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# COMMENTS

## THE DECLINE OF BLACK FARMING IN AMERICA: A CALL TO ALERT

### I. INTRODUCTION

The above captioned title, *The Decline of Black Farming in America*, emanates from a study published, February, 1982, by the U.S. Commission on Civil Rights, pursuant to Public Law 85-315, as amended (hereinafter textually referred to as "the report"). The report examined problems confronting black farmers historically nourished as well as through current conditions; racial discrimination, lack of institutional economic supports, and tax structures geared to benefit large farm operations, and many unscrupulously operated farm credit programs within the Farmers Home Administration (FmHA).

Almost ninety-four percent of the farms formerly operated by blacks have been lost since 1920 (925,710/1920 farmers), while the number of white operated farms declined by 56.4% (5,499,707/1920 farmers) during the same period.<sup>1</sup> Farmland is included in the Census of Agriculture count every five years if it produces an income for its owner of at least \$1,000.00 a year. Accordingly, the Census has an information base on those blacks who derive at least \$1,000 in farm sales a year. They numbered 57,000 controlling 4.2 million acres in 1978. Only 23,500 of the 57,000 black farm operators in this nation gross \$2,500 or more annually. Approximately 4,400 black farmers gross \$20,000 or more per year, of which, only 499 have gross sales of \$100,000 or more annually.<sup>2</sup> The Emergency Land Fund (ELF), an organization in existence over a decade, headquartered in Atlanta, and dedicated to providing assistance in black land ownership preservation in the rural south, appropriately considers the government's definition of what is considered a farm as "out of sight, out of mind." The conclusion is reinforced by a recent study ELF conducted, entitled "The Impact of Heir Property on Black Rural Land Tenure in the Southeastern Region of the United States," wherein it was determined that in 1974, blacks owned or had access to over ten million acres with as many as 1.6 million individual black owners who were scattered throughout the United States with a land title in the rural Southeast.<sup>3</sup> If ELF's estimate is accurate, then over two-thirds of the black farmland base, some five million acres, receive no policy attention and none of the program resources available through public supported agricultural institutions. Thus, estimates place the decreasing rate of black land ownership

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1. U.S. COMM'N ON CIV. RIGHTS, *The Decline of Black Farming in America* 2-3 (Feb. 1982) [hereinafter cited as *The Decline of Black Farming*].

2. U.S. DEPT OF COM., BUREAU OF THE CENSUS, *1978 Census of Agriculture*, vol. 1. pt. 51, table 42, 209.

3. EMERGENCY LAND FUND, *The Impact of Heir Property on Black Rural Land Tenure in the Southeastern Region of the United States* 6 (Condensed Version, Jan. 1981) [hereinafter cited as *The Impact of Heir Property*].

at approximately 6,000 acres per week. This category of "unaccounted for" black rural land is often left idle, subject to absentee ownership (which provides more lucrative tax write-offs), occupied by elderly individuals (who are often on public assistance and who, in many cases, cannot read or write well), encumbered with clouded titles, and are regularly lost in tax, partition and foreclosure sales, and are prey to land speculators. Condemnation/eminent domain and adverse possession proceedings are other sources of land loss. Extensive impact studies have not yet materialized on the national rate of urban real property loss among blacks. In short, it is important to recognize that the magnitude of this dilemma exceeds the confines of the farm. This commentary attempts to highlight the historical developments which led to the findings as an "endangered species." In so doing, some other common means through which black landowners lose their land and some existing as well as proposed legal, legislative, and investment remedies employed toward ownership preservation will be briefly surveyed. It is the author's hope that this commentary will serve as a source of motivation for prospective and practicing black attorneys to further investigate, litigate, and become more cognizant of real property ownership patterns among black people in respective areas.

## II. BLACK FARMING IN AMERICA

"Forty acres and a mule", the familiar "illusory promise" made to newly "freed" slaves in reparation for their expatriation from Africa and their enslavement in America, in many instances resulted not only in breached promises, but also in being "kicked by the very mules that they failed to receive."

