

Agricultural Land: Ownership in Fee Simple or Held in Trust?

by EARL WARREN, JR.*©

This article explores the current—and future—parameters of governmental regulation of agriculture.

In the 1950's, when I was a farm advisor for the Agricultural Extension Service, I cautioned farmers to consider themselves to be as much in the real estate business as in the farming business. Even in those boom times they tended to close their eyes to the encroachments of cities, roads, parks and other such developments. The advice was sound then—and, in many cases, still is although recent developments and trends create considerable cloudiness in the theory.

Those were the days when fee simple still pretty much meant the right to do what you wanted with your land. Farmers were essentially lords of their domains. Their options were many.

Of course, farmers were sometimes subject to acreage restrictions on a few crops. They also had to obtain some local governmental approval to convert farm land to industrial or residential use, and occasionally they had trouble continuing their present style of operating when heavier land uses pushed against their boundaries (e.g. dust, odors, flies from their farm causing nuisances to the new subdivisions). Their running room, however, was still wide and most of their decisions were their own. Eventually, increased land taxes forced farmers to make a choice—either get rid of their land or intensify the efficiency of their

* Earl Warren, Jr. is presently a judge in the municipal court in Sacramento, Cal. He received a B.S. degree from U.C. Davis and a J.D. from University of California at Berkeley. He served as the Farm Advisor for the Agriculture Extension Service. He presently is a adjunct professor, McGeorge School of Law in Farm & Ranch Law.

operations in order to survive. The problem was particularly acute where the land lay in the path of urban development, for land taxes have historically been based on "highest and best use."

Some relief developed in the succeeding years in the form of "green belt zoning," a concept of setting aside farm lands which are to be maintained and taxed as such. Supported by both farmers and environmentalists, it looked like it might be a panacea for many problems. But the implementation of green belt zoning became sketchy as population pressures mounted. Many farmers opted for the higher taxes so they could sell when the "flight to the suburbs" from the inner cities came in their direction, and as reservoirs, parks and other public projects opened up new vistas for recreation. In fact, the "voluntary" aspect of setting aside land for green belt zoning has essentially failed.

A new concern has now supplanted the very limited success of this plan in its initial form. The concern is not for the farmer as such, but rather for the preservation of farm lands for the good of all the citizenry—to maintain a stable food supply, to preserve "open spaces" and, apparently, to maintain farm lands as national, state and local assets. Hence what was once a *farmers'* relief program has been converted to a *citizens'* relief program with wide-ranging implications.

Does this mean that in the future farmers will not "own" the land? Will they only be the owners of a right to use the land in certain ways? All indicators say "yes." In essence that is what has already happened to urban landowners who are bound by specific zoning, and who are faced by a multitude of "musts" and "must nots" in the maintenance and use of their real properties. The "home is a castle" theory has lost its protective moat.

It might be claimed that the expansion of this concept to farm lands will come slowly, if at all, for we started out as an agrarian society and have always prized that heritage. There is some logic in this argument, for when Congress first met in 1789, farming was the way of life of most all Americans. Neither Congress nor the individual states saw any need for farm laws. In fact, it was not considered the province of government to concern itself with the affairs of farmers. Farming was considered "the fundamental employment of man," not a business.

Since that time, our governments have begun to regulate some farming activities. Until recently, however, almost all regulation has been at the instigation of the farmers to preserve their industry. Very little compulsory regulation has been imposed from outside sources, even when much of the land was being ravaged by overgrazing, erosion, decimation of timberlands, eradication of wildlife, and destruction of waterways.

Ninety percent of all Americans lived on farms when our country was first formed. Less than 5 percent do now. In spite of improved farming techniques, nearly three million acres of farm land are still lost every year, much of it by urban encroachment. Therefore, farmers must expect planning and zoning procedures to come into effect to protect farm lands just as they have protected land in urban areas. Farm land may even be creeping into something akin to the "endangered species" concept. If this is so, agricultural interests must confront an important and compelling question: Will our farm lands end up in some sort of public trusteeship?

GOVERNMENT CONTROL OF WATER

Lest we think that the concept of holding natural resources in trust is wildly radical or even new, let us look to the history of agriculture's lifeblood—water. California originally adhered to the riparian theory of water rights which said, in essence, that landowners whose land abutted a waterway "owned" the water in that waterway. Ownership was subject only to reasonably beneficial use and the rights of other abutting landowners. Later, largely because of the politics of mining interests, another type of right arose—the right to use water gained by adverse possession (prescriptive right). Following this, a third theory of water rights developed in regard to unused waters (appropriative right).

