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IN CELEBRATION OF THE FORTIETH ANNIVERSARY OF THE LL.M.
PROGRAM IN AGRICULTURAL AND FOOD LAW AT THE UNIVERSITY
OF ARKANSAS SCHOOL OF LAW, THE JOURNAL OF FOOD LAW &
POLICY DEDICATES THIS ISSUE IN RECOGNITION OF THE LL.M.
PROGRAM.

ALL OF THE PUBLISHED ESSAYS AND ARTICLES ARE WRITTEN BY
ALUMNI OR CURRENT LL.M. CANDIDATES. THE ISSUE BEGINS WITH
AN ESSAY THAT MARKS THE FIRST HISTORICAL REFLECTION ON THE
LL.M. PROGRAM.

The Arkansas LL.M. Program: Forty Years of Leadership

Susan A. Schneider*

The University of Arkansas School of Law has been a leader in agricultural law education for over forty years through its innovative LL.M. Program in Agricultural and Food Law. I am proud to serve as the current Director of this Program and as one of its alumni. This essay memorializes the history of this signature Program and charts its progress through the decades as agricultural law issues evolved and the discipline expanded.

I. Beginnings: First in the Nation

Over four decades ago, the University of Arkansas School of Law created a new specialized LL.M. Program focusing on agricultural law. Arkansas was the first law school to endorse agricultural law as a specialty worthy of graduate study, and its leadership was instrumental in establishing agricultural law as a discipline. This section of my essay recounts the creation of the LL.M. Program at Arkansas and describes its formative years.

In February 1977, the University of Arkansas Law School faculty approved in principle the creation of a post-J.D. graduate program, i.e., an LL.M. degree program.¹ The following June, the faculty approved the broad outlines of a generalist graduate program as was proposed by the faculty Committee on Graduate Programs.² While the faculty supported the creation of this general program, they also called for a study of the feasibility of a specialized program focusing on agricultural law.³

Agricultural law is the study of the law as applied to the agricultural sector. Agriculture is uniquely suited for this type of

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¹ Univ. of Ark. Sch. of L. Faculty, Excerpts from the Faculty Minutes Relating to the Agricultural Law Program: February 1977 to March 1979, at June 20, 1977 (1977) (on file with author).

² *Id.* Univ. of Arkansas School of Law Faculty Minutes, June 20, 1977 (on file with author). The motion was based on a memorandum from the Committee on Graduate Programs, composed of law faculty members S. Nickles, R. Knowlton, and M. Gitelman, Chairperson.

³ Memorandum from the Comm. on Graduate Programs to the Univ. of Ark. Sch. of L. Faculty (Feb. 20, 1978) (on file with the author). Committee members were C. Carnes, R. Fairbanks, and M. Gitelman.

study because so many legal exceptions and special provisions apply to the agricultural sector.

“Agricultural exceptionalism,” i.e., the use of legal exceptions to protect the agricultural industry, is pervasive. This term is often used to reference its American origins in labor law, where agricultural laborers are excluded from many of the protections afforded to other workers. However, the concept is evident throughout the law, with farmers protected from involuntary bankruptcy, exempted from many environmental regulations, and excepted from anti-trust restrictions. The first use of the term is often credited to international trade scholarship, where special exceptions are also evident in other countries.⁴

In the mid-1970s, there was growing interest in considering agricultural law as a new discipline. Expanding export markets, high farmland values, the increasing size of farm operations, and the use of new contracting arrangements fueled the need for specialized legal services.⁵ This peaked the Arkansas Law faculty’s interest, and the Committee on Graduate Programs was tasked with exploring the feasibility of developing an LL.M. program in agricultural law in addition to the general studies LL.M.

The Committee reviewed a survey conducted by the American Association of Law School (AALS) that reported twenty-seven different legal specialties offered by graduate programs at U.S. law schools, with none focused on agricultural law. The committee consulted with Professor Drew Kershen of the University of Oklahoma College of Law. Professor Kershen was one of only a handful of law professors who taught agricultural law courses and seminars at that time. The Committee reported its conclusions to the faculty in a 1978 memorandum.

After the meeting, the Committee was convinced that an LL.M. program in Agricultural Law would (1) be sound doctrinally and intellectually, (2) meet government and private sector professional needs, (3) attract qualified students, and (4) produce job-marketable specialists.⁶

⁴ Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENV'T L. & POL'Y REV. 935, 936 (2010) (internal citations omitted).

⁵ Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization and Practice*, 43 ARK. L. REV. 503, 511 (1990).

⁶ Memorandum from the Comm. on Graduate Programs, *supra* note 3.

Based on the Committee recommendation, the law faculty voted to create a specialized LL.M. Program in Agricultural Law and gave the development of this program priority over the development of a general program.⁷

The subsequent proposal for the creation of this “innovative and unique”⁸ program was presented by the University of Arkansas to the Arkansas Department of Higher Education in 1978. This proposal described the program as follows:

“The LL.M. in Agricultural Law will be administered by the School of Law, University of Arkansas, Fayetteville, as a post-J.D. program to provide specialized training in a rapidly developing, particularly complex area of law, technology, and government regulation with international, national, regional, and statewide impacts. The purpose of the program will be to train a small number of carefully selected attorneys as specialists in the legal problems of agricultural production, distribution, and marketing. Graduates of the program will enter both the public and private sector as highly trained specialists available to large law firms representing agri-business interests, large corporations engaged in agricultural processing, marketing and distribution, government agencies closely involved in agriculture (Dept. of Agriculture, State Dept., Commerce Dept.), and academic institutions seeking to provide curricular offerings in the agricultural law area.”⁹

The proposal called for implementation of the new program in the 1979-80 academic year with the hiring of a faculty director and the enrichment of the law library’s agricultural law holdings. An additional faculty member would be hired for 1980-81, and six fellowship students would be admitted for the inaugural class. A third faculty member would be hired in 1981-82, with six additional fellowship students admitted. “About ten additional courses or seminars” would be created, with these courses available to second and third-year law students at the University of Arkansas.¹⁰

The program was approved by the Arkansas Department of Higher Education in 1979, and it was subsequently approved by the

⁷ Univ. Of Ark. Sch. of L. Faculty, *supra* note 1, at Feb. 28, 1978.

⁸ Letter from Milton Copeland, Acting Dean, Univ. Ark. Sch. of L., to Charles E. Bishop, President, Univ. of Ark. (Sept. 21, 1978) (on file with author).

⁹ *Id.*

¹⁰ *Id.*

AALS and the Section of Legal Education and Admissions of the American Bar Association.¹¹

The law school hired Jerry Wayne (Jake) Looney in 1980 as the inaugural director of the new LL.M. Program. Professor Looney already had a distinguished background in agricultural law with dual master's degrees in Animal Science and Agricultural Economics and a J.D. from the University of Missouri - Kansas City. He had teaching experience at the University of Missouri, Virginia Tech, and Kansas State and had a solid publication record in agricultural law.¹²

As director of the new program, Professor Looney was tasked with developing policies and procedures for the program and guiding its formation. Professor Looney presented the faculty with proposed policies in December 1980 and noted that the University had committed to add a second LL.M. faculty member in 1981.¹³ The law school honored this commitment and hired Neil D. Hamilton, a young attorney from Iowa who was already making his mark in the agricultural law community.¹⁴ At the time he was hired, Hamilton served as Assistant Attorney General for the state of Iowa, working in the Farm Division.¹⁵ He assisted Professor Looney with plans for the new Program, and the inaugural LL.M. class was welcomed in the Fall of 1981.¹⁶

In 1982, Professor Looney became Dean of the Law School, and in 1983, Professor Don Pedersen was hired as the new Director of the LL.M.¹⁷ Program. Professor Pedersen was an experienced agricultural law teacher, scholar, and practitioner. He taught at Capital University Law School, where his courses included Farm Labor Law, and at William Mitchell College of Law, where he taught Agricultural Law, with publications across a wide variety of agricultural law related subjects.¹⁸ He was also an experienced agricultural law practitioner. Professors Looney, Pedersen, and

¹¹ UNIV. OF ARK. SCH. OF L. SELF STUDY, THE GRADUATE AGRICULTURAL LAW PROGRAM 3 (1986) (on file with author) (hereinafter, 1986 SELF STUDY).

¹² *Id.* See also *J.W. Looney, Former School of Law Dean, Dies at Age 74*, UNIV. OF ARK. NEWS (Oct. 26, 2018), <https://news.uark.edu/articles/45276/j-w-looney-former-school-of-law-dean-dies-at-age-74>.

¹³ Memorandum from Jake Looney to Law Faculty 4 (Dec. 1, 1980) (on file with author).

¹⁴ 1986 SELF STUDY, *supra* note 11, at 3, 4.

¹⁵ Interview with Neil D. Hamilton, Retired Dean, Univ. of Ark. Sch. of L. (Mar. 29, 2022).

¹⁶ 1986 SELF STUDY, *supra* note 11, at 3.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 14, 15.

Hamilton are credited with being the three founders of the LL.M. Program.

The Arkansas law faculty can be commended for recognizing the importance of agricultural law as an emerging discipline, but even with their great foresight, they could not have imagined the explosion of legal issues during the first decade of the LL.M. Program. The Farm Crisis of the 1980's has been characterized as "a defining period for agriculture in the United States" and the "worst financial crisis [on the farm] since the Great Depression."¹⁹ Professor Looney described the situation in a 1985 law review article:

"[T]he current financial distress in agriculture portends other even more dramatic changes for the farm sector and for rural communities. Increasing debt-to-asset ratios, cash flow problems, business failures and bankruptcies combined with depressed land and machinery markets not only threaten the continued viability of the farm sector, but also have adverse effects on farm suppliers and lenders. The cumulative effect of these financial problems on rural communities is of particular concern."²⁰

The need for specialized expertise to navigate the economic upheaval within the agricultural sector and the complex legal issues that arose confirmed agricultural law's status as a discipline worthy of recognition by both the academy and the bar, with the University of Arkansas as a recognized leading force.²¹

The American Agricultural Law Association (AALA) was formed in 1980 "to further the development and dissemination of knowledge about agricultural law."²² One early meeting to discuss forming the organization was held in Iowa in the summer of 1980,

¹⁹ Barry J. Barnett, *The U.S. Farm Financial Crisis of the 1980s*, 74 AGRIC. HIST. 366, 366 (2000).

²⁰ J.W. Looney, *Agricultural Law and Policy: A Time for Advocates*, 30 S.D. L. REV. 193, 194 (1985).

²¹ Arkansas LL.M. faculty have consistently produced scholarship addressing the special issues presented in agricultural law, and in the 1980's this scholarship provided timely information on the financial issues presented. See, e.g., J.W. Looney, *Protecting the Farmer in Grain Marketing Transactions*, 31 DRAKE L. REV. 519 (1982); Neil D. Hamilton & J.W. Looney, *Federal and State Regulation of Warehouses and Grain Warehouse Bankruptcy*, 27 S.D. L. REV. 334 (1982); Janet Flaccus, J.W. Looney, Donald B. Pedersen & Mary Davies Scott, *Representing Farmers in Financial Distress*, 20 ARK. LAW. 150 (1986).

²² Leo P. Martin, *Agricultural Law Association Forms at Law School; Discusses Taxes, Financing, Zoning, Conservation*, QUAERE, Jan. 1981, at 1 (on file with author).

with Professor Looney in attendance along with future Arkansas hire, Neil Hamilton, representing the Farm Division of the Iowa Attorney General's Office.²³ The official meeting to convene the new association was held in December 2000 at the University of Minnesota with all three of the LL.M. founders in attendance, although at that time, only Professor Looney had been hired by the University of Arkansas, and the LL.M. Program was being developed.²⁴

Several years later, the AALA was housed at the University of Arkansas with Bill Babione, an LL.M. graduate at the helm as Executive Director.²⁵ The three founders of the LL.M. Program, Professors Looney, Hamilton and Pedersen all served as Presidents of the AALA during its formative years.²⁶ Professor Pedersen coordinated and edited the monthly AALA publication, *The Ag Law Update*.²⁷

When Professor Looney developed the policies and procedures for the new LL.M. Program, a proposed curriculum was drafted. The following courses, all to be created as new courses that were likely not offered at any other law school in the United States, were proposed:

- Agricultural Finance & Credit
- Agricultural Cooperatives
- International Agricultural Trade
- Government Regulation of Agriculture
- Agriculture and Environmental Control
- Farm Estate and Business Planning
- Commodities Trading and Regulation

When Professor Pedersen was hired in 1983, one of his first scholarly projects was developing an agricultural law casebook. In 1985, West Publishing released the book *AGRICULTURAL LAW: CASES AND MATERIALS* authored by Professor Pedersen, Keith Meyer (University of Kansas School of Law), Norman W. Thorson

²³ Interview with Neil D. Hamilton, *supra* note 15.

²⁴ See Leo P. Martin, *Agricultural Law Association Forms at Law School: Discusses Taxes, Financing, Zoning, Conservation*, *QUAERE*, Jan. 1981, at 1 (showing Professors Looney and Pedersen); Interview with Neil D. Hamilton, *supra* note 15.

²⁵ Margaret Rosso Grossman, *The American Agricultural Law Association: 1991 and Beyond*, 68 *N.D. L. REV.* 255, 256 (1992).

²⁶ *AALA Past Presidents and Directors*, *AM. AGRIC. L. ASS'N.*, <https://www.aglaw-assn.org/aala-past-presidents/> (last visited Apr. 28, 2022).

²⁷ See, e.g., *Am. Agric. L. Ass'n*, 2 *THE AGRIC. L. UPDATE*, Jan. 1985, at 2, available at <https://www.aglaw-assn.org/wp-content/uploads/01-85.pdf>. (crediting Professor Don Pedersen as editorial liaison).

(University of Nebraska) and John H. Davidson (University of South Dakota).²⁸ Publication of this extensive casebook made it possible for law professors across the country to teach an agricultural law survey course without having to create the course from scratch. This furthered the discipline and allowed more students to consider agricultural law as a career path. I was one of those fortunate students. My professor at the University of Minnesota Law School, Professor Gerald Torres, relied on a draft manuscript of the casebook when I took his new Agricultural Law class in 1984.²⁹

Under Professor Pedersen's leadership, the new LL.M. Program thrived. The Law School's 1985 Self Study contains a chapter on the LL.M. Program and its important contributions to the law school and the agricultural community.³⁰ The Program successfully addressed two program policy issues that were hampering the graduation rates of the candidates: the thirty credit degree requirement and the thesis requirement. Although at the time other LL.M. Programs in the United States required only twenty-four credits for the LL.M. degree, Arkansas's program required 30. Professor Pedersen and the Graduate Legal Studies Committee also proposed a "non-thesis option," that was "common to American graduate education" and would better serve those candidates who were not focused on an academic career. Both proposals were passed by the faculty and the appropriate university bodies.³¹

In 1985, the required courses in the Program were Colloquium in Agricultural Law, Research Seminar in Agricultural Law I, and Economics of Agricultural Policy. The economics course was offered through the Agricultural Economics department of the University's School of Agriculture. "Non-thesis option" candidates were also required to take a new Research Seminar in Agricultural Law II course.³² Twelve elective courses were available, with most also available to JD students:

- International Agricultural Transactions
- Regulation of Agricultural Lands
- Agricultural Taxation
- Farm Estate and Business Planning
- Agricultural Cooperatives

²⁸ See KEITH G. MEYER, DONALD B. PEDERSEN, NORMAN W. THORSON, & JOHN H. DAVIDSON, *AGRICULTURAL LAW: CASES AND MATERIALS* (1984).

²⁹ Susan A. Schneider, *Thoughts on Agricultural Law and the Role of the American Agricultural Law Association*, 10 *DRAKE J. AGRIC. L.* 1 (2005).

³⁰ See 1986 SELF STUDY., *supra* note 11, at 2-3.

³¹ See *id.* at 5-7.

³² *Id.* at 8.

- Agricultural Finance and Credit
- Agricultural Labor Law
- Forestry Law & Policy
Food and Drug Law³³

A few JD classes were recognized as appropriate for LL.M. candidates and Administrative Law was a required background class.³⁴

When Professor Neil Hamilton left Arkansas to take a position with Drake Law School, the Law School did not replace him. The Law School justified this decision by noting that the LL.M. students “deserve to be exposed to various members of the law faculty” and recognizing that the “highly specialized nature of the agricultural law courses” made it difficult to replace someone who left.³⁵ “By having wide faculty involvement, the loss of a particular teacher should not cripple the program or create undue problems if a replacement cannot immediately be found.”³⁶ While law school financial constraints and JD faculty hires likely contributed to this decision, the result was the same. Law faculty were recruited to teach in the LL.M. Program. Given the “highly specialized nature” of the courses, these faculty members often had to learn new subject matter and then develop their own course materials.³⁷ Dean Looney also continued to teach Government Regulation of Agriculture in the program while serving as dean.³⁸

JD faculty members that were recruited to teach agricultural law courses were Professor Lonnie Beard (Agricultural Taxation and Farm Estate and Business Planning), Professor Mary Beth Matthews (Agricultural Cooperatives), Professor Linda Malone (Regulation of Agricultural Lands), Professor Charles Carnes (Agricultural Labor Law) and Professor Robert B. Leflar (Food and Drug Law). Professor Christopher Kelley taught Forestry Law and Policy as an adjunct.³⁹

Professor Pedersen handled all aspects of Program management, including recruitment, placement, alumni relations, and reporting duties and had an exhaustive teaching load. He taught Agricultural Colloquium, Research Seminar in Agricultural Law I

³³ *See id.* at 9-11.

³⁴ *See id.* at 12.

³⁵ *Id.*

³⁶ UNIV. OF ARK. SCH. OF L. SELF STUDY, THE GRADUATE AGRICULTURAL LAW PROGRAM 11-12 (1986) (on file with author) (hereinafter, 1986 SELF STUDY).

³⁷ *See id.* at 13.

³⁸ *Id.* at 10.

³⁹ *See id.* at 10-11.

and II, Agricultural Finance and Credit, International Agricultural Transactions, and a JD survey course in Agricultural Law.⁴⁰ From the Law School's 1986 Self Study:

All of the students are impressed with the expertise and tireless efforts of the program's director, Professor Donald Pedersen. The success of the program is due largely to his classroom activities, extensive publications, and performance of a multitude of other duties on behalf of the program. . . . The only criticism is that the program is too dependent on Professor Pedersen. In fairness to him, another faculty member needs to be hired to assist in those duties. At the very least, another faculty member needs to be responsible for such duties as recruitment, coordinating alumni relations, publicizing, and promoting the program and job placement.⁴¹

In addition to its academic work, the LL.M. Program also provided information to the public, recognizing the "substantial need for a clearinghouse operation" to serve the legal profession and the agricultural industry.⁴² In 1987, thanks to the support of Senator Dale Bumpers and his legislative assistant, Chuck Culver, an LL.M. alumnus, the law school received Congressional recognition for its agricultural law work and funding to support a new agricultural law center. Quoting from Senator Burdick's statement to the Congressional Record, "[t]he Agricultural Law Program at the [University of Arkansas] Leflar Law Center is recognized for its unique expertise in the area of agricultural law."⁴³ This expertise supported the award of funds to the law school for "the creation of the National Center for Agricultural Law Research and Information."⁴⁴ The funds were to be used to hire a director, professional researchers, a research and information librarian, and support staff, and to fund graduate assistantships for students in the LL.M. Program, as well as other elements necessary to support the new Center at the law school.⁴⁵

Federal funding for the National Center was provided to the law school through a USDA grant beginning in 1988, with the grant administrated through the USDA National Agricultural Library. The

⁴⁰ *See id.* at 15.

⁴¹ *Id.* at 37.

⁴² UNIV. OF ARK. SCH. OF L. SELF STUDY, THE GRADUATE AGRICULTURAL LAW PROGRAM 34 (1986) (on file with author (hereinafter, 1986 SELF STUDY)).

⁴³ 133 CONG. REC. S35253 (daily ed. Dec. 11, 1987) (statement of Sen. Burdick).

⁴⁴ *Id.*

⁴⁵ *Id.* The funding was secured through the 1988 appropriations legislation passed as Pub. L. 100-202, 101 Stat. 1329-30 (1987).

cooperative agreement between the USDA and the law school reiterated the Congressional directive and specified that the Center was to “provide research and information to the USDA and the National Agricultural Library” independently from the USDA.⁴⁶ The Dean of the Law School (Dean Looney) and the Director of the Agricultural Law Graduate Program (Professor Pedersen) served as the inaugural co-principal investigators and were responsible for setting up the new center.⁴⁷

The National Center was a natural partner for the LL.M. Program. Professionals were hired at the center for their agricultural law expertise and were then available to teach a class in the LL.M. Program, and LL.M. faculty consulted on Center projects. The opportunity to teach enhanced the center staff attorney positions and helped to recruit well qualified attorneys. The availability of Center attorneys who were qualified to teach reduced the need for JD faculty to teach in the LL.M. Program. LL.M. candidates were hired as Graduate Assistants and provided research to support Center attorneys. I was fortunate to receive a Graduate Assistantship when I attend the LL.M. Program in 1989-90, working with then Center Director, John Copeland, on agricultural bankruptcy law issues.

The Center operated under this arrangement for two decades, receiving consistent federal funding directed to the law school and producing a wide variety of publicly available information. In 2009, the USDA shifted the grant for the Center from the law school to the University of Arkansas Division of Agriculture, thereby placing the Center under the exclusive control of the Division. By subsequent agreement between the law school and the Division, the Center remained housed at the law school for the next two years, with a number of graduate assistants still funded by the Center. The Center relocated in 2012, officially ending collaborations with the law school. The Center remains under the Division as a USDA grant-funded enterprise, directed by Harrison Pittman, an LL.M. alumnus. The Center’s work is now accomplished by staff attorneys and students hired from law schools across the country.

Throughout the 1990s, the LL.M. Program was led by Professor Pedersen and Associate Dean and Professor Lonnie Beard. Professor Pedersen continued his impressive teaching portfolio. Center attorneys with excellent academic credentials and practice experience taught additional LL.M. classes and contributed in many

⁴⁶ Letter from Willard J. Phelps, Contract Specialist, U.S. Dep’t. of Agric., to J.W. Looney, Dean, Univ. of Ark. School of L. (Mar. 31, 1988) (On file with author).

⁴⁷ *Id.*

ways to the program.⁴⁸ Associate Dean Beard pioneered the concept of condensed courses that are still popular today. These courses are taught over the course of several days, immersion style, by nationally recognized professionals who travel to Arkansas for a short visit. These offerings included James Baarda of the USDA Cooperative Service who taught Agricultural Cooperative Law, and Professor Drew Kershen of the University of Oklahoma who taught Environmental Regulation of Agriculture. In addition, Christopher Kelley, a nationally recognized agricultural law practitioner, taught Agricultural Administrative Practice, and I taught Agricultural Bankruptcy, my specialty at that time.

Professor Pedersen retired in 1996, leading to a national search for a tenure-track agricultural law professor. I was among the applicants along with Christopher Kelley, my husband. We were both alumni of the LL.M. Program with agricultural law practice specialties, and we agreed to compete for the position with the understanding that one of us could teach and the other would practice law. In the end, thanks to a suggestion from Associate Dean Beard, the faculty voted to split the position, hiring each of us for one half of a tenure-track appointment. Over the next several years, we each shifted into full-time positions and were tenured. My position was established as full-time in the LL.M. Program; Professor Kelley's position was set at half-time in the LL.M. Program and half-time in the J.D. Program.

II. An Expanded Focus: Food Law & Policy

As interest in food safety, transparency, quality, and sustainability increased, the University of Arkansas School of Law was at the forefront of the rise of another new discipline - food law and policy. This approach offers a systemic analysis of our food system, incorporating elements of agricultural law in combination with food law to provide a more integrated and holistic approach. This section of my essay explores the development of food law and policy as a new discipline and the role of the LL.M. Program in fostering it through its transition from agricultural law to agricultural and food law.

I was appointed Director of the LL.M. Program in 2000. As I took the reins of the program, I was inspired by my memories of Professor Pedersen who served as director when I attended the

⁴⁸ There are too many talented Center attorneys to mention, but several deserve special recognition for their many contributions to the LL.M. Program while serving as staff attorneys or directors at the Center: John Copeland, John Harbison, Janie Hipp, Christopher Kelley, Martha Noble, Allen Olson, and Michael Roberts.

program a decade earlier. Professor Pedersen always expected the best from his students and motivated them to work hard. He also cared deeply about each of them and his broad range of expertise allowed him to relate to each student individually. The success of the LL.M. Program is largely due to his dedication.

Also key to success was the ability to anticipate legal trends and important issues in a rapidly changing world. Both Professors Jake Looney and Neil Hamilton were masters of recognizing impending change and signaling new directions to the profession. I have tried to continue this tradition by keeping the LL.M. Program at the leading edge of law and policy.

During the first two decades of the Program, financial and business issues were at the heart of the LL.M. curriculum. Dramatic efforts to address the financial problems facing the agricultural industry during the 1980s - 90s made courses such as Agricultural Finance & Credit particularly relevant. The loss of family farms was a recurrent policy theme, with the focus on these farmers and farm policy. One of the signature aspects of my tenure as director has been to expand the Program toward a broader perspective. For example, when a family farmer goes out of business, what is the impact that this has on the rural community; what impact does this have on our food system; how are consumers impacted?

Since the 1980s, many agricultural law scholars have cautioned about the changes occurring in agriculture. Consolidation and industrialization reduced the number of farms, shifted power and control from individual farmers to powerful corporations, and dire environmental consequences have been realized. Most analysts focused on agricultural policies and the impacts on the farm. Professor Hamilton was the first agricultural lawyer to emphasize the impact these changes made to our food system, highlighting the integral connections between agricultural law and food law.⁴⁹

In 1999, Professor Hamilton, teaching at Drake University Law School, developed a Food and the Law class.⁵⁰ Beginning in 2000, we invited him to teach an introductory condensed course as a Visiting Professor in the LL.M. Program called Introduction to the Law of Food and Agriculture that incorporated some of these themes.

⁴⁹ Neil D. Hamilton, *Plowing New Ground: Emerging Policy Issues in a Changing Agriculture*, 2 *DRAKE J. AGRIC. L.* 181, 196 (1997). In this section, he provides the basic argument for a systemic analysis of our food system.

⁵⁰ Baylen J. Linnekin & Emily M. Broad Leib, *Food Law & Policy: The Fertile Field's Origins and First Decade*, 2014 *WIS. L. REV.* 557, 590 (2014).

Soon thereafter, food safety issues provided a terrifying window into the direct connections between farm and food when bovine spongiform encephalopathy (BSE or “mad cow” disease) was diagnosed in a cow in the United States. The FDA and USDA had recognized BSE as a potential threat for years and had banned the practice of giving cows feed derived from cows or other animals since 1997.⁵¹ The reality of the risk, however, did not reach widespread consumer concern in the U.S. until it was found in a cow in the Washington state in December 2003.⁵² The Government Accountability Office (GAO) had warned of this risk in its 2002 report, noting that in contrast to many other pathogens, the prions that cause this disease cannot be killed by cooking.⁵³ “Mad cow” disease and the concept of “downer cattle” exploded into consumer awareness and dramatically entwined the world of agricultural law and food law. It accelerated growing concerns about where food comes from and how it is produced.

I recall discussing the emerging BSE issue with Professors Christopher Kelley and Michael Roberts as we strategized about the future of the LL.M. Program. Professor Roberts had paused his successful practice in Utah to attend the LL.M. Program, and shortly after he returned to practice, we recruited him back to Arkansas to lead the National Center. In this role, he also taught in the LL.M. Program, and along with Professor Neil Hamilton, helped us shape the future direction of the LL.M. Program. In this strategy session, we discussed mad cow concerns as an example of how the connection between farm and food was inseparable, and how important it was that the LL.M. Program incorporate food law into our curriculum. This notion of “food law,” however, envisioned a new approach, one that focused on the farm to food connections.

At this time, food law was taught in law schools as a Food and Drug Law class that focused on the wide variety of products under the jurisdiction of the Food and Drug Administration (FDA), Food is one such category of products.⁵⁴ Such a course, however, inevitably either excludes or minimizes any consideration of

⁵¹ Substances Prohibited from Use in Animal Food or Feed; Animal Proteins Prohibited in Ruminant Feed, 62 Fed. Reg. 30,936 (June 5, 1997).

⁵² Matthew L. Wald & Eric Lichtblau, *U.S. is Examining a Mad Cow Case, First in Country*, N.Y. TIMES, Dec. 24, 2003, at A1.

⁵³ U.S. GOV'T ACCOUNTING OFF., GAO-02-183, MAD COW DISEASE: IMPROVEMENTS IN THE ANIMAL FEED BAN AND OTHER REGULATORY AREAS WOULD STRENGTHEN U.S. PREVENTION EFFORTS (2002).

⁵⁴ Linnekin & Broad Leib, *supra* note 50, at 591 (referencing Peter Barton Hutt, *Food and Drug Law: Journal of an Academic Adventure*, 46 J. AM. L. SCHS. 1, 8 (1996)). See also PETER BARTON HUTT & RICHARD A. MERRILL, *FOOD AND DRUG LAW CASES AND MATERIALS* (University Casebook Series, 1st ed., 1980).

agricultural practices, farm to food connections, or even USDA jurisdiction over meat and poultry products.⁵⁵

At our meeting at the law school, we strategized that an expanded, systemic view of food law, incorporating consumer perspectives should be a course in the LL.M. Program. Implementing this new direction, and with the assistance of LL.M. Graduate Assistant, Amy Lowenthal, Professor Roberts created a Food Law & Policy class in the Spring of 2004 and first offered it the following Fall. This class addressed basic elements of FDA food safety regulation, but also focused heavily on USDA and addressed consumer interests and concerns. Food Law & Policy soon became a core course in the LL.M. curriculum.⁵⁶

With Professor Roberts' leadership and seed money from the National Agricultural Law Center, the University of Arkansas School of Law established the Journal of Food Law & Policy in 2004, and its first issue was published in 2005.⁵⁷ Neil Hamilton⁵⁸ and Peter Barton Hutt⁵⁹ both authored articles for the inaugural issue, signaling a new merger of agricultural law and food law and signaling the new discipline of Food Law & Policy.

Once again, Arkansas had recognized an emerging national trend. Consumer interest in food and the perceived failings of agricultural policies that encouraged "cheap" processed foods were becoming pervasive. Eric Schlosser's book, *Fast Food Nation* was published in 2001 and the film, *Fast Food Nation*, was released in 2006.⁶⁰ Michael Pollen's book, *Omnivore's Dilemma* was published

⁵⁵ In the early days of the LL.M. Program, a Food & Drug Law class was offered, using Merrill and Hutt *Food and Drug Law* as a primary casebook. The course was initially co-taught by Professors Neil Hamilton and Arkansas Law Professor Robert B. Leflar, and there was some effort to address the agricultural law issues associated with food safety through supplemental readings. For example, the USDA "Federal Nutrition and Feeding Programs" were listed on the initial course syllabus. Univ. of Ark. Sch. of L. Faculty, *Food and Drug Law Course Syllabus*, (Fall 1982) (on file with the author). Professor Hamilton returned to Iowa to teach at Drake University Law School in 1983, founding its Agricultural Law Center, the Arkansas course continued as a J.D. course taught periodically by Professor Leflar with a generally traditional focus covering not only food, but drugs.

⁵⁶ Linnekin & Broad Leib, *supra* note 50, at 590.

⁵⁷ *About the Journal of Food Law & Policy*, UNIV. OF ARK. SCH. OF L., <https://law.uark.edu/jflp/about.php> (last visited Apr. 25, 2022).

⁵⁸ Neil D. Hamilton, *Food Democracy II: Revolution or Restoration?*, 1 J. FOOD L. & POL'Y 13 (2005).

⁵⁹ Peter Barton Hutt, *Food Law & Policy: An Essay*, 1 J. FOOD L. & POL'Y 1 (2005).

⁶⁰ *FAST FOOD NATION* (Fox Searchlight Pictures 2006). The film is loosely based on ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* (2001).

in 2006. The documentary *Food Inc.* was released in 2008.⁶¹ By 2014, it was reported that twenty of the nation's top 100 law schools offered some type of food law and policy course.⁶² By 2017, that number had increased to thirty-four.⁶³

Students increasingly came to the LL.M. Program to learn about agricultural law because of their interest in where our food comes from, what agricultural policies guide its production, and how the legal system frames our food system. We responded by incorporating more food and consumer-focused elements into our core agricultural law classes. Agricultural Biotechnology addressed not only patent and contract issues, but also the use of genetically engineered products in human and animal food. Agriculture & the Environment incorporated the study of the Federal Insecticide, Fungicide, and Rodenticide Act not just to address farm regulation but to explore the consequences of the extensive use of pesticides in growing our food.

As we expanded our LL.M. curriculum to increase our food law offerings, LL.M. candidates were drawn to this integrated study, and increasingly students came to the LL.M. Program with food law as a primary interest. Enrollment increased. We were delighted to add renowned food safety litigation attorneys Bill Marler and Denis Stearns of Marler Clark⁶⁴ to our roster of professors, teaching a condensed course for us each year. Professor Roberts left Arkansas for a D.C. food law practice, eventually making his way back to academia as a Professor of Practice and the Founding Director of the Resnick Food Law & Policy Center at UCLA School of Law,⁶⁵ and I took over teaching our Food Law & Policy class, shifting my research and writing as well.

Tenured Arkansas Law Professor Uche Ewelukwa⁶⁶ offered to design and teach courses in the LL.M. Program, capturing her

⁶¹ *FOOD, INC.* (Magnolia Pictures 2008).

⁶² Linnekin & Broad Leib, *supra* note 50, at 599.

⁶³ Emily M. Broad Leib & Baylen J. Linnekin, *Food Law & Policy: An Essential Part of Today's Legal Academy*, 13 J. FOOD L. & POL'Y 228, 230 (2017).

⁶⁴ See William Marler, MARLER CLARK, <https://marlerclark.com/lawyers/william-marler> (last visited Apr. 28, 2022). Denis Stearns has since retired from Marler Clark and established his own part-time specialized practice as STEARNS LAW, PLLC, <https://www.artisanal-law-firm.com/> (last visited Apr. 9, 2022).

⁶⁵ Michael T. Roberts, UCLA L., <https://law.ucla.edu/faculty/faculty-profiles/michael-t-roberts> (last visited Apr. 9, 2022). See also Resnick Center for Food Law & Policy, UCLA L., <https://law.ucla.edu/academics/centers/resnick-center-food-law-policy> (last visited Apr. 9, 2022).

⁶⁶ Uche U. Ewelukwa, UNIV. ARK. SCH. OF L., <https://law.uark.edu/directory/faculty/uid/uchee/name/Uche-Ewelukwa/> (last visited Apr. 9, 2022).

interest in human rights, international law, and corporate responsibility. She developed two courses for us that have become a regular part of our curriculum each Fall: Right to Food and Business, Human Rights, and Corporate Responsibility in the Food and Agriculture Sector. She also developed an excellent course, Intellectual Property in Food and Agriculture that is offered periodically.

Professor Christopher Kelley,⁶⁷ with half-time duties in the LL.M. Program, has always been a full partner in all LL.M. Program developments. Beyond his agricultural law expertise, his leadership increased our international law perspective, adding international agricultural and food law issues into the two required courses that he teaches, Agriculture and the Environment and Agricultural Perspectives and occasionally teaching Selected Issues in International Food & Agriculture.

Capturing this new focus and seeking to include the energy of a new kind of student, Professor Kelley and I proposed a name change for the LL.M. Program. In 2009, the LL.M. Program in Agricultural Law officially became the LL.M. Program in Agricultural & Food Law.⁶⁸

In 2009-10, I wrote an article that captured my vision for the future of this combined world of agricultural and food law, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*.⁶⁹ In this article, I sought to reconcile the special legal treatment of farmers with the systemic problems that so many recognized. I called out agricultural policies for focusing too much on the economic interests of those involved in production and processing and focusing too little on the ultimate goal of sustainable food production. The article proposes a new paradigm for agricultural exceptionalism that would be based on the production of healthy food in a sustainable, ethical manner. The article won the 2011 AALA Professional Scholarship Award.⁷⁰

⁶⁷ Christopher R. Kelley, UNIV. ARK. SCH. OF L., <https://law.uark.edu/directory-faculty/uid/ckelley/name/Christopher+Rowand+Kelley/> (last visited Apr. 9, 2022).

⁶⁸ Susan A. Schneider, *LL.M. Program in Agricultural and Food Law*, THE LL.M. PROGRAM IN AGRIC. & FOOD L. BLOG (Aug. 29, 2009), <https://www.agfoodllm.com/2009/08/llm-program-in-agricultural-and-food.html>.

⁶⁹ Schneider, *supra* note 4, at 935.

⁷⁰ Susan A. Schneider, *American Agricultural Law Association Symposium*, THE LL.M. PROGRAM IN AGRIC. & FOOD L. BLOG (Oct. 23, 2011), <https://www.agfoodllm.com/2011/10/we-just-got-back-from-wonderful-trip-to.html?q=AALA+Distinguished>.

In 2011, the first edition of my book, *Food, Farming, and Sustainability: Readings in Agricultural Law* was published.⁷¹ This book solidified the themes that I had written about previously and provided a text that I hoped would be useful in teaching agricultural law courses in law schools across the country. The book was successful in that regard, with a second edition published in 2016. To my surprise and delight, the book is also used as a resource in teaching *Food Law & Policy*, although that was not my original intent.

As another indication of the importance of the connections between agricultural and food law, in 2013, Law School Dean Stacy Leeds⁷² hired LL.M. alumna Janie Hipp to establish the Indigenous Food and Agriculture Initiative (IFAI) at the law school.⁷³ Janie Hipp had served as senior advisor for Tribal Relations to USDA Secretary Thomas Vilsack in Washington, D.C. and before that had a distinguished career in agricultural law.⁷⁴ The IFAI has been tremendously successful, fulfilling a great need in Indian Country for legal information and guidance in reestablishing tribal food systems. Another LL.M. alumna, Erin Parker, now serves as IFAI Executive Director.⁷⁵ Staff Attorneys at the IFAI have participated in the LL.M. Program; Janie Hipp and Erin Parker created the LL.M. course, *Legal Issues in Indigenous Food and Agriculture*; and LL.M. candidates have worked at the IFAI as researchers and graduate assistants.

In 2015, I helped found the first academic membership organization devoted to the new discipline, the Academy of Food Law & Policy. The Academy was incorporated as a non-profit

⁷¹ SUSAN A. SCHNEIDER, *FOOD, FARMING, & SUSTAINABILITY: READINGS IN AGRICULTURAL LAW* (2011).

⁷² Dean Stacy Leeds, the first indigenous woman to lead a law school, served as Dean of the Law School from 2011-2018, providing support to our agricultural and food law efforts. She remains Dean Emeritus but now serves as the Foundation Professor of Law and Leadership at the Sandra Day O'Connor College of Law, Arizona State University. See *Biography*, STACY LEEDS, <http://stacyleeds.com/biography> (last visited Apr. 26, 2022).

⁷³ *Arkansas Law School Launches Initiative on Tribal Food and Agriculture*, UNIV. OF ARK. NEWS (Jan. 10, 2013), <https://news.uark.edu/articles/19942/arkansas-law-school-launches-initiative-on-tribal-food-and-agriculture>.

⁷⁴ Janie Hipp's exceptional experience and dedication to agricultural law has more recently led to her service as General Counsel at USDA. Chickasaw Nation Media Relations Off., *Chickasaw Attorney Confirmed as USDA General Counsel*, THE CHICKASAW NATION (Aug. 5, 2021), <https://www.chickasaw.net/News/Press-Releases/Release/Chickasaw-Attorney-confirmed-as-USDA-General-Couns-56487.aspx>.

⁷⁵ *Parker Named Director of Indigenous Food and Agriculture Initiative*, UNIV. OF ARK. NEWS (Dec. 16, 2020), <https://news.uark.edu/articles/55508/parker-named-director-of-indigenous-food-and-agriculture-initiative>.

organization in Arkansas. I served on the inaugural board of trustees with Emily Broad Leib (Harvard Law School, Food Law & Policy Clinic); Neil Hamilton (Drake Law School); Margaret Sova McCabe (New Hampshire School of Law, later to become Dean at our law school); Michael Roberts (UCLA Resnick Food Law & Policy Center); Peter Barton Hutt (Covington & Burling / Harvard Law School); and LL.M. alumnus and food law author, Baylen Linnekin. I served for the first four years as co-chair of the Board with Emily Broad Leib.⁷⁶

I have also been able to showcase the LL.M. Program's food law and policy work through the National Food Law & Policy Student Network (FLSN).⁷⁷ This network is a collaboration of law students from around the country "dedicated to promoting the study and practice of food law and related fields."⁷⁸ Formed in 2015 through the Harvard Food Law and Policy Clinic, the network has been fostered by Food Law Student Leadership Summits sponsored by Harvard's clinic.⁷⁹ I have been honored to speak at each of the Summits. And in 2020, thanks to the leadership of Arkansas law school Dean Margaret Sova McCabe,⁸⁰ our law school hosted the summit.⁸¹ We were proud to host sixty-three law students from forty-two different law schools. With a conference theme of "Food Law & Policy in the Face of Climate Change," twenty-seven academic, professional, and governmental experts presented to the students. The event was co-sponsored with Harvard's Food Law & Policy Clinic and the FLSN.⁸²

The LL.M. Program's combined focus on agricultural and food law has allowed us to continue to lead through our integrated study of food production and consumption, from "farm to plate" and

⁷⁶ Emily M. Broad Leib & Susan A. Schneider, *A Call to Action: The New Academy of Food Law & Policy*, 13 J. of Food L. & Pol'y. 1, 1 (2017).

