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# Defining Damage: The "Damage to Commercial Agricultural Products" Exception to Oregon's Right-to-Farm Law



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## A HYPOTHETICAL INTERACTION FOR CONSIDERATION

*It is a sunny day in Oregon. Cars sporadically pass by the fields, their passengers admiring the bucolic countryside or thinking about their ultimate destination. Two adjoining properties, each with vast amounts of land, are separated only by the road that carries cars to their destinations. On one side of the road, the farmer grows Crop A—a self-pollinating crop. Her neighbor across the road grows Crop B—a cross-pollinating crop. Crops A and B are of the same species; however, they differ in variety.*

*The farmer who grows Crop A has repeatedly requested that her neighbor grow his Crop B on the other side of his property, further away from the road. The farmer of Crop A feared accidental cross-pollination that would result in Crop A's fertilization, resulting in Crop AB (which has a lower market value than Crop A). The farmer of Crop A, who saves seeds after harvest, is concerned about the long-term health of her seeds. If pollen from Crop A cross-pollinated, it would not affect the future development of Crop B. The farmer of Crop B resists this, wanting to restore the soil further from the road to avoid soil degradation.*

*There is a breeze, characteristic of the season. In that breeze, pollen from Crop B floats across the narrow country road. Further down, a bee, sprinkled in pollen from Crop B, floats across the road to explore the fields of Crop A. Pollen from Crop B ultimately ends up impacting Crop A. However, the farmer of Crop A does not realize that the interaction has occurred until the next harvest, when she realizes that the seeds that she had saved have resulted in a field of Crop AB.*

*The farmer, who expected and cared for Crop A, is left with a field of Crop AB, at no direct fault of the farmer of Crop B. Does the farmer of Crop A have a remedy? Does the farmer of Crop B not have a right to grow whatever is best suited to his land?*

## INTRODUCTION

The hypothetical above, while simplified, can be a reality for farmers in Oregon. What is cultivated on a neighboring property has the potential to shape the harvest of another. Farming is an inherently risky venture. While a farmer may take great care to foster the growth of her crop, factors outside her control may result in a lifeless field by harvest time.

Oregon's right-to-farm law, codified at ORS 30.936, provides:

> (1) No farming or forest practice on lands zoned for farm or forest use shall give rise to any private right of action or claim for relief based on nuisance or trespass.
>
> (2) Subsection (1) of this section shall not apply to a right of action or claim for relief for:
>
> (a) *Damage to commercial agricultural products*; or
>
> (b) Death or serious physical injury . . . .
>
> (3) Subsection (1) of this section applies regardless of whether the farming or forest practice has undergone any change or interruption.[1]

Oregon's right-to-farm law insulates farmers from liability from neighbors' nuisance and trespass claims, unless the nuisance or trespass results in "[d]amage to commercial agricultural products."[2] However, the definition of "damage to commercial agricultural products" is ambiguous, inconsistent, unexplained, and outdated.[3] The damage component of the exception is not the text's only component that raises questions. The protections from trespass and nuisance liability do not extend to actions that damage commercial agricultural products, which implies that the ban on private suits still protects farmers who damage noncommercial agricultural products.[4]

A clear definition of "damage to commercial agricultural products" is critical because an unclear understanding results in inconsistency, unfairness, and an incentive to grow more sturdy crops at the expense of more delicate, exacting crops. Shielding farmers from liability for their farms' operations is a state-sanctioned granting of power. In legal

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1 OR. REV. STAT. § 30.936 (2019) (emphasis added).

2 *Id.* § 30.936(2)(a).

3 Of the limited caselaw that exists involving ORS 30.936, no case adequately explains or defines what constitutes "damage to commercial agricultural products."

4 Lisa N. Thomas, *Forgiving Nuisance and Trespass: Is Oregon's Right-to-Farm Law Constitutional?*, 16 J. ENV'T L. & LITIG. 445, 458 (2001).

battles, the smallholder farmer will likely be unable to withstand the pressure from the more capital-rich industrial farmer across the road.

Power dynamics in agriculture do not abide by a binary, where one set of actors always holds the power while another party is always at its mercy. Thus, agricultural conflicts between individual farmers lack the proverbial "good guy" versus the ill-intentioned "bad guy"—there are two parties, each with valid propositions about their own sovereignty. Power dynamics fluctuate depending on the crop type and the manner in which the party is raising that crop.[5] Often, there are the smallholder organic farmers resisting encroachment by large conventional farmers, but there are also smallholder farmers growing conventional crops who face legal threats from large organic farms that fear cross-contamination.

Power dynamics can shift according to the governing law. For instance, in Oregon, marijuana farmers may exert power relative to a neighboring farm at the state level, but at the federal level the marijuana farmers can be at the mercy of a neighboring farm growing another crop because marijuana is still illegal.[6] While the characteristics and practices of a given farmer are not reliable indicators in mapping power relations, economic resources are a useful indicator of power in a relationship. As this Comment will show, vignettes of farms in Oregon are useful for examining these power dynamics in light of the ambiguity in the "damage" exception.

Statutory ambiguity in the "damage" exception serves those with the fiscal resources to litigate their position. Ambiguity serves those with money because they can navigate the legal system in a way that serves their interests. Farmers who are already struggling to turn a profit in a volatile market are not going to risk the expenses of litigating an issue where an outcome is undeterminable. The purpose of the right-to-farm law was originally to mitigate legal disputes as urban sprawl stretched closer to farmlands;[7] Oregon's right-to-farm law was not designed to handle disputes between farmers. Other schemes regulate agriculture.[8] The right-to-farm scheme was not drafted to consider that two farmers,

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5 While it will not be discussed in this Comment, there are myriad other power dynamics and interactions in agricultural relations, including around race, gender, ethnicity, and class, just to name a few.

6 *See, e.g.*, Momtazi Fam., LLC v. Wagner, No. 3:19-CV-00476-BR, 2019 WL 4059178, at *5 (D. Or. Aug. 27, 2019).

7 Schultz Fam. Farms LLC v. Jackson Cnty., No. 1:14-CV-01975, 2015 WL 3448069, at *4 (D. Or. May 29, 2015).

8 *See generally* OR. REV. STAT. § 561.005 (2019).

both practicing entirely in the realm of reasonability, could have incompatible or competing interests.

Damage is less ambiguous in the context of a farmer living adjacent to an urbanite; for example, if a farmer's cattle break down a neighbor's fence and cause property damage, there is a clear measure of damages that could open a farmer up to liability. However, in a farmer-versus-farmer context, there are areas of natural interaction, like cross-pollination. Without a clear definition of damage, legal remedies are unclear given the liability shield. The ambiguity of the "damage" exception in the right-to-farm law permits two reasonable farmers to litigate trespass and nuisance claims.

An ethos of autonomy runs throughout the history of American agriculture.[9] The mythos of the American farmer is well recognized—a recognizable trope consists of a red barn, surrounded by crops and farm animals, where there is nothing but farmland as far as the eye can see. However, in the twenty-first century, the farmer does not live in the frontier—he has neighbors. What one farmer does on his own farm can impact his neighbor's farm. There is an inherent tension in property rights: one has a right to operate their land (within reason) as they best see fit; however, the effects of that farmer's actions do not necessarily respect property boundaries. There is clear tension between individualism, on one hand, and ecological and commercial interdependence on the other. One farmer's choice to apply pesticides, for example, can impact the economic bottom line of a neighboring farmer.

Debates as to the duties of farmers on agricultural lands are often framed in terms of stewardship, steeped in notions of intergenerational preservation and Jeffersonian agrarian idealism.[10] What grows on one farm, however, impacts more than just that particular farmer. There is a fundamental tension in agriculture between land sovereignty and ecological interdependence. Farmers should not have external factors beyond their control limit the scope of their land's possibilities; however, a farmer's choices can impact their neighbor's scope of possibilities for their land use, and vice versa. Impacts, nevertheless, are neither necessarily nor inherently damaging. The tension between

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[9] *See* Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 225–26 (1993); *see also* H.W. Brands, *Why Have Americans Always Been So Obsessed with Land?*, HISTORY, https://www.history.com/news/american-land-frontier [https://perma.cc/KJ69-AWBB] (last updated Jan. 31, 2019).

[10] *See* Hamilton, *supra* note 9, at 225–26.

autonomy and interdependence cannot ever be resolved; however, the law can expect such a tension and determine the boundary of acceptable behavior relative to one's neighbor.

Since "damage" is undefined in Oregon's right-to-farm law, the extent and type of damage necessary to expose a farmer to liability can range depending on both the case and the judge. Damage, left undefined, can represent slight diminution in value for an otherwise marketable commercial product, or it can necessitate complete crop demise before a neighboring farmer's affirmative defense of their right-to-farm is judicially questionable. There should be a consistent definition of "damage" to commercial agricultural products under Oregon's right-to-farm law. Without a clear definition, cases where the damage is a triable issue of fact will result in inconsistent caselaw. The inconsistency in holdings will promote inequities of access to remedy, with some farmers deciding that the risk of costly litigation with no guaranteed success is not worth any potential remedy that they may receive for what they deem to be damage to their crops.

