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In coming issues:

The 2008 Farm Bill Summary

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Ohio Court of Appeals Clarifies Lack of Local Zoning Authority over Confined Animal Feeding Operations

-by Peggy Kirk Hall*

When Ohio's General Assembly delegated zoning authority to township governments, it included an exception for the regulation of agricultural activities. Ohio Revised Code § 519.21 (A) states that the enabling law for township zoning "confers no power" on a township to use zoning "to prohibit the use of any land for agricultural purposes . . .." The statute also contains an extensive definition for "agriculture" that includes animal husbandry, the care and raising of livestock, and dairy production, among other agricultural activities.[1] The intent of the agriculture exception was to prevent a township from regulating or "zoning out" agriculture, a concern raised by the agricultural industry in the legislative debate over delegation of zoning authority.

Despite the unambiguous language of the agricultural exception in O.R.C. § 519.21(A), the Board of Trustees for Ross Township in Greene County, Ohio attempted to exert zoning authority over a proposed dairy facility in its community. Meerland Dairy, LLC, intended to construct a 2,100 dairy operation in Ross Township. Upon learning of the proposal and prior to the land purchase for the dairy, the Board of Trustees amended its zoning code. The zoning resolution had already required an "agribusiness" to obtain a conditional use zoning permit, which is permissible under Ohio zoning law. The township's definition of

(cont. on page 2)

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Right to Confine: The Current State of the Law of Nuisance Affecting Confined Animal Feeding Operations in Oklahoma- by Jess M. Kane*

Introduction

Since its inception, the American nation has reserved a special place in its lore, philosophy, and policy for the farmer. The quiet nobility inherent in the basic principle of agriculture, tending the land to supply society's need for food and fiber, has always captured Americans' interest and earned our respect. Thomas Jefferson often expressed his belief that a nation of self-reliant "yeomen farmers" would most effectively protect the rights and liberties of all. Perhaps the most poignant manifestation of this powerful undercurrent in American thought came in the Statement of Principles found in *Twelve Southerners: I'll Take My Stand*. The 12 southerners wrote in their manifesto decrying the rapid industrialization of the antebellum South that "the theory of agrarianism is that the culture of the soil is the best and most sensitive of vocations, and that therefore it should have the economic preference and enlist the maximum number of workers…"[1] With this kind of thought prevalent, it is not hard to how see how the Right-to-farm movement gained prominence, not just in those states whose economies are heavily reliant on agriculture, but throughout the Union. Today all states, including Oklahoma, have right-to-farm laws on the books.[2]

(cont. on page 3)

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Kirk Hall - Ohio Court of Appeals Clarifies Lack of Local Zoning Authority over Confined Animal Feeding Operations (cont. from p. 1)

agribusiness included "manufacturing, warehousing, storage, and related industrial and commercial activities that provide services for or are dependent upon agricultural activities" and listed examples such as fertilizer production, sales, storage, and blending; sales and servicing of farm implements and related equipment; preparations and sale of feeds for animals and fowl; livestock auctions; veterinarian services and retail nurseries.[2]

The Ross Township amendment expanded the zoning code's definition of agribusiness to include large and major concentrated animal feeding operations. The amended definition specified only those operations that met the size requirements for regulation under the state's livestock permitting program, and specifically stated that such operations would not be considered "agriculture" for purposes of the township zoning resolution.[3]

Following the township's zoning change, Meerland Dairy applied for and received its state regulatory permits through the Ohio Department of Agriculture's Livestock Environmental Permitting Program.[4] Meerland Dairy did not apply for a conditional use zoning permit from the township. Rather, the dairy's owners brought suit against the township and challenged the zoning regulation as a violation of O.R.C. §519.21(A), the agriculture exception to township zoning authority. Meerland Dairy requested a declaratory judgment and an injunction preventing enforcement of the zoning provision.

The Greene County Court of Common Pleas appointed a magistrate to the case, who focused his decision on the fact that the dairy had not applied for or been denied a conditional use permit. Citing common law requirements for exhaustion of administrative remedies prior to attacking the constitutional validity of a zoning regulation, the magistrate rejected Meerland's challenge. The common pleas court adopted the magistrate's decision, and Meerland Dairy filed an appeal with Ohio's Second District Court of Appeals.

In its opinion issued on May 9, 2008, the court of appeals acknowledged the contentious nature of the case, opening with the statement that "[t]his appeal is another chapter in the ongoing struggle in Ohio between operators of large agricultural enterprises and local authorities and other residents adversely impacted by those enterprises."[5] Unlike the lower court, the appellate court chose to confront the issue of the legal validity of the township's zoning regulation. The lower court's reliance upon the dairy's failure to exhaust administrative remedies drew little consideration as the appellate court determined that Ross Township's zoning regulation was prohibited by Ohio law.

