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**FUTURE ISSUES IN AGRICULTURAL LAW  
AND RURAL PRACTICE**

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*This Is Not Your Grandpa's Farm Law:  
Cutting Edge Legal Issues in Agriculture Today*

**June 12, 2006  
Landmark Center  
St. Paul, MN**

**Continuing Legal Education Seminar  
presented by**

**Farmers' Legal Action Group, Inc.  
360 N. Robert Street, Suite 500  
St. Paul, MN 55101  
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## ***Future Issues in Agricultural Law and Rural Practice***

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### **I. Introduction – Thinking About the Future of Agricultural Law and Rural Practice**

The future of legal practice for those involved in representing agricultural and rural clients will be full of promise, challenges, and opportunities. In thinking about the legal and political issues which shaped agricultural law over the past 25 years it seems clear in 1980 few of us could have predicted all that unfolded. The farm crisis of the early 1980's, the development of environmental concerns, the rate of industrialization and consolidation of farms and agricultural businesses, the reorientation and scale of farm programs – these are just a few of the key developments shaping agricultural law and rural practice. Other trends such as the continuing decline in farm numbers, the increased scale of many remaining operations and the emergence of new communities of farmers and rural landowners have influenced agricultural law and rural practice. While each of these trends and developments was not entirely unexpected, what could not be predicted with accuracy was the actual shape they would take, the timing of their development, and their effect on relations within agricultural and rural America.

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

It is always dangerous to dabble as a futurist trying to predict what might be ahead, partly because of the pretensions inherent in such an approach and partly from the risks of being wrong. But in looking over my 25-year career as a professor of agricultural law much of my work appears to have a futurist cast, so as they say “horses run to form.” The choice

is eased somewhat by the fact the dangers of being wrong in predicting the future are usually smaller than the glory of getting at least a few things right! Few go back and hold you to predicting wrongly but staking claim to a new issue can have many rewards.

## II. The Value in Thinking About the Future of Agricultural Law and Rural Practice

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

1. Taking a broader view of “agricultural law,” especially to include the discussion of food and rural development issues, is essential if the discipline is to evolve and not be constrained by the declining number of traditional farms and issues such as the future of federal farm programs.
2. The exercise can begin to identify some of the key practice issues and the types of expertise rural attorneys need to develop, for example working with community foundations and non-profits, or understanding the application of conservation issues to non-agricultural rural landowners.
3. Considering future issues allows us to focus on the type of leadership roles attorneys can and must play with clients in terms of being aware of potentially innovative programs, and as leaders in building the institutional arrangements in our communities, such as local economic development groups.
4. Many of the “new” issues are classically agricultural only because they are land based. What may be different is dealing with a new set of relationships in who owns the land and their motivations, how the land is being used and what products or services are being produced. Recognizing owners’ goals will make it easier to appreciate alternative ownership structures for the land, such as various types of conservation easements, and other agreements, such as energy leases.
5. Similarly, many of the issues are agricultural because they deal with food. But what may be new are the food products or the types of further processing and marketing involved. The extension of agriculture into food processing and marketing will require understanding a variety of legal and regulatory issues from food processing to institutional purchasing, and from to food safety and labeling.
6. The primary value in thinking about the future is to view the possible changes and the new sets of legal issues they will bring as opportunities for service, for acquiring new skills and knowledge, for being leaders. In many ways the future of agricultural law and rural practice will determine our ability to maintain a role or value for practicing law in this field.

## III. Five Candidates for New Opportunities in Agricultural Law and Rural Practice

The following discussion identifies five areas of legal practice or policy development as candidates for consideration as important topics for agricultural and rural practitioners. The discussion is brief rather than expository but the notes provide examples of laws, cases, or other developments illustrating the issues.