In Part I, this Comment will examine the history of Oregon's right-to-farm law, noting that the Oregon Legislature was concerned about unreasonable lawsuits brought by urbanites moving into Oregon's agricultural lands against the farmer engaged in reasonable farming practices—not lawsuits brought by farmers against one another. Part I will also describe how legal disputes will continue between neighboring farmers in the absence of a clear definition of "damage." Part I will also delve into the interplay between Oregon's right-to-farm law and the Oregon Constitution.

In Part II, this Comment explores three vignettes from Oregon's farmlands to demonstrate how ambiguity in the "damage" exception creates legal disputes between two farmers who are both engaged in reasonable farming practices. Part II will demonstrate how the ambiguity in Oregon's right-to-farm law can be used to advance personal motivations at the expense of farmers' autonomy. Part II also affords significant consideration to the impact of legal marijuana farming in Oregon on other farmers under the regime of the right-to-farm law.

# I
# THE RIGHT TO FARM

## *A. Oregon's Right-to-Farm Law*

Oregon has a strong right-to-farm law that not only insulates the reasonable farmer from nuisance claims but also from trespass claims. Adopted in 1993,[11] Oregon's right-to-farm law states, "No farming or forest practice on lands zoned for farm or forest use shall give rise to any private right of action or claim for relief based on nuisance or trespass."[12] Nuisance and trespass include but are not limited to "claims based on noise, vibration, odors, smoke, dust, mist from irrigation, use of pesticides and use of crop production substances."[13] Once a defendant raises the right-to-farm defense, the plaintiff alleging the damage has the burden of establishing that the defense is not applicable.[14] For example, in *Hood River County v. Mazzara*, the court of appeals reversed the trial court's finding that prolonged dog barking did not fall under the protections of the right-to-farm defense, noting that the county had failed to satisfy its burden to show that the defense was not applicable.[15] Notably, the immunity from private action "applies regardless of whether the farming or forest practice has undergone any change or interruption."[16] This is designed to ensure that farmers are protected from liability, even if there has been a recent change in how or when the farm operates.[17]

### *1. Farming Practices*

A farming practice is defined as "a mode of operation on a farm" that is similarly and reasonably used on other farms to obtain a profit in a manner that complies with relevant laws and is "done in a

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11 Oregon's right-to-farm law was updated in 1995 and 2001. NAT. RES. PROGRAMS, OR. DEP'T AGRIC., *Oregon's Right-to-Farm Law* (Apr. 2021), https://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/RightToFarm.pdf [https://perma.cc/28JM-C2XL].

12 OR. REV. STAT. § 30.936(1) (2019).

13 *Id.* § 30.932.

14 *See* Hood River Cnty. v. Mazzara, 89 P.3d 1195, 1197 (Or. Ct. App. 2004).

15 *Id.* at 1199; Harrison M. Pittman, *Validity, Construction, and Application of Right-to-Farm Acts*, § 18, 8 A.L.R. 6th 465 (2005).

16 OR. REV. STAT. § 30.936(3) (2019).

17 *See, e.g.*, Jewett v. Deerhorn Enters., Inc., 281 Or. 469, 479 (1978) (exemplifying how, prior to passage of Oregon's right-to-farm law, a court affirmed a permanent injunction against a pig farmer's operations, in part because the neighbor's residence was established prior to the establishment of the pig farm).

reasonable and prudent manner."[18] Reasonable farming practices include practices that are used on similar farmlands and are "generally accepted, reasonable, and prudent" commercial farming methods that are reasonably performed or otherwise follow pertinent laws.[19] Oregon's right-to-farm law was drafted in a more far-reaching way than most other states' right-to-farm laws, shielding farmers on all lands zoned for farming or forest use, regardless of when the farming operations commenced, for not only nuisance but also for trespass.[20] Oregon's Department of Environmental Quality, Department of State Lands, State Department of Agriculture, and State Forestry Department are statutorily authorized to dismiss complaints without any investigation if they deem the complaint to be based on protected farming practices.[21] A great deal of discretion is afforded to farmers relative to their neighbors, so long as the farming stays reasonable.

The liability shields are intended to be absolute across the state. The state legislature both statutorily invalidated any existing local rules and disallowed any future local regulations from making a farming practice a nuisance or trespass where ORS 30.936 would otherwise govern.[22] Oregon's Legislature not only limited a private citizen's ability to allege nuisance or trespass but also declared that "the authority of local governments and special districts" to label farming practices as either nuisance or trespass was to be curtailed.[23] This limiting of local powers' ability to influence farming activities was to avoid inconsistency with state land use policies.[24]

There are two statutory exceptions that limit a farmer's immunity. First, the immunity does not extend to claims relating to "[d]eath or serious physical injury."[25] The second exception, the one of focus in this Comment, is that the immunity does not apply to claims for relief for "[d]amage to commercial agricultural products."[26] The Oregon Legislature designed this exception to allow commercial farmers a remedy through private suit if the actions of other farmers damaged

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18 OR. REV. STAT. § 30.930(2) (2019); *Hood River Cnty.*, 89 P.3d at 1196–97.

19 NAT. RES. PROGRAMS, *supra* note 11.

20 Thomas, *supra* note 4, at 448.

21 OR. REV. STAT. § 30.943 (2019).

22 *Id.* § 30.935.

23 *Id.* § 30.933(2)(d).

24 *Id.*

25 *Id.* § 30.936(2)(b).

26 *Id.* § 30.936(2)(a).

their commercial crops.[27] However, "damage" is not defined in the context of Oregon's right-to-farm law. The "damage to commercial agricultural products" exception inherently presumes that a liable farmer acted unreasonably; otherwise, such "damage to commercial agricultural products" would not have occurred.

### *2. The Legislative History Behind Oregon's Right-to-Farm Law*

Oregon codified the policy considerations and legislative findings that shaped the drafting of Oregon's right-to-farm laws.[28] The state's agricultural land use policy centers on protections of the agricultural way of life; the Oregon Legislature declared that rural lands are important to the public, "justif[ying] incentives and privileges . . . to encourage owners of rural lands to hold such lands in exclusive farm use zones."[29] The state legislature wanted to curtail the ability of local governments to label some farming practices as a trespass or a nuisance, which would be "inconsistent with land use policies,"[30] adversely affecting some farmers while not impacting others. The creation of Oregon's right-to-farm law reflects the state legislature's understanding that farming is a crucial part of Oregon's economy.[31] Not only does agriculture support Oregon's economy, but it was also deemed an essential component of natural resource preservation.[32]

The Oregon Legislature, like the legislatures in many other states, was concerned that farmers could face legal repercussions for the realities of operating a farm as residential communities expanded closer to agricultural lands.[33] Specifically, the Oregon Legislature was concerned about private suits brought for noise, smoke, dust, vibration, odors, and pesticide use—results of acceptable farming practices occurring outside an urban growth boundary.[34] In order to prevent legal disputes regarding farming practices, the Legislature found it wise to insulate farmers from liability from actions that "may be intended to limit, or have the effect of limiting, farming and forest practices."[35]

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27 Jennifer Bennett, *Act vs. Amendment: Schultz Family Farms, Legislative Exceptions, and the Future of Right-to-Farm*, 23 J. ENV'T & SUSTAINABILITY L. 2, 4 (2016).

28 *See* § 30.933 (2019).

29 *Id.* § 215.243(4) (noting Oregon's general agricultural land use policy).

30 *Id.* § 30.933(2)(d).

31 *Id.* §30.933(1)(a).

32 *Id.* § 215.243(1) (noting Oregon's general agricultural land use policy).

33 *Id.* §§ 30.933(1)(b), 215.243(3).

34 *Id.* § 30.932; H.B. 2731, 71st Or. Legis. Assemb. (2001).

35 § 30.933(1)(c) (2019).

Statutorily, the Legislature declared that "[p]ersons who locate on or near an area zoned for farm or forest use must accept the conditions commonly associated with living in that particular setting."[36] The law was drafted with those not accustomed to farming practices in mind, rather than other farmers. The text and history of the law demonstrate that the primary concern of the Oregon Legislature was urban encroachment.[37]

Oregon's Legislature intended to protect farmers from ruinous litigation as residential uses encroached on agricultural lands because farming practices are "critical to the economic welfare of th[e] state."[38] Prior to the enactment of Oregon's right-to-farm law in 1993, farmers could be liable for their farming operations depending on the substantiality of the interference, the nature of the neighborhood (residential as compared to agricultural), and the effect on "the enjoyment of life, health, and property."[39] The Legislature was aware that conflict was likely to arise between varying uses of the land as urban development expanded onto lands traditionally used for resource cultivation.[40] Recognizing that "neighboring suburbanites, who inevitably find the farming practices loud, smelly, invasive, or simply irritating," would bring suit for nuisance or trespass against farmers, the Oregon Legislature "tip[ped] the scales in favor of the farms."[41] Conversely, the Legislature did not want to permit farmers to behave negligently. The "damage to commercial agricultural products" exception is indicative of the Legislature's lack of desire to "give free license to use *any* farming practices."[42]

However, there is no indication that the Legislature considered "damage" in detail. The commerciality component of the exception implies that the Legislature wanted to permit compensation where a farmer could no longer market his or her crop. Oregon courts, until recently, have not had a justiciable controversy that would allow them

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36 *Id.* § 30.933(2)(c).