Finally, the Legislature of the State of California recognized, as the courts and some other state legislatures had tended to do in the past, that the old concept of riparian rights fails to recognize problems of water scarcity and the need to make maximum beneficial use of all available water. It did so by declaring:

All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.¹

In accordance with the new philosophy, California established a special bureaucracy to control water usage. This scarce, essential commodity thus came to be the property of all the people of the state. Hence, it is not radical thinking to surmise that such a scarce, essential commodity as land might soon be similarly classified.

Even if a trust is not expressly impressed on the land, the gravity of the problem of water control is obvious, for without water, most western farmers would be greatly restricted in how they could use their lands.

While water rights do not relate directly to the fee simple concept, erosion or change of water rights can drastically alter the "aggregation of rights, powers, privileges and immunities" which run with the title to

1. CAL. WATER CODE § 102 (West 1971).

any property. When the California legislature mandated that all water within the state is the property of the people of the state, it stated further:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.²

There is little doubt that this broad language covers *all* water, be it in surface watercourses, lakes and the like, or in subsurface concentrations.

It is essential to note that this part of the State Constitution mandates that the state's water resources "be put to beneficial use to the *fullest* extent of which they are capable" and that they are to be used "in the interest of the *people* and for the *public welfare*."

The language appears to subject all waters in the state to the theory of "highest and best use". If this is true, farmers can probably expect some governmental controls to intrude into historic patterns of farming. High-water-use crops such as rice may have to give way to less demanding crops. Urban homes and gardens and industrial requirements possibly could have priority in dry years. Some lands may have to be abandoned simply because they are so saline or shallow that water use on them is relatively wasteful. Other lands may be rendered unusable because fresh water is intercepted upstream, thus allowing salt water intrusion into the local irrigation supply. Additionally, certain crops may get priority treatment because they are "necessary" or politically favored crops. These are all delicate problem areas replete with intense economic, sociological and political overtones. Yet, they are very real, and some have become imminent in the recent drought period.

Another serious consideration which is implicit in the constitutional mandate deals not just with the quantity of water available but with the key word "conservation" which surely includes keeping water in a useable form. This long-neglected aspect of water use is simply stated by asking a question which answers itself: Is polluted water still "water" within the overall concept?

More and more we have come to realize that water *quality* is nearly as important as water *quantity*. We have started to acknowledge that polluted waters can render good waters unusable when the two are mixed together. We have been polluting our waters with great abandon

2. CAL. CONST. art. 14, § 3; CAL. WATER CODE § 100 (West 1971).

since our country's inception, and industry, agriculture and urban development have each been both culprit and victim.

As to control of water pollution, Congress passed the ancient Rivers and Harbors Act of 1899³ and the more recent Federal Water Pollution Control Act.⁴ Both laws pertain to navigable waterways, with primary responsibility to control water pollution being left to the individual states.⁵ Some states, however, have sought to fill part of the gap left by Congress by entering into interstate compacts. Fourteen such agreements now exist in the United States.⁶ Unfortunately, all of these control measures have been generally unsatisfactory to date and in many cases totally ineffective, either through inadequacy of the laws' coverage or through non-enforcement.

In 1970, however, California enacted legislation which offers considerable more enforcement power.⁷ The legislation alters old laws in that: (1) pollution no longer must adversely affect beneficial uses. It is objectionable if it unreasonably affects not only the present but future beneficial uses, including esthetic values; (2) waste disposal is no longer an accepted use, but only a mere privilege; (3) the courts may now enjoin even the threat of pollution; (4) a discharge report must be filed by anyone (including farmers) who presently discharges or in the future will discharge waste that could affect water quality; (5) a violator must clean up pollution and failure to do so can result in a lien being filed on his property for the costs of cleanup incurred in the absence of his compliance; (6) the Attorney General can bring suit to enforce the Act, with remedies of criminal penalties, injunctive relief, and up to \$6,000.00 a day in civil penalties.

