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An Overview of Arkansas' Right-to-Farm-Law

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AN OVERVIEW OF ARKANSAS' RIGHT-TO-FARM LAW

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I. INTRODUCTION

In the1980s, state legislatures in all fifty states enacted statutes commonly referred to as "right-to-farm" laws.[1] Arkansas enacted its right-to-farm law ("the Act") in 1981.[2] While there are similarities, these laws differ from state-to-state.[3] All right-to-farm laws provide agricultural producers with statutory defenses to nuisance challenges, subject to certain

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1. *See* Adam Van Buskirk, *Right-to-Farm Laws as "Takings" in Light of Bormann v. Board of Supervisors and Moon v. North Idaho Farmers Association*, 11 ALB. L. ENVTL. OUTLOOK J. 169, 170 **2006). For a survey of all fifty states right-to-farm laws, see Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99 *1988).

2. Hamilton & Bolte, *supra* note 1, at 104.

3. *See generally* Hamilton & Bolte, *supra* note 1.

conditions.[4] As one scholar has noted, right-to-farm laws are designed "to protect existing farm investments by reducing actions under nuisance law that enjoined agricultural activities."[5] These laws also work to preserve farmland and protect established farmland from the pressures of urbanization, allowing "farmers to continue with their husbandry pursuits rather than enjoining them from farming due to the presence of a nuisance."[6]

Legal scholars have written much about right-to-farm laws.[7] This article will not attempt to recover areas already covered by those authors. Instead, this article will discuss the statutory protections offered by the Act to an agricultural producer. Section II.A will deal with general background on right-to-farm laws. Section II.B of the article will focus on the Act's specific provisions. This section will encompass who is protected, what agricultural operations are protected, the exemptions the Act contains, and the affect of the Act on local and county ordinances in Arkansas. Section II.C covers constitutional takings that might arise out of the Act.

II. DISCUSSION

A. *Right-to-Farm Laws Generally*

Right-to-farm laws typically can take two approaches: 1) codifying the "coming to the nuisance" defense.[8] According to one source, "the fact

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4. *See* Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. R. 87, 87-88 (2006), *available at* http://www.nationalaglawcenter.org/assets/articles/centner_righttofarm.pdf.

5. *Id.*

6. *Id.* at 88.

7. *See* Keith Burgess-Jackson, *The Ethics and Economics of Right-to-Farm Statutes*, 9 HARV. J. L. & PUB. POL'Y 481 (1986) (reviewing the economic efficiency of right-to-farm statutes); Tiffany Dowell, *Daddy Won't Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers,* 18 SAN JOAQUIN AGRIC. L. REV. 127 (2008-09) (looking at important provisions in the laws); Jeffry R. Gittins, *Bormann Revisited: Using the Penn Central Test to Determine the Constitutionality of Right-to-Farm Statutes*, 2006 BYU L. REV. 1381 (2006) (looking at the constitutionality of the laws); Jennifer L. Beidel, *Pennsylvania's Right-to-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 PENN STAT. L. REV. 163 (2005) (looking at Pennsylvania's right-to-farm law); Steven J. Laurent, *Michigan's Right to Farm Act: Have Revisions Gone Too Far?*, 2002 L. REV. MICH. ST. U. DET. C.L. 213 (2002) (reviewing Michigan's right-to-farm law); Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121 (2000) (looking at the takings issue), *available at* http://nationalaglawcenter.org /assets/bibarticles/richardsonfeitshans_nuisance.pdf.

8. Centner, *supra* note 4, at 95.

that the complainant 'came to the nuisance' constitutes a defense or operates as an estoppel[;]"[9] and 2) limiting the statutory period in which nuisance suits can be brought, such as requiring nuisance suits to be brought within one-year of the establishment of the agricultural operation.[10] With this defense, the right-to-farm law will provide a period of time from the establishment of the operation when a nuisance suit must be brought. The Act takes both of these approaches, as well as adding other statutory protections and exemptions.[11]

B. *Arkansas's Right-to-Farm Law*

The stated purpose of the Act is "to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance."[12] To limit the circumstances under which agricultural operations can be deemed a nuisance, the legislature created provisions to help protect Arkansas agricultural operations from the encroachment of nonagricultural land uses.

