the process of removing income supports by offering producers a seven year series of decreasing payments in exchange for agreeing to follow applicable conservation provisions, such as conservation compliance and swampbuster. A one-time sign-up period for

⁴⁵. See, e.g., Martha A. Hamilton, *Monsanto Aims to Round Up Business*, DES MOINES REG., June 30, 1996, at G1 (reporting that Monsanto's U.S. patent on Roundup will expire in four years).

⁴⁶. Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996).

⁴⁷. See, e.g., Kenneth Pins, *Congress OKs Farm Bill, End to Subsidies*, DES MOINES REG., Mar. 29, 1996, at 1A; Kenneth Pins, *Farm Bill Signed into Law*, DES MOINES REG., Apr. 1, 1996, at 1A; Eric Schmitt, *House Approves Biggest Change in Farm Policy Since New Deal*, N.Y. TIMES, March 1, 1996, at A1.

⁴⁸. Agricultural Market Transition Act, Pub. L. No. 104-127, Title 1, 110 Stat. 896(1996).

participation was scheduled during the summer of 1996 and resulted in the sign-up of more than 98.8% of the eligible acres.⁴⁹ The 1996 Farm Bill left the existing regime of soil and water conservation programs including renewed authority for the Conservation Reserve Program, sodbuster, swampbuster, and conservation compliance, largely in place.⁵⁰ In addition the bill created a new funding authority, the Environmental Quality Incentives Program (EQIP), which will target more than \$1.2 billion to producers for implementing environmental improvements on their farms including incentives for use by livestock producers.⁵¹

The provisions of the 1996 Farm Bill are extensive and present significant challenges to the USDA to implement. Because several important components of the program are new, the USDA is faced with developing rules and administrative guidelines, such as the rules for handling future tenant and landlord disputes under the transition contracts, under serious time constraints.⁵² Agricultural lawyers who work with farm program issues will no doubt encounter a variety of new legal questions on issues such as crop insurance, disaster assistance, and crop price support lending, as USDA implements the new law. Legal issues involving the rights of tenants and landlords may be especially prevalent, as landowners act on the natural desire to receive the largest portion possible of the transition payments. But another group of issues are associated with the new federal approach to farm programs.

The question is how will we deal with national agriculture policy, such as environmental issues concerning soil and water quality, in a post-Farm Program era. In our rush to reform federal farm programs - to create the so-called freedom to farm - did Congress ignore the question of how the cost and responsibility of soil conservation will be paid when there is no public financial support for producers? While there is no reason to assume farmers will drop soil conservation efforts if no farm programs exist, it is foolish to believe the public desire for soil and water quality protection will disappear just because farm programs do. Society's interest in how land is farmed will not end just because deficiency payments disappear. Agriculture should not delude itself by thinking society does not have ways to require soil and water protection even if it is not attached to a check. We should be wary of trading a system of public supports for regulatory expectations. Current efforts to use environmental programs, such as the wetland reserve⁵³ and the conservation reserve

⁴⁹. See *98.8% Sign-up Sends Message on Market-Price Farm Policy*, AGRI-PULSE, Sept. 2, 1996, at 1.

⁵⁰. See Schmitt, *supra* note 47, at A1.

⁵¹. Federal Agricultural Improvement and Reform Act § 334.

⁵². A significant component of the administrative rules for implementing the new programs are found at Implementation of the Farm Program Provisions of 1996 Farm Bill, 61 Fed. Reg. 37544 (July 18, 1996), containing rules for the Office of the Secretary, the Farm Service Agency and the Commodity Credit Corporation.

⁵³. On Aug. 14, 1996, USDA promulgated new rules for implementing the 1996 Wetland Reserve Program. See *Wetlands Reserve Program*, 61 Fed. Reg. 42,137 (1996) (amending 7 C.F.R. pts. 620 and 1467).

program,⁵⁴ to make long-term shifts on environmentally sensitive lands could help avoid more onerous future regulations.