1. Rural development and the role agricultural lawyers can and should play in developing a rural policy for America

The topics of rural development and rural policy are not new to the nation, yet efforts to develop and articulate policies effective in addressing the unique challenges of rural America and distinct from agricultural issues have proven extremely difficult. The continuing demographic shifts in rural areas with an increasing rural non-farm population, i.e., 55 million of the nation's 300 million people, with fewer direct ties to agriculture, make the need for such work more timely. It is not necessary or possible to divorce rural policy from the existence of agriculture and food production as primary economic activities, but it is critical to recognize rural and agriculture are not the same thing. In 2005 I taught a one-credit course "The Law of Rural Development," and assembled a 600-page set of readings for the topic. I was surprised to find the broad diversity of organizations and institutions working on issues of rural poverty, housing, education, and economic development. Many of the groups face significant legal issues in operation, funding, and project implementation, meaning rural lawyers can be important resources to their work. Some of the representative issues in this area include:

- the work of community foundations as a source of economic support for charitable causes and local economic development and entrepreneurship. This topic is being addressed by the federally funded Center for Community Vitality at Iowa State University. (See [www.ccv.org](http://www.ccv.org).) Iowa has implemented a unique state funding mechanism as part of a recent expansion of casino licenses. The political concern was counties without casinos were missing out on the substantial infusion of charitable funds being given by gaming-based foundations. As a result the state implemented the Endow Iowa program, Iowa Code Sections 15E.303, et. seq., which allocates an annual pool of funds to one eligible community organization in each of the 85 counties without gaming facilities. Passage of the law and creation of this funding stream stimulated the creation of these organizations in all the counties without existing gaming based foundations.
- challenges caused by wealth transition and other demographic shifts in rural America. The critical issue here results from the decline in farm numbers and the exodus of farm heirs out of agriculture and rural America in recent decades coupled with the eventual death of the landowning parents. This combination means the ownership, control and economic benefits of farmland ownership are flowing largely to people who do not reside on the land or even in the state where it is located. This separation of ownership from operation has any number of policy implications, for example for land tenancy practices, but a critical issue concerns the economic shifts reflected in where the benefits of this wealth is experienced. Valuable legal and policy work is needed to identify how a portion of this wealth can remain or be harnessed in local initiatives, such as investments in ethanol plants or other forms of economic development, or better yet, making it possible for heirs to return to Iowa, either for retirement or to pursue new economic opportunities.

- the role of attorneys in rural communities working through the various USDA Rural Development programs. Many attorneys in rural America have worked with communities applying for federal funding for traditional infrastructure improvements of sewer and water or newer forms of development assistance such as broad-band access. USDA Rural Development offers a broad array of programs offering grants, loans, training and other services to rural businesses and communities. The diversity in these programs is surprising, and the levels of funding available is impressive, which means any lawyer practicing in Rural American needs to be familiar with the work of USDA Rural Development and especially to stay on top of new programs and initiatives developed by the agency. Rural development will be one of the most critical aspects of the next farm bill now scheduled for consideration in 2007. For information see [www.rurdev.usda.gov/](http://www.rurdev.usda.gov/).
  - greater use of micro-enterprise loan programs to support entrepreneurship and business development. The idea of “micro-enterprise” financing is providing loans at a scale smaller than traditional commercial lending, often to borrowers with non-traditional business ideas and credit histories. The Senate version of the 2002 farm bill included authorization for such a micro-enterprise lending program and it is predictable such approaches will be considered for inclusion in future efforts. See e.g. 2002 Farm Bill, Section 638 “Rural Entrepreneurs and Micro-enterprise Assistance Program.” The relative low cost of micro-finance programs and the flexibility in their design and operation make it likely the tool will see more significant use in the U.S. in years ahead.
  - producer marketing associations of various types, especially as operated within food-based businesses. Cooperatives and other forms of joint producer action have been a historic strong suit of rural America and farmers. Today the proliferation of business opportunities in agriculture and the evolution of business forms provide an overwhelming range of options for producers to consider and decipher. Regardless of the business form chosen, if it involves cooperative efforts of several individuals then a common set of issues must be addressed, including: ownership and control, decision making, liability and financing. To help producers and lawyers consider these issues the Drake University Agricultural Law Center in 2005 published The Farmers Legal Guide to Producer Marketing Associations, by Doug O’Brien, Neil Hamilton, and Robert Luedeman. We are pleased to provide each of you with a copy of that book as a gift of the Center, made possible with funding by the Farm Credit Foundation.
2. Regional food systems and local food identity – using food as a form of rural economic development