1. What is an "Agricultural Operation"

The Arkansas legislature clearly intended the Act to protect Arkansas's agricultural operations, and in so doing, broadly defined what is considered an "agricultural operation."[13] An "agricultural operation" is defined as follows:

> an agricultural, silvicultural, or aquacultural facility or pursuit conducted, in whole or in part, including:
> (A) The care and production of livestock and livestock products, poultry and poultry products, apiary products, and plant and animal production for nonfood uses;
> (B) The planting, cultivating, harvesting, and processing of crops and timber; and
> (C) The production of any plant or animal species in a controlled freshwater or saltwater environment[.][14]

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9. 58 Am. Jur. 2d *Nuisances* § 373 (2009).
10. Centner, *supra* note 4, at 95.
11. Arkansas's right-to-farm statute is codified at sections 2-4-101 through 2-4-108 of the Arkansas Code.
12. ARK. CODE ANN. § 2-4-101 (West 2009).
13. *See Id.*
14. *Id.* § 2-4-102. "Apiary products" would be honey.

The breadth of this statutory definition has never been fully explored by an Arkansas court. It would be a safe assumption that agricultural producers involved in traditional agricultural operations, such as livestock and row crops, would be protected under the Act. Newer, more non-traditional "agricultural operations" may be determined by an Arkansas court on a case-by-case basis.

Other states' courts have recognized non-traditional "agricultural operations" as covered by their states' right-to-farm laws. For example, a Michigan court found that a pheasant hunting preserve qualified as a "farming operation" under Michigan's right-to-farm law.[15] In this case, the court examined the definitions of "farm product" and "farm operations."[16] The court determined that game birds constituted "'farm products' because the[y] are useful to human beings and produced by agriculture."[17] The court also determined that the "hunting of game birds on defendant's property constitutes a 'farm operation' because it involves the 'harvesting of farm products.'"[18] The operation qualified as a "farm operation," and because other relevant statutory conditions were satisfied, the court afforded the defendants the protections of the right-to-farm law.[19]

On the other hand, a Texas court found that the raising of fighting chickens did not qualify as an "agricultural operation" under Texas's right-to-farm law.[20] In *Hendrickson*, the court looked at the legislative intent in passing Texas' right-to-farm law.[21] The court found the legislative intent was to protect those agricultural producers "who engaged in activities that produce food[,]" and the raising of fighting chickens did not qualify as the

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15. Milan Twp. v. Jaworski, No. 240444, 2003 WL 22872141, at *4 (Mich. Ct. App. Dec. 4, 2003), *appeal denied,* 683 N.W.2d 146 (Mich. 2004). Note that Arkansas's law includes "farming operation" within "agricultural operation." *See* § 2-4-102(1).

16. *Milan Twp.*, 2003 WL 22872141, at *4. Michigan defines a "farm operation" as "the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products[.]" *Id.* (quoting MICH. COMP. LAWS ANN. § 286.472(b) (West 2009)). A "farm product" is defined as:

those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy products, poultry and poultry products . . . or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.

Id. (quoting MICH. COMP. LAWS ANN. § 286.472(c) (West 2009)).

17. *Milan Twp.*, 2003 WL 22872141, at *4.

18. *Id.*

19. *Id.*

20. Hendrickson v. Swyers, 9 S.W.3d 298 (Tex. App. 1999).

21. *Id.* at 300.

production of food.[22] These are just some examples of non-traditional agricultural operations found to either fall under the protections of a state's right-to-farm law or outside the protections.[23]

2. Types of Defenses Available

Under Arkansas's law, an agricultural operation cannot be enjoined from operating due to a nuisance as long as certain statutory conditions are met. The law provides three different statutory conditions that an agricultural producer may fall under for the protections of the law. [24] The three different statutory conditions include a one-year statute of repose, employing methods commonly associated with agricultural production, and establishing the operation before the complaining activities came.[25] An agricultural producer only needs to qualify under one of the three defenses provided.[26]

i. Using Practices Commonly Associated With Agriculture

Section 1-4-107(b)(1) provides that "[e]xcept as provided in this section, an agricultural operation shall not be found to be a public or private nuisance if the agricultural operation alleged to be a nuisance employs methods or practices that are commonly or reasonably associated with agricultural production."[27] If the agricultural producer is using those "methods or practices that are commonly or reasonably associated with agricultural production,"[28] then their operation will have "a rebuttable presumption that an agricultural operation is not a nuisance."[29] Neither the statute nor the Arkansas courts have defined "methods or practices that are commonly or reasonably associated with agricultural production."[30]

In other states, using accepted agricultural practices is seen as a way to "encourage abstinence from poor husbandry practices that might

22. *Id.*

23. For more examples of activities found to be "agricultural operations" under other states' right-to-farm laws, see Harrison M. Pittman, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R.6th 465 (2005).