Ross Township's appeal relied heavily upon the statutory language of Chapter 903 of the Ohio Revised Code, which established Ohio's Livestock Environmental Permitting Program. In an interesting twist of logic, the township argued that the permitting program statute preempted and created an exception to the agriculture exception from zoning found in O.R.C. § 519.21(A). The township based its contention on O.R.C. § 903.25, which provides that an owner or operator of an animal feeding facility who holds a permit from the state department of agriculture under the permitting program shall not be required by any political subdivision of the state "to obtain a license, permit, or other approval pertaining to manure, insects or rodents, odor, or siting requirements for an animal feeding facility." This provision preempted the conflicting prohibitions of O.R.C. § 519.21(A) and preserved the township's authority to utilize its police power to regulate public health and safety matters other than those specifically delegated to the department of agriculture through the permitting program. Authority to regulate public health and safety issues such as dewatering of wells, strains on township roads and emergency services was not explicitly delegated to the department of agriculture and thus was impliedly reserved for the local government, claimed Ross Township.

The court of appeals rejected each of the township's arguments. Explaining first that preemption does not apply to conflicts between two state laws, the court noted the absence of a conflict that would necessitate operation of the preemption doctrine. The state permitting program administered by the department of agriculture and the zoning prohibitions for townships in O.R.C. § 519.21(A) are simply not in conflict with one another, concluded the court. Nor did the court accept that Chapter 903 created an exception from § 519.21(A) and implied authority for townships over health and safety issues other than those specifically assigned to the department of agriculture. Ohio township zoning power, stated the court, requires an express grant of authority from Ohio's General Assembly. Addressing the township's attempt to revise the state's definition of "agriculture" by declaring large confined animal feeding operations to be "agribusiness" and not "agriculture" for purposes of township zoning, the court stated that the size of an operation is not a basis for locally distinguishing confined animal facilities from agriculture.

The court's opinion issued on May 9, 2008, ordered the trial court to enter judgment declaring the zoning amendment in conflict with O.R.C. § 519.21(A) and to issue an injunction against enforcement of the regulation. Ross Township filed a motion for reconsideration, which the court denied on June 17, 2008.

In its entry on the reconsideration application, the court emphasized that O.R.C. § 519.21(A) "carves out a categorical exception" to township zoning authority over land used for agricultural purposes. A legislative amendment to § 519.21(A) was necessary if certain types of agricultural uses were to be excepted from the exception, advised the court. In dicta suggesting empathy with the township, the court admitted that "[w]e do not necessarily disagree with contentions that such exceptions ought to apply." The court's final statement aptly summarizes the legal status of local control over confined animal feeding operations in Ohio – "the General Assembly has denied townships, which are political subdivisions created by the General Assembly, the authority to adopt zoning regulations that limit or restrict agricultural uses."

Endnotes

[1] Ohio Rev. Code § 519.01 (2008).

[2] Ross Township, Greene County, Ohio, Zoning Code § 202.002 (1999)

[3] Ross Township, Greene County, Ohio, Zoning Code § 202.002 (2005)

[4] Ohio Rev. Code §§ 903.01 et seq. (2008).

[5] Meerland Dairy, LLC v. Ross Twp., (2008) 2008-Ohio-2243 at ¶ 1.

Kane - Right to Confine: The Current State of the Law of Nuisance Affecting Confined Animal Feeding Operations in Oklahoma - (cont. from p. 1)

The debate over right-to-farm laws has reignited in recent years. Advancements in production techniques have given rise to the confined animal feeding operation or CAFO. Beef cattle feedlots, chicken houses, and hog barns have become common agricultural enterprises in Oklahoma and are a significant portion of the state's rural economy. Thus, it seems fitting that Oklahoma is at the forefront of the development of land use controls affecting CAFOs. Advances in confined animal production have led many policy makers to question whether right-to-farm legislation was intended to grant immunity for non-traditional means of agricultural production.

This paper will explore the current state of the law in Oklahoma. Primarily the purpose is to determine whether traditional right-to-farm laws still control nuisance actions against CAFOs. This topic will necessitate a brief discussion of CERCLA, as all recent litigation of nuisance caused by CAFOs has been heard as an alternative means of recovery to a citizen enforcement suit of CERCLA. Other federal environmental statutes such as the Clean Water Act are applicable, but these areas of the law are well settled and need not be discussed here.

