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Mediating Farm Nuisance: Comparing New Jersey, Missouri, and Iowa Right to Farm Laws and How They Utilize Mediation Techniques

GINA MORONI*

I. INTRODUCTION

My neighbor farms hogs,
Stinky, smelly, stenchy hogs,
Right to farm or harm?¹

Is it a right to farm, or a right to be a bad neighbor? The ability to sue a neighbor who farms claiming nuisance is largely dependent on each state's right to farm law. Just because there is a nuisance claim that *can* be filed in court does not necessarily mean the complaint *should* be heard in court. Instead, mediation can be a low cost, confidential, and even binding² alternative which helps parties resolve their disputes in creative ways. Section II of this Comment examines what right to farm laws do, the agricultural dynamics that led to the creation of the first right to farm laws, and how the laws are currently changing. Section III examines mediation and the USDA's agricultural mediation program. Sections IV, V, and VI examine the right to farm laws in Iowa, New Jersey, and Missouri including how each of these states utilizes mediation techniques to resolve the disputes. Finally, Section VII compares these three states mediation techniques for right to farm issues and ultimately concludes that the decision to mediate depends on your interests.

II. RIGHT TO FARM

A. *What are Right to Farm Laws?*

The primary goal of "right to farm" laws is to protect farmers from nuisance lawsuits.³ All 50 states have adopted some form of a right to farm statute.⁴ These statutes are not all the same, but many share similar approaches.⁵ Most consider

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1. Gina Moroni original haiku April 21, 2017 (unpublished).

2. Yes, binding. Where mediation is typically not binding and parties are free to leave the mediation at any time and settle a dispute in court, many states have set up Agricultural Mediation Services that create a legally binding agreement that acts like a contract. *See, e.g.*, FAQ, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/faq/> (last visited Aug. 31, 2017).

3. 13-124 Agricultural Law § 124.02[1].

4. Kyle Weldon & Elizabeth Rumley, *States' Right-to-Farm Statutes*, NATIONAL AGRICULTURAL LAW CENTER, <http://nationalaglawcenter.org/state-compilations/right-to-farm/> (last visited Aug. 31, 2017).

5. 13-124 Agricultural Law § 124.02[2][a].

three factors: “(1) which agricultural operations are covered; (2) the conditions for obtaining the protection; and (3) the scope of the protection.”⁶

Generally, right to farm statutes define the type of agricultural operations that are covered.⁷ These operations may be defined broadly by encompassing all people engaged in producing agricultural products, or may be limited to protecting farmers engaged in operations of only a certain size or value.⁸ In addition, agricultural processors, like slaughterhouses and cotton gins, typically qualify as agricultural operations under these laws.⁹

Before an agricultural operation may be considered protected by right to farm laws, certain variables typically must be met.¹⁰ The three variables most often considered are: (1) urban sprawl and land use changes; (2) how long the operation has been in existence; and (3) how the operation has functioned since it was established.¹¹ In other words, these limitations create a “first in time” rule and place statutes of limitations for those bringing complaints; otherwise the operation is considered protected by the right to farm laws.¹² For example, right to farm laws were traditionally created to codify the “coming to the nuisance” defense for farmers, which protects farming operations from nuisance complaints caused by urban sprawl.¹³

Finally, the scope of protection offered by right to farm laws vary from state to state. Most states protect qualified operations from both public and private nuisances.¹⁴ In addition, many states limit local government’s ability to zone out agriculture as a nuisance, or otherwise regulate agriculture.¹⁵ The nuisance protections help safeguard farming operations as well as protect the agricultural economy in the state.¹⁶

B. Farming up to the 1970s: Creating the Environment for Right to Farm Laws

The first right to farm laws were created in the 1970s in response to changes in the agricultural industry.¹⁷ These changes will be addressed in this Section. During the 20th century, American agriculture underwent a significant transformation.¹⁸ At

6. *Id.*

7. Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1708 (1998).

8. *Id.*

9. *Id.* at 1708-09.

10. *Id.* at 1710.

11. *Id.*

12. *Id.* at 1711.

13. Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 104, (1998).

14. Reinert *supra* note 7 at 1713.

15. *Id.*

16. For example, New Jersey passed its right to farm law in part to protect the agricultural industry in the state because the legislature found that industry to be a vital industry for the state. Agricultural Mediation Program, Fact Sheet, United States Department of Agriculture, Farm Services Agency, (Revised August 2013) https://www.fsa.usda.gov/Internet/FSA_File/ag_mediation_program.pdf.

17. *Right-to-Farm Laws: History & Future*, FARM FOUNDATION 1, <http://www.farmfoundation.org/news/articlefiles/129-hipp.pdf>.

18. Carolyn Dimitri, Anne Efland & Neilson Conklin, *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, U.S. DEP’T OF AGRIC. 2 (2005), https://www.ers.usda.gov/webdocs/publications/44197/13566_eib3_1_1.pdf?v=41055.

the beginning of the 20th century, farms were typically small, located in rural areas, very labor intensive, and each raised a wide range of products including both animals and crops.¹⁹ At the turn of the 20th century, over half of the U.S. population lived in rural areas²⁰ and 41 percent of the workforce was employed in agriculture.²¹

The Smith-Lever Act of 1914 created a system of agricultural extension services associated with federal land-grant universities²² to help educate rural farmers about advances in farming practices and technology.²³ Shortly thereafter, the Smith-Hughes Act brought agriculture into the classroom by creating a vocational agricultural (“vo-ag”) system that emphasized agricultural job training.²⁴ These acts quickly led to the formation of two of the largest national agricultural organizations for youth, 4-H and Future Farmers of America (“FFA”).²⁵

By the 1930’s, farmers commonly used hybrid seed corn for growing row crops.²⁶ In 1935, the Agricultural Adjustment Act created soil conservation measures and established nonrecourse federal loans so that farmers could retain their crops until they were able to sell them for an adequate price.²⁷ Additionally, in 1935, the Bankhead-Jones Agricultural Research Act increased the funding for agricultural extension offices and put those resources under the administration of the Secretary of Agriculture.²⁸

During the 1940s-1960s, additional acts were passed that expanded agricultural education²⁹ and created more ethical accountability for agricultural activities, especially in animal agriculture.³⁰ Participation in farm organizations and movements

19. *Id.*

20. *Id.*

21. *Id.*

22. The Morrill Act of 1862 set up the system of Land Grant Institutions which are today federally mandated “to provide instruction in agriculture and the mechanical arts, conduct agricultural research, and deliver knowledge and practical information to farmers and consumers.” NATIONAL RESEARCH COUNCIL, COLLEGES OF AGRICULTURE AND THE LAND GRANT UNIVERSITIES: A PROFILE 2 (1995), <https://www.nap.edu/read/4980/chapter/2>.

23. *Smith Lever Act of 1914*, NATIONAL ARCHIVES FOUNDATION, <https://www.archivesfoundation.org/documents/smith-lever-act-1914/>.

24. Eric Lynch, *High School Vocational Education: Past and Present*, CALPRO-ONLINE 7-8, <http://www.calpro-online.org/eric/docs/lynch/lynch3.pdf>.

25. *See 4-H History*, 4-H, <http://4-h.org/about/history/>. *See also FFA History*, NATIONAL FFA ORGANIZATION, <https://www.ffa.org/about/what-is-ffa/ffa-history>.

26. *Historical Timeline- 1930*, GROWING A NATION: THE STORY OF AMERICAN AGRICULTURE, <https://www.agclassroom.org/gan/timeline/1930.htm> (last visited Aug. 31, 2017).

27. *Agricultural Adjustment Act of 1938*, WHAT-WHEN-HOW, <http://what-when-how.com/the-american-economy/agricultural-adjustment-act-of-1938/> (last visited Aug. 31, 2017).

28. James G. Maddox, *The Bankhead-Jones Farm Tenant Act*, DUKE LAW SCHOLARSHIP REPOSITORY, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1875&context=lcp>.

29. *See, e.g.*, Thomas C. Hunt, *National Defense Education Act*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/National-Defense-Education-Act> (The National Defense Education Act of 1958 “provides funding to improve American schools and to promote postsecondary education.”); *Historical Timeline-1960*, GROWING A NATION: A STORY OF AMERICAN AGRICULTURE, <https://www.agclassroom.org/gan/timeline/1960.htm> (“Antipoverty programs lead to expansion of extension education programs in inner cities.”); *Historical Timeline-1940*, GROWING A NATION: A STORY OF AMERICAN AGRICULTURE, <https://www.agclassroom.org/gan/timeline/1940.htm> (the G.I. bill increases enrollment in land-grant institutions.).

30. *See, e.g.*, *Historical Timeline-1950*, GROWING A NATION: A STORY OF AMERICAN AGRICULTURE, <https://www.agclassroom.org/gan/timeline/1950.htm> (In 1956, the Soil Bank Program was authorized. In 1957, the Poultry Inspection Act was passed. In 1958, the Humane Slaughter Act was passed.). *See also, Historical Timeline-1960, supra* note 29 (In 1967, the Wholesome Meat Act was passed. In 1968, the Wholesome Poultry “Products Act” was passed.).

increased.³¹ Agriculture became much more involved with other scientific fields, which led to farmers using larger amounts of chemical fertilizers, insecticides, and herbicides in crop production.³² Furthermore, life on the farm modernized with the expansion of electricity and the telephone into rural areas and farms.³³

By the 1970s, the agricultural industry had been revolutionized. The Agrarian Creed,³⁴ which considered farming to be a wholesome lifestyle was replaced by the FFA Creed,³⁵ which encouraged the advancement of modern agricultural trends and practices. The tractor replaced the mule.³⁶ The use of commercial fertilizer by farmers had reached an all-time high.³⁷ Finally, farmers were more educated about their trade than ever before because of the land-grant education system, the Department of Agriculture, agricultural extension services, vocational agriculture programs, and agricultural youth organizations like 4-H and FFA.³⁸

Animal agriculture was one of the areas that changed the most leading up to the 1980s. In the early 1900s, the traditional American farm raised a variety of livestock and crops, but that was soon to change.³⁹ Factory farming began with chickens in the late 1920s.⁴⁰ By the 1970s, factory farms began keeping a million or more hens in one location for egg production.⁴¹ The number of farms with dairy

31. See, e.g., *Historical Timeline-1940*, *supra* note 29 (In 1947, the National Farm Labor Union organized a strike among California farmworkers.); see also, *Historical Timeline-1950*, *supra* note 30 (In the 1950s there were “10,051 cooperatives with 7 million members.” In 1955, the National Farmers Organization was formed.); also *Historical Timeline-1960*, *supra* note 29 (In the 1960s the United Farm Workers Organizing Committee began unionizing California farmworkers and commodity groups moved to the forefront of Congressional influence. In 1966, the “Fair Labor Standards Act extended to include agricultural labor ... [and the] [f]ederal minimum wage extended to some farmworkers.”).

32. DON PAARLBERG & PHILIP PAARLBERG, *THE AGRICULTURAL REVOLUTION OF THE 20TH CENTURY* 32, 38-39 (1st ed., 2000).

33. *Historical Timeline-1940*, *supra* note 29 (By 1940, “58% of all farms have cars; 25% have phones; [and] 33% have electricity.”); *Historical Timeline-1950*, *supra* note 30 (By 1954, “70.9% of all farms have cars; 49% have phones; 93% have electricity; [and] Social Security coverage extended to farm operators.”); *Historical Timeline-1960*, *supra* note 29 (By 1968, “83% of all farms have phones; [and] 98.4% have electricity.”).

34. DON PAARLBERG & PHILIP PAARLBERG, *supra* note 32 at 6 (The Agrarian Creed is as follows: “1. Farmers are good citizens, and a high percentage of our population should be on farms. 2. Farming is not only a job but a way of life. 3. Farming should be a family enterprise. 4. The land should be owned by the one who tills it. 5. It is good to make two blades of grass grow where only one grew before. 6. Anyone who wants to farm should be free to do so. 7. Farmers should be their own bosses. 8. As agriculture goes, so goes the nation.”).

35. See *FFA Creed*, NATIONAL FFA ORGANIZATION, <https://www.ffa.org/about/who-we-are/ffa-creed> (The FFA Creed was written by E.M. Tiffany and adopted in 1930.).

36. DON PAARLBERG & PHILIP PAARLBERG, *supra* note 32 at 24 (“From 1940 to 1950, the number of tractors increased from 1.6 to 3.4 million (Cochrane, 1979). The number of horses and mules peaked at 26 million in 1919; by 1955 the number had fallen to about 4 million, many of which were riding horses for recreation rather than farm work.”).

37. *Fertilizer*, LIVING HISTORY FARM, http://www.livinghistoryfarm.org/farminginthe50s/crops_06.html.

38. See *supra* notes 17-37.

39. U.S. Bureau of the Census, *Agriculture 1950: Changes in Agriculture, 1900 to 1950*, in U.S. CENSUS OF AGRICULTURE: 1950 69, <https://www2.census.gov/prod2/decennial/documents/41667073v5p6ch4.pdf>. (“In 1900, the farmer performed chores by hand, plowed with a walking plow, forked hay, milked by hand, and went to town once a week...”).

40. *Factory Farming: In The Beginning Unintended Consequences*, FACTORY-FARMING.COM, http://www.factory-farming.com/factory_farming.html (“Factory farming started with chickens and first appeared on the scene in 1926.”).