Another issue in future discussions of federal agricultural policy should be preparing for the debate in 2002 over the continuation of federal farm programs. Unlike the politically expedient process that led to the freedom to farm bill, which asked neither how to justify farm program payments nor what the public will obtain for the funds, perhaps those questions will be asked in the future debate over federal farm programs. Unfortunately that debate will occur against the backdrop of the current transition payments, which may, at least for this year, amount to one of the more scandalous financial raids on the federal treasury ever perpetrated by agriculture. While the flexibility provisions of the new law were much needed, they could have been enacted without the mandated payments set out in the 1996 act. Here is a question: what did Iowa landowners do to deserve \$600 million in transition payments in 1996, when under the law in place in 1995 they would not have received a dime in deficiency payments as a result of record high commodity prices? Perhaps when the debate occurs in 2002, the question might be asked what else could have been done with that \$600 million or with the \$5 billion transferred to the farm sector in 1996 alone?

VII. FARMLAND PRESERVATION: WILL THE PUBLIC ACT TO PROTECT THE BASE OF AGRICULTURE?

Across the nation there is a debate about whether the amount of farmland being converted to other uses is a threat to our agricultural future. USDA's most recent figures place the amount of annual loss at 1 million acres while others believe the figure to be higher.⁵⁵ But the numbers are only part of the story. While the loss of farmland is a national issue, the most direct effects are often local. Conversion of farmland to other uses sets many forces in motion. Not only is farmland lost to production but adjacent farms are jeopardized. The American Farmland Trust, a national group working to preserve farmland, calls this the impermanence syndrome. The process of farmland conversion can be seen in almost any community in our nation as development marches along the roads that serve as growth corridors. While those roads may now be lined with bountiful farms, the nearby growth and installation of services, such as sewer and water, means that in five years most of those farms will no longer exist. Unless something is done to control suburban growth in a planned fashion or to preserve the farmland, these farms will be lost. Part of the problem is our attitudes about farmland. Most city planners and

⁵⁴. On Aug. 27, 1996, USDA recently promulgated rules for operation of the amended CRP program. See 1986-1990 Conservation Reserve Program; 1991-2002 Conservation Reserve Program, 61 Fed. Reg. 43,943 (1996)(amending 7 C.F.R. Parts 704 and 1410).

⁵⁵. See, e.g., Valerie Berton, *Harvest or Homes? AFT Research Highlights Need to Protect Ag as Central Valley Grows*, AM. FARMLAND, Fall 1995, at 12; *Nation's Top Producing Farm Region Imperiled by Sprawl*, FARMLAND PRES. REP., Nov.-Dec. 1995 at 1.

developers consider it undeveloped or land waiting for someone to improve it. This attitude is common in places such as Iowa where our abundance of farmland makes it difficult for people to consider its conversion as a problem.

In recent years concerns about the loss of farmland to development have grown.⁵⁶ Across the nation, dozens of states and communities are devoting resources to create effective programs to preserve farmland.⁵⁷ As part of the 1996 farm bill, Congress authorized spending as much as \$35 million a year to support such efforts.⁵⁸ Education will be a key to such efforts, educating developers and officials about the value of preserving farmland and educating home buyers and society of the need to do so. The American Farmland Trust has played a critical role in focusing the nation's attention on the threat from farmland loss and in developing innovative market driven approaches to protect farmland.⁵⁹ In recent years the AFT has documented that more than fifty percent of the nation's top-value agricultural commodities are produced in metropolitan counties or counties adjacent to them, in other words on the agricultural land most at risk of conversion.⁶⁰ In 1995, AFT undertook a study to show how development poses a major threat to agricultural production in California, the nation's main supplier of many horticultural crops.⁶¹

The availability of productive farmland plays a fundamental role in the operation and health of any agricultural system whether at a national or local level. The emerging crisis in the Central Valley of California and the sprawl of Minneapolis, though larger in scale, are emblematic of the challenges being felt by communities and regions across the nation.⁶² Even in Iowa, blessed with a bounty of farmland, cautionary voices are being raised about developers' profligate ways in

⁵⁶. See, e.g., Carey Goldberg, *Alarm Bells Ring as Suburbs Gobble Up California's Richest Farmland*, N.Y. TIMES, June 20, 1996, at A7.