Right to Farm Laws in Oklahoma

In 1949 the Supreme Court of Oklahoma handed down an entertaining opinion in *Dobbs v. City of Durant*[3] illustrating the traditional application of the law of nuisance to agricultural operations in Oklahoma. In this case Roy Dobbs operated a mule sale barn in down-town Durant where he conducted his business of buying and selling mules. Dobbs had operated this business successfully, providing a valuable service to the surrounding community for 17 years. The trial court found that the sale barn's operation caused "unusual odors and noises" to interrupt the neighboring downtown businesses. Upon appeal to the Oklahoma Supreme Court, Justice Corn held that "a mule barn within a city is not a nuisance per se..." but that under the evidence of this case "the mule barn as operated by the defendant is a nuisance because of the fact that it is located where it is located. In short, the court found that Mr. Dobbs was a "victim of progress."[4] The court quoted *Kenyon v. Edmundson*[5] to state the Oklahoma law of nuisance as follows:

> No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie. And this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business.[6]

This principle stood as the primary land use control of agricultural operations until 1980 when the Oklahoma legislature passed 50 O.S. § 1.1, Oklahoma's right-to-farm law.

The national right-to-farm movement was sparked by the Arizona Supreme Court's decision in *Spur Industries, Inc. v. Del Webb Development Company.*[7] Ironically, the nuisance in the case was caused not by a traditional farming operation, but by a CAFO. In this case, a developer took advantage of lower land prices near the Spur feedlot to build a community. The developer then filed suit against the feedlot on a theory of nuisance because 1300 lots on the southwest portion of the development were unfit for sale due to the feedlot's operations. The Arizona court incurred the ire of the national agricultural community with its holding, even though its remedy was decidedly deferential to the interests of Spur. The court found that the feedlot constituted both a private and public nuisance and required Spur to relocate, but, in an extraordinary exercise of judicial authority, ordered Del Webb to indemnify Spur for its relocation costs because it had "brought people to the nuisance to the foreseeable detriment of Spur."[8] The right-to-farm movement was born not because the decision was unjust to Spur, but because the decision rejected coming to the nuisance as a defense to nuisance liability. In a period of rapid growth and urban sprawl, this decision fulfilled the worst nightmare of farmers and ranchers nationwide.

Oklahoma's right-to-farm law became effective in October of 1980 and is codified in Title 50 of Oklahoma Statutes:

> A. As defined in this act: 1. "Agricultural activities" shall include, but not be limited to, the growing or raising of horticultural and viticultural crops, berries, poultry, livestock, grain, mint, hay, dairy products and forestry activities; 2. "Farmland" shall include, but not be limited to, land devoted primarily to production of livestock or agricultural commodities; and 3. "Forestry activity" means any activity associated with the reforesting, growing, managing, protecting and harvesting of timber, wood and forest products including, but not limited to, forestry buildings and structures.
>
> B. Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety. If that agricultural activity is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.[9]

The Oklahoma Legislature seemed to retreat from this position beginning in August of 1998 when it passed the Oklahoma Concentrated Animal Feeding Operations Act. The act has been amended in the wake of recent litigation. The new regulation took affect on November 1, 2007.[10]

As revised, Title 2 creates a bifurcated system with swine operations regulated under the Oklahoma Swine Feeding Operations Act[11] and non-swine operations regulated under the Oklahoma Concentrated Animal Feeding Operations Act.[12] The Oklahoma Swine Feeding Operations Act does not extinguish negligence actions against swine feeding operations that are in compliance with the act. Non-swine operations, however, have a qualified immunity from negligence suit under the Oklahoma CAFO act:

> "Any animal feeding operation licensed pursuant to the Oklahoma Concentrated

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> Animal Feeding Operations Act, operated in compliance with those standards, and in compliance with the rules promulgated by the Board, shall be deemed to be prima facie evidence that a nuisance does not exist; provided, no animal feeding operation shall be located or operated in violation of any zoning regulations.[13]

Title 2 and Title 50, however, have not totally disposed of the nuisance cause of action in Oklahoma. The statutes were remarkably successful in deterring litigation for many years, as evidenced by the striking lack of nuisance actions filed against Oklahoma agricultural operators between 1980 and 2003. In recent years a different tactic has emerged and thus far has been successful. In the 2003 case *City of Tulsa v. Tyson Food, Inc*.,[14] the City of Tulsa was the first plaintiff to be successful in a holding that animal manure produced by CAFOs is subject to the Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or "Superfund." In addition to the CERCLA claim, the city asserted common law claims including nuisance. Though the court's summary judgment in favor of the city was vacated, the ruling has created a good deal of uncertainty within the agricultural community with respect to the continued effectiveness of Oklahoma's right-to-farm laws.

