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Remarks by James R. Mosely - Assistant Secretary of Agriculture for Natural Resources and Environment to the American Agricultural Law Association Annual Meeting - November 1, 1991 - Atlanta, Georgia

James R. Moseley

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REMARKS BY JAMES R. MOSELEY
ASSISTANT SECRETARY OF AGRICULTURE
FOR NATURAL RESOURCES AND ENVIRONMENT
TO THE AMERICAN AGRICULTURAL
LAW ASSOCIATION
ANNUAL MEETING
NOVEMBER 1, 1991
ATLANTA, GEORGIA

Thank you. It's a pleasure for me to be with you. Today, I want to share some general observations I've made about the environmental issues facing agriculture, and how these issues are relevant to you and your clients.

I don't think it's a surprise to anyone in this country that we are indeed in an environmental era. Future history books will recall the decade of the 90s as the "greening of America." If you're not "green conscious," you're likely out of sync with the rest of society. And agriculture—farmers, ranchers and agribusiness—are not excluded from this public scrutiny. In fact, agriculture is one of the targets environmentalists want to green up, and the ramifications for the industry will be far reaching.

For the past twenty years environmentalists have been working diligently to achieve their environmental agenda on behalf of saving the environment. More routinely this environmental agenda has excluded economic development over environmental protection.

During this same time, agriculture was advancing on its own agenda. However, our agenda primarily focused on ways to make agriculture more productive.

Those of us whose business depends on the utilization of our natural resources believe that in order to keep our country, and in particular, agriculture, productive we must have a policy framework that provides for both economic development and environment protection. The two are closely linked. In fact, you can't have one without the other. You only have to look at Eastern Europe to see what happens to environmental protection without a strong economy to provide the resources to pay for it.

These differing "economic and environmental" philosophies have opened the door to a fierce debate—environmentalists damning the business community and industrialists damning the environmentalists. What concerns me with this polarized debate is that the vast majority of people, who represent the mainstream

of thinking in our country, are most severely affected by misguided public policy generated by these opposing ideologies.

It's not the person who chains himself to a tree or the producer who thumbs his nose at environmental protection who suffers. It's the person who has tried to do a good job at taking care of his natural resources. It's the person whose livelihood depends on the wise use of his natural resources. It's the person who walks into your law office, after receiving notification of an environmental violation, and says, "Can they really do this to me?" These are the people who end up getting hurt the most.

There's a phrase that I've come to appreciate which says, "A man's greatness is measured not by his ability to reach the extreme's in life, but rather in his ability to touch both at the same time." We desperately need our leaders in Congress to display some greatness by putting balance in our nation's natural recourse policy.

Now that I've seen what can happen with these issues once they reach Washington, D.C., I believe it's crucial for the agricultural community to reach an agreement on its plan for the environment and take the lead in formulating sound, responsible public policy.

While American agriculturalists have been figuring out how to feed our growing world population, environmental organizations have effectively used legislation, regulation, and litigation as a way to achieve their environmental goals. And as a result, your clients are finding themselves dealing with not only public policy issues but the legal aspects of those issues as well.

We only have to examine our current environmental issues to see what's happening and what's likely to happen in the future. A good example is endangered species. Frankly, I think this is an issue that's going to cause more concern for our country and your clients than any other environmental issue we will face in the next decade.

Many of you have probably not been affected by this law, but if you want to better understand its impact just talk to some of your peers from the Pacific Northwest. We are seeing graphic evidence of the impact of our endangered species law with the spotted owl, the salmon and the delta smelt.

As I travel around the country, particularly in the Northwest, many people ask me why Congress doesn't change the endangered species law to give greater consideration to economic impact, along with species protection. In all my conversations on

Capitol Hill concerning the spotted owl, the majority of comments from congressional members are, "Our voters are telling us the Endangered Species Act is just fine the way it is." I take this response to mean it's unlikely that Congress is going to change the law to deal with the impact the Endangered Species Act has on economic activities, at least at the present time.

The second point I want to make is the fact that the listing of endangered species is not going to remain a Northwestern regional issue. Every week I hear of potentially endangered species in every one of our states.

Another significant point is that species protection, as in the case of the spotted owl, includes not only public lands but privately owned lands as well. Before the spotted owl was listed as a threatened species, private property rights comforted property owners into believing they were not going to be affected by this law. But that's not the case. Ask a private land owner in Oregon what happens if he has a spotted owl on his property. He has to provide species protection the same way the government does on public lands.