Historially, the abolition of slavery, which affected four million slaves after the Civil War did not transfer economic independence to most blacks. Those who had great expectations of receiving a share of their slave master's land found themselves, instead, with little more than their own clothes, a few tools, and perhaps some farm animals. While land prices were low immediately after the War, few blacks had the cash needed to buy land.<sup>4</sup>

Guided by continuing postwar attitudes of racism, promises of nationally supervised land distribution among the freed slaves were not fulfilled. Although Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands in March 1865, to confiscate land and property of rebels in the Confederate cause for redistribution among the freed slaves, President Andrew Johnson declared a "general amnesty from confiscation" several months later. In 1867, Representative Thaddeus Stevens (R-Pa.) introduced a bill that "would have granted forty acres and fifty dollars to every former slave who was head of household," but the bill was defeated in Congress (Act of March 3, 1865, Ch. 90, 13 Stat. 507).<sup>5</sup>

While the plantation system was shaken by the Civil War, it was not destroyed, and sharecropping replaced slavery as the prevailing relationship

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4. M. MARBLE, *HISTORICAL PERSPECTIVE, AND THE BLACK RURAL LANDOWNER—ENDANGERED SPECIES*, (ed. L. McGee and R. Boone (1979)) [hereinafter cited as *Historical Perspective*].

5. See R. RANSOM AND R. SUTCH, *ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION* 82 (1977) [hereinafter cited as *ONE KIND OF FREEDOM*].

between white landowners and black farmers without land.<sup>6</sup> Sharecropping, while a more subtle form of dominance than slavery, yielded similar patterns of control and subservience. The sharecropper typically paid the landowner one-half of his crop as rent; the landowner provided housing, fuel, animals, tools, seed and close supervision. The cost of fertilizer was deducted from the crop. The landlord weighed and marketed the cotton and kept all sales and financial records. Food, clothing, and household needs were obtained by the sharecropper, usually on credit at high interest rates.<sup>7</sup>

A positive development for black farmers during this period was the creation of small, black-owned banks and lending institutions. Beginning in the 1880's, with the combined resources of a few black, ministers, entrepreneurs, and educators, more than fifty black-owned lending institutions were established by 1911, with annual transactions worth more than \$20 million. Other significant factors favorably influencing black agricultural were the increase of literacy and the establishment of dozens of black agricultural and teachers colleges, spearheaded by Booker T. Washington, enabling blacks to acquire a range of farming skills.<sup>8</sup>

However, whites violently resisted any social, economic, or educational improvement on the part of blacks that might have led to disruption of the social order. Racism in extension of credit and the selling of land resulted in smaller and less productive landholdings for those blacks who were able to buy their own farms. The system of credit inextricably tied blacks to cotton, and when cotton fell prey to the boll weevil and the market was glutted, blacks were least cushioned by institutional support.<sup>9</sup> Fear and illiteracy rendered blacks easily exploited. What should have been a secure position in agriculture turned out to be a struggle merely for survival. As black farmers struggled for survival, they received inadequate support from government programs which failed to break with a history and environment of racism.

New job opportunities created in the north as a result of the World War provided blacks with an alternative to the hardships they endured as southern farmers and sharecroppers.<sup>10</sup> By 1930, the number of blacks migrating north had increased more than five-fold since the late 1800s.<sup>11</sup>

Present priorities for agricultural research (established and supported in large part by state and federal funds), economics of scale related to mechanization, increased production resulting from technology, government farm price and income supports, tax benefits, and institutional lending practices

6. See W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA 1860-80* (1935).

7. RANSOM AND SUTCH, *supra* note 5, at 90.

8. MARABLE, *HISTORICAL PERSPECTIVE*, *supra* note 4, at 11-12.

9. *The Decline of Black Farming*, *supra* note 1, at 176-77.