24. *See* ARK. CODE ANN. § 2-4-107 (West 2009).

25. *See id.*

26. Each agricultural producer's situation will be different, and effectively planning to defend against possible litigation may require the producer to consult with a licensed attorney to help determine the proper defense the operation would qualify for.

27. ARK. CODE ANN. § 2-4-107(b)(1) (West 2009).

28. *Id.*

29. *Id.* § 2-4-107(c)(2).

30. *Id.*

constitute a nuisance."[31] The typical problem with limiting right-to-farm statutes to accepted agricultural practices is that a judicial determination must be made regarding whether the agricultural practice is entitled to the statutory right-to-farm defense.[32] A federal district court was unwilling to extend Washington's right-to-farm law to protect a defendant who had "not engaged in 'good forestry practices' as demonstrated by the fact that it violated several water quality laws."[33] In order to qualify for the statutory defense, an Arkansas agricultural producer must abstain from poor agricultural practices and avoid violating other state or federal laws.

If an agricultural operation is following those accepted agricultural practices, it will not be found to be a public or private nuisance because of limited activities or conditions such as: "(A) Change in ownership or size; (B) Nonpermanent cessation or interruption of farming; (C) Participation in any government-sponsored agricultural program; (D) Employment of new technology; or (E) Change in the type of agricultural product produced."[34] Any change in ownership, temporary halt in farming operations, an interruption in farming, participation in any type of government agricultural program,[35] adoption of new technology, or change in crops or livestock raised will still allow a producer to claim the law's statutory defense of following accepted agricultural practices.

ii. The "Coming to the Nuisance" Defense

The next statutory defense the law provides is a codification of the "coming to the nuisance" defense. Section 2-4-107(c)(1)(A) provides that an agricultural operation will not become a public or private nuisance if it "[w]as established prior to the commencement of the use of the area surrounding the agricultural operation for nonagricultural activities[.]"[36] In order to qualify for this statutory defense, the agricultural operation must also use be using reasonable or commonly used agricultural practices.[37]

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31. Centner, *supra* note 4, at 107.
32. *See id.* at 109.
33. Gill v. LDI, 19 F. Supp. 2d 1188, 1200 (W.D. Wash. 1998).
34. ARK. CODE ANN. §§ 2-4-107(b)(2)(A)-(E) (West 2009).
35. Examples of these programs include the Conservation Reserve Program, the Conservation Security Program, and the Environmental Quality Incentives Program, which would not eliminate the protections the law provides by following accepted agricultural practices. CRS Report for Congress, Agricultural Conservation: A Guide to Programs, Sept. 8, 2010, *available at* http://crs.ncseonline.org/nle/crsreports/10Oct/R40763.pdf.
36. ARK. CODE ANN. § 2-4-107(c)(1)(A) (West 2009).
37. *Id.* § 2-4-107(c)(1)(B).

The coming to the nuisance defense is limited to nuisance claims by future neighbors.[38] The Supreme Court of Georgia found that statutory coming to the nuisance defense did not apply when the plaintiff's use of property had existed prior to the defendant's use.[39] This is an exception to the coming to the nuisance defense that agricultural producers rarely consider. In order to qualify for the statutory defense, an agricultural producer's use must be established before other neighboring landowners' uses are established.

iii. One-year Limitations Period

The final defense in the law provides agricultural producers with a limited period in which nuisance suits can be brought. The law provides that:

An agricultural operation or its facilities or appurtenances shall not be or become a public or private nuisance as a result of any changed conditions in and about the locality after it has been in operation for a period of one (1) year or more when the agricultural operation or its facilities or appurtenances were not a nuisance at the time the agricultural operation began.[40]

This provision means that a neighboring landowner who does not file a nuisance action within one year of "the commencement of the offensive activity may not successfully maintain the nuisance lawsuit."[41] After one year, unless the agricultural operation was a nuisance when it started, the agricultural producer is exempt from nuisance suits brought by neighboring landowners in the future. Decisions of states interpreting similar provisions can also provide some guidance for an Arkansas court. These decisions provide an Arkansas court with two differing interpretations. With the first view, the Texas Supreme Court has found a provision similar to Arkansas's to be a statute of repose.[42] According to the Texas court, "the relevant

38. *See* Centner, *supra* note 4, at 96-97.

