

# Agricultural Law Update

The Official Newsletter of the



A nonprofit, professional organization focusing on the legal issues affecting agriculture throughout the United States for over 29 years.

VOLUME 26, NUMBER 9, WHOLE NUMBER 310

September 2009

## In This Issue

If reading this in the PDF format, click on “[Go to Page](#)” to go to the start of the article. All URLs in the articles are also active links and a click on them will take you to that web page. Return to the first page with the link on the bottom left of each page. Let us know what you think of our new format.

• **Goeringer, THE NATIONAL PORK PRODUCER’S COUNCIL’S CHALLENGE TO EPCRA IS NON-JUSTICIABLE.** This article discusses a recent Federal District Court decision that the NPPC’s challenge of EPA regulations based on the intent of the EPA as expressed in the preamble to the regulations was not justiciable.

[Go to Page 2](#)

• **Kershen, AGRICULTURAL LAW BIBLIOGRAPHY—2<sup>nd</sup> and 3<sup>rd</sup> Quarter 2009.**

[Go to Page 3](#)

• **Feitshans, NEW NORTH CAROLINA LAW PLACES RESTRICTIONS ON CONDEMNATIONS OF LAND SUBJECT TO CONSERVATION EASEMENTS.** Effective October 1, 2009, North Carolina has placed additional restrictions on the condemnation of land subject to a conservation easement.

[Go to Page 6](#)

• **Goeringer—COURT CONSIDERS CONSTITUTIONALITY OF STATE’S RIGHT-TO-FARM LAW.** In *Lindsey v. DeGroot*, the Indiana Court of Appeals held that Indiana’s Right-to-Farm Act was not an unconstitutional taking.

[Go to Page 7](#)

\* \* \* \* \*

## From the AALA Executive Director

**New Update Format** As you can already see, this issue presents a new format that brings new functionality to the e-mail version without adversely affecting the readability of the print version. The front page will now feature a short summary of all articles. The PDF version sent by e-mail also has embedded links in the summary which will take the reader directly to that article inside the newsletter. The bottom of each page also has a link to take you back to the top of the issue. If you are receiving the print version and would like the e-mail version, just send me an e-mail and I’ll switch you over. [RobertA@aglaw-assn.org](mailto:RobertA@aglaw-assn.org)

The AALA board is seeking new members, including student members, for the Update Editorial Board, responsible for overseeing the *Agricultural Law Update*. Please contact Jesse Richardson, [jessj@vt.edu](mailto:jessj@vt.edu).

Work continues on placing all the past issues of the Update on the AALA web site as well as past conference papers.

**2010 Membership Renewals** will be sent out in late November.

Robert P. Achenbach, AALA Executive Director

# THE NATIONAL PORK PRODUCER'S COUNCIL'S CHALLENGE TO EPCRA IS NON-JUSTICIABLE

by L. Paul Goeringer\*

In January 2009, the National Pork Producers Council (NPPC) and the Wisconsin Pork Association (WPA) filed a petition in the Court of Appeals for the District of Columbia Circuit challenging some of the EPA's recent regulatory amendments.<sup>1</sup> The regulations at issue were recently amended by the EPA and changed the reporting exemptions for animal waste under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>2</sup> and the Emergency Planning and Community Right-to-Know Act (EPCRA).<sup>3</sup>

On February 6, 2009, the NPPC filed a similar suit raising the same issues in the Federal District Court for the Western District of Wisconsin.<sup>4</sup> On May 26, 2009, the District Judge granted a motion to stay the suit before the district court in Wisconsin until the D.C. Circuit Court of Appeals ruled on a motion by the NPPC addressing whether the court of appeals had jurisdiction over the claims.<sup>5</sup>

The NPPC recently moved the district court to lift the stay on proceedings related to the EPCRA regulation, 40 C.F.R. § 355.31(g), but not those related to the CERCLA regulation, 40 C.F.R. § 302.6(e)(3).<sup>6</sup> The NPPC argued that the court of appeals had jurisdiction over the CERCLA claim only.<sup>7</sup> Exclusive jurisdiction is granted to the court of appeals for "[r]eview of any regulation under" CERCLA.<sup>8</sup> EPCRA has no similar provision granting the court of appeals exclusive jurisdiction over challenges to EPCRA regulations.<sup>9</sup> The EPA argued that the NPPC's EPCRA claims must also be decided by the court of appeals "because they are so intertwined with the challenge to § 302.6(e)(3) that *is* proceeding under § 9613(a)."<sup>10</sup>

The NPPC had four challenges to § 355.31(g).<sup>11</sup> Count I, at issue here, challenged "what plaintiffs believe is an implicit 'premise' in the rule, that the EPA is attempting to override a *statutory* provision in EPCRA that provides a reporting exemption any time a 'hazardous chemical' is used in 'routine agricultural operations.'"<sup>12</sup> The NPPC argued that the stay should be lifted on Count I for two reasons.<sup>13</sup> First, Count I was not presented to the court of appeals,

and second, the court of appeals would not rule on the issue of jurisdiction for at least a year.<sup>14</sup> The EPA did agree that Count I was not a part of the proceedings before the court of appeals, but it argued that Count I was not justiciable.<sup>15</sup> Because Count I was not properly before the court of appeals, the district judge turned to the EPA's motion to dismiss Count I.<sup>16</sup>