10. The black exodus from the South was caused as much by a desire to escape the racial injustices of the South as by the attraction of northern wages. Fear and intimidation through racial violence continued to be a part of southern life. Between 1882 and 1918, 3,040 blacks died by lynching; another 619 lynchings took place between 1918 and 1937. A large number of these hangings occurred because of black resistance to the vicious practice of debt slavery. See D.H. PALMER, *Moving North; Migration of Negroes During World War I*, in D. BROMLEY & F. LONGINO, JR., *White Racism and Black America*, 31-3 (1972).

11. MARABLE, *HISTORICAL PERSPECTIVE* *supra* note 4, at 19. From 1880 to 1910, only 79,400 blacks left the Blackbelt for the north; between 1910 and 1920 the figure leaped to 226,900, and from 1920 to 1930 about 440,400 black migrants fled the deep south. Most, if not all, of these people were sharecroppers, small owner-operators, or workers in jobs connected with agriculture.

all are geared to large scale farming.<sup>12</sup>

In 1965, the U.S. Commission on Civil Rights produced a report entitled, *Equal Opportunity in Farm Programs*. The 1965 report documented specific findings of discrimination in the U.S. Department of Agriculture's (USDA) Farmers Home Administration, Cooperative Extension Service, Soil Conservation Service, and the Agricultural Stabilization and Conservation Service.<sup>13</sup>

In 1980, the USDA's Office of Equal Opportunity confirmed violations of the FmHA which included:

1. discrepancies in the real estate appraisal of farm land owned by blacks (used to determine potential collateral);
2. inordinate waiting periods between application and loan approval for blacks;
3. absence of deferred loan payment schedules for blacks;
4. requirements that some blacks agree to voluntary liquidation as a condition to obtaining loans; and
5. disparities in the number and amounts of loans made to blacks.<sup>14</sup>

In March 1981, black farmers from Arkansas, Mississippi, and Tennessee held a twenty-one-day sit-in at a Tennessee county FmHA office to protest what they perceived to be discrimination by FmHA.<sup>15</sup>

While all of the USDA's farm programs have various relevance to black farmers, the report focused on the farm credit programs of the Farmers Home Administration, particularly limited resource loans.

Farm ownership loans are for borrowers who cannot obtain credit elsewhere to improve or purchase farms, refinance debts, finance nonfarm enterprises, or make additions to farms. FmHA targeted twenty-five percent of all farm ownership loan funds for limited resource, low-income farmers in 1980. These farmers were charged interest at a rate of six percent, while other borrowers of insured loans paid at a rate not more than the cost of money to the government, about 10.5 percent. The interest rate on guaranteed loans was negotiated by the lender. FmHA defines a limited resource farmer as one who operates a "small or family farm (a small farm is a marginal family farm)", with low income, and possibly "underdeveloped managerial ability", limited education, and a low producing farm.

In fiscal year 1980, blacks received 3.1 percent of all the loans provided under the farm ownership loan program (limited resource and others combined). In fiscal year 1981, the number of black farm ownership loans dropped to only 1.9 percent of the total.<sup>16</sup>

To remain in a competitive position, even the most well-established farmer must aggressively expand by using borrowed funds. The average farm debt, according to the 1974 Agricultural Census, was \$44,000, but for blacks it was only \$12,888.<sup>17</sup>

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12. *The Decline of Black Farming*, *supra* note 1, at 177.

13. U.S. COMMISSION ON CIVIL RIGHTS, *Equal Opportunity in Farm Programs* (1965).

14. *The Decline of Black Farming*, *supra* note 1, at 86-7.

15. Interview with Tom Burrell, sit-in participant (May 14, 1981), cited in *The Decline of Black Farming*, *supra* note 1, at 91.