39. Herrin v. Opatut, 281 S.E.2d 575, 578-79 (Ga. 1981) (finding plaintiffs' nonagricultural uses of their land were established before defendants built their egg farm). *See also* Cline v. Franklin Pork, Inc., 361 N.W.2d 566, 572 (Neb. 1985) (finding defendants' hog farm was established after the plaintiffs had moved on their property and statutory defense did not apply); Flansburgh v. Coffey, 370 N.W.2d 127 (Neb. 1985) (holding plaintiffs' residential use of their property was established prior to defendants' establishment of a hog farm on their property and statutory defense did not apply).

40. ARK. CODE ANN. § 2-4-107(a) (West 2009).

41. Centner, *supra* note 4, at 98.

42. Holubec v. Brandenberger, 111 S.W.3d 32 (Tex. 2003). A "statute of repose" is defined as "[a] statute barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period

inquiry is whether the conditions or circumstances constituting the basis for the nuisance action have existed for more than a year."[43] This view is followed by many states.[44]

The competing view has only been adopted by Minnesota. The Court of Appeals of Minnesota, when reviewing a similar provision in Minnesota's right-to-farm law, looked to the plain meaning of the section.[45] The court found that when "considering the timeliness of a nuisance claim against a facility that has been in operation for more than two years [a court] must determine whether . . . the operation was a nuisance when [it was] established."[46] Simply put, if the agricultural operation was a nuisance at the time the operation was established, the law would not protect the operation.

Starting in 1984, the Arkansas attorney general has issued two opinions on this provision of the law. Although not binding on a state court, the opinions provide persuasive authority on how to interpret this provision. In answering a question posed by the Department of Health on the department's authority to promulgate regulations pertaining to general sanitation, the attorney general found the one-year limitations provision would not allow enforcement of those rules against facilities in operation for more than one year.[47]

The attorney general appears to have adopted the Minnesota view.[48] When evaluating the provision, the attorney general considered the General Assembly's emergency clause, which stated:

> that to permit any such facility which was not a nuisance when established to be declared a nuisance and forced to cease operations because of change in conditions in the

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ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1451 (8th ed. 2004).

43. *Holubec*, 111 S.W.3d at 38.

44. *See generally* Lindsey v. DeGroot, 898 N.E.2d 1251 (Ind. Ct. App. 2009) (finding Indiana's right-to-farm law barred claims if the operation had continually operated for more than one year); Horne v. Haladay, 728 A.2d 954 (Pa. Super. Ct. 1999) (finding the defendant's poultry house had been in operation in a substantially unchanged manner for more than one year prior to the plaintiff's filing the nuisance suit); Aguilar v. Trujillo, 162 S.W.3d 839, 853-54 (Tex. App. 2005) (finding it irrelevant when the plaintiffs discovered the circumstances constituting the nuisance action if more than one year had passed); Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544 (Tex. App. 2004) (finding nuisance claims for dust caused by cattle barred because it had been in existence for more than one year).

45. Wendinger v. Forst Farms, Inc., 662 N.W.2d 546, 553 (Minn. Ct. App. 2003).

46. *Id.*

47. Ark. Op. Att'y Gen. No. 86-199 (1986), 1986 WL 83826.

48. *See* Ark. Op. Att'y Gen. No. 84-94 (1984), 1984 WL 63274, at *3-4.

> locality and after the facility has been in operation for a long period of time is not only unfair to the owners, operators and employees of such plant but is highly detrimental to the economic growth and development of the State. . .[49]

The attorney general found this to mean that:

> the spraying operation, if it be a nuisance, has been such since its inception. Furthermore, this is not the case of an acceptable operation becomming(sic) a nuisance as a result of changed conditions in the area occurring after the spraying had been in operation for a long period of time. Therefore, Act 301 of 1981 should pose no barrier to a private suit.[50]

An Arkansas court interpreting this one-year limitation provision could choose from two alternatives. The Arkansas court could follow the majority view to bar all nuisance suits against an agricultural operation after the operation has been established for more than one year. The other view is to look back to the establishment of the operation to determine if the operation was a nuisance, and if so, allow nuisance suits against the operation.