⁷⁷ NAT'L FOOD L. STUDENT NETWORK, <https://foodlawstudentnetwork.org/> (last visited Apr. 9, 2022).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Our food law and policy work helped to attract New Hampshire Professor Margaret Sova McCabe to Arkansas to serve as dean, as she is "nationally respected expert in food and agriculture law and policy." *Sova McCabe Named Dean of University of Arkansas School of Law*, UNIV. ARK. NEWS (Apr. 27, 2018), <https://news.uark.edu/articles/41816/sova-mccabe-named-dean-of-university-of-arkansas-school-of-law>. Dean McCabe served in that role until 2022, providing support and encouragement to our work.

⁸¹ Shirah Dedman, *School of Law Hosts 2020 Food Law Student Leadership Summit*, THE LL.M. PROGRAM IN AGRIC. & FOOD L. BLOG (Mar. 12, 2020), <https://www.agfoodllm.com/2020/03/school-of-law-hosts-2020-food-law.html>.

⁸² *Id.*

beyond.⁸³ Because of this expanded approach, the program is able to consider the diverse interests of all quarters of the food system - the farm, manufacturer, retailer, and consumer, presenting a holistic look at our food system. And we have maintained our leadership place amidst rapidly expanding interest in this area of law.

III. A New Approach: Distance Education

The LL.M. Program took another important step forward when it expanded its reach through distance education. This section of my essay discusses this transition and the benefits realized.

From its inaugural class in 1981 through 2014, the LL.M. Program offered only on-campus, full-time instruction to a small class of LL.M. degree candidates. Since its beginning, the Program has always drawn students nationally and internationally, but only students able to relocate to Fayetteville could attend. The intensive course of study was designed to be completed in two semesters, with additional time granted for completion of a final writing project.

As early as 2006, Professor Christopher Kelley and I were intrigued with the possible advantages posed by new distance technology. A friend and agricultural law colleague, David Saxowsky introduced us to remote teaching through video conferencing technology, demonstrating the technique to us, Professor Michael Roberts, and Dean Richard Atkinson in a 2006 video conference from North Dakota.⁸⁴ We were all excited about the potential of this new technology.

⁸³ "Beyond" from farm to plate references the LL.M. Program's food waste reduction efforts. Thanks to a grant from the Women's Giving Circle, the LL.M. Program created the Food Recovery Project. Visiting Professor Nicole Civita produced the publication, *FOOD RECOVERY: A LEGAL GUIDE*, available at <https://law.uark.edu/service-outreach/food-recovery-project/Legal-Guide-To-Food-Recovery.pdf> (last visited Apr. 26, 2022), that has been circulated nationwide and referenced in the national media. *See also Food Recovery Project*, UNIV. OF ARK. SCH. OF L., <https://law.uark.edu/service-outreach/food-recovery-project/index.php> (last visited Apr. 9, 2022).

⁸⁴ David M. Saxowsky was an Associate Professor in the Department of Agribusiness and Applied Economics at North Dakota State University and an adjunct professor at the University of North Dakota School of Law. *See David M. Saxowsky*, N.D. STATE UNIV., <https://www.ndsu.edu/pubweb/~saxowsky/aglawtextbk/author.html> (last visited Apr. 18, 2022). He was one of the first professors in North Dakota to teach remotely via video-conference, delivering his teaching to remote areas of North Dakota. Obituary for David Saxowsky, W. FUNERAL HOME, <https://www.westfuneralhome.com/obituary/David-Saxowsky> (last visited Apr. 28, 2022). Professor Saxowsky retired in 2019 and passed away in 2021. *Id.*

Dean Atkinson was responsible for leading the law school's award-winning building addition, essentially doubling the size of the law school.⁸⁵ Part of his new design included a beautiful LL.M. classroom with a wall of windows that looked out onto a tree-lined campus street. Although Dean Atkinson passed away unexpectedly before our move into the new addition, I know he would be pleased with our use of this amazing facility today, as several years later, we introduced conferencing technology to our classroom and our Program.

In 2014, with leadership from Associate Dean Don Judges, who then served as Associate Dean for Graduate and Experiential Education⁸⁶ and Dean Stacy Leeds, the Law School partnered with the University of Arkansas Global Campus⁸⁷ to develop a distance education program as an integrated addition to our on-campus attendance. Global Campus provided funding for a state-of-the-art distance technology to be installed in our classroom, allowing our distance students to video conference into class, participating along with our on-campus students. Global campus also provided support for distance course development, including assisting the law school with the funding to hire LL.M. alumna Nicole Civita as a visiting professor to help us design distance courses and develop the new approach.⁸⁸ Professor Civita was with us for two years designing courses and helping to further our distance education vision. Her work was invaluable, and she remains on our faculty as an adjunct professor.⁸⁹

In many ways, our plan was audacious. We were already short-staffed and many in the legal academic community were hesitant about distance education. Nevertheless, we believed that there were many talented attorneys who were interested in our specialized studies but who could not relocate to Fayetteville. We

⁸⁵ See Design Award Winners (2011): University of Arkansas Leflar Law School Addition, AM. INST. OF ARCHITECTS ARK., <https://www.aiaa.org/awards/design-award-winners/detail/university-of-arkansas-leflar-law-school-addition/> (last visited Apr. 28, 2022).

⁸⁶ See *Donald P. Judges*, UNIV. OF UTAH, https://faculty.utah.edu/u6029377-DONALD_P_JUDGES/hm/index.html (last visited Apr. 26, 2022). We recognize Dean Judges for his leadership and innovation in spearheading our creation of the LL.M. distance education opportunity. He went on to serve in distance education leadership roles at the University before retiring in 2019. *Id.*

⁸⁷ See *Global Campus*, UNIV. OF ARK., <https://globalcampus.uark.edu/> (last visited Apr. 26, 2022).

⁸⁸ Susan A. Schneider, *Celebrating our LL.M. Faculty: Visiting Professor Nicole Civita*, LL.M. PROGRAM IN AGRIC. & FOOD L. BLOG (July 25, 2014), <https://www.agfoodllm.com/2014/07/celebrating-our-llm-faculty-visiting.html>.

⁸⁹ *Nicole Civita*, UNIV. OF ARK. SCH. OF L., <https://law.uark.edu/academics/llm-food-ag/faculty/faculty-ncivita.php> (last visited Apr. 26, 2022).

believed that eventually the demand for the convenience of distance education would force schools to offer distance alternatives, at least at the LL.M. level, and we wanted to stay ahead of the trend. We also believed that distance education, if done thoughtfully, could match our high standards for on-campus instruction. We promised our alumni that we would only deliver courses that met these high standards. The integrity of the LL.M. degree would be maintained.

Recognizing that there were attorneys who were already employed who would like to take advantage of our new offerings, we also created a part-time option. Students would be able to take the classes that they wished each semester, within a four-year timetable for graduation. We would still recruit for our small, full-time, on-campus students, but these students would be joined by part-time and distance candidates, increasing our overall numbers.

As we worked to expand our student body, we also completed a full curriculum review. Existing courses were revised, updated, or eliminated. New courses were created.

Our course formats were also expanded. We would continue to deliver our signature synchronous classes, with students in the classroom and distance students participating remotely. These courses would be scheduled for the full-semester, condensed into a half-semester, or truly condensed into our popular three-four day immersion experiences. As a second model, we designed courses that we refer to as “hybrid.” These courses are designed with a significant degree of asynchronous work combined with periodic meetings for high level discussions. And, a third model is a fully online class, with all asynchronous work and online communication.

Professor Nicole Civita, guided by Global Campus instructional designers, Miran Kang and Adam Brown, helped us to create our hybrid and online courses. Distance courses at the University of Arkansas are designed and certified through Global Campus as a means for assuring excellence. Our distance classes are successful largely because of the Global Campus process and the excellent professionals who work with our professors.

We added additional adjunct professors to our faculty, supported by enhanced enrollment, the expanded curriculum, and the flexibility afforded by distance education. These adjuncts included noted agricultural law experts such as Allen Olson, an LL.M. alumnus with teaching and extensive agricultural law practice experience; Amy Lowenthal an alumna with USDA Office of the Inspector General in Washington, D.C., and Lauren Manning, an alumna with teaching, practice, journalism, and farming experience.

We officially launched our part-time and distance initiatives Fall semester 2014 and our efforts were successful. We posted the following to the LL.M. Blog that August:

We are delighted to welcome 9 face-to-face LL.M. candidates to Fayetteville. Eight are out-of-state students; they have moved to Arkansas from Alaska, Illinois, North Carolina, Oregon, Texas, and Washington, D.C. One student is from Arkansas. Three are 2014 law school graduates, and the remaining 6 are experienced attorneys.

We are also very pleased to welcome our inaugural class in the distance track. These students will be integrated into the face-to-face classroom through video conferencing, classroom capture, online communication, and blended classroom settings. We are proud to have 8 distance LL.M. candidates with us. All are out-of-state students, and they live and work in Colorado, Georgia, Michigan, New York, Oklahoma, Virginia, Illinois, and Washington, D.C. All are experienced attorneys. Three have significant military experience and have been recognized for their leadership and service.⁹⁰

Since this time, distance enrollment has continued to grow, bringing talented attorneys with professional experience into our Program. When the COVID pandemic hit, we moved seamlessly to distance delivery for all our students with no interruption and none of the glitches affecting others unfamiliar with the technology. As we have moved back to on-campus instruction, our distance program has been strengthened.

IV. The Present and Future of the LL.M. Program

Today, the LL.M. Program continues as a vibrant part of the Law School, serving a wide variety of students and maintaining ties with our alumni. This final section of my essay describes where the Program is now.

The mission of the LL.M. Program remains true to the goals of the Program founders. As stated in the 2019 Self-Study Report prepared as part of the university's program review:

⁹⁰ Susan A. Schneider, *Welcome to the Fall 2014 Incoming LL.M. Class*, LL.M. PROGRAM IN AGRIC. & FOOD L. BLOG (Aug. 27, 2014), <https://www.agfoodllm.com/2014/08/welcome-to-fall-2014-incoming-llm-class.html>.

The LL.M. Program's mission is to prepare a small number of carefully selected attorneys as specialists in the complex legal issues involving agriculture and food law - a complex system of national and international importance. This translates to the following four educational objectives:

- to recruit well-qualified attorneys to the integrated study of agricultural and food law;
- to introduce our students to the wide-ranging and complex law and policy issues associated with our food and agricultural systems;
- to educate our students in a way that allows them not only to master an understanding of current agricultural and food law issues, but also prepares them to address these issues in a changing legal landscape; and
- to graduate students who will use the education they received to serve at the highest professional level, enhancing the reputation of the LL.M. Program, the School of Law, and the University of Arkansas.⁹¹

We have now developed over thirty academic courses focusing on food and agricultural law, each specifically designed for the LL.M. Program. Each semester we offer more than a full-time load of specialized LL.M. courses, plus additional opportunities for experiential work including externships and practicums. New additions to our faculty include Erin Parker⁹² teaching Nutrition Law & Policy and Lauren Bernadett⁹³ teaching Agricultural Water Law. When a special issue arises, we have a framework in place to develop a new course addressing that issue. For example, the Food, Law and COVID-19 class was delivered during the Fall of 2020, organizing a dozen respected colleagues from across the country to co-teach the class.⁹⁴

Most of our courses are delivered with a synchronous, real-time classroom experience. Recordings allow students who are unable to participate to keep up and to register their reactions. A class

⁹¹ UNIV. OF ARK. SCH. OF L., LL.M. PROGRAM IN AGRICULTURAL AND FOOD LAW SELF-STUDY 1, 14 (2019) (on file with author).

⁹² See *Erin Parker*, INDIGENOUS FOOD & AGRIC. INITIATIVE, <https://indigenousfoodandag.com/erin-parker/> (last visited Apr. 26, 2022).

⁹³ See *Lauren D. Bernadett*, Attorney, HARRISON TEMBLADOR, HUNGERFORD, & GUERNSEY (last visited, Apr. 26, 2022).

⁹⁴ *National Experts Collaborate to Examine Food, Law and COVID-19*, UNIV. OF ARK. NEWS (Nov. 19, 2020), <https://news.uark.edu/articles/55330/national-experts-collaborate-to-examine-food-law-and-covid-19>.

blog feature allows students to comment, either in writing, via podcast, or video recording.⁹⁵

Other classes are offered in a hybrid-format, with independent readings, videos, recorded lectures and podcasts supplemented with synchronous class meetings for high level discussions or question-and-answer sessions. A few classes are offered in a fully asynchronous format, with all interaction online.⁹⁶

The extensive thesis that was required at the start of the LL.M. Program was scaled back in the mid-1980s, but the importance of a legal writing is evident throughout the Program. An article that demonstrates "rigorous legal analysis" and "quality legal writing skills" is required, but it can be written as a law review or as a practice publication. Assistance in drafting is provided through our *Advanced Legal Research and Writing* class, providing as much or as little assistance as is needed. Professor Christopher Kelley's *Effective Legal Writing* class focuses on building good skills and reducing bad writing habits such as "legalese." Most of our regular classes require a written essay of some sort, as we strive for final projects that offer synthesis and reflection. Unlike the typical JD exam, our final projects are rarely time-limited and never "closed book."

In 2019, we participated in a university-mandated program review and received an excellent report from our external reviewers:

The LL.M. program in Food and Agricultural Law benefits tremendously from the profound level of commitment of a diverse, nimble, and talented group of core and support faculty and staff. The program Director and contributing faculty are thought leaders in this burgeoning field, focusing on the nexus between agricultural production, food systems, and related implications for public health, environmental quality, and human rights. These individuals are the life of the program and are key to its continued success.

Perhaps the strongest (and most important) aspect of the program is its attentiveness to student input. It has demonstrated a high level of flexibility and responsiveness to students' needs and interests. It has modified its

⁹⁵ See *Ways to Participate*, UNIV. OF ARK. SCH. OF L., <https://law.uark.edu/academics/llm-food-ag/ways.php> (last visited Apr. 26, 2022).

⁹⁶ *Id.*

curriculum to attend to the most pressing food-law issues of the day while remaining deeply engaged in the production aspects of our food supply system. It has engaged policy at a high level, while also explaining the machinations of the legal system that the students must understand as they adjust their career trajectories or deepen their skill set. It has done all of this while maintaining an excellent national reputation. Both the course work and the reputation of the program also bring important benefits to the J.D. program, including the development of a richer array of available courses.

The expansion into distance education and part-time offerings is also laudable. These enhancements reflect modern needs for flexibility and adaptability in program delivery, and also reflect the evolving educational needs of experienced legal professionals. Moreover, support for the deployment of distance education via the Global Campus is top notch.

The program is also notable for the variety of opportunities it provides students to contribute to legal scholarship through *The Journal of Food Law and Policy*, network with other student leaders around the country through the Food Law Student Leadership Summit (which will be held here in Fayetteville in 2020), and gain applied experience (as well as an invaluable professional network) in this specialized area through externships with international companies, government agencies, and leading non-profit organizations. This diverse array of opportunities exceeds expectations for a traditional LL.M. program and is, undoubtedly, one of the reasons for the program's success and reputation.

All of this enables the program to attract a diverse cadre of professionals who, after being here, enjoy strong post-graduate prospects. We think the program is a model for the development of programs in other institutions.⁹⁷

The reviewers did, however voice one criticism, a lack of sufficient institutional support for program staffing, an observation strikingly similar to that provide in 1986.⁹⁸ Indeed, when the LL.M.

⁹⁷ Anthony Schutz & Michele Nowlin, LL.M. PROGRAM REVIEW 1, 6 (Oct. 2, 2019) (on file with author).

⁹⁸ *Id.* at 4-5. The reviewers stated that:

Our primary concern is focused on the historic lack of institutional support for the program. Despite the results of the last programmatic review -

Program was founded, the proposal to the Arkansas Board of Higher Education promised tenured faculty positions for a director and two professors. The LL.M. Program has never had that staffing. Over the years, we have met our needs with J.D. law faculty who teach a course in the program, an impressive group of adjunct faculty, and dedication.

Recognizing the need for additional assistance and recognizing the experiential opportunities in food and agricultural law outreach, in 2021, Dean Margaret Sova McCabe obtained the support from the University of Arkansas for a new visiting assistant professor position for the LL.M. Program.

After a national search, in December 2021 LL.M. alumna Kelly Nuckolls was hired as a Visiting Assistant Professor and Assistant LL.M. Program Director. In this new role, Professor Nuckolls works to enhance LL.M. Program outreach, teaches in the LL.M. Program, and assists with Program administration. Professor Nuckolls' prior experience with advocacy in Washington, D.C. as a senior policy specialist at the National Sustainable Agriculture Coalition (NSAC) combined with experience with the University of Maryland Agricultural Law Education Initiative provided an excellent fit to the needs of the LL.M. Program. Her prior teaching experience at George Mason University Law School and Sterling

which emphasized the urgent need for additional resources - and ensuing development of both a part-time option and distance learning option that resulted in substantial increases in program enrollment, the LL.M. program is now doing more with fewer resources than it has ever had! The additional burdens on the program Director and Coordinator are not sustainable, nor are they equitable, and they risk the program's excellent national reputation and place in the legal academy. The lack of adequate resources also undermines opportunities for further growth in size and stature and impedes faculty contribution to scholarship in this expanding area of study and practice.

We therefore recommend more attention to all levels of support, beginning with support for the anticipated strategic planning process the program will undergo this fall. Mapping the forward trajectory for the program will help to identify clear priorities for resource allocation. If the program is going to grow, it must have additional resources. Even if the program simply wants to maintain its current status, it needs attention to succession planning and program administration. More pointedly, it would be impossible to recruit a new program director without these additional resources. *Id.* at 4-5.

See also infra, note 38 regarding similar concerns about Professor Pedersen's role as director.

College in Vermont have allowed her to step into the classroom effectively.⁹⁹

We are now launching the Food and Agriculture Impact Project under the Professor Nuckolls' leadership. This Project will allow us to work with agricultural and food-focused organizations, agencies, and other colleges and universities to support legal research, education, and policy analysis on food and agricultural law issues. Through this new Project, we hope to provide exciting new experiential opportunities for our LL.M. students as well as interested Arkansas JD students.

No reflection on the LL.M. Program would be complete without recognizing our students and our alumni. Our students continue to be talented, highly motivated, and anxious to learn as much as possible about food and agricultural law. They offer us a premier teaching experience. When they convert their status to alumni, the bond to the Program continues. We now have over three hundred alumni in forty-four different states and nineteen foreign countries, working in private practice, for corporations, for advocacy groups, for state or federal agencies, and teaching. Each year, it is an honor to connect them with our current students. For the first time ever, in Spring 2022, we designed a "Selected Issues" class that is taught by our alumni, with a different person teaching each week. Current students helped to pick the topics, and then I was able to select from our alumni ranks to fill the roster.¹⁰⁰ It has been a wonderful opportunity for me to reflect on the breadth of our area of study and to be grateful for the LL.M. network that we share.

My appreciation is extended to all my students, past present and future, to the many professors who have helped to make the LL.M. Program a success, and to the Deans who supported our work at every step of the way. I apologize in advance for any aspects of the Program that I have neglected to mention. There are many individuals that contributed to its success that deserve recognition but that are not mentioned here due to space constraints. Many of our professors, our alumni, and certainly our dedicated staff, could recount hours of personal experiences that would probably be far more interesting than my efforts at chronicling the factual aspects of

⁹⁹ *Nuckolls Joins School of Law's Agricultural and Food Law Program*, UNIV. OF ARK. NEWS (Jan. 11, 2022), <https://news.uark.edu/articles/58629/nuckolls-joins-school-of-law-s-agriculture-and-food-law-program>.

¹⁰⁰ *LL.M. Program Celebrates 40-Plus Years, Offers New Course Taught by Distinguished Alumni*, UNIV. OF ARK. NEWS (Feb. 11, 2022), <https://news.uark.edu/articles/58945/ll-m-program-celebrates-40-plus-years-offers-new-course-taught-by-distinguished-alumni>.

the development of the Program. Perhaps when we reach our fiftieth anniversary, it will be time for that essay.

Agricultural Carbon: The Land, Landowner, and Farmer

Barclay Rogers*

Abstract

Carbon is certainly a hot topic in agriculture. Across the countryside, farmers, landowners, agricultural service providers, and many others are trying to understand what carbon is about and what it may mean to them. One of the more interesting topics around agricultural carbon concerns the relationship between the landowner and tenant farmers on absentee-owned land (i.e., land that is farmed by someone other than the person who owns it). This article provides a brief background on the agricultural carbon opportunity and explores some ideas about how to pursue the opportunity on absentee-owned farmland.

I. Agricultural Carbon Primer

Almost every human endeavor – eating, driving, turning on the lights, even breathing – generates greenhouse gases (GHG), which in turn have been linked to climate change.¹ Companies across many economic sectors have launched ambitious efforts to reduce their GHG emissions² and are actively looking for solutions. Companies are working in various ways to reduce their GHG contributions³, including reducing their own emissions (Scope 1), reducing emissions indirectly caused by them through, for example, electricity consumption (Scope 2), and working with others within their supply chains to reduce their indirect emissions (Scope 3). If reductions are simply not possible (e.g., you can't fly an airplane without jet fuel), companies can purchase offset credits.⁴ Companies looking for offset credits are focused almost exclusively on those

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¹ See Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis* 4 (2021).

² *Ambitious Corporate Climate Action*, SCI. BASED TARGETS INITIATIVE, <https://sciencebasedtargets.org/> (last visited Mar. 13, 2022).

³ *Calculation Tools*, GREENHOUSE GAS PROTOCOL, <https://ghgprotocol.org/calculationg-tools-faq> (last visited Mar. 13, 2022).

⁴ *What is a Carbon Offset?*, CARBON OFFSET GUIDE, <https://www.offsetguide.org/understanding-carbon-offsets/what-is-a-carbon-offset/> (last visited Mar. 13, 2022).

approved by recognized carbon registries like Climate Action Reserve and Verra.⁵

Agriculture is uniquely positioned to make material contributions to help address climate change. U.S. agriculture is currently a net emitter, accounting for approximately 10% of US GHG emissions.⁶ However, with a few simple changes at the field-level (e.g., planting cover crops, reducing tillage, improving nitrogen management), farms can transition from being net emitters to “sequesters” of GHG.⁷ Importantly, certain farming practices – specifically cover crops and minimal tillage – can result in the “removal” of GHG from the atmosphere.⁸ Few other options exist to remove GHG from the atmosphere, so agriculture could play a truly meaningful role in helping to address climate change.⁹

Against this background on the agricultural carbon opportunity, let’s turn to the specific question of the relationship among the land, the landowner, and the farmer. Two things are important with respect to agricultural carbon:

- **Additionality**, which means that something additional must be done on the farm to cause the GHG profile to change in a way that more GHGs are removed, or abated, relative to the baseline condition.
- **Permanence**, which means that changes must remain over a long period of time.

A practical example helps to illustrate these concepts. Assume that a farmer went from conventional tillage practices with no cover crops to no-till and cover crops. The cover crop is an example of additionality because the farmer did something that he had not done before (e.g., planted a cover crop) and that practice

⁵ *Registries and Enforcement*, CARBON OFFSET GUIDE, <https://www.offsetguide.org/understanding-carbon-offsets/carbon-offset-programs/registries-enforcement/> (last visited June 6, 2022).

⁶ *Sources of Greenhouse Gas Emissions*, ENV’T PROT. AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Mar. 13, 2022).

⁷ *Id.*

⁸ CARBON CYCLE INST., CARBON FARMING: IMPROVING SOIL FERTILITY & WATER HOLDING CAPACITY THROUGH INCREASING SOIL CARBON 1, 2 (n.d.), available at <https://www.carboncycle.org/wp-content/uploads/2018/09/carbon-farming-brochure-Sept2018-CCI-5.pdf>

⁹ *Id.* at 1.

changed the GHG profile (e.g., the cover crop removed CO₂ from the atmosphere through photosynthesis and stored some portion of it below the surface in its roots). By limiting the exposure of carbon stored in the root biomass to the atmosphere, the no-till practice helped to ensure that the removed carbon remained stored in the soil profile, and thus helps to establish permanence. In essence, the cover crop is pulling carbon from the atmosphere and the soil is storing it.¹⁰

II. Carbon Farming on Leased Land

Let's leverage this example to orient our minds around who does what to sequester carbon in agricultural soils. The farmer is planting the cover crop and implementing the tillage practices. But the land itself is storing the carbon, which may be released if the soil is disturbed in the future. If agricultural carbon is going to be successful, the agricultural community must ensure that there are ways to guarantee that the carbon remains stored. And as over 50% of farmland, and sometimes upwards of 80%, of farmland used to grow the major commodity crops in the US is absentee-owned, appropriate incentives must be provided for landowners and tenants alike.¹¹

Farmers and landowners are very accustomed to working through commercial agreements together through the land leasing process. About 70% of the time, farmers lease land from non-operator owners on a cash rent basis (e.g., \$X per acre-year).¹² Crop share, flexible cash, or free arrangements account for the remainder of leased acres. In essence, the farmer and the landowner reach a decision about who is going to do what (e.g., farmer will farm the land), who will be compensated how (e.g., farmer pays landowner a fixed cash amount or they decide to share in the revenues or profits), and what conditions govern the arrangement. These arrangements have been aided by standardized land leases like the ones available from the National Agricultural Law Center.¹³

¹⁰ Many farming practices may alter the GHG profile of a farm but cover crops and reduced/no-till currently have the greatest impact in terms of sequestering carbon in agricultural soils.

¹¹ See DANIEL BIGELOW ET AL., ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., EIB-61, U.S. FARMLAND OWNERSHIP, TENURE, AND TRANSFER iii (2016).

¹² *Id.* at 28.

¹³ *Agricultural Leases*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/research-by-topic/ag-leases/> (last visited Mar. 13, 2022).

Some important considerations come into focus when thinking about carbon farming on leased land:

- What is required for leased land to enter a carbon program?
- Who should earn money from the sale of any carbon credits or other payments associated with carbon farming?
- Who should pay the costs associated with the carbon farming practices?
- What happens if a different farmer assumes control of the leased land?

A. What Rights are Required to Enroll in a Carbon Program?

Carbon methodologies, like the Soil Enrichment Protocol published by the Climate Action Reserve, require the participation of the person who has “management control over agricultural management activities for one or more fields within the project area.”¹⁴ This is the farmer in common parlance. The Soil Enrichment Protocol expressly states that “[t]here is no requirement for direct participation of the landowner. . . .”¹⁵ Tenant farmers therefore can participate in carbon programs on leased land if they have management rights over the farm.

B. How Should the Revenues and Costs of Carbon Farming Be Apportioned?

Carbon revenues and costs are no different than any other revenues and costs associated with farming. Farmers and landowners can split them however they desire. For example, a farmer and landowner might agree to assign all carbon revenues to the farmer as long as the farmer covers the costs of implementing carbon farming practices. At the other end of the spectrum, the farmer and landowner might agree that the landowner gets all the carbon revenue in exchange for the landowner reducing the rent and the farmer paying for the costs of implementing the practices. Many other potential arrangements exist, but it’s fundamentally a commercial decision for the landowner and farmer to reach together.

¹⁴ CLIMATE ACTION RSRV, SOIL ENRICHMENT 7 (2020).

¹⁵ *Id.*

C. What Happens If Someone Else Starts Farming the Land?

The best question comes last. Recall that carbon is stored in the soil, and that it may be released through tillage practices. Now imagine a situation where one tenant farmer is fully committed to carbon farming on a leased farm, but another tenant assumes control over this farm and decides to return to a full tillage regime. In this case, most of the carbon that was stored in the soil would be released to the atmosphere.

The broader agricultural carbon opportunity may provide unviable if farmers are “penalized” for implementing practices that result in the release of carbon when farming conditions require such intervention (e.g., tilling areas of a field that were heavily rutted during a wet harvest period). Nevertheless, mechanisms should be implemented to provide appropriate incentives to help maintain carbon stored in the soil. In the case of Indigo’s carbon program, the farmer is paid out over time, as a form of deferred compensation, to ensure that he always has an incentive to maintain the carbon stored in the soil.

But what happens if the farmer loses the farm, and the subsequent tenant releases the stored carbon? The credits have been sold to third parties on the condition that the carbon will remain stored in the soil. How do we encourage a continuation of the carbon farming practices, or at least discourage the release of stored carbon, when a leased farm passes from one tenant to another?

Fortunately, this kind of situation has been addressed before in the Conservation Reserve Program (CRP).¹⁶ Under CRP, farmers remove environmentally sensitive land from agricultural production and plant ecologically beneficial plant species in exchange for a yearly payment.¹⁷ CRP contracts typically bind the land to the program for 10 to 15 years.¹⁸ Under the regulations governing the CRP program, parties who wish to remove land enrolled in the program must “refund all or part of the payments made by CCC with respect to the CRP contract, plus interest, and must also pay

¹⁶ *About the Conservation Reserve Program*, USDA, <https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-program/> (last visited Mar. 13, 2022).

¹⁷ *Id.*

¹⁸ *Id.*

liquidated damages as provided for in the CRP contract, if directed to do so by CCC.”¹⁹ The regulations, however, further state that:

“If a participant transfers all or part of the right and interest in, or right to occupancy of, land subject to a CRP contract and the new owner or operator becomes a successor to such contract ... then such participant will not be required to refund previous payments received under the contract

[or]

No refunds of previous payments will be required if the person or entity to whom all or part of the right and interest in, or right of occupancy of, land subject to such contract reaches an agreement with CCC to modify the contract in a way that is consistent with the objectives of the program.”²⁰

In short, the CRP program does not impose any financial penalty if the land enrolled in the program remains in the program after a transition between owners, operators, or otherwise. USDA has rightfully recognized that the “land” is the ultimate counterparty to the contract and realized that the objectives remained satisfied if the land remains in the CRP program regardless of who owns or operates it. The CRP program is pointing the way toward a solution to the carbon farming on leased land problem.

But let’s consider one other important element with respect to carbon farming: the baseline. Recall that a carbon credit is essentially a calculation of the relative GHG profile of a farm before/after a particular farming practice is implemented. The baseline approximates the GHG profile based on the historical farming practices on that field before the carbon farming practices are implemented. The baseline is usually determined based on 3 to 5 years of records for particular fields.

Now, let’s return to the leased field that moved from one tenant farmer to another. Where is the baseline going to come from? If the first tenant doesn’t share the baseline, or at least the data by which it was created, with the subsequent tenant, the subsequent tenant is effectively barred from earning carbon credits until he farms

¹⁹ 7 C.F.R. § 1410.32 (2022).

²⁰ *Id.*

it long enough to establish the baseline himself (i.e., 3 to 5 years depending on crop rotation). This is surely a suboptimal outcome, especially if the farmer wishes to continue to carbon farm that field.

But what incentive does the initial tenant have to share the baseline data with the subsequent tenant? As you will see in our proposed path forward, the initial tenant and subsequent tenant could essentially exchange the baseline for a promise to continue the carbon farming practices. Several positive outcomes are realized through this approach:

- Carbon farming practices are maintained on the land, thus eliminating potential release of carbon stored in the soil.
- The initial tenant may receive any unvested carbon payments from the carbon project developer on the condition that the carbon farming practices are maintained on the field. The initial tenant could enter a commercial arrangement, like the CRP construct, via the land lease in which the subsequent tenant agrees to refund the carbon project developer if the carbon farming practices are terminated. This commercial arrangement would give the carbon project developer confidence to release unvested payments to the initial tenant.
- The subsequent farmer could receive the baseline, and underlying data, from the initial tenant and thus secure his ability to continue to earn carbon revenue under the previously established baseline.

Such a construct would provide aligned incentives between tenants as well as the landowner and the carbon program administrator. It would avoid potential value destruction – through release of previously stored carbon or simple delays associated with re-establishing a baseline – that may otherwise occur when different farmers assume control of leased farmland.

III. Potential Path Forward

So how to apply these lessons to ensure that the agricultural carbon opportunity is available on leased farmland? Here are a few practical perspectives:

- Farmland leases should include a provision that makes clear that the tenant farmer has management control over the agricultural activities on the farm, including the implementation of carbon farming practices and the right to

submit the necessary data to comply with agricultural carbon programs.

- Farmland leases should likewise include a provision that establishes the revenue and cost dynamics associated with carbon farming. Farmers and landowners need to be clear about who is responsible for what and how they will be compensated accordingly.
- Farmland leases should have a carbon farming “transition clause” that allows tenant farmers to agree between themselves to exchange baseline data on the farm for a promise to maintain carbon farming practices into the future.

Many farmers and landowners ask how to carbon farm on leased land. The ideas, outlined herein, and a potential farmland lease addendum, included as an exhibit below, is an effort to outline a path forward.²¹

IV. Exhibit: Farmland Lease Addendum

This Addendum supplements the rights and obligations associated with the land described in the Farmland Lease between *[Owner]* and *[Operator]* executed on *[Date]* (“**Effective Date**”) relative to the following land: *[Legal Description]* (“**Land**”). Owner and Operator are collectively referred to as Parties.

1. The Land is enrolled in the following agricultural carbon program: *[Name of Program]* (“**Carbon Program**”) administered by *[Name of Carbon Program Administrator]* (“**Carbon Program Administrator**”). Owner confirms that Operator has management control over the Land to a degree sufficient for the Operator to participate in the Carbon Program.
2. Owner and Operator agree to share revenues and costs associated with the Carbon Program as follows:

	Revenue	Costs
Operator	_____ %	_____ %
Owner	_____ %	_____ %

²¹ It is ultimately the responsibility of the farmland owner or manager to establish a lease with this tenant that is acceptable to both parties, and this article or exhibit is not intended to be final language or represent legal advice of any nature by the author. The exhibit is a basic template intended to communicate the ideas outlined in this article.

In the event that Owner has agreed to share in the Revenues or Costs, Operator agrees to account to Owner the Revenue and Costs associated with the Carbon Program by no later than [Date].

3. The following provisions are applicable if the Land was enrolled Carbon Program before the Effective Date:

- A. Has Operator received the data from [Yes / No] [Name of former tenant] (“**Former Tenant**”) necessary to establish by, or continue following, the Effective Date the baseline for the Land in the Carbon Program?
- B. Does Operator agree to maintain the [Yes / No] carbon farming practices and to share the necessary data as required by the Carbon Program during the term of this Farmland Lease?
- C. Does Operator agree to reimburse the [Yes / No] Carbon Program Administrator for any losses of carbon to the atmosphere if Operator discontinues carbon farming practices or fails to share the necessary data as required by the Carbon Program during the term of this Farmland Lease? Amount: \$_____ If so, please specify the amount that Operator agrees to pay Carbon Program Administrator upon delivery of reasonable evidence demonstrating failure to maintain carbon farming practices and/or to share the necessary data as required by the Carbon Program.

BLACK-OWNED BEEF: SHOULD BLACK BEEF PRODUCERS STAKE SPACE IN FOOD JUSTICE?

Shirah Dedman*

I. Introduction

On June 3, 2020, cheers erupted from a crowd gathered in front of the Discovery Green Park in downtown Houston, Texas. Astride horses, a trail-riding club trotted through the park with several of its members donning shirts that read “I Can’t Breathe.” That day, the Non-Stop Riderz travelled 20 miles through Houston to protest the murder of George Floyd, a Black man killed by a White police officer. As Black “cowboys,” the Non-Stop Riderz would make their mark on the consciousness of a modern-day social justice movement.¹

While there is growing interest in Black cowboys, the narrative is largely tethered to parades and urban and suburban saddle clubs, much like the fictional movie on Netflix, *Concrete Cowboy*. Missing from the narrative are today’s real Black cowboys: rural ranchers and farmers raising cattle for beef production and consumption.

The legacy of the Old West cowboy came out of Texas, in 1890 Texas, estimated one-third of cowboys were black and two-thirds by 1910.² Today, Texas continues to claim its rank as Black cowboy country. Not only do the highest number of Black cattle farmers call Texas home, but Texas also has the highest number of Black farmers and ranchers across the nation.³ Roughly a quarter of all Black producers in the U.S. live and work in Texas.⁴ Together with just eleven southern states, they account for 88 percent of all Black farmers.⁵

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¹ Cat Cardenas, *The Best Thing in Texas: A Black Trail-Riding Club Joined a Houston Protest on Horseback*, TEX. MONTHLY (JUNE 8, 2020), <https://www.texasmonthly.com/news-politics/black-trail-riding-club-houston-protest/>.

² Alwyn Barr, *Introduction to BLACK COWBOYS OF TEXAS* 10 (Sara R. Massey ed., 2d prtg. 2000).

³ NAT’L AGRIC. STAT. SERV., U.S. DEP’T OF AGRIC., ACH17-9, BLACK PRODUCERS 1 (2019).

⁴ *Id.*

⁵ *Id.*

Nearly half of all Black-operated farms specialize in cattle production.⁶ Yet insofar as it persists in the modern American imagination, the image of the Black farmer is predominately informed by images growing cotton and traditional Black staples like collard greens, okra and Black-eyed peas—even if these images don't reflect the realities of Black farming operations today.⁷ But the reality we can all agree on is that in the United States, Black farmers are becoming extinct. As of the 2017 Agricultural Census, the total number of Black producers accounted for just 1.3 percent of the country's 3.4 million producers.⁸ The already dwindling numbers of Black-operated farms had fallen three percent from 2012.⁹ While the largest number of Black producers—farmers and ranchers—may call Texas home, they account for just three percent of the state's total number of producers.¹⁰

While the current food justice movement seeks to bring Black farmers from the edge of extinction, many in the movement advocate their erasure—perhaps unwittingly—by calling for the end of beef production. Resulting from the realities of intensive industrialized animal agriculture, they portray all beef production as drivers of a public health crisis, environmental disaster, and White supremacy. However, this portrait leaves out important aspects of social equity and economic justice, especially for Black rural populations.

Instead of vilifying beef production, should we re-envision it as an integral part of food justice? This requires an investigation into whether beef production can sustain a healthy, environmental and socially conscious diet that supports thriving local food systems and racial equity. This paper explores the cultural challenges Black beef producers face, as well as economic barricades controlled by an intensive beef industry.

⁶ *Id.* Farm specialization refers to the North American Industry Classification System (NAICS). More than half of a farm's sales come from the commodity. *Id.*

⁷ A 1986 USDA report on Black farmers found that while a majority of Black-operated farms were classified as livestock operations, the likelihood that livestock was the major specialty decreased as sales increased. Sixty-eight percent of all Black-operated farms with sales of less than \$2,500 annually were classified as livestock (cattle and hogs) operations. For Black farms with annual sales of \$20,000 or more, livestock specialties were only 11 percent of the total. See VERA J. BANKS, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., RDRR-59, BLACK FARMER THEIR FARMS 9 (1986).

⁸ NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., *supra* note 3, at 1.

⁹ *Id.*

¹⁰ *Id.*

II. A Public Health Crisis

African-Americans face an ongoing health crisis. According to the Centers for Disease Control and Prevention (CDC), the percent of Blacks aged 20 and over who are obese: 37.5 percent of Black men and 56.1 percent of Black Women.¹¹ Besides accidents, the leading causes of death are heart disease and cancer; both obesity-related conditions. In 2018, non-Hispanic blacks were twice as likely as non-Hispanic whites to die from diabetes.¹² Furthermore, SARS CoV-2 has opportunistically exploited diabetes as 39 percent of the U.S. COVID-19 related deaths were among diabetics.¹³

Much like the rest of Americans, nutrition-related illnesses amongst Black communities have climbed during the last forty years despite national nutritional standards set forth in the Dietary Guidelines. The Dietary Guidelines forms the basis of federal nutrition programs and guides local, state, and national health promotion and disease prevention initiatives.¹⁴ By law, school nutrition programs are required to be in line with the Dietary Guidelines.¹⁵ The National School Lunch Program serves a high percentage of Black public school students.¹⁶ Accordingly, Black youth's nutritional access and food culture are significantly impacted by the low-fat promoting Dietary Guidelines. Since adoption in 1977, Dietary Guidelines have vilified saturated fats (primarily found in

¹¹ Health of Black or African American Non-Hispanic Population, NAT'L CTR. FOR HEALTH STAT., CTRS. FOR DISEASE CONTROL, <https://www.cdc.gov/nchs/fastats/black-health.htm> (Feb. 16, 2022).

¹² Diabetes and African Americans, OFF. OF MINORITY HEALTH, U.S. DEP'T OF HEALTH & HUM. SERV., <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=18> (Mar. 1, 2021).

¹³ Edward W. Gregg et al., *Diabetes and Covid-19: Population Impact 18 Months into the Pandemic*, 44 J. CLINICAL & APPLIED RSCH. & EDUC. 1916, 1919 (2021), <https://diabetesjournals.org/care/article/44/9/1916/138829/Diabetes-and-COVID-19-Population-Impact-18-Months>.

¹⁴ Introducing the New Dietary Guidelines for Americans 2020-2025, WEILER NUTRITION COMM'NS, <https://weilernutrition.com/2021/01/introducing-the-new-dietary-guidelines-for-americans-2020-2025/#:~:text=The%20US%20Dietary%20Guidelines%20have%20a%20significant%20impact,and%20national%20health%20promotion%20and%20disease%20prevention%20initiatives> (last visited Feb. 23, 2022).

¹⁵ The Nutritional School Lunch Program is statutorily required to be in line with the Dietary Guidelines. See 42 U.S.C.A. § 1758 (a)(1)(A) (Westlaw through Pub. L. No. 117-80); 42 U.S.C.A § 1773 (e)(1)(A) (Westlaw through Pub. L. No. 117-80).