41. *Id.* (“It wasn’t until the early 1970’s that the first giant animal factories appeared and they were for egg production. In California, a farm began keeping 3 million hens in one locale although the entire flock had to be destroyed due to rampant disease from keeping so many chickens so closely confined.”).

cattle decreased from 3.65 million in 1950 to just 278 thousand in the 1980s, leading to operations with significantly more animals, but fewer farms overall.⁴² Corporate farms discovered they could maximize profit by raising large quantities of pigs and selling them at low costs, effectively forcing many small hog farms out of business, and reducing the diversity of productions who once raised hogs on the side.⁴³ The modernization of animal agriculture that began in the 1900s led to the development of Concentrated Animal Feeding Operations (“CAFOs”) that have become the major source of animal agriculture today.⁴⁴

All of these changes on the farm led to an evolution in demographics.⁴⁵ Once farms began specializing in only one or two agricultural products and began using better technology, the land size of most farms increased while the overall number of farms and workers decreased.⁴⁶ The majority of the U.S. population shifted to cities and towns that were growing beyond their limits leading to urban sprawl that began encroaching on many farms.⁴⁷ In the 1970s, rural land was being converted to urban land at a rate of up to one million acres per year.⁴⁸

In the 1970s and 1980s, urban sprawl placed people who had never been around farming operations right next door to one.⁴⁹ The charm of living next to a farm was often short lived, as the new neighbors’ perceptions of a farm and rural living collided with its reality.⁵⁰ It didn’t take long for the new neighbors to begin complaining about the side effects of their agricultural neighbors.⁵¹ These new neighbors would often file their complaints as nuisance lawsuits in local courts.⁵² The nuisances they claimed typically stemmed from noise, odor, flies, and dust caused by

42. *Id.*

43. *Id.*

44. *Animal Feeding Operations*, U.S. DEP’T OF AGRICULTURE, www.usda.gov, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/af0/>.

45. See, e.g., *Shrinking Farm Numbers*, LIVING HISTORY FARM, http://www.livinghistory-farm.org/farminginthe50s/life_11.html.

46. *Id.* (“Between 1950 and 1970, the number of farm[s] declined by half before leveling off. More farms were consolidated or sold during this period than in any other period in our history. The number of people on farms dropped from over 20 million in 1950 to less than 10 million in 1970. The average size of farms went from around 205 acres in 1950 to almost 400 acres in 1969. At the same time, productivity increased – farmers were producing even more food at a cheaper cost to consumers on roughly the same amount of farmland in the country.”).

47. *Right to Farm Laws: History and Future*, *supra* note 17 (“Losses of agricultural land were occurring in that period of our history from conflicts in potential uses of agricultural land and from the rising tide of urban encroachment into traditional agricultural areas.”).

48. Marlow Vesterby, Ralph E. Heimlich & Kenneth S. Krupa, *Urbanization of Rural Land use in the United States*, USDA Agricultural Economic Report 673 6.

Marlow Vesterby, Ralph E. Heimlich & Kenneth S. Krupa, *Major Uses of Land in the United States, 1997*, in U.S. DEP’T OF AGRIC. 10, https://www.ers.usda.gov/webdocs/publications/47144/13203_sb973_1_1.pdf?v=41056,

49. *Right to Farm Laws: History and Future*, *supra* note 17 (“Persons not involved in farming were beginning to move into traditional agricultural areas and with them they were bringing new complaints concerning the way agricultural is: complaints concerning odor, flies, dust, noise from field work, spraying of farm chemicals, slow moving farm machinery, and other necessary byproducts of farming operations.”).

50. Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN L. REV. 159, 165 (“Because views of the rural are now frequently formed at a distance rather than through direct experience, they are more likely to be based on stereotypes.”).

51. *Right to Farm Laws: History and Future*, *supra* note 17.

52. *Id.*

farming operations.⁵³ Farmers, who typically lived in the area before their neighbors, would often unsuccessfully use a “came to the nuisance” defense.⁵⁴ Regardless of the outcome, the cost of these lawsuits would have serious economic effects on the farmers and sometimes even force them out of business.⁵⁵ Many farms also faced other economic pressures due to the 1980s farm crisis.⁵⁶ The farm crisis likely pushed many state legislatures to pass right to farm laws because it forced states to acknowledge just how important the agricultural sector was on their economies.⁵⁷ State legislatures responded to urban sprawl and these nuisance claims by enacting right to farm laws in order to protect farmers.⁵⁸ Today, all 50 states have adopted some form of right to farm law.⁵⁹

C. Agriculture in the Last 30 Years and How Right to Farm Laws are Changing

Over the last 30 years, agricultural policy has been shaped largely by interest groups.⁶⁰ These groups have competing interests that are taking modern right to farm laws in different directions. One movement is very focused on local right to farm disputes and is taking steps to set up mediation panels to deal with nuisance disputes, passing ordinances that require alerting homebuyers of existing right to farm laws, and requiring new homeowners to waive their right to sue farmers for

53. David Bennett, *Right to Farm laws being tweaked across nation*, DELTA FARM PRESS (Aug. 7, 2013), <http://deltafarmpress.com/government/right-farm-laws-being-tweaked-across-nation>.

54. The simple fact is, not all courts have recognized this as a defense, or it may only be one factor that is considered in determining whether a nuisance exists. 61C Am. Jur. 2d Pollution Control § 1960, *see also*,

Land Use Planning and Development Regulation Law § 14:6 (3d ed.) (April 2016 Update) (“While the plaintiffs have usually been late arrivals to the area, the farmers’ use of the defense that the plaintiffs “came to the nuisance” has often not been successful”). Coming to the nuisance is a policy that would protect the party based on a first in time rule—essentially that if a party comes to the nuisance, then the nuisance has the right to continue. Donald Wittman, *Coming to the Nuisance*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Macmillan, 1998) <https://people.ucsc.edu/~wittman/nuisance.html>.

55. *Right to Farm Laws: History & Future*, *supra* note 17 (“If neighboring landowners brought a lawsuit against an agricultural operation and it was found to be a nuisance, courts had the option of closing the operation, altering the way it conducted its business, or assessing penalties to compensate the neighboring landowner for the nuisance.”).

56. Iowa Public Television, *Causes of the Farm Crisis*, 1980S FARM CRISIS, <http://site.iptv.org/mtom/classroom/module/13999/farm-crisis?tab=background#background> (The 1980s farm crisis was caused in large part to President Jimmy Carter’s halting of exporting grains to the Soviet Union. The bottom fell out of the grain industry and prices collapsed. The result of this collapse led to thousands of farmers defaulting on their loans and losing their farms. In 2985, Congress passed the Farm Credits Amendments Act and created the Farm Credit Administration. In addition, Congress created a Chapter 12 bankruptcy designed for family farmers combining elements of Chapter 11 and Chapter 13 plans.).

57. It was during the 1980s that most right to farm laws were passed. In addition, many states also passed other laws in response to the farm crisis. These issues are not independent of each other, as the states were in a “protect the farmers” kind of mood during this time period. *See* Michael Bates, *States Hustle to Aid Midwest Farmers Experts View Farm Crisis as National, International Problem*, NEWSOK, (Feb. 16, 1986) <http://newsok.com/article/2137971>.

58. *Right to Farm Laws: History & Future*, *supra* note 17.

59. Harrison M. Pittman, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R.6th 465, § 2.

60. “[I]n most developed countries farm groups and industrial capital appear to have enjoyed more influence than consumers and taxpayers in recent years [on shaping agricultural policy].” L.R. BOWLER, THE GEOGRAPHY OF AGRICULTURE IN DEVELOPED MARKET ECONOMIES 27 (1992).

nuisance.⁶¹ The other movement is pressing for changes to right to farm laws by proposing blanket amendments to state constitutions that purport to give an unrestricted “right to farm.”⁶² For example, these interests were competing against each other in 2014 when Missouri passed its right to farm amendment to the State Constitution.⁶³

The agricultural interest groups advocate mostly for the economic interests of farmers.⁶⁴ The different interest groups have differing viewpoints in large part because of the conflicting needs of different types of farming operations.⁶⁵ These interest groups can be placed in one of three categories: (1) corporate farming and “big ag;” (2) Farm Bureau type of ag interest groups; and (3) groups focused on animal protection and food safety, environmentalists, and advocates for farm workers.⁶⁶

Corporate farming is a term used generally to describe large scale agricultural companies and business interests.⁶⁷ Included in this category are not only corporately-owned farms, but additionally agricultural pharmaceutical companies, companies that produce agricultural products, and the parts of these organizations that engage in lobbying and policymaking.⁶⁸ Additional terms used to describe corporate farming are “commercial farms” and “big ag”. There are several major players that fall in this category that are most influential on agricultural policy.⁶⁹ These major players include six major pesticide corporations (Monsanto, DuPont, Dow, Syngenta, Bayer, and BASF)⁷⁰ and four corporations that control more than 75% of the global grain trade (ADM, Bunge, Cargill, and Dreyfus).⁷¹ Additionally, a select few corporations control the majority of the market share for beef, pork, and poultry production.⁷² Many of these corporations donate money to candidates for public

61. Reinert *supra* note 7 at 1707-08.

62. See, e.g., Shoemyer v. Mo. Sec’y of State, 464 S.W.3d 171, 174 (Mo. 2015) (Upholding the ballot language of Missouri’s right to farm amendment that read “Shall the Missouri Constitution be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed?”).

63. See Marshall Griffin, *Is Missouri Ballot measure boon for family farms or just big corporations?*, PBS (Jul. 17, 2014, 3:22 PM), <http://www.pbs.org/newshour/rundown/would-missouri-ballot-measure-benefit-family-farms-or-corporations/> (This article shows that the interests are not only democrat and republican but also include Farm Bureau against the Humane Society of the United States, and groups like the corn and bean associations against environmentalists.)

64. Boundless, *Agricultural Interest Groups*, BOUNDLESS.COM, <https://www.boundless.com/political-science/textbooks/boundless-political-science-textbook/interest-groups-7/types-of-interest-groups-49/agricultural-interest-groups-291-5662/> (“Agricultural interest groups represent the economic interests of farmers.”)

65. *Id.* (“Today, agricultural interest groups are often divided among themselves. There are various types of farms and farmers in the U.S. that often have conflicting interests.”)

66. *Id.* (This article suggests that there are agricultural interest groups ranging from large agribusiness, to groups representing mid-sized and commodity farmers, and groups that advocate for policies that would benefit local farm production.)

67. *Corporate Farming*, CENTER FOR RURAL AFFAIRS, <http://www.cfra.org/corporate-farming>.

68. *Id.*

69. See, e.g., Greenpeace, *Corporations Control our Food*, GREENPEACE, <http://www.greenpeace.org/international/en/campaigns/agriculture/problem/Corporations-Control-Our-Food/>.

70. *Id.*

71. Econexus, *Agropoly: A handful of corporations control world food production*, ECONEXUS 14 (2013), http://www.econexus.info/sites/econexus/files/Agropoly_Econexus_BerneDeclaration.pdf; see also *Corporations Control our Food*, *supra* note 69.

72. Adam Jones, *Tyson Foods Commands 24% of the Beef Market*, YAHOO (Dec. 11, 2014), <http://finance.yahoo.com/news/tyson-foods-commands-24-beef-184153052.html> (In 2014, four producers controlled 75% of the beef packing market share, Tyson Tyson Foods – 24%, JBS USA – 22%, Cargill –

office, support organizations which directly advocate for right to farm legislation, and lobby themselves.⁷³

The Farm Bureau type interest group includes the American Farm Bureau Federation along with each of Farm Bureau's offshoots including their insurance companies and student organizations.⁷⁴ Though not directly related to the Farm Bureau, similar organizations include meat trade and lobbying organizations,⁷⁵ the Grocery Manufacturers Association,⁷⁶ and membership based trade organizations representing the major commodities, including corn,⁷⁷ soybeans,⁷⁸ wheat,⁷⁹ cotton,⁸⁰ and rice.⁸¹ Most, if not all, of these organizations have tried to pass laws that would reduce the amount of regulations that can be passed on agriculture. Oklahoma's 2016 ballot initiative 777, for example, would have created a right to farm amendment to the state constitution if it had passed in the 2016 General Election.⁸²

19%, National Beef – 10%. In the ready-to-eat chicken market 40% of the market is controlled by three companies: Tyson Foods – 21%, Pilgrim's Pride Corporation (PPC) – 18%, Sanderson Farms, Inc. (SAFM) – 7%. And 71% of the market share of pork production is controlled by 5 corporations: Tyson Foods – 17%, Smithfield – 26%, JBS – 11%, Cargill – 9%, and Hormel Foods Corp. (HRL) – 8%.)

73. See, e.g., Katie Sieger & Megan Severson, *Report Connects Political Influence of Big Ag with Polluted Waterways in Wisconsin*, WISCONSIN ENVIRONMENT (Dec. 4, 2013), <http://www.wisconsinenvironment.org/news/wie/report-connects-political-influence-big-ag-polluted-waterways-wisconsin> ("In the past five years, agribusiness and agribusiness-related organizations...spent more than \$4.4 million lobbying the state government in Wisconsin.").

74. Farm Bureau is a general term referring to all things branded by this national group, the American Farm Bureau Foundation ("Farm Bureau"). The group considers itself "the voice of agriculture." See Farm Bureau, *The Unified National Voice of Agriculture*, FARM BUREAU, <http://www.fb.org/>.

75. Steve Johnson, *The Politics of Meat*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/meat/politics/> ("Most of the companies involved in the meat business, including the big meatpackers, are represented by one or more of the powerful meat trade and lobbying organizations: the American Meat Institute, the National Meat Association, and the National Cattlemen's Beef Association.").