Again, it should be noted that each available defense described is one of three possible choices that an Arkansas producer will have in defense of a potential nuisance suit, and each defense is independent of the other. A producer would want to consult with a licensed attorney to determine the best defense for their operation.

3. Attorneys Fee Provision

Regardless of which view an Arkansas court adopts, an Arkansas producer that successfully defends a nuisance suit brought by a neighboring landowner may not be forced to pay the substantial legal bills that may mount during the litigation process. This fee provision is not universal to all states' right-to-farm laws, and Arkansas is unique for having such a provision.[51] Section 2-4-107(d) provides that the court may award

49. *Id.* at 3.

50. *Id.* at 4.

51. For a list of states' right-to-farm statutes with attorney's fee provisions, see Neil D. Hamilton, *A Livestock Producer's Legal Guide To: Nuisance, Land Use Control, and Environmental Law* 166-69 (Drake Univ. Agric. Law Ctr. 1992).

litigation expenses to the prevailing party.[52] The litigation expenses provided for in the Act would allow, in the court's discretion, the prevailing party to collect "expert fees, reasonable court costs, and reasonable attorney's fees[.]"[53] This provision helps to provide the producer with some extra protection and provide for their litigation expenses for successfully defending against a nuisance suit barred by the Act.

4. Exclusions to the Law

The Act contains two exclusions when the right-to-farm defense or defenses would not be available to an agricultural producer. Neither of the two exclusions has been tested in an Arkansas court. With the first exclusion, the Act will not provide a defense for the pollution of or change in condition to the waters of a stream.[54] This exclusion provides that:

> [t]he provisions of this chapter shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by them on account of any pollution of or change in the condition of the waters of any stream or on account of any overflow of the lands of any person, firm, or corporation.[55]

From a plain reading of the provision, an agricultural producer could expect to lose the statutory defenses of the Act whenever their operations are found to have caused pollution of a stream, a change in condition of a stream, or cause water to overflow on a neighbor's land. An example of this could occur when a rice producer floods a rice field. If any water overflowed and caused damages to a neighboring landowner, the rice producer would lose the defenses the Act provides from the damages caused by the overflowing water. The same is true for any stream water pollution or change in the condition of a stream caused by an agricultural operation. Agricultural producers causing this type of damage also lose the defenses provided by the Act.

The second exclusion does not exempt agricultural producers from statutory obligations under federal or other state laws, such as federal and

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52. ARK. CODE ANN. § 2-4-107(d) (West 2009). This section provides "[t]he court may award expert fees, reasonable court costs, and reasonable attorney's fees to the prevailing party in any action brought to assert that an agricultural operation is a public or private nuisance." *Id.*

53. *Id.*

54. *See Id.* § 2-4-106.

55. *Id.*

state environmental laws.[56] The Act does not preempt federal environmental laws because of the Supremacy Clause of the U.S. Constitution.[57] An agricultural producer still needs to meet statutory duties under federal laws.[58] An example given by Grossman and Fischer is the permit requirements for certain concentrated animal feeding operations under the Federal Water Pollution Control Act.[59] According to Grossman and Fischer, the right-to-farm law may give protection for the nuisance caused by the violation of the permit, but does not shield the agricultural producer from EPA enforcement for the permit violation.[60]

The Act does not provide protection against liability incurred because of a violation of a state environmental law. The Act, as Grossman and Fischer point out, expresses "no intention in the language of those statutes to repeal environmental laws applicable to farming operations."[61] This allows for both laws to "be interpreted consistently if right to farm laws are construed not to affect the application of the environmental laws."[62]

In summary, in order to qualify for the statutory defenses of the Act, agricultural producers must make sure that their agricultural operation is not violating either of the two exclusions. The statutory defenses will be lost if the agricultural producer causes pollution of a stream, a change in condition of a stream, or water to overflow on a neighbor's land. Finally, the Act will only provide statutory defenses for nuisance actions, and not give general statutory defenses to all applicable federal and state laws.