⁵⁷. For a discussion of the history of efforts to use public funds to acquire the development rights on agricultural land to preserve it, see *Putting Dollars to Work to Save Farmland: 20 Years of PDR Programs*, AM. FARMLAND, Summer 1996, at 9.

⁵⁸. While Congress appropriated only \$2 million for use in 1997, USDA was able to locate \$15 million from other funds for use in 1996. See *Farmland Protection Gets First Year Jump Start of \$15 Million*, AGRI-PULSE, Sept. 2, 1996, at 2. On Aug. 21, 1996, the USDA promulgated rules for the operation of the Farmland Protection Program. See *Farmland Protection Program*, 61 Fed. Reg. 43,226 (1996).

⁵⁹. See, e.g., Sonja Hillgren, *On the Green Scene: Ralph Grossi Advocates an Environmental Alliance*, TOP PRODUCER, January, 1994, at 12 (concerning the California farmer who is president of AFT and his work to build coalitions between farm and conservation groups).

⁶⁰. See, e.g., Valerie Berton, *Farming on the Edge*, AM. FARMLAND, Summer 1993, at 11; EDWARD THOMPSON, JR., AM. FARMLAND TRUST, *FARMING ON THE EDGE: A VERY PRELIMINARY ASSESSMENT OF THE IMPORTANCE OF AND PRESSURES ON URBAN-EDGE AGRICULTURE*, 1993.

⁶¹. See, e.g., Valerie Berton, *Harvest or Homes? AFT Research Highlights Need to Protect Ag as Central Valley Grows*, AM. FARMLAND, Fall 1995, at 12; and *Nation's Top Producing Farm Region Imperiled by Sprawl*, FARMLAND P. REP., Nov.- Dec. 1995 at 1.

⁶². The Land Stewardship Project (LSP) in Minnesota has been working on the issues of suburban sprawl around the Twin Cities. See AMERICAN FARMLAND TRUST, *FARMLAND AND THE TAX BILL: THE COST OF COMMUNITY SERVICES IN THREE MINNESOTA CITIES* (1994).

building over this resource.⁶³ Lawyers will play an essential function in helping local officials, farmland owners, and others develop innovative programs and legal devices, such as conservation easements and transferable development rights, to protect farmland. Complicating the efforts to develop such initiatives will be the matter of property rights. The tension between the constitutional protection of private property and the ability of governments to exercise the police power to protect the welfare of society is ingrained in our legal system, and the issue will not disappear with simplistic legislative actions. If Congress or the states try to legislate the matter, the contests will be in court cases trying to understand what was done.⁶⁴ If, as is more likely, Congress and most states do not legislate, the courts still will be left with the fundamental challenge of balancing the public's right to regulate land use with the individual's constitutional protection from takings. As the owners of much of the nation's private productive land, this issue is especially important to agriculturalists.

VIII. WATER ALLOCATION: CAN AGRICULTURE'S CLAIM TO A PRECIOUS RESOURCE BE PROTECTED?

Another resource related topic concerns agricultural water rights and usage. It is entirely probable the United States will experience an increase in conflicts over water use, as low value, high volume users such as agriculture are challenged increasingly by other demands for water use.⁶⁵ Most notable among these other claims on water resources will be increasing urban needs and those, such as in-stream flows, which stem from an increase in recreational demands and a changing understanding of environmental needs. Conflicts over water use, efforts to allow for the sale and transfer of water, arguments over whether to build new impoundment and transfer systems, will all be part of these issue. Lawyers will play key roles in the resolution of disputes and the development of new approaches for determining who can use limited water supplies.⁶⁶ For example, consider the current dispute in the farming communities in the Imperial Valley over efforts by San Diego to purchase and transfer the water rights associated with 40,000 acres of farmland now

⁶³. The rapid expansion of development west of Des Moines, has stimulated talk of a proposed western freeway loop project. See William Petroski, *Growth Spurs Talk of Western Bypass*, DES MOINES REG., July 23, 1996, at A1. Opposition has been triggered to further uncontrolled growth into the rich farmlands west of the city. Stephanie Armour, *Rural Residents Cast Wary Eye at Proposal*, DES MOINES REG., July 23, 1996, at 5A. For a recent guest editorial on the issue of urban sprawl and the need for better regional planning in the greater Des Moines area, see Jerry L. Anderson, *Containing Urban Sprawl: Can We Learn from England?* DES MOINES REG., Aug. 11, 1996, at C1.