76. Peggy Lowe, *Lobbyists of all Kinds Flock to Farm Bill*, MIDWEST CENTER FOR INVESTIGATIVE REPORTING (July 14, 2014), <http://investigatamidwest.org/2014/07/14/lobbyists-of-all-kinds-flock-to-farm-bill/> ("The Grocery Manufacturers Association, the largest trade group for companies making food, beverage, and consumer products, used roughly \$12.7 million to, among other issues, keep food stamps funded, fight food labeling and block efforts to limit food marketing to children, the data revealed.").

77. See, e.g., THE NATIONAL CORN GROWERS ASSOCIATION, <http://www.ncga.com/home>.

78. See, e.g., AMERICAN SOYBEAN ASSOCIATION, <https://soygrowers.com/>.

79. See, e.g., NATIONAL ASSOCIATION OF WHEAT GROWERS, <http://www.wheatworld.org/>.

80. See, e.g., NATIONAL COTTON COUNCIL OF AMERICA, <http://www.wheatworld.org/>.

81. See, e.g., US RICE PRODUCERS ASSOCIATION, <http://www.usriceproducers.com/>.

82. Oklahoma already has a right to farm statute. In 2016, the state presented to the voters an opportunity to expand their right to farm protections by adding in a right to farm amendment to the state constitution. The ballot language read as follows,

"To protect agriculture as a vital sector of Oklahoma's economy, which provides food, energy, health benefits and security as is the foundation and stabilizing force of Oklahoma's economy, the rights of citizens and lawful residents of Oklahoma to engage in farming and ranching practices shall be forever guaranteed in this state. The Legislature shall pass no law which abridges the right of citizens and lawful residents of Oklahoma to employ agricultural technology and livestock production and ranching practices without a compelling state interest.

Nothing in this section shall be construed to modify any provision of common law or statutes relating to trespass, eminent domain, dominance of mineral interests, easements, rights of way or any other property rights. Nothing in this section shall be construed to modify or affect any statute or ordinance enacted by the Legislature or any political subdivision prior to December 31, 2014."

See, Shannon L. Ferrell & Larry D. Sanders, *State Question 777: A Proposed Constitutional Amendment*, OKLAHOMA COOPERATIVE EXTENSION SERVICE AGEC-1064, <http://osufacts.ok-state.edu/docushare/dsweb/Get/Document-10351/AGEC-1064web.pdf>.

Proudly supporting this initiative were Oklahoma Farm Bureau, Oklahoma Cattleman's Association, Oklahoma Pork Council, Oklahoma Cotton Council, and many more of the organizations that fit squarely within the category of Farm Bureau type ag interest groups.⁸³

The final interest group includes organizations focused on local food movements, animal rights, and environmentalism. This group is often considered the "organic" or liberal group, whereas the other two groups are typically very conservative. Included in this group are PETA,⁸⁴ the Humane Society of the United States,⁸⁵ National Farmland Trust,⁸⁶ Food and Water Watch,⁸⁷ and many local organizations including members of the local and organic food movements, as well as advocates for farm workers. Additionally, administrative agencies like the Environmental Protection Agency ("EPA") and even the United States Department of Agriculture ("USDA") would fall into this category.⁸⁸ Many of the organizations that fall into this category are the drivers of agricultural regulations and often feel that the regulations that are created do not go far enough.⁸⁹ This group has been, in large part, the major opposition to the changing right to farm laws, and to the extent

83. See Heide Brandes, *Opposing groups battle about 'Right to Farm'*, RED DIRT REPORT (July 25, 2016), <http://www.reddirtreport.com/red-dirt-news/opposing-groups-battle-about-%E2%80%99right-farm%E2%80%99> (Endorsements include Oklahoma Farm Bureau, Oklahoma Cattlemen's Association, Oklahoma Pork Council, Oklahoma Cotton Council, Oklahoma Sorghum Association, Oklahoma Agricultural Cooperative Council, The Poultry Federation, American Farmers & Ranchers, Oklahoma Wheat Grower's Association, Oklahoma Agri-Women, and a number of state representatives and individuals.).

84. PETA's mission "focuses its attention on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: in the food industry, in the clothing trade, in laboratories, and in the entertainment industry. We also work on a variety of other issues, including...cruelty to domesticated animals." *About PETA*, PETA, <http://www.peta.org/about-peta/>.

85. "The Humane Society of the United States is the nation's largest and most effective animal protection organization. We and our affiliates provide hands-on care and services to more than 100,000 animals each year, and we professionalize the field through education and training for local organizations. We are the leading animal advocacy organization, seeking a humane world by combating large-scale cruelties such as puppy mills, animal fighting, factory farming, seal slaughter, horse cruelty, captive hunts and the wildlife trade." *About Us*, THE HUMANE SOCIETY, <http://www.humanesociety.org/about/overview/>.

86. The mission of National Farmland Trust is "protecting farmland, promoting sound farming practices, and keeping farmers on the land." *Mission & History*, AMERICAN FARMLAND TRUST, <https://www.farmland.org/mission-history>.

87. "Food and Water Watch champions healthy food and clean water for all. We stand up to corporations that put profits before people, and advocate for a democracy that improves people's lives and protects our environment." *About*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/about>.

88. See, e.g., *EPA Rule Will Upend Farming and Livelihoods*, WISCONSIN FARM BUREAU FEDERATION, (June 24, 2014), <http://wfbf.com/ag-newswire/epa-rule-will-upend-farming-and-livelihoods-farm-bureau-says/> (The Farm Bureau Federation Director of Regulatory Affairs said, "The EPA isn't content with regulating just water – they want to control land use too..."); and Farm Bureau supports the opposition to Agricultural Secretary Tom Vilsack in a case interpreting a South Dakota wetland regulation. "Every day, agencies create new legal interpretations intended to control how a myriad of laws should be applied to farmers and the rest of the regulated public," the Farm Bureau said in a brief supporting the Fosters." Amanda Reilly, *Deference to Agencies at Issue in S.D. Wetlands Fight*, E&E NEWS (Sep. 26, 2016), <http://www.eenews.net/stories/1060043401>.

89. See, e.g., David Sommerstein, *What New Pesticide Rules mean for Farms and Farm Workers*, NORTH COUNTY PUBLIC RADIO (Oct. 2, 2015), <http://www.northcountypublicradio.org/news/story/29689/20151002/what-new-pesticide-rules-mean-for-farms-and-farm-workers> ("Farmers fear the new regulations will be too bureaucratic and costly to obey. Workers say they don't go far enough."). This is, of course, a traditional perspective of these agencies and does not reflect the Trump administration's impact on the organizations.

that members of these groups are able to, advocated against the recent blanket right to farm amendments such as Oklahoma's initiative 777.⁹⁰

III. MEDIATION

A. Definition of Mediation

Mediation is a method of dispute resolution involving a neutral third party who aids the disputing parties in reaching a mutually agreeable conclusion.⁹¹ Mediation is often nonbinding, but can be made binding by creating a contract or signed agreement detailing the agreed on terms.⁹² Mediators tend to take different approaches at the mediation, these approaches are broadly broken down into three categories, evaluative, facilitative, and transformative.⁹³ Evaluative mediation is “[m]ediation in which the mediator may direct the parties’ thinking and communications to some extent by evaluating the merits, strengths, and weaknesses of each party’s position.”⁹⁴ Facilitative mediation, on the other hand, is “[m]ediation in which the mediator helps the parties communicate and negotiate but does not offer advice or comments on the merits or otherwise intervene in the dispute.”⁹⁵ Finally, transformative mediation focuses on “allowing and supporting the parties in mediation to determine the direction of their own process.”⁹⁶ Even though there are defined styles of mediation, some scholars argue that the styles are more of a continuum than distinctly different and that many mediators use a mixture of styles depending on the specific mediation.⁹⁷

B. History of Mediation

Mediation in the United States has gone through four phases.⁹⁸ The initial phase was one where mediation existed but was typically not used in legal disputes.⁹⁹ The second phase is considered the growth phase of mediation where it expanded into the legal world but was fought by many legal authorities.¹⁰⁰ The third phase is where mediation gained acceptance, legitimacy, and popularity.¹⁰¹ The

90. The Humane Society of the United States, for example, formed a group in Oklahoma called the Oklahoma Stewardship Council to oppose initiative 777. Fran Howard, *Oklahoma's Right to Farm Amendment Sparks Opposition*, FARM JOURNAL: AG WEB (Dec. 14, 2015), <https://www.agweb.com/article/oklahomas-right-to-farm-amendment-sparks-opposition-naa-fran-howard/>.

91. *Mediation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

92. Jonah Orlofsky, *Making Sure a Mediated Settlement Is Binding*, (Aug. 11, 2014), <http://orlofskymediation.com/mediation-updates/making-sure-a-mediated-settlement-is-binding/>.

93. Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, MEDIATE.COM, <http://www.mediate.com/articles/zumeta.cfm>.

94. *Evaluative Mediation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

95. *Facilitative Mediation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

96. Zena Zumeta, *supra* note 93.

97. *Id.*

98. Jeffery W. Stempel, Symposium, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247 at 271 (citing Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation From Custody to Full Service*, 35 WILLAMETTE L. REV. 485, 497-500 (1999) at 516).

99. *Id.*

100. *Id.*

101. *Id.*

final phase of mediation is the current period of expanding and maturing mediation techniques with vigorous acceptance of ADR.¹⁰²

Prior to the 1900s and the expansion of the administrative state, mediation was a way that closed communities settled familial and community disputes.¹⁰³ In the early 1900s the federal government began using mediation to resolve disputes in the administrative process.¹⁰⁴ This began with the establishment of the Federal Board of Mediation in 1913, the U.S. Conciliation Service formed in 1918, and the National Mediation Board for railroad mediation was established in 1926.¹⁰⁵ Much of the interpersonal conflict mediation was adapted from the experiences of labor and industrial dispute resolution from these early agencies and their mediation practices.¹⁰⁶

Since the 1970s, community mediation has rapidly grown.¹⁰⁷ In the early 1970s there were a few isolated programs.¹⁰⁸ By the 1980s, there were nearly 200 programs.¹⁰⁹ By the early 2000s, that number doubled.¹¹⁰ Today, mediation is widely used in disputes ranging from simple divorces to complex litigation and international conflicts.¹¹¹ Mediation is a major part of the modern court systems and one of its major effects is taking some of the pressure off overburdened court dockets.¹¹²

C. USDA Farm Service Agency Mediation Program

The USDA has established a program granting federal funds to state entities whereby states create a mediation program for agricultural producers, lenders, and others directly affected by the actions of the USDA agencies.¹¹³ The states get their grant funding from the Farm Services Agency (“FSA”), a branch of the USDA.¹¹⁴ These federal funds are earmarked for “agricultural loans, whether made by USDA or commercial lenders, and disputes involving USDA actions on farm and conservation programs, wetland determinations, rural water loan programs, grazing on national forest system lands, pesticides, rural housing and business loans, and crop insurance.”¹¹⁵

The mediation program is voluntary.¹¹⁶ The mediator’s role in these proceedings is merely to facilitate discussion and “explore their issues in a useful, non-

102. *Id.*

103. *History of Mediation*, MEDIATION MATTERS, <http://www.mediationmatterssd.com/mediation-matters/history.html> (For example, the Jewish community in New York City established its own form of mediation. Chinese immigrants established the Chinese Benevolent Society to resolve familial and community disputes before mediation was widely accepted and used for legal issues.).

104. Lou Chang, *Mediation in Hawaii: A Brief History*, 15-JUL HAW. B.J. 4 (2011).

105. *Id.*

106. MEDIATION MATTERS, *supra* note 103.

107. ROBERT A. BARUSH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 7 (2nd ed. 2005).

108. *Id.*

109. *Id.*

110. *Id.*

111. Christopher Honeyman & Nita Yawanarajah, *Mediation*, BEYOND INTRACTABILITY (2003), <http://www.beyondintractability.org/essay/mediation>.

112. ROBERT A. BARUSH BUSH & JOSEPH P. FOLGER, *supra* note 107 at 8.

113. Farm Service Agency, *Agricultural Mediation Program Fact Sheet*, U.S. DEP’T OF AGRIC. (Revised Aug. 2013), https://www.fsa.usda.gov/Internet/FSA_File/ag_mediation_program.pdf.

114. *Id.*

115. *Id.*

116. *Id.*

confrontational manner.”¹¹⁷ The mediation may be resolved in one session or over the course of several sessions.¹¹⁸ If no agreement is met, other legal avenues, such as litigation, may be pursued.¹¹⁹ The costs of mediation through this program are either nominal or free and the exact cost varies from state to state.¹²⁰ As of 2013, 40 states have state-certified mediation programs that are funded by the FSA.¹²¹ For the states that do not have a certified program, if a mediation is requested with the FSA, half of the cost of mediation in the private sector will be covered by the FSA.¹²²

This program does not cover mediations for basic nuisance disputes because they are not controlled by any USDA program. Nevertheless, some states have expanded their USDA Farm Services Agency Mediation Program to include these types of disputes and the states fund non-USDA claims separately.¹²³ For example, New Jersey and Iowa have both expanded their USDA mediation programs to provide mediators for right to farm disputes.¹²⁴

IV. NEW JERSEY RIGHT TO FARM ACT

Though many outsiders may think the entire state of New Jersey is a suburb of New York City, it is in fact a very agriculturally rich state. As of 2012, New Jersey had more than 715,000 acres of land being used as farmland in addition to more than 9,000 farms.¹²⁵ The state is among the top ten in the nation in the production of cranberries, bell peppers, spinach, peaches, and blueberries.¹²⁶

A. New Jersey’s Right to Farm Laws

The New Jersey Right to Farm Act passed and became effective in 1983.¹²⁷ It was designed to help farmers faced with urban sprawl and neighbors who in large part did not understand the adverse effects of living next door to a farm.¹²⁸ The law is based on five legislative findings.¹²⁹ First, the Garden State notes the importance of agriculture in the state by “insuring the numerous social, economic, and environmental benefits which accrue from one of the [state’s] largest industries.”¹³⁰ Second, regulations from State agencies and ordinances from municipalities had been

117. *Id.*

118. *Id.*

119. Farm Service Agency, *supra* note 113.

120. *Id.*

121. *Id.*

122. *Id.*

123. See N.J. State Agricultural Development Committee, *Right to Farm*, N.J. DEPARTMENT OF ATTORNEY GENERAL, <http://www.nj.gov/agriculture/sadc/rtfprogram/>.