The NPPC's argument in Count I relied on the exemptions to the reporting requirements in 42 U.S.C. § 11021(e).<sup>17</sup> The NPPC argued that a controversy existed based on the language used in the preamble of the rule.<sup>18</sup> "Owners and operators of farms, like all other facilities, are required to report the release of hazardous substances into the environment in accordance with CERCLA section 103 and EPCRA section 304 when it meets or exceeds the [reportable quantity] of the hazardous substance."<sup>19</sup> The quoted language, the NPPC argued, showed intent by the EPA to disregard the statutory language that provided reporting exemptions for "routine agricultural operations."<sup>20</sup>

The district judge agreed with the EPA that no justiciable controversy existed for the court to decide.<sup>21</sup> The judge explained that justiciable claims do not exist "when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts."<sup>22</sup> The court further explained that it is rare for a preamble of a rule to create a justiciable controversy.<sup>23</sup>

The district judge concluded that this case was not an exception to the rule and that the NPPC had presented no evidence that the EPA planned to disregard the statutory language.<sup>24</sup> The NPPC did not allege that the EPA was changing policy and now including farms in the definition of "facilities."<sup>25</sup> Finally, the sentence in the preamble relied on by the NPPC did not suggest the view "that farms are not subject to reporting requirements because farms engage in 'routine agricultural operations' within the meaning of the exemption under Section 11021(e)(5)."<sup>26</sup> The judge found that the sentence suggested the opposite: "Owners and operators of farms... are required to report the release of hazardous substances

into the environment *in accordance with... EPCRA section 304.*"<sup>27</sup>

According to the judge, a member of the NPPC may be "required to report because it releases hazardous chemicals as part of something other than routine agricultural operations."<sup>28</sup> But the judge had to dismiss Count I because the NPPC failed "to identify anything in the preamble that would increase the likelihood that any one of them will be charged with violating a reporting requirement."<sup>29</sup> Because the remaining counts II through IV were currently before the D.C. Circuit Court of Appeals, the judge closed the case administratively to be reopened if the court of appeals declined jurisdiction.<sup>30</sup>

## Endnotes

<sup>1</sup> See *Nat'l Pork Producers Council v. Jackson*, No. 09-cv-73-sic, 2009 WL 1505150, at \*1 (W.D. Wis. May 26, 2009).

<sup>2</sup> See *id.* See also Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75 (2006); 40 C.F.R. § 302.6(e)(3) (2009).

<sup>3</sup> See *Nat'l Pork Producers Council*, 2009 WL 1505150, at \*1. See also Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. §§ 11001-50 (2006); 40 C.F.R. § 355.31(g) (2009).

<sup>4</sup> See *Nat'l Pork Producers Council*, 2009 WL 1505150, at \*1.

<sup>5</sup> See *id.* at \*3.

<sup>6</sup> See *Nat'l Pork Producers Council v. Jackson*, No. 09-cv-73-sic, 2009 WL 2213481, \*1 (W.D. Wis. July 23, 2009). This opinion has been marked for publication in the Federal Supplement.

<sup>7</sup> See *id.*

<sup>8</sup> *Id.* (citing 42 U.S.C. § 9613(a)).

<sup>9</sup> See *id.*

<sup>10</sup> *Id.*

<sup>11</sup> See *Nat'l Pork Producers Council*, 2009 WL 2213481, at \*1. Section 355.31(g) exempts releases into the air of hazardous substances from animal waste at farms when fewer than a certain number of livestock are confined there for certain categories of livestock. The

(cont. on page 3)

\* National Agricultural Law Center

four challenges brought by the NPPC are: Count I - the carve-out for larger farmers in the final rule violates EPCRA exemption for routine agricultural operations; Count II - EPA's justification for the carve out is not authorized by EPCRA; Count III - The reporting requirement is not supported by the administrative record because information needed to make reporting decisions is lacking; and Count IV - The reporting requirement is not supported by the administrative record because data on farm emissions is lacking. See Complaint at 8 - 14, *Nat'l Pork Producers Council v. Jackson*, No. 09-cv-73-sic, 2009 WL 959371 (W.D. Wis. Feb. 6, 2009).

<sup>12</sup> *Nat'l Pork Producers Council*, 2009 WL 2213481, at \*1.

<sup>13</sup> See *id.* at \*2.

<sup>14</sup> See *id.* The parties had agreed that oral arguments before the D.C. Circuit Court of Appeals would occur in spring 2010 with a decision to follow three to nine months later. See *id.* at \*1.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at \*2.

<sup>17</sup> See *Nat'l Pork Producers Council*, 2009 WL 2213481, at \*2. "Under § 11021(e)(5), the definition of 'hazardous chemical' does not include '[a]ny substance to the extent it is used in routine agricultural operations.'" *Id.* at \*2 (quoting 42 U.S.C. § 11021(e)(5)).

<sup>18</sup> See *id.* at \*3.

<sup>19</sup> *Id.* (citing 73 Fed. Reg. 76,951 (Dec. 18, 2008)).

<sup>20</sup> See *id.* at \*3.

<sup>21</sup> See *id.* at \*2.

<sup>22</sup> *Nat'l Pork Producers Council*, 2009 WL 2213481, at \*2 (quoting *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992)).

<sup>23</sup> See *id.* at \*3 (citing *Natural Res. Def. Council v. EPA*, 559 F.3d 561, 564-65 (D.C. Cir. 2009)).

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Nat'l Pork Producers Council*, 2009 WL 2213481, at \*3 (emphasis in original).

<sup>28</sup> *Id.* at \*4.

<sup>29</sup> *Id.*

<sup>30</sup> See *id.* at \*4.

