



March 26, 2013

**Oregon State Legislature
House Committee on Agriculture and Natural Resources
Hearing on Initiatives HB 2715, 2319, 2736**

My name is Lori Ann Burd and I am an attorney with the non-profit, public interest organization the Center for Food Safety (CFS). CFS is a nationwide consumer and sustainable agriculture organization whose mission includes furthering the public's right to know how their food is produced, through labeling and other means. We have nearly 300,000 farmer and consumer members across the country, including many in Oregon. CFS has worked on the issue of genetically engineered (GE) crops, GE labeling, and farmer protection for nearly two decades, at both the federal and state levels. To that end, we have worked with dozens of states on the crafting of bills pertaining to GE crops.

I thank Chair Witt and the members of the Committee for the opportunity to present testimony in support of HB 2715, 2319, and 2736 and will address each in turn.

As an initial matter, these bills do not raise constitutional issues or otherwise conflict with federal law. Although the Constitution empowers Congress to regulate interstate commerce, states may regulate articles in interstate commerce, so long as they do not discriminate against out-of-state interests.¹ HB 2715, 2319, and 2736 would not so discriminate as they only propose to regulate in-state activities.²

¹ See, e.g., *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

² See, e.g., *Hampton Feedlot v. Nixon*, 249 F.3d 814, 819 (8th Cir. 2001) (upholding a Missouri state statute regulating the sale of livestock in Missouri).

Further, if a state law thus has only indirect effects on interstate commerce, it is proper unless the burden it imposes is “clearly excessive” in relation to its local benefits.³ Oregon’s myriad interests in protecting citizens economic, health, and environmental interests, its farmers’ choice to grow non-genetically engineered crops, and consumers’ choice to consume non-genetically engineered foods easily outweigh any “burdens” imposed by these three bills. State or county safeguards such as those in the bills—planting limitations, monitoring programs that prevent the spreading of genetically engineered material, and protections for farmers that are inadvertently contaminated by neighboring transgenic crops—are a far cry from “clearly excessive.” Moreover, “less burdensome” alternatives to prevent the spread of transgenic crops and prevent farmer liability for inadvertent contamination hardly exist.

Many states have passed farmer protection acts and other state and county GE-related ordinances without incident. In fact, there has never been a challenge to a state bill or county moratorium. Oregon currently has a law that regulates biopharmaceutical crops—this law has not been preempted or otherwise challenged. Similarly, the house bills are not unconstitutional or otherwise in conflict with federal law.

HB 2715 – Establishing control areas for commodities containing transgenic material

Management of local agricultural matters is an important and traditional role for counties. The Oregon Constitution and ORS 203.035 grant county’s authority over “matters of county concern.” ORS 203.035 further states that the power it grants to counties shall be liberally construed, to the end that counties have all powers over matters

³ See, e.g., *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

of county concern that it is possible for them to have under the Constitutions and laws of the United States and of this state.”

HB2715 authorizes counties to prohibit, limit, or condition the commercial or personal production of commodity GE crops based on county needs. It allows counties to respond to local conditions by establishing control areas for GE crops. Counties are well situated to respond to the concerns of their residents regarding this issue and must be allowed to do so to protect the county interests.

Many counties across the nation have decided to take action to more stringently regulate GE crops. These include Santa Cruz, Mendocino, Marin, and Trinity counties in California, Hawaii and Maui counties in Hawaii, and San Juan County in Washington.⁴ These bills have successfully regulated GE crops at a county-wide level and have not been subject to any extensive legal challenges. Similarly, HB2715 will give counties the authority to more stringently regulate GE crops. I encourage your support of this bill to ensure that counties can continue to play their important role in regulating local agricultural affairs.

HB 2319 – Granting the state department of agriculture authority to impose safeguards on the spread of transgenic crops

Safeguards on GE crops such as those proposed in HB 2319 are critical to prevent the spread of unwanted transgenic material in Oregon. HB 2319 would allow farmers to

⁴ Santa Cruz County, Cal., Code of Ordinances, tit. 7, ch. 7.31 (2006); Mendocino County, Cal., Code of Ordinances, tit. 10A, ch. 10A-15 (2004); Marin County, Cal., Code of Ordinances, tit. 6, ch. 6.92 (2004); Trinity County, Cal., Code of Ordinances, tit. 8, ch. 8.25, art. 1 (2004); Hawai‘i County, Haw., County Code, ch. 14, art. 15 (2008); Maui County, Haw., Code of Ordinances, tit. 20, ch. 20.38 (2009); San Juan County, Wash., Initiative Measure 2012-4, Ordinance Concerning Prohibitions on the Growing of Genetically Modified Organisms (adopted Nov. 2012).

request the State Department of Agriculture conduct a site inspection if the farmer has concerns that an agricultural or horticultural commodity containing genetically engineered material is interfering with or may interfere with his farming practice through the spread of that material. If the state's investigation substantiates the farmer's concerns, it may impose restrictions on future planting.