The Takings Issue

In addition to the uncertainty caused by CERCLA legislation, "right-to-farm" laws are undergoing significant scrutiny from a constitutional perspective. Two states[15] have ruled that the right to maintain a nuisance action is an easement that runs with the land, and that any statute that extinguishes nuisance actions affects a taking. The Iowa Supreme Court in *Bormann v. Board of Supervisors for Kossuth County, Iowa*[16] ruled that the state's right-to-farm laws were an unconstitutional taking of private property without just compensation. In *Bormann*, the plaintiff challenged the validity of a decision by his county Board of Supervisors to designate his neighbor's land an "Agricultural Area." Under Iowa right-to-farm statutes, designated agricultural areas received significant protections from nuisance actions. The court held:

> When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of the few. In short, it appropriates valuable private property interests and awards them to strangers.[17]

The Iowa Supreme Court's reasoning was based in part on dictum of the Supreme Court of the State of Washington in *Buchanan v. Simplot Feeders Ltd. Partnership*.[18] The Washington court found that the state's right-to-farm law gives farmers a "quasi-easement" to continue activities that may constitute a nuisance against future urban developments. Finally, the Iowa Supreme Court extended its reasoning from *Bormann* to CAFOs in *Gacke v. Pork Xtra L.L.C.*[19] In this decision the Iowa court held that the state's statutory grant of immunity to CAFOs was a violation of the 4th amendment for the same reasons as given in *Bormann*.

As the Iowa Supreme Court predicted,[20] this line of cases has sent ripples through the industry. The trend toward urban sprawl that caused the dispute in *Spur Industries*[21] has only increased since the Arizona court's decision galvanized the right-to-farm movement, leaving many producers with well-founded fears that their business may be have to continue without statutory protection from nuisance actions. Since the Iowa Supreme Court's 1999 decision in *Bormann*, however, Iowa's interpretation has remained in the minority of jurisdictions. Jesse J. Richardson and Theodore A. Feitshans gave two reasons why the Iowa decision would remain in the minority in the *Drake University Agricultural Law Journal*.[22] Their analysis dating to spring of 2000, just months after the Iowa court handed down the *Bormann* decision is especially compelling since they have thus far been proven correct. As of November 2007, no state has overturned a right-to-farm law as an unconstitutional taking without just compensation.

Bormann may remain a minority for two reasons. First, courts of other jurisdictions may decline to find that right-to-farm laws create easements despite dicta in *Buchanan* that support the view. Such a finding implies that a wide range of regulatory restrictions, like wetland protections and endangered species habitat protections, may also create easements,. Widespread adoption of the *Bormann* reasoning on easements as a physical invasion results in unprecedented restrictions on the ability of the federal government to regulate land use for environmental protection. Secondly, even if other courts hold that right-to-farm acts create easements, the courts may not be willing to take the further step and hold that such easements constitute physical invasion. Indeed, many easements, including the entire class of negative easements, appear to involve no physical invasion. The reasoning of the Iowa Supreme Court in holding that the easements created by the right-to-farm law amounts to a physical invasion is less than clear.

A third reason that the *Bormann* decision will remain a minority view, which Richardson and Feitshans did not discuss, is the significant differences in the right-to-farm statute as codified in Iowa compared to other jurisdictions. Iowa, as would be expected given the prevalence of agriculture in the state's economy, had one of the toughest right-to-farm laws on the books. Oklahoma's law is significantly more lenient. The Iowa law stated simply:

> A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation.[23]

Conversely, the Oklahoma law states:

> Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety.[24]

The difference between the wording of these statutes is significant. Whereas, the Iowa statute created an absolute bar on nuisance actions against operators located within an established agricultural area that the Iowa court saw as an easement, the Oklahoma statue creates only a rebuttable presumption in favor of the agricultural operator. This language seems much less likely to create the

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easement that a *Bormann* analysis would require to find Oklahoma's right-to-farm law a taking.

IV. CERCLA and CAFOs

The Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund contains a citizen enforcement provision.[25] The application of CERCLA to CAFOs is significant to right-to-farm laws because it has the potential to be a new form of land use control available to neighbors and other private citizens. The fact that all the recent CERCLA cases brought against CAFOs have contained a nuisance action illustrates that the cause of action for a CERCLA claim and a nuisance claim can often be closely related. To date the citizen suit provision has been used successfully, both times by the Sierra Club, to enforce superfund cleanup on a CAFO. These cases overcame the major hurdle for environmental groups in getting CAFOs classified as "facilities" within the province of CERCLA.