¹⁶ See SUSAN AUD ET AL., NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., NCES 2010-015, STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS IV (2010).

animal products such as meat and dairy)¹⁷ while favoring plant-based unsaturated fats, even in highly processed foods and those containing trans fats.

Trans fats have been linked to increase heart attacks, stroke, and type 2 diabetes.¹⁸ Prior to the invention of Crisco and margarine (trans fats made from hydrogenated vegetable oils), Americans almost exclusively cooked with butter and animal fats. Consumers shifted away from traditional foodways as mechanization of hulling and pressing seeds and beans made vegetable oils cheaper than raising and slaughtering animals for butter or animal fat.¹⁹ Additionally, the federal government, scientists and aggressive advertising convinced consumers that unsaturated vegetable fats, and not animal fats, should be used as part of a sanitary and nutritious diet.²⁰ Unnoticed is the influence of the plant-based Seventh-Day Adventist church on our national food policy.

Beyond the growing theological influence on its followers, the church is profoundly influential in how we understand nutrition. And the Dietary Guidelines reflect the more than 100 years of lobbying against meat and saturated fat. Founded in the mid-nineteenth century, Seventh-Day Adventist is a homegrown American religion. Since its inception, the church has promoted a grain-based, processed food diet.²¹ Some of its most famous followers were The Kelloggs brothers: Dr. John Harvey Kellogg, inventor of Kellogg's Corn Flakes®, and Will Keith Kellogg, founder of Kellogg's Cereal Company.²² But perhaps the most notable of the church's followers was Dr. Kellogg's mentee, Lenna Frances Cooper.

¹⁷ There are plant-based foods with large amounts of saturated fat, namely, avocado and coconut. The 2020 Dietary Guidelines still suggest using alternatives to coconut oil because of its high percentage of saturated fat. U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., *DIETARY GUIDELINES FOR AMERICANS 2020-2025: MAKE EVERY BITE COUNT WITH DIETARY GUIDELINES* 44 (2020).

¹⁸ Laura Cassidy, *Big Fat Controversy: Changing Opinions About Saturated Fats*, AOCS, <https://www.aocs.org/stay-informed/inform-magazine/featured-articles/big-fat-controversy-changing-opinions-about-saturated-fats-june-2015?SSO=True> (last visited Feb. 23, 2022).

¹⁹ *Id.*

²⁰ See NINA TEICHOLZ, *THE BIG FAT SURPRISE: WHY BUTTER, MEAT, AND CHEESE BELONG IN A HEALTHY DIET* 284 (2015).

²¹ See ELLEN G. WHITE, *COUNSELS ON DIET AND FOODS* 267 (1938).

²² Howard Markel, *The Secret Ingredient in Kellogg's Corn Flakes Is Seventh-Day Adventism*, SMITHSONIAN MAG. (July 28, 2017), <https://www.smithsonianmag.com/history/secret-ingredient-kelloggs-corn-flakes-seventh-day-adventism-180964247/>.

Cooper served as the first Supervising Dietitian for the U.S. Army, where she played a seminal role in setting nutrition standards during World War I. Her 1917 book, *How to Cut Food Costs*, was published during a time when the American public was being urged to reduce consumption of key staples feeding soldiers on the front lines. The book set forth the premise that meat shouldn't be eaten because it was unhealthy, and instead recommended a grain-based diet.²³ Cooper went on to co-found the Academy of Nutrition and Dietetics (formerly known as the American Dietetic Association), and write the textbook used in dietetic and nursing programs globally.²⁴

To this day, the Academy of Nutrition and Dietetics plays a major role in nutrition science by establishing the curriculum for university nutritional science programs,²⁵ publishing a magazine and peer-reviewed journal,²⁶ and lobbying state governments for mandatory state licensing for Registered or Licensed Dietitians in order to work in hospitals and public schools.²⁷ Of the twenty members of the 2020 Dietary Guidelines Advisory Committee, nine members were dietitians, arguably in violation of the Federal Advisory Committee Act (FACA).²⁸ FACA requires all federal advisory committees to be “fairly balanced in terms of the points of view represented and the functions to be performed by the advisory

²³ While beef is rich in calcium, cereals contain calcium only when fortified. Yet, in her book, Cooper found that “cereals, which include all kinds of bread stuffs, as well as breakfast foods, supply important building material for the bones.” LENNA FRANCES COOPER, *HOW TO CUT FOOD COSTS* 16 (1917).

²⁴ See John Westerdahl, *Academy Co-Founder Lenna Frances Cooper: A Pioneer in Vegetarian Nutrition and Dietetics*, VEGETARIAN NUTRITION, <https://www.vndpg.org/vn/about/academy-co-founder-lenna-frances-cooper-a-pioneer-in-vegetarian-nutrition-and-dietetics> (last visited Feb. 24, 2022).

²⁵ See *Accredited Programs Directory*, ACAD. OF NUTRITION & DIETETICS, https://www.eatrightpro.org/acend/accredited-programs/accredited-programs-directory?rdType=url_edit&rdProj=acend_prog&rdInfo=dpd (last visited Feb. 24, 2022).

²⁶ See *Aims & Scope*, J. ACAD. NUTRITION & DIETETICS, <https://www.jandonline.org/content/aims> (last visited Feb. 24, 2022); *About Us*, FOOD & NUTRITION MAG., <https://foodandnutrition.org/about-us/> (last visited Feb. 24, 2022).

²⁷ See CAL. ACAD. OF NUTRITION & DIETETICS, <https://dietitian.org/> (last visited Feb. 23, 2022).

²⁸ See AGRIC. RSCH. SERV., U.S. DEP'T OF AGRIC., SCIENTIFIC REPORT OF THE 2020 DIETARY GUIDELINES ADVISORY COMMITTEE: ADVISORY REPORT TO THE SECRETARY OF AGRICULTURE AND SECRETARY OF HEALTH AND HUMAN SERVICES 1 (2020).

committee.”²⁹ Despite a cozy relationship with Big Sugar,³⁰ the Academy continues to have a stronghold on nutrition science.

In addition to new data calling into question previous findings on saturated fat, in 2016 researchers exposed Big Sugar’s funding seminal research linking saturated fat to heart disease.³¹ Yet antiquated positions on saturated fats continue to permeate our nutritional standards. Equating nutritional profiles of all beef penalizes beef cattle raised with practices that can ensure beef as part of a healthy diet. It also lets industrialized animal agriculture off the hook by not emphasizing how their practices degrade the nutritional quality of the meat they produce. There’s evidence that grass-fed beef is healthier compared to grain-finished, factory-farmed beef. Grass-fed beef has been found to contain higher amounts of conjugated linoleic acid (a fatty acid associated with reducing body fat levels),³² omega-3,³³ vitamins A and E,³⁴ and less monounsaturated fat³⁵ and omega 6 fatty acids (the consumption of which has been associated with elevated inflammation).³⁶

Emblematic of the current nutritional zeitgeist, journalists, hospital nutritionists, influencers and hip-hop artists are telling African-Americans to turn away from meat consumption.³⁷ And it’s working. A 2020 Gallup poll found that African-Americans were

²⁹ 5 U.S.C. App. §5(b)(2).

³⁰ See Alexandra Sifferlin, *Soda and Snack Food Companies Welcomed at Nutrition Conference*, TIME (Oct. 14, 2016), <https://time.com/4531268/junk-food-nutrition-diet/>.

³¹ See Cristin E Kearns et al., *Sugar Industry and Coronary Heart Disease Research: A Historical Analysis of Internal Industry Documents*, JAMA INTERNAL MED. (Sept. 16, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5099084/pdf/nihms816629.pdf>.

³² See Leah D. Whigham, et al., *Efficacy of Conjugated Linoleic Acid for Reducing Fat Mass: A Meta-Analysis in Humans*, 85 AM. J. CLINICAL NUTRITION 1203, 1203 (2007), <https://academic.oup.com/ajcn/article/85/5/1203/4632999.2>.

³³ See A.J. McAfee et al., *Red Meat from Animals Offered a Grass Diet Increases Plasma and Platelet n-3 PUFA in Healthy Consumers*, 105 BRIT. J. NUTRITION 80, 80, 87 (2011).

³⁴ See Cynthia A. Daley et al., *A Review of Fatty Acid Profiles and Antioxidant Content in Grass-Fed and Grain-Fed Beef*, 9 NUTRITION J. 1, 9 (Mar. 10, 2010), <https://nutritionj.biomedcentral.com/track/pdf/10.1186/1475-2891-9-10.pdf>.

³⁵ Mary E. Van Elswyk & Shalene H. McNeill, *Impact of Grass/Forage Feeding Versus Grain Finishing on Beef Nutrients and Sensory Quality: The U.S. Experience*, 96 MEAT SCI. 535, 536-37 (2014).

³⁶ See Daley et al., *supra* note 34, at 4-6, 9.

³⁷ Laura Reiley, *The Fastest-Growing Vegan Demographic Is African Americans. Wu-Tang Clan and Other Hip-Hop Acts Paved the Way*, WASH. POST (Jan. 24, 2020), <https://www.washingtonpost.com/business/2020/01/24/fastest-growing-vegan-demographic-is-african-americans-wu-tang-clan-other-hip-hop-acts-paved-way/>.

more likely to be flexitarians, those who have reduced meat consumption by eating a “flexible,” mostly vegetarian diet, and fully vegan.³⁸ Although vegetarians and vegans are still a small minority of the population, African-Americans are the fastest growing segment within veganism, with *The Washington Post* reporting that eight percent of African-American adults consider themselves vegans.³⁹ In a People for the Ethical Treatment of Animals (PETA) article on Black celebrity vegans, most of the celebrities point to health issues in embracing plant-based diets.⁴⁰ African-Americans are more likely to report food allergies than either Whites or Hispanics,⁴¹ and African-Americans with food allergies are more likely to be vegan or vegetarian.⁴²

Food allergies can point to larger health issues. For instance, one reason people shift to plant-based diets is due to maldigestion of meat. This maldigestion could be caused by an infection of *H. pylori*, a bacteria that hooks itself into its host’s stomach lining. Whereas the stomach acid required to digest meat would kill the bacteria, *H. pylori*’s main defense is to suppress stomach acid production, leaving the host with uncomfortable to painful gastritis. Two major cancers have been linked to *H. pylori*. It is the main cause of stomach cancer,⁴³ and linked to colorectal cancer in African-Americans⁴⁴ (the cancer which caused the untimely passing of the beloved King of Wakanda⁴⁵). The prevalence of *H. pylori* in African-Americans is stark: African Americans are thought to have a prevalence around

³⁸ See Justin McCarthy & Scott Dekoster, *Nearly One in Four in U.S. Have Cut Back on Eating Meat*, GALLUP (Jan. 27, 2020),

<https://news.gallup.com/poll/282779/nearly-one-four-cut-back-eating-meat.aspx>.

³⁹ Reiley, *supra* note 37.

⁴⁰ Zachary Toliver, *These 47 Black Vegans Who Save Animals Inspire PETA*, PETA, <https://www.peta.org/blog/black-vegans-saving-animals/> (last updated Feb. 3, 2022).

⁴¹ Cary Funk & Brian Kennedy, *The New Food Fights: U.S. Public Divides over Food*, PEW RSCH. CTR. 25 (Dec. 1, 2016), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2016/11/PS_2016.12.01_Food-Science_FINAL.pdf. 27 percent of Blacks, 13 percent of Whites, and 11 percent of Hispanics say they have food allergies. *Id.*

⁴² See *id.* at 11.

⁴³ See Łukasz Hołubiuk & Jacek Imiela, *Diet and Helicobacter Pylori Infection*, 11 GASTROENTEROLOGY REV., Mar. 2016, at 150, 150-54.

⁴⁴ Julia Butt et al., *Serologic Response to Helicobacter pylori Proteins Associated with Risk of Colorectal Cancer Among Diverse Populations in the United States*, 156 GASTROENTEROLOGY 175, 181 (2018).

⁴⁵ See UC Davis Comprehensive Cancer Center, *Chadwick Boseman: Actor’s Death Reflects a Rise in Colorectal Cancer Rates Among Young Adults*, SYNTHESIS, Winter 2021, https://health.ucdavis.edu/synthesis/issues/winter2021/patient_focus/chadwick-boseman.html.

50-60%, a 2- to 6-fold increased odds compared to Whites.⁴⁶ So instead of pushing a plant-based agenda, professionals and influencers should educate the African-American about the potential health issues food allergies may evidence.

III. An Environmental Movement

Food justice has its origins in the fight against pollution endemic to urban minority communities.⁴⁷ Today, environmental concerns weigh heavily in Black communities, with a majority of African-Americans being seriously concerned about climate change.⁴⁸ While climate change solutions are at the center of the current food justice movement, they are driven by an urban agricultural, plant-based regime advocated by wealthy donors, such as Bill Gates,⁴⁹ and the United Nations.⁵⁰ Industrialized beef production practices have been linked to climate change,⁵¹ yet the dominant solution narratives ignore the “industrialized” portion of this equation. In analyzing the work of eco-philosopher Thomas Berry, African-American environmentalist Carl Anthony summarizes Berry’s position on the problems created by industrialization as a dominant paradigm:

“On one side are those who believe in the power of science and industry to guide us to a safer and more abundant future... scientific materialism has caused us to lose touch with spiritual, ethical, and aesthetic dimensions of life and has led to mass extinctions and an increasingly toxic industrial environment.”⁵²

⁴⁶ Meira Epplein et al., *Race, African Ancestry, and Helicobacter pylori Infection in a Low-Income United States Population*, 20 *CANCER EPIDEMIOLOGICAL BIOMARKERS PREV.* 826, 827 (2011).

⁴⁷ CARL ANTHONY, *THE EARTH, THE CITY, AND THE HIDDEN NARRATIVE OF RACE* 26 (2017).

⁴⁸ See Matthew Ballew, et al., *Which Racial/Ethnic Groups Care Most About Climate Change?*, *YALE PROGRAM ON CLIMATE CHANGE COMMUN.* (Apr. 16, 2020), <https://climatecommunication.yale.edu/publications/race-and-climate-change/>.

⁴⁹ James Temple, *Bill Gates: Rich Nations Should Shift Entirely to Synthetic Beef*, *MIT TECH. REV.* (Feb 14, 2021), <https://www.technologyreview.com/2021/02/14/1018296/bill-gates-climate-change-beef-trees-microsoft/>.

⁵⁰ See generally Int’l Panel on Climate Change [IPCC], *CLIMATE CHANGE AND LAND: AN IPCC SPECIAL REPORT ON CLIMATE CHANGE, DESERTIFICATION, LAND DEGRADATION, SUSTAINABLE LAND MANAGEMENT, FOOD SECURITY, AND GREENHOUSE GAS FLUXES IN TERRESTRIAL ECOSYSTEMS 7* (P.R. Shukla et al., eds., 2019), https://www.ipcc.ch/site/assets/uploads/sites/4/2020/02/SPM_Updated-Jan20.pdf.

⁵¹ See *id.*

⁵² ANTHONY, *supra* note 47, at 141.

Instead of promoting de-industrialized beef production practices as a climate change solution, powerful institutions such as the United Nations (UN) promote industrialized plant-based solutions. An example of this is factory and laboratory crafted plant-based “meats,” with the UN naming Beyond Meat and Impossible Foods the 2018 Champions of the Earth, the UN’s highest accolade for the environment.⁵³ However, these plant-based meats rely on the same destructive surpluses of soybeans and corn that fueled the expansion of factory farming. In addition, the environmental impact and food safety of these products are unknown. Finally, shifting consumption away from beef to plant-based proteins flies in the face of environmental justice and racial and gender equity by placing the primary supply of protein into the hands of corporations, their investors, and their mostly White male executives.

Yet, there have been proposals to accelerate the shift of consumers away from beef and toward plant-based proteins by making meat more expensive through use of a meat tax, with proponents such as Vice President Kamala Harris.⁵⁴ According to FAIRR, a “global network of investors who regard the issues linked to intensive animal production and seek to minimize the risks within the broader food system,” a meat tax is now becoming increasingly likely as a result of the Paris Climate Accord.⁵⁵ There is little to no consideration that a tax would disproportionately impact food costs for low-income communities of color.

While Black communities face a possible regressive tax on their food to pay for the harmful impacts of industrialized animal agriculture, they are already paying the price of the destruction to their environments caused by concentrated animal feeding operations (CAFOs).⁵⁶ Whereas factory farming operations used to

⁵³ See Press Release, UN Env’t Programme, Plant-Based Meat Revolutionaries Win UN’s Highest Environmental Honor (Sept. 28, 2018).

⁵⁴ See Amanda Radke, *Politician Vows to Tax Producers to Make Beef More Expensive*, BEEF MAG. (Sept. 20, 2019), <https://www.beefmagazine.com/beef/politician-vows-tax-producers-make-beef-more-expensive>.

⁵⁵ FARM ANIMAL INVESTMENT RISK & RETURN [FAIRR], THE LIVESTOCK LEVY: PROGRESS REPORT 9 (Jun. 30, 2020).

⁵⁶ There isn’t much data on whether beef cattle CAFOs (concentrated animal feeding operation) are concentrated in predominately African-American communities. Although most cattle farms are found in the Black Belt, most beef cattle CAFOs are in midwestern states. See S. M. Rafael Harun & Yelena Ogneva-Himmelberger, *Distribution of Industrial Farms in the United States and Socioeconomic, Health, and Environmental Characteristics of Counties*, 2013

be found in urban areas, they've mostly been relocated to rural areas.⁵⁷ Thus, ironically, rural populations are now getting the brunt of the harmful impacts of CAFOs which are used to feed an increasingly urbanized world.

Largely overlooked are the increasing number of studies that find cattle raised in regenerative agricultural settings could play an important part in climate change mitigation. A 5-year study by researchers from Michigan State University and the Union of Concerned Scientists found that as opposed to continuous grazing or feed-lot finishing systems, grass-fed beef from adaptive multi-paddock (AMP) grazed and finished cattle not only offset their greenhouse gas emissions, but may also be net carbon-negative by virtue of sequestering carbon in the soil.⁵⁸ And when you add to this the fact that the organic matter sequestering this carbon also retains a massive amount of water in the soil, AMP grazed beef could actually be one of the most environmentally sustainable foods for some climates and ecosystems.⁵⁹

IV. An Anti-Racist Movement

In addition to environmental justice underpinnings, proponents of plant-based diets raise racial equity issues. For instance, Black veganism itself carries a racial justice component. As one writer explains: "To be a Black Vegan is a revolutionary act. Why? Because it takes courage to unlearn what we've been taught both by our families and by governmental agencies who allegedly

GEOGRAPHY J. 3, 4 (July 15, 2013), <https://downloads.hindawi.com/archive/2013/385893.pdf>. It is likely that because these states lack significant African-American populations outside of urban areas, there aren't many studies on the issue. However, a study of Ohio's CAFOs found that African-American, Hispanic, and poor communities were disproportionately impacted. See Julia Lenhardt & Yelena Ogneva-Himmelberger, *Environmental Injustice in the Spatial Distribution of Concentrated Animal Feeding Operations in Ohio* in POLITICAL ECOLOGIES OF MEAT 127, 133 (Jody Emel & Harvey Neo eds., 2015). The most significant research on the detrimental impact of CAFOs on African-American communities was on hog CAFOs in North Carolina. See generally Nicole Wendee, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENV'T'L HEALTH PERSPECTIVES, June 2013, at 182, 183 (2013).

⁵⁷ See WILLIAM KANDEL, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., RECENT TRENDS IN RURAL-BASED MEAT PROCESSING 1 (2009).

⁵⁸ See Paige L. Stanley, et al., *Impacts of Soil Carbon Sequestration on Life Cycle Greenhouse Gas Emissions in Midwestern USA Beef Finishing Systems*, 162 AGRIC. SYS. 249, 250 (2018).

⁵⁹ See Jong-Yoon Park, et al., *Evaluating the Ranch and Watershed Scale Impacts of Using Traditional and Adaptive Multi-Paddock Grazing on Runoff, Sediment and Nutrient Losses in North Texas, USA*, 240 AGRIC., ECOSYSTEMS & ENV'T. 32, 36 (2017).

‘want the best for us.’”⁶⁰ Many have animal welfare concerns and added to these concerns are the vestiges of slavery when African-Americans were legally considered property, like animals, and treated inhumanely.⁶¹

However, anti-colonialism rhetoric misses the irony that the nutrient-dense superfoods they rely on are products of colonialism. From coconut oil to avocados, these foods are plucked from abroad per American trade hegemony. The Global South’s small farmers, farmworkers, food autonomy, and environment suffer to feed our insatiable appetite for tropical plants. For instance, the ethics of plant-based protein cashews should be questioned as cashew harvesting requires laborers to work under unbearable conditions, often suffering burns from the caustic acid within cashew shells.⁶² Additionally, anti-racist stances against beef production and consumption miss the important role cattle have played in American racial justice movements.

Churches serving northern, urban Black populations preached the importance of farming within self-support systems. Religious leaders like Father Divine would lead his followers from his interracial Harlem-based church to a farm in New York’s rural Hudson Valley. Among other livestock, they would raise cattle for their own use or to sell.⁶³ The Nation of Islam, founded in Detroit, would set up a farm in the 1960s (though it was shuttered by the

⁶⁰ Danni Roseman, *How Black Veganism Is Revolutionary and Essential for Our Culture*, BLAVITY (Jun. 25, 2017), <https://blavity.com/black-veganism-is-revolutionary?category1=community-submitted&subCat=health&category2=health>.

⁶¹ The MOVE organization was a social justice driven organization active in Philadelphia during the 1970s through the mid-1980s. Radical environmentalists and vegans, most members were killed in 1985 when Philadelphia police dropped two bombs on their house, which led to several residential blocks being burnt to the ground within the African-American enclave of West Philadelphia. In a written interview, one of the only surviving members recounts: “We exposed the crimes of government officials on every level,” Janine Africa wrote to me. “We demonstrated against puppy mills, zoos, circuses, any form of enslavement of animals. We demonstrated against Three Mile Island [nuclear power plant] and industrial pollution. We demonstrated against police brutality. And we did so uncompromisingly. Slavery never ended, it was just disguised.” Ed Pilkington, *A Siege. A Bomb. 48 Dogs. And the Black Commune that Would Not Surrender*, THE GUARDIAN (July 31, 2018), <https://www.theguardian.com/world/2018/jul/31/a-siege-a-bomb-48-dogs-and-the-black-commune-that-would-not-surrender>.

⁶² See Jack Coulton, *Cashew Nuts: A Toxic Industry*, SLOW FOOD (Mar. 5, 2020), <https://www.slowfood.com/cashew-nuts-a-toxic-industry/>.

⁶³ *A Virtual Tour of Father Divine’s Ulster County ‘Heavens’*, TIMES HUDSON VALLEY MEDIA (Feb. 13, 2019), <http://timeshudsonvalley.com/stories/a-virtual-tour-of-father-divines-ulster-county-heavens,4016>.

1990s).⁶⁴ Farrakhan is quoted in the organization's Final Call newspaper, as describing farming and animal husbandry as "the first professions," and "*the engine* of every nation."⁶⁵ The Pan African Orthodox Christian Church, also founded in Detroit, looked to the South to purchase farm land to feed its congregation and to "strike a devastating blow to the myth of Black inferiority and the pattern of dependency that still shackles the minds of far too many," and "offer hope to young people who feel that their only hope is to beg for employment from corporations that have already proven they don't need them or risk their lives in the illegal economy."⁶⁶ Today, while their dream wasn't fully realized, their farmland is leased to a Black beef cattle producer.⁶⁷

Though the Civil Rights era catapulted vegan ideology amongst northern, urban Black populations,⁶⁸ southern "back to the land" agricultural cooperatives made plans to raise cattle as part of self-sufficiency. Among them was Freedom Farmer Cooperative, which was established by journalist and anti-poverty activist Fannie Lou Hamer.⁶⁹ There was also New Communities, a cooperative land trust co-founded by Charles Sherrod, a founding member of Student Nonviolent Coordinating Committee (SNCC) in southwest Georgia, and SNCC's first Field Secretary.⁷⁰ Still in operation today, the Federation of Southern Cooperatives, a cooperative association of Black farmers, landowners, and cooperatives, used cattle in their training farm to promote cooperative economic development as a

⁶⁴ Nafeesa Muhammad, *The Nation of Islam's Economic Program, 1934-1975*, BLACK PAST, (Apr. 1, 2020), <https://www.blackpast.org/african-american-history/the-nation-of-islams-economic-program-1934-1975/>.

⁶⁵ Ridgely Mu'min Muhammad & Abdul Arif Muhammad, *Fox News Lies: Louis Farrakhan Receives No Government Funding*, NATION OF ISLAM, https://www.noi.org/fox-news-lies_03-14-2014/ (last visited Mar. 3, 2022).

⁶⁶ *The Beulah Land Farms Story- Mortgage Paid in Full October 2018*, SHRINES OF THE BLACK MADONNA, (last visited June 24, 2020), <https://www.shrinesoftheblackmadonna.org/beulah-land-story/>.

⁶⁷ *America's Best Young Farmer & Ranchers: Gary Coleman Jr.*, PROGRESSIVE FARMER, <https://spotlights.dtnpf.com/abyfr/GC2013.cfm> (last visited June. 21, 2020).

⁶⁸ See Amariah Mercer, *A Homecoming*, EATER (Jan. 14, 2021), <https://www.eater.com/22229322/black-veganism-history-black-panthers-dick-gregory-nation-of-islam-alvenia-fulton>.

⁶⁹ MONICA M. WHITE, *FREEDOM FARMERS: AGRICULTURAL RESISTANCE AND THE BLACK FREEDOM MOVEMENT* 65 (2018).

⁷⁰ Shirley Sherrod, *The Struggle for the Land: A Story from America's Black Belt*, NONPROFIT Q., (Feb. 18, 2020), <https://nonprofitquarterly.org/the-struggle-for-the-land-a-story-from-americas-black-belt/>.

philosophy and to advance the stewardship of Black-owned land and other natural resources in rural, low-income communities.⁷¹

In sum, cattle have played an important role in the African-American journey for personal freedom and the economic welfare of rural development. It naturally follows that the Black farmer's ability to continue to produce beef is key to economic justice for rural communities. However, they face many hurdles in succeeding in the industry.

V. Black Producers' Beef with the Industry

The United States is the largest producer of beef, primarily grain-fed beef for domestic and export consumption.⁷² In 2018, cattle production was a \$67 billion market that represented roughly 18 percent of all agricultural commodities cash receipts.⁷³ Even so, in this lucrative market, Black beef producers face many challenges, namely one of profitability. As a Georgia farmer puts it, "We're in the game of raising cattle, but [White farmers] are in the business of raising cattle."⁷⁴ Most Black farmers run a few heads of cattle to diversify their operations,⁷⁵ as usually crops and cattle succeed inversely to the other.⁷⁶

The U.S. beef industry consists of two production sectors: cow-calf operations and cattle feeding.⁷⁷ While there may be some exceptions, Black beef producers run cow-calf operations: farms or ranches where calves are born and raised to weaning age, and subsequently sent to a stockyard, sold at auction, or sold to a concentrated animal feeding operation (CAFO), where they are fattened up on grain.⁷⁸ Cow-calf operations are the backbone of the beef industry; they're mostly smaller operations with less than 100

⁷¹ See JESSICA GORDON NEMBARD, *COLLECTIVE COURAGE: A HISTORY OF AFRICAN AMERICAN COOPERATIVE ECONOMIC THOUGHT AND PRACTICE* 118, 121 (2014).

⁷² *Cattle & Beef, Sector at a Glance*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/topics/animal-products/cattle-beef/sector-at-a-glance/> (last updated Nov. 29, 2021).

⁷³ See *id.* Data on 2018 cash receipts.

⁷⁴ Interview with Handy Kennedy, Operator, HK Farm LLC, Co-founder, AgriUnity (Dec. 2, 2021).

⁷⁵ Interview with Ben Burkett, President, Nat'l Family Farm Coal. (Mar. 9, 2020).

⁷⁶ Interview with Albert Jones, Farm Program Dir., Ark. Land & Cmty. Dev. Corp. (June 9, 2020).

⁷⁷ *Cattle & Beef: Overview*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/topics/animal-products/cattle-beef/> (last updated Jan. 22, 2021).

⁷⁸ See JAMES M. MACDONALD ET AL., *ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., EIB-189, THREE DECADES OF CONSOLIDATION IN U.S. AGRICULTURE* 37 n. 20 (2018).

cows.⁷⁹ In an industry that's becoming increasingly vertically integrated, dominated by a few meat packing companies, cow-calf operations are one of the few refuges in the meat industry for small-scale, independent producers.

Cow-calf operations take on the most risk as they only get paid when they deliver healthy and hearty cattle to a feeding operation. If a Black producer can manage to sell his cattle to a stockyard, they'll see more money in their pocket, instead of the pockets of the middlemen at the auction or CAFOs.⁸⁰ But most Black producers don't have the paperwork to prove their cattle's pedigree, and a stockyard isn't going to take cattle without it. And the price cattle demand at the auctions and CAFOs also depend on pedigree, because it's going to determine the beef grade, a uniform system for valuing a feeder cattle based on the frame and muscle.⁸¹ A Black producer's payday may further be cut by discrimination: Many have complained that their cattle will be incorrectly graded.⁸² But when it comes to pricing, all cattle farmers are hurt from industry-wide low prices of cattle. Even before the Covid-19 pandemic hit, the price of beef cattle had dropped to lows while the price consumers paid kept inching up. The cause of this seemingly paradoxical situation is the industry's structure, and the bottleneck created by the meatpacking companies.

The American public first learned about the machinations of the meatpacking industry from Upton Sinclair's famous novel, *The Jungle*,⁸³ which detailed its atrocious working environment at the turn of the 20th Century. Less than two decades after this exposé was published, a 1919 Federal Trade Commission (FTC) report concluded that the then "Big Five" meat packers had "attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and

⁷⁹ See ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., SMALL-SCALE U.S. COW-CALF OPERATIONS i (2011).

⁸⁰ Interview with Handy Kennedy, *supra* note 74.

⁸¹ *Feeder Cattle Grades and Standards*, AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., <https://www.ams.usda.gov/grades-standards/feeder-cattle-grades-and-standards> (last visited Mar. 7, 2022). United States Standards for Grades of Feeder Cattle, 65 Fed. Reg. 39,587 (June 27, 2000).

⁸² U.S. COMM'N ON CIV. RTS., 7 *RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION: THE MISSISSIPPI DELTA REPORT* (2001).

⁸³ *The Jungle* was published serially in 1905 and as a single-volume book in 1906. An exposé of conditions in the Chicago stockyards, the book caused a public outcry which led to the passing of the U.S. Pure Food and Drug Act. The 1906 act helped improve conditions in slaughterhouses. Kate Lohnes, *The Jungle: Novel by Sinclair*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/The-Jungle-novel-by-Sinclair> (last visited Mar. 7, 2022).

hold the fortunes of their competitors in their hands.”⁸⁴ Following these FTC findings, Congress passed the Packers and Stockyards Act of 1921.⁸⁵ While the Act was initially successful in breaking up the meatpacking industry, by the 1980s reconsolidation began.⁸⁶ While the Big Five meatpackers in 1921 controlled 70 percent of the market, the Big Four meatpackers currently sitting atop the American beef industry— Tyson Foods, Cargill, National Beef, and JBS— process about 85 percent of beef on the market.⁸⁷ In 2019, several anti-trust lawsuits were brought against the Big Four claiming they colluded to fix prices, including reducing capacity or closing plants. It wasn’t until the Covid-19 pandemic hit that the USDA and Justice Department started investigating these allegations.⁸⁸

Even prior to the pandemic, the Big Four were making record profits. But with the pandemic came an increase in demand, and prices went up further.⁸⁹ According to a 2021 White House blog post, the Big Four’s profit margins increased 300 percent during the pandemic.⁹⁰ This occurred during a time when processing capacity at plants were cut due to Covid-19 spreading amongst the labor force. Longstanding unsafe conditions made plants a breeding ground for the virus.⁹¹ Among the large immigrant workforce are Somali refugees, Black laborers who routinely face discrimination.⁹² Until

⁸⁴ Christopher R. Kelley, *An Overview of the Packers and Stockyards Act*, 2003 ARK. L. NOTES 35, 37.

⁸⁵ *See id.* at 38.

⁸⁶ *Id.*

⁸⁷ Leah Nylen & Liz Crampton, ‘*Something Isn’t Right*’: *U.S. Probes Soaring Beef Prices*, POLITICO (May 25, 2020), <https://www.politico.com/news/2020/05/25/meatpackers-prices-coronavirus-antitrust-275093>.

⁸⁸ *Id.*

⁸⁹ *See* Chelsey Cox, *Fact Check: Cattle Farmers Are Paid Less, Consumers Pay More Amid Beef Shortage*, USA TODAY, <https://www.usatoday.com/story/news/factcheck/2020/06/05/fact-check-farmers-paid-less-consumers-pay-more-amid-beef-shortage/5311455002/> (last visited June 12, 2020).

⁹⁰ Brian Deese et al., *Recent Data Show Dominant Meat Processing Companies Are Taking Advantage of Market Power to Raise Prices and Grow Profit Margins*, THE WHITE HOUSE BLOG (Dec. 10, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/12/10/recent-data-show-dominant-meat-processing-companies-are-taking-advantage-of-market-power-to-raise-prices-and-grow-profit-margins/>.

⁹¹ Michael Haedicke, *Meat Factory Work Is Dangerous in Normal Times. The Same Conditions Spread Covid-19*, IN THESE TIMES (May 11, 2020), <https://inthesetimes.com/article/meat-processing-factory-farm-covid-19-coronavirus-unions-worker-organizing>.

⁹² *See* Chico Harlan, *For Somalis, Hope Falls to the Cutting Floor: Refugees Entrapped by Popular Meat Industry*, THE WASH. POST (May 24, 2016),

their arrival Black labor in the meatpacking industry had been on the decline, having been replaced by Latino immigrants though some Blacks did find work in supervisory positions.⁹³ A brutal job for low-skilled employees who work on fast lines with dangerous machinery, the virus ravaged workers' health, while plant closures sent them to join the unemployed. In the wake of safety issues, the deputy director of the Food and Agriculture Organization of the United Nations (FAO) said he expects human labor to be "increasingly replaced by machines."⁹⁴ In the meantime, the Big Four are rolling out their own plant-based "meats."⁹⁵ So while meatpackers make unprecedented profit,⁹⁶ they seemingly have no intention of protecting American beef production nor employment for rural communities and people of color.

That the Big Four's oligopolistic hold of the market detrimentally impacts cow-calf operators was never more apparent when at the beginning of Covid-19 shutdowns beef shortages hit grocery retailers although there was no shortage of beef cattle. Because of the meatpacking bottleneck cattle prices plummeted, and without an end buyer in place, auctions had fewer buyers attending.⁹⁷ For Black producers, who mostly sell through auctions, this would mean foregoing a sale altogether.⁹⁸ The pandemic did increase opportunities to sell directly to consumers who were worried about access and about the safety of their meat.⁹⁹ Unfortunately, for Black cattle producers who'd like to process and sell their own beef, there are major hurdles to getting around the Big Four. While Black producers supplying beef to local communities were selling out, they

<https://www.washingtonpost.com/sf/national/2016/05/24/for-many-somali-refugees-this-industry-offers-hope-then-takes-it-away/>.

⁹³ See VANESA RIBAS, *ON THE LINE: SLAUGHTERHOUSE LIVES AND THE MAKING OF THE NEW SOUTH* 32, 61 (2016).

⁹⁴ Arthur Neslen, *Rise of the Robo-Slaughtermen*, POLITICO (May 25, 2020), <https://www.politico.eu/article/coronavirus-rise-of-the-robot-slaughtermen/>.

⁹⁵ Chloe Sorvino, *The World's Largest Meat Seller Embraces Plant-Based Proteins as Pandemic Demand Surges*, FORBES (June 18, 2020), <https://www.forbes.com/sites/chloesorvino/2020/06/18/the-worlds-largest-meat-seller-embraces-plant-based-proteins-as-pandemic-demand-surges/>.

⁹⁶ See Joe Fassler & H. Claire Brown, *Why Covid-19 Plant Shutdowns Could Make the Big Four Meatpackers Even More Profitable*, THE COUNTER (May 14, 2020), <https://thecounter.org/covid-19-meat-plant-closures-food-prices-cattle/>.

⁹⁷ Samantha Masunaga et al., *People Want Beef. Ranchers Have Cows. Here's What's Going Wrong*, L.A. TIMES (May 16, 2020), <https://www.latimes.com/business/story/2020-05-12/how-coronavirus-disrupted-california-meat-plants>.

⁹⁸ Interview with Albert Jones, *supra* note 76.

⁹⁹ Lillianna Byington, *As Meat Giants Face Scrutiny, Small and Niche Producers Capitalize*, FOOD DIVE (June 8, 2020), <https://www.fooddive.com/news/as-meat-giants-face-scrutiny-small-and-niche-producers-capitalize/578687/>.

were unable to meet the increased demand for their product because of the backlog at custom processing abattoirs.¹⁰⁰

Processing infrastructure remains a critical bottleneck in the supply chain. Under current law, meat offered for retail sale must be butchered under the supervision of a USDA Food Safety and Inspection Service (FSIS) employee or by inspectors in states with FSIS equivalent certification. Only 27 states operate equivalent inspection programs.¹⁰¹ While these are states that hold a significant number of Black-operated farms, there still aren't enough independent slaughterhouses—i.e., abattoirs—or USDA inspectors to service most small to mid-size cattle producers locally or even regionally, and without a constant throughput smaller facilities aren't profitable and are soon shuttered.¹⁰² Black-owned beef abattoirs are nonexistent.¹⁰³

Several years earlier legislation was introduced in the House that would lower barriers for new meatpacking facilities. Introduced in 2015, the Processing Revival and Intrastate Meat Exemption (PRIME) Act, would have allowed states to legalize the sale of custom-processed meat direct to household customers and to restaurants, hotels, grocery stores, farmers' markets, and other establishments that directly serve consumers in a state.¹⁰⁴ The PRIME Act never left committee.¹⁰⁵ While cow-calf operators and Muslims, whose halal practices require strict animal welfare

¹⁰⁰ See P.J. Huffstutter & Rod Nickel, 'How About Next June?' *Small Meat Processors Backlogged as Virus Idles Big Plants*, REUTERS (May 26, 2020), <https://www.reuters.com/article/us-health-coronavirus-meatpacking/how-about-next-june-small-meat-processors-backlogged-as-virus-idles-big-plants-idUSKBN23217V>.

¹⁰¹ A subset of the 27 states that have Meat and Poultry Inspection Programs also have Cooperative Interstate Shipment agreements with the FSIS that allows meat to be sold across state lines. These are mostly northern states, which don't have a significant number of Black-operated farms. See *FSIS and Iowa Sign Cooperative Interstate Shipment Agreement*, FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC. (May 21, 2020), <https://www.fsis.usda.gov/news-events/news-press-releases/fsis-and-iowa-sign-cooperative-interstate-shipment-agreement-0>.

¹⁰² See ROB HOLLAND & HAL PEPPER, UNIV. OF TENN. EXTENSION, *INITIAL CONSIDERATIONS FOR STARTING A SMALL-SCALE LIVESTOCK HARVEST AND PROCESSING FACILITY* 2-3 (2014).

¹⁰³ In interviews with Black producers in Arkansas, Georgia, Mississippi, North Carolina, and Tennessee, and an unofficial survey of members of the National Black Farmers Association, no one could point to a black-owned beef abattoir. The author was able to locate a formerly black-owned abattoir in Tennessee that had shuttered in around 2017-2018, and an abattoir in North Carolina slated to open February 2022.

¹⁰⁴ Processing Revival and Interstate Meat Exception (PRIME) Act, H.R. 3187, 114th Cong. (2015).

¹⁰⁵ *Id.*

methods, advocated for the PRIME Act, it was the pandemic that resulted in its political resurgence due to the general public's growing awareness of the food security and safety issues posed by the consolidated meat supply chain.¹⁰⁶

VI. UnCOOL Land and Marketing Issues

The United States is a net beef importer, purchasing lower-value beef destined for processing.¹⁰⁷ Since 2015, foreign beef processed in the U.S. can legally be labeled "Product of U.S.A." even if the animal was raised a continent away.¹⁰⁸ As a response to a successful suit for unfair trade practice filed with the World Trade Organization (WTO) by Canada and Mexico, the USDA rolled back Country of Origin Labeling (COOL) for beef and pork products, allowing meat to be sold without disclosing its home country on the label.¹⁰⁹ And as purveyors of beef that is graded low,¹¹⁰ Black producers are less able to compete with these cheaper imports. So in order to compete in a market with odds stacked against them, more Black cow-calf operators are selling their grass-fed beef directly to consumers. Grass-fed beef commands a premium for being healthier and more environmentally sustainable. So, the ability to distinguish themselves based on their production practices and country of origin is critical to their brand for the sake of food safety and traceability. And with Covid-19 consumers are becoming more wary of the food safety issues of industrialized meat. Large meatpacking companies can produce a single USDA-inspected beef product that contains more than 100 animals hailing from multiple countries.¹¹¹

¹⁰⁶ Stephen Robert Miller, *Amid Covid-19 Bottleneck in Meat Industry, PRIME Act Gains Support*, FERN'S AGRIC. INSIDER (June 3, 2020), thefern.org/ag_insider/amid-covid-bottleneck-in-meat-industry-prime-act-gains-support/.

¹⁰⁷ *Cattle & Beef: Overview*, *supra* note 77.