37 Schultz Fam. Farms LLC v. Jackson Cnty., No. 1:14-CV-01975, 2015 WL 3448069, at *4 (D. Or. May 29, 2015).

38 *Id.* at *3 (quoting OR. REV. STAT. § 30.933(1)(a)).

39 *See, e.g.*, Jewett v. Deerhorn Enters., Inc., 281 Or. 469, 473 (1978) (affirming a decision to permanently enjoin a pig farm's operations as the only "effective remedy" to address the offending smells and sounds of the pig farm. *Id.* at 479.).

40 § 30.933(1)(b) (2019).

41 *Schultz Fam. Farms LLC*, 2015 WL 3448069, at *4.

42 *Id.*

to interpret Oregon's right-to-farm law.[43] The "damage to commercial agricultural crops" exception was the Legislature's recognition that not all farming practices are shielded from liability.[44] The "damage" exception prevents farmers from being able to rely on the right-to-farm scheme to justify the use of unreasonable farming practices.[45] However, damage can exist on a spectrum. An unclear understanding of the sort of damage the Legislature intended to address will result in judicial inconsistency.

Oregon's Department of Agriculture realizes that Oregon's right-to-farm law will not adequately protect all farmers, advising farmers that "it is in [their] best interests to prevent and resolve conflict where possible and maintain good relationships with neighbors."[46] However, disputes are likely to arise between neighboring farmers, even after good faith communication. Oregon's right-to-farm law has not adequately evolved to address modern disputes. For example, there is a concern that Oregon's right-to-farm law does not adequately address concerns around the new Oregonian hemp and marijuana industries.[47]

This is a matter of competing property rights. Where there are competing rights, there is the risk that any power imbalance will dictate the outcome of the dispute. It is also a matter of balancing the duty that farmers owe to their own land and the duty they owe to a neighbor—a balancing act that is as old as the concept of private property. If a suit is brought for nuisance or trespass from any reasonable farming practice, the prevailing party can win attorney fees and costs at trial and on appeal.[48] This can greatly impact smaller farmers who might feel as though their crops have been damaged but fear being defeated in court and having to pay attorney fees.[49] The legislative history of Oregon's

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43 Bennett, *supra* note 27, at 12 (noting the minimal citation to the relevant parts of Oregon's right-to-farm law in caselaw).

44 *Id.* at 21.

45 *Id.* (referencing Schultz Family Farms LLC v. Jackson County, at *4).

46 NAT. RES. PROGRAMS, *supra* note 11 (advising farmers to "communicate early and often"; "[s]hare, in as much detail as possible, the challenges you face"; and "[t]alk about the various options that might provide a solution to the challenges you face, and the costs associated with each.").

47 *See* Ted Krempa, *Your View: Right-to-Farm Rules Shouldn't Shield Hemp*, MAIL TRIB. (Oct. 15, 2019), https://www.mailtribune.com/editorials/2019/10/15/your-view-right-to-farm-rules-shouldnt-shield-hemp/ [https://perma.cc/9BAE-F7J5].

48 NAT. RES. PROGRAMS, *supra* note 11.

49 The Associated Press, *Oregon's "Right to Farm" Law Called into Question in Pesticide Dispute*, OREGONIAN, https://www.oregonlive.com/pacific-northwest-news/2016

Right-to-Farm Act indicates that the law was not intended to solve these eternal disputes through the "damage" exception.[50] However, a clarified definition of damage would be indicative of what duty a farmer owes to his neighbor. If the exception is to govern disputes arising from a farmer's autonomy on his own land and its impact on his neighbor, then what constitutes damage should be defined.

### *B. Potential Future Legal Disputes Given the Ambiguity of "Damage"*

A clearer definition of damage is needed so that farmers who feel that they have experienced a loss have confidence in bringing suit, and so that farmers know what is expected legally of them vis-à-vis their neighbor. Damage could require the complete annihilation of a crop. Damage could also be defined as any diminution in value to the crop, no matter how small or inconsequential. While nuisance and trespass claims between farmers would likely overlap in most cases, it is worth considering the two claims independently.

#### *1. Trespass*

Trespass is defined in Oregon as "any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist."[51] Trespass must be intentional, meaning that the intruder is aware of the intrusion, even if the intruder does not mean to cause harm.[52] While harm is not a necessary element to establish trespass, damage that establishes that invisible trespass has occurred is an

/05/oregons_right_to_farm_law_ques.html [https://perma.cc/WPB2-26BX] (last updated Jan. 9, 2019).

50 *See, e.g.*, H.B. 2731, 71st Or. Legis. Assemb. (2001) (demonstrating how amendments to the law focused on the growth of urban boundaries); *see also* Schultz Fam. Farms LLC v. Jackson Cnty., No. 1:14-CV-01975, 2015 WL 3448069, at *4 (D. Or. May 29, 2015) (noting that "[t]he exception demonstrates that the Right to Farm Act does not give free license to use *any* farming practices. While farming practices may not be limited by a suburbanite's sensitivities, they may be limited if they cause damage to another farm's crops.").

51 Thomas, *supra* note 4, at 457 (quoting Davis v. Georgia-Pacific Corp., 445 P.2d 481, 483 (Or. 1968)).

52 *Id.*

important component in establishing causation.[53] Additionally, an unpermitted entry onto the soil of another is trespass at common law.[54]

Oregon's Supreme Court has followed the first Restatement of Torts, adopting a rule that liability for unintentional intrusion can only be found when the intrusion stems out of "negligence or an ultrahazardous activity."[55] However, Oregon's highest court has recognized standard farming practices as trespass. In *Ream v. Keen*, the Oregon Supreme Court affirmed a court of appeals' finding that smoke from controlled burns on a farm could result in trespass; however, the Oregon Supreme Court significantly noted that it could not reach the issue of the farmer's right-to-farm defense due to a preservation issue.[56]

Reasonable farming practices include the proper and permitted application of pesticides.[57] However, pesticides can trespass across property lines and land on crops that were supposed to remain organic.[58] While unreasonable application of pesticides is not protected under the right-to-farm law,[59] the organic farmer is left without remedy if a neighbor properly applies pesticides and then asserts a right-to-farm defense if the pesticides cross boundaries.

As will be discussed throughout this Comment, pollen poses an interesting conundrum for Oregon's right-to-farm law given the ambiguity of the "damage" exception. Oregon's Supreme Court has held that microscopic emissions from an aluminum reduction plant entering a livestock farmer's land constituted trespass.[60] It is likely that Oregon's courts would continue to reject the idea that trespass necessitates an invasion of a certain physical size.[61] An unclear

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53 *Id.*

54 Carvalho v. Wolfe, 140 P.3d 1161, 1163 (Or. Ct. App. 2006).

55 *Id.* at 1163–64 (adopting §§ 158, 165 of the Restatement (First) of Torts).

56 Ream v. Keen, 838 P.2d 1073, 1075–76 (Or. 1992).

57 NAT. RES. PROGRAMS, *supra* note 11.

58 *See* Hale v. State, 314 P.3d 345, 346 (Or. Ct. App. 2013), *cert. denied*, 354 Or. 840 (2014) (noting that the initial litigation was between organic farmers and nonorganic neighbors whose pesticides allegedly drifted across and infected the plaintiffs' organic crops. The suit was ultimately voluntarily dismissed after defendants asserted their right-to-farm defense. *Id.* Plaintiffs then filed suit against the State, alleging that Oregon's right-to-farm law unconstitutionally deprived them of a remedy. *Id.*).

59 The Associated Press, *supra* note 49.

60 Martin v. Reynolds Metals Co., 342 P.2d 790, 797 (Or. 1959); Shené Mitchell, *Organic Crops, Genetic Drift, and Commingling: Theories of Remedy and Defense*, 18 DRAKE J. AGRIC. L. 313, 321 (2013).

61 *See* Mitchell, *supra* note 60, at 321.

definition of damage, coupled with the microscopic nature of pollen, could result in an increase of litigation where farmers claim that their neighbor's right-to-farm defense is inapplicable because cross-pollination caused "damage" to their commercial crops. This is especially likely to arise in the context where genetically modified crops cross-pollinate onto organic fields (resulting in a loss of organic certification) or where the plaintiff farmer is growing a crop that needs to avoid external pollination.

*2. Nuisance*

For an actionable claim of nuisance, an interference must be a substantial "non-trespassory interference with another's private use and enjoyment of [his or her] land," even if the action is otherwise legal.[62] In determining whether actionable nuisance occurred, a court will first determine whether there is a substantial and unreasonable interference with use and enjoyment of the claimant's land.[63] Rather than relying on fixed general rules to determine the validity of a nuisance allegation, courts will assess a particular case's individual facts.[64] In describing nuisance, the Oregon Court of Appeals has described five factors that determine the substantiality of the interference: (1) the location, (2) the neighborhood's character, (3) the interference's nature, (4) the interference's frequency, and (5) the effect of the interference on "plaintiff's enjoyment of life, health, and property."[65]

Oregon's right-to-farm law shields farmers from liability in private nuisance lawsuits.[66] Without this shield, a neighbor "whose property or personal enjoyment thereof is affected by a private nuisance[] may maintain an action for damages therefor."[67] The liability protection, however, does not cover private nuisances that result in "[d]amage to commercial agricultural products."[68] If a neighbor alleges that a condition on one farmer's property resulted in "damage" to the "commercial agricultural products" grown by that neighboring farmer,

62 Thomas, *supra* note 4, at 456 (quoting Mark v. State Dep't of Fish & Wildlife, 974 P.2d 716, 719 (Or. Ct. App. 1999)).