In the first case, *Sierra Club v. Seaboard Farms Inc.*,[26] the 10th Circuit Court of Appeals overruled an Oklahoma Federal District Court opinion favorable to the CAFO. The 10th Circuit ruled that the farm as a whole is the proper entity to be assessed under CERCLA emissions reporting standards. Seaboard had successfully argued at trial that CERCLA required each individual chicken house to meet hazardous emissions standards for ammonia. The 10th Circuit, however, ruled that a facility under CERCLA is the aggregation of all emissions from a farm that incorporates multiple chicken houses for reporting and compliance purposes.[27] The second case to enforce CERCLA against CAFOs was *Sierra Club v. Tyson Foods, Inc.*[28] In this case a Kentucky Federal District Court similarly found that a facility under CERCLA included all facilities on the site operated together for a single purpose.[29]

These cases, by establishing the definition of facility, have allowed further enforcement of CERCLA against CAFOs. Most notably, these cases include *City of Tulsa v. Tyson Foods, Inc.*,[30] *City of Waco v. Schouten*,[31] and *State of Oklahoma v. Tyson Foods, Inc.*[32] In *City of Waco*, the City brought an action against 14 dairies alleging various causes of action under CERCLA and both public and private nuisance. The case was resolved by settlement agreement in early 2006.[33] The *City of Tulsa* case is more relevant because it spawned a ruling that may be cited as non-binding precedent and because it is the direct predecessor to the ongoing dispute in *State of Oklahoma v. Tyson Foods, Inc.*[34] In *City of Tulsa* the municipality filed suit against poultry operators in the Illinois River Watershed alleging violations of CERCLA and of private and public nuisance. Though later vacated pursuant to a settlement agreement, the District Court ruled on several motions for summary judgment. These rulings have consistently been cited as precedential, and will likely be followed in *State of Oklahoma v. Tyson Foods, Inc.* since the case is being heard by the same court.

City of Tulsa has become extremely significant for two reasons. First, the court held that the phosphate found in chicken litter used for fertilizer contained phosphorous which is a listed hazardous substance under CERCLA. The court reasoned:

> For us to consider the whole separate from its hazardous constituent parts would be to engage in semantic sophistry. When a mixture or waste solution contains hazardous substances, that mixture is itself hazardous for purposes of determining CERCLA liability…. Liability under CERCLA depends only on the presence in any form of listed hazardous substances.[35]

This ruling sent shudders through the agricultural community because, if adopted it could in effect extend Superfund liability to any operation producing phosphate rich animal manure. Second, the ruling is significant because the court did not grant summary judgment on the nuisance claims based on Oklahoma's right-to-farm laws. The poultry defendants moved for summary judgment based on the Oklahoma right-to-farm law. The court agreed that the record did not dispute that the application of poultry litter as fertilizer has not had a "substantial adverse affect on the public health or safety."[36] However, the court did not agree that the application of poultry litter was consistent with good agricultural practice and the defendants had not shown that the practice had existed prior to the use of the lakes as a municipal water supply.[37] Thus, the court was able to rule that the defendant's poultry operation did not meet both elements of the statute necessary for its protection.

Oklahoma State Attorney General Drew Edmondson has attempted to expand on the precedents set by *City of Tulsa in State of Oklahoma v. Tyson Foods, Inc.* In the complaint filed Jun 13, 2005, the state alleges two causes of action under CERCLA. Count One is for CERCLA cost recovery, and Count Two is for CERCLA natural resource damages.[38] Immediately following these in Count three is a cause of action for state common law nuisance. Count Three states:

> As a result of their poultry waste disposal practices, the Poultry Integrator Defendants have intentionally caused an unreasonable invasion of, interference with, and impairment of the State of Oklahoma's and the public's beneficial use and enjoyment of the IRW, including biota, lands, waters, and sediments therein, thereby causing the State of Oklahoma and the public inconvenience, annoyance, impairment of use, interference with enjoyment, and other injury. This unreasonable and intentional invasion of, interference with and impairment of the State of Oklahoma's and the public's beneficial use and enjoyment of the IRW, including the biota, lands, waters, and sediments therein, by the Poultry Integrator Defendants continues to this day.[39]

As expected, the Poultry Integrator defendants responded with affirmative defenses, saying that the claim was barred by the Oklahoma right-to-farm laws. The Tenth Affirmative defense states:

> The Complaint is barred by the right-to-farm Statutes codified at ARKANSAS CODE ANNOTATED § 2-4-101 *et. seq.* and OKLA. STAT., tit. 50 § 11.[40]

In the Fifteenth Affirmative Defense, the defendants stated:

> The Plaintiffs' state common law claims of nuisance, trespass, and unjust enrichments are precluded by the existence and provisions of the Oklahoma Registered Poultry Feeding Operations Act, OKLA.