¹⁰⁸ Joe Fassler, *Foreign Beef Can Legally Be Labeled "Product of U.S.A." It's Killing America's Grass-Fed Industry*, THE COUNTER (July 16, 2018), thecounter.org/grass-fed-beef-labeling-fraud-country-origin/.

¹⁰⁹ JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING (2016).

¹¹⁰ Cattle finished on grass typically have lower USDA quality grades, an indication of fat within the muscle, than grain fed cattle. *Grass-Fed Beef Production*, PENN STATE EXTENSION (Mar. 7, 2018), <https://extension.psu.edu/grass-fed-beef-production>.

¹¹¹ McDonald's, a JBS client, openly states their practice of buying beef patties that contain multiple beef sources in a website FAQ: "Do McDonald's burgers contain beef from lots of different cows? We only use whole cuts of 100% beef in our burgers, from over 16,000 British and Irish farmers. Our patty supplier buys whole cuts of forequarter and flank from approved abattoirs across the U.K. and Ireland. Here the beef is prepared by skilled butchers before being minced and

The pandemic's disruption of the beef supply chain caused an animal welfare and food waste catastrophe as thousands of cattle were being culled on farms.¹¹² It also brought the first shipment of grass-fed beef imported from Namibia.¹¹³ Just the year prior to the repeal of COOL, U.S. producers accounted for more than 60 percent of the domestic grass-fed market.¹¹⁴ But by 2017, after the repeal of COOL, American ranchers' share of the domestic, grass-fed beef market plunged.¹¹⁵ Now, American producers are estimated for only 15 percent of the grass-fed market.¹¹⁶ Without COOL, meat labeling can easily confuse consumers into believing a beef product is American produced. As a grass-fed beef producer explains:

“The splashy consumer-facing label features a USDA organic seal, a USDA inspection sticker, and, in smaller print, the phrase “processed in USA” alongside Trader Joe’s corporate address in Monrovia, California. Of course, foreign beef can still be certified USDA organic, and all imported meat goes through USDA inspection.”¹¹⁷

But even with COOL in place, Black producers would still struggle to compete in the grass-fed market because grass-finishing cattle requires a lot of land, and African-Americans were historically kept out of land ownership. After the Civil War, stock laws would end traditional Southern agricultural practice of allowing livestock to be grazed in the commons, and this served as one of the biggest drivers of emigration from the South in search of economic opportunity.¹¹⁸ For those who were able to obtain land, there were

shaped to create our hamburger patties. In the blending process, we do mix beef from different delivery batches and the resulting batches can be made up of the meat from more than 100 cattle.” *Do McDonald’s Burgers Contain Beef from Lots of Different Cows?*, MCDONALDS, [mcdonalds.com/gb/en-gb/help/faq/18908-do-mcdonalds-burgers-contain-beef-from-lots-of-different-cows.html](https://www.mcdonalds.com/gb/en-gb/help/faq/18908-do-mcdonalds-burgers-contain-beef-from-lots-of-different-cows.html) (last visited Feb. 24, 2022).

¹¹² See Sophie Kevany, *Millions of Farm Animals Culled as US Food Supply Chain Chokes Up*, THE GUARDIAN (Apr. 29, 2020), <https://www.theguardian.com/environment/2020/apr/29/millions-of-farm-animals-culled-as-us-food-supply-chain-chokes-up-coronavirus>.

¹¹³ See Charmaine Ngatjiheue, *Namibia’s First Beef Batch Reaches US*, MEAT IMPORT COUNCIL OF AMERICA (Apr. 23, 2020), <http://www.micausa.org/namibias-first-beef-batch-reaches-us/>.

¹¹⁴ Fassler, *supra* note 108.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ MATTHEW HARPER, *THE END OF DAYS: AFRICAN AMERICAN RELIGION AND POLITICS IN THE AGE OF EMANCIPATION* 85 (2016). Under the old open grazing

legal mechanisms used to divest them of it.¹¹⁹ Some African-Americans would migrate to the West, but had limited access to Homestead Acts' land grabs.¹²⁰ Known as exodusters, only the best land was already taken and generally what was available was land not fit for growing crops; and this kind of land is utilized to support animal agriculture, which is why many turned to raising cattle for subsistence.¹²¹ With these historical limitations and continuous limited access to capital, Blacks aren't able to compete for the best land when acquiring farms, thus the total value of products sold per acre are all significantly lower for Black farmers reflecting poorer quality of land¹²² as well as less land.¹²³ *Pigford vs. Glickman* brought attention to the plight of Black farms' survival and the USDA's racially discriminatory policies that unfairly led to the foreclosure of farms owned by African-Americans.¹²⁴ While farmers ultimately won a settlement, many had already lost their land.

Finally, a major barrier to Black beef producers supplying local communities is a lack of communications infrastructure in rural areas. A lack of internet access—and sometimes even a phone connection—has already plagued Black farmers by creating a barrier to receiving USDA programs and services.¹²⁵ This digital divide also poses a challenge to connecting with customers through direct online marketing.

system, responsibility for protecting crop lands lay with farmers, who had to build fences around their fields to keep animals out. Stock laws shifted liability and cost of fencing from the crop cultivator to the livestock owner. *Id.*

¹¹⁹ Vann R. Newkirk II, *This Land Was Our Land: How Nearly 1 Million Black Farmers Were Robbed of Their Livelihood*, 324 ATLANTIC MONTHLY, Sept. 2019, at 74, 76, 78-80.

¹²⁰ The 1862 Homestead Act and Kinkaid Act of 1904 allowed for public domain land to be acquired free of charge with a modest filing fee. *See* Homestead Act of 1862, ch. 75 § 1, 12 Stat. 392; Kinkaid Act, Pub. L. No. 58-233, 33 Stat. 547 (1904).

¹²¹ BRUCE A. GLASRUD & CHARLES A. BRAITHWAITE, AFRICAN AMERICANS ON THE GREAT PLAINS: AN ANTHOLOGY 7 (2009); 1 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY 1896 TO THE PRESENT: FROM THE AGE OF SEGREGATION TO THE TWENTY-FIRST CENTURY 30 (Paul Finkelman et al. eds., 2009).

¹²² *See* BANKS, *supra* note 7, at 10-11, 15.

¹²³ According to the 2017 Ag Census, 85 percent of Black farms vs 70 percent of U.S. farms generally, had fewer than 180 acres. *See* NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., *supra* note 3.

¹²⁴ CONG. RSCH. SERV., RS20430, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 1 (2013).

¹²⁵ *See* Greg Kaufmann, *Black Farm Families Face a Struggle for a Share of COVID-19 Aid*, SPOTLIGHT ON POVERTY & OPPORTUNITY (May 5, 2020), <https://spotlightonpoverty.org/spotlight-exclusives/black-farm-families-face-a-struggle-for-a-share-of-covid-19-aid/>.

VII. Envisioning Equitable Beef

Rather than advocating policies that would eradicate Black beef production, food justice activists should advocate for a revamped beef industry: Small-scale, humane, and soil enriching beef production supporting food security for local communities. The FAO has also recognized that livestock contribute to poverty alleviation by building resilience and supporting the livelihoods of large numbers of rural people by providing food security and economic opportunity.¹²⁶ Among economic benefits is the circulation of money back into Black and rural economies. As the FAO warns about global famines from global food supply chain disruptions due to Covid-19, localized food chains are more important than ever.¹²⁷ The following are policy considerations to help build a racially equitable beef industry:

Revisit nutritional standards. In recognizing that beef is the basis of a culturally relevant, nutritious diet, advocating for rigorous evidence-based data around nutrients, including saturated fats.

Reject calls for a meat tax. Unfair imposition of a tax will detrimentally impact small beef producers, thus having a disproportionate impact on Black producers. It also places a regressive tax on low-income consumers. Instead, advocate for the removal of government subsidies on corn and soybean so that the price of meat increases to reflect the true cost of production. In addition, this would make CAFOs less profitable, if at all economically viable.

Increase producer participation in local food systems. Nutritious, affordable, and high-quality food is out of reach for many low-income neighborhoods, communities of color, and rural areas: Eight percent of African Americans live in a tract with a supermarket, while 20 percent of rural counties are food deserts.¹²⁸ Increasing direct-to-consumer opportunities (CSAs, farmers' market, and online) for Black beef producers could help meet this need. As custom processed beef has higher costs, affordability may be a

¹²⁶ Food & Agric. Org. of the United Nations [FAO], *Shaping the Future of Livestock 5* (Jan. 2018), <https://www.fao.org/3/18384EN/i8384en.pdf>.

¹²⁷ See *FAO Needs \$350 Million to Avert Rising Hunger as Countries Reel from COVID-19 Pandemic's Impact*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS (May 18, 2020), <https://www.fao.org/news/story/en/item/1276081/icode/>.

¹²⁸ SARAH TREUHAFT & ALLISON KARPYN, POLICYLINK, *THE GROCERY GAP: WHO HAS ACCESS TO HEALTHY FOOD AND WHY IT MATTERS 7* (2010).

factor.¹²⁹ One way to address this issue would be to include producers in Supplemental Nutrition Assistance Program (SNAP) authorized retailers and provide assistance in doing so where there are no SNAP authorized retailers.

Offering training in sustainable production. Utilizing extension programs, provide producers with training on regenerative animal agricultural practices. Operations cost will decrease as less feed will be needed. Sustainable production would transform farms from specialized to diversified operations, including reverting back to traditional practices of having multi-use cattle that provide a wide diversity of products, ranging from milk, leather, tallow, and beef to increase income and cut food waste. This closed system would also increase total farm productivity by providing natural fertilization for crops, and in turn using crop residues into cattle feed into valuable protein. Fertilizer could also present an additional income source, as they are needed in the booming organic farming industry. Finally, by aiding producers toward raising animals in a natural environment, producers will move away from using inputs that have cattle competing for human-edible food.

Expand custom processing. Decentralizing meat distribution wrests in producers' ability to process their animals for director-to-market sales. An additional benefit of producing beef for local consumption is animal welfare. Local processing would cut down on injury to the cattle during transportation and would decrease unnecessary cattle harvesting adding to the glut of speculative demand to supply domestic and international grocery stores, thereby also cutting down on food waste caused by spoilage or food chain disruptions. Thus, eliciting congressional support for the federal PRIME Act is essential. Alternatively, constituents can advocate for state laws that allow intrastate meat sales. One example is Wyoming's Food Freedom Law that allows ranchers to process cattle on the farm and sell cuts of meat directly to in-state consumers by making those consumers part-owners of the cattle.¹³⁰ Another example would be, The Kentucky Proud Meat Grader Program funded by the Kentucky Department of Agriculture, which provides USDA-certified meat grading services to Kentucky Proud members as a service designed

¹²⁹ See RENEE CHEUNG & PAUL MCMAHON, BACK TO GRASS: THE MARKET POTENTIAL FOR U.S. GRASSFED BEEF 30 (2017), https://www.stonebarnscenter.org/wp-content/uploads/2017/10/Grassfed_Full_v2.pdf.

¹³⁰ WYO. STAT. ANN. §11-49-103 (West, Westlaw through 2021 Sess.).

to provide small producers and processors a level playing field with large-scale businesses at retail.¹³¹

Support worker-owned abattoirs. Cooperative organizations have long been at the heart of the Black economic independence movement. Whereas the purpose of an agricultural cooperative is to augment leverage through aggregation, a worker cooperative puts the workers at the core of the enterprise. By having workers own the business and they participate in its financial success on the basis of their labor contribution, the cooperative ensures assets are owned and controlled by the communities that depend on them for livelihoods, sustenance, and ecological well-being. Most importantly, with workers having the power to influence their workplace conditions, workers would be in a position to better respond to pandemic and other food safety issues.

Funding programs for new producers. Finally, while farmers of all races are aging, the Black farmer is on average the oldest. Congress should ensure funding for the Beginning Farmer and Rancher Development Program, which was cut under the current administration. The program supports new minority farmers and ranchers.

Increase Access to Farmland. In order to help Black farmers secure farmland and to remediate previous discriminatory practices, the federal government should provide grants, low-interest loans, and 99-year leases of public land.

VIII. Staking Space in Food Justice

In conclusion, food justice advocates should reframe mainstream narratives that push out Black farmers. Already marginalized by the highly industrialized meat industry, Black beef producers should not be further marginalized by calls for the end of beef production. Rather, supporting policies to create equitable beef production is not only good for Black producers, but all American beef producers and consumers.

¹³¹ Ray Bowman, *KDA Initiates Beef Grading Program*, KENTUCKY FARM BUREAU (May 4, 2015), <https://www.kyfb.com/federation/newsroom/kda-initiates-beef-grading-program/>.

The Broken Beef Cattle Industry: COOL, COVID and CattleTrace

Hayden L. Ballard*

I. Introduction

*“A page of history is worth a volume of logic.”*¹

~ U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. (1921) ~

Kansas City, Missouri – 1922. Just west of Kansas City, down in the river bottoms along the Missouri River, a hired hand throws a saddle across the back of an old sorrel gelding. He’s done this a hundred times before, day in and day out, week after week, riding pens for the Kansas City Stockyards checking for sick or downed steers, checking feed and water, and sorting cattle. New steers come in daily from across the West and Midwest, most either trailed or trucked in, and most destined for markets back East in places like Chicago and New York. For a moment, the pen rider looks up at the colossal Livestock Exchange Building with its 475 offices, making it the largest livestock exchange building in the world, and one of the largest office buildings in Kansas City.² Cattle buyers and sellers are constantly moving in and out of the Livestock Exchange Building where huge blackboards hang on the wall showing the ever changing spot prices for cattle from across the country, and where the tellers exchange money and title to cattle like a well-oiled, free-market machine. The loud chugging and clanking of the steam engines and the rail cars pulling up to the loading docks perks up his horse’s ears and snaps the hired hand back to reality. He waits for the cars to stop, then he drives a sorted pen of steers up the alley, pushes them up the ramps, loads them on the cars, turns his horse back and does it all over again.

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¹N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 349 (1921).

² LIVESTOCK EXCH. BLDG., <https://livestockexchangebldg.com> (last visited Mar. 10, 2022).

To put the Kansas City Stockyards in perspective, at its height in the early 1920's, over 2.6 million head of cattle came through the iconic stockyards each year,³ making it the 2nd largest stockyards in America, second only to the Union Stockyards in Chicago.⁴ (While the focus of the Kansas City Stockyards was beef cattle, there were over 2 million head of hogs⁵ and thousands of sheep that were sold through the yards on a cash basis every year).⁶ From its humble beginnings as a small set of cattle pens on 5 acres in 1870, the stockyards had grown to encompass 207 acres, with a handling capacity of 170,000 head of cattle at any given time, and employed over 20,000 people.⁷ Because of the Stockyards, for roughly a century “[Kansas City] rivaled its big brother Chicago as a transportation hub, meat packer and agribusiness powerhouse but with its own Western flair.”⁸ This free-market inspired cattle industry transformed Kansas City from a backwater town in Jackson County, Missouri into a cattle mecca fueled cultural hub.⁹

However, by the early 1920's, the free market, or cash market, which had been used to dictate the fair market price for beef cattle in places like the Kansas City Stockyards, was being replaced by a corporatized, monopolized model. In 1920 this model, or monopoly, was controlled by five large meat packing companies, namely, Armour & Company, Cudahy Packing Company Morris & Company, Swift & Company, and Wilson & Company.¹⁰ This monopoly, controlled by the “Big Five” with its captive markets, was suffocating the independent cattlemen and the rancher. The monopoly caught the attention of President Woodrow Wilson back in 1917 when he ordered the Federal Trade Commission (FTC) to

³ See *Story*, STOCKYARDS DIST., <http://www.kcstockyardsdistrict.com/story> (last visited Mar. 10, 2022).

⁴ See *Kansas City's Agriculture Roots Run Deep – Cowtown Turned Animal Health and Technology Center*, GALLAGHER, <https://am.gallagher.com/en-US/Solutions/Case-Study-Listings/Kansas-City-Agriculture-Roots-Run-Deep---Cowtown-Turned-Animal-Health-and-Technology-Center> (last visited Mar. 10, 2022).

⁵ See Johnny D. Boggs, *Cattle, Cowboys, and Culture*, TRUE W. MAG. (Feb. 27, 2018), <https://truwestmagazine.com/cattle-cowboys-and-culture>.

⁶ See Nancy Jorgensen, *Where Did All the Cattle Go?*, TODAY'S FARMER MAG. (June 12, 2013), <https://todayfarmermagazine.com/mag/728-where-did-all-the-cattle-go>.

⁷ See *id.*

⁸ Boggs, *supra* note 6.

⁹ See *id.*

¹⁰ See Robert M. Aduddell & Lous P. Cain, *The Consent Decree in the Meatpacking Industry, 1920-1956*, 55 BUS. HIST. REV. 359, 359 (1981).

investigate the packing industry.¹¹ In 1919 the FTC released its report, finding that the Big 5 controlled roughly 70% of the market, and had “attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortune of their competitors in their hands.”¹²

The situation would soon catch the attention of Congress and President Warren G. Harding (29th President of the United States from 1921-1923).¹³ The year he took office, Congress would pass the Packers & Stockyards Act of 1921 (Public Law 67-51, 42 Stat. 159, 7 U.S.C. 181 et seq.) (Packers and Stockyards Act),¹⁴ breaking up the meat packing monopoly and breathing new life into the suffocating beef cattle industry. Specifically, as stated by Congress, the purpose of the Packers & Stockyards Act was “to assure fair competition and fair trade practices, to safeguard farmers and ranchers...to protect consumers...and to protect members of the livestock, meat, and poultry industries from unfair, deceptive, unjustly discriminatory and monopolistic practices....”¹⁵ This breakup of the meat packing monopoly in 1921 and the protections put in place through the Packers and Stockyards Act allowed the American cattle industry to flourish throughout the rest of the 20th Century.

Kansas City, Missouri – 2022. Fast forward 100 years. The hum and clanking of the cattle cars has been replaced with the hustle and bustle of a modern city. The iconic Kansas City Stockyards are long gone – closed back in 1991¹⁶ and have long since been torn down. If it weren’t for the old red brick Kansas City Livestock Exchange Building (the former headquarters for the Stockyards built

¹¹Roger A. McEowen, *DOJ to Investigate Meatpackers – What’s It All About?*, AGRIC. L. & TAX’N BLOG (May 8, 2020), <https://lawprofessors.typepad.com/agriculturallaw/2020/05/doj-to-investigate-meatpackers-whats-it-all-about.html>.

¹²FED. TRADE COMM’N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEATPACKING INDUSTRY PT. 1 (1919).

¹³Warren G. Harding, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/warren-g-harding/> (last visited Mar. 10, 2022).

¹⁴See Packers and Stockyards Act of 1921, Pub. L. No. 67-50, 42 Stat. 159 (codified as amended at 7 U.S.C.A. §§ 181-229b).

¹⁵*Jurisdiction of Packers and Stockyard Acts: Hearing on H.R. 7743 and H.R. 8536 Before the H. Comm. on Agric.*, 85th Cong. 8 (1957); see generally Packers and Stockyard Act of 1921, Pub. L. No. 67-51, 42 Stat. 159 (codified as amended at 7 U.S.C. §§ 181-229b).

¹⁶See Diane Euston, *Moove Over! It’s Time to Embrace Kansas City’s Cowtown Past*, MARTIN CITY TELEGRAPH (Apr. 16, 2018), <https://martincitytelegraph.com/2018/04/16/moove-over-its-time-to-embrace-kansas-citys-cowtown-past/>.

in 1908)¹⁷ which still stands, one would have no idea that for over a hundred years the Stockyards had even been there, let alone been the keystone that made Kansas City one of the most famous “Cowtowns” of the era. However, echoes of the past still remain. The Stockyards lent themselves to making the Kansas City Strip steak a high demand cut of beef (although it was later rebranded the New York Strip by the famous Delmonico Brothers),¹⁸ and helped create the barbeque culture, that to this day puts Kansas City on the map as one of the greatest barbeque cities in the country. In talking about putting Kansas City on the map, one can’t forget the American Royal Agricultural Show (the predecessor to the American Royal) and the namesake for the Major League Baseball Team, the Kansas City Royals.¹⁹ All have their roots and beginnings in the Kansas City Stockyards. Plus, it’s no coincidence that the nations center of animal health and animal health technology is now firmly rooted in the Kansas City Animal Health Corridor, thanks in part to Kansas City’s Cowtown past.²⁰ Today the West Bottoms where the Stockyards once reigned supreme is full of shopping and modern housing options in the aptly named Stockyards District.²¹

While the Stockyards themselves are gone, just like in the early 20th Century, a beef monopoly has once again found its way into the industry, and a way around the Packers and Stockyards Act of 1921 and is again suffocating the industry. While at the time of the act’s passage in 1921 five companies controlled the market, today the market is even more consolidated in the “Big Four,” as the four biggest meat packing companies in America are commonly known (Cargill, Tyson, JBS and National Beef/Marfrig), and are again arguably stifling the free-market. If Americans do not act quickly to address this extreme consolidation, then the free-market, independent cattle rancher will soon face the same fate as the Kansas City Stockyards, and soon, like the Stockyards, will simply be history and a distant memory. This is not only bad news for the American rancher, but is even worse news for the American consumer, as the

¹⁷ *See id.*

¹⁸ *See Bone Appetit: The History Behind the KC Strip*, SULLIVAN’S STEAKHOUSE, <https://www.sullivansteakhouse.com/bone-appetit-the-history-behind-the-kc-strip/> (last visited Mar. 10, 2022).

¹⁹ *See* Jared Diamond & Kevin Helliker, *Think the Kansas City Royals Are Named for Kings? That’s a Bunch of Bull*, WALL ST. J., <https://www.wsj.com/articles/did-you-know-the-kansas-city-royals-were-named-after-cows-not-kings-1413426602> (Oct. 16, 2014).

²⁰ *See generally About the Corridor*, KAN. CITY ANIMAL HEALTH CORRIDOR, <https://kcanimalhealth.thinkkc.com/about> (last visited Mar. 10, 2022); *see also* Gallagher *Kansas City’s Agriculture Roots Run Deep – Cowtown Turned Animal Health and Technology Center*, *supra* note 5.

²¹ *See generally Story*, *supra* note 4.

consolidation creates food security and food safety issues, as highlighted by the recent events of 2020-2021 surrounding the COVID-19 pandemic.

To address this looming problem, this paper will highlight three things:

Part I will show that like the monopoly created by the Big Five in the early 20th Century, the Big Four have again created a beef supply chain monopoly and that the monopoly is again harming beef producers.

Part II will examine the federal legislation known as Mandatory Country of Origin Labeling (MCOOL), which until 2015 was one of the tools that independent beef producers used to overcome the monopolistic practices of the Big Four. While MCOOL was repealed some seven years ago, there are still efforts to revive it, and it could still be resurrected as part of a multi-pronged approach to fixing the broken beef industry.

Part III will examine several other options for alleviating the burden beef producers currently face in the market and suggest several solutions to the consolidation problem aside from simply restoring MCOOL.

Perhaps by looking to the options presented in this paper, there is still a fighting chance that the independent American rancher and cattleman will not go by the wayside or become echoes of the past like the Kansas City Stockyards and the Cowtowns of yesteryear.

II. THE MONOPOLY

*“The seasons still turn and the prairies still yearn
For those who were here long ago.
The Sioux have all gone and the bison moved on
And soon I will follow them home.”*²²

A. CORPORATE CONTROL BY THE BIG FOUR AND COVID-19

²² CHRIS LEDOUX, *The Buffalo Grass*, on HORSEPOWER (Cap. Recs. Nashville 2003).

Hoxie, Kansas – 2022. On the high plains of Western Kansas, the sun peaks over the eastern horizon and sends a soft glow across the prairie. A weathered feedlot hand fires up the feed wagon and the diesel engine reluctantly comes to life in the cold air and chugs along. The steers out in the vast pens start to beller just a little as they anticipate breakfast. This particular feedlot is the Hoxie Feedyard, located just west of Hoxie, Kansas and has roughly 50,000 steers on feed at any given time. Scott Foote, the owner/manager has several yards of approximately the same size scattered across Western Kansas and Nebraska,²³ making Foote Livestock the 6th largest feedlot company in America.²⁴

What makes this feedlot so unique is not the fact that Foote Livestock has close to a quarter million steers on feed at any given time between its several yards. No, what makes this particular feedlot company unique, is that it is owned by a private, small-town company. Unlike so many other major feedlots, it is not owned by one of the four multi-national companies known in the industry as “the Big Four” – Cargill, Tyson, JBS and National Beef/Marfrig. The Big Four control roughly 85% of the meat packing market, and that market share is growing at a surprisingly rapid rate.²⁵ What is particularly worrisome about that figure, is that in 1977 only 25% of the industry was concentrated in these conglomerates, and that number has risen to 85% in the 43 years since then.²⁶

It may be beneficial before diving into a further analysis of the Big Four and the beef industry to gain a clear picture of the difference between a monopsony and a monopoly. In short, “a monopsony is a market condition in which there is only one buyer, the monopsonist...The difference between a monopoly and monopsony is primarily in the difference between the controlling entities. A single buyer dominates a monopsonized market while an

²³ See *Our Story*, FOOTE CATTLE CO., <https://footecattle.com/our-story/> (last visited Mar. 10, 2022).

²⁴ *Top 30 Cattle Feeders 2015*, R-CALF USA, <https://r-calfusa.com/wp-content/uploads/2013/04/160125-Top-30-Cattle-Feeders.pdf> (last visited Mar. 11, 2022).

²⁵ Brian Deese et al., *Addressing Concentration in the Meat-Processing Industry to Lower Food Prices for American Families*, WHITE HOUSE BLOG (Sept. 8, 2021), <https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/>.

²⁶ See Telephone Interview by Mackenzie Johnston with Sheila Ellis, Rancher (Aug. 10, 2020), <https://fair-cattle-markets.com/interviews/audio-sheila-ellis-discusses-why-labeling-us-beef-is-vital-for-consumers-producers/?fbclid=IwAR2-GGkDa2jo4hWzoe7mA6MogV8eLw8UxWc3oSOMCAYVYqr372fzST1108w>.

individual seller controls a monopolized market.”²⁷ Here, if the Big Four control 85% of the packing market, in truth they are a monopsony where they effectively serve as the only buyers for cattle ranchers and can effectively set the price for what ranchers are paid for their product. However, because the Big Four also serve as the sellers of processed beef to the retail markets, again controlling 85% of the sector, they are also a monopoly in their relationship with consumers. So, oddly enough, the Big Four are both a monopsony and a monopoly – a bottleneck of sorts for the entire beef industry. Because more people are likely familiar with the term “monopoly” as compared to the term “monopsony” the remainder of this paper will use the term monopoly when discussing the consolidation, however, be advised that in truth the Big Four are both a monopoly and a monopsony.

In addition to controlling the lion’s share of the packing industry, through subsidiaries, the Big Four also control a large percentage of the biggest feedlots in America. For example, while Foote Livestock is the 6th largest feedlot company in America, the award for largest in America goes to Five Rivers Cattle Feeding, based in Greeley, Colorado, and owned by none other than JBS.²⁸ Five Rivers has a combined 11 feedlots with a capacity of close to a million head.²⁹ As another example, the third largest feedlot company is Cargill Cattle Feeders, LLC, a subsidiary of Cargill, Inc. based in Wichita, Kansas.³⁰ It appears the Big Four are not content with controlling the packing industry, but also seek to (and do) control a large swath of the cattle feeding sector as well.

The current problem in the beef cattle industry, specifically the multi-national corporate control of the industry, is best explained through a somewhat personal look at the industry through the eyes of someone in the beef cattle industry. This problem was recently explained by cattle rancher and R-CALF Board Member, Shad Sullivan in an interview with entrepreneur Patrick Bet-David on his network Valuetainment. Shad Sullivan was invited onto the show because in early summer of 2020 Mr. Sullivan uploaded an impromptu video on the social media platform YouTube discussing the food security, food safety and other negative impacts of the corporate takeover of the beef industry, all of which had been brought to light by COVID-19. Essentially, because of the consolidation in the beef packing industry, only four companies have

²⁷ Julie Young, *Monopsony*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/monopsony.asp>. (Nov. 21, 2020).

²⁸ See *Top 30 Cattle Feeders 2015*, *supra* note 25.

²⁹ *Id.*

³⁰ *Id.*

processing plants across the country. In addition to one major plant in Holcomb, Kansas being shut down because of a fire in the fall of 2019³¹ because of the COVID-19 outbreak, processing plant “workers are afraid to go to work because of COVID, which has created a bottleneck or backlog of cattle waiting to be slaughtered.”³² But while there is a bottleneck of cattle waiting to be slaughtered, meanwhile, the United States has begun importing beef from countries like Namibia.³³

Early on the interview, Patrick Bet-David asks, essentially, so as a consumer why do I care. Specifically, he asks:

“PBD: How does that affect the average person...and how am I impacted by what’s going on to you?”

SS: Well you’re impacted by a supply issue, and a food safety issue. So what has happened down through the years is our federal government has allowed acquisitions and mergers of multi-national corporations to take over our food supply system. So in the beef industry for example, we have four companies that control 85% of the beef cattle supply chain. Ok, so there we are, putting all our eggs in one basket so to speak. So what happened is, the COVID come in, we get these sick people, and because our eggs are in one basket, we have the inability to process those animals to get them to the consumer. So the power that those companies have funnels down to the consumer, you’re no longer able to get your product, number one. Number two, the safety, they’re importing a lower quality beef into our supply and mixing it into our supply, which is increasing their profits, oppressing our profits, and gouging the consumer. So you don’t know exactly what kind of product you’re getting. It does come down to a food safety issue and a liberty issue.”³⁴

The conversation then turned to the Big Four specifically, and after establishing why the consumer should care about the

³¹ See Steve Kay, *The Smoldering Impact of Tyson’s Holcomb Fire*, MEAT + POULTRY (Oct. 14, 2019), <https://www.meatpoultry.com/articles/22036-the-smoldering-impact-of-tyson-holcomb-fire>.

³² See Valuetainment, *Cattle Rancher Warns About the Meat You’re Buying*, YOUTUBE, at 5:05 (May 8, 2020), <https://www.youtube.com/watch?v=m8ioFjN7viY>.

³³ *Id.* at 4:21.

³⁴ *Id.* at 6:45.

consolidation in the industry, Patrick then asks exactly how this consolidation is hurting the producer.

“PBD: How do they [the Big Four] bully you around as the small business owner? Because maybe they can afford to go through 6 months of bad times, where a lot of folks in your world cannot. So what role do they play making it difficult for you?”

SS: They have taken away all competition. So with the acquisitions and mergers over the last 25 or 30 years, they have gained more power and control, and that has eliminated the competition. So lets say 30 years ago there would have been 800 processors across the United States able to process and harvest this beef. Where now, there are only four main processors that harvest 85% of that chain. So what they have done is totally eliminated cash competition. What that does, is that has created their power to network down and take control of the industry that way.”³⁵

Addressing the corporate control and depressed beef prices, compared to other industries, Patrick then asks could you convince new people to come into the beef industry under these circumstances.

“PBD: So you’re standing there...could you easily sell others to consider getting into your industry today?”

SS: It’s financially impossible. As an individual it’s financially impossible...

PBD: Why do you say that?

SS: Because of the overhead, it costs too much to start up. It takes a lot of land, it takes a lot of overhead...The proverbial term in the beef cattle industry is, unless you marry it or inherit it, you aint gonna have it. And that’s one of the problems that has taken place as a result of this, it’s hard for families. Everybody’s dream is to pass the family farm or ranch down, and that’s totally impossible now. You can’t do it...These young kids, it is impossible to get a start up. You can get some government help as a first time landowner or business owner, but the cost of the

³⁵ *Id.* at 10:00.

land...and the cost of the inputs are increasing and gaining, so it's impossible without a lot of equity or cash in the bank to get a start. It's nearly impossible. And therefore across America we have seen thousands of youth not return to the family operation after high school or college.

PBD: Because of this specific reason?

SS: Correct.”³⁶

Not only are youth not returning to family farms and ranches because of the financial risk and inability to succeed, but addressing the loss of American ranchers, earlier in the interview, Patrick asked how many ranchers we have lost in the last 30 years. We went from roughly 1.2 or 1.3 million operators, to approximately 700,000.

“PBD: How many of these 700,000 are going to be able to withstand the current challenges they're facing.

SS: That's a good question... We could lose through this COVID situation, we could lose plus 1/3 of those this year.

PBD: You could lose a third! So we could go from 700,000 to 450,000 in the next 6 or 7 months!

SS: It is possible. Maybe more.”³⁷

This loss of America's ranchers because of the problems induced by the Big Four corporate control of the beef industry, is not a hypothetical issue. It is very real. In fact, during the interview, Shad Sullivan admits that he and his family have had serious conversations about having to sell out or at least sell off land just to get by. Patrick follows up on this part of the conversation by asking:

“PBD: So you've actually considered that? You've actually had that conversation?

SS: We are having it more and more every day. It's just a tough industry to be in, and if you're not profitable, well, it's not good business. Let's say we're spending \$1,200 a head to make \$900 a head, that's terrible business. We love the life, we love the

³⁶ *Id.* at 18:15.

³⁷ *Id.* at 20:20.

legacy. But at some point you have to draw the line and say ok, are we going to be business people or are we going to lose everything we've put together over the last 60 years and go from there. I don't know. I think you have to be a business person, you have to be smart, and you have to be real.

PBD: You know, they don't see legacy. They don't see family. They don't see tradition. They don't know the stories you have with your pops and the lessons you're going to hand down to your 4-year-old son. They just see profit margins. That's all they see.

SS: That's right....You know, there are two factions in our industry, there's the independent producer, and then there's the globalists. And those two factions are fighting right now for what's best for our industry.”³⁸

This long set of quotes from the Shad Sullivan interview are extremely helpful when discussing the problems presented by the Big Four takeover of the beef industry. Instead of simply looking at numbers and figures, the personal insight of a man trying to keep a family operation up and running so he can hand that legacy down to his own children is gut checking. Mr. Sullivan makes some extremely good points, and does point out, there is a fight going on for the future of the beef industry...those who wish to pass on the western legacy and way of life vs. those who simply see profit margins and spreadsheets.

B. The DOJ Investigation And Current Political Efforts

The consolidation issue caught the attention of President Donald Trump in early 2020, and he ordered the Department of Justice (DOJ) to open an investigation into the packing industry. Specifically, the President ordered the DOJ to look into allegations that U.S. meat packers broke antitrust law because the prices paid to farmers and ranchers has declined even as meat prices rose. “I've asked the Justice Department to look into it. ... I've asked them to take a very serious look into it, because it shouldn't be happening that way and we want to protect our farmers,” the president said at a White House event attended by Agriculture Secretary Sonny Perdue

³⁸ See Valuetainment, *Cattle Rancher Warns About the Meat You're Buying*, YOUTUBE, at 24:48 (May 8, 2020), <https://www.youtube.com/watch?v=m8ioFjN7viY>.

and Iowa Governor Kim Reynolds. “Are they dealing with each other? What’s going on?” the president asked.³⁹

In addition to the DOJ investigation, the U.S. Department of Agriculture also conducted an investigation into not only the Holcomb, KS fire, but also the COVID-19 effects and consolidation effects on the industry. The report, “The Boxed Beef & Fed Cattle Spread Investigation Report” was released on July 22, 2020.⁴⁰ Interestingly enough, “one of the earliest conclusions in the paper is this: ‘Findings thus far do not preclude the possibility that individual entities or groups of entities violated the Packers and Stockyards Act during the aftermath of the Tyson Holcomb fire and the COVID-19 pandemic. The investigation into potential violations under the Packers and Stockyards Act is continuing.’”⁴¹ In short, while no wrongdoing has been discovered ...the investigations are ongoing, and violations have not been ruled out. As of Summer 2021, 27 U.S. Senators have renewed the call for the necessity of a DOJ investigation into the meat packing industry, specifically to examine anticompetitive behavior among meatpackers.⁴²

The concern of anticompetitive behavior in the packing industry shared by these 27 Senators and former President Trump, is backed up by data. For example, as written by Professor Roger A. McEowen, Kansas Farm Bureau Professor of Agricultural Law & Tax, “according to USDA data, boxed beef prices have recently more than doubled while live cattle prices dropped approximately 20 percent over the same timeframe. The concern is that the meatpackers are engaged in price manipulation and other practices deemed unfair under federal law.”⁴³ The concern is further shared by the Attorneys General of 16 different states, who in December 2021 addressed a letter to the new Secretary of Agriculture, Tom Vilsack,

³⁹ Greg Henderson, *Trump Asks DOJ to Investigate Meat Packers*, AGWEB, (May 6, 2020), <https://www.agweb.com/article/trump-asks-doj-investigate-meat-packers>.

⁴⁰ AGRIC. MKTG. SERV., U.S. DEP’T OF AGRIC., BOXED BEEF & FED CATTLE PRICE SPREAD INVESTIGATION REPORT (2022).

⁴¹ See Alan Newport, *USDA Disasters Investigation Suggests Changes*, FARM PROGRESS: BEEF PRODUCER (July 24, 2020), https://www.farmprogress.com/regulatory/usda-disasters-investigation-suggests-changes?NL=FP-002&Issue=FP-002_20200806_FP-002_743&sfvc4news=42&cl=article_1_b&utm_rid=CPG02000003370832&utm_campaign=51768&utm_medium=email&elq2=87ec91f6f79741fc92833667f1555f79.

⁴² Letter from Michael Rounds et al., U.S. Senator, to Merrick Garland, Att’y Gen., U.S. Dep’t of Just. (June 1, 2021), <https://www.rounds.senate.gov/imo/media/doc/060121%20June%201%202021%20Rounds-Smith%20et%20al.%20to%20Attorney%20General%20Garland.pdf>.

⁴³ McEowen, *supra* note 12.

urging the USDA to take action strengthening the PSA.⁴⁴ The letter states, in part, “the Packers and Stockyard Act originated in 1921 due to concerns about the concentration in meat processing markets and the effect this concentration had on producers...At that time, however, the five largest processors only controlled 70% of the market, indicating the concentration problems of today are worse than they were at the time of the passing of the PSA.”⁴⁵

President Joe Biden has taken efforts similar to his presidential predecessor, issuing Executive Order 14036, “Promoting Competition in the American Economy”⁴⁶ in July 2021. Among other things, the Executive Order directs the USDA to reexamine the Packers & Stockyards Act and issue new rulemaking addressing several key points in the statutory and regulatory law thereunder. These changes are examined throughout the remainder of this article, but suffice it to say, that the anti-trust focus of the USDA under the Biden Administration will have sweeping effects in the beef industry.

C. A Comparison To The Hog Industry

With this solid background in mind, to completely understand how the consolidation in the beef industry is harming the individual/independent cattle producer, it may be helpful to examine the beef industry’s sister industry – the hog industry. Like the beef industry, the hog industry is becoming increasingly consolidated, and as recent events in 2020-2021 have shown, that consolidation is a recipe for disaster.

By way of introduction to this sub-analysis of the hog industry, in the iconic Western television miniseries “*Lonesome Dove*” there is a well-known line, still quoted to this day – “We Don’t Rent Pigs!”⁴⁷ In light of current food safety events revolving around COVID-19 and packing house closures around the country, that classic line is quickly taking on new meaning in 2022.

⁴⁴ See Keith Ellison et al., *Letter to USDA Secretary Vilsack and Senior Advisor Green* (Dec. 21, 2021). In addition to Attorney General Ellison, the letter was signed by the Attorneys General of the States of Wyoming, Iowa, California, Delaware, Hawaii, Idaho, Illinois, Maryland, Nevada, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota and Utah. Of note is that these states represent a diverse political spectrum with both “red” and “blue” states represented, indicating that the meat consolidation issue transcends traditional party lines.

⁴⁵ *Id.* at 2.

⁴⁶ Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021).

⁴⁷ Hayden L. Ballard, ‘*We Don’t Rent Pigs*,’ FOOD SAFETY NEWS (May 14, 2020), <https://www.foodsafetynews.com/2020/05/we-dont-rent-pigs/>.

For anyone who hasn't seen it, in *Lonesome Dove* the two main characters (Gus McCrae and Captain Woodrow Call) are a couple of old, washed-up, Texas Rangers-turned-cattlemen, who start a cattle company and plan to trail a couple thousand head of cattle from Texas to the Montana Territory. Gus, the more eccentric of the two, makes a sign for their new cattle company, and to the sign adds the line "We Don't Rent Pigs!"⁴⁸ Captain Call, the more level-headed and serious one, is obviously not impressed by the sign and asks Gus why he had to put that stupid line on there. Gus responds:

"Well, we don't rent pigs and I figure it's better to say it up front 'cause a man that does like to rent pigs is... he's hard to stop."⁴⁹

While Gus never explains exactly what he meant by the second half of that statement, it doesn't take much imagination to envision why someone would want to rent a pig...to eat it. If you do rent a pig to a man who wants to eat it, you're getting the "short end of the stick" because you're probably not ever getting that pig back, "cause a man who does like to rent pigs is..., well, hard to stop."⁵⁰ Essentially, this tongue-in-cheek line can be interpreted as saying we don't tolerate dishonest people who want to "rent" pigs.

As this is an article about consolidation in the beef cattle industry, at this point, the reader may very well be thinking "well that's a wonderful story about two fictional cowboys from a by-gone era, but what in the world does that have to do with current food safety issues?" To answer that question, again fast forward to current events. The Coronavirus (COVID-19) has swept the world, the booming economy of the United States has ground to a halt, various state and federal officials have issued controversial stay-at-home orders, mask and vaccine mandates, and across the country businesses have closed their doors. Meanwhile, America's meat producers (particularly it's cattle, hog and poultry farmers/ranchers) haven't stopped working, and production continues (because you can't exactly tell a steer or a hog to stop growing just because the world is under quarantine).