## AGRICULTURAL LAW BIBLIOGRAPHY — 2<sup>nd</sup> and 3<sup>rd</sup> Quarter 2009

by Drew L. Kershen\*

### Administrative Law

Comment, *The Role of Administrative Law in Regulating "Mad Cow Disease" as Explained in Creekstone Farms Premium Beef, LLC v. Department of Agriculture*, 1 Ky. J. Equine, Agric., Nat. Resources L. 123-134 (2009).

Govern, *Agroterrorism and Ecoterrorism: A Survey of Indo-American Approaches under Law and Policy to Prevent and Defend against These Potential Threats Ahead*, 10 Fla. Coastal L. J. 223-261 (2009).

Min, et al., *Rent-Seeking in Invasive Species Regulation: the Case of Noxious Weeds*, 84 Land Econ. 306-326 (2008).

Note, *The Mystery of the Disappearing Honeybee: Will Government Funding and Regulation Save this Important Pollinator?*, 14 Drake J. Agric. L. 175-197 (2009).

Todd, Smith & Buettner, *Indemnified, Eventually: Insured Farmers Resort to Litigation to Obtain Proper GRIP Payments*, 26 Agric. L. Update 1-3 (6-2009).

### Agricultural Law: Attorney Roles and Educational Programs

McEowen, *Agricultural Law Developments: Shaping the Sector and Legal Practice*, 14 Drake J. Agric. L. 1-18 (2009).

### Animals — Animal Rights

Cupp, *Moving Beyond Animal Rights: A*

*Legal/Contractualist Critique*, 46 San Diego L. Rev. 27-84 (2009).

Lovvorn & Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 Animal L. 149-169 (2009).

Note, *Anti-Horse Slaughter Legislation: Bad for Horses, Bad for Society*, 84 Ind. L. J. 353-371 (2009).

### Bankruptcy

#### Farmers

Schweizer, *Is a Farmer's Potential Obligations to USDA under the Guaranteed Loan Program Subject to a Discharge in Bankruptcy?*, 26 Agric. L. Update 1, 3-5 (6-2009).

### Biotechnology

Kinderlerer, *The Cartagena Protocol on Biosafety*, 4 Collection Of Biosafety Rev. 12-65 (2008).

### Commodities Futures

Rubin, *CFTC Regulation 1.59 Fails to Adequately Regulate Insider Trading*, 53 N.Y.L. Sch. L. Rev. 599-624 (2009).

### Corporate Farming (Restrictions on Corporate Farming/Family Farm Preservation)

Schultz, *Corporate-Farming Measures in a Post-Jones World*, 14 Drake J. Agric. L. 97-147 (2009).

### Energy Issues

Aakre & Haugen, *Wind Turbine Lease Considerations for Landowners*, NDSU Extension Service EC-1394 pp. 1-8 (2009).

Cai, *Think Big and Ignore the Law: U.S. Corn and Ethanol Subsidies and WTO Law*, 40 Geo. J. Int'l L. 865-917 (2009).

Comment, *Frankenfuel: Genetically Modified Corn, Ethanol, and Crop Diversity*, 30 Energy L. J. 169-188 (2009).

Comment, *Corn Ethanol: Setting Straight a Misguided Attempt to Free the United States from Foreign Oil*, 31 Houston J. Int'l L. 377-417 (2009).

de Lima Mantilla, *The Survival of the United States Ethanol Subsidies and Tariff: Are There Further Reasons to Keep Them on the Books?*, 15 ILSA J. Int'l & Comp. L. 203-225 (2008).

Ferrell, *Wind Energy Agreements in Oklahoma*, 80 Okla. Bar J. 1015-1028 (2009).

McCarl & Boadu, *Bioenergy and U.S. Renewable Fuels Standards: Law, Economic, Policy/Climate Change and Implementation Concerns*, 14 Drake J. Agric. L. 43-73 (2009).

Note, *Environmental Perspectives on Siting Wind Farms: Is Greater Federal*  
(cont. on page 4)

\*Professor of Law, The University of Oklahoma



*Control Warranted?*, 17 N.Y.U. Envtl. L. J. 1243-1294 (2009).

Note, *The Iowa Power Fund: Making Iowa the Energy Capital of the World*, 14 Drake J. Agric. L. 221-244 (2009).

Note, *Thirsting for Change: How the Growth of the Biofuel Industry Can Stimulate Advancements in Water Law*, 2009 U. Ill L. Rev. 583-625

Ottinger, *Biofuels—Potential, Problems & Solutions*, 19 Fordham Envtl. L. Rev. 253-263 (2009).

Rinker, *How to Assist Farmers and Ranchers to Negotiate a Wind Lease on their Property*, 26 Agric.L. Update 5-7 (6-2009).

Student Article, *Robbing Peter to Pay Paul: Why Ethanol Production Must Be Regulated and How To Do It*, 16 U. Baltimore J. Envtl. L. 53-82 (2008).

#### **Environmental Issues**

Centner, *New Public Participation Requirements Under the 2008 CAFO Regulations*, 26 Agric. L. Update 1-2 (4-2009).

Cremer, *Tractors Versus Bulldozers: Integrating Growth Management and Ecosystem Services to Conserve Agriculture*, 39 Envtl. L. Rep. News & Anal. 10541-10554 (2009).

Davidson, *The New Public Lands: Competing Models for Protecting Public Conservation Values on Privately Owned Lands*, 39 Envtl. L. Rep. News & Anal. 10368-10375 (2009).