One of the most important forces creating opportunities for small scale and alternative farmers is the steady increase in demand for locally grown food. Efforts to diversify the types of crops grown by farmers and to broaden the array of marketing opportunities available to them has been a common ingredient in most of the efforts to promote

sustainable agriculture. The belief is broader crop diversity makes agriculture more resilient, opens opportunities for new producers and helps meet consumer demand. Alternative marketing systems, typically involving some form of direct marketing, can result in higher farm prices and in agriculture retaining a larger share of the consumer's food dollar. The Leopold Center for Sustainable Agriculture at Iowa State University has provided valuable national leadership on this issue through Rich Pirog and the Marketing and Food Systems Initiative. In 1999 the Agricultural Law Center published a SARE funded book The Farmers' Legal Guide to Direct Farm Marketing, which remains a popular seller today. Today the growth in demand for organic food and related developments such as the continued expansion of farmers' markets and other efforts to put a face on our food, combine to make alternative production and marketing an important aspect of agriculture and our food system. I have written extensively about the developments of local food systems and how this trend is part of a larger set of forces leading to what I have labeled Food Democracy. [See e.g., Food Democracy and the Future of American Values, 9 *Drake Journal of Agricultural Law* 9 (2004); and Food Democracy II: Revolution or Restoration? 1 *Journal of Food Law and Policy* 13, University of Arkansas, Spring 2005.]

One indicator of the growth in the local foods movement concerns farmers' markets. In 2005 Congress appropriated one million dollars for the USDA to provide farmers' market promotion grants, as authorized by the 2002 farm bill. In January the agency published guidelines for the grants and in May it received over 360 applications from 48 states totaling over \$20 million in requests. From a legal perspective the main opportunities for lawyers and rural practitioners in regard to local foods initiatives relate to providing farmers and other clients with information and contacts to the programs and resources designed to promote local foods. These opportunities include:

- expanding on the idea of "value-added agriculture." This term has become a commonly used, perhaps overused term in farm states, but it is an important issue, especially if it can be broadened to focus on what values are being added and what part of the added value is being retained by farmers and rural communities. One of the most important provisions of the 2002 farm bill was section 6401 creating the value-added agricultural product market development grant program. This popular program administered by the USDA Rural Development has provided millions of dollars to fund hundreds of projects through the country. [See [www.rurdev.usda.gov/rbs/coops/vadg.htm](http://www.rurdev.usda.gov/rbs/coops/vadg.htm).] It is an outstanding example of how a targeted grant program can be the catalyst for economic development involving food and alternative energy. A critical opportunity with value added agricultural funding is to consider the programs in a context larger than the interests of the farmers involved to recognize how food processing and distribution can be important forms of rural economic development bringing new jobs and business activities to rural communities.
- developing various forms of direct and higher value marketing efforts. Part of the increased attention to locally grown and farm fresh food is a function of the quality and taste values of the foods. The attention to food quality provides an

important way for consumers, chefs and other food marketers to make the connection between food quality and the existence of a farming sector to produce the food. In states across the nation a variety of programs have been developed in recent years to connect consumers with producers and to build on the creation of local food identities as a form of economic and social development. Efforts such as the “Buy Fresh Buy Local” program underway in Iowa and eleven other states illustrate this idea. In Minnesota publication of the book Renewing the Countryside, an effort led by the Institute for Agriculture and Trade Policy, has helped give form to the extensive network of food related economic developments taking place across the state. (See [www.mncountryside.org](http://www.mncountryside.org).) This publication has led to similar efforts in other states including a 2005 Renewing the Countryside: Iowa. Other initiatives include the Edible communities publication series that now includes an Edible Twin Cities. One of the most educational and helpful initiatives has been the wonderful 2005-2006 calendar “Minnesota Cooks: a farm to table tour of Minnesota” featuring Minnesota food and agriculture efforts, produced as a joint effort by the Minnesota Farmers Union, Food Alliance Midwest and Renewing the Countryside.