63 Smith v. Wallowa Cnty., 929 P.2d 1100, 1103 (Or. Ct. App. 1996).

64 *Id.*

65 Thomas, *supra* note 4, at 456.

66 OR. REV. STAT. § 30.936(1) (2019).

67 *Id.* § 105.505.

68 *Id.* § 30.936(2)(a).

the right-to-farm law permits the neighboring farmer to bring suit for nuisance.

A notable component of Oregon's right-to-farm law is its reliance on reasonability of the farming practice as the baseline scope for a farmer's protections. For a farming practice to be shielded from nuisance suits, it has to be a reasonable farming practice.[69] However, the courtroom is often far from the farm. Agriculture is highly technical, and the nuances of a practice can be easily lost upon someone who has no exposure to agriculture. Given the urban-rural divide in the United States, details are likely to get lost in translation. A judge or jury must be convinced of a farming practice's reasonableness. While the legislature provided evidence of some types of farming practices that it had in mind, such as noise or vibrations,[70] not all disputes will be as clearly outlined.

### *3. Pollination and a Potential Cause of Action Given the Ambiguity of "Damage"*

One of the biggest unexplored disputes with Oregon's right-to-farm law is whether cross-pollination from one lot to another could constitute "damage to commercial agricultural products," thereby removing the farmer's shield from liability. In considering this potential dispute, it is important to consider how pollination from a neighboring lot can alter a farmer's ultimate crop and subsequent harvests.

Pollination is the reproductive process of plants. Selective breeding and pollinating of crops has developed agricultural diversity over thousands of years.[71] Pollen from plants with desired characteristics has been transferred to other crops, resulting in a new variety of plant over time.[72] Pollination is the transfer of pollen from the male anther of a plant to the female stigma.[73] Plants can be either self-pollinating, whereby the plant can fertilize itself, or cross-pollinating, whereby the crop needs an external force to transfer the pollen to another flower of

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69 *Id.* § 30.930(2).

70 H.B. 2731, 71st Or. Legis. Assemb. (2001); *see also* OR. REV. STAT. § 30.932 (2019).

71 Ania Wieczorek & Mark Wright, *History of Agricultural Biotechnology: How Crop Development Has Evolved*, NATURE EDUC. (2012), https://www.nature.com/scitable/knowledge/library/history-of-agricultural-biotechnology-how-crop-development-25885295/ [https://perma.cc/BF69-VZ2X].

72 *Id.*

73 *What Is Pollination?*, U.S. DEP'T AGRIC., https://www.fs.fed.us/wildflowers/pollinators/What_is_Pollination [https://perma.cc/T8RS-7NSN].

the same species.[74] External vectors that move pollen to cross-pollinating plants can include the wind or an animal's movement—for example, a bee can collect pollen grains on its body and move it to another flower as it collects nectar.[75] Most plants cross-pollinate, resulting in a vast variation of genetic material; whereas self-pollinating plants self-reproduce, resulting in identical offspring.[76]

Seeds, which carry the genetic information to produce a new plant, are produced when the pollen is transferred between the same species of flowers.[77] Cross-pollination can occur only between varieties of the same species but not between entirely different species.[78] However, given the rise of the monocrop economy in much of the United States[79] and given the fact that certain environments tend to suit certain crops, it is not difficult to imagine that pollen has to travel very far to find another crop of the same species.

The fruit that is ultimately cultivated from a plant that another variety of the same species has cross-pollinated will not be affected for that cycle; however, it can impact the crop of any seeds planted from that cross-pollinated crop.[80] This is notable given the practice of many farmers of saving seeds—can seeds that cannot be saved for replanting due to cross-pollination be considered damaged commercial agricultural products? Under a textualist reading of the exception, the seeds are not directly "commercial," meaning that the seeds are not for direct commercial profit (apart from farmers who sell the seeds in the commercial market). However, these seeds would be the critical component of a farmer's ability to produce the future commercial agricultural product.

Cross-pollination is a natural process that can occur between farms without the farmers ever realizing it. The crops do not have to be directly adjacent for the cross-pollination to occur. One study on wheat

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74 *Id.*

75 *Id.*

76 Mark Goodwin, *Pollution Basics*, SCIENCE LEARNING HUB (June 6, 2012), https://www.sciencelearn.org.nz/videos/1755-pollination-basics [https://perma.cc/58U3-G6PP] (quoting a transcript of a video).

77 U.S. DEP'T AGRIC., *supra* note 73.

78 Heather Rhoades, *Cross Pollination in Plants: Cross Pollinating Vegetables*, GARDENING KNOW HOW, https://www.gardeningknowhow.com/edible/vegetables/vgen/cross-pollination.htm [https://perma.cc/P9YU-VWKT] (last updated Feb. 22, 2021).

79 *E.g.*, Tamar Haspel, *Monocrops: They're a Problem, but Farmers Aren't the Ones Who Can Solve It*, WASH. POST (May 9, 2014), https://www.washingtonpost.com/lifestyle/food/monocrops-theyre-a-problem-but-farmers-arent-the-ones-who-can-solve-it/2014/05/09/8bfc186e-d6f8-11e3-8a78-8fe50322a72c_story.html [https://perma.cc/JBU8-KNL6].

80 Rhoades, *supra* note 78.

pollen drift found a genetic trait for herbicide resistance can be transferred at a low frequency to fields of wheat without the herbicide resistance approximately 200 feet away—a distance that is "greater than [is] usually assumed."[81] Given the uninterpreted meaning of "damage," it could be argued that cross-pollination results in "damage to commercial agricultural products," thereby opening a farmer up to liability for nuisance and trespass. Whether or not cross-pollination could satisfy the requirements for nuisance or trespass is another unexplored area. In order to claim that cross-pollination constituted nuisance, for example, a plaintiff would need to establish causation; in other words, a plaintiff would need to establish that the pollen originated from their neighbor. This can be a steep request, especially if there are multiple neighbors all growing similar crops. As a claim for trespass operates, intent must be established[82]—could one farmer's expression of concern about cross-pollination, as exemplified in the hypothetical that introduced this Comment, constitute sufficient awareness in the other farmer of the intrusion to create liability? In order for these allegations to be explored in a courtroom, it would need to be accepted that cross-pollination can be the cause of damage.

### *C. Constitutional Considerations*

Right-to-farm laws are based on a statutory curtailing of the legal right of those living next to a farm to bring a trespass or nuisance claim.[83] Political efforts are being organized in response to right-to-farm laws based on the notion that these laws are unconstitutional exercises of a state's police power, amounting to an unjust taking without compensation.[84]

Oregon's Constitution provides that "every man shall have remedy by due course of law for injury done him in his person, property, or

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81 *Colorado State Studies Wheat Cross-Pollination to Other Wheat Crops and Related Weeds*, COLO. STATE UNIV., PUB. RELS. (Aug. 22, 2005), https://publicrelations.colostate.edu/2005/08/22/colorado-state-studies-wheat-cross-pollination-to-other-wheat-crops-and-related-weeds/ [https://perma.cc/RG75-B2HU] (quoting researcher Pat Byrne of Colorado State University's Department of Soil and Crop Sciences. "Seed producers and other growers interested in preserving the identity of their crops will likely be interested in these results." *Id.*).

82 Thomas, *supra* note 4, at 457.

83 Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 113 (1998).

84 *Id.*

reputation"[85] (the Remedy Clause). Oregon's right-to-farm law could be reasonably interpreted as a deprivation of a remedy for nuisance and trespass. One notable case on the matter is *Hale v. State*.[86] Organic farmers initially challenged neighboring, nonorganic farmers, alleging that the nearby use of pesticides would migrate and trespass onto the organic farms.[87] That suit was ultimately voluntarily dismissed after the nonorganic farmers raised a defense under Oregon's right-to-farm law.[88] The organic farmers then brought suit against the state, seeking a declaratory judgment that Oregon's right-to-farm law deprived them of their constitutional right to "have remedy by due course of law for injury done" to their property.[89] The trial court dismissed the organic farmers' case with prejudice, finding that there was no justiciable controversy for the courts to consider.[90] The farmers appealed.[91]

On appeal, the farmers sought a declaration that Oregon's right-to-farm law violated Oregon's Remedy Clause, arguing that such a decision would clarify their rights to seek relief in a court against their nonorganic farming neighbors.[92] The state argued that a finding of unconstitutionality "could not affect the ability of the plaintiffs' neighbors, who are not parties, to nonetheless invoke the Act's immunity provision in a future lawsuit."[93] The court of appeals ultimately affirmed the trial court's dismissal, finding that "a judgment declaring [Oregon's right-to-farm law] unconstitutional will have a concrete impact on plaintiffs in this case only if several contingencies occur. The connection is too speculative."[94] The Oregon Supreme Court denied review of the affirmed dismissal.[95]

Following the logic in *Hale*, any constitutional claim against Oregon's right-to-farm law would depend on the actual occurrence of the hypothetical, speculative harms that the organic farmers alleged.