124. *Id.*

125. *The Right to Farm Act in New Jersey: A Guide for Farmers, Neighbors, and Municipalities*, N.J. STATE AGRICULTURE DEVELOPMENT COMMITTEE 3 (June 2016), <http://www.nj.gov/agriculture/sadc/rtfprogram/resources/guidebook.pdf>.

126. *Id.*

127. N.J. STAT. ANN. § 4:1C:1 (West 2017), Legislative History.

128. *The Right to Farm Act in New Jersey: A Guide for Farmers, Neighbors, and Municipalities*, *supra* note 125 at 2.

129. N.J. STAT. ANN. § 4:1C-2 (West 2017).

130. N.J. STAT. ANN. § 4:1C-2(a) (West 2017).

passed that “may unnecessarily constrain essential farm practices.”¹³¹ Third, there is a necessary need for systematic and continuing efforts in examining regulation on the agricultural industry.¹³² Fourth, “[a]ll State departments and agencies should encourage the maintenance of agricultural production and a positive agricultural business climate.”¹³³ Fifth, the Act is passed to protect commercial farming operations from nuisance actions.¹³⁴ Specifically, the intention of the Act is as follows:

It is the express intention of this act to establish as the policy of this State the protection of commercial farm operations from nuisance action, where recognized methods and techniques of agricultural production are applied, while, at the same time acknowledging the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in New Jersey.¹³⁵

Eligibility for the Right to Farm Act’s protection requires a farm to be a commercial one.¹³⁶ To be a commercial farm, the state looks at the acreage of the farm and the annual value of agricultural and horticultural products produced by the operation.¹³⁷ In addition to being categorized as a commercial farm, the farm must be located in an appropriately labeled agricultural zone or have been in operation since July 2, 1998.¹³⁸ Finally, the operation must conform with the recommended Agricultural Development Committee management practices; be in compliance with all federal and state statutes and regulations; and not pose a direct threat to the public health and welfare.¹³⁹ Right to Farm protections are also given to certain beekeeping operations “producing honey or other agricultural or horticultural apiary-related products, or providing crop pollination services, worth \$10,000 or more annually[.]”¹⁴⁰

B. Mediating a Right to Farm Claim in New Jersey

Even though mediation is not required by the New Jersey right to farm laws, it is highly encouraged.¹⁴¹ The New Jersey Department of Agriculture encourages “strategies for resolving agriculture-related disputes and supporting a positive agricultural business environment” as an alternate to formal conflict resolution.¹⁴² The strategy they stress most is the State Agricultural Development Committee’s (“SADC”) free Agricultural Mediation Program.¹⁴³

131. N.J. STAT. ANN. § 4:1C-2(b) (West 2017).

132. N.J. STAT. ANN. § 4:1C-2(c) (West 2017).

133. N.J. STAT. ANN. § 4:1C-2(d) (West 2017).

134. N.J. STAT. ANN. § 4:1C-2(e) (West 2017).

135. *Id.*

136. *The Right to Farm Act in New Jersey: A Guide for Farmers, Neighbors, and Municipalities*, *supra* note 125 at 4.

137. N.J. STAT. ANN. § 4:1C-3 (West 2017).

138. N.J. STAT. ANN. § 4:1C-9 (West 2017). This section was originally passed in 1983, but it was amended a number of times, including in 1998 when this section was added. *Id.*

139. *Id.*

140. N.J. STAT. ANN. § 4:1C-3 (West 2017).

141. See N.J. State Agricultural Development Committee, *Right to Farm*, *supra* note 123.

142. *Id.*

143. *Id.*

The SADC has run the Agricultural Mediation Program since the year 2000.¹⁴⁴ This program uses the same mediators as New Jersey's USDA Farm Services Agency Mediation Program to provide free mediation for farmers on both USDA, and Right to Farm issues.¹⁴⁵ The goal of this program is "to help farmers and others resolve agriculture-related disputes, quickly, amicably, and in a cost-effective manner."¹⁴⁶

SADC's mediation program has a "roster of certified mediators."¹⁴⁷ Once both parties agree to mediation, the program assigns a mediator and works with the parties to set up a mutually convenient time and place for both parties, and often take place at the Rutgers extension office in the county.¹⁴⁸ The mediation sessions are confidential and most complaints are resolved in one or two meetings.¹⁴⁹ Once the parties come to an agreement, the mediator describes in writing the agreement the parties came up with, has the parties sign the agreement, and then each party receives a copy.¹⁵⁰ These signed agreements are binding like contracts are in the state.¹⁵¹

SADC's mediation program has experienced success with a number of different right to farm issues including "issues related to farm markets, signs, farm buildings, equipment storage, equine activities, water runoff, manure management, flies, odors, fencing, and dust."¹⁵² One example of a successful mediation included a dispute between neighbors regarding a fence that the farmer used to protect his crops from deer.¹⁵³ Even though the farmer's fence was likely protected by New Jersey's right to farm laws, the neighbors used mediation as a way to come up with a creative solution that included planting flowers along the fence row.¹⁵⁴ The mediation allowed for the parties to come together and listen to each other's concerns while creating a solution that was a small additional cost, helped maintain the neighborly relationship, and potentially prevented future conflicts.¹⁵⁵

Another successful right to farm mediation in New Jersey dealt with a neighbor who lived downhill from a farmer and was having issues with runoff from the farm that was flooding his property, including his basement.¹⁵⁶ The neighbor filed a formal complaint with his local County Agriculture Development Board ("CADB"), but upon suggestion of the Board, he and the farmer agreed to mediation before continuing the formal process.¹⁵⁷ The neighbor was concerned that the farmer's

144. *Id.*

145. N.J. State Agriculture Development Committee, *New Jersey Agricultural Mediation Program Handbook*, N.J. STATE AGRICULTURE DEVELOPMENT COMMITTEE 2, <http://nj.gov/agriculture/sadc/ag-mediation/handbook.pdf>.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Division of Consumer Affairs, *Alternative Dispute Resolution Brochure*, N.J. DIV. OF CONSUMER AFFAIRS 2, (2016), <http://www.njconsumeraffairs.gov/News/Brochures/alternative-dispute-resolution.pdf>.

152. State Agriculture Development Committee, *New Jersey Agricultural Mediation Program Handbook*, *supra* note 145 at 6..

153. *Id.* at 12.

154. *Id.*

155. *Id.*

156. *Id.* at 13.

157. *Id.*

irrigation system, which was designed by the Natural Resources Conservation Service (“NRCS”), was faulty and caused the runoff.¹⁵⁸ The farmer brought in a representative from the NRCS who was able to talk with the neighbor about the design of the irrigation system and the record level rainfall that was more likely the cause of the flooding, which helped clear up some frustration with the neighbor.¹⁵⁹ The parties were able to come to an agreement in which NRCS would double check the irrigation system and make any additional suggestions that might be able to help the problem.¹⁶⁰

C. The Formal Right to Farm Complaint Process

If the parties do not try mediation, or if they were unable to come to an agreement in mediation, the parties can file a formal, public complaint. The formal complaint process is heard first by the CADB or State Agricultural Development Committee (SADC), which have special expertise in agriculture and understand the needs of farm operations.¹⁶¹ The CADBs (or SADCs) have the authority to determine whether a commercial farm is entitled Right to Farm protection through “(1) [a] complaint process that neighbors and municipalities can initiate; [or] (2) [a] site-specific request process that farmers can initiate.”¹⁶²

If a party decides to file a formal nuisance complaint against a farm in New Jersey, they must begin outside of the court system with an applicable CADB or with the SADC if there is not a CADB located in the county where the complaint arises.¹⁶³ The CADB begins by “reviewing the [Right to Farm] Act’s threshold eligibility criteria: whether the farm is a commercial farm, whether the farm meets the Act’s locational eligibility provision, and whether the activity in question is included in the Act’s protectable activities.”¹⁶⁴ The CADB then holds a public hearing and issues its findings in the form of a resolution.¹⁶⁵ If a party is aggrieved by the CADB’s decision, they may appeal to the SADC; and if aggrieved by the SADC’s decision, may appeal to the New Jersey Superior Court, Appellate Division.¹⁶⁶

The SADC is located within the state’s Department of Agriculture.¹⁶⁷ Actions of the committee are subject to a 15-day period of approval by the Governor who may within that 15-day period veto any action taken by the committee.¹⁶⁸ Outside

158. State Agriculture Development Committee, *New Jersey Agricultural Mediation Program Handbook*, *supra* note 145 at 13.

159. *Id.*

160. *Id.*

161. *The Right to Farm Act in New Jersey: A Guide for Farmers, Neighbors, and Municipalities*, *supra* note 125 at 8 (“CADBs, in other words, have primary jurisdiction to review and decide agriculture-related disputes.”).

162. *Id.*

163. N.J. STAT. ANN. § 4:1C-10.1(a) (West 2017).

164. *The Right to Farm Act in New Jersey: A Guide for Farmers, Neighbors, and Municipalities*, *supra* note 125 at 8.

165. *Id.*

166. *Id.*

167. N.J. STAT. ANN. § 4:1C-4(a) (West 2017). The committee is made up of eleven members including the Secretary of Agriculture who serves as the chair, the Commissioner of Environmental Protection, the Commissioner of Community Affairs, the State Treasurer, Dean of Cook College at Rutgers University, and six citizens who are both actively engaged in farming and farm owners.

168. N.J. STAT. ANN. § 4:1C-4(f) (West 2017).

of just reviewing nuisance lawsuits, the committee has many responsibilities including studying and developing recommendations to the appropriate state agencies regarding how to regulate agriculture, such as how to regulate agricultural nuisance.¹⁶⁹

V. IOWA RIGHT TO FARM LAWS

Iowa is one of the most traditional agricultural states. As of 2016, there were over thirty million acres of land farmed in Iowa.¹⁷⁰ Iowa is the leading state in producing grains and oilseeds.¹⁷¹ Iowa's rolling hills produce a large amount of the country's soybeans and corn, and is one of the country's largest exporters of agricultural products.¹⁷² Iowa is also one of the nation's leading meat producing states.¹⁷³

A. Iowa Right to Farm Laws

The right to farm laws in Iowa were passed in 1982 with the focus of preserving the state's agricultural land.¹⁷⁴ Part of this focus was to allow citizens and local governments to have a tool to protect farmland¹⁷⁵ from urban development and other nonfarm uses.¹⁷⁶ The general assembly recognized the finite supply of agricultural land and the challenges faced by agriculture when it is losing the farmland to urban development and other non-farm uses, especially weighed against the Iowa's rich

169. N.J. STAT. ANN. § 4:1C-6(c) (West 2017) ("Study, develop and recommend to the appropriate State departments and agencies thereof a program of agricultural management practices which shall include, but not necessarily be limited to, air and water quality control, noise control, pesticide control, fertilizer application, integrated pest management, and labor practices."). See also N.J. STAT. ANN. § 4:1C-7(d) (West 2017) ("Study, develop and recommend to the departments and agencies of State government a program of recommended agricultural management practices appropriate to agricultural development areas, municipally approved programs (provided that these practices shall not be more restrictive than for those areas not included within municipally approved programs) and other farmland preservation programs, which program shall include but not necessarily be limited to: air and water quality control; noise control; pesticide control; fertilizer application; soil and water management practices; integrated pest management; and labor practices[.]").

170. United States Department of Agriculture, *2016 State Agriculture Overview*, USDA: NASS, https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=IOWA (last visited Sep. 1, 2017).

171. *Id.*

172. *Id.*

173. *Id.*

174. IOWA CODE ANN. § 352.1 (West 2017).

175. "Farmland" is defined as "those parcels of land suitable for the production of farm products." IOWA CODE ANN. § 352.2.5 (West 2017). "Farm" is defined by "the land, buildings, and machinery used in the commercial production of farm products." IOWA CODE ANN. § 342.2.4 (West 2017). "Farm operation" is defined by "a condition or activity which occurs on a farm in connection with the production of farm products and includes but is not limited to the raising, harvesting, drying, or storage of crops; the care or feeding of livestock; the handling or transportation of crops or livestock; the treatment or disposal of wastes resulting from livestock; the marketing of products at roadside stands or farm markets; the creation of noise, odor, dust, or fumes; the operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor." IOWA CODE ANN. § 352.2.6 (West 2017).

176. IOWA CODE ANN. § 352.1 (West 2017).

agricultural economy.¹⁷⁷ Additionally, this law was passed during the farm crisis and a much attention was being aimed at helping farmers.