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STAT., tit. 2 § 10-9.1 *et. seq.* and the Oklahoma Concentrated Animal Feeding Operations Act, OKLA. STAT., tit. 2 § 9-201 *et. seq.*, among other state laws.[40]

In short, Despite the contrary ruling in *City of Tulsa*, the controversy over right-to-farm statutes is alive and well, and being litigated as this paper takes shape.

Conclusions and Synthesis

The ongoing litigation concerning CAFOs and CERCLA makes any answer on the continued applicability of right-to-farm statutes to CAFOs somewhat questionable. However, the weight of the authority as it currently exists suggests some conclusions. The current state of the law returns a mixed bag of blessings and concerns for agricultural operators. First, Oklahoma's right-to-farm laws will not be held unconstitutional as a taking without just compensation. For the reasons stated above, it seems unlikely that the Oklahoma statutes as currently codified will cause any court in Oklahoma (state or federal) to join Iowa's minority position by invalidating right-to-farm laws under the Fifth Amendment analysis in *Bormann*. Furthermore, Oklahoma's right-to-farm laws will continue to bar recovery for nuisance in actions against CAFOs such as *State of Oklahoma v. Tyson Foods*. It is most probable that, in the end, a court will find that the use of manure as a fertilizer is a good agricultural practice as the Oklahoma statutes require. This question was the sole reason that the *City of Tulsa* court did not dismiss the nuisance claim in its ruling on motion for summary judgment. The use of manure for fertilizer is a practice as old as agriculture itself. Once evidence has been brought before a finder of fact, it seems unlikely that the practice will not be upheld as a good agricultural practice.

Finally, barring passage of federal legislation exempting animal waste from CERCLA, actions against CAFOs under CERCLA will be successful. Given that the *State of Oklahoma* case is currently being considered by the Federal District Court for the Northern District of Oklahoma, the same court that would have held phosphates as a hazardous substance under CERCLA in *City of Tulsa*, it seems highly unlikely that the court will reach a decision to the contrary. Furthermore, the 10th Circuit has already ruled unfavorably for CAFO defendants in *Sierra Club v. Seaboard Foods*, making it seem unlikely that a decision contrary to the poultry integrator defendants in the Northern District of Oklahoma will be overturned. This is important because liability for CAFOs under CERCLA provides an alternative to traditional common law nuisance action for environmental plaintiffs.

These conclusions give some comfort to confined animal feeding operators in that nuisance actions will most likely still be barred by state right-to-farm laws. However, many of the larger more complicated actions brought as citizen enforcement suits under CERCLA will not be. Of course the entire direction of this area of law is dependent upon the outcome of *State of Oklahoma v. Tyson Foods, Inc*. Until this case is definitively concluded, the law will remain in flux.

Endnotes

[1] Ransom *et. al.*, *Twelve Southerners: I'll Take My Stand*, (Harper, N.Y., 1962).

[2] Plater *et. al.*, *Environmental Law and Policy: Nature, Law, and Society*, (3d ed. 2004).

[3] Dobbs v. City of Durant, 201 Okla. 382, 206 P.2d 180 (1949).

[4] *Id.*

[5] Kenyon v. Edmundson 80 Okla. 3, 193 P. 739 (1920).

[6] *Id.*

[7] Spur Industries, Inc. v. Del Webb Development Company 108 Ariz. 178, 494 P.2d 700 (1972).

[8] *Id.*

[9] 50 Okla. Stat. § 1.1.

[10] 2 Okla. Stat. § 20.

[11] Oklahoma Swine Feeding Opertations Act, 2 Okla. Stat. § 20-1 to § 20-29.

[12] Oklahoma Concentrated Animal Feeding Operations Act, 2 Okla. Stat. § 20-40 to § 20-64.

[13] *Id.*

[14] City of Tulsa v. Tyson Food, Inc., 258 F.Supp. 2d 1263 (N.D. Okla. 2003).

[15] Washington and Iowa.

[16] Bormann v. Board of Supervisors for Kossuth County, Iowa, 584 N.W. 2d 309 (Iowa 1998).

[17] *Id.*

[18] Buchanan v. Simplot Feeders Ltd. Partnership, 134 Wash. 2d 673, 952 P.2d 610, 615 (1998).

[19] Gacke v. Pork Xtra L.L.C., 684 N.W. 2d 168 (Iowa 2004).

[20] Bormann v. Board of Supervisors for Kossuth County, Iowa, 584 N.W. 2d 309 (Iowa 1998).

[21] Industries, Inc. v. Del Webb Development Company, 108 Ariz. 178, 494 P.2d 700 (1972).