- identifying how state and local governments can support local food initiatives. State and local governments have in many instances been the most fertile ground for the developing and experimenting with efforts to support new markets for farm and food products, as evidenced by the current success of ethanol, a product which was for many years primarily the dream of state commodity promotion efforts. In a number of states the creation of state food policy councils have provided a mechanism for the systematic study of such opportunities. (See [www.statefoodpolicy.org](http://www.statefoodpolicy.org) for a discussion of different state and local efforts.) The Iowa Food Policy Council, which I chair, has worked for six years to develop and promote state policies to improve the opportunities in Iowa’s food and agriculture system. The Council’s most exciting new initiative is a joint pilot project between the Governor’s office, the Department of Administrative Services and the Drake University Agricultural Law Center to study institutional purchasing. A Drake employed food system specialist will spend the next six months studying how the state’s food purchasing system operates with the goal of making recommendations for how more Iowa grown and processed food can be utilized. At the county level, the Woodbury County Board of Supervisors has recently enacted several innovative food related policies, one offering a property tax break to any landowner converting land to organic production and another to require asset percentage of food purchased by the county to be locally grown organic food. [For more information contact Rob Marqusee, director, Rural Economic Development, 712/279-6609, or see [www.woodburyiowa.com](http://www.woodburyiowa.com).]
- considering how existing regulatory approaches might apply to efforts to promote local food marketing. A recent court case from Minnesota concerning the application of custom meat processing rules to people involved in direct marketing helps illustrate the role law and lawyers will play in efforts to expand marketing opportunities for locally grown foods. In State v. Hartmann, 700

N.W.2d 449 (Minn. 2005), a divided Minnesota Supreme Court considered whether a constitutional provision protecting the right of farmers to sell farm products without obtaining a license (M.S.A. Const. Art. 13 §7) protected a farm couple from prosecution for selling custom-processed meat in violation of Minn. Stat. §31A.10(4) of the Minnesota Meat and Poultry Inspection Act. A majority of the Court concluded that while the constitutional provision protected the farmer from needing a license to sell meat, the provision did not prohibit the state from imposing a requirement that the meat be processed in a state inspected facility licensed for such sales. While custom processed meat can be consumed at home and sold in portions prior to the animal being processed, such custom processed meat can't be sold in individual cuts or at retail. The dissent held the state had not shown sales of custom processed meat is a public health risk and that applying the inspection rule eviscerated the constitutional protection from licensing.

3. Natural resource conservation and recreation based opportunities to support economic development for farmland owners and rural communities

Two of the most significant changes occurring on the landscape of the Midwest are inter-related. The first concerns the gradual but not insignificant shift of portions of the land to non-farm uses with a primary focus on natural resource protection and outdoor recreation enhancement. The second concerns a new group of landowners who are becoming a force driving the marketing for farmland and shaping the look and economies of some regions. Both developments present challenges and opportunities for rural lawyers. In recent years a considerable amount of land has shifted from annual row crop production to more environmentally friendly long-term uses. Whether it is the restoration of tens of thousands of acres of wetlands under the Wetland Reserve Program, the continuing retirement of millions of acres under the Conservation Reserve, the utilization of new NRCS initiatives such as the grassland reserve or the wildlife habitat improvement program, or the private restoration of prairies and woodlands rural landowners have increasingly been taking some land out of farming. Some of the land use changes are being made by farmers who own the land, but many of the shifts in use are being made by a new generation of landowners. The new owners have purchased the land with the goal and intention of using it for non-crop production purposes. Whether they are hunters who want a place to bag a buck or nature lovers who want to restore prairies and wetlands to increase wildlife and their opportunities to enjoy nature, this new crop of owners have different goals and priorities from farmers trying to maximize annual yields. The effects of this shift in demand for farmland and its use can have several effects. First, it can add strength to the demand for farmland resulting in higher land prices - good if you are a seller but perhaps not so good if you are the neighboring farmer wanting to expand. Second, the desire to use the land for non-crop production may take land out of production and off the rental market, both with possible impacts on local economies. Third, the desire to use the resource, such as for hunting opportunities, may create conflicts with other local landowners and hunters who have historically used the property for these purposes. Similar conflicts can occur when current owners decide to close property to open use and instead lease it for private hunting or other fee based approaches. A recent article detailed the growth in fee hunting, see Jerry Perkins,

“Hunters Gaining Ground,” Des Moines Register, May 20, 2006, p. D1. There are many implications of these trends for rural practitioners, the most important include:

