



FOOD FOR THOUGHT: TECHNOLOGY AND REGULATIONS ON OLD MCDONALD'S FARM

Ruth E. Robinson and Lawrence R. Smith SmithAmundsen LLC

INTRODUCTION

The old pitchfork picture creates a stern image. Manual labor for a farm family was not just a way of life, it was essential for financial survival. Weather was more important than hedging on the Options Exchange. Times have changed big time.

OBSELETE NICKNAMES

When the University of Nebraska

named its team the Cornhuskers, little did Nebraskans know they would be fourth in U.S. corn production by 2012. The Arkansas Razorbacks have the same problem; North Carolina is now first in pig production. Oklahoma is known for "where the wind comes whistling down the plain," but California is number one in wind turbines.

The Green Bay Packers have a nickname, but the only thing they pack in

Green Bay these days is snowballs. America's number one "Dairy Land" is technically California not Wisconsin.

TECHNOLOGY AND SCIENCE

Not only have John Deere and Caterpillar changed production goals down on the farm, but so have ADM, Monsanto, DuPont, DeKalb Ag Research, Dow, Mosaic and Potash. "Knee-high by the 4th of July"

is obsolete. While the general public at home and abroad react to price changes at the grocery store and restaurants, these changes are more likely to be caused by the price of oil and ethanol, weed killers and fertilizer than just the production numbers for corn and wheat.

IT'S A BRAND NEW FARM

Farmers depend on rain just like they used to, but the concept of using water for a "fish farm" is brand new. Clean water can't be assumed anymore. Wide spread fracking on land that was previously used for farming may make us energy independent down the road, but the potential damage to well water and aquifers can't be ignored.

Fracking down on the farm, wind energy and solar farms have the potential to bring revenue to America's farmers, but they also create potential problems. Fracking has obvious environmental issues. Wind turbines have been blamed for killing endangered eagles and other birds. When cows yield less milk and chickens have less egg production, farmers are now blaming the "whoosh" sound and the strobe light effect from wind turbines. Thawing ice on wind turbine blades can become 60 foot long javelins.

INCREASED CROP YIELDS

So with all the potential problems outlined above, surely increased crop yields must be a good thing for America's farmers, right? GMOs (genetically modified organisms) have created disease resistant crops that yield larger harvests. A few small problems have arisen, however, for America's farmers: the Euro Zone won't buy GMO crops and farmers now have to be mindful of patent laws. Just ask Farmer Bowman in Indiana.

RELEVANT COURT DISCUSSIONS

In *Bowman v. Monsanto Company*, the United States Supreme Court ruled in favor of Monsanto in a patent suit against Mr. Bowman, an Indiana farmer. Bowman had purchased "Roundup Ready" soybean seeds to use on his farm. These seeds produced higher yields because the crops were resistant to weeds and typical pesticides, like Roundup, didn't damage the crops.

Bowman decided to save seed from one season to the next. As might be expected, when Monsanto found out about this practice, it sued Bowman. The case eventually went to the United States Supreme Court which ruled in favor of Monsanto and found that Farmer Bowman violated Monsanto's patent. If Bowman wanted a second, third or fourth year of increased crop yields from

Roundup Ready soybeans, he would have to buy new seeds each season to get the benefit of "Roundup Ready" soybeans.

Remember the reference to the Arkansas Razorbacks? Arkansas may have lost the title on hog production, but it is now number one in rice production. Riceland Foods, a farmer's cooperative, sought damages against Bayer Crop Science because Bayer's genetically modified rice "contaminated" shipments of non-genetically modified rice to the European Union. Unfortunately, the European Union does not accept genetically modified crops so the co-op sued the producer of the GMO rice and won \$136.8 million in punitive and compensatory damages from an Arkansas jury. The introduction of Bayer's genetically modified rice, "Liberty Link" rice, into the U.S. rice supply was viewed as an adulteration in the European Market which has banned the importation of GMOs for an extended period of time. The jury blamed Bayer's Liberty Link for the Co-Op's lost sales.

In May 2013, the USDA announced that Monsanto's genetically modified wheat was found in the U.S. wheat supply. Unfortunately, Japan, Korea and Taiwan suspended their acceptance of any U.S. grown wheat. Farmer Bowman probably grinned when a Kansas wheat farmer filed suit for damages in Federal court against Monsanto under the same theory used by the Riceland Foods Farmers' Co-Op in Arkansas.

THE EPA DOWN ON THE FARM

The purpose of the Clean Water Act is to ensure the "restoration and maintenance" of chemical, physical, and biological integrity of U.S. waterways. The Environmental Protection Agency is charged with the responsibility of enforcing the Clean Water Act. Lois Alt, a West Virginia poultry farmer, received a letter from the EPA. The letter alleged that storm water flowing from piles of chicken manure on her property was polluting a nearby stream. The EPA ordered Ms. Alt to obtain a permit and to remedy the water runoff problem. The *daily* fine for a continued violation was \$37,500!

Lois decided to fight back. She filed suit against the EPA to contest the threat of potential fines. She sought a Declaratory Judgment that rain water running across her poultry farm did not require that a permit be obtained under the National Pollutant Discharge Elimination System (NPDES) permitting process. She argued that the Clean Water Act and the NPDES permit applied to industrial activity, not "concentrated animal feeding operations"

(CAFOs). Alt eventually won summary judgment against the EPA, but the EPA recently appealed the decision.

CONCLUSION

Everybody knows that farming is hard work. Today's farmers are just as likely to be up at the crack of dawn like their parents and grandparents, but now they may be hedging on the Options Exchange before they head to the field. Farms today require a great deal of knowledge about everything from GMOs to European Union import restrictions. When the EPA calls, farmers better listen.

Being an "AG" lawyer these days is also far more complicated than it used to be. Farmers are not just interested in estate planning and the weather forecast. Not only must farmers heed the regulations of the Food and Drug Administration and the Environmental Protection Agency, they must also decide when to use the GMOs and to which countries they want to sell their harvest.

Old McDonald's farm has changed forever. What hasn't changed is the work ethic of America's farmers and the fact that worldwide consumption/demand will continue to rely upon increased yields and increased production down on America's farms.

Lawyers who practice "AG" law need to keep up with a lot more than preserving family ownership interests. Farmers face complicated issues and they need sophisticated and dedicated lawyers to help them.



Ruth E. Robinson is a partner at SmithAmundsen and chair of the firm's Agribusiness group. Ruth's practice includes agricultural law and agribusiness services, as well as personal injury, medical malpractice and catastrophic & complex defense litigation. She can be reached at rrobinson@salawus.com.



Larry R. Smith is a founding partner of SmithAmundsen. He has tried more than 120 jury trials in many different specialty areas including transportation, product liability and employment. He can be reached at lsmith@salawus.com