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85 OR. CONST. art. I, § 10.

86 Hale v. State, 314 P.3d 345 (Or. Ct. App. 2013), *cert. denied*, 354 Or. 840 (2014).

87 *Id.* at 346.

88 *Id.*

89 *Id.* (quoting the Remedy Clause of Oregon's Constitution).

90 *Id.*

91 *Id.*

92 *Id.* at 347.

93 *Id.*

94 *Id.* at 350 (noting that "[t]here is no suggestion by plaintiffs that the circumstances that gave rise to the earlier action, which was voluntarily dismissed, somehow present a live controversy now. Rather, plaintiffs argue that the prospect of a *future* chemical drift presents a justiciable controversy." *Id.* at n.6.).

95 Hale v. State, 354 Or. 840 (2014) (denying review).

The court is implying that the right-to-farm law could be unconstitutional, but it would be under very narrow circumstances.[96] In this case, the injuries were too speculative. The court of appeals focused on the justiciability of the claim and the trial court did not reach the merits of the claim.[97] An actual dispute is necessary for a court to comment on the scope of damage, as a court cannot issue advisory opinions.[98] Given the ambiguity of the "damage to commercial agricultural products" clause, there could be a successful claim challenging the statute for violating the Remedy Clause. While a clear definition of "damage" will not prevent all constitutional challenges under the Remedy Clause, it is likely that a clearer definition will mean that there is less room to debate where the Legislature intended to limit access to a remedy and where it did not.

## II
## THREE VIGNETTES FROM OREGON'S FARMLANDS

Right-to-farm laws curb the legal ramifications of inevitable interactions between autonomous actors: one farmer's right to do as he pleases can inherently impact another farmer's right to do as she pleases. The diversity of potential results complicates the determination of what constitutes "damage to commercial agricultural products" under Oregon law. While a neighbor's standard agricultural practice may easily annihilate one crop, another crop may not react at all to the same reasonable practice. The law was not drafted with these sorts of disputes in mind—the law was designed to address the suburban neighbor who sought a bucolic countryside lifestyle, only to be aghast at some of the realities of agriculture.[99]

It is useful to consider the ramifications of various interpretations of the "damage to commercial agricultural products" exception in different areas of Oregonian agriculture. Exploring how the "damage" exception actually impacts farmers should be the first step for defining damage. The "damage" exception was the Oregon Legislature's attempt at ensuring that farmers could not be shielded from liability for

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96 Beau R. Morgan, *Iowa and Right to Farm: An Analysis of the Constitutionality of Right to Farm Statutes Across the United States*, 53 CREIGHTON L. REV. 623, 633 (2020).

97 Hale v. State, 314 P.3d 345, 347 (Or. Ct. App. 2013), *cert. denied*, 354 Or. 840 (2014).

98 *See, e.g.*, *id.*

99 OR. REV. STAT. §§ 30.933(1)(b), 215.243(3) (2019).

unreasonableness or gross negligence.[100] The definition of "damage" should reflect the weight the Legislature gave to what is reasonable in the agricultural context based on actual case studies. Accordingly, three vignettes offer insight into how Oregon's right-to-farm law may be understood in reality: wine grapes, genetically modified seeds, and marijuana.

### *A. The Battle of the Vices: Neighboring Wine Grapes and Marijuana*

One farmer's vice is not necessarily his neighbor's virtue. Marijuana and wine grape growers both seek fertile agricultural environments.[101] A shared landscape has resulted in grape growers alleging that the odors and oils of nearby marijuana crops are damaging their grapes and subsequently impacting their commercial profits.[102]

Oregon's right-to-farm statutory liability shield is pushing these sorts of disputes into the federal system.[103] Marijuana growers are not inherently farming in an unreasonable way; they just happen to be adjacent to farmers growing a sensitive crop, especially in the fertile Willamette Valley. Without a clear legal remedy at the state level, wine grape growers have found potential solace in the Racketeer Influenced and Corrupt Organizations Act (RICO).[104]

In *Momtazi Family, LLC v. Wagner*, U.S. Senior District Judge Anna Brown denied a marijuana farmer's motion to dismiss a complaint brought by a neighboring wine grape grower.[105] Judge Brown did not grant the motion to dismiss because the wine grape grower had sufficiently alleged plausible harm so as to continue with a suit under RICO.[106] The wine grape grower alleged that "one of its customers cancelled an order for six tons of grapes grown on [the wine grape

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100 *Id.* § 30.930(2); Hood River Cnty. v. Mazzara, 89 P.3d 1195, 1196–97 (Or. Ct. App. 2004).

101 Brendan Bures, *Don't Taint My Grapes: Wine Producers Worried Nearby Marijuana Plants Will Ruin Crops*, FRESH TOAST (Sept. 12, 2019), https://thefreshtoast.com/cannabis/dont-taint-my-grapes-wine-producers-worried-nearby-marijuana-plants-will-ruin-crops/ [https://perma.cc/9U7Y-CQUJ].

102 *Id.*

103 *See* Momtazi Fam., LLC v. Wagner, No. 3:19-CV-00476-BR, 2019 WL 4059178, at *7 (D. Or. Aug. 27, 2019).

104 18 U.S.C. §§ 1961–1968.

105 *Momtazi Fam.*, 2019 WL 4059178, at *7.

106 *Id.*; Mateusz Perkowski, *Alleged Marijuana Damage to Grapes Ruled Plausible*, CAPITAL PRESS (Sept. 4, 2019), https://www.capitalpress.com/state/oregon/alleged-marijuana-damage-to-grapes-ruled-plausible/article_a95ce280-cf68-11e9-8b22-67ef35339263.html [https://perma.cc/E8UB-G7LN].

grower's] property because of the marijuana operation on Defendants' property [since] [t]he customer believed the smell created by the marijuana contaminated the grapes and would affect the wine made from those grapes."[107] In other words, the court held that the wine grape growers had a plausible claim for relief under RICO because of an agricultural nuisance caused by farmers who were reasonably growing marijuana under state law. Such a claim would need further fact-finding under Oregon's right-to-farm law as to whether damage to commercial agricultural products had occurred; instead, such a claim is pushed into federal court, where marijuana remains an illegal substance.

While odor may not inherently seem like a source of "damage to commercial agricultural products," there is plenty of room for debate. Smoke from wildfires can impact the taste of grapes and wine.[108] Research has suggested that eucalyptus plants that neighbor vineyards can alter the taste of grapes, even after those grapes have been processed into wine.[109] There is not adequate research on whether marijuana aromas and oils impact the growth of the wine grape.[110] Vague statutory language in Oregon's right-to-farm law, however, is preventing these questions from reaching a state-level courtroom. Instead, bringing a suit under RICO was deemed the safer alternative—to bring marijuana growers to federal court since marijuana remains an illegal substance at the federal level.

The *Momtazi Family* case was filed in federal court after a related state-court case had been attempted.[111] Under a narrow interpretation of Oregon's right-to-farm law, the odor stemming from the marijuana farm would not have caused tangible "damage" to the grapes so as to revoke the protection from liability; however, under a broader interpretation of Oregon's right-to-farm law, a court would need to have a finding of facts to determine whether or not the marijuana farmer's practices caused damage to the grapes.

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107 *Momtazi Fam.*, 2019 WL 4059178, at *1.

108 Bures, *supra* note 101; Andrew Selsky, *Wildfires Taint West Coast Vineyards with Taste of Smoke*, ASSOCIATED PRESS (Sept. 23, 2020), https://apnews.com/article/virus-outbreak-wildfires-oregon-fires-wineries-ecead6f181c11c6110f017c9af8e63a2 [https://perma.cc/S7VV-9QXK].

109 Bures, *supra* note 101.

110 *See id.*

111 *Momtazi Fam.*, 2019 WL 4059178, at *3.

Notably, in denying defendants' motion to dismiss, the court held that plaintiffs "establish[ed] 'injury to a property interest' that constitutes a 'concrete financial loss' sufficient for standing under RICO."[112] Implicitly, the court permitted the case to continue beyond summary judgment because plaintiffs had established sufficient evidence that there had been an economic impact to their commercial agricultural product—whether or not such an economic impact to commercial agricultural product could be translated to "damage" under Oregon's right-to-farm law remains undetermined. Unless a clarified definition of damage is found, the understanding of damage as it relates to trespass and nuisance under the right-to-farm law will be shaped by the federal court in resolving RICO disputes.