5. Law's Affect on County and Local Ordinances

The Act limits the affect of local ordinances on agricultural operations. The Act invalidates all municipal and county ordinances that attempt to make agricultural operations nuisances. Section 2-4-105 reads:

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56. For a detailed discussion on this issue, see Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 150-57 (1983).

57. *Id.* at 150-51. The Supremacy Clause of the U.S. Constitution states that the U.S. "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land[.]" U.S. CONST. art. VI, § 2.

58. Grossman & Fischer, *supra* note 56, at 150.

59. *Id.* at 151-52.

60. *Id.* In fact under Arkansas law, compliance with such a permit would "create a rebuttable presumption that an agricultural operation is not a nuisance." ARK. CODE ANN. 2-4-107(c)(2) (West 2009).

61. Grossman & Fischer, *supra* note 56, at 153.

62. *Id.*

> Any and all ordinances adopted by any municipality or county in which an agricultural operation is located making or having the effect of making the agricultural operation or any agricultural facility or its appurtenances a nuisance or providing for an abatement of the agricultural operation or the agricultural facility or its appurtenances as a nuisance in the circumstances set forth in this chapter are void and shall have no force or effect.[63]

But with few counties having set up county zoning boards, the extent of the Act only currently applies to a limited number of counties in the state.[64] In these counties, this section would void all county or local ordinances that have the effect of making an agricultural operation a nuisance.

The Arkansas attorney general has issued a few opinions dealing with this section of the Act. Although the opinions are not binding on an Arkansas court, they provide persuasive authority to the courts. Using this section, the attorney general has found that a city would have no jurisdiction to adopt ordinances regulating livestock auction barns.[65]

In dealing with city ordinances prohibiting swine and poultry operations in certain areas of the Town of Oak Grove, the attorney general found that this provision would limit the city's power.[66] The attorney general found that this provision would invalidate any ordinance that tried to regulate those agricultural operations "in existence for at least one year prior to the ordinance's adoption."[67]

Finally, in dealing with a county having the authority to exclude a hog farm from certain areas, the attorney general also found this provision would limit the county's powers.[68] The attorney general found that the hog farm ordinance would be valid if it was a reasonable restraint on "property owners so as not to cause injury to the property rights of their neighbors."[69]

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63. ARK. CODE ANN. § 2-4-105 (West 2009).

64. For example, Washington County currently has ordinances in place to protect agriculture and allow for the zoning of agriculture. *See* PARA Task Force Recommendation for Establishing Various Zones and Implementing Zoning in Washington County, Arkansas, http://www.co.washington.ar.us/PARA/PARA-SummaryRecommendation120805.htm (last visited Nov. 19, 2012). This is just one example of the type of zoning regulations that could exist for agriculture.

65. Ark. Op. Att'y Gen. No. 83-194 (1983), 1983 WL 52188.

66. Ark. Op. Att'y Gen. No. 87-120 (1987), 1987 WL 124416.

67. *Id.*

68. Ark. Op. Att'y Gen. No. 87-297 (1988), 1988 WL 279362.

69. *Id.*

On the other hand, the ordinance that interfered with an existing agricultural facility is void because of the local ordinance provision.[70]

Other states have a similar provision in their right-to-farm laws, and have dealt with the extent of the limits of the right-to-farm preemption of local and county ordinances.[71] The Alaska Supreme Court found that their ordinance preemption provision did not preempt the enforcement of a permit revocation requiring the agricultural producer to remove a fence.[72] The Connecticut Court of Appeals found their state's preemption provision did not bar a local ordinance requiring a horse farm to submit a nutrient management plan.[73] The Supreme Court of Rhode Island held their right-to-farm statute preempted a local ordinance, in which the municipality was asserting that the agricultural operation had violated a local ordinance with dust that came from pond excavation activities, and the court found the right-to-farm law protected this activity.[74]

Agricultural producers in Arkansas have protection from municipal and county ordinances directed at making their operations nuisances in areas. However, many producers are starting to feel the pressures of urbanization and urban sprawl. This provision will preempt nuisance ordinances that could be used to drive preexisting agricultural operations out of the area, which is another protection the Act offers agricultural producers in the state.