Unfortunately, many of the meat processing plants across the country closed, or closed temporarily, due to health concerns related to COVID-19. For example, over twenty meat processing plants across the country shut down over the span of two months during the spring of 2020 as thousands of packing house workers tested positive

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

for the virus.⁵¹ These closures and reduction in workforce resulted in an overall reduction in production capacity of 30% - 40% at that time.⁵²

This reduction in processing capacity is problematic for all meat producers, but particularly troublesome for pork producers. Because the pork processing industry has become so centralized in a handful of companies, those companies have standardized their processes and require a certain weight of hog for the machinery to operate efficiently. This creates a bottleneck of sorts, because pork producers can't simply wait for the COVID-19 epidemic to blow over and wait for the packing houses to come back online, because by then, the hogs they are currently raising will be too big and the packing house won't take them.⁵³ While small, local butcher shops could alleviate some of this bottleneck, because of the consolidation in the industry, small butcher shops are far and few between, and with plant closures, most small butchers are already booked 3 months out or more.⁵⁴ Producers could also sell directly to consumers, but few consumers know how to butcher their own pig, and as stated, small butchers are already booked, so that rules out the option of consumers purchasing direct from farmers and taking it to get slaughtered themselves.

What all this means for meat producers is that due to the COVID-19 virus, they simply have nowhere to go with their livestock. According to John Tyson, the Chairman of the Board of Tyson Foods, what this means is:

“In addition to meat shortages, this is a serious food waste issue...Farmers across the nation simply will not have anywhere to sell their livestock to be

⁵¹ *Id.* (citing *Agriculture Sec. Perdue on Meat Workers Health Concern Amid Coronavirus Pandemic*, FOX NEWS (Apr. 30, 2020), <https://video.foxnews.com/v/6153248260001?fbclid=IwAR0iu6gxCpAiQZx1HcQjhKFuUe-10nj04dJu91p6eA6wurQHgrXiaY0FPYE#sp=show-clips>).

⁵² *Id.* (citing *Could Food Plant Closures Disrupt Food Supply Chains?*, FOX NEWS (Apr. 28, 2020), <https://video.foxnews.com/v/6152541987001#sp=show-clips>).

⁵³ Hayden L. Ballard, 'We Don't Rent Pigs,' FOOD SAFETY NEWS (May 14, 2020), <https://www.foodsafetynews.com/2020/05/we-dont-rent-pigs/> (citing Jenny Splitter, *Farmers Face Their Worst-Case Scenario: 'Depopulating' Chickens Euthanizing Pigs and Dumping Milk*, FORBES (Apr. 8, 2020), <https://www.forbes.com/sites/jennysplitter/2020/04/28/farmers-face-their-worst-case-scenarios-depopulating-chickens-euthanizing-pigs-and-dumping-milk/?sh=32b158403003>).

⁵⁴ *Id.*

processed, when they could have fed the nation...the food supply chain is breaking.”⁵⁵

The situation got so bad in 2020 that it is estimated that around 160,000 hogs would be euthanized DAILY in the United States.⁵⁶ With these kinds of numbers of hogs being killed every day, but not being put into the food supply chain, it doesn't take much of an imagination to realize that very soon there won't be any ham, bacon or sausage in the supermarket.

The situation is just as bad for dairy farmers and poultry farmers, as producers have begun euthanizing millions of chickens⁵⁷ and dumping milk for the same reasons.⁵⁸ Cattle producers and feedlot owners have not been forced to begin euthanizing cattle...yet. However, as shown by one stocker operator in North Texas, Shad Sullivan, the beef cattle industry is not far behind. In April 2020, he received an official email from the United States Department of Agriculture and Animal and Plant Health Inspection Service, stating as follows:

“State officials will be assisting to help identify potential alternative markets if a producer is unable to move animals and if necessary, advise and assist on **depopulation and disposal methods**” (emphasis added).⁵⁹

Clearly the COVID-19 induced bottleneck in meat processing has put a huge strain on cattle producers, but has now created a food security issue for the nation. The control of the packing industry by the Big Four has simply exacerbated the problem, and COVID-19 has revealed the problem. As Shad Sullivan put it, “We are importing beef and we are destroying our harvests in

⁵⁵*Id.* (citing *Could Food Plant Closures Disrupt Food Supply Chains?*, FOX NEWS (Apr. 28, 2020), <https://video.foxnews.com/v/6152541987001#sp=show-clips>).

⁵⁶ *Id.* (citing Mike Dorning & Michael Hirtzer, *America's Mass Hog Cull Begins with Meat to Rot in Landfills*, BLOOMBERG (Apr. 28, 2020), <https://www.bloomberg.com/news/articles/2020-04-28/closed-jbs-plant-will-be-used-to-euthanize-hogs-peterson-says>).

⁵⁷ Shad Sullivan, *Starvation is Coming – Rancher Explains*, YOUTUBE (Apr. 28, 2020), <https://www.youtube.com/watch?v=i9pCEnEqaz8>.

⁵⁸ See generally Jenny Splitter, *Farmers Face Their Worst-Case Scenario: 'Depopulating' Chickens, Euthanizing Pigs And Dumping Milk*, FORBES (Apr. 28, 2020), https://www.forbes.com/sites/jennysplitter/2020/04/28/farmers-face-their-worst-case-scenarios-depopulating-chickens-euthanizing-pigs-and-dumping-milk/?fbclid=IwAR0ILYXF93yb5CvEqym9gv97QQv2dY0jsX10huChipmHgoWw_onS4I1EBt0#2dc39aa93003.

⁵⁹ Sullivan, *supra* note 58.

a time when people don't have jobs, and that's not the American way."⁶⁰

In an effort to curb this problem, in 2020 President Trump invoked the 1950 Defense Production Act to order meat processing plants to stay open during this pandemic.⁶¹ While some have criticized the move as endangering lives and creating other food safety issues, the move was much needed. Ultimately, while some criticized the President's actions as creating food safety issues (letting meat plants and meat workers be exposed to COVID-19) one must ask themselves, at what point does the risk of food safety outweigh the actual availability of food at all? At this point, the repercussions of all plants shutting down in this country would push recovery from months to years. This move by President Trump may be a band-aid that "stopped the bleeding," but it hasn't cured the underlying problem.

While the Coronavirus was clearly the identifiable catalyst to this pending meat shortage, the virus simply exacerbated an underlying condition that has been festering in this country for the past few decades – consolidation. In the United States, roughly ¾ of all pork is processed by four companies, JBS, Cargill, Tyson and Smithfield,⁶² commonly known as "The Big Four" in the pork industry. Further, "there are more than 60,000 pork producers in the U.S., but roughly 60% of all hogs are processed in just 15 large pork-packing plants. These packing plants are designed to efficiently and affordably process animals for food consumption, and each one has a large workforce."⁶³ While today the Big Four of the pork industry have vertically integrated the process from piglet to slaughter, as noted in the Introduction herein, the pork industry used to be dominated by the cash market, as shown by the fact that over 2 million hogs used to be sold through the Kansas City Stockyards alone in the 1920's.

Not only does this level of market share make what's left of the hog cash market susceptible to undue influence, but as seen, this

⁶⁰ *Id.* at 5:45.

⁶¹ *Ballard, supra* note 48 (citing *Coronavirus: Trump Orders Meatpacking Plants to Stay Open*, BBC NEWS (Apr. 29, 2020), <https://www.bbc.com/news/world-us-canada-52466502>.)

⁶² *Id.* (citing FOOD & WATER ET AL., THE ANTICOMPETITIVE EFFECTS OF THE PROPOSED JBS-CARGILL PORK PACKING ACQUISITION 4 (2015).

⁶³ *Id.* (citing Jayson Lusk & Candace Croney, *The Road from Farm to Table*, PURDUE UNIV. COLL. OF AGRIC. (Apr. 28, 2020), https://ag.purdue.edu/stories/the-road-from-farm-to-table/?fbclid=IwAR0IORw686qjABwa2_dDM_O52QDkP6Okot3zZ8ILZYmU4bLMLO1_jzmrBgc).

consolidation has now contributed to a possible nationwide food shortage and food safety crisis. All it takes is for one of these companies to shutter its plants, and as seen by the nationwide euthanization of hogs, and other meat animals, instantly the farmers feel the devastating effects. Additionally, with the packing industry so consolidated, it has pushed small, local butchers out of business, and only a handful remain – further adding fuel to the fire.

So, if major consolidation and monopolization of the hog industry has contributed to a nationwide food shortage/safety crisis, then what can be done to help fix this problem immediately? While Part III of this paper will analyze some potential solutions in depth, there are several things that can be done at the federal level now to assist in rectifying the current hog situation.

- (1) The Biden Administration could use the authority granted by the Packers & Stockyards Act and enforce its provisions as to break up the meat packing monopolies, just like was done when the act was first passed roughly 100 years ago. Doing so would make it easier for hog livestock auctions to be reopened and create a cash market for hogs again. This would reduce the complete reliance on the integrator contracts the Big Four currently utilize, and which have aided in the standardization of hog slaughter which has led to the current bottleneck in processing. These integrator contracts essentially make the pork farmers renters of the very pigs they raise, because oftentimes the company (one of The Big Four) retains ownership of the pig for its entire life, and the farmer simply cares for it. Essentially, the farmers “rent” the pigs.⁶⁴
- (2) Congress could create small-business exceptions to the myriad of rules and regulations imposed on large packers, and extend them to small local butchers, to make it easier for them to stay in business, and for more processors to enter the market.

⁶⁴ See CHRISTOPHER LEONARD, *THE MEAT RACKET: THE SECRET TAKEOVER OF AMERICA'S FOOD BUSINESS* 84 (2014).

- (3) Congress could loosen food safety regulations and make it easier for hog producers to sell directly to consumers.

While these changes will not alleviate the total problem here-and-now in 2020 (the damage has already been done to the hog supply chain), by implementing these changes, perhaps we could avoid a similar problem in the future with the cattle industry. Perhaps for that reason, the Coronavirus was a blessing in disguise as it revealed a major vulnerability in the nation's meat supply chain – namely consolidation in the meat processing market has created bottlenecks which as seen in 2020 – 2021 can lead to food shortages, euthanization of productive farm animals, and ultimately food insecurity. This attitude of “We Don't Rent Pigs” translates directly to the beef cattle industry. This is because, as the sister industry of the beef cattle industry, the hog and pork industry is a type, or shadow, or what is to come if the Big Four are able to completely consolidate and integrate the cattle industry, the same as was done with hogs.

In the coming days and months consumers may very well start turning to their local farmers hoping to buy meat. However, unless action is taken at the federal level as outlined above and in Part III of this paper, to ensure that the meat supply chain is decentralized and more local processing encouraged, it may be difficult for every consumer to get enough meat to eat. BUT, if these changes are put in place, perhaps hog farmers can stop “renting” the pigs from The Big Four. Like was said at the beginning, the tongue-in-cheek line from Gus McCrae saying “We Don't Rent Pigs” can be interpreted as saying we don't tolerate dishonest people who want to “rent” pigs. Today, the Big Four literally rent pigs to the farmers who are beholden to the companies will, and while the farmer may not trust the system, there isn't much that can be done by the individual farmer. However, as said, if these problems are rectified, then the independent farmers and ranchers can again hold their heads high, and may have to start hanging a new sign out front – “We Don't Rent Pigs!...But We Do Sell ‘Em.”⁶⁵

With this foundation established showing the increasing monopolization of the meat packing industry and the ways in which COVID-19 brought this issue to light, Part II will now examine one of the tools previously available to both pork and beef producers in their efforts to parry packer influence – country of origin labeling.

⁶⁵ Ballard, *supra* note 48.

III. MCOOL

*“My old man’s that old man,
Spent his life livin’ off the land,
Dirty hands and a clean soul.
It breaks his heart, seein’ foreign cars
Filled with fuel that isn’t ours
And wearin’ cotton we didn’t grow.”⁶⁶*

Mandatory Country-of-Origin Labeling (MCOOL) for beef is not a new issue in the United States. It has been a hotly contested policy for years and the American cattle industry remains sharply divided on the issue. On one side, the supporters of MCOOL include many independent cow-calf producers and organizations such as the Kansas Cattlemen’s Association (KCA), and the Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (RCALF-USA). Supporters argue that U.S. consumers have a right to know where their beef comes from and that given a choice, they would purchase the domestic version. Particularly the cow-calf segment of the beef industry supports MCOOL by and large, since this would strengthen demand and prices for U.S. ranchers and producers. They also argue that it is unfair to exempt beef from the labeling requirements that U.S. importers of almost all other products already must meet, and additionally that major U.S. trading partners impose their own COOL requirements for imported meats.

On the other side, the opponents of MCOOL include the meat packing companies and organizations like the National Cattlemen’s Beef Association (NCBA), the Kansas Livestock Association (KLA) and the American Meat Institute (AMI), as well as the governments of Canada and Mexico (as highlighted by World Trade Organization arbitration proceedings discussed more fully below). The opponents of MCOOL contend that there is little or no real evidence that consumers want such information and that industry compliance costs far outweigh any potential benefits to producers or consumers. They further argue that mandatory COOL for agricultural commodities is a form of protectionism that undermines U.S. efforts to reduce foreign barriers to trade in the global economy.

As extensive litigation and arbitration spanning the past two decades has shown, the two positions seem to be irreconcilable. This policy analysis suggests that as unlikely as it may seem, there is a

⁶⁶ TOBY KEITH, *Made in America, on CLANCY’S TAVERN*, at 0:17–0:38 (Universal Music 2011).

path to a policy-based compromise, and that path runs through Kansas.

A. *Mandatory Country-of-Origin Labeling in the United States*

Since the 1930's, U.S. tariff law has required almost all imports to carry labels so that the "ultimate purchaser," usually the retail consumer, can determine their country of origin. However, many products, including many agricultural commodities, have long been excluded from the country of origin labeling requirement.⁶⁷ Supporters of MCOOL in the beef industry have long argued that it was unfair to exempt beef from the labeling requirements that U.S. importers of almost all other products already must meet, and additionally that U.S. consumers have a right to know where their beef comes from and that given a choice they would purchase the domestic version.⁶⁸ Congress first implemented MCOOL for beef in 2002, including it as a covered commodity in the 2002 farm bill.⁶⁹ The Act required retailers of a "covered commodity" to "inform consumers" as to the commodity's country of origin at the "final point of sale."⁷⁰ Implementation of the legislation was delayed, and then modified in the 2008 Farm Bill to ease some of the concerns raised with the original 2002 law.⁷¹ The final rule to implement the COOL requirements for beef and all other commodities was issued by the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) in early 2009.⁷²

In 2009, Canada and Mexico challenged MCOOL before the World Trade Organization (WTO) dispute settlement panel, as unfairly discriminatory against Canadian and Mexican beef, and ultimately won in 2012.⁷³ To comply with the WTO Appellate Body's holding, the USDA promulgated a new MCOOL rule in May

⁶⁷ See JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 2 (2015).

⁶⁸ *Id.*

⁶⁹ Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified 7 U.S.C.A. § 1638).

⁷⁰ See Cassidy L. Woodard, *From Cattle Drives to Labeling Legislation: The Implications of Mandatory Country of Origin Labeling on the Beef Industry*, 47 TEX. TECH L. REV. 399, 402 (2015).

⁷¹ See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (codified 7 U.S.C.A. § 8701); JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 2 (2015).

⁷² JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 2-3 (2015).

⁷³ Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/R (June 29, 2012).

2013, which required more precise information - revealing the location of each production step.⁷⁴ The 2013 rule established the “Born, Raised, and Slaughtered” regime, by requiring the label on beef to “specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin destination.”⁷⁵ Thus, for beef to be labeled a Product of the U.S.A., the animal would have to be born, raised, and slaughtered in the United States. Almost immediately opponents of MCOOL, led by the American Meat Institute (AMI), filed suit, claiming that the new rule requiring country of origin disclosures was a violation of the Constitution and their First Amendment rights, that it exceeded the scope of the initial 2008 Farm Bill, and was in violation of the Administrative Procedure Act.⁷⁶ Ultimately, the case was heard by the D.C. Court of Appeals who held in favor of MCOOL. The Appellate court found that the “Government’s interests in making country-of-origin information available to consumers, including history of country-of-origin disclosures to enable consumers to choose American-made products, demonstrated consumer interest in extending country-of-origin labeling to food products, and individual health concerns and market impacts that could arise in event of food-borne illness outbreak, were sufficient to sustain United States Department of Agriculture (USDA) regulations mandating disclosure of country of origin information about meat products, despite meat industry trade association’s contention that mandate violated its First Amendment right to freedom of speech.”⁷⁷

Although MCOOL was upheld by the U.S. judicial system, in 2015, Canada and Mexico again challenged the amended MCOOL rule, and again the WTO found in their favor, this time authorizing the two countries to respond with retaliatory tariffs against the United States.⁷⁸ Fearing retaliation, and without waiting for final WTO action, Congress repealed MCOOL in June 2015 with the passage of the *Country of Origin Labeling Amendments Act of 2015*.⁷⁹ Soon after, U.S. cattle prices began falling, causing U.S. ranchers to lose

⁷⁴ Mandatory Country of Origin Labeling, 78 Fed. Reg. 31,367 (May 24, 2013) (codified at 7 C.F.R. pt. 60, 65).

⁷⁵ *Id.*

⁷⁶ *See* Am. Meat Inst. v. U.S. Dep’t of Agric., 968 F. Supp. 2d 38, 42-43 (D.D.C. 2013).

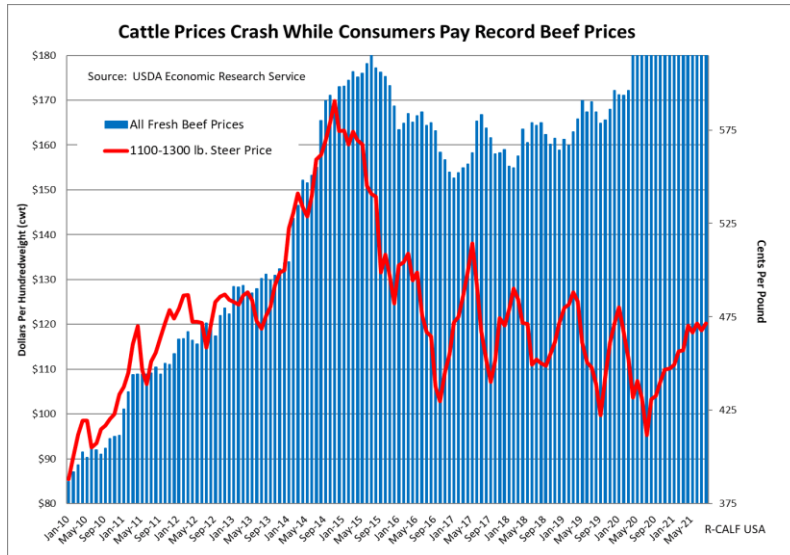
⁷⁷ *See* Am. Meat Inst. v. U.S. Dep’t of Agric., 760 F.3d 18, 23-27 (D.C. Cir. 2014).

⁷⁸ JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 2, 5 (2015).

⁷⁹ *Id.* at 49.

upwards of \$500 for each animal sold.⁸⁰ Despite the rapid fall of cattle prices paid for Fed Cattle⁸¹ following MCOOL’s repeal, the price for beef paid by consumers continued to climb to record highs. Below is a graph produced by R-CALF USA, depicting this phenomenon.⁸²

Figure 1.⁸³



As can be seen in the chart above, fed “cattle prices (red line) historically followed consumer beef prices (blue columns) up and

⁸⁰Letter from Bill Bullard, CEO, R-CALF United Stockgrowers of Am., to Donald Trump (Dec. 11, 2015), BILL BULLARD, LETTER TO DONALD TRUMP 1 (R-CALF, 2015), <https://r-calfusa.com/wp-content/uploads/2013/05/151211-Letter-to-Donald-Trump.pdf>.

⁸¹ ANDREW P. GRIFFITH, UNIV. OF TENN. EXTENSION, CATTLE AND BEEF MARKET DEFINITIONS 4 (2019),

<https://extension.tennessee.edu/publications/Documents/W801.pdf> Fed Cattle, sometimes referred to as fat cattle or live cattle, are “steers and heifers that have been fed a nutrient-dense ration for the purpose of growing the animals, usually for 90-180 days in a feedlot or until they reach a desired slaughter weight and are ready for slaughter” typically between 1,100 and 1,300 pounds. *Id.*

⁸² *Chart Shows Cattle Prices (Red Line) Historically Followed Consumer Beef Prices (Blue Columns) Up and Down Very Closely*, R-CALF UNITED STOCKGROWERS OF AM., <https://www.r-calfusa.com/label-our-beef/chart-shows-cattle-prices-red-line-historically-followed-consumer-beef-prices-blue-columns-up-and-down-very-closely/><https://www.r-calfusa.com/label-our-beef/chart-shows-cattle-prices-red-line-historically-followed-consumer-beef-prices-blue-columns-up-and-down-very-closely/> (last visited Mar. 11, 2022).

⁸³ *Id.*

down very closely.”⁸⁴ However, note that the lines diverge sharply in mid-2015, which coincides with the repeal of MCOOL. According to the graph, ranchers are receiving the same prices for their cattle that they were receiving roughly 10 years ago back in 2011 and 2012 (although given the impacts of inflation and higher costs of inputs,⁸⁵ that same dollar-for-dollar value is arguably even less than it was 10 years ago). Meanwhile, according to the graph, as of 2021 packers are receiving record setting highs for the retail value of beef. In short, the difference between the blue line and the red line shows the profit margin going to the packers. While the rancher struggles to make a living, the packers are, quite literally, “making a killing.”

Currently, while MCOOL is not in place for beef, various other agriculture products are still required to disclose their country of origin.⁸⁶ With MCOOL at the national level repealed, groups like R-CALF USA continue to fight to see it reinstated in one form or another⁸⁷ with varying levels of success. For example, in September 2021, “Senator John Thune (R-S.D.), for himself and for Senators Jon Tester (D-Mont.), Mike Rounds, (R-S.D.), and Cory Booker (D-N.J.) introduced the ‘*American Beef Labeling Act of 2021*,’”⁸⁸ Senate Bill 2716. The bill, if passed, “reinstates beef as among the numerous food commodities currently subject to the United States mandatory country-of-origin labeling (M-COOL) law that was originally passed by Congress in the 2002 Farm Bill.”⁸⁹ The bill also directs the Office of the U.S. Trade Representative (USTR) and Department of Agriculture (UDA) to “develop a means of reinstating the requirements that complies with the rules of the World Trade Organization”⁹⁰ thus avoiding the pitfalls of the previous MCOOL law. In short, “Senate Bill 2716 undoes the repeal that Congress did in the Consolidated Appropriations Act of 2016 by simply reinserting the terms “beef” and “ground beef” back into the existing M-COOL

⁸⁴ *Id.*

⁸⁵ *Reduce Farm Input Costs: Farm Financing Options*, AG AM. LENDING (Dec. 2, 2021), <https://agamerica.com/blog/reducing-farm-input-costs/>.

⁸⁶ 7 U.S.C.A. § 1638(1)(A) (Westlaw through P.L. 117-80).

⁸⁷ See *Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. Perdue*, 718 Fed. Appx. 541, 542 (9th Cir. 2018) (arguing that a Federal Meat Inspection Act regulation cannot exempt imported beef and pork from complying with the statute's demand that meat be labeled with its country of origin through retail).

⁸⁸ *Country of Origin Labeling: MCOOL Bill Officially Introduced*, TRI-STATE LIVESTOCK NEWS (Sept. 24, 2021), <https://www.tsln.com/news/country-of-origin-labeling-mcool-bill-officially-introduced>.

⁸⁹ *Id.*

⁹⁰ American Beef Labeling Act, S. 2716, 117th Cong. § 2(c)(1) (2021).

law, and it requires M-COOL to be implemented no later than 1-year after the bill's enactment."⁹¹

In addition to seeking MCOOL reinstated at the federal level, some states have sought to implement state level COOL. For example, in 2019 Montana proposed a state level COOL system in response to testimony delivered in 2016 to the Montana House Ag Committee showing that under current federal laws, the "USDA allowed a loophole for beef and pork to be labeled 'Product of USA,' even if it is only processed or packaged here."⁹² According to the testimony, a state level COOL was needed because "oftentimes, USA beef is mixed in with cheaper imported beef, misleading our consumers and defrauding our ranchers."⁹³ In recent years, Wyoming and South Dakota have also ran similar bills.⁹⁴

B. Voluntary Country-of-Origin Labeling in the United States

Most recently, Voluntary Country of Origin Labeling (VCOOL) was first used when MCOOL was included the 2002 Farm Bill. The bill stated that the MCOOL labeling requirements would not become mandatory until 2004, and until then, labeling would be voluntary under the USDA guidelines promulgated for that purpose.⁹⁵

While VCOOL was used only in the interim between the passage of MCOOL and its implementation, it was again proposed when Congress ultimately repealed MCOOL in June 2015. At the time of repeal, there was a compromise bill ran at roughly the same time entitled the *Voluntary Country of Origin Labeling (COOL) and Trade Enhancement Act of 2015* (S. 1844).⁹⁶ While the VCOOL bill

⁹¹ *Fact Sheet: Senate Bill 2716 (S.2716)*, R-CALF USA, 1 (2021), <https://www.r-calfusa.com/wp-content/uploads/2021/09/210923-Fact-Sheet-S2716-final.pdf> (last visited Mar. 11, 2022).

⁹² Associated Press, *Montana Country-of-Origin Labeling Bills Stuck in Committees*, FARM J. PORK (Mar. 1, 2019), <https://www.porkbusiness.com/news/ag-policy/montana-country-origin-labeling-bills-stuck-committees/>.

⁹³ *Id.*

⁹⁴ Dan Flynn, *Ranchers Look for Some Traction on Country-of-Origin Labeling*, FOOD SAFETY NEWS (Feb. 3, 2017), <https://www.foodsafetynews.com/2017/02/ranchers-look-for-some-traction-on-country-of-origin-labeling/>.

⁹⁵ J. VanSickle et al., Int'l Agric. Trade & Pol'y Ctr., *Country of Origin Labeling: A Legal and Economic Analysis*, PBTC 03-5 (May 2003). See also Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling, 67 Fed. Reg. 63,367, 63,368 (Oct. 11, 2002).

⁹⁶ Voluntary Country of Origin Labeling (COOL) and Trade Enhancement Act of 2015, S. 1844, 114th Cong.

also repealed MCOOL for beef, it simultaneously sought to amend the Agricultural Marketing Act,⁹⁷ requiring USDA to establish a label designation that enables meat processors to voluntarily use a U.S. label for beef that is exclusively born, raised, and slaughtered in the United States.⁹⁸ At the time, the National Farmers Union (NFU) called the compromise bill “the only real solution for food labeling,” since the repeal of MCOOL would put to rest the complaint by Mexico and Canada, and yet put in its place a voluntary labeling system that could allow consumers to know the origin of their food.⁹⁹

The NFU lauded VCOOL as a “win-win” for all the parties involved, including Mexico and Canada. In fact, during the 2012 WTO Appellate Body Report, Canada and Mexico both suggested voluntary labeling as a way to resolve the issue.¹⁰⁰ Canadian Minister of Agriculture Gerry Ritz stated in August 2014 that “when it’s mandatory it creates that segregation and discriminatory price system...if you do a voluntary label, which we do in Canada under product of Canada, you don’t have that trade sanctioned problem.”¹⁰¹

The VCOOL system proposed would have been similar to other labeling programs overseen by the USDA. For example, the voluntary Certified Organic label program overseen by the Agricultural Marketing Service, allows for certain food products to carry the “USDA Organic” label if the production of that food followed certain steps as put forth by the USDA.¹⁰² Thus, if a consumer wants to buy organic food, they can be assured that if the food carries the USDA Organic label, that it was produced following all the USDA Organic regulations.¹⁰³ The consumer can trust that the label represents a certain process that was followed to get that food to them, and be assured it’s truly “organic.” Although it is completely voluntary, the organic labeling program provides a system, where if consumers demand organic products, then producers can have a level playing field that allows them to put a premium on their products as the free-market dictates. Without the integrity the label provides,

⁹⁷*Id.*

⁹⁸ JOEL L. GREENE, CONG. RSCH. SERV., RS22955, COUNTRY-OF-ORIGIN LABELING FOR FOODS AND THE WTO TRADE DISPUTE ON MEAT LABELING 25-26 (2015).

⁹⁹ *Fact Sheet: Bipartisan Senate COOL Compromise: The Only Real Solution for Food Labeling*, NAT’L FARMERS UNION (July 27, 2015), <https://1yd7z7koz052nb8r33cfxyw5-wpengine.netdna-ssl.com/wpcontent/uploads/2015/07/Senate-COOL-Compromise-Final.pdf>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *About Organic Labeling*, AGRIC. MKTG. SERV., U.S. DEP’T OF AGRIC., <https://www.ams.usda.gov/rules-regulations/organic/labeling> (last visited Mar. 11, 2022).

¹⁰³ *Id.*

anyone could simply state their product was “organic” and undercut the producers who followed the labeling regulations.

Because the 2015 VCOOL bill failed, there is currently no structure in place, like the organic labeling system, that would allow consumers to use the free market to demand beef produced in the USA.¹⁰⁴ Had the 2015 VCOOL bill passed, it would have done much to appease those worried about renewed sanctions from Canada and Mexico, while maintaining the integrity of the “Made in the USA” brand and providing a framework for producers to utilize their greatest asset, the “Product of the USA” label.

Returning to President Joe Biden’s Executive Order 14036, “Promoting Competition in the American Economy,”¹⁰⁵ among other things, the Executive Order directs the USDA to issue new rulemaking addressing a VCOOL label. Specifically, the Executive Order directs the Secretary of Agriculture as follows:

“...to ensure consumers have accurate, transparent labels that enable them to choose products made in the United States, consider initiating a rulemaking to define the conditions under which the labeling of meat products can bear voluntary statements indicating that the product is of United States origin, such as “Product of USA”...”¹⁰⁶

As the status of the Biden Executive Order and the resulting rules and regulations are still pending, the effectiveness of this particular order remains to be seen. However, with the Secretary being directed to at least consider a USDA voluntary Product of USA label, the potential for a USDA sanctioned VCOOL system is high.

C. Economic Benefits of Beef Country-of-Origin Labeling

While MCOOL has been repealed, and the 2015 VCOOL proposal failed in Congress, there is no lack of support for COOL in the United States. For example, the support of COOL among agricultural producers is extremely high, with one study showing that 98% of U.S. agricultural producers favored labeling.¹⁰⁷ Support of COOL among consumers hasn’t declined either and has in fact increased slightly over time. For example, in 2002 when COOL was first passed, a national survey found that 86% of consumer

¹⁰⁴ Voluntary Country of Origin Labeling (COOL) and Trade Enhancement Act of 2015, S. 1844, 114th Cong.

¹⁰⁵ Exec. No. 14036, 86 Fed. Reg. 36,987, 36,993 (July 9, 2021).

¹⁰⁶ *Id.*

¹⁰⁷ VanSickle et al., *Int’l Agric. Trade & Pol’y Ctr.*, *supra* note 96, at 12.

respondents favored country of origin labeling.¹⁰⁸ Compare that to a study conducted by the Consumer Federation of America in 2013, indicating that 90% of the Americans surveyed favored COOL on fresh meat.¹⁰⁹ This willingness of the consumer to “spend a little more in the store for a tag in the back that says USA,”¹¹⁰ translates into an economic impact in excess of \$3.5 billion for beef alone (as of 2002).¹¹¹

On the other hand, opponents to COOL rely on studies like the one conducted by the Kansas State University Department of Economics, that suggest that even if there were increased market demand, that the costs of compliance introduced by COOL outweighed any evidence of increased demand. These particular results suggest an aggregate economic loss for the U.S. meat and livestock supply chain spanning from producers to consumers as a result of MCOOL implementation.¹¹² The study then went on to state that if VCOOL was economically beneficial, it would have occurred on its own, and where it hadn't, this supported the assertion of many COOL opponents, “where is the market failure?”¹¹³ However, this study is in conflict with another study that proved that the implementation costs, in regard to record keeping specifically, were 90 to 95% lower than the USDA cost estimates, and translated into less than one-tenth of a cent per pound for the covered commodities.¹¹⁴ Thus, whether the costs of implementation really do outweigh the benefits is still debatable, and deserves further analysis industry wide.

D. The Current State of MCOOL

In the battle of studies, surveys, and public opinion, both sides of the COOL debate remain heated and staunchly fixed in their respective positions. Even if the support of the cow-calf sector and the consumers was enough to get some sort of VCOOL passed, there's no real incentive on the part of the retailers and packers to participate. In short, opponents of COOL, such as the packing industry, oppose COOL because their studies affirm their position

¹⁰⁸ *Id.*

¹⁰⁹ *Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat*, CONSUMER FED'N OF AM. (May 15, 2013), https://consumerfed.org/press_release/new-poll-shows-strong-support-for-usdas-approach-to-resolving-country-of-origin-labeling-dispute/.

¹¹⁰ KEITH, *supra* note 67.

¹¹¹ VanSickle et al, *Int'l Agric. Trade & Pol'y Ctr.*, *supra* note 96, at 3.

¹¹² GLYNN T. TONSOR ET AL., KAN. STATE UNIV., *MANDATORY COUNTRY OF ORIGIN LABELING: CONSUMER DEMAND IMPACT 3-4* (2012).

¹¹³ *Id.* at 5.

¹¹⁴ VanSickle et al., *Int'l Agric. Trade & Pol'y Ctr.*, *supra* note 96, at 3-4.

that the cost to implement it (including data collection and record keeping) outweighs any benefit to the packing industry, and they get “stuck with the bill” as it were. Supporters of COOL, such as many cow-calf producers, are in favor of it because it puts a premium price on American beef, thus driving up domestic cattle prices, yet they have almost no implementation costs as non-regulated entities.¹¹⁵ Groups such as R-CALF have brought litigation attempting to reinstate MCOOL,¹¹⁶ and have launched websites and initiatives to encourage Congress to bring it back and reinstate it.¹¹⁷ On the other side of the issue, the National Cattlemen’s Beef Association (NCBA) is much larger, and wields much greater political influence than does R-CALF. The NCBA is adamantly opposed to MCOOL¹¹⁸ and so for the time being, MCOOL will face an uphill battle in making a resurgence.

With the two sides adamantly opposed, and with studies on both sides supporting their claim, it seems impossible to reach some sort of policy compromise. Accordingly, cattle producers need to begin thinking outside the box and begin looking at additional options to cure the market ills that ail them. This is the topic of Part III.

IV. BEYOND MCOOL

While the analysis in Part II has shown that there is a viable argument in favor of reinstating Mandatory Country of Origin Labeling for beef, the hard truth most producers now face is this – MCOOL is a steep uphill battle. It is still possible that MCOOL could be reinstated legislatively, and it is possible that some of the ongoing litigation revolving around MCOOL could bring a similar result. However, the chances of that are slim, and so is it possible? Yes. Is it likely? It seems that the metaphorical jury is still out on that question. So then the question becomes, if reinstating MCOOL is the best option, but unavailable to producers, what else can be done to bring back competitive cattle markets, raise cattle prices for producers, and lessen the control that the Big Four have on the beef industry as a whole? This section seeks to put forward several options

¹¹⁵ *Id* at 5, 13.

¹¹⁶ *Court Finds Cattle Producers Harmed by Lack of Country-of-Origin-Labeling: Moves Issue Onto Administration’s Plate*, R-CALF UNITED STOCKGROWERS OF AM., (June 5, 2018), <https://www.r-calfusa.com/court-finds-cattle-producers-harmed-lack-country-origin-labeling-moves-issue-onto-administrations-plate/>.

¹¹⁷ *Label Our Beef*, R-CALF UNITED STOCKGROWERS OF AM.R-CALF USA, <https://www.r-calfusa.com/label-our-beef/> (last visited Mar. 7, 2022).

¹¹⁸ Julie Harker, *NCBA Says R-CALF Is Wrong on COOL*, BROWNFIELD (May 9, 2017), <https://brownfieldagnews.com/news/ncba-says-r-calf-wrong-cool/>.

that can be used, or at least put forth to be explored further as possible options.

A. U.S. CattleTrace, Inc. and the Path to Compromise

A possible solution to the MCOOL standoff comes in the form of a compromise involving a state level VCOOL system coupled with the Kansas CattleTrace Pilot Project (now U.S. CattleTrace, Inc.). In December 2017, members of the Kansas Livestock Association voted to amend their policy to support mandatory cattle disease traceability, in support of the Beef Industry Long-Range Plan put forth by the National Cattlemen's Beef Association.¹¹⁹ Soon after, on June 30, 2018, Kansas Governor Jeff Colyer announced the creation of the Kansas CattleTrace Pilot Project, a public-private collaboration including the KLA, the Kansas Department of Agriculture (KDA), and others, aimed at animal disease traceability.¹²⁰

The CattleTrace program uses Ultra-High Frequency (UHF) eartags on participating cattle, and automated tag readers located at partner livestock markets, feedyards and processors to gather the minimal data points necessary to determine: (1) that a particular animal was (2) at that place, (3) on that date, and (4) and that time. These four data points allow for a disease trace back in the event of an outbreak.¹²¹ The project has been funded by private industry groups, the USDA, as well as the Kansas Department of Agriculture, which was allocated another \$250,000 towards the project in the 2020 Kansas Senate budget bill.¹²²

Support for the CattleTrace program has been generally positive, but in ways mirrors the same "camps" that support and oppose COOL. As of December 2018, all three major beef packing companies in Kansas were participating in CattleTrace as well as 14

¹¹⁹ See Pat Melgares, *Keeping Kansas Beef on Track: CattleTrace Project Aims to Safeguard State's \$17B Industry*, SEEK, Spring 2019, at 30, 30.

¹²⁰ See *Kansas Announces Cattle Trace Pilot Program for Disease Traceability*, KAN. DEP'T OF AGRIC., <https://agriculture.ks.gov/news-events/news-releases/2018/07/02/kansas-announces-cattle-trace-pilot-program-for-disease-traceability#:~:text=Cattle%20Trace%20is%20a%20public,the%20nation%2C%E2%80%9D%20said%20Colyer> (last visited Mar. 9, 2022).

¹²¹ See *What Was the CattleTrace Pilot Project?*, U.S. CATTLE TRACE, <https://www.uscattletrace.org/cattletracepilotproject> (last visited Mar. 9, 2022).

¹²² See *Legislative Action Includes CattleTrace Funding Enhancement*, KAN. LIVESTOCK ASS'N (Mar. 25, 2019), <https://www.kla.org/news-center/news-releases/news/details/12915/legislative-action-includes-cattletrace-funding-enhancement>.

feedyards and 7 livestock markets.¹²³ With a goal of enrolling 55,000 cattle over the next two years, there is a strong need for more cow-calf producers, so in the final year of the pilot project, the recruitment focus is on getting more cow-calf operators and backgrounders to get involved.¹²⁴

Cow-calf producers have many concerns about participating in the program, and David Gregg, a World Perspectives consultant, has been working with Cattle Trace to try to address those concerns, as well as develop a system that can be replicated across the country. Cow-calf producers have raised concerns about management of data, data privacy, as well as the hefty initial cost of setting up a system and maintaining it. Cattlemen have also expressed concerns that traceability would not provide enough added value to offset the cost of participation in an identification system. (i.e., each eartag would cost between \$1.00 and \$2.75).¹²⁵ Then there's also the added liability that can arise from the ability of regulators and others to trace back meat products to the farm of origin.¹²⁶ With these concerns, many cow-calf producers just don't see any benefit of participating in CattleTrace, unless there was some other incentive that outweighs these concerns.

Dr. Justin Smith, the Kansas Animal Health Commissioner, has addressed the potential for the CattleTrace infrastructure to be used for other purposes to benefit the cow-calf producers in Kansas. In September 2018, Dr. Smith gave a presentation in Kansas City, Missouri on the CattleTrace program. There he emphasized the focus of CattleTrace is disease traceability, but went on to say:

“...All the time [we] get the questions about what else can it do, what else can it do?”

“We hope the infrastructure is going to be there to do a huge amount of things for the industry, for each participant to grab a hold of that infrastructure and leverage it for their own purposes, but our focus is disease traceability and that's the direction we're

¹²³ See Walt Davis, *KLA Members Get Update on Cattle Trace Development Efforts*, FARM PROGRESS (Dec. 5, 2018), <https://www.farmprogress.com/livestock/kla-members-get-update-cattle-trace-development-efforts>.

¹²⁴ *Id.*; see also John Maday, *Disease Traceability: Better Late than Never*, DROVERS (Sept. 6, 2018), <https://www.drovers.com/news/disease-traceability-better-late-never-0>.

¹²⁵ See generally *The Producer-Led Organization for Animal Disease Traceability*, U.S. CATTLE TRACE, www.cattletrace.org (last visited Mar. 9, 2022).

¹²⁶ VanSickle et al., *Int'l Agric. Trade & Pol'y Ctr.*, *supra* note 96, at 4.

going, and that's why we're only going to collect the four data points. But honestly, we hope that infrastructure's there that they can leverage for their own purposes and collect what they want to collect...

We're trying to address the cow-calf concerns...the biggest questions we get out of cow-calf producers, which I think is a hugely valid question, is what's in it for me? Why do this?... I think that's a question that we've all struggled with, and we're working through that. I think that's where the opportunity of trying to demonstrate to them some of the ability to leverage that infrastructure for their purposes, for their economic purposes..."¹²⁷

While Dr. Smith never mentions Country of Origin Labeling as a potential use of the CattleTrace infrastructure, he does state that, in addressing the cow-calf concern of "what's in it for me," he believes that one of the benefits to the cow-calf producers is their ability to "grab a hold" of the CattleTrace infrastructure and leverage it "for their economic purposes."¹²⁸ A Kansas VCOOL system could very well be that "economic purpose" and could provide the incentive necessary for the cow-calf producers to get on board with CattleTrace. By using the four data points already being collected for disease traceability, the infrastructure for a state-wide record keeping system necessary for COOL would already in place.