⁶⁴. For a recent discussion of Congressional action in this area, see Daryn McBeth, *Note: Public Need and Private Greed -- Environmental Protection and Property Rights*, 1 DRAKE J. OF AGRIC. L. 112 (1996).

⁶⁵. See, e.g., *Water Wars*, PROGRESSIVE FARMER, July 1992, at 18.

⁶⁶. See, e.g., J. W. Looney, *Enhancing the Role of Water Districts in Groundwater Management and Surface Water Utilization in Arkansas*, 48 ARK. LAW REV. 643 (1995).

owned by the Bass family of Texas.⁶⁷ The proposed transfer, which is designed to relieve San Diego of dependence on Los Angeles' Metropolitan Water District, is causing concern among other farmers in the Valley about the effect of the sale on the availability of water to maintain agriculture in the valley. This story is only one example of the types of controversies the agricultural law community can expect over water rights. Other resource issues also will continue to affect agriculture, most notably water quality protection and the need to address non-point source pollution.⁶⁸

IX. MODERNIZING FOOD SAFETY LAWS: WILL HACCP AND POST-DELANEY FOOD SAFETY INSPECTION STANDARDS PROTECT CONSUMERS?

In recent months there have been several significant changes in the laws that establish the basic premises of the U.S. food safety and inspection system. First, Congress passed and the President signed the Food Quality Protection Act of 1996 (Pub. L. 104-170, Aug. 3, 1996, 110 Stat. 1489), which among other actions, amends the Delaney clause to substitute a risk based standard for the previous total ban on the appearance of known carcinogens as food additives.⁶⁹ Second, the administration has approved use of the Hazard Analysis and Critical Control Points (HACCP) approach to meat inspection, which will, among other things, substitute use of microbial tests for the old touch, view, and smell method.⁷⁰ The agriculture and food sector has greeted these changes warmly. It is argued the changes will relieve some of the regulatory obstacles of the past and allow use of new technologies and inspection methods to improve the efficiency and performance of the food safety system. This may be true, but only time will tell. Already there have been grumblings about how quickly the changes in meat inspection will lead to improvements in the safety of meat.⁷¹ Even when the changes are implemented, the

⁶⁷. See James Sterngold, *A Blow for Water Independence*, N.Y. TIMES, Aug. 6, 1996, at A6.

⁶⁸. See, e.g., Cyril T. Zaneski, *U.S. Boost for Glades Restoration: \$650 Million Eyed*, MIAMI HERALD, Feb. 18, 1996, at 1A (concerning the federal debate over funding the cleanup of the Everglades, a program eventually funded in the 1996 farm bill).

⁶⁹. The text of the new law can be found at 142 CONG. REC. H8127-8147 (daily ed. July 23, 1996)(statement of Rep. Roberts). See, e.g., Heather C. Jones, *Delaney Reform Bill Moves to Clinton for Signature*, FEEDSTUFFS, July 29, 1996, at 1; *Progress of Pesticides*, N.Y. TIMES, editorial, July 22, 1996, at A14. *New Pesticide Rules Beneficial to Nation's Kids*, DES MOINES REG., July 26, 1996, at 4A.

⁷⁰. See, e.g., Marian Burros, *Sweeping Changes Set for System of Meat and Poultry Inspection*, N.Y. TIMES, March 14, 1996, at A21.