16. Report Code 691 (FY1981). *The Decline of Black Farming*, *supra* note 1, at 106.

17. 1974 Census of Agriculture, I-95. Cited in *The Decline of Black Farming*, *supra* note 1, at 60-2. Price and income support payments are closely tied to the volume of production, thus, benefiting those who need them least—large farm operators. According to a study of the distribution

An additional consideration is that many insurance companies, which finance the bulk of farm loans in the country, require loans to be at least \$100,000. While commercial banks lend lesser amounts, they often require repayment within five years, a term too short for the average black landowner.<sup>18</sup>

### *Findings and Recommendations of the Report*

The U.S. Commission on Civil Rights concluded that, "there has been no significant Federal response to the alarming rate at which Blacks are losing their farms. The need for intervention is immediate."

In so doing the following *findings* and *recommendations* were formulated within the report.

#### 1. *Finding*

The current rate of decline of Black operated farms in the U.S. is 2½ times the rate of decline for white-operated farms. If the rate of Black land loss continues unabated, there will be fewer than 10,000 Black farmers at the end of the next decade. With a historical mission to preserve and enhance the livelihood of those family farmers in need who cannot obtain credit from other sources, the FmHA (with a \$6 billion annual budget) is in a unique position to provide assistance to Black farms . . . Congress specifically identified minority farmers as among those who need special assistance and intended beneficiaries of these loans. . . Incomplete limited resource loan data reveals that the majority of Blacks receiving farm operating loans did so at regular interest rates. . . [thus] many well-established white farmers received low interest loans.

#### *Recommendations*

Congress should conduct oversight hearings on the extent to which USDA policies and programs address the problems related to the loss of Black operated farmland. . .

The Farmers Home Administrator should review FmHA regulations to ensure that farm loans [particularly limited resource loans] are provided to those for whom Congress intended. For example, FmHA should:

1. require stricter "credit elsewhere" tests to determine if credit is available to applicants from other sources;
2. provide, for purposes of eligibility, a more specific definition of a "limited resource borrower."
3. require documented outreach to minority and small farmers informing them of special loan programs, particularly the limited resources loan program.

#### 2. *Finding*

There has been no significant Federal effort to half the loss of Black-operated farmer. Within USDA, interagency efforts to assist small farmers have not been targeted towards minorities. Furthermore, those activities geared towards small farmers have lacked direc-

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of direct income support payments under 1978 farm programs, of those farmers who did participate in support programs, (and most small farmers did not), the smallest, 30 percent, received less than 4 percent of all payments. The size of payments ranged from \$365 for small farmers to \$36,000 for farmers with more than 2,500 acres. The concentration of payments among a few large farmers was greatest in cotton and rice areas of the South. U.S. GENERAL ACCOUNTING OFFICE, *Changing Character and Structure of American Agriculture: An Overview* 101-02 (1978).

18. *The Decline of Black Farming*, *supra* note 1, at 63.

tion, specific goals, systematic program evaluation, coordination and communication among agencies, and flexibility in program guidelines and regulations necessary for their success.

*Recommendation*

The Secretary of Agriculture should provide for the development and implementation of a coordinated Department-wide program designed to assist minority farmers. . . Agencies should be required to develop plans for this purpose, with activities and goals which can be measured and evaluated. Special emphasis should be placed on outreach to minorities. . .

3. *Finding*

The systematic consideration of minority needs and concerns in policy formulation and program planning is essential for a meaningful civil rights effort. For this reason, USDA's Secretary's Memorandum No. 1662, "USDA Policy on Civil Rights", and its supplements, require that all USDA agencies collect and evaluate accurate minority program participation data; set minority targets in advance of the program year; and evaluate all proposed policies and procedures for their civil rights impact. However, Secretary's Memorandum 1662 and its supplements have not been fully implemented. In particular, minority program participation targets have not been set in advance of the program year and policies which would significantly affect minorities have been proposed without civil rights impact analysis.