- learning how to work with land trusts. Today there are over 1500 land trusts in operation in the U.S. These are non-profit organizations created for the purpose of holding some form of interest in land with the goal of protecting or preserving certain natural or historic values. Land trusts can be very localized focusing on a particular site or can operate on a state-wide or national basis. [For more information on land trust, see the web site for the Land Trust Alliance, [www.lta.org](http://www.lta.org).] I serve on the board of the Iowa Natural Heritage Foundation, which has been in existence for over 25 years, has protected over 80,000 acres of land in more than 500 projects all across the state. There are a number of reasons why it is important for rural attorneys to become familiar with the work of land trusts. First, it is likely land trusts operate in your area or soon will. Second, the trusts often have the need for legal advice and counsel. Third, land trusts can be important allies in helping you carry out the objectives of landowning clients, especially those who wish to protect some natural features on their property. Finally, land trusts have considerable expertise to share on alternatives for structuring land transaction and can provide alternative methods of funding unique land protection efforts. For example the Iowa Natural Heritage Foundation has published a helpful guide, The Landowners Options: A guide to the voluntary protection of land in Iowa. [See [www.inhf.org](http://www.inhf.org).]
- the increased use of conservation easements to develop flexible approaches to land protection. One of the most valuable legal tools for use in protecting various natural resource features of property is the conservation easement. The basic idea is to separate the ownership of the fee interest and the protection of some feature or use subject to the easement. Conservation easements typically work to prevent certain more intensive uses which would interfere with the conservation objective, such as preventing home development in order to protect farmland. Anyone who has enrolled land in the Wetland Reserve Program has encountered a conservation easement in the form of the perpetual restriction USDA-NRCS places on use of the site for farming. Conservation easements are typically authorized under state law. For example Iowa Chapter 457A provides the authority for the creation and acceptance of conservation easements:

**457A.1 Acquisition by other than condemnation** – The department of natural resources, soil and water conservation district as provided in chapter 161A, the historical division of the department of cultural affairs, the state archaeologist appointed by the state board of regents pursuant to section 263B.1, any county conservation board, and any city or agency of a city may acquire by purchase, gift, contract, or other voluntary means, but not by eminent domain, conservation easements in land to preserve scenic beauty, wildlife habitat, riparian lands, wetlands, or forests; promote outdoor recreation, agriculture, soil and water conservation or open space; or otherwise conserve for the benefit of the public the natural

beauty, natural and cultural resources, and public recreation facilities of the state.

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

**457A.8 Privately held easements** – A conservation easement may be held by a private, nonprofit organization for public benefit if the instrument granting the easement or the bylaws of the organization provide that the easement will be transferred to a public body or another private nonprofit organization upon the dissolution of the private, nonprofit organization. A conservation easement meeting these requirements acquired after July 1, 1984 is transferable and perpetual as provided in section 457A.2.

This provision is the authority for land trusts such as the Iowa Natural Heritage Foundation to accept and hold conservation easements. If you are interested in learning more about using conservation easements I encourage you to obtain The Conservation Easement Handbook, 2nd Edition by Michelle Byers and Karin Marchetti Ponte, published in 2005 by the Land Trust Alliance.

- using land conservation and outdoor recreation as a form of rural economic development. Admittedly the history of Minnesota has been a convergence of agricultural development and appreciation for natural resources such as your thousands of lakes. But other farming states such as Iowa have not been as blessed with natural resources providing such rich inherent recreation potential. As a result many regions are now having to consider how their existing natural resources or those which can be restored can serve as the basis for outdoor recreation and natural resource based development. The Upper Mississippi Blufflands is an excellent example of how attractive physical beauty combined with efforts to expand recreation and other economic opportunities can help bring new vigor and populations to a region. Of course development is not without its own risks, which is one way a land trust can be of value in helping create mechanisms to identify and protect the resources which help give identity to a place. In Iowa one of the most exciting examples of an effort to combine large-scale private natural resource protection with regional economic development based on outdoor recreation and tourism is the story of the Whiterock Conservancy in Coon Rapids. The Whiterock Conservancy is a 5,000 acre preserve along five miles of the Raccoon River created by the Garst family, famous for their involvement in seed corn production and agricultural based diplomacy. This initiative is the result of the family’s long term commitment to natural resource conservation and a belief rural Iowa needs to diversify its economic basis to include eco-tourism and opportunities to connect people with