⁷¹. While the new move to HACCP for meat inspection is seen as an improvement it is still going to allow for considerable levels of contamination. See, e.g., Marian Burros, *Despite New Guidelines, Meat Can Still Be Risky*, N.Y. TIMES, July 10, 1996, at B1 George Anthan, *New Rules Still Allow Some Level of Tainting*, DES MOINES REG., Aug. 18, 1996 at 1A. *Cook It Well*, DES MOINES REG., Aug. 20, 1996, at 10A (following up George Anthan article with editorial comment). All of these stories report that under the new meat inspection system progress on reducing the amount of contaminated meat will be slow. For example as much as 50% of ground turkey and 45% of ground

underlying issues of society's desire for safe food and the agriculture and food sector's responsibility to provide it will not go away. Inherent in this relation are natural tensions and conflicts over what level of protection is sufficient and who bears the ultimate responsibility for safety.

Implementation of the new U.S. food safety provisions will be played out against a background of heightened public concern about food borne illnesses, as illustrated by food safety problems in Japan and Great Britain. The recent food poisoning outbreak in Japan involving *E. coli* bacteria 0157⁷² and the crisis in Europe caused by the presence of BSE in British beef⁷³ created major economic and political crises for the governments and had sharp effects on the functioning of the food marketing systems. The long term impacts on consumer confidence and buying habits are as yet unknown but episodes such as this do not boost confidence in the food safety system.⁷⁴ The U.S. experienced its own food safety scare during June 1996 with an outbreak of food poisoning attributed to the microbe *cyclospora*.⁷⁵ Until the source of the microbe was ultimately traced to raspberries imported from Guatemala, a number of other U.S. food products, most notably strawberries from California, were the focus of official attention and declining sales. The debate over food safety in the U.S. is also being influenced by the controversy over marketing of engineered food products such as the fake fat Olestra.⁷⁶ While efforts to provide consumers with accurate information about the health and safety of their foods, such as the Food and Drug Administration's recent rule requiring restaurants to provide nutritional information on menus to support health claims,⁷⁷ are valuable, some consumers may feel overwhelmed by conflicting claims. The legal community will play a role in helping the nation continue to improve the safety of our food system. Whether it is in the implementation of the new food inspection rules or in the consideration of more dubious legal measures, such as the agricultural product

chicken can test positive for salmonella under the new rules and still be legal. *See New Meat, Poultry Rules Not Strict Enough, Some Say*, OMAHA WORLD HERALD, Sept. 3, 1996, at 15.

⁷². *See, e.g.,* Sonni Efron, *Food Poisoning Outbreak in Japan Has Ripple Effect*, DES MOINES REG., July 22, 1996, at 6A.

⁷³. *See, e.g.,* Ray Moseley, *British Farmers Forgotten in Beef Scare*, DES MOINES REG., Apr. 21, 1996, at G3.

⁷⁴. *See, e.g.,* Evelyn Iritania, *E. Coli Outbreak Hurts U.S. Beef Sales*, DES MOINES REG., Sept. 2, 1996, at 6A.

⁷⁵. *See, e.g.,* Lawrence H. Altman, *Illness Outbreak Puzzles Officials: Microbe Elusive as It Navigates the Nation's Food Supply*, N.Y. TIMES, June 30, 1996, at A1.

⁷⁶. *See, e.g.,* Laura Shapiro, *Fake Fat: Miracle or Menace?* NEWSWEEK, Jan. 8, 1996, at 60; Marian Burros, *Debate Intensifies Over Fat Substitute for Snack Foods*, N.Y. TIMES, Jan. 17, 1996, at B6.

⁷⁷. *See* Food Labeling; Nutrient Content Claims and Health Claims, Restaurant Foods. 61 Fed. Reg. 40,320 (1996)(amending 21 C.F.R. Part 101). *See also* U.S. Judge: Law Requires Nutrition Labels on Menus, DES MOINES REG., July 3, 1996, at 3A. *Restaurants Must Back Up Health and Nutrient Claims Made on Menus, Says FDA*, NUTRITION WEEK, (Community Nutrition Institute, Washington, D.C.) Aug. 9, 1996, at 1.

disparagement laws now the rage in many states,⁷⁸ there will be jobs for lawyers to do.