Implementing a Kansas VCOOL system utilizing the CattleTrace infrastructure, would simultaneously solve two problems – break the MCOOL standoff and increase cow-calf participation in CattleTrace. The opponents of COOL don't see its value, particularly where the implementation costs outweigh any benefits they receive. This same group also supports CattleTrace but are struggling to get cow-calf producers support for it. On the other side of the fence, the cow-calf producers aren't participating in CattleTrace because their implementation costs outweigh any benefits they would receive. Thus, when you boil it down, packers don't see the value of COOL, and cow-calf producers don't see the value of CattleTrace.

¹²⁷ Justin Smith, *Cattle Trace – Livestock Traceability Initiatives and Projects*, YOUTUBE, (Oct. 16, 2018), <https://www.youtube.com/watch?v=peftDhAYXF8>, at 14:05-15:10 (presenting from the NIAA 2018 Strategy Forum on Livestock Traceability, September 25 - 26, 2018, Kansas City, MO, USA).

¹²⁸ *Id.* at 15:03.

Perhaps some *quid pro quo* could be provided by implementing a Kansas VCOOL system in conjunction with the CattleTrace project. In exchange for greater, voluntary participation in CattleTrace, the packing industry would support a VCOOL system in Kansas, utilizing the CattleTrace infrastructure for COOL data collection. It's true that the packing industry could then face VCOOL implementation costs, but the cow-calf producers would also face CattleTrace implementation costs. Still, all involved would get some sort of a "win." The consumers would now have a reputable labeling system overseen by the KDA, and be given the choice to purchase domestic beef, or not - a win for the consumer. The cow-calf producers would now be provided a way to put a premium on their product - a win for the cow-calf producers. The packing industry, and supporters of CattleTrace, would now also have the participation of the entire beef supply chain for disease traceability - a win for them. Lastly, so long as the COOL system was voluntary, it would avoid discriminating against beef from Canada or Mexico, and avoid running afoul of any WTO proceedings.

Some may challenge this proposal on the basis of the fact that as a voluntary system implemented by individual states, the program lacks the "teeth" or the sweeping effect of a federal law. The critics would likely say that to fix a nationwide problem requires federal law applicable, well, nationwide. While this argument has some merit, to put the vast potential of this policy proposal into perspective, perhaps it would be useful to briefly examine some numbers using a visual.

Below is a map of all of the states that, according to the U.S. CattleTrace program, are now States with U.S. CattleTrace Participation.

States with U.S. CattleTrace Participation

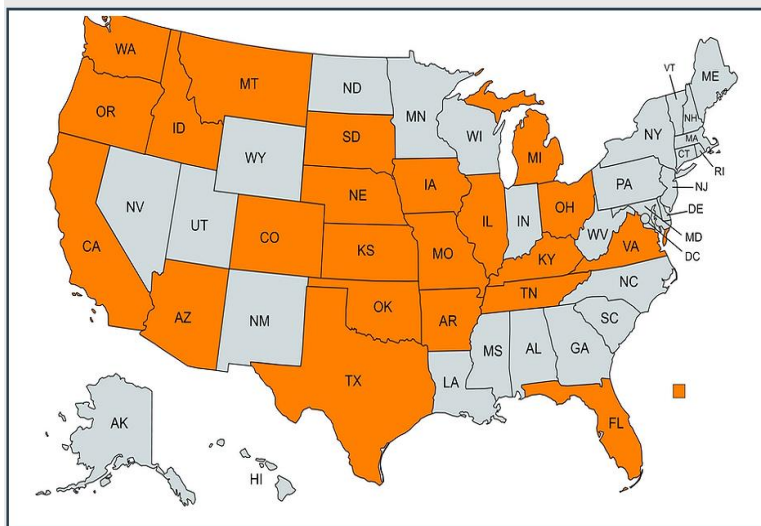


Figure 2. U.S. CattleTrace – Industry Partners¹²⁹

By looking at the above map, it may not be immediately apparent that the CattleTrace partnership really covers that much of the beef industry, as many states are still not partners. This seemingly lends credence to the critics' argument mentioned above. However, looking at the Partner states individually, and looking at the number of cattle in each may help make this argument clear.

Below is a crude table created by the author. This table shows a list of all the CattleTrace Partner states (according to the above map), as well as the number of beef cattle in that state, a ranking of that states beef population (in parenthesis) as well the percentage of the total U.S. beef herd that is raised in that state. These numbers are retrieved from the beef informational website "Beef2Live".¹³⁰

¹²⁹ See *Industry Partners*, U.S. CATTLE TRACE, <https://www.uscattletrace.org/our-partners> (last visited Mar. 9, 2022).

¹³⁰ See Rob Cook, *Ranking of States with the Most Beef Cows*, BEEF2LIVE, (Mar. 10, 2022), <https://beef2live.com/story-ranking-states-beef-cows-0-108181>.

Table 1.¹³¹

State (Rank)	Total Cattle	Percentage of U.S. Total
Texas (1)	4,685,000	15.04%
Oklahoma (2)	2,189,000	7.03%
Missouri (3)	2,035,000	6.53%
Nebraska (4)	1,900,000	6.1%
South Dakota (5)	1,799,000	5.77%
Kansas (6)	1,477,000	4.74%
Montana (7)	1,419,000	4.55%
Kentucky (8)	983,000	3.15%
Florida (10)	929,000	2.98%
Arkansas (11)	925,000	2.97%
Tennessee (12)	900,000	2.89%
Iowa (13)	890,000	2.86%
California (16)	670,000	2.15%
Colorado (17)	659,000	2.12%
Virginia (18)	595,000	1.91%
Oregon (19)	525,000	1.68%
Idaho (22)	474,000	1.52%
Ohio (30)	302,000	0.97%
Washington (32)	221,000	0.71%
Arizona (34)	194,000	0.62%
<u>Michigan (38)</u>	<u>100,000</u>	<u>0.32%</u>
CattleTrace States	23,598,000	76.61%
United States	31,200,000	100%

As the above table makes clear, when all of the cattle in the CattleTrace Partner states are added together, they total 23,598,000 head of beef cattle. This number represents 76.61% of the total U.S. beef cattle herd. This is not an insignificant number. For those who say that a federal law is required to address this problem, because the CattleTrace Program isn't applicable nationwide, this graph shows

¹³¹ *Id.*

that it indeed has nationwide potential. In fact, as shown, over three-quarters of the entire U.S. beef herd is currently in Partner states.

Perhaps, instead of attempting to reinstate federal legislation like MCOOL, by strategically using CattleTrace to the producer's advantage, over three-quarters of the U.S. beef herd could be included in this compromise - having major effects on the U.S. beef industry as a whole. Not only is this a possible path forward, but it is also producer driven and would avoid a federally mandated animal disease traceability system. This point is driven home by Joe Leathers (CattleTrace, Inc. Board Member and General Manager of the 6666 Ranch in Guthrie, Texas) when he said the following about the CattleTrace initiative as a whole:

“We’re working real hard to make sure that the producer is the one that’s driving it...I want everyone to understand that the driver of this is from the producer up, not from the federal government down. I think that’s a big difference in what’s been happening before...I really feel like this is one of the rare opportunities where we in the cattle industry have an opportunity to not only have a seat at the table, which doesn’t come very often, but we can be proactive instead of reactive.”¹³²

It's true that this compromise proposal is not the “end-all-be-all” solution, and likely raises more questions than it answers. However, this proposal is of a limited scope, and is not intended to answer every possible question raised. Instead, this analysis is simply meant to show that this policy proposal is an option that if explored further, is a workable solution to an issue that has faced the cattle and beef industries since MCOOL was first passed 20 years ago. In short, the American cattleman's greatest asset and marketing tool is the fact that American beef is renowned worldwide, and that standard deserves to be protected. However, the battle lines involving MCOOL have been drawn such that neither side seems to be willing to budge. A Kansas VCOOL system containing a born, raised and slaughtered regime, coupled with CattleTrace, provides a route to compromise. By implementing a state level voluntary country-of-origin labeling system in Kansas, the free market would be given a structure wherein consumers could demand domestic beef. It would also provide a way for domestic cattle producers to put a premium on their product, and simultaneously kick-start the CattleTrace

¹³² Ken Anderson, *Texas Cattleman Helps Lead Cattle Traceability Effort*, FOUR SIXES RANCH (Apr. 12, 2018), <https://www.6666ranch.com/news/texas-cattleman-helps-lead-cattle-traceability-effort/>.

animal disease traceability project by giving cow-calf producers an incentive to participate. If this policy was pursued, Kansas and CattleTrace could be a realistic model of compromise for the remaining CattleTrace Partner states to follow, or even be a model for a federal system (as the Biden Executive Order directs the creation of a USDA sanctioned VCOOL system).¹³³ Perhaps if this compromise is followed, beef producers can show that it still means something to be Made in America.

B. The Corporate Social Responsibility Argument

Another avenue worth exploring, and one that is commonly overlooked, is viewing the consolidation issue through the lens of Corporate Social Responsibility. First, before beginning an in-depth analysis, regarding the Big Four's beef packing practices through the lens of Corporate Social Responsibility (CSR), it's important to first define CSR and also determine which CSR definition is going to be used.

Companies worldwide are increasingly feeling the pressure to “behave socially responsible”¹³⁴ and adopt some sort of Corporate Social Responsibility to guide their efforts. The problem, thus far, has been that there is no universal definition of what constitutes “CSR.” This is partially because the “modern era of CSR, or social responsibility...is most appropriately marked by the publication by Howard R. Bowen of his landmark book *Social Responsibilities of the Businessman* in 1953”¹³⁵ effectively beginning the CSR era at that time in the not so distant past. This initial CSR work came about because of Bowen's belief that seven hundred of the largest businesses in the United States “were vital centers of power and decision making and that the actions of these firms touched the lives of citizens in many ways.”¹³⁶ Bowen's initial work was refined by a man by the name of Carroll, who broke down a businesses' social responsibility into four main responsibilities, stating: “Corporate social responsibility encompasses the economic, legal, ethical, and discretionary (philanthropic) expectations that society has of organizations at a given point in time.”¹³⁷ These four responsibilities, economic, legal, ethical, and philanthropic were later visualized into

¹³³ Exec. No. 14036, 86 Fed. Reg. 36,987, 36,993 (July 9, 2021).

¹³⁴ Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, CORP. SOC. RESP. & ENV'T. MGMT., Jan. 2008, at 1, 1.

¹³⁵ Archie B. Carroll, *Carroll's Pyramid of CSR: Taking Another Look*, INT'L J. CORP. SOC. RESP., July 5, 2016, at 1, 1,

<https://jcsr.springeropen.com/track/pdf/10.1186/s40991-016-0004-6.pdf>.

¹³⁶ *Id.*

¹³⁷ *Id.* at 2.

what has become known as “Carroll’s Pyramid of CSR.”¹³⁸ Carroll’s Pyramid broke these four responsibilities down into what is required by society, expected by society and what is desired by society. Starting at the bottom of the pyramid, Economic Responsibilities, the responsibility to be profitable, was required by society.¹³⁹ The next step up, Legal Responsibilities, the duty to obey laws & regulations, was also required by society.¹⁴⁰ Moving up the pyramid, Ethical Responsibilities, that of the duty to “do what is just and fair” and “avoid harm” was expected, but not required, by society.¹⁴¹ At the top of the pyramid, Philanthropic Responsibilities, the duty to be a good corporate citizen, was simply desired by society.¹⁴² While this pyramid seemed to place emphasis on certain responsibilities more than others, Carroll believed that all four should be considered simultaneously when determining whether an action was corporately socially responsible.

While Carroll’s Pyramid of CSR did much to shed light on the issue, as the years progressed, no single definition of CSR emerged. In fact, recently one study found that 37 different definitions had been adopted by global companies.¹⁴³ For example, the Commission of the European Communities, in 2001, defined CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”¹⁴⁴ Another group, Business for Social Responsibility, defined CSR as “achieving commercial success in ways that honour ethical values and respect people, communities and the natural environment.”¹⁴⁵ While each of the 37 definitions was slightly different, each of the 37 sound somewhat similar, because as a whole, each took into account five main dimensions that were taken into account when drafting each individual definition. These dimensions are: (1) the Environmental Dimension, which takes into account the natural environment when making business decisions,¹⁴⁶ (2) the Social Dimension, which considers the relationship between business and

¹³⁸ *Id.* at 5 fig. 1.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Archie B. Carroll, *Carroll’s Pyramid of CSR: Taking Another Look*, INT’L J. CORP. SOC. RESP., July 5, 2016, at 1, 5 fig. 1,

<https://jcsr.springeropen.com/track/pdf/10.1186/s40991-016-0004-6.pdf>.

¹⁴² *Id.*

¹⁴³ See Dahlsrud, *supra* note 135, at 3.

¹⁴⁴ *Id.* at 7 app.

¹⁴⁵ *Id.* at 8.

¹⁴⁶ *Id.* at 4.

society,¹⁴⁷ (3) the Economic Dimension, which looks at socio-economic or financial aspects, including describing CSR in terms of a business operation,¹⁴⁸ (4) the Stakeholder Dimension, which considers individual stakeholders and stakeholder groups,¹⁴⁹ and (5) the Voluntariness Dimension, which accounts for actions not prescribed by law.¹⁵⁰ So while none of the above 37 definitions of CSR could agree on a single definition of what exactly CSR is, each looked at these five dimensions, environmental, social, economic, stakeholders and voluntariness when crafting a CSR proposal that fit each unique circumstance.

With this understanding of not only the four responsibilities proposed by Carroll's Pyramid of CSR, but also the five dimensions used by modern companies, an in-depth review can now be undertaken regarding beef packing companies in the United States and whether they are arguably committing CSR abuses.

It's no secret that the United States beef packing industry has become extremely consolidated, as has been analysed thus far. In fact, "according to the U.S. Department of Agriculture, the top four beef processors hold 85 percent of the market share, controlling the beef market to the point that some farmers believe the companies' clout unfairly influences livestock prices."¹⁵¹ These four companies, Tyson, Cargill, JBS and National Beef are often referred to as the "Big Four" as stated before.¹⁵²

Through horizontal and vertical integration, the consolidation of the beef market in the hands of only a few major players, namely the Big Four, is only getting worse. For example, in 2019, National Beef (the fourth-largest of the Big 4) was acquired (almost wholly) by the Brazilian company Marfrig Global Foods

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Alexander Dahlsrud, *How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions*, CORP. SOC. RESP. & ENV'T. MGMT., Jan. 2008, at 1, 4.

¹⁵⁰ *Id.*

¹⁵¹ Grant Gerlock, *Consolidation in the Livestock Industry May Get a Boost Since Proposed USDA Rule Won't Take Effect*, HARVEST PUB. MEDIA (Nov. 3, 2017), <https://www.harvestpublicmedia.org/post/consolidation-livestock-industry-may-get-boost-proposed-usda-rule-won-t-take-effect>.

¹⁵² Joe Fassler, *A New Lawsuit Accuses the "Big Four" Beef Packers of Conspiring to Fix Cattle Prices*, THE COUNTER (Apr. 23, 2019), <https://thecounterBa.org/meatpacker-price-fixing-class-action-lawsuit-cattlemen-tyson-jbs-cargill-national-beef/>.

SA.¹⁵³ This same year, the Marfrig owned National Beef acquired another beef packing company – Iowa Premium Beef, which is a regional packer focused on processing steers in the Upper Midwest.¹⁵⁴ While this deal didn't make waves or national headlines, it highlights the dangers that consolidation poses to the beef industry. Iowa Premium was one the last smaller, independent packers, situated in the Iowa-Minnesota region, which “is the only place left in the country where over half of all cattle are sold into the cash market”¹⁵⁵ meaning, livestock auctions, where the fair market price of the cattle is determined by competitive bidding. Today, because of consolidation (like the Iowa Premium buyout) nationwide “only 25 percent of cattle sell on the cash market. Instead, most cattle are sold through forward contracts or through ‘formula pricing,’ in which packers determine the value of cattle based on a non-negotiated pricing formula.”¹⁵⁶ This number is concerning because, as stated by Robert Taylor, Professor of Agricultural Economics at Auburn University, “the thinner the cash market is, the more easily it’s manipulated.”¹⁵⁷ Referencing the Iowa Premium deal, Bill Bullard, CEO of the Ranchers-Cattlemen Action Legal Fund (R-CALF) had this to say – “The deal could hasten the death of competitive price setting for cattle...The cash market is the price discovery market for the entire cattle industry. If the cash market continues to thin...then it’s essentially game over for cattle producers...with a lack of a competitive marketplace, the packers will dictate prices to producers.”¹⁵⁸ In short, when there are only four main buyers of cattle, those four buyers can control the entire beef industry.

The CSR implications of this growing consolidation through acquisitions and mergers may not be apparent to some, but the actions taken by the Big 4 are arguably socially irresponsible. When the Big Four’s monopoly is viewed through the lens of Carroll’s Pyramid of CSR, it’s clear that all four companies are meeting their first responsibility, the Economic Responsibility, or duty to be profitable. In fact, in late 2019, packers’ profit margins rose to a

¹⁵³ *Brazil’s Marfrig Raises Stake in National Beef to 81.7%*, REUTERS, <https://www.reuters.com/article/national-beef-ma-marfrig-gl-foods/brazils-marfrig-raises-stake-in-national-beef-to-81-7-idUSL2N27Y05P> (Nov. 18, 2019).

¹⁵⁴ See Claire Kelloway, *Beef Packing Merger Threatens America’s Last Competitive Cash Cattle Market*, FOOD & POWER (Apr. 11, 2019), <http://www.foodandpower.net/2019/04/11/beef-packing-merger-threatens-americas-last-competitive-cash-cattle-market/> (2019).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

record \$358 per head.¹⁵⁹ To put that in perspective, in 2018 alone, there were 33.7 million cattle slaughtered in the United States.¹⁶⁰ On the flip side, at the same time period that packers profit margins were \$358 per head, "... cattle feeders saw their margins decline from an average of \$24 per head profit to a \$28 per head loss."¹⁶¹ That swing is a direct result of the "cash fed cattle market at \$5 per cwt. lower"¹⁶² than usual.

While packers are "making a killing" in profits, the rest of the industry is suffering, and the cash market is down to a point that cattle producers are losing money. With this information in mind, looking at the rest of Carroll's Pyramid, the next rung is Legal Responsibilities, or the duty to obey laws & regulations, which is required by society. While the Big Four are arguably meeting this responsibility, on the surface, this meeting of this responsibility is questionable. For example, the Packer & Stockyards Act was passed in 1921 to, in part, prevent the monopolization of the cattle industry. The Packers & Stockyards Act contains various provisions defining what is "unfair practices" in an effort to prevent packers' abuses of the rest of the industry. However, as the law currently stands, for an individual cattle producer to be able to show that one of the Big Four has engaged in an unfair practice, they "have to prove harm for the entire. . . industry rather than harm to themselves when seeking relief. . . for abusive contract practices."¹⁶³ An interim rule was passed in 2016 called the Farmer Fair Practices Rule (FFPR), which eliminated this requirement, and required only that the producer show that the unfair practice harmed his individual operation, not the industry as a whole. The FFPR was withdrawn in 2017, much to the chagrin of independent cattlemen's groups, such as the United States

¹⁵⁹ Greg Henderson, *Profit Tracker: Packer Margins Went Up How Much?!*, DROVERS (Aug. 20, 2019), <https://www.drovers.com/news/industry/profit-tracker-packer-margins-went-how-much>.

¹⁶⁰ *Statistics and Information, STATISTICS AND INFORMATION*, ECON. RSCH. SERV., U.S. DEPT. OF AGRIC. Tbl.3a, https://www.ers.usda.gov/topics/animal-products/cattle-beef/statistics-information.aspx_ (Sept. 28, 2021).

¹⁶¹ Henderson, *supra* note 160.

¹⁶² *Id.*

¹⁶³ *See Action Alert: Farmer Fair Practices Rules in Jeopardy at USDA*, NAT'L FARMERS UNION, <https://nfu.org/action-alert-farmer-fair-practices-rules-in-jeopardy-at-usda/> (last visited Mar. 16, 2022).

Cattlemen's Association.¹⁶⁴ The repeal was lobbied for by the National Cattlemen's Beef Association.¹⁶⁵

This section of the PSA that the FFPR sought to address is the subject of President Biden's Executive Order 14036, "Promoting Competition in the American Economy," which directs the Secretary of Agriculture to:

"...address the unfair treatment of farmers and improve conditions of competition in the markets for their products, consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act to strengthen the Department of Agriculture's regulations concerning unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences, advantages, prejudices, or disadvantages, with the purpose of furthering the vigorous implementation of the law established by the Congress in 1921 and fortified by amendments."¹⁶⁶

In short, the proposed rule would be similar to the FFPR, in that a producer would no longer have to prove industry wide harm to receive some sort of relief under the PSA.¹⁶⁷

Another example of questionable legal responsibilities includes two of the Big Four, JBS and National Beef/Marfrig, both of which are Brazilian based companies. Together with JBS, "Marfrig has a record of colluding with JBS to lower prices paid to Brazilian cattle producers and bribing public officials."¹⁶⁸ While similar practices have not been proven here in United States, the fact that JBS and Marfrig/National Beef has a history of such practices in their home country it should not surprise anyone that they are now being accused of that here in the States (more on that *infra*).

¹⁶⁴ See Hagstrom Report, *USDA Withdraws GIPSA's Farmer Fair Practices Rules*, THE FENCE POST (Oct. 17, 2017), <https://www.thefencepost.com/news/usda-withdraws-gipsas-farmer-fair-practices-rules/>

¹⁶⁵ See *USDA Moves Forward with Flawed GIPSA Rules*, NAT'L CATTLEMEN'S BEEF ASS'N (Oct. 14, 2016), https://www.ncba.org/newsreleases.aspx?NewsID=6030_2

¹⁶⁶ Exec. Order 14036, 86 Fed. Reg. 36,987 (July 14, 2021).

¹⁶⁷ See Daniel Litwin, *How Will Updates to the Packers and Stockyards Act Shape Agriculture's B2B Relationships?*, MARKETSCALE, (Aug. 12, 2021), <https://marketscale.com/industries/food-and-beverage/how-will-updates-to-the-packers-and-stockyards-act-shape-agricultures-b2b-relationships/>.

¹⁶⁸ Kelloway, *supra* note 155 (citing *Brazil Prosecutors Seek \$774 mln in Fines over Alleged Loan Scheme*, REUTERS (Oct. 5, 2018), <https://www.reuters.com/article/brazil-caixa-fraud/brazil-prosecutors-seek-774-mln-in-fines-over-alleged-loan-scheme-idUSL2N1WL13E>).

Moving up the pyramid, Ethical Responsibilities, that of the duty to “do what is just and fair” and “avoid harm” were expected, but not required, by society. Here, there is nothing just or fair about dictating prices to cattle producers in a way that the Big Four are seeing record profits and forcing the rest of the industry into a losing game. At the top of the pyramid, Philanthropic Responsibilities, the duty to be a good corporate citizen, were simply desired by society. Here, the duty to be a good corporate citizen is lacking. Each of the Big Four have issued various CSR Reports outlining the good they do. From a philanthropic view, they do much for the good of society. However, behind the scenes they are crippling, or simply buying their competition. This is not meeting the duty to be a good corporate citizen. Carroll’s pyramid seemed to place emphasis on certain responsibilities more than others, Carroll believed that all four responsibilities should be considered simultaneously when determining whether an action was corporately socially responsible. Here, when viewed in light of these four responsibilities as a whole, it appears that the Big Four, as a whole, are lacking.

When the actions of the Big Four are viewed through the lens of the five dimensions of CSR proposed by Dahlsrud, there also appears to be some holes in their conduct. The first dimension, the environmental dimension, is not really the focus of this paper and as such would require extensive research beyond the scope of this paper and will not be addressed. However, the second dimension, the social dimension, considers the relationship between business and society. Here, the alleged conduct of dictating prices, and price fixing, is putting America’ cattlemen/cattlemen out of business and killing the ranching way of life in America as we know it. While it may not be as drastic as the shuttering of the Stockyards in Kansas City or Omaha, it is killing a way of life. These actions likely are in conflict with the social dimension. Third, the economic dimension, as discussed above, is being met by these companies. The fourth dimension, the stakeholder dimension, will be discussed in the final section of this paper. Lastly, the fifth dimension, the voluntariness dimension is a tough one to meet, because as was stated above, CSR compliance is not regulated by State’s, and is completely voluntary on the part of the company. As such, if companies, such as the Big Four, choose to violate various aspects of CSR, there isn’t a whole lot of enforcement mechanisms available.

As stated above, CSR compliance is not regulated by States, and is completely voluntary on the part of the company. As such, if companies, such as the Big Four, choose to violate various aspects of CSR, there are not many enforcement mechanisms available. Industry groups can try to work with the Big Four to reach workable

solutions, or overcome these CSR shortcomings, but at the end of the day, if the Big Four choose to continue down the path they are on, the voluntariness dimension says they can do as they please. This is where R-CALF USA again comes into play.

According to their website “R-CALF USA (Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America), is the largest producer-only membership-based organization that exclusively represents U.S. cattle and sheep producers on domestic and international trade and marketing issues. R-CALF USA, a national, non-profit organization, is dedicated to ensuring the continued profitability and viability of the U.S. cattle industry.”¹⁶⁹ In short, their slogan is “Fighting for the U.S. Independent Cattle Producer.”¹⁷⁰

As one of the leading groups fighting for the independent U.S. cattle producer, R-CALF has taken many steps thus far, including extensive litigation over the years. For example, in 2019, R-CALF filed a large class action lawsuit with a 121-page complaint, alleging that the Big Four conspired to depress cattle prices, and inflate their own margins. As such, “the suit alleges the nation’s four largest beef packers violated U.S. antitrust laws, the Packers and Stockyards Act, and the Commodity Exchange Act by unlawfully depressing the prices paid to American ranchers.”¹⁷¹ While the outcome of this litigation remains to be seen, as shown, JBS and Marfrig have faced similar charges at home in Brazil, it may not be surprising if similar conduct is found here in the States.

In fact, while the R-CALF lawsuit continues, another lawsuit ended in February 2022, making essentially the same allegations. In the case of *Pacific Agri-Products, Inc. v. JBS USA Food Company Holdings, et al.*,¹⁷² the Plaintiff Pacific Agri-Products, Inc. (a wholesale food distributor who purchases beef from the Big Four) brought suit in the U.S. District Court for the District of Minnesota alleging that “Tyson, Cargill, National, and JBS worked together, starting in 2015, to reduce the number of cattle slaughtered which

¹⁶⁹ *About Us*, RANCHERS-CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AM. (2022) <https://www.r-calfusa.com/about-us/> (last visited Mar. 16 2022).

¹⁷⁰ *Id.*

¹⁷¹ *R-CALF Files Lawsuit Against “Big Four” Beef Packers*, N. AG NETWORK (Apr. 24, 2019), <https://www.northernag.net/r-calf-files-lawsuit-against-big-four-beef-packers/>.

¹⁷² *Pacific Agri-Products, Inc. v. JBS USA Food Company Holdings et al.*, 0:19CV02720 (D. Minn., 2019) (Court Listener.).

created, ‘artificial Beef supply restraints.’”¹⁷³ The case settled in early February 2022, wherein “JBS SA agreed to pay a sum of \$52.5 million to settle litigation following accusations of conspiring to inflate prices and pocketbooks by limiting beef supply in the U.S. market.”¹⁷⁴ In a Press Release dated February 2, 2022, Iowa’s Senator Chuck Grassley had this to say regarding the settlement:

“If there were any doubt about the shenanigans Big Packers play to line their pockets at the expense of consumers and independent producers, look no further than JBS’ \$52.5 million settlement in price-fixing litigation. The other members of the Big Four packers continue to face similar allegations. Although the settlement is a spit in the ocean compared to JBS’ record profit throughout the pandemic, it validates what cattle producers have been telling me when they try to get a fair price in the marketplace. It’s time to put an end to these price fixing schemes once and for all. Congress must pass the *Cattle Price Discovery and Transparency Act* to bring access and accountability to the meatpacking industry.”¹⁷⁵

In addition to litigation, R-CALF has taken other steps, such as advocating extensively for the implementation of the Farmer Fair Practices Rule discussed above.¹⁷⁶ Another example of their involvement is through organizing educational events, workshops and meetings across the nation, in conjunction with other advocacy groups, such as the recent “Rally to Stop the Stealin’” held in Omaha, Nebraska in October, 2019, held in conjunction with the Organization for Competitive Markets.¹⁷⁷ Such educational events

¹⁷³ Jim Mundorf, *The Truth About Beef Price Fixing, the JBS \$52.5 Million Settlement, and Justice*, LONESOME LANDS (Feb. 8, 2022), <https://www.lonesomelands.com/new-blog/2022/2/6/the-truth-about-beef-price-fixing-and-why-jbs-525-million-settlement-is-not-justice>.

¹⁷⁴ Jenna Hoffman, *JBS Settles Price Fixing Allegations for \$52.5M, Industry Responds*, DROVERS (Feb. 2, 2022), <https://www.drovers.com/news/industry/jbs-settles-price-fixing-allegations-525m-industry-responds>.

¹⁷⁵ Press Release, Chuck Grassley, Senator, *Grassley: JBS Settlement Tells You Everything You Need to Know About Packers’ Anticompetitive Tactics* (Feb. 2, 2022), <https://www.grassley.senate.gov/news/news-releases/grassley-jbs-settlement-tells-you-everything-you-need-to-know-about-packers-anticompetitive-tactics>.

¹⁷⁶ See *GIPSA Rules Will Help Reverse Cattle Industry Decline*, RANCHERS-CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AM. (Dec. 14, 2016), <https://www.r-calfusa.com/r-calf-usa-gipsa-rules-will-help-reverse-cattle-industry-decline/>.

¹⁷⁷ *October 2, 2019; Rally to Stop the Stealin’!*, ORG. FOR COMPETITIVE MKTS., (Sept. 20, 2019), <https://competitivemarkets.com/stopthestealin/>.

are important, as fighting to influence the “court of public opinion” is oftentimes as important as fighting in the courts of law. This is because, as once wisely observed by Wilma Mankiller (the first female president of the Cherokee Nation), “public perception creates public policy.”¹⁷⁸ With that in mind, the following are several recommendations on how this issue can be more effectively addressed in the future to influence better practice and change within the private beef packing sector.

First, because much of CSR is voluntary, most internal company change in regard to CSR comes as a result of the company feeling pressure to change from their consumers. R-CALF has done an excellent job at educating beef cattle producers, but so far, has somewhat overlooked the consumers. There are far more consumers in America, than there are beef cattle producers. If advertising, and educational events could be tailored in a way that draws consumers into them, then the consumers can use their collective weight through the power of their “purse” to slow any abusive practices in the packing industry.

The second step would be a nationwide push for the reimplementing of the Farmers Fair Practices Rule. Because the FFPR would benefit not just beef producers, but all livestock producers nationwide, a working group could be created consisting of representatives of all independent beef cattle producing organization, as well as those that represent independent sheep, pork, and poultry producers. By creating a working group consisting of all segments of the livestock industry, there would not be a lone voice in favour of the FFPR, but the collective power of the entire meat industry. Again, the Biden Administration has proposed rulemaking similar to the FFPR, and the success of said rulemaking remains to be seen.

The second step then translates into the third step, the creation of a “United States Multi-Stakeholder Initiative.” This cross-sector initiative could include representatives from the beef industry, the cattle industry, as well as consumer groups, food safety groups, and free-market advocates. This multi-stakeholder initiative has the benefit of governance without government. In other words, if the federal government were not ultimately successful in reinstating the FFPR, or enforcing the Packers & Stockyards Act, then the initiative could create an independent system of market-based

¹⁷⁸ Gary Herbert, *Utah Compact on Racial Equity, Diversity and Inclusion*, FACEBOOK (Dec. 15, 2020), <https://www.facebook.com/GovGaryHerbert/videos/145876427011787/>.

regulatory mechanisms including guidelines, certifications, auditing and labelling, to start. With representatives from this cross-sector group, these market-based regulatory instruments could be drafted in a way to take the Big Four and “hold their feet to the fire” as it were.

While these suggestions arising from the CSR analysis are like the VCOOL/CattleTrace Compromise in that they are not the “end-all-be-all” solutions, they are still worth mentioning. Up to this point in time, the entire argument surrounding overcoming the packers consolidation of the industry has revolved around MCOOL and breaking up the “Big Four.” By shedding light on other options, like those proposed above involving CSR, perhaps the discussion can be changed to where producers and organizations begin looking at other options.

C. Other Solutions

As stated above, the point of introducing other options aside from simply renewing the fight for MCOOL is to get producers and industry experts thinking about how else to fix the problem. It’s true that MCOOL is one of the best tools to fight back against consolidation, price fixing and price manipulation – however, since that option is only one options, what other options are available beyond what has been discussed?

In a recent interview with rancher Sheila Ellis, she was asked that very question, namely, “what are some solutions that could be implemented to fix these issues?”¹⁷⁹ She responded, “the PRIME Act being made into law, enforcement of anti-trust laws, and breaking up the packer monopolies would all be viable solutions.”¹⁸⁰ Of Ms. Ellis’ proposals, the first, instating the PRIME Act is one of the best options available at this point. The PRIME Act (Processing Revival and Intrastate Meat Exemption) was first introduced in 2015.¹⁸¹ This options is one of the best because “currently, custom facilities across the country are exempt from state and federal inspection regulations to process meat for personal consumption...However, when a farmer wants to actually sell meat to any buyer — individual consumer, restaurant, hotel, or grocery store — the animal must be slaughtered and processed at a USDA-inspected or...state-inspected facilities to legally sell the meat.”¹⁸² By exempting these smaller processing facilities from strict, suffocating federal “red tape” would encourage

¹⁷⁹ Johnston, *supra* note 27.

¹⁸⁰ *Id.*

¹⁸¹ Jared Cates, *What is the PRIME Act?*, CAROLINA FARM STEWARDSHIP ASS’N <https://www.carolinafarmstewards.org/what-is-the-prime-act/> (last visited Mar. 16, 2022).

¹⁸² *Id.*

the development and building of more, local, processing plants. Thus, giving consumers more local options for their meat, and giving up-start beef processors a fighting chance against the Big Four.

Under the Biden Executive Order discussed prior, the USDA recently announced that it intends to invest \$500M to support and incentivize “new competitive entrants into meat and poultry processing” and more than \$150M to strengthen existing “small and very small” facilities.¹⁸³ This funding will do much to encourage the development and building of more, local, processing plants. Again, however, in addition to funding, the USDA should consider ways to decrease the “red tape” that these small processing facilities must cut through simply to get their product to the consumers. For example, Kaibab Processing is a small, family owned “custom-exempt meat processing facility” located in Fredonia, Arizona.¹⁸⁴ Kaibab Processing has a 4 out of 4 rating from the Arizona Department of Agriculture and “offer[s] custom slaughter and processing livestock.”¹⁸⁵ As an Arizona inspected facility, the family has been able to bring this custom processing facility from an idea to a fully functioning plant in less than 2 years processing livestock and game in the State of Arizona. However, where Fredonia, Arizona is located on the Arizona/Utah border, and due to the unique geography, Kaibab Processing is very isolated from the rest of Arizona yet extremely proximate to Southern Utah (Fredonia is 195 miles from its county seat of Flagstaff, Arizona, yet only 7 miles from Kanab, Utah, the county seat of neighboring Kane County, Utah). Because of USDA regulations, Kaibab Processing is able to engage in only limited interstate commerce even though most of their potential clientele reside north of the Arizona/Utah border. Again, particularly in situations like those pertaining to Kaibab Processing, in addition to funding, the USDA should consider ways to decrease the “red tape” that these small processing facilities must cut through simply to get their product to the consumers.

The second solution brought up by Ms. Ellis is that of enforcing the anti-trust laws that are already on the books. This is another viable option, as there are various anti-trust laws already in

¹⁸³ Ellison et al., *supra* note 45(citing Press Release, U.S. Dep’t of Agric., USDA Announces \$500 Million for Expanded Meat & Poultry Processing Capacity as Part of Efforts to Increase Competition, Level the Playing Field for Family Farmers and Ranchers, and Build a Better Food System (July 9, 2021), <https://www.usda.gov/media/press-releases/2021/07/09/usda-announces-500-million-expanded-meat-poultry-processing>).

¹⁸⁴ *About Us*, KAIBAB PROCESSING, http://kaibabprocessing.com/?page_id=11 (last visited Mar. 16, 2022).

¹⁸⁵ *Id.*

effect that are simply not being enforced – such as the Packers and Stockyards Act. According to Professor Roger A. McEowen, “a good case can be made that the courts have not carried out the legislative intent of the PSA provision concerning price manipulation.”¹⁸⁶ There are legal mechanisms already in place to prevent the type of activity engaged in by the Big Four, those mechanisms just need to be used and enforced. Here, a federal/state partnership may be extremely beneficial as highlighted in the letter signed by 16 Attorneys General in December 2021 and sent to Secretary of Agriculture, Tom Vilsack, urging the Secretary as follows:

“USDA should consider using funds appropriated through the American Rescue Plan Act of 2021 to establish a grant that state antitrust enforcers could avail themselves of for the purpose of investigating and bringing actions in agricultural markets. State attorneys general have the potential to have significant impact on agriculture market concentration, but lack of resources is a perennial limitation on what states can do.”¹⁸⁷

While the State attorneys general share the enforcement authority to enforce and investigate antitrust violations, as noted the perennial lack of resources prevents States from playing an active role. However, if a fund were to be established from which States could draw from and aid the USDA in its efforts, perhaps the PSA could be enforced like it was originally intended.

The third solution raised by Ms. Ellis is that of breaking up the packing monopolies. Of the three options, this one is by far the hardest to accomplish. To break up the monopolies (as was done with the Big Five early in the 20th Century) would require some sort of proof of wrongdoing. As discussed earlier in this paper, there are ongoing investigations into the meat packing industry. So while as of now this option may not be viable, if the DOJ returns with findings that the Big Four have violated the Packers & Stockyards Act, perhaps this could be a reality.

The list of possible solutions is extensive, and this paper is not intended to address all of them, but other possible solutions include looking further into the following:

¹⁸⁶ McEowen, *supra* note 12, at 4.

¹⁸⁷ Ellison et. al., *supra* note 45.

1. Promoting local processing options through funding mechanisms rather than simply through the PRIME Act.
2. Enforcing the Packers & Stockyards Act through federal/state partnerships.
3. Reinstating the Farmer Fair Practices Rule.¹⁸⁸
4. Break-up the Big Four monopoly as was suggested.
5. A Beef Contract Library (like the Swine Contract Library §222 P&S Act) to encourage greater transparency into the contracts entered into by the Big Four and facilitate price discovery.
6. Mandatory Cash Sales, as has been suggested by Senator Chuck Grassley (R-IA) in his recent bill,¹⁸⁹ dubbed the “50/14 Rule.” In short, this “bipartisan bill will require that a minimum of 50 percent of a meat packer’s weekly volume of beef slaughter be purchased on the open or spot market”¹⁹⁰ and require a packer to actually slaughter the beef within 14 days of the sale.¹⁹¹

While this list is not exclusive and would obviously require greater “flushing out” to determine how effective (or ineffective) each would be, the point is still this – producers need to begin looking at other options besides just MCOOL. As has been stated, if producers desire a level playing field that is not dominated by the Big Four, then MCOOL is a wonderful option. However, as shown, it’s not truly viable at this point, as various groups oppose it, and under the current political climate, the odds of it passing Congress are not good. So in the meantime, there is a problem that needs addressing, and these suggestions are simply that, suggestions. Suggestions to spark conversation and get beef producers thinking about how best to save their industry from those who simply see profit margins and

¹⁸⁸ *GIPSA Rules Will Help Reverse Cattle Industry Decline*, *supra* note 177.

¹⁸⁹ Alan Newport, *Senate Bill Would Require 50% Cash Cattle Sales*, BEEF MAG. (May 14, 2020), <https://www.beefmagazine.com/legislative/senate-bill-would-require-50-cash-cattle-sales>.

¹⁹⁰ Press Release, Chuck Grassley, Senator, *Grassley, Colleagues Introduce Bipartisan Bill to Increase Transparency in Cattle Market*, (Mar. 24, 2021), <https://www.grassley.senate.gov/news/news-releases/grassley-colleagues-introduce-bipartisan-bill-to-increase-transparency-in-cattle-market>.

¹⁹¹ S. 949, 117th Cong. § 1(4)(A)(ii) (2021).

spreadsheets. To get producers thinking about how to preserve their industry and the western legacy for those to come.

V. CONCLUSION

*“So when you see the cowboy, he’s not ragged by his choice
He never meant to bow them legs or put that gravel in his voice.
He’s just chasin’ what he really loves and what’s burnin’ in his
soul
And wishin’ to God that he’d been born a hundred years ago,
Still singin’ Strawberry Roan and Little Joe.”*¹⁹²

Omaha. Dodge City. Abilene. Denver. Fort Worth. All five of these American cities have one thing in common. Like Kansas City, all five were founded as “Cowtowns.” After the American Civil War ended in 1865, there was a shortage of beef in the ever industrializing northern states, and millions of head of cattle in the western plains of the country that needed to get to those markets.¹⁹³ Accordingly, the Chisolm Trail became a hotbed of cattle being trailed from Texas and Oklahoma to shipping yards in places like Kansas City or Dodge City, which was affectionately dubbed “Queen of the Cowtowns.”¹⁹⁴ These Cowtowns were where the cattle coming off the trail were sold to cash bidders, and railed to packing houses back east. The success of these Cowtowns, and the competitive markets of the cash bidders for cattle, gave rise to some of the most iconic ranches and heroes of the day.