This is not the only regulatory scheme in the codes. The Fish and Game Code makes it "unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this State . . . [a]ny substance or material deleterious to fish, plant life, or bird life."⁸ The Health and Safety Code says, "No person shall cause or permit any horses, cattle, sheep, swine, poultry, or any kind of live stock or domestic animals, to pollute the waters, or tributaries of waters, used or intended for drinking purposes by any portion of the inhabitants of this State."⁹ There are similar provisions found elsewhere in statute form.

3. 33 U.S.C. § 407 (1970).

4. *Id.* § 1151.

5. Curlin, *The Interstate Water Pollution Compact—Paper Tiger or Effective Regulatory Device?*, 2 *ECOLOGY L.Q.* 333, 334 (1972).

6. *Id.*

7. Porter-Cologne Water Quality Control Act, CAL. WATER CODE § 13000 (West 1971).

8. CAL. FISH & GAME CODE § 5650 (West 1971).

9. CAL. HEALTH & SAFETY CODE § 4454 (West 1971).

Farming practices contribute heavily to pollution. Farmers use pesticides and fertilizers. They leach salts from their soils with water. They increase the organic content of the water. The excrement of farm animals enters runoff. Erosion silts up discharged waters. Hence there is no doubt that increasingly heavy pressure will be brought to bear on farmers to change the use of their lands in such a way as to minimize their contribution to the pollution problem.

Other water problems might also affect the use of farm land. In some cases, the 160-acre limitation under the National Reclamation Act¹⁰ will affect a farmer's ration of water as the current controversy over the Westlands Water District aptly illustrates.¹¹ Even long-forgotten Indian water rights will come into play in a good number of areas¹² for it is generally conceded that the superior right of Indians to certain waters has been consistently disregarded by both the State and Federal governments.¹³

ENVIRONMENTAL CONSIDERATIONS AND OWNERSHIP OF LAND

The fee simple was and still is the largest estate known to the law. It envisions the maximum of legal ownership, the greatest aggregation of rights, powers, privileges and immunities which a person may have in land.¹⁴

Modern law, however, requires the owner of a fee simple estate, as a member of the community, to conform to fundamental established social patterns for the welfare of the community.¹⁵ Thus the owner occupies and uses the land subject to the rights of other landowners and even to certain rights of the general public.

Zoning, nuisance laws, and the right of condemnation for public uses are commonly recognized local controls, and even the federal government has entered the picture by requiring an environmental impact statement (EIS) whenever there is a major federal action which significantly effects the quality of the human environment.¹⁶ Although the legislation initially appears simply to be a restriction on federal activity, a

10. Pub. L. No. 161, 32 Stat. 388 (1902).

11. See BUREAU OF RECLAMATION, DEP'T OF INTERIOR, CONGRESS SHOULD RE-EVALUATE THE 160 ACRE LIMITATION ON LAND ELIGIBLE TO RECEIVE WATER FROM FEDERAL WATER RESOURCE PROJECTS, (Report to Congress, November 30, 1972); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 292 (1958); Baker, *Westlands Faces New Federal Pressure*, Fresno Bee, February 2, 1977.

12. See *Winters v. United States*, 207 U.S. 564 (1908) (settlers cannot divert river to prejudice Indian water rights); *Power Co. v. Federal Power Comm'n*, 298 F.2d 335 (D.C. Cir. 1962) (additional annual rent awarded for use of Indian lands).

13. Veeder, *Indian Water Rights in the Upper Missouri River Basin*, 48 N.D. L. REV. 617 (1972).

14. J. MOYNIHAN, *LAW OF REAL PROPERTY* 29 (1972).

15. R. POWELL, 2 *THE LAW OF REAL PROPERTY* § 190 (1977).

16. The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1977).

closer examination reveals that it has considerable philosophical ramifications, and that it critically involves many individual landowners. It applies both to new projects and continuing activities directly undertaken by federal agencies through federal contracts, grants, loans, subsidies, leases, permits, licenses, certificates, and other entitlements for use of land.¹⁷

California's Environmental Quality Act (EQA) similarly says:

All state agencies, boards, and commissions shall prepare . . . and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment.¹⁸

This has been defined as encompassing:

- (1) Activities directly undertaken by any public agency;
- (2) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies;
- (3) Activities involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use by one or more public agencies.¹⁹