X. BUILDING THE NEW AGRICULTURE: CAN LAW CREATE OPPORTUNITIES AND COMMUNITY IN THE FOOD SYSTEM ?

The final emerging legal topic for consideration concerns a range of issues related to the alternative market and production systems being created across the country. These are the issues referred in an earlier article, *Tending the Seeds*, as the New Agriculture.⁷⁹ One premise of the article is the recognition that agriculture is about more than just farming, and farming is about more than just the corn, beans, hogs, cattle and other crops that predominate in farm states. At its heart, agriculture is about producing food and caring for the land. It is about creating the system that brings food to consumers and ensures the supply will continue. Thinking about agriculture in a more inclusive food system approach results in several things. First, the community of people who have an interest in the issues is broadened. Second, the discussion expands to include a wider range of questions. Third, the stories may become more interesting and optimistic. Across the nation thousands of farmers, consumers, educators, processors, food marketers, and chefs are working to create more productive and fulfilling futures. They recognize that it is not just about farming, but it is about a food system, which we all, lawyers included, have a stake in creating.

One underlying force helping bring about the emergence of the new agriculture is the concern many consumers have about the safety and quality of our food. The response by many consumers will be to seek other methods of purchasing food that bring more security or satisfaction. Part of the challenge for lawyers will be to deal with the unique legal needs of the new farmers and farm operations, such as

⁷⁸. See, e.g., Paul Rauber, *Vegetable Hate Crimes*, SIERRA, Nov.-Dec. 1995, at 20; Brian Williams, *Badmouthing Broccoli, Mocking Melons Could Land You in Court*, THE COLUMBUS DEMOCRAT, Jan. 14, 1996, at 2H. Examples of such laws can be found at TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001-.004 (West Supp. 1997)(False Disparagement of Perishable Foods); FLA. STAT. ANN. § 865.065 (West 1994 & Supp. 1997)(Disparagement of perishable agricultural food products; causes of action; limitation); and GA. CODE ANN. § 2-16-1 to -4 (Harrison 1994 and Supp. 1996)(Action for Disparagement of Perishable Food Products or Commodities). None of the laws have been considered by the courts but related cases include *Auvil v. CBS 60 Minutes*, 836 F. Supp. 740 (E.D. Wash. 1993); *Action for a Clean Environment v. Georgia*, 457 S.E.2d 273 (Ga. App. 1995) and *International Dairy Foods Ass'n v. Amestoy*, 898 F. Supp. 246 (D. Vt. 1995). For a recent article analyzing the issues raised by the laws, see Eric M. Stahl, *Can Generic Products be Disparaged? The "Of and Concerning" Requirement after Alar and the New Crop of Agricultural Disparagement Statutes*, 71 WASH. L. REV. 517 (1996).

⁷⁹. See Neil D. Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States*, 1 DRAKE J. OF AGRIC. L. 7 (1996).

community supported agriculture (CSAs),⁸⁰ community gardens,⁸¹ direct marketers, and others involved in new forms of farming ventures, which respond to these consumer desires. An important part of this work will be developing the public policies and ideas that can help this portion of agriculture emerge. The action by Congress to include funding for community food security projects in the 1996 farm bill is an example of how public policy can support new agricultural efforts.⁸² Federal action to develop organic food rules, even though much delayed,⁸³ will play an important role in the growth of this sector of farming.⁸⁴ Another example of how proposed legislation may create opportunities for small scale producers and improve the operation of local food systems can be seen in current efforts to amend federal meat inspection laws to allow interstate sale of state inspected meat.⁸⁵

Food is much more than merely fuel for our bodies or the economy. Raising, preparing, and sharing food are among the most elemental and essential human experiences. America's food system includes many things. It is about the satisfaction of eating quality food, it is about experiencing the cultural diversity reflected in our food supply, and it is about the pleasure of sharing food with our families and loved ones. Being involved in our food system is why 28 million Americans, including many Iowans, have vegetable gardens. It is why we have more than 2,500 farmers' markets.⁸⁶ It is why we have created such places as Living

⁸⁰. For a discussion of the operation of a CSA, see Jay P. Wagner, *Want Fresh Veggies or Flowers? CSAs Link Farmers, Consumers*, DES MOINES REG., Aug. 11, 1996, at 4G.