The definition of damage should be explicitly determined at the state level under Oregon's right-to-farm law, not implicitly under federal claims. For one, economic harm determinations will reflect the disparities of legality for the recreational marijuana industry. Additionally, discussing the damage done to one farmer's crop on another under the regime of RICO pushes the conversation away from agricultural themes—themes that are critical to the origin of Oregon's right-to-farm law—and toward matters of criminality and marketability. While the Oregon Legislature carved out an exception to protect commercial crops, the intent of the exception is only partially about marketability. The exception permits liability for trespass and nuisance as a way to restrict farmers to reasonable practices; in other words, the intent was to communicate to farmers that the exception would not shield them from liability for any negligent farming practices. The intent of the exception was not to demonize an industrial hemp industry that did not exist at the time of the exception's drafting, nor was the intent to push such disputes between farmers to federal court.

From the record, it does not appear that the defendant marijuana growers in the *Momtazi Family* case were engaged in any farming practices that would be considered outside the realm of reasonability for growing marijuana—it just happened to be next to another farmer's grape crop.[113] This case exemplifies how Oregon's right-to-farm law has not evolved with developments in the state's agricultural sector. It is time that the Legislature refine the scope of the "damage to commercial agricultural products" exception in light of modern

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[112] *Id.* at *5.

[113] *Id.* at *1.

farming realities so that Oregon farmers have clarity about their remedies at the state level.

### *B. Genetically Modified Seed Technology Drift and Jackson County*

Jackson County's popular adoption of an ordinance restricting the cultivation of genetically modified plants offers another case study in how an unclear "damage to commercial agricultural products" exception results in confusion and unsuccessful private suits. In a case challenging the validity of the ban, a court found that Oregon's right-to-farm law permitted the ban on genetically modified (GM) seeds because the lawmakers designed the ordinance to prevent "damage to commercial agricultural products" caused by GM-seed and pesticide drift.[114]

Despite a statewide ban on counties' ability to restrict certain seed use, Jackson County's ordinance was only permissible because the Legislature specifically created a narrow carve-out for the county's GM-crop ban.[115] Regardless of where one falls on the merits of the claim that GM-seed and pesticide drift results in damage, the Jackson County case exemplifies how an unclear understanding of the right-to-farm exception results in inconsistency at the state level. The case illustrates the agricultural tension between individual autonomy and collective ecological responsibility. Additionally, the case exemplifies how state-level and local-level preferences in agriculture can vary. Questions that are inherently about a farmer's autonomy on their own land and what duty is owed to their farming neighbor are pushed into courtrooms cloaked in case-specific financial questions.

#### *1. Some Background on Genetically Modified Seed Drift*

Much of the debate about pollen drift and agricultural damages has centered on the cross-pollination of patented genetically modified (GM) seeds into the fields of neighboring farmers who grow either non-genetically modified (non-GM) crops or organic crops.[116] Genetic drift

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114 *See* Schultz Fam. Farms LLC v. Jackson Cnty., No. 1:14-CV-01975, 2015 WL 3448069, at *5 (D. Or. May 29, 2015).

115 *Id.*

116 For a crop to be certified as organic by the U.S. Department of Agriculture, it cannot be grown from a genetically modified seed; however, not all non-GM crops are certifiably organic—a designation that also depends on the crop being free of prohibited substances. Miles McEvoy, *Organic 101: Can GMOs Be Used in Organic Products?*, U.S. DEP'T OF

can transpire when the patented genetic material (here, seeds) moves onto another farmer's property, resulting in liability for that farmer who is not contracted with the patent-owner.[117] Intent to acquire the patented commodity without authorization is not an element of patent infringement.[118] Thus, regardless of whether the non-GM farmer is aware that the patented seeds have crossed onto their property or not, the farmer can face liability for patent infringement.[119] Given the equitable considerations of this scenario, much of the legal discussion about cross-pollination and agricultural damages centers on genetically modified seeds and patent protections, rather than right-to-farm laws.

An emphasis on genetically modified seeds and patent protections is not unwarranted. Monsanto, for example, has repeatedly brought patent infringement claims against non-GM farmers for having their fields contaminated with Monsanto's patented seeds—even though many of the farmers specifically did not want Monsanto's seeds.[120] On top of legal costs, organic farmers face an economic loss from cross-contamination, as their crops would no longer be eligible to be certified as organic by the U.S. Department of Agriculture.[121] Even more concerning, an accidental cross-contamination of seeds that have been genetically engineered to kill their own embryos (so as to prevent farmers from saving and replanting patented seeds in subsequent seasons) could unintentionally destroy a neighboring farmer's future crop yields.[122] Even slight cross-contamination could result in commercial retailers rejecting a farmer's formerly organic products, forcing the farmer to sell their crops at much lower prices.[123]

One of the most relevant cases on the matter stems from Canada: after pollen from Monsanto's Roundup Ready™ crops had cross-pollinated onto Percy Schmeiser's farm, resulting in his crops being contaminated, Monsanto sued, alleging that Schmeiser had saved patented seeds.[124] Monsanto alleged that Schmeiser had saved seeds,

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AGRIC. (Feb. 21, 2017), https://www.usda.gov/media/blog/2013/05/17/organic-101-can-gmos-be-used-organic-products [https://perma.cc/GM3P-VUC3].

117 Justin T. Rogers, *The Encroachment of Intellectual Property Protections on the Rights of Farmers*, 15 DRAKE J. AGRIC. L. 149, 164 (2010).

118 Mitchell, *supra* note 60, at 320.

119 *Id.*

120 *Id.* at 314.

121 *Id.*

122 *See* Rogers, *supra* note 117, at 161; *see also* Mitchell, *supra* note 60, at 320.

123 Thomas P. Redick, *Coexistence of Biotech and Non-GMO or Organic Crops*, 19 DRAKE J. AGRIC. L. 39, 55 (2014).

124 Rogers, *supra* note 117, at 164.

despite Schmeiser's never having purchased seeds from Monsanto.[125] Ultimately, Canada's Supreme Court upheld an award of damages for Monsanto, consisting of Schmeiser's profits for that year and technical fees.[126] Canada's highest court noted that "it was [Schmeiser's] responsibility to destroy the seed that was windblown onto his property, not Monsanto's."[127] While this case is from Canada, the logic used by Canada's Supreme Court represents a potential danger for American farmers given the amount of litigation that Monsanto brings for similar fact patterns.[128] Oregon represents an important legal ground for this sort of litigation, given the agricultural nature of the state and the large number of non-GM farms.

Some have suggested requiring a showing of intent in patent infringement cases involving patented seed cross-contamination, or otherwise using a farmer's organic certification as a valid affirmative defense against patent infringement in cases involving patented seed cross-contamination.[129] While this may help farmers who have had patented seeds cross onto their property, it is unlikely to aid Oregon courts in establishing whether or not commercial damage has occurred upon conventional cross-contamination under Oregon's right-to-farm law. There must be an understanding of "damage" to commercial crops outside of the context of patent infringement, given the number of organic farms in Oregon.[130]

### *2. Jackson County Farmers' Attempt for Local Autonomy*

A right-to-farm law is intended to give the farmer autonomy to continue long-standing agricultural practices without new, unfamiliar neighbors bringing legal interference. However, Oregon's right-to-farm law has also inhibited Oregonian farmers' sense of autonomy in the context of the GM-seed debate. The story of Jackson County offers important insights into how Oregon's right-to-farm law may help

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125 *Id.*

126 *Id.*

127 *Id.*

128 *See id.*

129 *See* Mitchell, *supra* note 60, at 327–31.

130 As of 2016, Oregon had 195,000 acres of certified organic farming (resulting in $351 million in sales), which ranked Oregon as the sixth largest grower of certified organic crop acreage in the United States. NAT'L AGRIC. STAT. SERVS., U.S. DEP'T OF AGRIC., *2016 Certified Organic Survey: Sales Up 23 Percent* (Oct. 2017), https://www.nass.usda.gov/Publications/Highlights/2017/2016_Certified_Organic_Survey_Highlights.pdf [https://perma.cc/Y8P5-3JCL].

powerful entities at the expense of the Oregonian farmer. The interpretation of "damage to commercial agricultural products" is a critical part of the story.

Farmers are well aware of the dangers of pollen drift between property lines. In 2014, residents of Jackson County passed a ballot measure, Jackson County Ordinance 635, that would ban the growth of genetically engineered crops in the county.[131] The measure was supposed "to protect local farmers from 'significant economic harm to organic farmers and to other farmers who choose to grow non-genetically engineered crops' that can be caused by 'genetic drift' from [genetically engineered] crops."[132] Advocates for the ordinance also focused on the environmental effects of pesticide drift from lots with GM-crops onto non-GM lots.[133] However, farmers who had already planted genetically modified Roundup Ready™ alfalfa seeds challenged the ordinance, claiming that the ordinance was in violation of Oregon's right-to-farm law.[134]

In *Schultz Family Farms LLC v. Jackson County*, the plaintiffs alleged that the ordinance would force them to destroy their planted alfalfa seeds—a taking without just compensation.[135] Plaintiffs sought either injunctive and declaratory relief to permanently enjoin enforcement of the ban or otherwise for an award of damages for the mandatory destruction of their GM-seeds.[136] The County responded that the ordinance was in compliance with the right-to-farm state scheme and that the ordinance falls under an exception of the recently passed "Seed Bill."[137] In 2013, the Oregon Legislature enacted Senate Bill 863, codified partially at ORS 633.738, which barred enactment or enforcement of any local law or regulation "to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed."[138] However, in an uncodified section of Senate Bill 863, additional legislation was enacted to provide that ORS 633.738

131 Bennett, *supra* note 27, at 3.

132 *Id.* at 5 (quoting JACKSON CNTY., OR., CODE § 635.02(c)).