Unlike the federal law, California does not require "major" governmental involvement in the development—only "any minimal link." Hence, whenever the California landowner proposes to do something which involves governmental acquiescence at *any* level and which may have a "significant effect on the environment" the requirements of the EQA will apply. It is likely that this could involve building permits, zoning variances, burning permits, crop dusting and a myriad of other common agricultural pursuits.²⁰

This conclusion is indicated by California Public Resources Code section 21083 which states that "significant effect on the environment" means:

- (1) Whether a proposed project has the potential to degrade the quality of the environment, curtail the range of the environment or to achieve short term, to the disadvantage of long term, environmental goals;
- (2) The possible effects of a project are individually limited, but cumulatively considerable;
- (3) The environmental effects of a project will cause substantial adverse effects on human beings either directly or indi-

17. 36 Fed. Reg. 7,724 (1971).

18. CAL. PUB. RES. CODE § 21100 (West 1971).

19. *Id.* § 21065.

20. See Kaufman, *Duty of Private Parties to File Environmental Statement*, 61 CALIF. L. REV. 559, 576 (1973).

rectly.²¹

In essence, the Act may come into play whenever a proposed project will alter the physical character of the area, involve fresh impact on the environment, or impact on a resource of critical environmental concern.²² This would include projects which are inconsistent with *national* environment standards.²³

Lest it be thought that processing of an Environmental Impact Report is just a bit more paperwork, the proposal must first be described, then include the seven following topics:

- (1) The proposal's significant environmental effects;
- (2) The proposal's growth-inducing impact;
- (3) Measures to mitigate the significant effects, specifically including measures to reduce energy consumption;
- (4) Significant environmental effects which cannot be avoided;
- (5) Any significant irreversible environmental changes foreseen;
- (6) Local, short-term environmental uses involved in the proposed project and their relation to the maintenance and enhancement of long-term environmental productivity;
- (7) Alternatives to the proposal.²⁴

The drafter must approach his project in four stages: planning, acquisition, development and operation, and as to each stage must discuss at the minimum:

- (1) Physical alteration of land, wetlands and bodies of water;
- (2) Noise, water and air pollution;
- (3) Energy and water consumption;
- (4) Disposal of solid wastes and hazardous materials;
- (5) Scenic and esthetic effects;
- (6) Conflict with established scientific, educational, recreational, and religious uses of the area;
- (7) Impacts on historical sites, vegetation, wildlife, and mineral resources;
- (8) Adverse effects on human beings;
- (9) Those impacts which led to the original decision to draft an EIR.

Although the degree of specificity required on each of the topics varies with the nature of the project, the task of filing the report properly and adequately must not be taken lightly, for the crucial step is that the project must be ultimately approved by the appropriate government agency.

21. CAL. PUB. RES. CODE § 21083 (West 1971).

22. See Kaufman, *supra* note 20.

23. Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972).

24. CAL. ADMIN. CODE, tit. 14, § 15143.

Why all these requirements? Simply because the Legislature of California (as well as the federal government and many other states) has essentially said that the *total environment* belongs to every citizen (as California previously did with water) and has imposed a trust on California's government at all levels to protect it. This is but a half step from saying that each element of the environment "owned" by an individual is held in trust for all others.

The language of Public Resources Code section 21000 leaves little doubt in this regard:

The Legislature finds and declares as follows:

- (a) The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.
- (b) It is necessary to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man.
- (c) There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.
- (d) The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.
- (e) Every citizen has a responsibility to contribute to the preservation and enhancement of the environment.
- (f) The interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution.
- (g) It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage.

When the Legislature passed this law, it acted in accordance with public opinion, for the espoused philosophy was overwhelmingly endorsed by the voters of the state when in 1970 they passed Proposition 20 to preserve coastal resources. Furthermore, conservationists and major businesses have jointly called for immediate creation of a new California state agency to develop a comprehensive statewide land use

plan,²⁵ and other states have also experienced similar activity.²⁶

In light of these trends, it is no surprise that the legislature seems to be moving toward preservation of agricultural land by statewide zoning as compared to leaving the matter to local entities. It is not extraordinary that a furor arose when pumping from an underground basin threatened the existence of the endangered pupfish in its desert potholes some miles away. It has been shown that even the completion of a huge dam could be held up because a certain species of tiny fish faced extinction from the project. It is also not hard to understand why the federal government would drastically curtail a major industry—tuna fishing—in order to save the highly intelligent dolphin. Are these whims of our times, or are they graphic illustrations of things to come under an already existing public philosophy?