[22] Richardson and Feitshans, "Nuisance Revisited After *Buchanan* and *Bormann,"* 5 *Drake J. Agric. L.* 121-136 (2000).

[23] Bormann v. Board of Supervisors for Kossuth County, Iowa, 584 N.W. 2d 309 (Iowa 1998).

[24] 50 Okla. Stat. § 1.1.

[25] CERCLA, § 310.

[26] Sierra Club v. Seaboard Farms Inc., 387 F.3d 1167.

[27] *Animal Waste and Hazardous Substances: Current Laws and Legislative Issue,* Congressional Research Service Report for Congress, 110th Cong. (2007).

[28] Sierra Club v. Tyson Foods, Inc., 299 F.Supp. 2d 693 (W.D. Ky. 2003).

[29] *Animal Waste and Hazardous Substances: Current Laws and Legislative Issue,* Congressional Research Service Report for Congress, 110th Cong. (2007).

[30] City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263 (N.D. Okla. 2003).

[31] City of Waco v. Schouten, (W.D. Tex., No. W-04-CA-118, filed April 29, 2004).

[32] (N.D. Okla., No. 4:05-cv-00329, filed June 13, 2005).

[33] *Animal Waste and Hazardous Substances: Current Laws and Legislative Issue,* Congressional Research Service Report for Congress, 110th Cong. (2007).

[34] State of Oklahoma v. Tyson Foods, Inc., (N.D. Okla, No. 4:05-cv-00329, filed June 13, 2005).

[35] City of Tulsa v. Tyson Foods, Inc., 258 F. Supp. 2d 1263 (N.D. Okla. 2003).

[36] *Id.*

[37] *Id.*

[38] State of Oklahoma v. Tyson Foods, Inc., (N.D. Okla, No. 4:05-cv-00329, filed June 13, 2005).

[39] *Id.*

[40] *Id.*

[41] *Id.*

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Never approach a bull from the front, a horse from the rear or a fool from any direction.

AALA ANNUAL AGRICULTURAL LAW SYMPOSIUM
October 24 & 25, 2008 Minneapolis, MN

The American Agricultural Law Association is holding its 29th annual Agricultural Law Symposium on October 24 & 25, 2008 at the Marriott Hotel in downtown Minneapolis, MN.

As soon as the program is essentially complete, the conference brochures will be printed and mailed. Although the program is not yet complete, I've included below the program proposed so far. Also, a registration form is included in the middle of this issue of the update. The registration form can also be found on the AALA web site, with payment by credit card through PayPal.

More information can be found on the AALA web site http://www.aglaw-assn.org or by contacting Robert Achenbach, AALA Executive Director at RobertA@aglaw-assn.org or by phone at 541-466-5444.

Conference Hotel Information:

Minneapolis Marriott City Center
30 S. 7th St., Minneapolis, MN 55402
www.marriott.com

The hotel is located in downtown Minneapolis two blocks from the light rail system with access to many of Minneapolis's best attractions.

The Marriott is about eight miles from the Minneapolis International Airport (airport code - MSP) and 25 minutes by the light rail system ($1.50 - $2.00; exit at Nicollete Mall stop).

Guest rooms for attendees are available at $129+tax for single, double, triple and quad occupancy. The conference rate is also available for a **very small number of rooms** for two days before and the last day of the conference. For reservations, call 800-228-9290 Be sure to identify yourself as attending the American Agricultural Law Association conference. **All blocked rooms return to retail price on September 30, 2008**. This should be a well-attended conference so reserve your room early. If the block fills, contact RobertA@aglaw-assn.org and I will seek block expansion.

Tentative Conference Program

Friday, October 24, 2008

"Lease financing opportunities and issues for the agribusiness community, including a discussion of leasing options for alternative energy financing."
Panelists:
Thomas Robinson, Director of Marketing, Farm Credit Leasing
Donald C. "Buzz" Shepard III, Faegre & Benson LLP, Minneapolis, MN

"UCC Developments and Agricultural Interests"
Keith G. Meyer, University of Kansas Law School

"Tax Law Developments Affecting Agriculture and Estate Planning and Business Issues in Agriculture"
Roger A. McEowen, Iowa State University
Phillip E. Harris, University of Wisconsin Law School
Neil E. Harl, Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor Economics, Iowa State University

"Update on Agricultural Bankruptcy"
Jeffrey A.. Peterson, Gray Plant Mooty Law Firm, St. Cloud, MN

"Environmental Law and Agriculture
Anthony B. Schutz, University of Nebraska Law School

"New Developments in Food Law"
Susan A. Schneider, Director, Agricultural LLM Program, University of Arkansas Law School, Fayetteville, AR

"The New Farm Bill: What's in, what's out in 2008"
David P. Grahn, Associate General Counsel, U.S. Department of Agriculture, Washington, D.C.