133 Katelyn Harrop, *This County in Oregon Completely Banned GMO Crops. Here Is Why That Matters for the Environment*, THINK PROGRESS (June 9, 2015), https://archive.thinkprogress.org/this-county-in-oregon-completely-banned-gmo-crops-heres-why-that-matters-for-the-environment-3444c92b5001/#:~:text [https://perma.cc/CX4N-8W87].

134 Schultz Fam. Farms LLC v. Jackson Cnty., No. 1:14-CV-01975, 2015 WL 3448069, at *1 (D. Or. May 29, 2015).

135 *Id.*

136 *Id.* at *2.

137 *Id.* at *1.

138 *Id.* at *5 (quoting OR. REV. STAT. § 633.738).

did not apply if the local regulation was "(1) [p]roposed by initiative petition and, on or before January 21, 2013, qualified for placement on the ballot in a county; and (2) [a]pproved by the electors of the county at an election held on May 20, 2014."[139] This is the exact timeline of the Jackson County ballot measure process for the ban on GM-seeds. As the District Court noted, "It is undisputed that the [exception to ORS 633.738 described above] applies to Jackson County Ordinance 635."[140]

The U.S. District Court for the District of Oregon determined that the local ordinance barring use of genetically modified seeds was valid on its face under the right-to-farm law and was also specifically authorized by state law.[141] The court was convinced by legislative history that demonstrated a clear exemption that was supposed to be afforded to Jackson County's local ordinance.[142] The court also found that the text and context of Oregon's right-to-farm law authorized the ordinance as being designed to protect against *damage* to commercial agricultural crops caused by GM-seed drift.[143]

The court disagreed with the plaintiff's assertion that the "damage to commercial agricultural products" necessitated a showing of "actionable damage" and that Jackson County's ordinance impermissibly applied to all GM farming without requiring evidence of actual damage.[144] Instead, the court noted that the Ordinance was designed to prevent the "damage to commercial agricultural products" *before* any damage actually occurred, and that nothing about Oregon's right-to-farm scheme demonstrated a requirement to show actionable damages before enactment of such a local ordinance.[145]

*Schultz* was the first case in Oregon on whether local restrictions on certain agricultural practices violate Oregon's right-to-farm law.[146] This case has been cited in arguments in opposition to amending or altering the law, under the notion that *Schultz* demonstrates the adaptability of the right-to-farm law with any change potentially

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139 *Id.*

140 *Id.*

141 *Id.* at *2.

142 *Id.* at *5–6.

143 *Id.* at *5 (emphasis added).

144 *Id.*

145 *Id.*

146 Bennett, *supra* note 27, at 7.

benefitting large, industrial farms.[147] *Schultz* demonstrates that the Oregon Legislature can create carve-outs that would allow for more flexibility via the "damage to commercial agricultural products" exception—here, the Legislature created an exception for Jackson County's GM-seed ban in a bill that would have otherwise barred regulation of seed use by farmers.[148] The expansive nature of the damage exception could be seen as a perk for allowing flexibility.[149]

However, this expansiveness can result in arbitrary and inconsistent application. County-by-county carve-outs to address the needs of only some of a county's farmers will result in the wealthier, more powerful farmers' needs being better heard in Salem. While the nonorganic farmers in *Schultz* did not leave the courtroom victorious in their challenge of an ordinance that organic farmers had spearheaded, power dynamics in Oregon agriculture are much more nuanced than affluent nonorganic farmers versus the smallholder organic farmers. Regardless of who the actors are on each side of the fence, flexible interpretation of any statutory exception is likely to bend toward the actor who has deeper pockets.

### *C. Marijuana in Oregon and the Right-to-Farm*

Oregon's right-to-farm law is facing new scrutiny given the legalization of recreational possession of marijuana and the ensuing marijuana-industry boom.[150] As marijuana and hemp are grown on an industrial level, there is an increased risk for cross-pollination of hemp and marijuana—an interaction that can drastically alter the commercial value for both crops.[151] Potential legal disputes about cross-pollination between commercial marijuana farmers and commercial hemp farmers are likely to be as contentious as the GM cross-pollination disputes.[152] With Oregon's right-to-farm law's "damage" exception, there will likely be suits that attempt to claim that cross-pollination constitutes "damage to commercial agricultural products." Beyond such a claim's

147 *Id.* at 24–25.

148 *Id.*

149 *See id.*

150 Ryan McGuire, *Member Blog: Cross-Pollination Poised to Prompt Litigation in Light of New USDA Hemp Rules*, NAT'L CANNABIS INDUS. ASS'N (Jan. 21, 2020), https://thecannabisindustry.org/member-blog-cross-pollination-poised-to-prompt-litigation-in-light-of-new-usda-hemp-rules/ [https://perma.cc/RM7Q-BLB4].

151 *Id.*

152 THOMAS PARKER REDICK, PRODUCT LIABILITY: DESIGN AND MANUFACTURING DEFECTS § 30.16 (2d ed.), Westlaw (Sept. 2020 Update).

ecological implications, claiming that cross-pollination resulted in damage to crops extends far beyond the legislative intent behind Oregon's right-to-farm law. If the Oregon Legislature determines that the right-to-farm law is the proper law to govern such a dispute, then clarification must be provided on what the permissible scope is for defining damage.

*Cannabis sativa*, the basis for both hemp and marijuana production, is a dioecious species, whereby its male and female flowers are on two distinct plants.[153] Hemp and marijuana both come from cannabis and are distinguished in the law based on the levels of tetrahydrocannabinol (THC), with hemp referring to cannabis that contains 0.3% or less THC content; conversely, marijuana has a THC content of above 0.3%.[154] A female flower that has not been exposed to male pollen has a higher concentration of cannabinoids, like THC and cannabidiol (CBD), as compared to the male flower.[155] If the end goal is marijuana with a higher THC content or hemp with a high CBD content, the farmer needs to maintain an exclusively female crop.[156]

Farmers who seek to grow a final product with a higher potency of THC or CBD will use the female flower and remove any lower-value male flowers, if they materialize, to prevent pollination.[157] Consumers are willing to pay a higher price for female-only cannabis products with higher THC.[158] However, hemp producers also need distance from marijuana growers to protect their product's marketability due to unintended THC content.[159] Hemp growers must demolish their crop per federal regulations if the hemp surpasses a 0.3% THC concentration limit.[160] Some male plants that contain higher levels of THC can pollinate female flowers that are intended to have a lower level of THC, which results in seeds that produce plants with higher levels of THC than the original female plant. This later results in seeds that produce

153 McGuire, *supra* note 150.

154 Sian Ferguson, *Hemp vs. Marijuana: What's the Difference?*, HEALTHLINE (Aug. 27, 2020), https://www.healthline.com/health/hemp-vs-marijuana [https://perma.cc/LD2V-JCUV].

155 McGuire, *supra* note 150.

156 REDICK, *supra* note 152.

157 McGuire, *supra* note 150.

158 REDICK, *supra* note 152.

159 *Id.*

160 McGuire, *supra* note 150.

plants with lower levels of CBD and cannabigerol (CBG).[161] The male crop releases pollen that can interfere with a female plant that is intended to produce a certain level of THC or CBD.

Cross-pollination between male and female flowers of *Cannabis sativa* can result in lower crop yields, seed production, and, depending on the interaction, a higher or lower value of CBD or THC in the flowers that are grown.[162] Cross-pollination can occur even when the plants are at a great distance from one another. While industry experts advise a minimum of ten miles of distance between different outdoor fields, research on cannabis pollen indicates that it is likely that the pollen can travel even further than ten miles.[163] The USDA's federal regulations on hemp production offer no guidance for an appropriate distance between hemp and marijuana production sites.[164] Suits for negligence or trespass could be an avenue for remedy for damages caused by cross-pollination.[165]

Litigation from such interactions between the different plants has already occurred in Oregon. In *Jack Hempicine LLC v. Leo Mulkey Inc.*, plaintiff Jack Hempicine, a hemp grower, alleged that male flowers from neighboring lots cross-pollinated onto his property, rendering plaintiff's crop unmarketable, and alleged damages in excess of $8,000,000 in lost crop value.[166] Hempicine was concerned about cross-pollination from his neighbor's male plants, which could impact his hemp, grown for its higher CBD content from feminized seeds.[167] Hempicine alleged that he told the defendants, who were neighboring hemp farmers, that he grew only feminized seeds and that he worried about potential cross-pollination from defendants' male plants.[168] Hempicine alleged that, despite his notices, the neighboring defendants grew male hemp seeds that cross-pollinated onto Hempicine's feminized plants, resulting in high levels of THC that made the hemp

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161 *Canna Law Blog: Oregon Industrial Hemp Litigation: Won't You Be My Neighbor?*, HARRIS BRICKEN (Sept. 8, 2018), https://harrisbricken.com/cannalawblog/oregon-industrial-hemp-litigation-wont-you-be-my-neighbor/ [https://perma.cc/2GT4-F27J] (citing the pleadings of Jack Hempicine LLC v. Leo Mulkey Inc., No. 18CV38712, Polk Cnty. Cir. Ct.).