Could it be that we are heading for a Supreme Court decision declaring that there is a constitutional right to a decent environment?²⁷ Have we already adopted James Michener's statement that "the quality of a good life depends in large part on how a man reacts to his natural environment, and we cannot destroy one without diminishing the other"?²⁸ Are we on the verge of seriously considering the "land ethic" and "biotic community" concepts of Aldo Leopold?²⁹ Some scholars have even espoused the concept that environmental objects have "rights" of their own:

25. *Unusual Alliance: Coalition Supports State Land Use Unit*, Sacramento Union, March 1, 1975, at A9, col. 5-7.

26. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

27. See Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, 1970 LAW & THE ENVIRONMENT 134; Pearson, *Toward a Constitutionally Protected Environment*, 2 Environmental L. Rev. 53 (1971); Robie, *California Environmental Quality Act: A Substantive Right to a Better Environment?*, 49 L.A. B. Bull. 17 (1973).

28. J. MICHENER, *THE QUALITY OF LIFE* 171 (1970).

29. LEOPOLD, *A SAND COUNTY ALMANAC* 239 (1971). Leopold's "biotic community" concept explains that the individual is a member of a "community" of interdependent parts. When one part is damaged or exterminated, the community suffers an injury. At some point, damage to individual members of the community will result in death of the community.

His "land ethic" concept is an enlarging of the community concept to include soils, waters, plants, and animals which are collectively called "the land".

The intent of the "land ethic" is to change the role of man in nature from conqueror to citizen. It is designed to create an ecological conscience in the individual landowner by regarding the land as a living thing.

Leopold expands these theories by holding that in order to maintain the integrity and stability of the biotic community, each part of it must be recognized as an essential element in a complex system evolved by nature over millions of years. He avows that when the other members of the biotic community are deemed to have legally recognizable rights, man will be forced to be more cautious in the conduct of his affairs. He surmises that upon that realization, both he and the community as a whole will prosper.

I am quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called 'natural objects' in the environment—indeed to the natural environment as a whole.³⁰

Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.³¹

Much in point philosophically is the controversy over private ranchers' grazing rights on public land and the rights of the citizenry to have wild animals such as deer and elk occupy the same ranges. An immediate problem in this area is the rapidly rising populations of "wild" horses and burros which feed on such ranges in many parts of the west.

The federal government owns and administers approximately 273 million acres of grazing land in eleven western states. These lands supply about 12 percent of the available livestock forage.³² Initially, these lands were considered "open range" with an "implied license that the public lands shall be free to the people who seek to use them where they are left open and unenclosed."³³ With this ideal in mind, the right to use these lands became the heart of many livestock operations.

Unfortunately, lack of governmental controls led to severe overgrazing as well as to bloody range wars. Finally, in 1934, Congress passed the Taylor Grazing Act which placed management and protection of open range lands under the Bureau of Land Management and the Forest Service. The Bureau thereafter issued permits for grazing. In 1971, Congress sought to protect "wild" horses and burros by passing the "Wild Free-Roaming Horse and Burro Act"³⁴ which resulted in a dramatic increase in the herds of those animals. Since they forage much the same as cattle and sheep, a serious problem has arisen as to which group must yield—the ranchers' herds or the wild horses and burros.

While the problem has not been solved, nor a reasonable solution even devised, the issue does point up a dilemma for all concerned. Without the historical grazing rights, the value of the land privately held by many of the ranchers would be drastically affected and in some cases would effectively prohibit the cattle operations which have traditionally been conducted there.

TECHNOLOGY AND RESTRAINTS ON CHEMICAL USAGE

In addition to the restrictions put on farmers through such vehicles as zoning and environmental protection acts, they often find themselves

30. C. STONE, SHOULD TREES HAVE STANDING? 9 (1974).

31. *Sierra Club v. Morton*, 405 U.S. 727, 741-42 (1972) (Douglas, J. dissenting).