Part of what Iowa's right to farm laws did was create a county land preservation and use commission.¹⁷⁸ The state agricultural extension service is given special responsibility in providing these commissions with "technical, informational, and clerical assistance."¹⁷⁹ These commissions were required to compile a county land use inventory of the unincorporated areas of the county along with inventory any land located inside city boundaries taxed as agricultural land.¹⁸⁰ After conducting this survey, the county commission proposed to the county board a land use plan for the unincorporated areas of the county which was to be approved by the county board.¹⁸¹ The county board was required to publish notice in a general circulation in the county and hold a public hearing of any qualified proposal to expand agricultural area where the board shall adopt the proposal with any modifications it deems appropriate unless it would be at odds with Chapter 352 of the Iowa Code.¹⁸² Today, owners of agricultural land may petition the county board in order to expand or create agricultural areas within the county.¹⁸³ Also, in order to withdraw from an agricultural area, a party must make the request by filing with the county board.¹⁸⁴

In general, Iowa's right to farm statutes protect farmers from nuisance lawsuits.¹⁸⁵ Specifically, the law provides that "[a] farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation" so long as the farm has been physically located within a designated agricultural area for six years.¹⁸⁶

177. *Id.*

178. See IOWA CODE ANN. § 352.1 (West 2017); see also IOWA CODE ANN. § 352.3 (West 2017).

179. IOWA CODE ANN. § 352.3.3 (West 2017).

180. IOWA CODE ANN. § 352.4 (West 2017). The inventories shall contain at least the following (a) the land available and used for agricultural purposes by soil suitability classifications or land capability classification; (b) the lands used for public facilities including parks, recreation areas, schools, government buildings, and historic sites; (c) the lands used for private open spaces such as woodlands, wetlands, and water bodies; (d) the land used for commercial and industrial uses including mineral extraction, residential areas, and transportation; and (e) lands that have been converted from agricultural use some other type of use since 1960.

181. IOWA CODE ANN. § 352.2 (West 2017). The plan should have written findings on the following factors: (a) methods of preserving agricultural lands for agricultural production; (b) methods of preserving and providing for recreational areas, forests, wetlands, streams, lakes and aquifers; (c) methods of providing for housing, commercial, industrial, transformational, and recreational needs; (d) methods to promote the efficient use and conservation of energy resources; (e) methods to promote the creation and maintenance of wildlife habitat; (f) methods of implementing the plan, if adopted; (g) methods of encouraging the voluntary formation of agricultural areas by the owners of farmland; and (h) methods of considering the platting of subdivisions and its effect upon the availability of farmland.

182. Chapter 352 of the Iowa Code is the Provision creating the County Land Preservation and Use Commissions and has a purpose of protecting agricultural lands as possible. IOWA CODE ANN. §§ 352.1, 352.7 (West 2017).

183. IOWA CODE ANN. § 352.6 (West 2017). Agricultural land is not limited to land used for crop or animal production but also includes residences constructed for occupation by those engaged in farming as well as nonconforming preexisting residences. In addition, certain utility companies have exceptions and are permitted in agricultural areas.

184. IOWA CODE ANN. § 352.9 (West 2017).

185. See IOWA CODE ANN. § 352.11 (West 2017). Ruled unconstitutional in part by *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998).

186. IOWA CODE ANN. § 352.11.1(a) (West 2017).

There are certain limitations on farms that would allow for someone to bring a nuisance¹⁸⁷ action.¹⁸⁸ Nuisance protection is not granted to a farm operation that is determined to be in violation of a federal statute or regulation or state statute or rule.¹⁸⁹ If the nuisance results from the negligent operation of the farm or farm operation, then the farm is not protected.¹⁹⁰ If damage occurs to a person or property because of the farm or farm operation before it is created as an agricultural area then a nuisance action can be brought.¹⁹¹ Additionally, nuisance protection is not granted to farm operations if the “injury or damage [was] sustained by the person because of the pollution or change in condition of the waters of a stream, the overflowing of the person’s land, or excessive soil erosion onto another person’s land [unless, of course] the injury or damage is caused by an act of God.”¹⁹²

B. Mediating a Right to Farm Claim in Iowa

Iowa mandates mediation for right to farm disputes.¹⁹³ No nuisance action shall be brought arising from a farm operation unless the parties proceed with mediation as provided in Iowa Code Chapter 654B.¹⁹⁴ Chapter 654B defines nuisance to be “an action injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, including but not limited to nuisances defined in section 657.2, subsections 1 through 5, and 7.”¹⁹⁵

The mandatory mediation proceedings for nuisance actions regarding farm operation require a party to try mediation prior to initiating a civil proceeding.¹⁹⁶ These parties shall not begin their civil proceeding until they receive a mediation release or they meet one of two outs determined by the court: (1) that the time delay required for the mediation would cause the party to suffer irreparable harm¹⁹⁷ or (2) the dispute is a class action claim.¹⁹⁸ Thus, right to farm legislation makes mediation a jurisdictional prerequisite to filing a civil action to resolve nuisance disputes against farm operations.¹⁹⁹

187. Iowa right to farm law defines nuisance as a “public or private nuisance as defined either by statute, administrative rule, ordinance or the common law.” And a nuisance action or proceeding is defined as “an action, claim, or proceeding, whether brought at law, in equity, or as an administrative proceeding, which is based on nuisance.” IOWA CODE ANN. §§ 352.2.9-.10 (West 2017).

188. See IOWA CODE ANN. § 352.11(b) (West 2017).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. IOWA CODE ANN. § 352.11(c) (West 2017).

194. *Id.*

195. IOWA CODE ANN. § 654B.1 (West 2017).

196. IOWA CODE ANN. § 654B.3 (West 2017).

197. The mediation period is “up to forty-two days after the farm mediation service received the mediation request. However, if all parties consent, mediation may continue after the end of the mediation period.” IOWA CODE ANN. § 654B.7 (West 2017). See also IOWA CODE ANN. § 654B.9 (West 2017) (“Upon petition by all parties, the farm mediation service may, for good cause, extend a deadline imposed by section 654B.4 or section 654B.7 for up to thirty days.”).

198. IOWA CODE ANN. § 654B.3.1.a (West 2017).

199. IOWA CODE ANN. § 654B.3 (West 2017); *aff’d* Gannon v. Rumbaugh, 772 N.W.2d 258 (Iowa Ct. App. 2009) (trial court erred in entering judgment for plaintiffs in nuisance suit caused by flooding onto plaintiff’s farmland, because plaintiffs did not obtain a mediation release or waiver for delay, and as such the court did not have jurisdiction to hear the case); see also Klinge v. Bentien, 725 N.W.2d 13 (Iowa

The Iowa Farm Mediation Service is responsible for facilitating these right to farm mediations. The Farm Mediation Service is a non-profit organization which has been in operation since 1985.²⁰⁰ The outcomes of these mediations are dependent on the parties and what type of agreement they are able to come to.²⁰¹ The mediations are facilitated by a trained mediator²⁰² who helps the parties hear each other out and consider all options in resolving the dispute.²⁰³ The mediations are confidential and less expensive than litigation.²⁰⁴ Parties may be represented by an attorney or a consultant to help assist them in the mediation process, but they are not required to have legal representation.²⁰⁵ If the parties are able to come to an agreement, the mediator will write the agreement for all the parties to sign and submit it to the Farm Mediation Service.²⁰⁶ Once signed, the agreement is a legally binding document on the participants, like a contract agreement.²⁰⁷ Judicial review of mediations is available but “limited to whether, based on clear and convincing evidence, the decision by the administrative head of the mediation service is an abuse of discretion.”²⁰⁸

C. Litigating a Right to Farm Claim in Iowa

If parties are unable to come to an agreement, and if the parties in attendance actively participated in the mediation, the mediator shall grant the parties a release so they can begin formal litigation.²⁰⁹ If the party desiring to initiate a civil proceeding to resolve the dispute fails to attend or participate in all the mediation meetings, or to send a person who is authorized to sign an agreement on their behalf, then the mediator shall not issue a mediation release.²¹⁰ This essentially requires a

2006) (the Iowa Supreme Court used the legislative intent to require a release from the farm mediation service to be a prerequisite to bringing an action under 654B.3).

200. Iowa Mediation Service, *Mediation*, www.iowamediationservice.com (last visited August 18, 2017).

201. Iowa Mediation Service, *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited August 18, 2017).

202. IOWA CODE ANN. § 654B.5.1 (West 2017) requires for mediators to be trained by the Farm Mediation Service.

203. Iowa Mediation Service, *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 24, 2017); IOWA CODE § 654B.5 (1990) (“At the initial mediation meeting and subsequent meetings, the mediator shall: (a) listen to all involved parties; (b) attempt to mediate between all involved parties; (c) encourage compromise and workable solutions; and (d) advise, counsel, and assist the parties in attempting to arrive at an agreement for the future conduct of relations among them.”).

204. Iowa Mediation Service, *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 24, 2017).

205. IOWA CODE ANN. § 654B.4 (West 2017).

206. IOWA CODE ANN. § 654B.8 (West 2017); Iowa Mediation Service, *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 24, 2017).

207. Iowa Code § 654B.8(3) provides that “parties to the mediation agreement may enforce the mediation agreement as a legal contract. The agreement constitutes a mediation release”; Iowa Mediation Service, *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 24, 2017).

208. IOWA CODE ANN. § 654B.10 (West 2017) (Reversal constitutes a mediation release).

209. See IOWA CODE ANN. § 654B.8 (West 2017); Iowa Mediation Service, *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 24, 2017).

210. IOWA CODE ANN. § 654B.8 (West 2017).

good faith effort by the parties to mediate a farm nuisance claim before jurisdiction may be granted to litigate the matter in the courts.²¹¹

If mediation is unsuccessful and a release is granted, the parties may file for civil litigation. If the defendant farmer prevails after litigation and the court determines that the claim was frivolous, then the plaintiff shall be responsible for the defendant's court costs and reasonable attorney's fees.²¹²

D. Constitutional Challenges to Iowa's Right to Farm Laws

While the main right to farm provision of the Iowa Code, Section 352.11, remains in the Code, the Iowa Supreme Court held certain provisions of the statute unconstitutional.²¹³ Specifically, in *Bormann v. Board of Supervisors*, the court held that the legislature exceeded its authority by granting nuisance protection to landowners in areas designated agricultural areas in that it created an easement over neighboring land without providing just compensation.²¹⁴ *Bormann* held this an unconstitutional taking under both the Constitution of the United States and the Iowa Constitution.²¹⁵ However, only the nuisance protection provisions of Iowa's right to farm laws were held unconstitutional under *Bormann*.²¹⁶

The mediation prerequisites of Iowa's right to farm laws have been upheld since *Bormann*.²¹⁷ Ten years after *Bormann*, the Iowa Court of Appeals upheld the jurisdictional prerequisite of obtaining a mediation release before bringing a civil suit for nuisance against a farm.²¹⁸

Gannon was a case brought by a group of farmers in Jasper County, against an adjoining farm because defendants' actions of damming a levy caused flooding on the plaintiff's farms, and therefore created a nuisance.²¹⁹ The Iowa Court of Appeals concluded that chapter 654B, the statutory provision creating and granting jurisdiction to the Farm Mediation Service, applies to the nuisance claims raised by the plaintiffs.²²⁰ Thus, because plaintiffs did not obtain a mediation release or get a

211. See generally IOWA CODE § 654B.8 (The Iowa Code requires mediation and for parties to be present at the mediation before they are able to litigate a right to farm claim.).

212. IOWA CODE ANN. § 352.11(1)(d) (West 2017).

213. See *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998) cert. denied, 525 U.S. 1172 (U.S. 1999) (Section 352.11(1)(a), which provides blanket nuisance protections for farms regardless of the established date of operation or expansion of agricultural activities so long as the farm is located within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal, infringes on the rights of neighboring landowners by allowing an illegal taking of property without just compensation).

214. *Bormann*, 584 N.W.2d at 321-22.

215. *Id.*

216. *Id.*

217. See *Gannon v. Rumbaugh*, 772 N.W.2d 258 (Iowa Ct. App. 2009) (finding that trial court erred in awarding judgment to plaintiffs in a nuisance claim where they had failed to obtain a mediation release or court determination that the time delay required for mediation would cause irreparable harm and because of this, the court lacked jurisdiction); see also *Klinge v. Bentien*, 725 N.W. 2d 13 (Iowa 2006) (holding that a mediation release was a prerequisite to a court having subject matter jurisdiction for the care and feeding contract for pigs under Iowa Code § 654B.3, the right to farm statute).

218. See *Gannon*, 772 N.W.2d at 262.

219. *Id.* at 261. In addition to the nuisance claim, the district court also found that defendants were negligent, that defendants removed drainage improvements that were authorized by law, and that plaintiffs were entitled to injunctive relief.

220. *Id.* at 262.

judicial waiver, the district court did not have jurisdiction to hear the claim.²²¹ The court highlighted the legislature's intent to allow farmers to better solve disputes in an informal setting as opposed to a costly adversarial proceeding.²²² The Court of Appeals vacated the nuisance portion of the district court's decision.²²³

VI. MISSOURI RIGHT TO FARM LAWS

Missouri is an agriculturally rich state.²²⁴ There are over 28 million acres of land farmed in Missouri.²²⁵ In 2016, Missouri soybean sales were over 2.6 billion dollars and Missouri corn sales were over 1.9 billion dollars.²²⁶ Missouri is among the top five states in the nation in producing soybeans, forages, and turkeys.²²⁷

In addition to having a right to farm statute, Missouri voters passed a right to farm amendment in 2014.²²⁸ The amendment is vague and limited case law interprets it. As such, it is unclear whether the amendment changes any of Missouri's existing laws that regulate agriculture, including the right to farm statutes.²²⁹ This Section will examine Missouri's right to farm statutes and amendment separately.