162 McGuire, *supra* note 150.

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 REDICK, *supra* note 152.

168 HARRIS BRICKEN, *supra* note 161.

unmarketable.[169] The damages of $8,000,000 reflected Hempicine's alleged damages for the loss of the crops for the 2016–2017 growing cycle; the complaint stated that it would need to include later damages for the lost crops for the subsequent 2018 growing cycle.[170]

The complaint alleged that the neighboring defendants negligently breached a duty of care owed to Hempicine, that the defendants acted negligently and were accordingly liable for either nuisance or trespass, and that the defendants knew that cross-pollination was likely to occur and, therefore, intentionally interfered with Hempicine's economic relations.[171] However, the implications of such a suit on Oregon's right-to-farm law never materialized. In late February 2021, the court dismissed the case with prejudice and without costs.[172]

When Oregon's right-to-farm law was first drafted and subsequently updated, commercial marijuana and industrial hemp were not deemed legitimate (or legal) commercial agricultural products. Despite efforts from the cannabis industry during the creation of Oregon's cannabis legislation, the legislature failed to consider the impacts of cross-pollination in that scheme.[173] Vagueness in the "damage to commercial agricultural products" exception will continue to result in similar private suits, leading to further confusion and undesirable outcomes for the future of autonomy, farming relations, and ecological care for the land of others. In the ambiguity, farmers are left to communicate with their neighbors to try to ensure that unintentional cross-pollination does not occur.[174]

Hempicine argued that the neighbor's plants damaged his commercial agricultural product, thereby permitting a nuisance or trespass claim under the right-to-farm law exception. Hempicine's claim was dependent on Oregon's right-to-farm law not shielding his neighbor from trespass or nuisance liability. For a court to fully take Hempicine's position, it would first need to find that a neighbor owes a duty of care to protect Hempicine's economic outcome from the far-reaching pollen of the neighbor's crop.[175] Hempicine claimed that he

169 *Id.*

170 *Id.*

171 *Id.*

172 Jack Hempicine LLC v. Leo Mulkey Inc., No. 18CV38712 (dismissed 2021).

173 HARRIS BRICKEN, *supra* note 161.

174 REDICK, *supra* note 152.

175 *Id.*

tried to communicate his concerns to his neighbor, as the Oregon Department of Agriculture has advised farmers to do.[176]

However, did the neighboring defendants, by growing male seeds, do anything that the Oregon Legislature was trying to prevent in creating Oregon's right-to-farm law? Surely, if Oregon recognizes farming autonomy as a value worth statutorily codifying,[177] the Legislature did not intend to restrict one farmer's ability to grow male seeds, with its own commercial benefit, in order to benefit another farmer's commercial outcomes. Does the defendant farmer in *Jack Hempicine LLC* not have their own so-called right-to-farm? At the same time, Hempicine experienced an economic loss due to neighboring pollen's technical trespass. The Oregon Legislature was not considering these sorts of pollen interactions when drafting the right-to-farm scheme; as such, both parties in the case have understandable grievances.

The "damage to commercial agricultural products" exception was intended to afford farmers a remedy when other farmers engaged in unreasonable practices that caused economic harm.[178] This exception was drafted in the context of a shield from liability in private suits brought by residential communities that grew alongside farmlands.[179] It seems imprudent and contrary to the legislative intent to designate cross-pollination, a natural process that is largely outside a farmer's control, as a source of damage that could remove a farmer's liability protections for nuisance and trespass claims from neighboring farmers. Absent a clear definition of damage, however, such a claim is subject to debate.

Hemp does not change when it commingles; therefore, courts are likely to be wary of imposing a duty on hemp growers to protect the economic potential of their neighbors.[180] Since the injured party is being paid for purity of his product, he has a duty to "fence in" his crop to avoid contamination by external actors.[181] Since the purity of the product is for the benefit of the farmer growing it, it logically follows that the grower should assume the expense of shielding it from corrupting sources, not a third party with nothing to gain from the purity.

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176 *See* NAT. RES. PROGRAMS, *supra* note 11.

177 *See* OR. REV. STAT. § 30.933 (2019).

178 *Id.* § 30.930(2).

179 *Id.* §§ 30.933(1)(b), 215.243(3).

180 REDICK, *supra* note 152.

181 *Id.*

Marijuana is an especially interesting case study for interpreting the meaning of "damage to commercial agricultural products," given the great distance that the pollen can travel.[182] However, the pollen problem extends to other crops. If a farmer can be liable to his neighbor for cross-pollination, the farmer has a greater incentive to grow what his neighbor grows; the incentives result in a mono-crop culture, which comes with its own environmental consequences.[183] A farmer has only so much land with which to cultivate his crop. A failure to proactively avoid the cross-pollination of female-only crops could be interpreted as a farmer failing to provide due care, thereby serving as the basis of a negligence claim. If cross-pollination is deemed capable of causing "damage to commercial agricultural products," farmers could be open to liability for nuisance or trespass for processes often outside their control. Similar conflicts are likely to arise again.

Even if cross-pollination could be established for purposes of causation, the cross-pollination did not result in the destruction of Hempicine's crop. Hempicine's products remained marketable, despite the final product not being the pure version that he intended. Male seeds can be grown from female plants, even if feminized. To hold that the occurrence of male seeds in a field of feminized plants is damage is to hold that a natural process that the plant itself carries out is damaging. Such a claim is too distanced from the legislative intent behind Oregon's right-to-farm law. Increased THC content is not the sort of damage that the Legislature had in mind when drafting the right-to-farm language; however, an unclear definition of "damage" done to commercial agricultural products will result in private suits between farmers like *Hempicine*. Oregon's right-to-farm law, at least in its current iteration, is not the correct law to resolve such a conflict.

## CONCLUSION

Agriculture implicates varying duties to people and to the land. A farmer has a duty to his farm and family; a farmer also has a duty to the land and to his neighbors. Disputes between farmers are as old as farms themselves. However, Oregon's Legislature could elucidate the damage exception of the right-to-farm law to mitigate the likelihood of disputes between neighbors. The vague understanding of the "damage to commercial agricultural products" exception will continue to result

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182 *Id.*

183 *See generally* Haspel, *supra* note 79.

in confusion, suits that are doomed before they enter the courtroom, and a power imbalance between those who can fight for a remedy and those who cannot afford to.

The vignettes presented in this Comment illustrate how power dynamics are operating on Oregon farms through the right-to-farm law. The purpose of this Comment is not to suggest a specific definition of "damage," but rather to highlight how power dynamics are currently operating. The Oregon Legislature can recognize that power dynamics fluidly operate in disputes between farmers by expounding the right-to-farm laws to either clarify "damage" to eliminate a farmer's shield from liability for nuisance or trespass, or better still, to create a new scheme that distinguishes disputes between farmers from disputes between farmers and urbanites. Only by exploring power dynamics in vignettes such as those presented in this Comment can the legislature determine whether it is tenable to still use the right-to-farm law to govern farmer-against-farmer disputes.

Currently, farmers are using the right-to-farm law to litigate incompatible, albeit reasonable, farming practices. "Damage" can be defined in a way that clarifies the ambiguity without changing the status quo—in other words, "damage" could be defined in a manner that allows farmers to sue one another for reasonable practices that have third-party impacts. It may not be possible to define "damage" in a way that completely recognizes farmers' reasonable incompatibilities. Farming operates in so many contexts, as illustrated in the vignettes, that a definition of "damage" that reflects all these varying contexts would be nearly impossible. However, if the inherent property tension is highlighted in the definition of "damage," then Oregon legislators can better prevent frivolous litigation and clarify a farmer's duty to her neighbor.

Oregon's Legislature could determine that a duty is owed to one's neighbor and that any degradation of economic potential constitutes "damage to commercial agricultural products." Alternatively, the Oregon Legislature could also require a showing of complete destruction of a crop before a farmer can face liability for nuisance or trespass under the right-to-farm law—essentially finding that a farmer must accept the conditions associated with living in an agricultural zone, just as residential communities must accept such conditions.[184]

The Legislature may require a showing of recklessness, malfeasance, or intent for a farmer to establish that her neighbor's crop

184 *See* § 30.933(2)(c).

damaged her own crop due to cross-pollination; or it could determine that a natural process of cross-pollination does not open a farmer up to liability under any circumstances.

No matter what the Oregon Legislature supposes to comprise "damage to commercial agricultural products," it should clarify the scope of the exception. The lives and commercial well-being of Oregon's farmers could hang in the balance. Oregon has codified its commitment to protecting the economic well-being of farmers.[185] It should elucidate what will and will not remove a farmer's shield from liability for nuisance and trespass to clarify its commitment to protecting farmers, if the respect of agrarianism is to be preserved in Oregon.

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185 *See id.* § 30.933(1)(a).