32. A. REITZ, JR., ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES, NINE-3 (1974).

33. *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

34. 16 U.S.C. §§ 1331-1340 (1974).

severely restricted by other actions of governmental agencies. An obvious restraint is the restrictions on the use of certain chemical compounds needed for the efficient operation of a farm. Various governmental entities may forbid the use of these substances on crops and soils because they pose a threat to other crops, humans, beneficial insects, or animals which the agency deems not commensurate with the value of the good done by the usage. DDT, hormone injections in meat animals and certain antibiotic applications to dairy animals are prime examples, but the instances of other such restrictions are legion.

Fortunately, technology has generally kept pace rapidly enough to prevent disaster by providing substitute compounds. There are times, however, when the nature and capability of the farm is changed merely because the government has banned a formerly used substance. What would happen if, as suggested, it turns out that nitrogen fertilizers break down the earth's ozone layer? Since nitrogen is often next to water in being the lifeblood of an intensive farming operation, this result could be catastrophic.

OWNERSHIP DOES NOT GIVE EXCLUSIVE RIGHT OF USE

Historically, farmers could decide who they would or would not allow on their properties. The farm was much in the same capacity as a private residence—the farmer could exclude all but invitees and governmental agents on legitimate business. Now, however, in California and some other states, farmers find that the advent of the possibility of unionization of their workers brings with it a right of entry by union organizers.³⁵ This has been a bitter pill for most farmers because now the farm is like any other business enterprise. It is not clothed with all the immunities of a private residence.³⁶

Another source of conflict of much the same nature appears inevitable from rapidly growing pressure for the public to have access rights to such things as mountains, streams, lakes, beaches, and historical sites. Some of these access routes may come by way of condemnation if they are not voluntarily given, and some will come by assertion of recreational easements where the public has openly used private lands for access over many years. Many, if not most, farmers are unaware of such rights, and, if they are recent purchasers of the land, may be completely unaware of the prior usage.

35. *NLRB v. Babcock*, 351 U.S. 105, 113 (1956).

36. *See, e.g., Note, Access to Farms as Mandated by the United States Constitution and by Action of the California Board of Agricultural Labor Relations*, 8 Sw. U.L. REV. 165, 182; CAL. ADMIN. CODE, tit. 8, § 20900; *Agricultural Lab. Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 128 Cal. Rptr. 183 (1976).

Where such access rights exist, farmers may well have to tailor their operations around them. They may have to construct protective fencing and refrain from any activity which might impair the public right. Additionally, they will have to take care that their operations do not endanger the users of the access routes, for if they do not, they may find themselves liable for damages users sustain.

Inevitably, they will also have to tolerate certain technical trespasses by the public, such as where the users reach a stream, then fan out along it to fish or swim. Concepts of ownership under the "high water" standard will likely come to be recognized as allowing public usage during periods of lower water levels and they may even be extended to allow reasonable use of land above the high water mark.

The concept of "navigability" also has considerable bearing on public access rights, for the common law has historically given the public a right to use navigable waters for the exercise of the incidents of navigation. These "incidents" include boating, fishing, swimming and other normal everyday uses.

Whether a stream is navigable is open to both state and federal interpretations, but the trend is definitely toward liberalization of the concept. Whereas the federal test is whether the watercourse is suitable for "commerce"³⁷ state law can be less stringent. Many states have, in fact, adopted a "pleasure boat test" which allows the concept to apply if even a canoe can navigate the stream.³⁸ Such state laws often hold that there is a strong policy favoring full public use of *all possible recreational lands and waters* within the state.³⁹

Many landowners have deeds which extend to the center of the watercourse, and have therefore felt that the portion of the stream or lake within their deed was theirs to use exclusively. But under the navigability concept that is patently not so.

Now, with a heavy accent being put on historical sites and environmental oddities, it is reasonable to assume that not only might similar doctrines be devised in order to give public access to other than watercourses, farmers might well be obligated to maintain those aspects of their domains for either present or future public use.

37. *Utah v. United States*, 304 U.S. 9 (1971).

38. *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1971).

39. *Id.*

GOVERNMENTAL NEEDS AS A NEW THREAT TO TRADITIONAL
INDEPENDENCE

Finally, we come to consideration of an issue which is beginning to look more like a probability than a possibility—governmental mandates as to which crops may and may not be grown. In a limited way we have already had some governmental intervention. Government has created acreage allotments, price supports, the Soil Bank and various forms of marketing agreements and commodity controls. Most of the restraints and inducements have been designed to reduce overproduction or stabilize prices—in essence, to protect certain segments of American farming. Therefore, nearly all of these restrictions have essentially been based on voluntary action, or at least acquiescence, by the agricultural community.