- the outdoors. The effort is utilizing a series of land donations, conservation easements, and an Iowa “Great Places” initiative. The management is based on a partnership between the Iowa Department of Natural Resources, the Leopold Center for Sustainable Agriculture and the Iowa Natural Heritage Foundation. [For more information, see [www.whiterockconservancy.org](http://www.whiterockconservancy.org).] One issue in connection with efforts to promote the use of outdoor recreation for economic developments concerns the availability of public funds to acquire land for such uses. In 2006 the Minnesota legislature considered a bill S.F. 2734 which in Article 1 amends the Minnesota Constitution to dedicate 1/8 of 1 cent of the sales tax for “hunter and angler access, and for fish and enhancement purposes.” [See <http://www.house.leg.state.mn.us/hrd/bs/84/sf2734ue1.html>.] In 2006 the Iowa legislature created an interim study committee to study the issue of supplemental funding for outdoor recreation and land acquisition.
- using eco-system services as a way to broaden the “products” produced by agriculture. Eco-system service is probably a term you have yet to encounter. The premise is if we could place an economic value on the environmental values derived from certain land uses, e.g. the value of clean water coming out of a restored wetland, rather than just on the products with a market value such as a bushel of corn, then we would be better equipped to compare and appreciate the social value of various land uses. Many law professors, environmentalists and economists are involved in efforts to expand the understanding of eco-system services, which includes the valuable exercise of identifying which services land is providing. Clearly agriculture is an economic use of land producing many services beyond the mere production of commodities. Open space, wildlife habitat, aquifer recharge, water quality improvement, and soil conservation are all among the types of services possible from agriculture. It is important to stress the possible because it is also clear agriculture has the potential to provide many negative impacts such as air pollution through odors, or water pollution through over use of nitrogen fertilizers. The key is thinking about how the uses on the land impact its environmental performance. By way of example, the CRP is basically a government program which pays landowners more to produce wildlife habitat and soil conservation than for more crop production. The opportunity facing agriculture is how the idea of eco-system services can be incorporated into future policy making such as the 2007 farm bill.
4. Developing a performance based and integrated approach to soil and water conservation, using federal farm programs and public support for environmental protection to provide consistent financial incentives for sustainable agriculture

When the history of 20th Century American farm policy is written the Conservation Title of the 1985 farm bill will earn its place as among the most significant developments and innovations in American farm policy and in the nation’s efforts to promote environmental stewardship with farmers and farmland owners. Over the last 20 years NRCS implementation of the programs created in that law - conservation compliance, swampbuster, sodbuster, and the conservation reserve program (CRP) – have left an

indelible stamp on America's rural countryside and on the practices of landowners. Undoubtedly great progress has been made in conserving soil and water, in creating wildlife habitat and in protecting fragile lands. But conservation is not something that stays done by its own inertia. It is a process that requires the continuing involvement and commitment of farmers and landowners in the decisions they make about how the land is used. In recent years it has become apparent there is a growing fatigue in our commitment to soil conservation and a shift in perception of the federal conservation provisions as active restraints on damaging farming practices. The desire to develop new more effective approaches to supporting environmental stewardship is in part what led Senator Harkin and others to promote the Conservation Security Program (CSP) as perhaps the most significant innovation in the 2002 farm bill. The key policy opportunity is to develop effective methods to integrate traditional conservation type programs such as those administered by the USDA with environmental protection based programs such as the Clean Water Act, which may deal with the same resources but come from a different legal orientation. The expansion of funding for the USDA's Environmental Quality Incentives Program (EQIP) to cover waste handling facilities in livestock operations is an example of such integration. [For information on EQIP, see <http://www.nrcs.usda.gov/programs/eqip/>.] Attorneys working in rural America will play an important role in both the development and implementation of new conservation and environmental programs, in helping farm clients understand the laws and in designing and refining the tools used to implement the programs. Some of the specific opportunities facing rural America in this regard include:

- assisting producers in enrolling in the Conservation Security Program (CSP) and supporting efforts to expand the program. The CSP focuses on working lands as opposed to land retirement efforts, and it represents the most significant innovation in conservation law since the enactment of the 1985 conservation title. One innovation of the program is use of a watershed-based approach for farmer eligibility. The program makes available a sliding scale of per acre payments determined based on the types of practices the farmer agrees to implement. The agency is using a one time sign-up by watershed meaning if a landowner does not apply to participate when eligible it could be seven or eight years before another opportunity comes along. While the road to funding and implementation of the program has not been smooth, USDA has now developed the mechanisms for its use and farmers who have been selected for participation have found it to be a valuable program. One of the most critical challenges to the future of the CSP will be the political support among farmers and rural communities for Congressional funding. For information about the CSP and the regulations used to implement it, see <http://www.nrcs.usda.gov/programs/csp/>.
- innovations in the Conservation Reserve Program (CRP) to support the transition to livestock production. Attorneys practicing in rural America know the CRP has been an extremely popular program with farmers and landowners, with over 35 million acres enrolled and close to \$2 billion in land rental payments made each year. But the CRP has also caused significant shifts in local economies and has proved to be an expensive way to obtain conservation. Efforts to open CRP