Gene flow from GE crops to conventional, organic, and wild plants (transgenic contamination) can result from pollen drift, seed mixing, flooding, seeds in machinery, seed spillage, and a variety of natural events and human errors that occur at each stage of the crop production process.⁵ Both farmers and researchers have documented contamination in a variety of crops including but not limited to alfalfa, canola, corn, rice, and sugar beets. Once contamination occurs, evidence shows this contamination can persist for many years.⁶ Further, “[o]nce the gene transmission occurs and a farmer’s seed crop is contaminated with the Roundup Ready gene, there is no way for the farmer to remove the gene from the crop or control its further spread.” A single incident of transgenic contamination can cost farmers hundreds of millions of dollars nationwide.⁷

⁵ *Geertson Seed Farms, et al. v. Johanns, et al.*, 2007 WL 518624, at *4 (N.D. Cal. Feb. 13, 2007) (“[C]ontamination can occur through pollination of non-genetically engineered plants by genetically engineered plants or by the mixing of genetically engineered seed with natural, or non-genetically engineered seed.”).

⁶ G. Squire et al., *The Potential for Oilseed Rape Feral (Volunteer) Weeds to Cause Impurities in Later Oilseed Rape Crops*, Department for Environment, Food and Rural Affairs (August 2003) available at <http://randd.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&ProjectID=11482&FromSearch=Y&Publisher=1&SearchText=re0114&SortString=ProjectCode&SortOrder=Asc&Paging=10#Description> (documenting canola contamination lasting 16 years).

⁷ See, e.g., *In re Genetically Modified Rice Litigation*, 666 F. Supp. 2d 1004 (E.D. Mo. Oct. 9, 2009); *In re Genetically Modified Rice Litigation*, 2009 WL 4801399 (E.D. Mo. Dec. 9, 2009).

Oregon is no stranger to transgenic contamination. In 2010, for example, the United States Department of Agriculture (USDA) became aware that Monsanto's Roundup Ready creeping bentgrass had escaped seven or eight years before from regulated field trials and established itself in the wilds of eastern Oregon. USDA believes the regulated crop escaped through either seed or cross-pollination.⁸

For some Oregon farmers, the risk of transgenic contamination alone has caused economic harm. A CFS member farmer has lost the majority of his *Beta* crop market—worth \$18,000 a year—due to the threat of contamination from Roundup Ready sugar beets. As GE crops continue to spread in Oregon, farmers may continue to lose export markets and other clients due to the mere threat of contamination. HB 2319 could greatly help prevent the spread of transgenic material and subsequently the risk of economic harm. CFS therefore urges the Committee to adopt HB 2319.

HB 2736 – Oregon Farmer Protection Act

HB 2736 is an important farmer protection law for a number of reasons, several of which are outlined below. For additional information on the importance of farmer protection laws, please see the report *Seed Giants v. U.S. Farmers* (copies provided).

⁸ GE crops, which are overwhelmingly engineered to do one thing only—be resistant to herbicides—have also massively increased overall herbicide use in U.S. agriculture, by hundreds of millions of pounds. They have also created an epidemic of herbicide resistant superweeds covering over 60 million acres of U.S. farmland. These pesticide promoting GE crops only lead to more herbicide use, causing damage to our agricultural areas and to our drinking water, and pose health risks to farm workers, wildlife, and consumers. GE crops have also reduced biodiversity through the transgenic contamination of local varieties and native flora.

Currently, five other states have Farmer Protection Acts that provide procedural protections for farmers who are investigated for patent infringement.⁹ North Dakota, California, Indiana, Vermont, and South Dakota have all taken this action in recognition of the fact that these state laws are necessary to protect farmers. Since the enactment of South Dakota's Farmer Protection Law, only one lawsuit has been filed against a South Dakota farmer alleging patent infringement. In states without protections, dozens of lawsuits have been filed since 2002. In Missouri alone, patent holders have filed 19 lawsuits against farmers. It is therefore critical that Oregon take similar measures to protect its farmers, especially in light of the widespread adoption of recently approved transgenic crops in Oregon, such as Roundup Ready Sugar Beets.

Oregon's health and environment are dependent on family farms that make up the backbone of our economy. Once planted, patented plants can disperse into the environment through a variety of means (described above). The liability for the uncontrollable movement of patented plants is being unfairly passed from manufacturers of patented plants to innocent and unknowing farmers and other property owners.