A. Missouri's Right to Farm Statute

Missouri's right to farm statute was first passed in 1982 during the farm crisis.²³⁰ Additional right to farm protections were added to the Missouri Code in 2011.²³¹ Its current form provides a protection from nuisance suits for agricultural

221. *Id.*

222. *Id.* ("The general assembly also finds that the independence and isolation of farm residents poses special obstacles in dispute resolution. Legal proceedings may be a costly, time-consuming, and inefficient means of settling disputes which a farm resident is a party. Disputes may be better resolved in an informal setting where understanding and accommodation may replace a formal and adversarial proceeding. Therefore the general assembly declares that farm mediation should be expanded to include more disputes between farm residents and opposing parties.")

223. *Id.*

224. Missouri 2016 State Agriculture Overview, United States Department of Agriculture, *2016 State Agriculture Overview*, (last visited Aug. 24, 2017), https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=missouri.

225. *Id.*

226. *Id.*

227. *Id.*

228. See MO. REV. STAT. § 537.295; see also MO. CONST. art. I, § 35.

229. Prior to its passage in 2014, there was no consensus about what the amendment would actually achieve. Opponents said that it would give too much power to large agribusiness and leave regulating agriculture to local governments without much legislative power. Supporters claimed that it was the only way to protect large farms from harmful and unnecessary regulations. See Chris Jasper, 'Right to Farm' divides Missouri as it charts unknown territory, COLUMBIA MISSOURIAN (July 17, 2014), http://www.columbiamissourian.com/news/local/right-to-farm-divides-missouri-as-it-charts-unknown-territory/article_a7e24a84-ba5a-57f7-b21e-4d07bd2d9df8.html.

230. MO. REV. STAT. § 537.295 (West 2017).

231. The 2011 changes included changes to nuisance laws including MO. REV. STAT. § 67.402 (providing that ten specified counties have been given specific rights to create nuisance abatement ordinances in their counties, however this statute specifically says that the county is not authorized to enact nuisance abatement ordinances that provide for the abatement of any condition relating to agricultural structures or agricultural operations such as crop or animal agriculture); MO. REV. STAT. § 226.720 (providing new regulations for junkyards located near state and county roads and establishes a penalty for failure to comply); and MO. REV. STAT. § 537.296 (defining exclusive compensatory damages for agricultural nuisances).

operations and their appurtenances²³² if there are any changes in the location thereof so long as the farm has been in operation for more than a year and were not a nuisance at the time the operation began.²³³ This essentially creates a first in time rule for farm operations, protecting them from urban sprawl.²³⁴ The farm's protected status is assignable, alienable, and inheritable.²³⁵ Temporary cessation of farming or diminishing the size of the operation does not waive protection.²³⁶

Right to farm protections do not apply if the nuisance results from the negligent or improper operation of the protected operation—for example, if the farm is in violation of any federal or local regulations.²³⁷ In addition to reducing operations, protected farms are allowed reasonable expansion in acres or animal units without losing their protected status, however, if they expand, they must maintain compliance with federal, state, and local laws and must not create a measurably significant difference in the environmental pressures on existing and surrounding neighbors because of increased pollution.²³⁸ Additionally, if the expanding farm is a poultry or livestock facility, it will be required to meet the recommendations of the University of Missouri Extension Service for storage, processing, or removal of animal waste to expand and keep right to farm protections.²³⁹

The statute specifically provides that protected farms may still be sued for any damages caused by the farm as a result of pollution or change in the quality or quantity of water used for private or commercial purposes, or as a result of overflow of land.²⁴⁰ However, the farms may only be sued by persons, firms, and corporations—no mention is made of how a government may recover for damages.²⁴¹ In addition, only a person who has an ownership interest in affected property shall have standing to bring an action for private nuisance when the alleged nuisance emanates from property primarily used for crop or animal production purposes.²⁴²

In 2011, the legislature expanded the right to farm laws to add a system for compensating private nuisance where the alleged nuisance emanates from property primarily used for crop or animal purposes.²⁴³ The statute “precludes recovery of non-economic damages for items such as loss of use and enjoyment, inconvenience, or discomfort caused by the nuisance.”²⁴⁴ Instead, economic damages may only be recovered by the diminution in the value of the property or documented medical costs caused by the nuisance.²⁴⁵ A temporary nuisance may be considered perma-

232. See MO. REV. STAT. § 537.295.2 (“agricultural operation and its appurtenances” includes, but is not limited to, “any facility used in the production or processing for commercial purposes of crops, livestock, swine, poultry, livestock products, swine products or poultry products.”).

233. MO. REV. STAT. § 537.295.1 (West 2017).

234. See Lawrence Berger, *An Analysis of the Doctrine that “First in Time Is First in Right”*, 64 NEB. L. REV. 349, 378-81 (1985).

235. MO. REV. STAT. § 537.295.1 (West 2017).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. MO. REV. STAT. § 537.295.3 (West 2017).

241. *Id.*

242. MO. REV. STAT. § 537.296.5 (West 2017).

243. See MO. REV. STAT. § 537.296.2 (West 2017).

244. *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 327 (Mo. 2015).

245. MO. REV. STAT. § 537.296 (West 2017).

ment if a second temporary nuisance suit is brought against the same property primarily used for crop or animal production purposes and it is deemed a nuisance.²⁴⁶ This provision also notes that causes of action independent of nuisance are still available to those injured by agricultural operations.²⁴⁷ A final judgment in any action alleging a private nuisance shall be recorded with the county recorder of deeds in order to put future purchasers of the claimant's property on notice of the nuisance.²⁴⁸

Unlike in neighboring Iowa, the Missouri Supreme Court has upheld right to farm statutes as constitutional.²⁴⁹ In *Labrayere v. Bohr Farms*, a group of landowners brought a temporary nuisance claim against Bohr Farms, a CAFO raising hogs for Cargill, because of offensive odors that caused loss of use and enjoyment of their property.²⁵⁰ The Circuit Court granted summary judgment to the CAFO determining that the 2011 addition to Missouri's right to farm law did not allow recovery of loss of use and enjoyment of their property.²⁵¹ The landowners unsuccessfully appealed to the Missouri Supreme Court alleging at least seven points on appeal, most of them claiming violations of both federal and state constitutions.²⁵² The court held that the restrictions on nuisance from right to farm laws were not unconstitutional.²⁵³

B. Missouri's Right to Farm Amendment

In 2014, with a margin of less than one percent, the Missouri voters added an amendment to the state constitution to "ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed."²⁵⁴ The amendment was adopted on August 5, 2014 and codified as Missouri Constitution Article I, Section 35.²⁵⁵ The amendment reads as follows:

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers

246. In this instance, the plaintiff may recover as they would against a permanent nuisance. See MO. REV. STAT. § 537.296.3 (West 2017).

247. See MO. REV. STAT. § 537.296.6 (West 2017) (noting that people may recover "damages for annoyance, discomfort, sickness, or emotional distress").

248. MO. REV. STAT. § 537.296.8 (West 2017).

249. See *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319 (Mo. 2015).

250. *Id.* at 325.

251. *Id.* at 325-26.

252. See *id.* (The court held (1) section 537.296 does not authorize an unconstitutional private taking; (2) section 537.296 does not authorize a taking for public use without just compensation; (3) section 537.296(2) does not deny equal protection because "rural landowners and residents" are not a suspect classification and land use regulations are subject to rational basis scrutiny, not strict scrutiny, and section 537.296 is rationally related to a legitimate state purpose; (4) section 537.2296(2) does not violate due process; (5) appellants did not have standing for separation of powers challenge that section 537.296(5) unconstitutionally delegates standing determination that a person has an "ownership interest" in the affected property; (6) appellants did not demonstrate that section 537.296(2) violates the open courts clause; and (7) section 537.296(2) is not an unconstitutional "special law" in violation of article III, section 40 of the Missouri Constitution.).

253. *Id.*

254. Brandon Kiley, *Missouri voters pass 'Right to Farm' amendment by slim margin*, KBIA (Aug. 6, 2014), <http://kbia.org/post/missouri-voters-pass-right-farm-amendment-slim-margin#stream/0>.

255. MO. CONST. art. I, § 35.

to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.²⁵⁶

When passed, it was uncertain what the amendment would achieve. Supporters argued that certain interest groups, like the Humane Society of the United States, had been attempting to pass harmful restrictions to agriculture in the state.²⁵⁷ The supporters painted a picture of saving the small farmer of the “threat from people who don’t understand how very difficult it is to raise a crop.”²⁵⁸ Opponents argued that the language of the amendment was too vague and had a true objective of granting larger farms the same protections that already existed for small farmers in the right to farm statutes.²⁵⁹ One thing that has remained certain since before the amendment’s passage is that, “we’re not going to know [what the amendment means] until courts take a look at the amendment and give their interpretation of it...it’s up in the air until that point.”²⁶⁰

In *Shoemyer v. Kander*, a group of Missourians brought a civil suit challenging the amendment alleging the ballot title was not sufficient and fair under Missouri election laws.²⁶¹ The summary statement that appeared on the ballot asked the voters:

Shall the Missouri Constitution be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed.²⁶²

The plaintiffs alleged that this ballot language was insufficient because it omitted that this right would be subject to Article VI of the Missouri constitution, which governs local governments, and that it inaccurately identified “citizens” instead of “farmers and ranchers” as the beneficiaries.²⁶³ The court upheld the ballot language as sufficient and fair providing “omission of a reference to limitations by Article VI in the summary statement is not problematic” because local governments have always had the powers enumerated in Article VI and this amendment would not alter that constitutionally enumerated right.²⁶⁴ Further, the court held that even if “farmers and ranchers” is different than “citizens,” it would not render the ballot title unfair or insufficient.²⁶⁵ The Supreme Court of Missouri did not address how the amendment should be interpreted.

Three additional cases have looked at Missouri’s right to farm amendment. In *U.S. v. White*, with the new amendment fresh at hand, a defendant charged with manufacturing 1,000 or more marijuana plants in violation of the U.S. Code, tried

256. *Id.*

257. Kiley, *supra* note 254.

258. Ben Whitford, *Missouri: corporate agriculture wins ‘Right to Farm’*, THE ECOLOGIST (Aug. 6, 2014), http://www.theecologist.org/News/news_analysis/2506071/missouri_corporate_agriculture_wins_right_to_farm.html.

259. *Id.*

260. *Id.*

261. *Shoemyer v. Kander*, 464 S.W.3d 171, 173 (Mo. 2015).

262. *Id.* at 174.

263. *Id.* at 174-75.

264. *Id.* at 175.

265. *Id.*

using Missouri's right to farm amendment as a defense to get the charges dismissed.²⁶⁶ The defendant alleged that "the plain language of Missouri Constitution, Article I, Section 35 ("Right to Farm Amendment,") decriminalized the manufacture of marijuana" in Missouri.²⁶⁷ The court did not find anything in the amendment that would "indicate an intention to legalize the manufacture of marijuana" in Missouri.²⁶⁸ Further, because this case was brought on federal charges, the Court held that "pursuant to the Supremacy Clause of the United States Constitution, the Right to Farm Amendment would have no effect on the validity and enforceability of federal statutes such as [this]."²⁶⁹

Vimont v. Christian County Health Department was decided in Missouri's Southern District Court of Appeals in October 2016.²⁷⁰ Vimont sought judicial relief from an order by Respondent to stop distributing raw milk.²⁷¹ The Christian County Commission enacted a food ordinance regulating the sale of raw milk.²⁷² In 2012, the County ordered Vimont to stop violating the ordinance.²⁷³ After the right to farm amendment was passed, Vimont sought relief from the order, claiming that the regulation restricted his constitutionally protected right to farm.²⁷⁴ The trial court granted summary judgment to the county because the constitutional right to farm is not unlimited, but subject to the powers of Article VI giving local governments the ability to pass certain laws.²⁷⁵ The appellate court upheld the trial court's decision because "Vimont's constitutional farming rights . . . are subject to local-government powers duly authorized and conferred by Article VI of Missouri's constitution" and the county was authorized to create and enforce this regulation.²⁷⁶ The Supreme Court of Missouri denied transfer to hear the case.²⁷⁷

The most recent case that had the opportunity to interpret the right to farm amendment was *In re Ameren Transmission Co. v. PSC of Mo.*²⁷⁸ In this case, a nonprofit corporation, Neighbors United, intervened in a Public Service Commission ("PSC") order opposing the construction of a new power line.²⁷⁹ One of their arguments was that "the PSC was constitutionally prohibited from granting the relief requested . . . because the proposed Project would impair the right of farmers and ranchers to engage in farming and ranching practices conferred by . . . the 'Right to Farm Amendment.'"²⁸⁰ Because the court vacated the order on other grounds, the

266. *United States v. White*, No. 12-03045-01-CR-S-BCW, 2016 U.S. Dist. Lexis 117413, *2 (W.D. Mo. June 22, 2016).

267. *Id.* at *3.

268. *Id.* at *4.

269. *Id.* at *4-5.