Donahue, *Elephant in the Room: Livestock's Role in Climate and Environmental Change*, 17 Mich. St. J. Int'l L. 95-122 (2008).

Note, *The Environmental Impact of Commodity Subsidies: NEPA and the Farm Bill*, 20 Fordham Envtl. L. Rev. 233-265 (2009).

Note, *The Impact of Feedlot Waste on Water Pollution under the National Pollutant Discharge Elimination System (NPDES)*, 33 Wm. & Mary Envtl. L. & Pol'y Rev. 947-970 (2009).

Remer, *Integrating Growth Management and Ecosystem Services to Conserve Agriculture*, 29 Envtl. L. Rep. 10541 (2009).

Student Article, *The Role of U.S. Agriculture in a Comprehensive Greenhouse Gas Emissions Trading Scheme*, 17 N.Y.U.

Envtl. L. J. 936-960 (2008).

#### **Equine Law**

D'Angelo & Waxman, *No Contest? An Analysis of the Legality of Thoroughbred Handicapping Contests under Conflicting State Law Regimes*, 1 Ky. J. Equine, Agric., Nat. Resources L. 1-28 (2009).

Comment, *Opening the Door: Recognizing the Many Hats of Jockeys for Workers' Compensation Coverage*, 1 Ky. J. Equine, Agric., Nat. Resources L. 109-122 (2009).

Note, *Reining in the Horse Racing Industry: A Proposal for Federal Regulation of Steroid Use in Racehorses*, 1 Ky. J. Equine, Agric., Nat. Resources L. 67-88 (2009).

Regan, *Horses and Perfection under the Uniform Commercial Code*, 73 Mich. B. J. 1322-1323 (1994).

#### **Farm Labor**

##### **Aliens**

Student Article, *Immigration Reform and Agriculture: What We Really Want, What We Really Need, and What Will Happen If They Leave?*, 10 Barry L. Rev. 63-79 (2008).

#### **Farm Policy and Legislative Analysis**

##### **Domestic**

Comment, *Huber Winery v. Wilcher: The Commerce Clause, State Regulations and the Free Trade of Wine*, 1 Ky. J. Equine, Agric., Nat. Resources L. 87-98 (2009).

Eubanks, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 Envtl. L. Rep. News & Anal. 10493-10509 (2009).

Eubanks, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 Envtl. L. Rep. 10493-10509 (2009).

Eubanks, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 Stan. Envtl. L. J. 213-310 (2009).

#### **Food and Drug Law**

Houghtaling, *Truth in Labeling? New FDA Guidance Does Not Require Labeling of Foods Derived from Genetically Engineered Animals*, 26 Agric. L. Update 1, 5-8 (7-2009).

McLeod-Kilmurray, *An Ecofeminist Legal Critique of Canadian Environmental Law: The Case Study of Genetically*

*Modified Foods*, 26 Windsor Rev. Legal & Soc. Issues 129-178 (2009).

Note, *Advertising Obesity: Can the U.S. Follow the Lead of the UK in Limiting Television Marketing of Unhealthy Foods to Children?*, 42 Vanderbilt J. Transnat. L. 317-350 (2009).

Walker, *Double Trouble: Competing Federal and State Approaches to Regulating the New Technology of Cloned Animal Foods, and Suggestions for the Future*, 14 J. Tech. L. & Pol'y 29-50 (2009).

#### **Forestry**

Magee, *Legal Implications of Forest Management Science in National Environmental Policy Act Analyses*, 10 Vt. J. Envtl. L. 213-228 (2009).

Tesini, *Working Forest Conservation Easements*, 41 Urban L. 359-375 (2009).

#### **Hunger & Food Security Issues**

Kong, *The Right to Food for All: A Right-Based Approach to Hunger and Social Inequality*, 32 Suffolk Transnat. L. Rev. 525-566 (2009).

Tabaro, *Food Security and Access to Plant Genetic Resources: An Analysis of the Multilateral System of Access and Benefit Sharing*, 15 eLaw J. No. 2 (12-2008).

#### **International Trade**

Bartels, *Preventing Coffee Cooperation from Grinding to a Halt: An Institutional Analysis of International Coffee Agreements and Recommendations for Achieving Long-Term Cooperation in the International Coffee Trade*, 42 Creighton L. Rev. 279-321 (2009).

Book Review, *International Environmental Liability and Barriers to Trade, Market Access and Biodiversity in the Biosafety Protocol: Trade in Genetically Modified Organisms: Who is Responsible for Damage Which Results?*, 26 Windsor Rev. Legal & Soc. Issues 205-218 (2009).

Disdier, et al, *The Impact of Regulations on Agricultural Trade: Evidence from the SPS and TBT Agreements*, 90 Am. J. Of Agric. Econ. 336-350 (2008).

Eliason, *Science Versus Law in WTO Jurisprudence: The (Mis)Interpretation of the Scientific Process and the (In)Sufficiency of Scientific Evidence in EC-Biotech*, 41 N.Y.U. J. Int'l L. & Pol. 341-406 (2009).

Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on*

(cont. on page 5)

*Comparative Advantage*, 17 Berkeley La Raza L. J. 65-93 (2006).

Kennedy, *The Doha Round Negotiations on Agricultural Subsidies*, 36 Denv. J. Int'l L. & Pol'y 335-348 (2008).

Note, *Gently Modified Operations: How Environmental Concerns Addressed through Customs Procedures Can Successfully Resolve the US-EU GMO Dispute*, 33 Wm. & Mary Envtl. L. & Pol'y Rev. 971-1016 (2009).