ground to some forms of farm use, such as allowing haying and grazing during droughts, can be controversial to those who view the program as primarily environmental protection. But it seems clear one opportunity the conservation community will continue to explore is how the CRP can be enhanced to reduce its cost but retain its conservation values while allowing forms of compatible economic use. The potential movement of erosive land out of the CRP back into row crop production is a legitimate worry which should stimulate the search for alternatives. One example is allowing use of the ground, such as the hill country of southern Iowa, for cattle grazing. While western ranchers grazing cattle on subsidized federal rangeland will no doubt oppose the effort, it is an example of the type of innovation we should consider.

- using performance based systems to evaluate producers with more focus on conservation compliance and planning. One criticism some observers make of current conservation programs is the apparent unwillingness on the part of the USDA to actively enforce conservation compliance requirements. While there are some examples of producers losing farm program benefits for failing to implement conservation plan requirements, their infrequency and the general attitude in farm country mean most producers do not see the risk of losing payments as an incentive for conservation. While it is not necessary for the programs to operate as a whip for them to be effective, if there is no fear of penalty then their value as a restraint is weakened. One result of this situation is a renewed attention among some in the conservation community to developing more objective performance based indicators as a way to evaluate compliance. Performance based indicators might be such things as actual testing of water quality or evaluation of sediment loads reaching stream segments of watersheds. The premise is that more refined objective measurements will have several benefits – revealing the effectiveness of practices, identifying continued sources of soil loss and water pollution, and creating measurements to reward or penalize landowners for their actions.

##### 5. Alternative energy policy and the effect on agriculture

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

the rapid development and emergence of agriculture as an energy supplier is beyond the scope of this talk. These topics will soon make the subject of a much-needed legal conference. In fact, later this month the Farm Foundation is sponsoring a two-day conference in Kansas City, titled “Energy in Agriculture: Managing the Risk.” [For more information on the conference see <http://www.farmfoundation.org/projects/06-34EnergyInAgManagingRisk.htm>.]

There is little question but that rural practitioners will be involved in these alternative energy efforts in various ways: as counsel for the producer groups, as investors, as advisors on funding opportunities, or as lawyers trying to assist individuals and communities deal with the results of such efforts. At this point in the process everyone is focusing on the potential and positives that can come to agriculture and farm communities from new markets for farm products and energy supplies. Some of these economic opportunities are real and represent important new avenues of employment and income for rural America. But anyone who lived through the farm crisis knows that what goes up can come down and what is now hailed as salvation can in the future trigger pleas for mercy and redemption. No doubt many of the ethanol and bio-diesel initiatives now being formed will succeed and lead to large profits. Reports from farm country indicate this has already been the case. But there have also been incidents of poor planning and deceit leaving some farm investors holding significant losses and bags of empty promises. The shift to energy production in agriculture will provide an important opportunity for the legal community to provide much needed leadership and service to agriculture and rural America. It is critical that in our push to use farming as an energy source that the economic impacts on farmers, rural residents and communities are addressed and any environmental issues related to this new pressure on the land are considered. A brief listing of the legal issues involved in this regard include:

- questions of how the economic benefits are being allocated from ethanol and bio-diesel plants, which in part relates to the organizational choices and business structures being used by producers.
- understanding how the environmental impacts, such as increased water use and air pollution, are being addressed or ignored. Because most of the energy sources are produced from farm commodities it is important to consider how these new sources of demand may impact water and soil conservation and water quality.
- creation of new energy supplies will also implicate the application of existing regulatory systems for utilities and energy distribution. Policy questions such as the prices being paid by utilities to the owners of on-farm wind generators, will lead to conflicts such as an Iowa case now in litigation.

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