270. *Vimont v. Christian Cty. Health Dep't.*, 501 S.W.3d 718, (S.D. Mo. 2016), transfer denied, 2016 Mo. Lexis 522 (Mo. Dec. 20, 2016).

271. *Vimont*, 501 S.W.3d at 719.

272. *Id.* The regulation provided, "Producers of retail raw dairy products may sell and take orders for their product at the physical farm location where the products are produced and may deliver the product to the clients [sic] domicile."

273. *Id.*

274. *Id.*

275. *Id.*

276. *Vimont*, 501 S.W.3d at 719-20.

277. *Id.* at 718.

278. *In re Ameren Transmission Co. v. PSC of MO.*, No. WD79883, 2017 Mo. App. Lexis 244 (Ct. App. Mar. 28, 2017).

279. *Id.* at *1-3.

280. *Id.* at *3.

Court chose not to discuss the right to farm argument considering discussing it as “unnecessary.”²⁸¹

One thing that is clear about this amendment is that it is still open to interpretation.²⁸² The language of the amendment “creates a broad and vague right to ‘engage in farming and ranching practices,’ and it is impossible to determine exactly how broadly a court might interpret this phrase or how far a court might find this right reaches.”²⁸³ A number of questions relating to the amendment remain open, including: (1) the scope and impact on state and local laws; (2) the effect it has on existing legislation; (3) how much of an effect is conferred in “duly authorized powers, if any, conferred by article VI of the Constitution”; and (4) how listing the amendment in Article I, the Bill of Rights provision of the Missouri Constitution, will affect its application.²⁸⁴

C. Mediating a Right to Farm Nuisance claim in Missouri

Unlike Iowa and New Jersey, Missouri does not have any procedure requiring nor encouraging mediating right to farm disputes. Instead, the only agricultural mediation system that is supported by the state is the Missouri Agricultural Mediation Program.²⁸⁵ This program, even though it purports to be available for “neighbor/neighbor” disputes, focuses exclusively on USDA disputes.²⁸⁶ Specific listed issues that can be mediated with this program are USDA “farm loans, farm and conservation programs, wetland determinations, rural housing loan program issues and rural water disputes, grazing on national forest system lands, pesticide issues . . . and any issue that may cause financial impact [incurred as a USDA program participant].”²⁸⁷ Missouri’s program is supported and funded through the Farm Service Agency’s Agricultural Mediation Program, but unlike New Jersey or Iowa, Missouri’s does not work on right to farm disputes.²⁸⁸

Because of Missouri’s right to farm amendment, there are serious questions regarding whether the right to farm statutes are still good law, since they regulate agriculture and are not subject to Article VI of the Missouri Constitution. The amendment is likely to give even greater protections to the nuisance creators than the statute did. For example, the requirement that the farm be in operation for more than one year, as provided by the statute, would likely be held a restriction on agriculture that infringes on the constitutional right to farm.²⁸⁹ There is a general uncertainty about Missouri right to farm laws, including how to go about mediating a right to farm complaint.

281. *Id.* at *12.

282. Before it passed, University of Missouri law professor Erin Hawley said that “it will likely lead to interpretation issues down the road.” Erin Hawley, *Missouri Constitutional Amendment Pits Farmer Against Farmer*, NPR: MORNING EDITION (Aug. 5, 2014, 5:07 AM ET).

283. David Cosgrove, *Legal Analysis of Missouri Right To Farm Constitutional Amendment 1 (HJ Res. Nos. 11 & 7)*, (Aug. 1, 2014).

284. *Id.*

285. Missouri Department of Agriculture, *Missouri Agricultural Mediation*, MO. DEP’T OF AG., <http://agriculture.mo.gov/grains/pdf/mediationbrochure.pdf>.

286. *Id.*

287. *Id.*

288. See United States Department of Agriculture, *Fact Sheet: Agricultural Mediation Program*, USDA FARM SERVICE AGENCY, (July 2003), https://www.fsa.usda.gov/Internet/FSA_File/mediate03.pdf.

289. See MO. REV. STAT. § 537.295.1 (West 2017).

VII. COMMENT: MEDIATING A RIGHT TO FARM DISPUTE

Right to farm laws logically grew from urban sprawl bringing people who had been removed from the agricultural process, for a generation or more, back agricultural areas.²⁹⁰ Each of the states right to farm laws were created to protect farming operations from neighbors who do not understand or who dislike the farming practice.²⁹¹ All of the statutes above created a first in time rule for farmers and allowed for reasonable expansion and growth of the operation so long as it complied with the federal, state, and local regulations.²⁹²

Each of the three states right to farm statutes described above, has a different way of handling nuisance disputes. In New Jersey, right to farm nuisance complaints are first heard through a public administrative procedure.²⁹³ Additionally, New Jersey strongly encourages mediating right to farm nuisance complaints for free with a mediator at the State Agricultural Development Committee's mediation program.²⁹⁴ The SADC mediation program's goals are to resolve agriculture-related claims quickly, amicably, and in a cost-effective manner.²⁹⁵ If mediation does not lead to the resolution of a claim, or if parties do not agree to try mediation, parties are not required to mediate and may go through the administrative complaint with their county agricultural development board or the State Agricultural Development Committee if they are from a county without a local board.²⁹⁶

In Iowa, mediation is a jurisdictional prerequisite of a right to farm nuisance claim.²⁹⁷ Iowa's Farm Mediation Service is the organization through which these nuisance claims are mediated.²⁹⁸ These mediations are less expensive than litigation, confidential, and binding.²⁹⁹ Parties are not required to come to an agreement

290. See Rusty Rumley, *A Comparison of the general Provisions found in Right-to-Farm Statutes*, 12 VT J. ENV'T L. 327, 327 (2011).

291. See N.J. STAT. ANN. § 4:1C-2.a (West 2017) (legislative finding that protecting agricultural activities would serve the best interest of the state because of social, economic, and environmental benefits, and that a policy of protecting farm operations from nuisance actions, when the farm is using reliable farming techniques is a policy of the state); IOWA CODE § 352.1 (“The general assembly recognizes the importance of preserving the state’s finite supply of agricultural land...[because agriculture is a] major economic activity in Iowa.”); MO. CONST. ART. I, § 35 (highlights that the agriculture is a vital sector of Missouri’s economy while granting a right to farm to all farmers and ranchers in the state of Missouri). See also *We look Back on Missouri’s Right to Farm Amendment Passage on One Year Anniversary*, PROTECT THE HARVEST (Aug. 5, 2015), <http://protecttheharvest.com/2015/08/05/we-look-back-on-missouris-right-to-farm-amendment-passage-on-its-one-year-anniversary/> (“Groups like Humane Society of the United States (HSUS) would continue to push harmful, misleading, and unnecessary legislation until they fulfilled their promise of ending animal agriculture.”).

292. See N.J. STAT. ANN. § 4:1C-9 (West 2017); IOWA CODE ANN. § 352.11 (West 2017), though part has been held unconstitutional by the Iowa Supreme Court in *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998); MO. REV. STAT. § 537.295 (West 2017).

293. N.J. STAT. ANN. § 4:1C-10.1 (West 2017).

294. New Jersey Agriculture Development Committee, *New Jersey Agricultural Mediation Program Handbook*, N.J. STATE AGRICULTURE DEVELOPMENT COMMITTEE at 2, <http://nj.gov/agriculture/sadc/agmediation/handbook.pdf>.

295. *Id.*

296. N.J. STAT. ANN. § 4:1C-10.1 (West 2017); see also IOWA CODE ANN. § 654B.11 (West 2017) (in addition, any statute of limitation shall be suspended upon filing a mediation request).

297. IOWA CODE ANN. § 352.11.1.c (West 2017) (with some exceptions).

298. IOWA CODE ANN. § 654B.5(1) (West 2017) (requires for mediators to be trained by the Farm Mediation Service).

299. IOWA CODE ANN. § 654B.8(3) (West 2017). Statute says nothing about mediations being less expensive than litigation or being confidential.

during mediations, but they are required to be present and participate in the mediation if they are seeking a mediation release so that they may pursue litigation.³⁰⁰

In Missouri, mediating a right to farm nuisance complaint is not as straightforward as New Jersey or Iowa. Missouri's Agricultural Mediation Program focuses almost exclusively on USDA related claims.³⁰¹ Further, Missouri's new right to farm amendment frustrates the legal rights of both the party creating the nuisance as well as the party seeking a solution. Without adequate interpretation by Missouri courts of the right to farm amendment, these types of cases will likely end litigation at the summary judgment stage with appeals to higher courts to define the ambiguous law.³⁰² Because there is not an emphasis on mediating these types of claims, there is a higher chance that the cases will end up in costly and timely litigation, and likely the appeals process.³⁰³

A. Advantages of Mediating a Right to Farm Dispute

Advantages that can be seen from Iowa and New Jersey's systems of mediating right to farm disputes include: (1) having mediators with expertise in agricultural issues; (2) being quicker than litigation; (3) having more creative solutions; (4) being more affordable; (5) helping facilitate relationships; and (6) being confidential.

One of the largest advantages of mediating a right to farm nuisance dispute is that mediators are impartial and in some states are specifically trained to have expertise in agricultural issues.³⁰⁴ The Iowa and New Jersey mediation programs have certified mediators that are specifically trained to help facilitate the discussion and aid the parties in expressing their interests and concerns.³⁰⁵ As the U.S. population continues to shift away from the farm, it is likely that without these specialized agricultural mediation programs, finding a mediator with understanding and expertise in agricultural concerns will be difficult. These mediators will likely have more expertise in agricultural disputes than judges, and the mediator will likely work with the parties to come to a resolution better-suited for the parties than a judge will.

300. IOWA CODE ANN. § 654B.8(2)(a) (West 2017).

301. Missouri Department of Agriculture, *Missouri Agricultural Mediation*, MO. DEP'T OF AGRIC., <http://agriculture.mo.gov/grains/pdf/mediationbrochure.pdf> (last visited Aug. 26, 2017).

302. Because the right to farm amendment is now a constitutional question, and a question of law, many judges will likely interpret the question in favor of one party or another at the summary judgment phase, and save themselves and the parties the hassle of a trial on the merits until the amendment is further interpreted.

303. Though, in *Vimont*, the litigant was pro se, so there were likely no attorney's fees, there were still a large amount of time consuming filings, and from the appellate court's ruling, it seems as if the court reluctantly excused Vimont's technical deficiencies. *Vimont v. Christian Cty. Health Dep't.*, 501 S.W.3d 718 (2016).

304. See New Jersey Agriculture Development Committee, *Right to Farm*, N.J. DEP'T. OF AG. STATE AG DEV. COMM., <http://www.nj.gov/agriculture/sadc/rtfprogram/> (last visited Aug. 27, 2017); see also www.iowamediationservices.com, *Farm Mediation*, IOWA MEDIATION SERV., <http://www.iowamediation-service.com/farm-mediation> (last visited Aug. 27, 2017).

305. See David A. Kimmel, Brian J. Schilling, & Jeffrey C. Everett, *New Jersey's Agricultural Mediation Program Fact Sheet FS 1254*, RUTGERS N. J. AGRIC. EXPERIMENT COOP. EXTENSION, (July 2016), <https://njaes.rutgers.edu/pubs/publication.asp?pid=FS1254>; *Farm Mediation*, IOWA MEDIATION SERV., <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

Mediation is generally a much quicker process than litigation.³⁰⁶ A typical civil case takes at least six months to go to trial,³⁰⁷ but often take much longer.³⁰⁸ Mediation of a typical civil case might be obtained in a few hours to a few sessions.³⁰⁹ In Iowa, upon receipt by the Farm Mediation Service, the mediation period is 42 days.³¹⁰ In New Jersey, the mediations are set at a time and place convenient for all parties, and are typically resolved at the first session.³¹¹

Instead of being focused on winning a legal argument, mediation focuses on needs and interests—this can lead to much more creative solutions than courts will entertain.³¹² Iowa’s Farm Mediation Service mediators “help . . . each side hear the other clearly and help . . . parties consider their options in a thoughtful manner.”³¹³ New Jersey emphasizes how mediation “allows the parties in a dispute to shape a dispute’s outcome, rather than a third party.”³¹⁴ By allowing the parties to express their views and concerns, solutions can be focused on much more than a monetary fix or a judicial injunction. Instead of focusing on legal outcomes, mediation agreements can be based on feelings.³¹⁵

Court processes are expensive.³¹⁶ Attorney hourly fees are often very expensive, especially in right to farm cases which often require preparation of fact intensive summary judgment motions. If a lawyer uses a contingency fee method, the recovery amounts obtained will often decrease by a third of the total recovery and then will be reduced further by additional litigation expenses.³¹⁷ Because these right to farm suits are rather complex, it is important to have legal representation if litigated. Mediation, on the other hand, does not require the same amount of litigation expenses and does not even require a lawyer. Neither Iowa nor New Jersey require for mediating parties to be represented by counsel during the right to farm mediations.³¹⁸ Mediation does not require that each legal right be assessed, and because

306. See Kimmel, Schilling & Everett, *supra* note 305; *Farm Mediation*, IOWA MEDIATION SERV., <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

307. *What to Expect, A Lawsuit Chronology*, FIND LAW, <http://litigation.findlaw.com/filing-a-law-suit/what-to-expect-a-lawsuit-chronology.html> (last visited Aug. 27, 2017).

308. *How Courts Work: Mediation*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages.html (last visited Aug. 27, 2017).

309. *Id.*

310. *Farm Mediation*, IOWA MEDIATION SERV., <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

311. Kimmel, Schilling & Everett, *supra* note 305; *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

312. *How Courts Work: Mediation*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages.html (last visited Aug. 27, 2017).