Note, *Pour Some Sugar in Me: How Importing and Supporting Sugarcane Ethanol Production Will Not Only Make Friends, but Save America from an Addiction of Foreign Oil or Why the United States Should Remove the Tariff on Sugarcane Ethanol*, 14 Drake J. Agric. L. 199-220 (2009).

Peck, *Nation-Specific Risk Tolerance in the WTO: US-Continued Suspension of Obligations in the EC-Hormones Dispute* (National AgLaw Center Publications) 8-2009 <http://www.nationalaglawcenter.org>

Shin, *The Domestic Decisionmaking Process and its Implications for International Commitments: American Beef in Korea*, 34 Yale J. Int'l L. 567-574 (2009).

#### Land Reform

Deininger & Ali, *Do Overlapping Land Rights Reduce Agricultural Investment? Evidence from Uganda*, 90 Am. J. Agric. Econ. 869-882 (2008).

Deininger, et al, *Legal Knowledge and Economic Development: the Case of Land Rights in Uganda*, 84 Land Econ. 593-619 (2008).

Miranda, *Uploading the Local: Assessing the Contemporary Relationship between Indigenous Peoples' Land Tenure Systems and International Human Rights Law regarding the Allocation of Traditional Lands and Resources in Latin America*, 10 Or. Rev. Int'l L. 419-452 (2008).

#### Land Use Regulation

##### Land Use Planning and Farmland Preservation Techniques

McLaughlin & Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 Wyo. L. Rev. 1-96 (2009).

##### Soil Erosion

Note, *The Dirt on International Environmental Law Regarding Soils: Is the Existing Regime Adequate?*, 19 Duke Envtl.

L. & Pol'y F. 165-207 (2008).

#### Livestock and Packers & Stockyards

El-Hajj, *Confined Animal Feeding Operations in California: Current Regulatory Schemes and What Must Be Done to Improve Them*, 15 Hastings W.-Nw. J. Envtl. L. & Pol'y 349-368 (2009).

Murphy, *CAFO Grief: Using Tax Grieving Procedures to Protest Industrial Animal Factories*, 23 J. Envtl. L. & Litig. 357-400 (2008).

Note, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress through Legal Reform*, 15 Geo. J. Poverty L. & Pol'y 391-408 (2008).

#### Marketing Boards, Marketing Orders, Marketing Promotion, & Marketing Quotas

Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now that the Legal Battles Have Quietened*, 14 Drake J. Agric. L. 149-173 (2009).

#### Patents and Other Intellectual Property Rights in Agriculture

Aoki, "Free Seeds, Not Free Beer": *Participatory Plant Breeding, Open Source Seeds, and Acknowledging User Innovation in Agriculture*, 77 Fordham L. Rev. 2275-2310 (2009).

Comment, *Agreements that Divide: TRIPS vs. CBD and Proposals for Mandatory Disclosure of Source and Origin of Genetic Resources in Patent Applications*, 18 J. Transnat. L. & Pol'y 131-154 (2008).

De Werra, *Fighting against Biopiracy: Does the Obligation to Disclose in Patent Applications Truly Help?*, 42 Vand. J. Transnat. L. 143-179 (2009).

Ikuta, *Genetically Modified Plants, Patents, and Terminator Technology: The Destruction of the Tradition of Seed Saving*, 35 O. N.U. L. Rev. 731-749 (2009).

La Viña, Kho & Benavidez, *Farmers' Rights in International Law*, Searice Rev. 1-20 (5-2009).

Mueller, *Chemicals, Combinations, and "Common Sense": How the Supreme Court's KSR Decision is Changing Federal Circuit Obviousness Determinations in Pharmaceutical and Biotechnology cases*, 35 N. Ky. L. Rev. 281-314 (2008).

Note, *Not Confused? Don't Be Troubled:*

*Meeting the First Amendment Attack on Protection of "Generic" Foreign Geographical Indications*, 30 Cardozo L. Rev. 2257-2293 (2009).

Note, *Terroir vs. Trademarks: The Debate over Geographical Indications and Expansions to the TRIPS Agreement*, 11 Vand. J. Ent. & Tech. L. 425-459 (2009).

Sanderson & Adams, *Are Plant Breeder's Rights Outdated? A Descriptive and Empirical Assessment of Plant Breeder's Rights in Australia, 1987-2007*, 32 Melbourne U. L. Rev. 980-106 (2008).

Uchtmann, *Saving Roundup Ready® Beans for Seed? Trantham, McFarling, and Scruggs Say "No,"* 26 Agric. L. Update 1-7 (5-2009).

#### Pesticides, Herbicides, Insecticides, Fungicides, Fertilizers

Busby & Eckstein, *Organophosphates, Friend and Foe: The Promise of Medical Monitoring for Farm Workers and their Families*, 27 UCLA J. Envtl. L. & Pol'y 39-69 (2009).

Angelo, *Embracing Uncertainty, Complexity and Change to Protect Ecological Integrity: An Eco-Pragmatic Reinvention of a First Generation Environmental Law*, 33 Ecol. L. Q. 105-202 (2006).

#### Rural Development

Comment, *Rural Land Stewardship: Reinventing Development from the Grassroots with a Localized, Long-Term, Incentive-Based Program*, 17 Pa. St. Envtl. L. Rev. 225-253 (2009).

Note, *Economic Stimulation: The History and Hope of Coffee in Development*, 18 Transnat. L. & Contemp. Probs. 169-196 (2009).

