

# Agricultural Law

The newsletter of the Illinois State Bar Association's Section on Agricultural Law

## Climate Change Theory and Agricultural Law in 2022

BY ALAN E. STUMPF

We are seeing incentive driven technology advocated for those in agricultural production. The legal context of administrative law and the Clean Air Act at 42 USCA Section 7411(a)(1) provides an analytical problem to explain before those who can afford to litigate regulations can elect to file suits contesting new environmental regulations.

Jonathan Coppess introduces us to the legal theories discussed in his ag law class in his April 7, 2022, *Farmdoc* discussion about “constitutional textualism.” See <https://farmdocdaily.illinois.edu/2022/04/another-curious-case-for-the-supreme-court-a-test-for-textualism.html>.

Our clients' decisions to produce and  
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## Report From the November 2021 AALA Conference

BY LYNNE R. OSTFELD

The American Agricultural Law Association (AALA) had its 2021 conference in Salt Lake City, Utah, this past fall. Attendees came from all over the United States. The four tracks this year were: Policy, Private Practitioner, Food Law, In-House/Corporate Counsel. All the presentations were excellent and informative, but two topics stood out: issues for the Native American and food issues.

### Native Food

There was a special concentration on issues found on Indian Reservations. Janie Hipp, general counsel of the USDA, is also

a member of the Choctaw Nation and a founding member of Indigenous Food Initiative. She talked about the food access problems they have, such as having over 5 million farmers in the 1980's and 2 million today. It may not be sustainable. There is a reduction in the people and services they need: big animal veterinarians, grocery stores, processing plants. It is more difficult to deliver food than staples. They also need agriculture tax specialists, having only 15 agricultural tax specialists, as well as needing jobs for young agricultural lawyers

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## Climate Change Theory and Agricultural Law in 2022

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spend are increasingly governed by EPA regulations. The justification for increased regulations is we should liberally construe the Clean Air Act to protect public health and welfare by using the “best system for emission reduction” both on and off the production site. These emission rules increasingly focus on greenhouse gas emissions (GHG).

Understanding the SCOTUS cases cited in the article, such as *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *Util. Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *Michigan v. EPA*, 576 U.S. 743, 751 (2015), will be needed to provide sound advice. Advocating changes to these rules based on sound public policy will be difficult.

The litigation seems to raise the question, does a “best system” mean anything new? We are reading about new advances in energy technology and chemistry every day that may apply to the textual “best system.” It would seem that interpreting the word “best” will test the bounds of the word “reasonable” in our legal system. I ask these questions:

“What happens when the government

runs out of money to promote anything new?”

“How long will ESG mechanisms in corporate management be paid for by the consumer and producer (inflation)?”

“Will our courts and not our agencies be the final arbiters of the cost-benefit analysis?”

This discussion may soon be guided by our SCOTUS in the case, *West Virginia v. EPA*, cert. granted October 29, 2021, 140 S.Ct. 420. Oral arguments were made on February 28, 2022. Applicable constitutional arguments, briefing and the docket for this case in the SCOTUS can be reviewed at <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1530.html>.

Recent USDA announcements appear to “go slow” on these regulations in the agricultural sector as available science is being considered, but nevertheless GHG regulations are being considered as our clients start planting and fertilizing their spring crops.

Thank you, Jon, for your thought provoking Farmdoc articles on administrative law. ■

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on the reservation, or even just in rural areas where they can help the farmer.

She joined Sarah Vogel<sup>1</sup> and Colby Duren<sup>2</sup> to discuss problems with the Native American Food Economies (“NAAF”).

COVID-19 brought to the forefront the gaps and insecurity in the food structure. The pandemic showed the problem with the lack of broadband in Indian country. Their supplies and customers shut down immediately because they did not have access to broadband to work through the problems.

There are food hubs throughout Indian country. The goal is to use them to keep the

food dollar value in the community. The goal is to build together so that the burden and cost do not fall on just one tribal government.

A problem is that small- and mid-sized businesses are primarily what operate in Indian Country and it has been difficult to deal with the FDA because they are so small.

There is an increasing recognition of tribal sovereignty at the USDA, that they have to work through tribal law. Nothing happens without the tribal nations acting in their sovereignty. The Bureau of Indian Affairs has a lot of say about what goes on in

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Indian Country, but personnel often do not show up.