But this is a very rapidly changing world where the United States no longer has commanding dominance and must constantly fight for position in the international struggle for survival. Markets for essential raw materials and finished goods have become highly controlled through means such as “common markets” and the Organization of Oil Producing Countries. “Warfare” of this nature may well supplant the militaristic warfare of the past. Accordingly, each country and each international cartel is inventorying its assets in this regard in an attempt, not just to get bargaining position, but to get control.

The United States is a very wealthy country in all respects, but, like all others, it is dependent on other countries to maintain its productivity. Hence it must, like every other country, trade intensely, utilizing its native resources to their fullest in making bargains. In this regard, agricultural productivity is one of its strongest assets, and must therefore be considered as a major player on the chessboard of international competition.

The gravity of this situation is evident in the fact that while the United States wallows in food surpluses, much of the rest of the world starves. A renowned economic analyst has stated:

Today no one can be ignorant of the fact that in whole continents countless men and women are ravished by hunger, countless children are undernourished, so that many of them die in infancy. The physical growth and mental development of many others is retarded and as a result whole regions are condemned to the most distressing dependency.⁴⁰

Newsweek Magazine (November 1974) has reported: “By the most conservative estimates, at least 460 million people are threatened with starvation today—ten million will probably die this year.” And an international nutrition expert has said: “Over 700 million people in 32

40. Address by Martin McLaughlin, (September 1974).

nations are on the brink of starvation.”⁴¹

One person in every two in the world is badly nourished, and one in three is chronically hungry. Half of the children alive today will never reach adulthood. Yet, in spite of these appalling death rates, there is a net increase in population of 190,000 every day, which adds up to seventy million annually or the equivalent of adding another Mexico or Canada each year!⁴² Not only is there a worldwide lack of food in general, there are even more severe shortages in certain essential nutrients, such as protein, which are particularly critical to the mental and physical development of children.

The per capita consumption of beef in the United States, which was fifty-five pounds in 1940, rose to 115 pounds in 1972. And it is reported that in 1973 we fed our livestock as much grain as all the people in China and India eat in a year.⁴³ We did this in spite of the fact that such domestic animals use up four to seven times as much food energy as the energy which is ultimately contained in their edible products. We even spend billions of dollars annually on food for our pets—food which would be considered extravagant *human* diets in most of the rest of the world. Moreover, we control much of the fertilizer production and restrict its distribution in order to keep our own production costs low, thus preventing other countries from raising their production of food.

How long can this pattern continue from a moral standpoint? How long can it continue from a practical standpoint? Most likely not long at all. Not only will we have to supply others with food, we will have to change our patterns of production, such as shifting to protein-rich plants and emphasizing the production of efficiently produced staple items over the less efficient production of certain animal products. And, of course, many exotic crops, such as fruit, may drift into obscurity.

These are realities which the American farmer will have to acknowledge, for world pressures may soon force our federal and even state governments to begin dictating in one form or another what should or can be grown. It is reasonable to assume that the “highest and best use” of farm land will become an established doctrine and that such “use” will vary from time to time depending upon world conditions and national political needs.

CONCLUSION

This article has been designed to illustrate a fact which we have gradually begun to realize over the past couple of decades—that a farm is

41. Lester Brown, *SCIENTIFIC AMERICAN*, (1974).

42. *FAMINE! CAN WE SURVIVE?* (1969).

43. *HARPER'S MAGAZINE* (1975).

not strictly a private holding. It is an asset in which the public has a strong legal interest. Use of a farm is already highly controlled. It will be even more so in the future. The concept of complete independence of the farmer no longer exists.

These realizations have been a bitter pill for some in the industry, and a source of abject frustration for others—but do these trends really hurt the farmer? Or do they instead protect the sanctity of agricultural pursuits and elevate the farmer to new heights of prestige in our complex society?

The answer may lie largely in the truism that no other group of people in the history of the United States has responded to change more effectively than American farmers. And that there is no reason to believe that this pattern will change.

The balance of the answer will lie in the farmers' response to the question: What is more exciting and challenging—operating land under the old fee simple concept, or being a trustee of one of the most vital elements of the environment in which man must live?