C. *Constitutionality of the Right-to-Farm law*

The final area of concern is the constitutionality of the Act.[75] The majority of states have upheld the constitutionality of their right-to-farm

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70. *Id.*

71. To view a thorough but not necessarily exhaustive compilation of similar state provisions preempting local and county ordinances, see the National Agricultural Law Center's Case Law Index for Urbanization and Agriculture decisions from January 1, 2002 to current, *available at* http://www.nationalaglawcenter.org/assets/caseindexes /urbanencroachment.html. For more cases, see Pittman, *supra* note 23.

72. Gates v. City of Tenakee Springs, 822 P.2d 455, 463 (Alaska 1991) (finding "that statute is designed to provide a defense against a nuisance action, not against a permit revocation under city ordinances.").

73. Ammirata v. Zoning Bd. of Appeals of Town of Redding, 782 A.2d 1285, 1292 (Conn. App. Ct. 2001), *rev'd on other grounds,* 826 A.2d 170 (Conn. 2003) (finding that the preemption law is limited to nuisance ordinances and the farm had not been declared a nuisance).

74. Town of N. Kingstown v. Albert, 767 A.2d 659 (R.I. 2001). Again, these are just examples and will only be persuasive to Arkansas courts deciding this issue. For more examples of decisions on this issue, see Pittman, *supra* note 23.

75. For a review of federal takings law, see Jason Jordon, *A Pig in the Parlor or Food on the Table: Is Texas's Right to Farm Act an Unconstitutional Mechanism to*

laws when challenged. Like many other issues involving the state's right-to-farm law, an Arkansas court has yet to rule on the constitutionality of the Act. Finding the Act unconstitutional would result in a loss of all the statutory defenses the Act provides.

The Supreme Court of Iowa has twice found provisions of their right-to-farm law to be unconstitutional.[76] In *Bormann v. Board of Supervisors*, the Supreme Court of Iowa found that a provision of the state's right-to-farm law was unconstitutional.[77] The court found that the immunity from nuisance suits, in Iowa Code section 352.11(1)(a), "resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants [defendants]. The easements entitle the applicants [defendants] to do acts on their property, which . . . would constitute a nuisance."[78] This creation of an easement was found to be an unconstitutional taking and the court invalidated this provision.[79]

In *Gacke v. Pork Xtra, L.L.C.*, the Supreme Court of Iowa found the section to be indistinguishable from the one at issue in *Bormann*.[80] Section 657.11(2) gave animal feeding operations a statutory defense against nuisance claims brought by neighboring landowners.[81] Relying on its earlier decision in *Bormann*, the court invalidated the section as an unconstitutional taking.[82]

When faced with the issue of the constitutionality of right-to-farm laws, the majority of states have reached the opposite conclusion of the Iowa courts. A Texas Court of Appeals rejected arguments that Texas's

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Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Growth?, 42 TEX. TECH L. REV. 943 (2010). This article also provides the reader with a good overview of the different types of nuisances.

76. Bormann v. Board of Supervisors In & For Kossuth County, 584 N.W.2d 309 (Iowa 1998); Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004) (a summary of the *Gacke* decision written by Jennifer Williams and provided by the National Agricultural Law Center is available at http://www.nationalaglawcenter.org/assets /cases/gacke.html).

77. *Bormann*, 584 N.W.2d at 322.

78. *Id.* at 321.

79. *Id.* at 321-22.

80. *Gacke*, 684 N.W.2d at 173.

81. *Id.* at 171.

82. *Id.* at 175. For more detailed discussions on these two cases, see Centner, *supra* note 5, at 117-41; Pittman, *supra* note 23, at sections 4-5, 7-8; Buskirk, *supra* note 1; Jeffery R. Gittins, *Bormann Revisited: Using the Penn Central Test to Determine the Constitutionality of Right-to-Farm Statutes*, 2006 BYU L. REV. 1381 (2006); Lynda J. Oswald, *At the Intersection of Environmental Law and Nuisance Law: Do Right-to-Farm Statutes Result in Regulatory Takings?*, 30 REAL EST. L. J. 69 (2001) (a copy of these articles are available upon request from the author).

right-to-farm statute is unconstitutional.[83] The Supreme Court of Idaho rejected an argument to apply the Iowa Supreme Court's reasoning to their right-to-farm law.[84] The Indiana Court of Appeals also rejected an argument to apply Iowa's ruling to Indiana's right-to-farm statute.[85]

Arkansas has no case law finding the right to maintain a nuisance creates an easement. The Idaho and Indiana courts cited a lack of similar case law as the reason to reject the reasoning of the Iowa Supreme Court. Lacking similar case law, an Arkansas court would probably reject arguments that the Act is unconstitutional.