Conventional (non-patented trait) seeds consistently test positive for patented material due to the uncontrollable movement of genetic traits. In one study¹⁰, researchers sent seed samples to three independent labs and concluded that more than half of the conventional soybean and corn seed supply contained patented material—even though these traits are not intentionally engineered into the seed supply and thus not sold as

⁹ See e.g., N.D. Cent. Code § 4-24-13 (2011); Cal. Food & Agric. Code § 52305 (2008); Ind. Code §§ 15-15-6-11, 15-15-7-1-12 (2008); Vt. Stat. Ann. tit. 10, § 6615 (2007), S.D. Codified Law § 38-1-44 to 38-1-50.

¹⁰ Union of Concerned Scientists, *Gone to Seed* (2004) available at http://www.ucsusa.org/assets/documents/food_and_agriculture/seedreport_fullreport.pdf.

patented varieties. Many farmers plant seeds with patented traits unwittingly and are subject to patent liability simply for possessing this patented property regardless of how it got there and if they have knowledge of it.

Farmers who grow crops with patented traits are often targeted with patent infringement investigations, since saving patented seed from your harvest is illegal. Growers of patented plants who are mistakenly targeted for saving seed have a harder time than conventional growers defending their case and deserve an opportunity to collect independent samples and be aware of the investigation from day one.

Patent holders investigate up to 500 farmers every year in the United States for patent infringement. Without an intact Farmer Protection Law, private investigators can arrive unexpectedly on farmers' land and take samples from fields, without written permission, a practice that has instigated repeated trespassing accusations. According to farmers, hired investigators would trespass on farmers' property to take photos or crop samples; make threats and engage in harassment; and even engage in entrapment-like activity.

The Farmer Protection Law prevents such unlawful investigations by providing procedures for an open and honest crop investigation process and protecting farmers from trespassing, harassment, or entrapment. The procedural protections are important because they deter patent holders from engaging in unlawful activities and provide patent holders a legal framework to follow and help to legitimize their patent infringement investigations. Patent holders have better access to farmers and their fields since a mandated framework for carrying out these investigations is in place.

Patent holders do not want to endure the embarrassment of mistakenly targeting farmers with investigations who have not infringed their patents. This law requires that farmers be engaged in patent infringement investigations from day one. Farmers can typically prove they didn't infringe plant patents through records and receipts, credible laboratory testing, and other evidence.

For some farmers, these investigations lead to litigation. In, 2003, the Center for Food Safety launched an investigation to determine the extent to which American farmers are impacted by litigation arising from the use of patented, genetically engineered crops. In 2005, CFS released a comprehensive assessment of Monsanto Company's use of U.S. patent law to control the use of staple crop seeds by farmers. The report, *Monsanto vs. U.S. Farmers*, details the results of this research, discusses the ramifications for the future of U.S. farming, and provides policy recommendations for improvement.¹¹ A recent update to the report found that, as of November 28, 2012, patent holder Monsanto has filed 142 alleged patent infringement lawsuits involving 410 farmers and 56 small farm businesses in 27 states.¹² It is critical that any patent infringement law suit start with a fair and honest crop investigation to protect the rights of farmers.

¹¹ Ctr. for Food Safety, *Monsanto vs. U.S. Farmers* (2005), available at <http://www.centerforfoodsafety.org/pubs/CFSMonsantovsFarmerReport1.13.05.pdf> (hereafter "*Monsanto vs. U.S. Farmers*"); see also Ctr. for Food Safety, *Monsanto vs. U.S. Farmers 2012 Update* (2012), <http://www.centerforfoodsafety.org/wp-content/uploads/2012/11/Monsanto-v-US-Farmer-2012-Update-final.pdf> (hereafter "*Monsanto vs. U.S. Farmers Update*"); see also *Seed Giants v. Farmers* (provided).

¹² Center for Food Safety & Save Our Seeds, *Seed Giants v. U.S. Farmers* (2013), available at http://www.centerforfoodsafety.org/files/Seed%20Giants_final_04424.pdf.

A current example of a patent infringement lawsuit is *Bowman v. Monsanto*.¹³ This case involves Monsanto's prosecution of 75-year-old Indiana farmer Vernon Hugh Bowman for alleged patent infringement because he saved and replanted his soybean seeds rather than purchasing new seeds for planting. Patent holder Monsanto investigated and sued Mr. Bowman despite Mr. Bowman's belief that he had legal grounds for saving seed. The lawsuit was recently heard before the Supreme Court of the United States.

The Farmer Protection Law does not remove the rights from patent holders. Instead, the law honors the rights of patent holders while also protecting and respecting the rights of Oregon's farmers.

Oregon has a rich history in protecting the state's interests. These bills will protect public health, the public's right to know, agricultural economy, environmental health, and native ecosystems. For all the reasons stated above, I encourage you to support these bills. Thank you for the opportunity to testify. I am happy to answer any follow up questions or provide additional analysis.

¹³ *Bowman v. Monsanto*, No. 11-796, 133 S.Ct. 420 (2012) (Petition for certiorari granted; oral argument scheduled Feb. 19, 2013).