313. *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

314. See Kimmel, Schilling & Everett, *supra* note 305; *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

315. *How Courts Work: Mediation*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages.html (last visited Aug. 27, 2017).

316. *Id.*

317. See *Contingency Fees: Read this Before You Hire a Lawyer*, JUX LAW FIRM, <http://jux.law/contingency-fees/> (last visited Aug. 27, 2017).

318. Kimmel, Schilling & Everett, *supra* note 305; *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

of that, some of the discovery costs can be reduced.³¹⁹ Mediating a right to farm dispute is “far less expensive than litigation,” and in New Jersey it is a free procedure.³²⁰

Because mediation requires for parties to sit down and talk with each other, it can have the effect of facilitating and improving relationships.³²¹ Mediators roles in keeping the discussion focused on ending the current problem can keep the parties from harming their relationship.³²² The relational aspect of mediating a right to farm dispute is very important because often times these parties are neighbors and will continue to deal with each other after the dispute.³²³ Mediating a right to farm dispute can allow parties to express their individual views and concerns and allows for the different sides to find common ground.³²⁴ The mediation process can also help parties correct misinformation and clarify misunderstanding between the parties, which can help aid the relationship.³²⁵ “[B]y allowing affected parties to mutually participate in the conflict resolution process, relationships can be maintained or even improved.”³²⁶

Litigation and administrative processes in most states are not confidential. Two neighbors fighting can be the talk of the town, and these cases often end up in the news.³²⁷ Most mediations are confidential processes, and mediation agreements become binding like contracts.³²⁸ Both Iowa and New Jersey’s farm mediation systems are confidential processes.³²⁹

i. Examples of Solutions

Below are some illustrations of how mediation can be beneficial in resolving right to farm disputes.

319. For example, the first in time rule will not have to be thoroughly examined. Additionally, determining whether a farming operation has substantially changed will not be as necessary an inquiry.

320. *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017); Kimmel, Schilling & Everett, *supra* note 305 (though costs for legal representation might still exist if parties choose to have an attorney represent them in the mediation).

321. *How Courts Work: Mediation*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages.html (last visited Aug. 27, 2017).

322. *Id.*

323. *Id.*

324. Kimmel, Schilling & Everett, *supra* note 305; *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

325. Kimmel, Schilling & Everett, *supra* note 305; *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

326. Kimmel, Schilling & Everett, *supra* note 305; *Farm Mediation*, IOWA MEDIATION SERVICE, <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017).

327. *See, e.g.*, Mateusz Perkowski, *Farmer Seeks \$50,000 in Oregon Land use dispute*, CAPITAL PRESS (Aug. 12, 2016, 4:03 PM); *Jury sides with hog farm in dispute with neighbors*, STATE JOURNAL REGISTER (June 12, 2016, 8:00 PM), <http://www.sj-r.com/news/20160612/jury-sides-with-hog-farm-in-dispute-with-neighbors>.

328. *How Courts Work: Mediation*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages.html (last visited Aug. 27, 2017).

329. *Farm Mediation*, IOWA MEDIATION SERV., <http://www.iowamediationservice.com/farm-mediation> (last visited Aug. 27, 2017); Kimmel, Schilling & Everett, *supra* note 305.

Example 1: CAFO/corn farm neighbor

CAFOs are often considered to be a nuisance by neighbors because of the odors, noise, and pollution associated with the operations. Even though the CAFO might be completely protected by the states right to farm laws, mediation can lead to good outcomes for each party. Mediating can help foster goodwill of the company creating the nuisance. Through mediation, the CAFO and neighbor can discuss positions and potential solutions, including ways that the CAFO and the neighbors can work together. Through mediation, the parties can come up with creative solutions to resolving the conflicts. For example, smell can be abated to some extent by planting trees or plants. In addition, the CAFO and the corn farmer can come up with business solutions such as a contract wherein the CAFO purchases the corn at a premium price from the farmer. Additionally, the CAFO can donate or offer for a low-cost manure to fertilize the neighbor's fields.

Example 2: The roost next door

Chickens have a reputation of being annoying and can create a nuisance. However, raising chickens is something that many people do, even within city limits.³³⁰ In a dispute between two neighbors over one neighbor's annoying roost, mediation can be a way for the neighbors to work together to come up with a solution. It might be surprising how much fresh eggs are able to help make the chickens seem less annoying. In addition, suing a neighbor for their chickens could be very costly. Calculating damages would add more challenges and could create further costs. The reduction in property value, for example, is just one factor to be considered in added costs caused by litigating one of these disputes. By having each neighbor talk about their feelings, instead of their legal arguments,³³¹ it might allow for creative solutions and help foster the relationship.

Example 3: Unsightly compost with odors

Composting food and yard waste is often considered a farming practice. Composting can create a nuisance, especially if done in an urban setting, because it can be unsightly and sometimes creates an odor. In a dispute between two neighbors over the compost pile near the property line, mediation can have its advantages. It is hard to tell how this kind of nuisance dispute would play out in court, and litigation is a costly process. If parties can agree to mediate this dispute, it can be much more affordable and can help parties understand each other's sides. During the mediation, the parties can discuss their positions. There is the possibility that the non-composting neighbor does not understand the composting process—and simply discussing the activity during mediation will help the parties clarify any misunderstandings.

330. See *Is it Legal to Raise Chickens in My Suburban Backyard?*, COUNTING MY CHICKENS, (Mar. 12, 2015), <http://www.countingmychickens.com/is-it-legal-to-raise-chickens-in-my-suburban-backyard/>.

331. Legal arguments including right to farm arguments and added costs of property appraisals.

B. Disadvantages of Mediating a Right to Farm Dispute

In addition to having advantages, there are also disadvantages to mediating right to farm disputes. The disadvantages to mediating a right to farm dispute are the following: (1) no precedent is set; (2) litigation will lead to lower costs over time; (3) based on the face of the laws, the nuisance creator wins; and (4) mediation can delay ultimate litigation.

Because mediation is confidential, there is no precedent set in the courts. If these right to farm cases are continually mediated, constitutional arguments like *Bormann* will not be heard nor ruled on.³³² *Bormann*, and its ruling that Iowa's right to farm statute is unconstitutional, is instructive on other states and should be considered in similar right to farm arguments. The Supreme Court of Missouri's decision in *Labrayere*, holding that Missouri's right to farm statutes were constitutional, likewise, should be considered in future right to farm arguments.³³³

One of the key reasons why right to farm statutes were originally passed was because litigation was a financial burden on farmers and could lead to farms having to close their doors or increase the prices of the food they produced. Mediating right to farm disputes could add additional costs to the nuisance creator and food producer in the long run because the mediated agreements act as additional, and potentially costly, regulations that can increase the cost of production of food and agricultural products. When the nuisance producer would win in litigation, even if it would cost more in the short term than mediation, could cost less in the long term because of fewer regulations.³³⁴

On the face of the right to farm laws, the nuisance creator will win in litigation. Each state has its own requirements, as can be seen with the three states discussed above and their differences, yet these laws were created to protect farmers from nuisance disputes. If the operation qualifies as protected under the laws, then the nuisance creator will likely win in court—and if the party will win in court, then why settle in mediation?

Corporations have different resources and needs than the typical farmer. Corporations often are the organizations behind CAFOs. There are a small number of corporations that produce the majority of the meat produced in the United States.³³⁵ These corporations already have legal teams and have more financial resources available to them than the average farmer. Cost is not as big of a factor for corporations. Additionally, pursuant to the right to farm laws, many of these corporations will be able to overcome a nuisance claim on a motion for summary judgment because their claim is a matter of law, not fact. Further, corporations have an interest setting precedents that their facilities are not a nuisance pursuant to the laws, and precedent is set through litigation.

Mediation relies on both parties being able to come to an agreement and does not always lead to an agreement. This delay in an ultimate resolution could be

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

333. See *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319 (Mo. 2015).

334. Further, if the nuisance creating party is a corporation or has multiple operations creating similar nuisances, litigating and winning once should set precedent for future arguments in similarly situated situations.

335. See Natasha Geiling, *5 Big Meat Companies Produce A Combined 162 Million Tons of Manure Each Year*, THINKPROGRESS (June 30, 2016), <https://thinkprogress.org/5-big-meat-companies-produce-a-combined-162-million-tons-of-manure-each-year-c3acced8f51e>.

avoided by simply filing the complaint in court at the outset. Because mediation focuses more on positions than on legal arguments, the mediation process will not necessarily speed up the litigation process once a legal complaint is filed. Further, mediation can be a step in the litigation process instead of just an alternate to litigation.

i. Example

Example 1: Corporate CAFO v. Special Interest Group

The biggest example of when litigation is the best solution is when the defendant is a CAFO and the petitioner is represented by a special interest group. In these situations, the corporation and the special interest group will likely already have the legal and monetary resources for litigation. Additionally, large corporate farms are already highly regulated.³³⁶ If the farm is already in compliance with all of the regulations (something that the special interest group will probably know about), having to mediate to come up with creative solutions will likely be costlier in the long run. However unfortunate it is that the neighbors find the operation to be a nuisance, if the corporate farm is in compliance with all of the regulations and meets the other statutory requirements of the right to farm laws, it probably makes more sense for the corporate farm to litigate. While corporate ill-will is a consideration, most consumers purchase meat products based on freshness and price as opposed to which brand of meat it is.³³⁷ Litigating these complaints will also help these corporations with future legal battles by setting precedent.

C. How Right to Farm Amendments Change Mediating a Right to Farm Dispute

Two states currently have right to farm amendments. These amendments have been left open and ripe for interpretation by the courts. While many of the advantages of mediation will still exist with farm nuisance complaints in states that have right to farm amendments, there will likely be less interest in compromising in states that have a right to farm amendment.

In Missouri, right to farm arguments will likely be decided at the summary judgment level—at least until the amendment is interpreted further.³³⁸ Additionally, Missouri has not included right to farm disputes as items specifically covered by the state's farm mediation service—making it less likely that a party would seek out mediation in this type of dispute. The effects of North Dakota's right to farm amendment are less apparent currently, as there is still no case law interpreting the amendment.

336. Though some would say that they are still not regulated enough.

337. See, e.g., *7 factors that influence how consumers purchase chicken*, WATTAGNET (Jul. 17, 2015), <http://www.wattagnet.com/articles/23200-7-factors-that-influence-how-consumers-purchase-chicken>.

338. All of Missouri's cases interpreting the right to farm amendment have gone through summary judgment. Further, it makes sense that a trial court will decide these types of constitutional questions at the summary judgment level until there is enough knowledge about what the law means for the judges to know how to properly litigate a dispute on this matter.

The advantages of mediating a farm nuisance dispute in a state with a right to farm amendment are most relevant when the parties are normal individuals, as opposed to sophisticated corporations and special interest groups. Because the right to farm amendments are vague new laws, they leave many questions ripe for appellate review. Right to farm arguments in lower courts will likely take expensive and sophisticated legal arguments. Mediating these disputes will allow for the parties to focus on their own views and concerns, as opposed to just their legal arguments.³³⁹ Mediating might help facilitate relationships between neighbors as well.³⁴⁰ Bad neighbors can decrease property values, which is likely against the interests of all the parties involved.³⁴¹

If a party has the financial resources available for a lengthy legal battle, then litigating a constitutional right to farm argument could potentially lead to success. If a farming operation is complying with all applicable regulations, then right to farm amendments will theoretically protect the operation from nuisance complaints. However, these amendments are going to face large amounts of judicial scrutiny. Further, the amendments must still follow the Constitution of the United States, and arguments like those in *Bormann* and *Labrayere* will continue to be made.³⁴²

VIII. CONCLUSION

Is mediation the best approach? The simple answer is that it depends on who you are. There are clear advantages to mediating a right to farm dispute, but there are also clear disadvantages. At the end of the day, it will be important for the parties to weigh the advantages and disadvantages of mediating the dispute and make the decision that best fits their objectives.³⁴³

If you are an urban or suburban resident and are upset with your next door neighbor's foray into hobby farming, it is best to mediate. Chickens *can* be annoying and compost *can* cause a stink, but litigation is expensive. Mediation can help neighbors understand each other and can lead to some creative solutions. It is best for these types of unsophisticated parties to work it out through mediation.

It is likely that sophisticated parties such as special interest groups and large agricultural corporations will continue to play a vital role in shaping the right to farm laws—not just in lobbying and passing new right to farm amendments, but also through legal battles defining the right to farm laws and setting precedent. These organizations lobbied for the right to farm laws, so it should be their responsibility to define what they mean—especially whether they are unconstitutional like in Iowa, or if they mean anything at all like Missouri's right to farm amendment.³⁴⁴

339. See, e.g., Kimmel, Schilling & Everett, *supra* note 305.

340. *Id.*

341. *Bad Neighbors Can Decrease Property Values*, DAILY REAL ESTATE NEWS (Jan. 31, 2013), <http://realtormag.realtor.org/daily-news/2013/01/31/bad-neighbors-can-decrease-property-values>.

342. See *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998); see also *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319 (Mo. 2015).

343. *But see* IOWA CODE ANN. §654B.3 (West 2017) (clarifying that in Iowa, it is a prerequisite to litigation).

344. The agricultural interest groups are responsible for pushing for regulations and fighting to create right to farm amendments, they should also be the ones responsible for defining what these laws mean—if they can't write good laws in the first place, they should be the ones paying for the litigation in the courts.