Farm Foundation 75th Anniversary Lecture:
"Influences on Global Commodity Prices"
Speaker: Dr. Christopher Hurt, Professor of Agricultural Economics, Purdue University, Indiana

"Agricultural Stress in the Grain Industry: A sign of the times?"
Sarah Vogel, Sarah Vogel Law Firm, P.C., Bismarck, ND
Bill Bridgforth, Ramsay, Bridgforth, Harrelson & Starling LLP, Pine Bluff, AR
David Barrett, Barrett, Easterday, Cunningham & Eselgroth LLP, Dublin, OH

"Corporate Farm Bans – New Developments"
Anthony B. Schutz, University of Nebraska Law School
Charles Carvell, Office of the Attorney General, North Dakota

"Vertically Integrated Production Enterprises"
Panelists: to be confirmed
"Update on Cooperatives Law"
Ron McFall, Stoel Rives Law Firm, Minneapolis MN

"Requiring Precaution: State Liability Exceptions for Agri-Tourism Activities"
Terence Centner, University of Georgia
"Precaution and International Trade in Agricultural Products"
Ilona Cheyne, Newcastle Law School (United Kingdom)

"The EU Approach to Precaution in the Food Sector"
Bernd van der Meulen (invited), Wageningen University (The Netherlands)

"Precaution in US and EC Authorization of GMOs: A Comparison"
Helle Tegner Anker, Copenhagen University (Denmark)
Margaret Rosso Grossman, University of Illinois

(cont. on page 8)

AMERICAN AGRICULTURAL LAW ASSOCIATION
P.O. Box 835
Brownsville, OR 97327

Saturday, October 25, 2008

"Ethical and Competent Management of Law Offices"
Patrick K. Costello, Muir, Costello & Carlson, Lakefield, MN
Gregory C. Sisk, University of St. Thomas, Minneapolis, MN
Drew L. Kershen, University of Oklahoma, Norman, OK

"Immigration"
Panelists: to be confirmed

"Siting of Livestock Production Facilities
Panelists: to be confirmed

"Community Based Wind Generation"
David Moeller, Allete (invited)

"The Lifecycle Carbon Footprint of Biofuels: How carbon may generate producer profit"
Panelists: to be confirmed

"The 2008 Farm Bill: A Fair Piece of the Farm Bill Pie for Organic Agriculture"
Martha Noble, Sustainable Agriculture Coalition

"Legal Strategies: How to Protect your Organic Client from Outside Threats"
Paula Maccabee, Just Change Consulting

"Organic and Beyond: Dispute Resolution Issues – Is it really Organic and How Do Private Certifications Address New Criteria?"
Jill Krueger, Farmers Legal Action Group, Inc. (FLAG)

"Equivalency, Imports and International Organic Standards
A. Bryan Endres, University of Illinois

"Tax and Estate Planning Developments"
Panelists: to be confirmed

"The Final Round up: The 2008 Farm Bill – Washington Policy Perspective"
Ms. Anne Hazlett, Minority Counsel, Committee on Agriculture, U.S. Senate
Ms. Anne Simmons, Majority Staff, Committee on Agriculture, U.S. House of Representatives
Mr. Michael Knipe, Assistant General Counsel for Legislation, U.S. Department of Agriculture

Country fences need to be horse high, pig tight and bull strong.

From the Executive Director:

Member News: Current past-president Steve Halbrook has accepted a new position as head of the Department of Agricultural Economics and Agribusiness at the University of Arkansas, Fayetteville, AR. After July 28, 2008, he can be reached at 217 Agriculture Hall, Univ. Of Arkansas, Fayetteville, AR 72701 ph. 479-575-2281.

Set your calendars now for October 24-25, 2008 – AALA 29th Annual Agricultural Law Symposium at the Marriott in downtown Minneapolis, MN

Conference Sponsorships. Each year the AALA receives sponsorships for assistance with the various costs of the annual conference. Several member firms have already come forward with generous sponsorships of the Friday evening reception, breakfasts, student travel sponsorships and others. Sponsorships start at $500 and all sponsors are acknowledged at the conference in the handbook and at the sponsored event. If your firm is interested in showing its support for the AALA through a conference sponsorship, please contact me (RobertA@aglaw-assn.org or 541-466-5444) as soon as possible so I can mention your sponsorship in the conference brochure to be mailed in late early July.

Robert P. Achenbach, Jr., AALA Executive Director