Pruitt, *Migration, Development and the Promise of CEDAW for Rural Women*, 30 Mich. J. Int'l L. 707- 761 (2009).

Pruitt, *The Forgotten Fifth: Rural Youth and Substance Abuse*, 20 Stan. L. & Pol'y Rev. 359-404 (2009).

Recent Development, "Forty Acres and a Mule" ...Not Quite Yet: *Section 14012 of the Food, Conservation, and Energy Act of 2008 Fails Black Farmers*, 87 N.C. L. Rev. 1230-1251 (2009).

#### Sustainable & Organic Farming

Dougherty, Michael L., *Brewing Justice: Fair Trade Coffee, Sustainability and* (cont. on page 6)

- Survival*, 73 Rural Soc. 139-141 (2008).  
Lappé, *Food, Fuel, and the Future of Farming: Conference of Sustainable Agriculture*, 10 Vt. J. Env'tl. L. 367-378 (2009).  
Maccabee, *Pipelines, Power Lines, and Organic Farms*, 14 Drake J. Agric. L. 19-42 (2009).  
Note, *Organic Foods Production: What Consumers Might Not Know about the Use of Synthetic Substances*, 21 Loyola Consumer L. Rev. 392-406 (2009).  
Redick, *Regulatory Update – FTC Seeks Input on Green Marketing Guides*, 26 Agric. L. Update 1-7 (8-2009).  
Schneider, *Reconnecting Consumers and Producers: On the Path Toward a Sustainable Food and Agricultural Policy*, 14 Drake J. Agric. L. 75-95 (2009).  
Student Article, *A New Standard: Finding a Way to Go Beyond Organic*, 17 N.Y.U. Env'tl. L. J. 883-907 (2008).
- Taxation**  
Comment, *Topping v. Commissioner: An Example of How an Equestrian Taxpayer Can Utilize "Single Activity" to Preclude the IRS "Hobby Loss" Challenge*, 1 Ky. J. Equine, Agric., Nat. Resource L. 97-108 (2009).  
McEowen, *Tax Provisions in the American Recovery and Reinvestment Act of 2009*, 26 Agric. L. Update 1, 3-6 (4-2009).  
McEowen, *Two Courts Say that LLC and LLP Members Are Not Per Se "Passive" Limited Partners – IRS Scolded for Lack of Regulations*, 26 Agric. L. Update 1-4 (7-2009).
- Torts and Insurance**  
Comment, *Shortcomings of the Cartagena Protocol: Resolving the Liability Loophole at an International Level*, 27 UCLA J. Env'tl. L. & Pol'y 145-180 (2009).  
Note, *The Pending Farmers' Market Fiasco: Small-Time Farmers, Part-Time Shoppers, and a Big-Time Problem*, 1 Ky. J. Equine, Agric., Nat. Resources L. 49-66 (2009).  
Redick & Endres, *Litigating the Economic Impacts of Biotech Crops*, 22 Nat. Resources & Env't. 24-29 (Spring 2008).
- Uniform Commercial Code**  
**Article Seven (Documents of Title)**  
Schutz, *Documents of Title*, 64 Bus. L. 1229-1236 (2009).
- Veterinary Law**  
Toby, *State Regulation of Complementary and Alternative Veterinary Therapies: Defining the Practice of Veterinary Medicine in the 21<sup>st</sup> Century*, 1 Ky. J. Equine, Agric., Nat. Resource L. 29-48 (2009).
- Water Rights: Agriculturally related**  
Comment, *Groundwater Allocation in Ohio: The Case for Regulated Riparianism and Its Likely Consequences under McNamara*, 40 U. Toledo L. Rev. 525-576 (2009).  
Findlay, *Rainwater Collection, Water Law, and Climate Change: A Flood of Problems Waiting to Happen?*, 10 N.C. J. L. & Tech. 74-94 (4-2009).  
Jones & Little, *The Ownership of Groundwater in Texas: A Contrived Battle for State Control of Groundwater*, 61 Baylor L. Rev. 578-609 (2009).  
Kwasniak & Hursh, *Right to Rainwater – A Cloudy Issue*, 26 Windsor Rev. Legal & Soc. Issues 105-128 (2009).  
Lindsay, *Counting Every Drop: Measuring Surface and Ground Water in Washington and the West*, 39 Env'tl. L. 193-214 (2009).  
Ottem, *The General Adjudication of the Yakima River: Tributaries for the Twenty-First Century and a Changing Climate*, 23 J. Env'tl. L. & Litig. 275-355 (2008).  
Shepard, *The Unbearable Cost of Skipping the Check: Property Rights, Takings Compensation & Ecological Protection in the Western Water Law Context*, 17 N.Y.U. Env'tl. L. J. 1063-1134 (2009).

If you desire a copy of any article or further information, please contact the Law School Library nearest your office. The National AgLaw Center website, <http://www.nationalaglawcenter.org>, has a very extensive Agricultural Law Bibliography. If you are looking for agricultural law articles, please consult this bibliographic resource on the National AgLaw Center website.

\* \* \* \*

## NEW NORTH CAROLINA LAW PLACES RESTRICTIONS ON CONDEMNATIONS OF LAND SUBJECT TO CONSERVATION EASEMENTS

by Theodore Feitshans\*

Effective October 1, 2009, North Carolina has placed additional restrictions on the condemnation of land subject to a conservation easement. Session Law 2009-439.