From a legal perspective, the endangered species issue poses two laws running head-long into one another—one, a constitutional doctrine that protects private property rights, and the other, a statutory law that protects endangered species. Both of these powerful laws have good intentions, but the resulting political conflict makes it very difficult for Congress to reconcile them.

Wetlands is another important issue that I'm certain all of your clients are concerned about. A critical issue in wetlands protection is the rights a private property owner has over his or her property and whether the government can take away a property owner's right to use that property.

Currently, our nation's wetlands policy is only a series of regulations. It is not statutory law. However, strong efforts are being made on both sides of the issue to put wetland regulations into the statutory law framework. The environmental community wants to make it illegal for private property owners to utilize their wetlands and agriculture, and industry wants a law to make it illegal to take wetlands away from property owners.

The final issue I want to address is reauthorization of the Clean Water Act—perhaps the most significant agricultural legislation Congress has yet to adopt. Normally, we think of agricultural legislation in the context of the Farm Bill, but the potential impact

of the Clean Water Act on agriculture is such that I consider it environmental and agricultural legislation.

Since the early 70s the Clean Water Act has primarily focused on point-source pollution. We've done such a good job in cleaning up surface water pollution that the emphasis has now shifted to non-point-source pollution.

Agriculture has been targeted as one of the primary sources of non-point pollution. The Environmental Protection Agency (EPA) estimates that agricultural activities impact about fifty-six percent of our streams with non-point-source pollution. Whether you agree or disagree with these numbers is not nearly as significant as the fact that the public is convinced there is a problem and wants it fixed.

The agricultural industry is ready and willing to take care of any non-point problems. However, a question of concern by the industry and the USDA is the fact that the Clean Water Act is not going to be addressed by the ag committees, whose members have a basic understanding of the agricultural industry, but rather by the members of the Public Works and Transportation Committee. These Congressmen don't have the same perspective on agriculture, because they primarily represent urban America. The industry's concern is that the Public Works Committee will view regulations and laws as the easiest solution to non-point pollution.

This is generally the direction taken by the current Baucus bill in Congress. In fact, in a hearing held in July with ag industry representatives, the first question asked by a committee member was, "Tell me why agriculture shouldn't be regulated?"

Those of us involved in agriculture on a daily basis know that regulations as a first line of attack are not the best answer. We know from experience that it is extremely difficult, and in some cases impossible, to fairly regulate an industry as diverse as agriculture.

Our approach at the USDA to these issues is to say, "We understand there may be some problem areas we need to address. But give us the opportunity to work with farmers and ranchers through our education and technical support systems first, before we go off regulating the way they farm and ranch."

From my perspective, having worked in the EPA, the USDA and as a farmer, let me share with you what I believe all of this means for you as agricultural lawyers. I don't think anyone can disagree with the fact that your farmer client's legal needs are changing dramatically. Historically, agriculture has been primar-

ily involved in contract law and estate planning. But producers are now in a situation where they are going to turn to you for legal advice on environmental law as well as the traditional areas. You will be the first one they turn to when the EPA or some other government agency slaps a fine or lawsuit on them because of some environmental violation.

I'm going to be perfectly honest with you. In my own personal case, if I were cited for an environmental violation because of my hog operation, I question whether my attorney could defend my case. I say this because neither he nor anyone else in his firm has spent time studying or practicing environmental law. In fact, I don't know whom I would turn to in my town of Lafayette, Indiana, if I needed help. Obviously, I would go to my attorney first and hopefully he would be able to refer me to someone.

The point I'm trying to make is that I hope our agricultural lawyers are preparing themselves and their businesses for these changing client needs. Environmental law is an expertise agricultural clients expect of their lawyers. One of the reasons we are facing many of these complex environmental laws and regulations is because they were crafted by lawyers representing environmental organizations. In many cases, some of the most effective environmental organizations are primarily comprised of lawyers.

We need more of that expertise in agriculture as well. Traditionally, our farm and commodity organizations have represented agriculture in the legislative debate, at public hearings, in lobbying efforts and in general public education efforts. These organizations have done an outstanding job, but producers also need your help.

Our elected officials at every level, particularly our congressmen, need to hear from the agricultural law community. They need to hear your "legal opinion" from your clients viewpoint so that at least when it comes time for them to vote on legislation, our elected officials have heard all sides of the legal issues. In the battle for public opinion the group that does the best job of educating the public and explaining the legal ramifications of the laws ultimately passed by Congress will determine the environmental course we set for this country.

Let me close with a quote from Robert Frost who said, "I came to a fork in the road, two paths that diverged in the woods. I took the one less traveled, and it has made all the difference."

We know that the less traveled path is rougher and more difficult, but I hope we follow it so that we too can make a difference.