Those days are long gone. The giant shipping yards and stockyards of Kansas City and Denver are no more, but cattle ranching in the United States is still hanging on, along with the cowboy spirit that it embodies. In fact, as of 2017, there were 882,692 total cattle and calve operations in the United States¹⁹⁵ the vast majority of which (96%) are family-owned or individually operated.¹⁹⁶ However, this industry, and its way of life is being threatened of extinction alongside those early Cowtown stockyards

¹⁹² GARTH BROOKS, *The Cowboy Song, on IN PIECES*, (Liberty Records 1993).

¹⁹³ Litwin, *supra* note 168.

¹⁹⁴ *Cowtowns*, KANSAPEDIA, KAN. HIST. SOC’Y, <https://www.kshs.org/kansapedia/cowtowns/15598> (Feb. 2013).

¹⁹⁵ NAT’L AGRIC. STAT. SERV., U.S. DEP’T OF AGRI., AC-17-A-51, 2017 CENSUS OF AGRICULTURE 19 tbl. 11 (2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/st99_1_0011_0012.pdf.

¹⁹⁶ *Industry Statistics*, NAT’L CATTLEMEN’S BEEF ASS’N, <https://www.ncba.org/beefindustrystatistics.aspx>, (last visited Mar. 10, 2022).

due to the ever-growing monopolistic power of the four, multi-national corporations known as the “Big Four.”

Returning to the interview between Patrick Bet-David and Shad Sullivan, towards the end of the interview Patrick asked Shad the following question:

“PBD: Do you have kids?”

SS: I do.

PBD: Any plans of one day passing this down to your daughter and son?

SS: Absolutely. That’s the goal. That is every rancher’s dream is to be able to pass down this business and the lifestyle. It’s a tradition. It’s something that we love. It brings a lot of hardship, but it brings a lot of love to the heart to. There’s a lot of rewarding experiences in this life, and I shouldn’t say it isn’t about the money. Because we have to be able to feed the world at a profit, we can’t do it at a loss. And in order to send that dream on down the road, we have to be successful. Because we do want to hand down that legacy, that’s what it’s all about...we were proud to be multi-generational operators, but at this point, it aint looking like it.... at some point you have to have a win.”¹⁹⁷

That tradition, and love of a way of life that Mr. Sullivan talks about is on the verge of extinction. There truly is a battle between those who love that tradition and way of life and those who simply see profit and cold, hard numbers. The American rancher and cattleman needs a win, otherwise, the industry is looking at losing many of its producers in the coming years, according to Mr. Sullivan. While the Big Four continue their march towards consolidation, groups such as R-CALF USA are attempting to do something about it, and slow that march, or halt it. By looking to the options presented in this paper, and considering the U.S. CattleTrace/VCOOL compromise proposed herein, perhaps the American Rancher will not go the way of the Kansas City Stockyards and the Cowtowns of yesteryear.

¹⁹⁷ Valuetainment, *supra* note 33, at 27:30 – 28:40.

Plantain Cultivation in Puerto Rico: Its Inclusion in the National Crop Table of the United States Department of Agriculture's Farm Service Agency, and its Loss Compensation in Disaster Programs.

Javier A. Rivera-Aquino, Esq.*
April 11th, 2022**

Abstract

If justice is to provide each person what they deserve, it seems plantain producers in Puerto Rico did not relish a just compensation for their farm losses after Hurricane Maria in 2017. The main culprit? Stale data. Farm Service Agency's (FSA) Wildfire and Hurricanes Indemnity Program (WHIP) utilized plantain production data under the National Crop Table (NCT) 2017, which seemingly did not reflect up-to-date yield averages of Puerto Rico's plantain farmers at the time of Hurricane Maria. According to the University of Puerto Rico (UPR), one acre of plantains, in the highlands, where no irrigation is utilized, averages a yield of 30,000 fruits. Based on NCT data, the County Expected Yield (CEY) for non-irrigated plantains in 2017, is 19,142 fruits per acre. UPR's averaged yields of 42,075 fruits for the coastal, semi-arid plains of Puerto Rico, where irrigation is more often used, whereas the NCT data, reflects an equivalency of 25,714 fruits. Plantain CEYs have been the same since 2013, for all counties in Puerto Rico, disregarding improvements in higher yielding clonal varieties and plant health protection, as well as plant density. Because the NCT data is used to determine loss compensation under Standing Disaster Assistance Programs like the Noninsured Crop Assistance Program (NAP), and *Ad Hoc* Payments such as WHIP, as less plantain fruits per acre were accounted for in FSA's dataset, plantain farmers received inadequate compensation. To claim higher compensation, plantain farmers will have to prove in administrative appeal, by

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** A first draft version was written on February 22nd, 2021; it was written in Spanish, more focused on the economic impact, without entering legal and policy considerations. An English version was written on October 17, 2021.

preponderance of the evidence, that the agency erred applying its own rules. They will have to overcome jurisdictional matters as well as the appealability of rules of general applicability. Funding considerations also apply. The data contained on the NCT will have major impact on FSA decisions in the future. A less than adequate compensation for plantain losses is likely to occur again if the data is not accurately maintained. Puerto Rico is situated in a hurricane alley, and plantains are very susceptible to wind damage. It is in the best interest of plantains farmers to verify that the information contained in the NCT is current and accurate, to avoid less than adequate compensations in the future. The objective of this paper is to raise awareness so that farmers can be better prepared and more involved in FSA decision making, and know their legal options, to ensure better program delivery.

I. Introduction

On September 20th, 2017, Hurricane María struck Puerto Rico as a Category 4 hurricane, borderline Category 5. With sustained winds of over 155 mph and gusts of wind exceeding 180 mph, this event had catastrophic results throughout Puerto Rico, particularly on its agriculture. This was one of many natural disasters experienced in the United States (U.S.) during that year.

It is known that farms are quite susceptible to natural disasters, not only affecting the livelihoods of farmers, but compromising food security as well, and because of it, the Federal Government provided funding to assist farmers overcome the losses inflicted by these natural disasters in the form of crop-loss compensation and recover as soon as possible. These compensations are often based on historical production and sales data provided by farmers to government institutions, or by regional production and sales historic averages kept by these institutions. If data is accurate and up-to-date, compensations will fairly reflect the losses experienced by farmers. Instead, if production and sales data is not properly kept, overpayments or underpayments are likely to occur. When the first occurs, taxpayers' money is expended unjustifiably. If the latter occurs, the purpose of disaster relief programs is defeated as farmers will not fully recover from their losses.

In this article, the second scenario is analyzed from the perspective of a staple crop, plantains, grown mostly by historically underserved farmers in the unincorporated U.S. territory of Puerto Rico. There is data that supports that, production and sales averages kept by the Federal government did not reflect up-to-date averages. This article looks in depth the effect FSA's official data had on the disaster loss compensations to plantain producers, explores the legal

remedies available to these farmers, and proposes a call to action to ensure proper policy execution.

II. Plantain Cultivation in P.R.

It can be argued that, within the U.S., commercially grown plantain mostly occurs in Puerto Rico,¹ as it is a tropical cultivar, widely used in many Puerto Rican dishes. Plantain cultivation was the most important crop in Puerto Rico.² According to the 2017 Agricultural Census,³ there were 2,035 farms dedicated to plantain cultivation, with 10,315 acres (10,624 “cuerdas”)⁴ in production, with an estimated value of \$42,271,955.⁵ This figure reflects a significant decrease if compared to the 2012 data: 4,737 plantain farms; 22,060 acres (22,719 “cuerdas”); at a value of \$80,505,103.⁶ This reduction in production is mainly due to the passage of Hurricane María in 2017.

Plantain (*musa* spp.) cultivation can be produced throughout all of Puerto Rico. Traditionally its cultivation is divided into two zones: Highlands or Humid areas; and Semiarid, also referred to as Coastal.⁷ This crop can be cultivated with irrigation (usually in semiarid or coastal areas) or without irrigation (usually in the highlands, where rainfall is evenly distributed throughout the year). One plant bears a “bunch” or “raceme” with several fruiting “hands.”⁸

In Puerto Rico, the following plantain varieties are found: a), Maricongo, which can produce between 32 and 45 fruits per bunch; b) Dwarf (or Common Dwarf) which can average 25 to 40 fruits; (c) Hartón, with an average of 15 to 25 fruits; d) Super Plátano, which

¹ A quick search of this crop on USDA’s National Agricultural Statistics Service only showed results for this cultivar in Puerto Rico.

² See Mildred Cortés & Manuel Díaz, *Gastos e ingresos proyectados para la producción de una cuerda de plátanos con una densidad de 1,100 plantas en la zona semiárida de Puerto Rico 2017-2018* [Projected Expenses and Income for the Production of a ‘Cuerda’ of plantains with a Density of 1,100 Plants in the Semi-Arid Zone of Puerto Rico 2017-2018] (n.d.), available at <https://www.mercadeoagricolapr.com/wp-content/uploads/2019/11/platano-llano-.pdf>.

³ Prepared by the USDA National Agricultural Statistics Service (NASS), issued in 2020.

⁴ One (1) “cuerda” equals 0.971 acres.

⁵ NAT’L AGRIC. STAT. SERV., U.S. DEP’T OF AGRIC., AC-17-A-52, 2017 *Census of Agriculture: Puerto Rico (2018): Island and Regional Data 48* (2020).

⁶ *Id.* at 19 tbl. 15.

⁷ Cortés & Díaz, *supra* note 4.

⁸ OECD (2010), *Safety Assessment of Transgenic Organisms: OECD Consensus Documents: Volume 4*, OECD Publishing.

by pruning inferior fruits, can average 58 to 60 fruits per raceme.⁹ Over the past ten (10) years, high-yielding varieties have been selected and cloned, producing a greater number of fruits per plant.¹⁰ According to the University of Puerto Rico (UPR), planting densities can range from 850 Plantain plants per “cuerda” (825 plants per acre) in the Highlands to 1,100 plants per “cuerda” (1,068 plants per acre) in the Coastal plains, and sales should be \$9,000.50 with a net income per “cuerda” approximates \$5,114.68, and \$12,622.50 and a net income should be \$8,867.31 respectively.¹¹

Plantain is a versatile product; it can be consumed green or ripe, and it is suitable for either fresh consumption, or for processing. The Puerto Rico Department of Agriculture (PRDA) estimates the *per capita* consumption of plantains in Puerto Rico at 50.47 pounds.¹² A phytosanitary ban¹³ limits the entry of fresh produce with skin into Puerto Rico, to prevent the entry of pests.¹⁴ The market for processed plantains seems to have taken surge, most products being imported (presumably from South and or Central America), except for plantain chips.¹⁵ Vertical integration (farming-manufacturing or farming-distribution) is limited. Roadside vendors, supermarkets, and restaurants, as well as farmers markets and school cafeterias, are

⁹ Manuel Díaz Rivera, *Manual práctico para el Cultivo Sustentable de Plátanos* [*Practice Manual for the Sustainable Cultivation of Plantains*] 8-9 (1997).

¹⁰ See Departamento de Agricultura de Puerto Rico [Department of Agriculture of Puerto Rico], *Orden Administrativa 2010-05* [*Administrative Order 2010-05*]. See also Gerardo E. Alvarado León, *Aceleran con tecnología el cultivo de plátanos* [*Technology Accelerates Cultivation of Plantains*], PRESS READER (Feb. 2, 2019), <https://www.pressreader.com/puerto-rico/el-nuevo-dia/20190202/281492162554032>.

¹¹ Mildred Cortés & Manuel Díaz, *U.P.R., Presupuesto Modelo: Plátano en la Altura (1 cuerda)* [*Model Budget: Plantain in Highlands*] (2022); CORTÉS & DÍAZ, *supra* note 4.

¹² Mildred Cortés, U.P.R., *Empresas Agrícolas de Puerto Rico: Potencial de Desarrollo* [*Agricultural Companies of Puerto Rico: Development Potential*] 19, available at https://www.uprm.edu/tamuk/wp-content/uploads/sites/299/2019/07/Mildred_Cortes_empresas_agricolas_reduced-1.pdf.

¹³ Mildred Cortés & Leticia Gayol, *Cambio en las preferencias del consumidor de plátano en Puerto Rico, 2003-2008* [*Change in Consumer Preference for Plantain in Puerto Rico, 2003-2008*], 96 J. AGRIC. U. P.R. 107, 109 (2012).

¹⁴ Ada N. Avlarado Ortiz & Manuel Díaz, *Guía Práctica de Plagas y Enfermedades en Plátano y Guineo* [*Practical Guide to Pests and Diseases in Plantains and Bananas*] AGRIC. Extension Serv., Coll. Of Agric. Scis., U. PR., 13-14, 17-18 (2007), available at <https://academic.uprm.edu/aalvarado/HTMLObj-119/PyG-PDF.pdf>.

¹⁵ Cortés & Gayol, *supra* note 17, at 110.

the main points of sale of this product.¹⁶ Plantain plantations are very susceptible to hurricanes.¹⁷

III. Farm Service Agency and the National Table of Crops

The U.S. Department of Agriculture's (USDA) Farm Service Agency (FSA) administers countless programs to assist farmers.¹⁸ Most prominently, FSA handles those programs aimed at providing financing, as lender of last resort, to otherwise underserved farmers, as well as disaster assistance programs. As part of its operation, the Agency adopted the concept of "national crops" in its Non-Insured

Item	Crop name (English)	Crop name (Spanish)	Crop code	Intended use	Practice code	Acresage reporting date	Time to begin harvest	Crop duration in the field	Planting period (See footnote 1)	Harvest period	Planting distance	Plants/Acre	Expected Yield/Acre	Units	Unharvest factor	Price
43	Nursery, Field	Viveros, Campo	1010 FLD	--	--	5/31/2017	--	--	All year	All year	--	--	--	--	0.75	--
44	Onion	Quimbombó	0142	FH	I	3/31/2019	60-70	--	See Exhibit 1	All year	2.5' x 1'	17,424	20.59	Cwt	0.90	78.58
45	Onion	Cebolla	0142 WYT	FH	N	3/31/2019	110 days	155 days	November-January	December-June	3' x 5" (5)	414,857	154	Cwt	0.90	25.49
46	Onion	Cebolla	0142 WYT	FH	I	3/31/2019	110 days	155 days	November-January	December-June	3' x 5" (6)	414,857	206	Cwt	0.90	25.49
47	Orange, Mandarin	China Mandarina	0025 MEND	FH	N	3/31/2019	--	Perennial	--	See Exhibit 1	16' x 16'	170	251	Box (45 lb)	0.70	12.15
48	Orange, Navel	China Navel	0033 NAV	FH	N	3/31/2019	--	Perennial	--	See Exhibit 1	16' x 16'	170	137	Box (45 lb)	0.70	10.14
49	Orange, Sweet (PK)	China Puerto Rico	0023 SWT	FH	N	3/31/2019	--	Perennial	--	See Exhibit 1	16' x 16'	170	137	Box (45 lb)	0.70	10.14
50	Orange, Valencia	China Valencia	0023 VAL	FH	N	3/31/2019	--	Perennial	--	See Exhibit 1	16' x 16'	170	137	Box (45 lb)	0.70	10.14
51	Papaya, Red	Papaya Roja	0181 RED	FH	N	3/31/2019	8 months	2 years	All year	All year	4' x 10'	1,089	206	Cwt	0.80	32.87
52	Papaya, Yellow	Papaya Amarilla	0181 YEL	FH	N	3/31/2019	8 months	2 years	All year	All year	4' x 10'	1,089	185	Cwt	0.80	32.87
53	Passion Fruit	Pacha	0502	FH	N	3/31/2019	--	--	--	June-December	4' x 12'	907	206	Cwt	0.80	40.00
54	Peas-Pigeon	Gardolón	0067 PIG	FH	N	3/31/2019	120 days	330 days	--	--	3' x 1'	14,520	103	Cwt	0.90	154.64
55	Pepper (GRN)	Pimiento Morón	0083 GRN	FH	I	3/31/2019	100 days (D) 70 days (T)	155 days (D) 125 days (T)	All year	All year	36" x 12"	14,520	154	Cwt	0.90	92.67
56	Pepper (PIM)	Pimiento	0083 PIM	FH	N	3/31/2019	90 days (D) 60 days (T)	135 days (D) 102 days (T)	All year	All year	36" x 12"	14,520	103	Cwt	0.90	56.93
57	Pepper (PIM)	Pimiento	0083 PIM	FH	I	3/31/2019	90 days (D) 60 days (T)	132 days (D) 102 days (T)	All year	All year	36" x 12"	14,520	154	Cwt	0.90	59.43
58	Pepper, Sweet Cherry	Ají dulce	0083 SWC	FH	N	3/31/2019	90 days	5-8 months	November-February	April-September	36" x 24"	7,260	51	Cwt	0.90	133.53
59	Pepper, Sweet Cherry	Ají dulce	0083 SWC	FH	I	3/31/2019	100 days	5-8 months	All year	All year	36" x 24"	7,260	103	Cwt	0.90	133.53
60	Pineapple	Piña	0185 ABA	FH	N	3/31/2019	--	--	All Year	All year	1.5' x 3.5'	8,297	14.42	Ton	0.73	1060.02
61	Plantain, Common	Plátano Común	0186 COM	FH	N	3/31/2019	See Footnote 7	See Footnote 7	All year	All year	6' x 7"	1,037	134	Cwt	0.92	52.56
62	Plantain, Maricaoage	Plátano Maricaoage	0186 MAR	FH	N	3/31/2019	See Footnote 7	See Footnote 7	All year	All year	6' x 7"	1,037	134	Cwt	0.92	52.56
63	Plantain, Maricaoage	Plátano Maricaoage	0186 MAR	FH	I	3/31/2019	See Footnote 7	See Footnote 7	All year	All year	6' x 7"	1,037	180	Cwt	0.92	52.56
64	Pumpkin	Calabaza	0147	FH	N	3/31/2019	120 days (D)	165 days (D)	All year	All year	6' x 6'	1,210	134	Cwt	0.90	20.96

Figure 1: NCT 2018

Crop Disaster Assistance Program (NAP)¹⁹ regulations. This concept refers to types or cultivars that have little price differences, for their most predominant use. The planting area and production for the crop group is summarized in a table called the National Crop Table ("NCT"), like the one seen on Figure 1, which is used to calculate

¹⁶ Based on observations by the author.

¹⁷ Gary L. Miller & Ariel E. Lugo, *Guide to the Ecological Systems of Puerto Rico*, FOREST SERV., U.S. DEP'T OF AGRIC., IITF-GTR-35, 137 (2009).

¹⁸ For statutes authorizing activities performed by FSA, see *Authorizing Statutes*, FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., <https://www.fsa.usda.gov/programs-and-services/laws-and-regulations/authorizing-statutes/index> (last visited Apr. 29, 2022).

¹⁹ 1-NAP (REV. 2), *Noninsured Crop Disaster Assistance Program for 2015 and Subsequent Years*, ¶200 FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., (2022) [Hereinafter 1-NAP].

losses.²⁰ This table often collects the following information: planting periods; crop payment code; crop payment code; crop types or varieties (E.g., Maricongo or Common Dwarf plantains); intended use; secondary use; county expected yield ("CEY"); average market price damage factor; unharvested factor (UH); and units of measure; among other.²¹

FSA is required to maintain its county records based on the best available information for yield averages per crop, per land area, and average prices.²² An Olympic average should be used to set yields and prices. To calculate the yield or price for any given year, data from the five (5) most recent crop years must be obtained, eliminating the highest and lowest values, averaging the remaining three (3).²³ If data is not available, the rules provide alternate methods of calculation that must be carefully followed.²⁴ County Committees ("CoC") as well as State Committees ("StC") must maintain minutes and documentation to evidence the process used to obtain such averages.²⁵ This data is used to award compensation under the NAP, and recently, under the Wildfires and Hurricanes Indemnity Program (WHIP).²⁶

IV. The Wildfires and Hurricanes Indemnity Program

The Wildfire and Hurricanes Indemnity Program (WHIP) was adopted by the U.S. Congress to compensate farmers for losses suffered due to natural disasters experienced in 2017.²⁷ FSA was ordered to administer the program. To do so, proper regulation²⁸ was adopted and the corresponding procedure was implemented under the WHIP Handbook,²⁹ short references as 1-WHIP. To determine

²⁰ For example, see the 2018 NCT published: Javier. Rivera-Aquino, *Dear Farmer, Do You Know How Your Crops Are Valued for Compensation After a Natural Disaster?*, JAVIER A. RIVERA-AQUINO BLOG, app. D, <https://javierriveraaquino.com/dear-farmer-do-you-know-how-your-crops-are-valued-for-compensation-after-a-natural-disaster/> (last visited Apr. 29, 2022).

²¹ For an example of the data gathered by FSA, see *id.*

²² 1-NAP, *supra* note 23, ¶ 276(B) (indicates that the expected performance by the county will be based on the best available information provided by any of the following sources: average APH per year, the Department of Agriculture, county committee knowledge, local markets, NASS, NIFA, RMA, Rural Development, as well as other reliable sources such as universities).

²³ See *id.* ¶ 276(C), ¶ 278(D).

²⁴ *Id.* ¶ 278(D).

²⁵ *Id.* ¶ 280.

²⁶ Agricultural Disaster Indemnity Programs, 7 C.F.R. §§ 760.1500—1517.

²⁷ 7 C.F.R. § 760.1500.

²⁸ 2017 Wildfires and Hurricanes Indemnity Program, 83 Fed. Reg. 33,795 (July 18, 2018) (codified at 7 C.F.R. pt. 760).

²⁹ See generally FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., *1-WHIP, Wildfires & Hurricanes Indemnity. Program (2018)* [hereinafter 1-WHIP].

losses, the agency had the responsibility of establishing expected values based on an average price set by the system, times the expected yield for the county per cultivar, times the producers crop acres. A WHIP factor, any harvested portions, and crop insurance payments would be deducted to finally determine a WHIP payment.³⁰ In jurisdictions of the U.S., loss determinations considered historical yields reported by each farmer. In Puerto Rico, a special provision was adopted for WHIP indicating that FSA could only use the expected yield per crop for each county ("CEY") and average prices found to the 2017 National Crop Table (NCT), seen on Figure 2.³¹ This blanket provision was adopted to "ensure disaster assistance" in a "timely and efficient manner."³²

PR Notice WHIP-1 Exhibit 1

2017 Puerto Rico National Crop Table - CDY												
County	Crop Name	Crop Code	Crop Type	Intended Use	Practice	Unit of Measure (UOM)	Pounds per UOM	NAP CEY	2017 County Disaster Yield	2017 CDY Percentage of CEY	NAP Market Price	UH Factor
Mayaguez	PINEAPPLE	185	ABA	FH	N	TON		14.42	2.163	15%	942.3467	0.73
Ponce	PINEAPPLE	185	ABA	FH	N	TON		14.42	2.163	15%	942.3467	0.73
Utua	PINEAPPLE	185	ABA	FH	N	TON		14.42	2.163	15%	942.3467	0.73
Adjuntas	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Adjuntas	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Arecibo	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Arecibo	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Barranquitas	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Barranquitas	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Caguas	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Caguas	PLANTAIN	186	MAR	FH	I	CWT		130	0	0%	49.1167	0.92
Caguas	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Corozal	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Corozal	PLANTAIN	186	MAR	FH	I	CWT		180	0	0%	49.1167	0.92
Corozal	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Lares	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Lares	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Mayaguez	PLANTAIN	186	COM	FH	I	CWT		180	0	0%	49.1167	0.92
Mayaguez	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Mayaguez	PLANTAIN	186	MAR	FH	I	CWT		180	0	0%	49.1167	0.92
Mayaguez	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Ponce	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Ponce	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Utua	PLANTAIN	186	COM	FH	N	CWT		134	0	0%	49.1167	0.92
Utua	PLANTAIN	186	MAR	FH	N	CWT		134	0	0%	49.1167	0.92
Adjuntas	POTATOES SWEET	156	WHT	FH	I	CWT		150	0	0%	37.2767	0.75
Adjuntas	POTATOES SWEET	156	WHT	FH	N	CWT		82	0	0%	37.2767	0.75

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Figure 2: 2017 NCT

³⁰ See *id.* ¶ 210(A-F).

³¹ *Id.* ¶ 191(B). The 2017 NCT can be found at Rivera-Aquino, *supra* note 24, app. A, at 16.

³² 1-WHIP, *supra* note 33, ¶ 191(A).

V. The Effect of the NCT on WHIP's Plantain Compensation in Puerto Rico

Since the data on the NCT was used to compensate the losses caused by Hurricane Maria, a deep dive at its content is needed to understand what was compensated and how. For the purposes of WHIP compensation, only the loss of plantain harvest or yield was considered; plantation was determined not eligible.³³ This contrasts with the payment of farm insurance offered by the Puerto Rico Crop Insurance Corporation (CSA for its Spanish acronym), which only considers compensation for plantation losses.³⁴

The NCT used for WHIP payments was adopted through the "*PR Notice WHIP-1*;" plantains are found on page 16.³⁵ The code for plantains is 186 and only includes the Maricongo (Mar) and Common Dwarf (Com) varieties. Under the "intended use" column, the nomenclature adopted is for fresh use ("FH"). In the "practice" column, there are irrigated ("I") plantains or non-irrigated ("N"). The alleged source of data, the PRDA, does not measure plantain farm output as either irrigated or not irrigated. The UPR, as said before, differentiates plantains between Highlands and Semiarid zones. The unit of measurement used is the "Hundredweight" or "CWT" (in Spanish, "quintales" or "QQ") when typically, in Puerto Rico, the unit used is "per fruit" or "thousands of fruits", almost never in pounds, CWT or kilograms. For example, the PRDA, measures plantains in "thousands of fruits", as it can be seen on the "*Agricultural Gross Income Report*"³⁶ so, does the National Agricultural Statistics Service.³⁷ According to the NCT, the expected average plantain production, for all counties in Puerto Rico, has remained unchanged since 2013, at 180 CWT in irrigated plantations and 134 CWT for plantations without irrigation.³⁸ This crop does not reflect a county disaster yield (CDY). The average price set for 2017 is \$49.1167/CWT or \$0.4912 per pound.³⁹ The discount factor for not having incurred in cost of harvesting the crop ("unharvested factor") is 92%.⁴⁰ The "WHIP factor" may vary depending on

³³ *Id.* ¶ 140(B). Notice that in the *PR Notice WHIP-1*, Exhibit 2, found at Rivera-Aquino, *supra* note 24, app. A, enumerates plantations, and plantains is not among them.

³⁴For the 2017-2018 Insurance Program for the Puerto Rico Crop Insurance Corporation, see Rivera-Aquino, *supra* note 24, app. G.

³⁵ *Id.* app. A, at 16.

³⁶ *Id.* app. B, at 2, 7.

³⁷NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC. *supra* note 7, at 19 tbl. 15.

³⁸ See Rivera-Aquino, *supra* note 24, at app. B.

³⁹ *Id.* app. A, at 16. Price per pound was converted CWT dividing by 100.

⁴⁰ *Id.*

whether it was insured; as stated before, CSA does not offer crop insurance for plantain harvest, just plantation.

The NCT for 2018 includes additional values (not publicized in the 2017 NCT) that shed light on the considerations taken by FSA for Plantain crops.⁴¹ Among them: the “planting period”, which for plantain is the entire year; the “planting distances” considered for this cultivar being six (6) feet by seven (7) feet; and, therefore, the “density of plants” per acre considered, for plantains being 1,037 (1,077 plants per “cuerdas”).⁴² The average price of plantains in 2018 was set at \$52.56/CWT or \$0.5256/pound.⁴³ There is also a column indicating the duration in the field, in the case of plantains with a footnote referencing information provided by the UPR in 1999.⁴⁴ At the bottom of the 2018 NCT, it also indicates that its data source is the P.R. Gross Agricultural Income Report provided by the PRDA’s Agricultural Statistics Division in fiscal year (FY) 2013/2014.⁴⁵ The 2018 NCT was adopted in November 2018. From a request under the Freedom of Information Act (FOIA) made to FSA, pursuant to what conversion factors were utilized for plantains, a “PR Notice CM-2” document was released FSA uses a conversion factor of 1,000 plantains equivalent to seven hundred (700) pounds.⁴⁶

If the data for the NCT comes from the PRDA’s Agricultural Statistics Service, why does FSA convert the unit of measuring of plantains instead of utilizing the same unit from their source? Where does the conversion factor come from? How accurate is it? These are all questions that to this date are still without an answer.

⁴¹ See *id.* app. D.

⁴² *Id.* app. D, at 3.

⁴³ *Id.*

⁴⁴ Javier. Rivera-Aquino, *Dear Farmer, Do You Know How Your Crops Are Valued for Compensation After a Natural Disaster?*, JAVIER A. RIVERA-AQUINO BLOG, app. D, at 4 n.7, <https://javierriveraaquino.com/dear-farmer-do-you-know-how-your-crops-are-valued-for-compensation-after-a-natural-disaster/> (last visited Apr. 29, 2022).

⁴⁵ *Id.* app. D, at 4. According to source referenced in the 2018 NCT, data was obtained from the PR Agricultural Gross Income as of November 29, 2016, the final data for the 2013/2014 and the preliminary 2014/2015 data reported. Per the author’s research, the following database reported for the Agricultural Gross Income, containing corrected information for 2013/2014 and preliminary data for 2014/2015 through 2016/2017 was not available until November 4, 2019. *Id.* app. B, at 1-5. Agricultural Gross Income containing preliminary data for 2016/2017 through 2018/2019, was not publicized until April 27, 2021. *Id.* app. B, at 6-10.

⁴⁶ On August 12, 2020, the author requested certain information on conversion factors for agricultural crops used by FSA into P.R., under the Freedom of Information Act of 1996 (FOIA). For the conversion factor of plantains, see *id.* app. E, at 10, 23. The document makes no reference to the source from which this conversion factor was obtained.

Seemingly, PRDA and FSA failed to share data between 2014 and 2019. If PRDA fails to report statistical data to FSA, what other sources does FSA have to supplement up-to-date farming production information? Knowing the answer to these questions is of utmost importance, so farmers and authorities can standardize production reports and obtain reliable data. Additional (FOIA) requirements were made to FSA to obtain historical NCT's. The following information for plantains was gathered:

Table 1.1: Average yield (in CWT) per acre and average price for Plantain cultivation according to FSA-NCT.⁴⁷

Plantains	2012	2013	2014	2015	2016	2017	2018
Average Yield	130 N 175 I	134 N 180 I	134 N 180 I	134 N 180 I	134 N 180 I	134 N 180 I	134 N 180 I
Average Price	\$38.3 667	\$42.2 3	\$40.5 733	\$52.5 6	\$52.5 6	\$49.1 167	\$52.5 6

N = non-irrigated, I = irrigated.

Since a reference is made to the PRDA's Gross Agricultural Income Report⁴⁸, the Plantain data used in these reports and the averages resulting from such data are summarized below:

Table 1.2: Annual Plantain Production according to the PRDA Gross Agricultural Income Report.⁴⁹

Plantains Average Price	2010	2011	2012	2013	2014	2015	2016	2017
-Thousands of Fruits	\$26 9.1 2	\$29 5.6	\$36 6.5	\$37 1.4	\$36 7.89	\$28 3.1	\$33 0.6	\$30 9.8
-Per Fruit	\$0. 269 1	\$0.2 956	\$0.3 665	\$0.3 714	\$0.3 679	\$0.2 831	\$0.3 306	\$0.3 098
Production								

⁴⁷ See Javier. A. Rivera-Aquino, *Dear Farmer, Do You Know How Your Crops Are Valued for Compensation After a Natural Disaster?*, JAVIER A. RIVERA-AQUINO BLOG, app. C, at 16, 41, 57, 67, 73, 84, 96, <https://javierriveraaquino.com/dear-farmer-do-you-know-how-your-crops-are-valued-for-compensation-after-a-natural-disaster/> (last visited Apr. 29, 2022).

⁴⁸ To access this report, see *id.* at app. B.

⁴⁹ Data compiled from the revised figures for the Agricultural Gross Income reports dated 11/29/2016 and 4/11/2019. See *id.* app. B, at 2, 7.

-Thousands	256,913	154,643	117,700	119,404	209,012	255,818	179,544	245,884
-Acreage	N/A	N/A	N/A	N/A	N/A	8,857.64	7,104	9,125.86
-Average Yield (in Thousands)/ "Cuerda" ⁵⁰ (Acre)	N/A	N/A	N/A	N/A	N/A	28.81 (27.97)	25.27 (24.53)	26.94 (26.16)

Another source of information on plantains is the Agricultural Census conducted by the USDA's National Agricultural Statistics Service, which is typically conducted every five (5) years, although the most recent was delayed because of Hurricane María. This data was obtained in 2018 and was not released until 2020.

Table 1.3: Average Production Based on Data from the NASS Agricultural Census.⁵¹

Plantain – Harvested	2007	2012	2017
	9,437,462	11,955,808	6,273,622
Units (fruits)	249,948,000	405,256,000	169,073,000
Average Fruit/Plant ⁵²	26.48	33.9	26.95
Average Plants/ "Cuerda" (Acre) ⁵³	916.31 (889)	876.82 (850)	974.49 (946)

Additionally, there is data from the UPR, specifically the model budget for plantains, which estimates average yields and prices for the product.⁵⁴

⁵⁰ *Id.* This figure, results from the division of thousands produced between the "cuerdas" in production.

⁵¹ NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., AC-12-A-52, *2012 Census of Agriculture: Puerto Rico: Island and Municipio Data* 133 tbl. 46 (2014); NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC. *supra* note 7, at 19 tbl. 15.

⁵² Dr. Alexandra Gregory, from the Department of Agricultural Economics of the UPR in Mayagüez, assisted in the computation of these data, particularly in the estimation of the averages of "plants/acre" and "fruits/plant."

⁵³ *Id.*

⁵⁴ See Rivera-Aquino, *supra* note 24, app. F.

Table 1.4: Average Production Based on Data from the UPR Plantain Model Budget.⁵⁵

Plantain – Harvested	Highland/H umid	Coastal/Sem iarid	Average
Average Fruits/ “Cuerda” (Acre)	30,000 ⁵⁶ (29,130)	42,075 ⁵⁷ (40,854)	36,037.5 (34,992)
Average Plants/ “Cuerda” (Acre)	850 ⁵⁸ (825)	1,100 ⁵⁹ (1,068)	975
Average Fruit/Plant ⁶⁰	35.29	38.25	36.77

From the analysis and associations of these data sets, important assumptions and pieces of information can be obtained. A contrast is here performed, between the "NCT" and other sources of information, to determine whether the compensation was fair and how in future instances it can improve. Three areas will be subject of review: 1) Plant Density; 2) Average Yields; and 3) Average Price.

A. Acreage Density

This element is of vital relevance since FSA must reflect accurately the data average per county. According to the UPR, farmers in counties that are predominantly coastal or semiarid areas, are likely to use irrigation, and have greater plant density than those in the highlands, likely not to use irrigation.⁶¹ For example, a farmer from the highlands who, plants ten (10) “cuerdas” (9.71 acres) of plantains at the rate of 850 plants per “cuerdas,” following UPR's recommendation, will have a total of 8,500 plants in total. However, if the farmer reports total plants, FSA will divide that number, 8,500, by the density by 1037 plants per “acre,” as stated on the NCT, for the acreage determination, which will result in 8.21 acres: one and one half (1.5) acres less to which the WHIP Payment will not be applied.

⁵⁵ See *id.*

⁵⁶ *Id.* Note “venta de plátanos” or sale of plantains, “millar” or thousands, in the quantity of 30.

⁵⁷ *Id.* Note “venta de plátanos” or sale of plantains, in the quantity of 42,075.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Divide Average fruits per acre by average plants per acre to obtain average fruits per plant.

⁶¹ See CORTÉS & DÍAZ, *supra* note 14, at 2 n.1; Mildred Cortés & Manuel Díaz, *Presupuesto Modelo: Plátano en lo Llano* (1 CUERDA) [Model Budget: Plantain in Plains] n.1 (2022), U. P.R., available at <https://www.mercadeoagricolapr.com/herramientas/presupuestos-modelo/>.

Table 2.1.1: Planting densities for Plantain cultivation according to various sources (UPR/FSA).⁶²

Plants per Acre	UPR	FSA	Difference
Highland	825 ⁶³	1037	212
Semiarid or Coastal	1068 ⁶⁴	1037	-31

According to the 2017 NCT, one non-irrigated acre, as typically occurs in the highlands, produces 134 CWT at a price of \$49.1167, for a value of \$6,581.6378 per acre.⁶⁵ If 1.5 acres of plantains are not considered, \$9,872.46 will not be part of the computation for compensation under WHIP under this scenario. The UPR, is the only source that distinguishes between two different practices in plantain cultivation, clearly stating that the Semiarid areas utilize irrigation whereas such recommendation is not made to farmers in the Humid areas.⁶⁶

Since the data of the 2017 Agricultural Census was not collected until 2018 and was not published until 2020, the Census information available to FSA in 2017 was the 2012 Agricultural Census. NASS data makes no distinction between plantain “cuerdas” with irrigation or without irrigation, nor between highland or coastal areas. Therefore, it is unlikely that this data is being used by FSA. Still, for the sake of dataset comparison, the average density obtained from NASS when compared with the NCT shows a difference of 187 plants per acre.

⁶² See Rivera Aquino, *supra* note 7, app A. Comparison between data from Table 1.4 and the 2017 NCT.

⁶³ 850 plants per “cuerda” are planted in the highlands. CORTÉS & DÍAZ, *supra* note 14, 2 n.1. If multiplied by the equivalence of “cuerdas” to acres, 0.971, results in 825 (825) plants.

⁶⁴ Around 1,100 plants are planted per “cuerda” in the semiarid zone. CORTÉS & DÍAZ, *supra* note 65, at n.1. If multiplied by the equivalence of “cuerdas” to acre, 0.971, results in 1068.

⁶⁵ Rivera-Aquino, *supra* note 24, app. A, at 16.

⁶⁶ CORTÉS & DÍAZ, *supra* note 14; CORTÉS & MANUEL *supra* note 4. Irrigation is a cost for the Semiarid, Coastal plains, whereas it is not recommended for the Highland, Humid regions.

Table 2.1.2: Planting densities for Plantain cultivation according to various sources (NASS/FSA).⁶⁷

Plants per Acre	NASS 2012	FSA	Difference
Highland	850 ⁶⁸	1037	187
Semiarid or Coastal		1037	187

Unfortunately, there is not enough data from the PRDA to determine the average density of plants per acre. So, where exactly does the NCT plant density comes from? How the dataset is built is not fully understood, but it seems to mix and match (or mismatch) several sources at once.

B. Acreage Yield

In the case of Puerto Rico, instead of taking the individual data from each farmer,⁶⁹ the yield averages of each county or region (CEY) from the NCT were utilized.⁷⁰ The weight of this factor in the calculation of compensations under programs such as the "NAP" or the WHIP is substantial.

As stated before, data from both PRDA and from NASS measure Plantain production in "thousands of fruits," while FSA uses CWT as a unit of measurement, based on a conversion factor that indicates that, for every 1,000 Plantain fruits, a weight of seven hundred (700) pounds will be presumed.⁷¹ In other words, each Plantain must weigh 0.7 lbs. or 11.2 ounces.⁷²

⁶⁷ Rivera-Aquino, *supra* note 7, app. A, at 16. A comparison between data from Table 1.3 and Appendix A.

⁶⁸ According to USDA/NASS reflects 876 plants per "cuerda", which adjusted to acres ("x 0.971") result in eight hundred and fifty (850) plants. NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC. *supra* note 7, at 105.

⁶⁹ FSA encourages farmers to yearly file a Report of Acreage, to maintain historical records of production. See FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., FSA-578, REPORT OF ACREAGE (2003), available at https://forms.sc.egov.usda.gov/efcommon/eFileServices/eFormsAdmin/FSA0578MANUAL_031015V01.pdf.

⁷⁰ According to the Noninsured Crop Disaster Assistance Program Handbook, CEY should reflect the average production potential in the county by practice and intended use. 1-NAP, *supra* note 23, ¶ 276.

⁷¹ This information was obtained through a FOIA, and appears published Rivera-Aquino, *supra* note 24, app. E, at 10.

⁷² The average weight per Plantain fruit with sigatoka treatment was 320.8 grams, which equals to 11.28 ounces. Note that the average fruit per bunch (therefore, per plant) of Plantain variety with treatment for Sigatoka was forty-seven (47) fruits. In

A second element that must be carefully analyzed, is that since 2013, the average yields per acre have been the same, without considering variations in rainfall, pest effects, etc., which tend to influence crop yields. If the source of data has been the PRDA, as claimed by FSA, productions between 2010 and 2014 should reflect variations.

i. Pounds per Plant (Cluster)

By performing a conversion from Hundredweight to pounds, the dividing the pounds by the total number of plants the NCT says exist in an acre, the weight per plant can be determined.

Table 2.2.1: Equivalence of Plantain Weight per Plant (Bunch).⁷³

NCT	Irrigated Acre	No Irrigated Acre
Plants	1,037	1,037
Hundredweight	180	134
Pounds	18,000	13,400
Pounds per plant	17.35	12.92

ii. Plantains per Acre according to "NCT"

If the average production considered by FSA is taken into consideration, against its own conversion factor, an important piece of data can be obtained on the average fruits per acre.