SENATE BILL 600 applies to public condemners. S.L. 2009-439 requires that the complaint "include a statement that alleges that there is no prudent and feasible alternative to condemnation of the property encumbered by the conservation easement." The holder of the conservation easement may contest that the condemner adequately considered alternatives. If, after discovery, the holder of the conservation easement has identified at least one alternative, the burden of persuasion shifts to the condemner. If the condemner does not prevail in the action, the holder of the conservation easement is entitled to costs, disbursements, and expenses (except for attorney fees). S.L. 2009-439 is not applicable to the N.C. Department of Transportation or the N.C. Turnpike Authority if alternatives to the proposed property were considered prior to initiation of the action and either a review under the State Environmental Policy Act (SEPA) or the National Environmental Policy Act (NEPA) was conducted. Vesting of title in the condemner is delayed until requirements of the statute are met. Compensation is to be determined based upon the value of the property unencumbered by the conservation easement. The compensation is then to be allocated between the holder of the conservation easement and the landowner.

\*North Carolina State University



# COURT CONSIDERS CONSTITUTIONALITY OF STATE'S RIGHT-TO-FARM LAW

by L. Paul Goeringer\*

In *Lindsey v. DeGroot*, the Indiana Court of Appeals held that Indiana's Right-to-Farm Act was not an unconstitutional taking.<sup>1</sup> The court further found that the Right to Farm Act applied and barred the Lindseys' nuisance claims.<sup>2</sup> Finally, the Lindseys presented no evidence to support their trespass claim, criminal mischief claim, and intentional infliction of emotional distress claim. The court affirmed the granting of summary judgment by the trial court.<sup>3</sup>

In 1998, the Lindseys purchased rural property in an area near other agricultural operations and constructed a home on their property.<sup>4</sup> In 2001, DeGroot bought an operational hog farm with the intent of turning the property into a dairy.<sup>5</sup> After construction of new barns, the DeGroots' dairy began operation on July 24, 2002.<sup>6</sup> The DeGroots were allegedly in violation of the Indiana Department of Environmental Management's (IDEM) dairy regulations, although none of the alleged violations were proven.<sup>7</sup>

On the north border of the Lindseys' property, the DeGroots owned farmland that they regularly planted with crops.<sup>8</sup> A grass strip that ran along the boundary was claimed by the Lindseys to be on their property.<sup>9</sup> Because of these allegations, the DeGroots hired a licensed surveyor to determine the boundary.<sup>10</sup> The surveyor determined that the Lindseys owned the southern half and the northern half was owned by the DeGroots.<sup>11</sup> Although the Lindseys did not agree with the survey, they never conducted their own survey.<sup>12</sup>

In December 2003, the Lindseys filed suit against the DeGroots seeking to enjoin them from spreading effluent on the DeGroots' neighboring property and for "nuisance, negligence, trespass, criminal mischief, and intentional infliction of emotional distress."<sup>13</sup> In April 2008, the trial court granted summary judgment in favor of the DeGroots and held that the Indiana Right-to-Farm Act was constitutional as applied in this case, that it barred the nuisance claims, and that no material issues of fact existed regarding the

trespass, criminal mischief, and intentional infliction of emotional distress claims.<sup>14</sup> The Lindseys filed this appeal.<sup>15</sup>

On appeal, the Lindseys argued Indiana's Right-to-Farm Act was an unconstitutional taking and cited precedent from other states to guide the court.<sup>16</sup> The court, after examining other states' decisions regarding the constitutionality of similar right to farm laws, found that Indiana's version was not an unconstitutional taking.<sup>17</sup> The Iowa Supreme Court had considered its right to farm law, and it found "that the right to maintain a nuisance is an easement" and that "easements are property interests subject to the just compensation requirements of both the federal and Iowa constitutions . . ."<sup>18</sup>

Next the court turned to prior decisions in Idaho and Texas that upheld the constitutionality of their states' laws.<sup>19</sup> The Idaho Supreme Court rejected the holding of the Iowa Supreme Court, finding "no direct authority in Idaho holding that the right to maintain a nuisance is an easement", and concluded Idaho's right-to-farm law was not an unconstitutional taking.<sup>20</sup> The Texas Court of Appeals also rejected claims that the Texas Right to Farm law was an unconstitutional taking.<sup>21</sup>

The Indiana court concluded, "we have found nothing to suggest that Indiana has adopted the seemingly unique Iowa holding that the right to maintain a nuisance is an easement...."<sup>22</sup> The court rejected the Lindseys' argument to extend the Iowa court's holding to Indiana.<sup>23</sup>

The Lindseys also argued that the dairy's operation fell within the three exceptions to the one-year statute of limitations found in the Act.<sup>24</sup> The Act contained a one-year statute of limitations, beginning at the time of operation of the farm, with some exceptions.<sup>25</sup> The Lindseys brought their action eighteen months after the dairy began operation, and was barred by the statute of limitations.<sup>26</sup> The court then looked to see whether the actions fell within one of the three exceptions to the one-year limitations period.<sup>27</sup> The court found:

a significant change in the type of operation, the operation would have been a nuisance at the time the operation began in its current locality, or the nuisance results from the negligent operation of the agricultural operation.<sup>28</sup>

As for the first and second exceptions, the court found that the Lindseys never alleged before the trial court that there had been a significant change in operation or that the dairy would have been a nuisance when it began its operation in that locality.<sup>29</sup> The court found that the Lindseys had waived these claims on appeal, and then turned to the third exception.<sup>30</sup>