⁸¹. For a discussion of the increase in community gardens, including in the Midwest, see Mary Hill, *Des Moines Inner City Turning Greener* DES MOINES REG., July 3, 1996, at N1, which estimates that more than 160 acres of gardens were cultivated on vacant lots within Des Moines. Much of the work was supported by USDA/AmeriCorp staff. *See id.* For an article discussing the importance of federal funding in the operation of many urban community gardening programs, see David Malakoff, *Final Harvest?* COMMUNITY GREENING REV. 1994, at 4.

⁸². *See* Cooperative State Research, Education, and Extension Service, Request Proposals (RFP): Community Food Projects Program, 62 Fed. Reg. 38,524 (1996).

⁸³. *See, e.g.*, Agricultural Marketing Service, Notice of Meeting of the National Organic Standards Board, 61 Fed. Reg. 43,520 (1996) (announcing a meeting of the N.O.S.B. for Sept. 18-20).

⁸⁴. For a discussion of the role of the federal rules see John Bell Clark, *Impact and Analysis of the U.S. Federal Organic Food Production Act of 1990 With Particular Reference to the Great Lakes*, 26 U. TOLEDO L. REV. 323 (1995).

⁸⁵. *See, e.g.*, Editorial, *Illogic on Meat Inspection: Rules Against Interstate Shipment Hurt Farmers, Small Businesses*, DES MOINES REG., June 18, 1996, at 10A. *See also*, Heather C. Jones, *USDA Recommends Interstate Shipment of State-Inspected Meat*, FEEDSTUFFS, July 15, 1996, at 8 (noting that USDA, in a report required under the 1996 Farm Bill, reported to Congress that it supports the interstate sale of state inspected meat). The effort to amend the meat inspection laws to allow the interstate movement of state-inspected meat has continued with the introduction of a bill for this purpose in Congress. *See also* Heather C. Jones, *Interstate Meat Shipment Bill Introduced*, FEEDSTUFFS, July 29, 1996, at 3.

⁸⁶. The growth in farmers' markets in the U.S. is one visible indicator of the changes going on both in production and marketing of food. *See, e.g.*, Bill Bell, Jr., *Variety Is Spice of Life at Local Farmers Market*, DES MOINES REG., Aug. 12, 1996, at 4M; George Anthon, *From the Farm to the*

History Farms to preserve and appreciate the history and values of our agricultural system. It is why the Seed Savers Exchange near Decorah, Iowa, is linking thousands of people preserving heirloom varieties of fruits and vegetables. It is why schools across the nation are using food and agriculture as tools to educate urban youth. Ultimately our food system is about building community, establishing linkages between those who produce our food and those who consume it. What could be of more importance or interest? The reality is we all need to eat and most of us, agricultural lawyers included, are planning on doing it for quite awhile.

In conclusion, this article has tried to look over the horizon and identify some of the issues that will occupy agricultural lawyers in the years ahead. No doubt, just like the blind pig who finds the acorn, the author will experience some success in identifying trends that will prove significant. At the same time, as with any effort at prognostication, some of the suggestions will no doubt be less important. Regardless of the final tally, it is clear the future will bring many challenges and opportunities for agricultural lawyers to use their skills and insights to assist America's farmers and consumers. By working on the issues identified in this Article, the agricultural law community can help ensure we all have plenty of quality food to eat.

Table, DES MOINES REG., Sept. 1, 1996, at 4G (reporting on the success of the USDA's farmers' market held in August). For an example of the legal issues involved in the operation of farmers' markets consider the rules defining "locally produced." See Food and Consumer Services, WIC Farmers' Market Nutrition Program, final rule, 60 Fed. Reg. 49,739 (1995).