Table 2.2.2: Plantain Fruit Equivalency per Acre.⁷⁴

	Acre (Irrigated)	Acre (Not Irrigated)
Pounds	18,000	13,400
Divided by conversion factor ⁷⁵	0.7	0.7

the case of untreated plants, the average weight per fruit is 229 grams or eight (8) ounces, with thirty-seven (37) fruits per raceme. It is not known whether this is the source of information for establishing the conversion factor, but the coincidence is remarkable. See Agenol González-Vélez, *Behavior of Plantain Clones Maricongo and FHIA -21 Under the Presence of the Black Sigatoka at the Humid Uplands of Puerto Rico*, 98 J. AGRIC. U. P.R. 21, 25 (2014).

⁷³ Using data on the 2017 NCT, converting hundredweight to pounds, then dividing pounds per plant. See Rivera-Aquino, *supra* note 7, app. A.

⁷⁴ *Id.* (according to FSA data found on the 2017 NCT).

⁷⁵ Per FSA's PR Notice CM-2, 1,000 Plantains equals seven hundred (700) pounds, therefore, one plantain equals 0.7 lbs. or 11.2 oz. See González-Vélez, *supra* note 76, at 25.

Fruits per acre	25,714.3	19,142.8
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iii. Plantains per Acre according to UPR, PRDA and NASS compared to "NCT"

The following differences in plantain production per acre between FSA and UPR data, can be inferred considering that in the semiarid or coastal zones, plantain is cultivated with irrigation, and that, in the Highlands, being humid, plantain is cultivated without irrigation.

Table 2.2.3: Contrast between to FSA and UPR Plantain Fruit Production/Sales per acre.⁷⁶

Production per Acre	With irrigation	No irrigation
Fruits per Acre based on FSA Data	25,714.3	19,142.8
Fruits per Acre based on UPR Data	42,075	30,000
Difference	-16,360.7	-10,857.20
x conversion factor	0.7	0.7
Difference in pounds	-11,452.49	-7,600.04
Difference in CWT	-114.52	-76.00
x NCT average price	\$49.1167/QQ	\$49.1167/QQ
Not Considered for Compensation	-\$5,625.08/Acre	-\$3,732.88/Acre

In the case of Semiarid zone with irrigation, there are 11,452 pounds that are not being considered by FSA, when compared with the UPR data; in the case of Highlands without irrigation, 7,600 pounds, not considered, after applying the Agency's conversion factor.⁷⁷ This difference results in a drastic reduction in compensation. If the pounds are converted to hundredweight, and

⁷⁶ Comparison between the 2017 NCT (Rivera-Aquino, *supra* note 24, app. A, at 16) and *Presupuesto Modelo para el Cultivo de Plátano en Zona de Altura de Puerto Rico* (Mildred Cortés & Manuel Díaz, *Gastos e ingresos proyectados para la producción de una cuerda de plátanos con una densidad de 1,000 plantas en la zona de altura húmeda de Puerto Rico* [Projected Expenses Revenues for the Production of a "cuerda" of Plantains with a Density of 1,000 Plants in the Humid Altitude Zone of Puerto Rico] (n.d.), available at <https://www.mercadoagricolapr.com/wp-content/uploads/2019/11/Copy-of-pl%C3%A1tano-altura.pdf>), and, *Presupuesto Modelo para el Cultivo de Plátanos en la Zona Semiárida de Puerto Rico* (CORTÉS & DÍAZ, *supra* note 4).

⁷⁷ In other words, if multiplied by 0.7 for each of the production differences. See Rivera-Aquino, *supra* note 24, app. E.

multiplied by \$49.1167/CWT, the difference reflects \$8,035 in the Semiarid zone with irrigation, or \$3,732.88 in the Highlands, not being compensated.

It is important to bear in mind that in 2018, there were 1,363 plantain farms in Puerto Rico, with 10,624 “cuerdas” (10,315 acres), right after Hurricane Maria.⁷⁸ Although it is difficult to predict how much was not compensated, imagine the impact in dollars if the amounts not considered were compensated. If the least amount on Table 2.2.3 is taken, \$3,732.88 per acre, \$38,504,657.20 were not considered for plantains, assuming the NCT average price is accurate. This amount will be utilized later to estimate WHIP payments not considered.

Since FSA indicates that prior to the hurricane, it only had PRDA data available until 2014, and since then, PRDA’s data was not captured, it is questionable how FSA calculates its Olympic averages, beyond that date. For illustrative purposes, of the years in which the PRDA did reflect acreage data, the year 2017 is chosen to show the differences in fruits per acre.

Table 2.2.4: Contrast between Plantain Fruit Production per acre according to FSA and PRDA 2016 data.⁷⁹

Production per Acre	Semi-arid zone/with irrigation	Highlands/no irrigation
Fruits Based on FSA Data	25,714.3	19,142.8
Fruits Based on PRDA Data	26,160	
Difference	445.7	-7,017.20

Table 2.2.5: Contrast between Plantain Fruit Production per acre according To FSA and NASS 2012 data.⁸⁰

Production per Acre	Semiarid/irrigated zone	Highland/no irrigation
Fruits Based on FSA Data	25,714.3	19,142.8
Fruits according to NASS	29,724 ⁸¹	

⁷⁸ NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC. *supra* note 7, at 19 tbl. 15.

⁷⁹ *See supra*, Table 1.2 & Table 2.2.2.

⁸⁰ *See supra*, Table 1.3 & Table 2.2.2.

⁸¹ It is calculated by multiplying 876.82 “plants” per acre, estimated according to data from the NASS 2012 for Plantains on Table 1.3, by 33.9 fruits per plant. NASS

Difference	-4,009.9	-10,581.2
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Considering the data through NASS, marked differences in production are reflected. About 4,010 fruits per “cuerdas” in zones semiarid with irrigation; 10,581 fruits difference in the Highlands without irrigation. Again, the effect of this difference shows a trend towards reduced disaster loss compensation.⁸²

iv. Plantains per Plant (Raceme) according to FSA

Since data is collected per “thousand units”, meaning “thousand fruits”, by both PRDA and NASS,⁸³ it is important to understand what the average amount of fruits per plant looks like. In the case of FSA, the average number of fruits per plant or raceme using irrigation is just 24.79; without irrigation, the average is 18.46.⁸⁴

Table 2.2.6: Average Fruits per Bunch according to "NCT"⁸⁵

Acre	Irrigated	Not Irrigated
Fruits	25,714.3	19,142.8
÷ Plants/acre ⁸⁶	1,037	1,037
Fruits/Plant	24.79	18.46

data does not distinguish between zones or practices. NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., *supra* note 55, at 10.

⁸² If the pounds are converted to quintals, and multiplied by \$49.1167/QQ, the difference reflects about \$1,969.08 in the semi-arid zone with irrigation or \$5,197.13 in the highlands, which seemingly were not part of the FSA compensation calculation. Rivera-Aquino, *supra* note 24, app. E.

⁸³ Bear in mind that data is collected on the field by PRDA, on a yearly basis, and NASS every five (5) years. There is no known set of data independently gathered by FSA.

⁸⁴ This data was calculated by using Table 2.2.2 and then dividing by the number of plants according to the source (the 2017 Puerto Rico National Crop Table published Rivera-Aquino, *supra* note 24, app. A, at 16) which is 1,037.

⁸⁵ Rivera-Aquino, *supra* note 24, app. A, at 16.

⁸⁶ According to FSA, one acre has a density of 1,037 plants.

FSA’s own PR Notice CM-2⁸⁷, states that one (1) “cuerda” (0.971 acres), has between 800 to 1,000 plants and that there are 40 plantains per bunch (thus per plant) for a total 25,000 plantains per cuerda. The arithmetic in this document is erroneous. If each plantain plant has one (1) bunch (or raceme), and each bunch has 40 plantains (fruits), the yield per “cuerda” is between 32,000 (if 800 plants/ “cuerda”), to 40,000 (if 1,000 plants per cuerda). Thus, the average weight according to the conversion factor on p. 8 (1,000 plantains = 700 pounds), should yield 224 CWT to 280 CWT per “cuerda”, or 217.5 CWT and 271.9 CWT per acre, instead of 134 CWT or 180 CWT per acre which appear on the 2017 NCT’s County Expected Yield (CEY).⁸⁸ There is a difference of 110 to 100 CWT less in the 2017 NCT if compared to the yield information seen on the Puerto Rico Notice CM-2. According to the 2017 NCT, the price for plantain was \$49.1167/CWT. This difference amounts \$4,911.67 not considered for compensation, per acre, in the 2017 NCT. This information will later be used to approximate non-compensated portions to plantain farmers under WHIP.

v. Plantains per Plant (Raceme) according to NASS compared to FSA

Even within the USDA, the difference in fruits per raceme seems to be at odds. Data from the 2012 NASS is here used, as it was the one available in 2017.

Table 2.2.8: Contrast between Plantain Fruit Production per raceme or plant according to FSA and NASS data.⁸⁹

Fruits per Plant/Maricongo	FSA	NASS 2012	Difference
Highland/Not Irrigated	18.46	33.9	-15.44
Semiarid/ Irrigated	24.79		-9.11

vi. Plantains per Plant (Raceme) according to UPR and compared to FSA

In their field studies, the UPR has averaged fruit production per raceme. This is another perspective where the NCT reflects diminished yields.

⁸⁷ Copy of this Notice can be found at Rivera-Aquino, *supra* note 24, app. E, at 5-7.

⁸⁸ See *Id.*; Rivera-Aquino, *supra* note 24 app. A, at 16.

⁸⁹ See *supra*, Table 1.3 & Table 2.2.6.

Table 2.2.7: Contrast between Plantain Fruit Production per raceme or plant according to FSA and UPR data.⁹⁰

Fruits per Plant/Maricongo	FSA	UPR	Difference
Highlands/Not Irrigated	18.46	35.29 ⁹¹	-16.83
Semi-arid/ Irrigated	24.79	38.25 ⁹²	-13.46

C. Price

Another determining factor in compensation setting is price. Not estimating correctly, the average price of plantains at the farm gate will have an adverse effect on the calculation for compensation under programs such as the NAP or the WHIP. An Olympic average must be used. According to FSA data, 1.42 plantains are equivalent to one pound.⁹³

i. Price per Pound and Per Fruit according to NCT

First, a conversion using simple arithmetic from CWT to pounds must be performed. To obtain the average price per fruit, the equivalence of fruits necessary to reach one pound is applied.

Table 2.3.1: Equivalence of Plantain Price per Pound and per Fruit according to data in NCT.⁹⁴

Plantains	2012	2013	2014	2015	2016	2017	2018
Price/CWT	\$38. 3667	\$42. 23	\$40. 5733	\$52. 56	\$52. 56	\$49. 1167	\$52. 56
Price/Lb.	\$0.3 837	\$0.4 223	\$0.4 057	\$0.5 256	\$0.5 256	\$0.4 912	\$0.5 256

⁹⁰ See *supra*, Table 1.4 & Table 2.2.8.

⁹¹ According to the Model Budget for Plantains in the Highlands, an estimated 30,000 fruits are estimated on a “cuerda” with a density of 850 plants. To convert to acre, the production must be multiplied by 0.971. See Cortés & Díaz, *supra* note 80, at 1 n.1.

⁹² According to the Model Budget for Plantains in the Semi-Arid Zone, an estimated 42,000 fruits are estimated on a “cuerda” with a density of 1,100 plants. To convert to acre, the production must be multiplied by 0.971. See Cortés & Díaz, *supra* note 4, at 2 n.1.

⁹³ By dividing seven hundred (700) pounds by 1,000 Plantains based on FSA conversion factor. See Rivera-Aquino, *supra* note 24, app. E, at 10, 23.

⁹⁴ Obtained from the compilation of NCTs 2012-2018, through a FOIA query, published Rivera-Aquino, *supra* note 24, app. C, at 16, 41, 57, 67, 73, 84, 96; dividing CWT by 100 to obtain pounds.

Price/Fruit 95	\$0.2 702	\$0.2 973	\$0.2 857	\$0.3 701	\$0.3 701	\$0.3 459	\$0.3 701
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Do notice that between 2012 and 2016, and upward movement in prices was reflected. Also notice that the prices in 2015, 2016 and 2018, are the same. Yet the year Hurricane María was experienced, 2017, the price fell by three (3) cents below 2015, 2016, and 2018.

ii. Price per Unit (Fruit) according to the PRDA, the UPR and NASS

If the average production considered by FSA is taken into consideration, against its own conversion factor, an important piece of information can be obtained on the average fruits per acre.

Table 2.3.2: Price equivalence for each Plantain Fruit according to the PRDA Gross Agricultural Income Report.⁹⁶

Plantains Average Price	201 0	201 1	201 2	201 3	201 4	201 5	201 6	201 7
-Thousand Fruits	\$26 9.1 2	\$29 5.6	\$36 6.5	\$37 1.4	\$36 7.8 9	\$28 3.1	\$33 0.6	\$30 9.8
-Per Fruit	\$0. 269 1	\$0. 295 6	\$0. 366 5	\$0. 371 4	\$0. 367 9	\$0. 283 1	\$0. 330 6	\$0. 309 8

PRDA average prices show increasing numbers that peaked in 2013, and from there decreased by as much as six (6) cents in 2017. Figures from NASS Agricultural Census for 2012, estimate the total value of plantains as \$80,505,103.00, with an estimated production of 405,256,000 plantains.⁹⁷ This averages a price per fruit of \$0.19, below all FSA estimates. Average price used by the UPR's model budget for plantain is \$0.30.⁹⁸

⁹⁵ To calculate price per fruit, the price per pound is divided by the number of fruits that make up one pound according to FSA, in this case, 1.42.

⁹⁶ This price equivalency is obtained from data on Rivera-Aquino, *supra* note 24, app. B, at 1-10.

⁹⁷ See NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC. *supra* note 55, at 15 tbl. 12.

⁹⁸ CORTÉS & DÍAZ, *supra* note 4.

iii. Average Olympic Price using PRDA's Gross Agricultural Income Report

According to FSA rules, to obtain the Olympic average, you must have the 5 years immediately consecutive, prior to the year for which you want to perform the calculation, remembering to discount the highest and lowest value, averaging between the remaining three values. According to the NCT of 2018, the last set of data available to FSA in 2017 was 2013/2014, so, in 2015, they should have to their avail the required 5 years, between 2009/2010 and 2013/2014. There are exceptions when data is not available. What exactly has been the source of information FSA used when PRDA did not deliver its statistical report is yet to be determined.

Table 2.3.3: 2015 Olympic Average according to data from the PRDA's Gross Agricultural Income Report.⁹⁹

Plantain	2010	2011	2012	2013	2014	Average 5 yrs.	Olympic Avg.
Price	\$0.2691	\$0.2956	\$0.3665	\$0.3714	\$0.3679	\$0.3341	\$0.3321

The average Olympic price for plantains (per fruit) obtained from the PRDA data for 2015, does not coincide with the data of the "NCT" for the same year.

Table 2.3.4: Olympic Average Prices for 2017 and 2018 according to data from the NCT itself.¹⁰⁰

Plantain	2012	2013	2014	2015	2016	Average 5 years	Olympic Average 2017
Price/Fruit	\$0.2702	\$0.2973	\$0.2857	\$0.3701	\$0.3701	\$0.3187	\$0.3177
Plantain	2013	2014	2015	2016	2017	Average 5 years	Olympic Average 2018
Price/Fruit	\$0.2973	\$0.2857	\$0.3701	\$0.3701	\$0.3459	\$0.2646	\$0.3378

As seen on table 2.3.4, the NCT equivalent price per fruit for 2017 is \$0.3459 and for 2018 is \$0.3701. Therefore, it must be ruled out that data from the NCT itself was utilized to produce the average prices in the respective years above discussed.

⁹⁹ Based on data found on published Rivera-Aquino, *supra* note 24, app. B, at 2.

¹⁰⁰ Using input from Rivera-Aquino, *supra* note 24, app. C, at 16, 41, 57, 67, 73, 84 and 96.

D. Compensation under WHIP

According to 1-WHIP, eligible acres includes acreage of initial crops and subsequent crops in multiple planting periods.¹⁰¹ Yield data used for WHIP for all Puerto Rico producers, must be the County Expected Yield (CEY).¹⁰² Payment calculations in WHIP “will be calculated on a crop-by-crop basis, for all acreage of the crop within the unit (not just acreage affected by a hurricane or wildfire).”¹⁰³ There is also a “WHIP Factor” to be applied, which for this case of an uninsured crop is sixty five percent (65%).¹⁰⁴ Payments received (such as RMA indemnities, NAP payments, secondary use, or salvage value payments) are to be subtracted. An “Unharvest Factor” (UH) must be applied as well.¹⁰⁵ It also states that payment factors will be applied to WHIP payments “when significant and variable harvesting expenses are not incurred because the crop acreage was either prevented from being planted or planted but not harvested.”¹⁰⁶ Also, “WHIP production includes all harvested production, unharvested appraised production.”¹⁰⁷ When “[c]rops with multiple planting periods within the same crop year [they] are identified as a separate WHIP pay grouping”¹⁰⁸ while “[c]rops with the same planting period will be grouped together unless they have different pay crop and payment type codes.”¹⁰⁹

For the sake of illustrating the extent of the effect of the 2017 NCT, two examples of farmers are adopted: a Coastal Plantain Farmer who utilizes irrigation; and a Highland Farmer who does not utilize irrigation. To maintain the exercise simple enough, ten “cuerdas” (9.71 acres) dedicated to cultivating plantains are assigned

¹⁰¹ See 1-WHIP, *supra* note 33, ¶90(C).

¹⁰² See *id.* ¶ 191.

¹⁰³ See *id.* at ¶ 210.

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 110 (B): Appraised production is production determined by FSA, or an insurance provider approved by FCIC, that was unharvested, but was determined to reflect the crop’s yield potential at the time of appraisal. It is important to note that when a producer certifies that acceptable record of harvested production is not available from any other source, an assigned yield based on CDY provision applies. Harvested production means the total amount of harvested production for the unit supported by an acceptable record and/or certification by the producer. The production of any eligible crop harvested more than once in a crop year will include the total harvested production from all harvests.

¹⁰⁸ *Id.* ¶ 63 (D).

¹⁰⁹ *Id.*

to each.¹¹⁰ Because CSA only covers plantation,¹¹¹ and WHIP only considers crop losses, no indemnities for crop insurance are deducted in these examples, and the lowest WHIP factor is applied.

i. Coastal Plantain Farmer

Based on the information derived from the previous discussion, the following can be said about this farmer: a) Plantain plant density per acre is 1,100 according; b) if FSA converts this plant density unto acres, it results in 10.6 acres; c) NCT's CEY is 180 CWT per acre for irrigated plantains; d) CEY utilizing UPR's data, after being converted from units to weight, is 286 CWT; e) CEY based on PRDA's data is 171 CWT/acre; f) 2017 prices according to the NCT were \$49.12/CWT; g) Assuming that UPR's estimated prices are for the same period, once converted into price per weight, it results in \$42.86/CWT; h) PRDA's price conversion results in \$44.26/CWT.

Following 1-WHIP, once acreage is determined, production value is calculated. After this value is calculated, and the WHIP Factor, Unharvested Factor, and Indemnities¹¹² are all subtracted the following compensations result:

Table 2.4.1: Coastal Farmer WHIP Compensation vs Expected Compensation using UPR and PRDA Data.¹¹³

WHIP Using	Plantain Acres	Production (CWT)	Value	Expected Compensation	Difference (NCT-Others)
NCT	10.6	1,909	\$93,781	\$56,081	0
UPR	9.71	2,776	\$119,010	\$71,186	-\$15,086

¹¹⁰ The arithmetic for each example can be found at Rivera-Aquino, *supra* note 24, app. F.

¹¹¹ *Id.* app. G, at 7.

¹¹² Since WHIP compensation is only for harvest (or production) and not for the plant, as stated on 1-WHIP, *supra* note 33, ¶140, no compensation is deducted, because the CSA only covers plantation losses. Rivera-Aquino, *supra* note 24, app. G, at 4.

¹¹³ For an in-depth detail on the calculations, see Rivera-Aquino, *supra* note 24, app. F.

PRD A	9.71	1,667	\$73,81 1	\$44,139	\$11,94 1
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For a Coastal Plantain Farmer, if the data from the UPR had been adopted by the NCT, \$15,086.00 more would have been compensated for 10 “cuerdas” or 11,000 plants. On the other hand, if the data used had been that from the PRDA, \$11,941.00 less should have been paid. If data from the UPR had been used, this Coastal farmer would have received \$15,086 more in WHIP payment. If data from the PRDA had been used, the same farmer would have been overpaid \$11,941. Of course, the PRDA data does not reflect the effect of irrigation in plantain production, nor the higher density of plants in Coastal plains.

ii. Highland Plantain Farmer

Based on the information derived from the previous discussion, the following can be said about this farmer: a) Plantain plant density per acre is 850; b) if FSA converts this plant density into acres, it results in 8.19 acres; c) NCT’s CEY is 134 CWT per acre; d) CEY utilizing UPR’s data, after being converted from units to weight, is 204 CWT; e) CEY based on PRDA’s data is 171 CWT/acre; f) 2017 price according to the NCT was \$49.12/CWT; g) Assuming that UPR’s estimated prices are for the same period, once converted into price per weight, it results in \$42.86/CWT; h) PRDA’s price conversion results in \$44.26/CWT.

Following 1-WHIP, once acreage is determined, production value is calculated. After this value is calculated, and the WHIP Factor, Unharvested Factor, and Indemnities¹¹⁴ are all subtracted the following compensations result:

Table 2.4.2: Highland Farmer WHIP Compensation vs Expected Compensation using UPR and PRDA Data.¹¹⁵

WHI P Usin g	Planta in Acres	Product ion (CWT)	Value	Expected Compensa tion	Differe nce (NCT- Others)
NCT	8.19	1,421	\$69,8 14	\$41,749	0

¹¹⁴ See *supra* note 116 and accompanying text.

¹¹⁵ Rivera-Aquino, *supra* note 24, app. F.

UPR	9.71	1,979	\$84,855	\$50,743	-\$8,994
PRDA A	9.71	1,667	\$73,811	\$44,139	-\$2,390

For a Highland Plantain Farmer, if the data from the UPR had been adopted by the NCT, \$8,994.00 more would have been compensated for 10 “cuerdas” or 8,500 plants. On the other hand, if the data used had been that from the PRDA, \$2,390.00 more would have been paid. Again, it is important to keep in mind that PRDA data neglects irrigation practices and plant density. In this case, this Highland plantain farmer could have received between \$2,390 to \$8,994 more in WHIP payments had data from the PRDA or the UPR been used, respectively.

Earlier it was stated that in 2018, there were 1,363 plantain farms in Puerto Rico, with 10,624 “cuerdas” (10,315 acres).¹¹⁶ If the least amount on Table 2.2.3 is taken, \$3,732.88 per acre, and multiplied by the total acres accounted tight after Hurricane Maria, \$38,504,657.20 were not considered as part of the value for plantains. Assuming the NCT average price is accurate and applying the WHIP factor (0.65) and the Unharvest factor (0.92) to the approximation before made, \$38,504,657.20 in plantain value not considered at all under WHIP, it yields to \$23,025,785 that could have been additionally compensated to plantain farmers if the NCT had considered the values of the UPR.¹¹⁷ This amount is likely to increase as irrigated plantain acres enter the equation.

Additionally, while comparing the 2017 NCT¹¹⁸ with the Puerto Rico Notice CM-2¹¹⁹, it was found that \$4,911.67 were not considered for compensation under WHIP. This value multiplied times the acreage reported by NASS in 2018, 10,315, results in \$50,663,876 not considered as part of the value of plantains. Again, if the 2017 NCT average price is accurate, applying the WHIP factor (0.65) and the Unharvest factor (0.92), it is likely that \$30,296,997.90 in compensations did not reach Puerto Rico plantain farmers under WHIP.¹²⁰

¹¹⁶ NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., *supra* note 7, at 19 tbl. 15.

¹¹⁷ *Id.* Multiply the value per acre, \$3,732.88, times total plantain acreage reported in 2018, times WHIP and UH factors.

¹¹⁸ Rivera-Aquino, *supra* note 24, app. A, at 16.

¹¹⁹ *Id.*; *see also* Rivera-Aquino, *supra* note 24, app. E, at 23.

¹²⁰ Multiply the value per acre, \$4,911.67, times total plantain acreage reported in 2018, times WHIP and UH factors.

In most scenarios, there is a clear tendency: plantain farmers seem to have been under-compensated by WHIP. Since FSA's NCTs is also used for NAP and is likely to be used in future ad hoc emergency programs, if the data is not modified to correctly reflect the reality of the field, plantain farmers are likely to continue to be under-compensated, thus being adversely affected. Indirectly this has a broader effect in rural Puerto Rico, where plantain farms operate.

V. Legal Remedies Available to Plantain Farmers

FSA defines a "participant" as "any individual or entity who has applied for, or who's right to participate in or receive, a payment, loan, loan guarantee, or other benefit in accordance with any program of FSA to which the regulations in this part apply is affected by a decision of FSA."¹²¹ An "adverse decision" is defined by the Agency as any denial of program participation, benefits, written agreements, or eligibility that results in a participant receiving fewer funds than the participant believes should have been paid, or not receiving a program benefit to which the participant believes the participant was entitled.¹²² Both issuance of payments or other program benefits to a participant in a program and errors in documentation and calculations necessary to determine program eligibility are numbered as applicable for appeals.¹²³

FSA offers various mechanisms to appeal, most prominently requesting mediation and reconsideration to their CoC's or StC. FSA's Appeal regulations are governed by 7 C.F.R. 780. Additionally, there is also the opportunity to raise the issue to USDA's National Appeals Division (NAD). The procedures within NAD are governed by 7 C.F.R. 11. In both forums, the farmer has the burden of proof and must demonstrate, by preponderance of the evidence, that the adverse decision made by the agency was in error.¹²⁴ Additionally, matters on time limitations and general applicability determination will come into play. Finally, there is a matter of funding availability.

A. Time Limitations

For reconsideration procedures, both at NAD and at FSA (CoC or StC), there is a time limitation in place. The federal code

¹²¹ 7 C.F.R. § 780.2 (2022). The term does not include individuals or entities whose claim arise under the programs excluded in the definition of participant published at 7 CFR 11.1 (2022).

¹²² 7 C.F.R. § 780.2 (2022).

¹²³ FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., 1-APP (REV. 2), *Program Appeals, Mediation, and Litigation* ¶ 9 (2016) [Hereinafter 1-APP].

¹²⁴ 7 C.F.R. § 11.8(e) (2022).

prescribes time limitations for farmers who seek reconsideration within FSA. Reconsideration or appeal petitions must not exceed thirty (30) days from the date a participant receives written notice of the adverse decision;¹²⁵ written notice is usually considered to have been received seven (7) days after it was made.¹²⁶ As far as NAD goes, based on case interpretations, there is indicia that it applies a thirty-calendar-day jurisdictional limitation from the time the participant receives the adverse decision.¹²⁷ This thirty-day period applies to instances when the agency fails to act.¹²⁸ Failure to act is by itself an adverse decision.¹²⁹ The language utilized states that the clock begins to count “from the moment the participant knew” or “should have reasonably known” that the agency had not acted.¹³⁰ There are no clear references of what a “reasonable” timeframe would be.¹³¹ This time limitation is there to bring finality to agency decisions.¹³² Generally, to minimize confusion on the part of participants, FSA does not issue letters notifying participants of the opportunity to challenge, seek reconsideration, or appeal, favorable decisions.¹³³

¹²⁵ 7 C.F.R. § 780.15(c) (2022) (“A participant requesting reconsideration, mediation or appeal must submit a written request as instructed in the notice of decision that is received no later than 30 calendar days from the date a participant receives written notice of the decision. A participant that receives a determination made under part 1400 of this title will be deemed to have consented to an extension of the time limitation for a final determination as provided in part 1400 of this title if the participant requests mediation.”).

¹²⁶ 7 C.F.R. § 780.15(e)(2) (2022) (“The date when an adverse decision or other notice pursuant to these rules is deemed received is the earlier of physical delivery by hand, by facsimile with electronic confirmation of receipt, actual stamped record of receipt on a transmitted document, or 7 calendar days following deposit for delivery by regular mail.”).

¹²⁷ Karen R. Krub, *USDA’s National Appeals Division Procedures and Practice*, NAT’L AGRIC. L. CTR., 21 (rev. 2019).

¹²⁸ 7 C.F.R. § 11.6(b) (2022) (“To obtain a hearing under § 11.8, a participant personally must request such hearing not later than 30 days after the date on which the participant first received notice of the adverse decision or after the date on which the participant receives notice of the Director’s determination that a decision is appealable. In the case of the failure of an agency to act on the request or right of a recipient, a participant personally must request such hearing not later than 30 days after the participant knew or reasonably should have known that the agency had not acted within the timeframes specified by agency program regulations, or, where such regulations specify no timeframes, not later than 30 days after the participant reasonably should have known of the agency’s failure to act.”). (Emphasis Ours)

¹²⁹ 7 C.F.R. § 11.1 (2022) (defining adverse decision).

¹³⁰ 7 C.F.R. § 11.6(b) (2022).

¹³¹ KRUB, *supra* note 132, at 10.

¹³² National Appeals Division Rules of Procedure, 64 Fed. Reg. 33367-01, 33371 (June 23, 1999).

¹³³ 1-APP, *supra* note 127, ¶ 12. According to FSA, “[d]ecision letters should contain as much information as possible summarizing all pertinent information and program

So, what about a plantain farmer who received a payment, without knowing that an error was made by the agency? Most plantain farmers in Puerto Rico received their payments in 2019. Farmers that received some sort of compensation from FSA and did not learn of an error from just reading their payment statement or Agency Record calculations, if available, should be able to request a reconsideration or appeal, thirty (30) days from the moment they learned about the error in their payment calculation, even if several months, or years have elapsed since the payment determination. Pieces of information for this article were obtained only after a FOIA request was issued, thus, key information to assess errors in payment calculations was not readily available to plantain farmers when they received some form of payments. There is no indication that they should have known that errors in payment calculations when they received their payments.

B. Matters of General Applicability

Another jurisdictional matter arises on whether issues of general applicability are appealable. FSA regulation states that “[a]ny general program provision or program policy or any statutory or regulatory requirement that is applicable to similarly situated participants” or “[m]athematical formulas established under a statute or program regulation and decisions based solely on the application of those formulas,” among other, are decisions that are not appealable.¹³⁴ NAD’s Director has the authority to determine whether the issue presented is one of “general applicability” and thus not appealable.¹³⁵ Price setting and CEY adoption are often regarded by FSA as of “general applicability.”¹³⁶ FSA has argued that, if an error occurs in the application of a matter of general applicability, that error affects all farmers and not just a particular farmer.

In relations to FSA’s plantain NCT record over the years, many incongruencies arise: 1) having the same CEY between 2013

provisions that could be relevant to the determination. A good decision letter: is a letter that adequately summarizes and explains everything that matters about a case[;] should require little additional information to explain what is really at issue in a case[; t]he decision letter is the starting point for the next administrative review authority.” *Id.*

¹³⁴ 7 C.F.R. § 780.5(a)(1)-(2) (2022).

¹³⁵ Christopher R. Kelley, *The USDA National Appeals Division: An Outline of the Rules of Procedures*, NAT’L AGRIC. L. CTR., 4 (2003).

¹³⁶ See 1-APP, *supra* note 127, ¶ 9. Issues that do not result in individual determinations, but which may or may not impact individual applications, such as definitions of eligible crops, prices, average yields, factors, signup dates or deadlines, or other generally applicable matters not decided in response to any specific application, applicant, or participant.

and 2018; 2) the claimed source of information, PRDA, does not differentiate between yields based on irrigation practices; 3) the claimed source of information, PRDA, uses a different unit of measure pertaining production; 4) the trends of historic prices in the NCT do not resemble those from the claimed source of information, PRDA; 5) utilizing a conversion factor without reference to a scientific source to determine its accuracy; 6) sound data from the UPR show higher yields of plantain fruits per plant than the data from FSA; 7) references to UPR data from 1999 is still cited in the 2018 NCT, leading to believe that outdated sources are still being used; 8) yields for plantains from the P.R. Notice CM-2, p. 23 and the P.R. Notice WHIP-1, p.16, differ greatly; etc. FSA may claim that the PRDA has not been consistent in providing their Agricultural Gross Income report, seemingly after 2015. There is a major difference between the “best data,” and the “best available data.” Now, FSA has the responsibility of properly maintaining NCT data, not the PRDA, including documenting how decisions are made.¹³⁷

Whether these incongruencies are sufficient to prove that FSA erred, by preponderance of the evidence, must consider the level of deference NAD may yield FSA. In NAD case number 2008E000455, under National Director review, it was determined that aspects such as “average market prices and the unharvested factors are appealable,” contrary to what the Hearing Officer had previously determined,¹³⁸ as it “directly affects the amount of the payments Appellant is eligible to receive.” Nonetheless, minor deviations and use of different sources of data do not amount to error.¹³⁹

Recently, an NAD Case¹⁴⁰ considered the issue of “agency deference.” On it, a reference to a “Kisor” test, adopted by the Supreme Court in 2019, is made. In the referred “Kisor” case, it is summarized that the “deference doctrine” is applied in interpretative

¹³⁷ 1-NAP, *supra* note 23, ¶ 276(C).

¹³⁸ Director Review Determination, NAD Case No. 2008E000455 (U.S. Dep’t of Agric. Oct. 22, 2008). The case goes on to say “FSA erred in calculating the average market price and the payment factors under its regulations that it then generally applied. Resolution of the issues Appellant raises in this case, i.e., the proper price and unharvested factors of his 2007 NAP crops, directly affects the amount of payments Appellant is eligible to receive.” *Id.*

¹³⁹ Director Review Determination, NAD Case No. 2016W000294 (U.S. Dep’t of Agric. July 7, 2017) (“Each year, FSA conducts a nationwide review to ascertain the basis of stark payment differences between counties... FSA also corrects mathematical errors, adjusts state committee established yields when RMA data becomes available, and adjusts RMA yields when NASS data becomes available.”).

¹⁴⁰ Director Review Determination, NAD Case No. 2021S000076 (U.S. Dep’t of Agric. Jan. 25, 2022).

questions related to an agency's own ambiguous rules.¹⁴¹ "The subject matter of a rule 'may be so specialized and varying in nature as to be impossible'—or at any rate, impracticable—to capture in its every detail."¹⁴² In these cases, courts limit themselves and allow agencies to construct "its own regulation."¹⁴³ But such deference should not be afforded to agencies "unless the regulation is genuinely ambiguous,"¹⁴⁴ and the agencies reading must be reasonable¹⁴⁵ if the "agency interpretation entitles it to its own weight"¹⁴⁶ and "implicate its substantive expertise."¹⁴⁷ Finally, an "agency's reading must reflect a fair and considered judgement" to receive deference.¹⁴⁸

To FSA, it may seem clear that plantain price setting and plantain CEY adoption, being applied in general to all plantain producers, even if in error, are not subject to appeal. Yet some ambiguity has been raised, once the issue of general applicability seemingly in error, is applied to a payment of a participant. It seems that this ambiguity, at least by NAD's standards, is not the sort that usher's deference. From the "Kisor" test, FSA's interpretation seems to fail both at the reasonableness and fairness elements as it would be unjust to allow an error generally applied, that affects an individual participant, not to be appealed.¹⁴⁹ To pinpoint errors in price setting and plantain CEY adoption, it may be necessary to issue a subpoena requiring the production of evidence and the attendance of witnesses, following 7 C.F.R. 11.8, to reverse engineer the confection of the plantain 2017 NCT.

C. Funding Availability

Lack of funding is another element to be considered outside the scope of the informal appeals process.¹⁵⁰ Most of the time, agencies need not to spend their funding by the end of the fiscal year, but rather obligate its use; actual spending, in most cases, must be spent under the "five-year" rule. This rule states that funds obligated

¹⁴¹ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

¹⁴² *Id.* at 2408.

¹⁴³ *Id.* at 2411.

¹⁴⁴ *Id.* at 2415.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2416.

¹⁴⁷ *Id.* at 2417.

¹⁴⁸ *Id.*

¹⁴⁹ See generally, Director Review Determination, NAD Case No. 2004W000899 (U.S. Dep't of Agric. Jan. 13, 2005).

¹⁵⁰ 1-APP, *supra* note 127, ¶ 9.

by the end of a fiscal year must be expended within five fiscal years from the last day it could have been obligated.¹⁵¹

Whether the funding for WHIP has been depleted, is outside the scope of this analysis. But this could well be an argument presented by FSA that may limit reconsiderations or appeals. Nonetheless, an OIG report on WHIP performed in 2020, studied the breadth of improper payments and in the cases underpaid producers, the OIG recommends that a payment be issued.¹⁵² Still, OIG's report on WHIP did not cover Puerto Rico; it only covered Georgia and Florida.

VI. Conclusions and Recommendations

FSA will utilize the best data available to them. If the Agency, nor the plantain farmers, do not make their best effort to have the most suitable sources of information on plantain production possible on a yearly basis, the best data available could well be obsolete data. CoC and StC members need to get more involved with NCT determinations, and periodically enter in communications with the UPR and the PRDA to request updated information. The information shared here shows the possibility that several sources of information were utilized and extrapolated to build NCT values, that do not reflect the reality of plantain farms today. There are references in the 2018 NCT dating back to 1999. The county expected yields are founded on values that do not resemble UPR data. A much deeper look is needed to figure out how exactly the NCT values for plantain have come into being over the years in FSA-Puerto Rico. This in-depth look may well occur in an appeals process. Had FSA used more current crop values in 2017 and the preceding years for plantain, such as the ones used by the UPR to prepare its plantain model budget, the NCT's average yield and average prices would have been higher and an additional \$8,035/acre in the semiarid zone with irrigation, or \$3,732.88/acre in the Highlands without irrigation should have been part of the values considered in the compensation calculation for these farmers. If the values within the NCT are not corrected, in future events that may affect plantain producers, they are likely to receive, once again, a reduced compensation.

¹⁵¹ The term "five-year rule" is borrowed from the course, Farm Policy, and the Federal Budget, at the LLM Program of the University of Arkansas. As reference material, see U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-29 (4th ed. 2016).

¹⁵² OFF. OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REPORT NO. 03702-0002-31, WILDFIRES AND HURRICANES INDEMNITY PROGRAMS 8 (2020).

Here are some recommendations for farmer organizations, the Agency and other agricultural support structures such as the UPR and the PRDA, to prevent reduced compensation in future climatic events that may affect plantain producers in Puerto Rico:

First – Adjust planting densities for the counties that predominantly cover the Highland or Coastal zones in such a way that they fairly represent the reality of the practices carried out by farmers, who often adopt UPR's recommendations. Knowing that the FSA is divided into Field Offices (counties) that can reasonably be representative of Highlands or Coastal zones, it would be more than reasonable to modify expected yields as such instead of having a blanket yield across all counties.

Second – Propose to FSA, PRDA and NASS methods that estimate more accurately the number of plantains produced per plant and per acre. This is particularly critical for farmers in the semiarid zones, who use irrigation, and undoubtedly obtain higher volumes of production if compared to humid zones.

Third – Request the Division of Agricultural Statistics of the Puerto Rico Department of Agriculture (PRDA), to officially publish, with logo and signature of the person in charge, the reports of Gross Agricultural Income at a certain and known date, every year. This way, accurate data will be available to make just compensations in the event of future events. If this piece of information is ever to be introduced as evidence in any administrative procedure, it will be recognized as an officially publicized document. In addition, they must publish data on land use, with irrigation and without irrigation, by product, to estimate more precisely the average production by type of practice.

Fourth - Request FSA to use the same units to estimate production and product yields as captured by PRDA and NASS. For example, in the case of plantains it is recommended to use thousands of fruits, as it is the commonly accepted unit of measure, instead of using hundredweight.

Fifth - Request FSA to publish annually the minutes of the meetings in which the data contained in the "NCT" for plantains is adopted, to verify correctness.

Sixth – Request that FSA and CSA share data, to ensure that any deductions on insurance payments are for the appropriate item, be it plantation (plants) or harvest (yield).

Seventh – Congregate UPR, FSA and PRDA to work together to achieve more uniform statistical analysis and recordkeeping pertaining plantains, considering the information required by the NCT.

Eighth – Recommend Congress that in future *Ad Hoc* disaster loss compensation programs, Puerto Rico farmers be allowed to use their historic records when submitted, as in the rest of the U.S.

Ninth – Petition PRDA and NASS to dissect their plantain data based on irrigation practices.

Tenth – Strengthen farmer participation in County Committees (CoC) and State Committees, allowing them to truly become an independent voice from FSA's administrative structure, to better serve their farming communities, through knowledge on procedures and agronomic data. Delegation of CoC functions to FSA's employees must be limited and CoC meetings must be held frequently.

When Federal or State governments issue agricultural disaster assistance programs, the goal is to help speed the recovery of American farmers who satisfy the nutritional security of the American people. This is also a way to revamp the rural economy where most farms operate. To achieve the goals intended, suitable procedure must be followed adequately. The objective of this paper is to raise awareness within FSA and other agricultural related agencies on the importance of maintaining an adequate data bases; farmers need to get more involved in the decision making within FSA. It is likely that climatic events will affect plantain farmers in the future. Unlike playing dice, which gives different results by doing the same action, if changes are not made to the NCT plantain data in Puerto Rico, the same result will occur over and over: less than fair compensation for losses experienced after natural disasters, perpetuating the condition of being socially disadvantaged farmers.