Now the Native Farm Coalition is trying to work with the USDA. It started with the 2018 Farm bill. The youth are starting to step up. There is cynicism to deal with the FDA and USDA but the youth are starting to step up and work with each other.

The tribes can insert their traditional ecological knowledge. There can be tribal values.

Tribal law is on a par with federal law and over state law. But if it wants to go interstate then it has to adhere to federal and state law.

## Food Law Update

Susan Schneider<sup>3</sup>, gave an update on food law and talked about how we are in a changing world.

The pandemic showcased the inequities within the food system. Some people could stay home and order on-line. Some people worked within the system, like the Tyson worker, or the person who had to show up at the grocery store to work.

The pandemic showed that the affluent became more affluent and the poor became poorer. We saw how many people are one crisis away from hunger.

Many restaurants have closed.

We had supply chain problems throughout the COVID lockdown. The focus on efficiency can come at the expense of resilience. There are many things that can go wrong in the system.

Food insecurity is better in 2021 than in 2020. However, one in eight people in the U.S. will experience food insecurity—12.9 percent or 42 million, and 17.9 percent or 13 million children. There is incredible racial disparity: whites, 11.1 percent; blacks, 21.3 percent. It is even higher in Indian country than among the black population. Food insecurity is 13.3 percent in rural counties versus 12.1 percent in urban counties.

Programs are increasing to help both the farmer and the consumer. Local economies have benefitted from SNAP programs: \$1 SNAP converts to \$1.80 local economic activity. Both Walmart and Dollar General in rural areas have seen a benefit to the local economy because SNAP cards can be used there.

As to diet related problems, half of the

American population is considered pre-diabetic or diabetic. Obesity is a serious problem: 40 percent of Americans are obese; 70 percent are overweight or obese. Obesity is why 71 percent of Americans cannot get into the military. Further, diet related diseases pose a major risk for COVID-19 but the US over-looks them.

The Senate held a hearing in November 2021 about the problems with ultra-processed foods, addictive qualities of food formulations, marketing problems, and empty calories.

There are a lot of important issues with advertising and whether and how it should be regulated.

President Nixon had a Whitehouse Conference on Food, Nutrition, Hunger and Health to end hunger for all time. There is a new call for another one. Most of today's policies came from the Nixon conference.

Food labeling is also a big issue. A lot of things are going on with food labeling but not so much with the FDA. It is a slow process. Pharmaceuticals have taken more attention.

Questions go to what it means to be healthy? What claims can food labels make. The FDA is working on a symbol for "healthy," but we do not really know what "healthy" is.

There are issues regarding labels for things that are other than what tradition has held them to be, such as milk and almond milk. In September, the FDA did a notice of comment about labelling. What should cell cultured products be called? The FDA has not defined natural and is steadfastly opposed to wasting their time on this issue. The FDA will take charge of the initial stages but then the USDA will take over. USDA will take charge of meats and poultry but there are other foods like seafood and eggs. Who will regulate what? The FDA regulates shell eggs but USDA regulates eggs in other forms.

There has been an explosion in food labeling litigation. Sometimes the lawyers make the money and the consumer only gets a coupon to buy something. But this is a means to beat back fraudulent labeling.

Food safety is a constant issue. There are two petitions before the USDA arguing that something needs to be done about salmonella in fish and poultry products. We

are trying to figure out how to do it better.

The new term is "pre-harvest" control: too many chickens coming through the system with a lack of control. The USDA does not have control over the farm, just the processor. But many processors also own the poultry farm.

Finally, we have the ever-discussed issue of food and climate change. We do not have water supplies to continue farming like we do.

The food system is a significant contributor to green-house gases.

The 2022 conference will be held in New Orleans, November 10-12, 2022. ■

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1. Sarah Vogel, Sarah Vogel Law, Bismark, ND. She is author of "The Farmer's Lawyer, the North Dakota Nine and the Fight to Save the Family Farm." (2021).

2. Colby Duren, Intertribal Agriculture Council/Native Farm Bill Coalition, Billings, MT.

3. Susan Schneider teaches at the Arkansas School of Law and serves as the Director of the law school's advanced degree program, the L.L.M Program in Agricultural & Food Law. [sschneid@uark.edu](mailto:sschneid@uark.edu).



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