This rejection would also be in line with the views of other legal scholars. The coming to the nuisance defense, codified in section 2-4-107(c)(1)(A), would be "a permissible extension of state law."[86] "Legislatures can establish rules whereby persons who move next to a nuisance are estopped from maintaining an action to abate the existing nuisance."[87]

The one-year limitations period, in section 2-4-107(a), would also prevent the Act from being found unconstitutional. Professor Terrence Centner has pointed out that similar limitation periods have withstood judicial scrutiny.[88] "Because statutes of limitation provide a window of opportunity for bringing nuisance actions, there is no unconstitutional deprivation of property rights."[89] Neighboring landowners would have one year in which to bring a nuisance claim, and not totally have that right taken away.

Arkansas case law does not include the same case law that Iowa has used to find its right-to-farm law unconstitutional. In comparing the defenses to those noted by other legal scholars, the Act's defenses are likely constitutional. But without specific facts and circumstances of such a case, the Act would appear to be constitutional in most applications.

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83. Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544 (Tex. App. 2004) (a summary of this opinion written by Ross Pifer is available at http://www.nationalaglaw center.org/assets/cases/barrera.html).

84. Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637 (Idaho 2004) (a summary of this opinion written by Ross Pifer is available at http://www.nationalaglaw center.org/assets/cases/moon.html). The Idaho court found no direct authority under Idaho law that the right to maintain a nuisance was an easement. *Moon*, 96 P.3d at 644.

85. Lindsey v. DeGroot, 898 N.E.2d 1251 (Ind. Ct. App. 2009) (a summary of this opinion written by Paul Goeringer is available at http://www.nationalaglawcenter. org/assets/cases/lindsey.html). The Indiana court also found no authority in Indiana "that the right to maintain a nuisance is an easement . . ." *Lindsey*, 898 N.E.2d at 1259.

86. Centner, *supra* note 5, at 138.

87. *Id.*

88. *Id.* at 139.

89. *Id.*

III. CONCLUSION

The Act provides many different statutory defenses to protect agricultural operations in the state. The Act covers traditional agricultural operations, such as rice, soybeans, and cattle. The Act may also cover newer, non-traditional agricultural operations, but this would be up to a court to decide.

A producer has three possible statutory defenses to use in potential nuisance litigation brought by neighboring landowners: 1) use of accepted agricultural practices; 2) the "coming to the nuisance" defense; and 3) a one-year statutory limitations period. Each defense is independent of the others, and a producer only needs to qualify for one of the three. When facing a nuisance challenge in court, agricultural operators can pick the defense that best meets their situation. Finally, if the producer wins the nuisance action, the producer would be able to collect attorney's fees and other costs from the neighboring landowner under the law.

Producers must also make sure their actions do not fall under an exemption to the Act. Producers cannot maintain protection if they pollute stream water, change the condition of a stream's water, or cause water to overflow on the property of another. A producer engaging in any of these three actions loses the protections of the Act. The Act also does not provide a defense to violations of other federal or state laws. To maintain the statutory defenses provided by the Act, producers must abide by these restrictions.

The Act also limits the impact of county and local ordinances on agricultural operations. The ordinances could not make the agricultural operation into a nuisance, but other regulatory ordinances that do not make an agricultural operation into a nuisance could exist under the Act.

Finally, in comparing the Act to the works of other legal scholars, the Act appears to be constitutional. A legislature's adoption of the coming to the nuisance defense is a permissible use of state law. Additionally, the one-year limitation period allows a window of time for neighboring landowners to bring claims. The Act does not appear to have the same problems as Iowa's right-to-farm law, but this is ultimately a question that will have to be answered by an Arkansas Court.

The Act has been offering the state's agricultural producers statutory nuisance defenses and protections from local and county ordinances for close to thirty years. In that time, the Act has not been challenged in court. As areas of Arkansas continue to urbanize, the Act may see some legal challenges to the extent of its protections. Agricultural producers can only hope that Arkansas courts will interpret the Act in their favor.