The Lindseys argued that the dairy was negligently operated because of violations of the IDEM's regulations.<sup>31</sup> According to the court, the Lindseys would need to show the DeGroots' "statutory violations were the proximate cause of the Lindseys' claimed injury."<sup>32</sup> The IDEM's injunctions were granted for manure spills and runoff that occurred one mile from the Lindseys' property and to protect against possible groundwater contamination.<sup>33</sup>

Regarding the testimony of the Lindseys about alleged violations in 2002 that interfered with their use and enjoyment of their property, the court found the Lindseys had presented no evidence of loss of use and enjoyment of their property because of the negligent operation of the dairy.<sup>34</sup> The Lindseys presented no evidence that these violations were the proximate cause of their claimed injuries; they failed to demonstrate a genuine issue of material fact; and the court affirmed the decision that their nuisance claims were barred.<sup>35</sup>

As to the claims of trespass and criminal mischief, the Lindseys presented no evidence to support these claims, and the court affirmed summary judgment on these claims.<sup>36</sup> Finally, on the issue of intentional infliction of emotional distress, the court found "nothing in the record which would support a reasonable inference that DeGroot Dairy intended to cause emotional distress

\* National Agricultural Law Center

the Act applies and bars the Lindseys' nuisance suit unless there has been

(cont. on page 8)

## Agricultural Law Update

The official newsletter of the American  
Agricultural Law Association

### Editor

Linda Grim McCormick

*Agricultural Law Update* is published by the American Agricultural Law Association, Publication office: 37500 Mountain Home Dr., Brownsville, OR 97327. Copyright 2009 by American Agricultural Law Association. All rights reserved. No part of this newsletter may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system, without permission in writing from the publisher.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Views expressed herein are those of the individual authors and should not be interpreted as statements of policy by the American Agricultural Law Association, its officers or its members.

Letters and editorial contributions are welcome and should be directed to:

Linda Grim McCormick, Editor,  
2816 C.R. 163  
Alvin, TX 77511  
ph. 281-388-0155

e-mail: [lindamccormick@gotsky.com](mailto:lindamccormick@gotsky.com).

For AALA membership information, contact:

Robert Achenbach, Executive Director  
P.O. Box 835

Brownsville, OR 97327

Ph. 541-466-5444; Fax 541-466-3311

E-mail: [RobertA@aglaw-assn.org](mailto:RobertA@aglaw-assn.org).

AALA on the web:

[www.aglaw-assn.org](http://www.aglaw-assn.org)

## Goering — COURT CONSIDERS CONSTITUTIONALITY OF STATE'S RIGHT-TO-FARM LAW cont. from p. 7

to the Lindseys by its behavior.<sup>37</sup> The court affirmed the granting of “summary judgment to DeGroot Dairy upon the Lindseys’ claim of intentional infliction of emotional distress.”<sup>38</sup>

### Endnotes

<sup>1</sup> See, *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App. 2009). For Indiana’s Right-to-Farm law, see Ind. Code Ann. §§ 32-30-6-1, 32-30-6-9 (West 2009).

<sup>2</sup> See, *Id.* at 1265.

<sup>3</sup> See, *Id.*

<sup>4</sup> See, *Id.* at 1255.

<sup>5</sup> See, *Id.*

<sup>6</sup> See, *Lindsey*, 898 N.E.2d at 1255.

<sup>7</sup> See, *Id.* Although the court does not mention it, in March 2008, the DeGroots where barred from operating animal feeding operations in Indiana till 2048 by the IDEM. For more information see Niki Kelly, *Huntington Dairy Operator Removed, THE JOURNAL GAZETTE*, Mar. 26, 2008, at 1C.

<sup>8</sup> See, *Id.*

<sup>9</sup> See, *Lindsey*, 898 N.E.2d at 1255.

<sup>10</sup> See, *Id.*

<sup>11</sup> See, *Id.*

<sup>12</sup> See, *Id.* at 1255-56.

<sup>13</sup> *Lindsey*, 898 N.E.2d at 1256.

<sup>14</sup> See, *Id.*

<sup>15</sup> See, *Id.*

<sup>16</sup> See, *Id.* at 1257-59.

<sup>17</sup> See, *Id.* at 1258.

<sup>18</sup> *Lindsey*, 898 N.E.2d at 1258 (See for

Iowa decision, *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998)).

<sup>19</sup> See, *Id.*

<sup>20</sup> See, *Id.* (See for Idaho decision, *Moon v. N. Idaho Farmers Ass’n*, 96 P.2d 637 (Idaho 2004)).

<sup>21</sup> See, *Id.* at 1258-59 (See for Texas decision, *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App. 2004)).

<sup>22</sup> *Lindsey*, 898 N.E.2d at 1259.

<sup>23</sup> See, *Id.*

<sup>24</sup> See, *Id.* at 1259-62.

<sup>25</sup> See, *Id.* at 1259.

<sup>26</sup> *Lindsey*, 898 N.E.2d at 1259.

<sup>27</sup> See, *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See, *Id.*

<sup>30</sup> See, *Id.* 1259-60.

<sup>31</sup> See, *Lindsey*, 898 N.E.2d at 1260.

<sup>32</sup> *Id.*

<sup>33</sup> See, *Id.* at 1260-61.

<sup>34</sup> See, *Lindsey*, 898 N.E.2d at 1261-62.

<sup>35</sup> See, *Id.* at 1261.

<sup>36</sup> See, *Id.* at 1262-64.

<sup>37</sup> *Id.* at 1265.

<sup>38</sup> *Id.*

\* \* \* \*

*The fastest way to move  
cattle is slowly.*