*Recommendation*

The Secretary of Agriculture should implement all USDA civil rights policies and regulations. In particular, the Secretary should reaffirm the policies and objectives of the Secretary's Memorandum No. 1662 and its supplements. The Secretary should establish procedures (e.g., requiring that the Assistant Secretary of Administration "sign-off" on new policies and procedures) to ensure that Office of Equal Opportunity review and approval is obtained prior to their implementation.

4. *Finding*

The Equal Credit Opportunity Act (ECOA) (distinct from Title IV Civil Rights Act) prohibits discrimination by lenders (including the Farmers Homes Administration) on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance benefits, and good faith exercise of rights under the Consumer Credit Protection Act. The Federal Trade Commission (FTC) is authorized to enforce compliance with ECOA in direct loan programs administered by the Farmers Home Administration. However, the FTC does not monitor FmHA's compliance, nor does it investigate all complaints. And, although the FTC is empowered to issue regulations and guidelines governing enforcement, it has not done so. In the absence of any guidance and oversight by the FTC, neither USDA nor the Farmers Home Administration has developed and adequate ECOA enforcement program.

*Recommendation*

USDA's Office of Equal Opportunity (OEO) has department-wide responsibility for developing a comprehensive program to ensure equal opportunity in USDA programs. However, OEO has failed to monitor, set standard, or develop guidelines for agency civil rights enforcement of the Equal Credit Opportunity Act. Furthermore, in its own enforcement activities OEO has failed, in some cases, to respond in a timely and effective manner.

The Director of USDA's Office of Equal Opportunity should:

- develop regulations, guidelines and training pertaining to enforcement of the Equal Credit Opportunity Act;
- require collection and evaluation of limited resource loan beneficiary data broken down by race, ethnicity, and sex;
- establish specific time-frames for initiation and completion of complaint investigations and compliance reviews;
- establish procedures for follow-up regarding findings of non-compliance reviews.

#### 5. *Finding*

The Farmers Home Administration lacks systematic and effective procedures for ensuring civil rights enforcement. In particular, FmHA has failed to develop guidelines and conduct reviews monitoring FmHA's compliance with the Equal Credit Opportunity Act. Similarly, FmHA has failed to set meaningful minority participation targets in a timely manner and to obtain and evaluate data on minority participation in the limited resource loan program.

#### *Recommendation*

The Farmers Home Administrator should:

- require that targets for minority participation in FmHA programs, including the limited resource loan program, be established (prior to the program year) and met at the county level;
- delegate additional adequately trained staff to monitor minority targets and participation, the quality of services and outreach to minorities, and conduct compliance reviews;
- develop specific interpretations of ECOA requirements and establish guidelines for enforcement in FmHA loan programs.

#### 6. *Finding*

FmHA county committees composed of three members, at least two of whom are farmers, determine the eligibility of FmHA farm loan applications and the limits of credit to be extended to borrowers. Committee members are nominated by FmHA county supervisors and appointed by FmHA State directors. Between 1979 and 1980 the number of black committee members fell 39.8 percent nationwide, despite an increase in overall committee membership during the same year. The loss of black committee members is especially severe at the state level, where, for example, Tennessee lost 93.3 percent of its black committee members, Georgia—60.7 percent, Mississippi—56.3 percent, Alabama—48.6, and Texas—45.5 percent.

#### *Recommendation*

The Farmers Home Administration should ensure that county committees are representative of the population of the county which they serve.

The basis for class action litigation exists under Title VI of the Civil Rights Act of 1964 (prohibition against discrimination) applicable in "direct" federal assistance programs. For example, the Farmers Home Administration administers approximately twenty-one programs which provide loans or grants to public and private entities for such things as community facilities, rural housing, farm labor housing, recreation and pollution abatement. Any federal agency providing program funding is responsible for ensuring civil rights compliance on the part of its program recipients by



implementing an enforcement program.<sup>19</sup>

Farmers Home Administration's direct farm loan programs are not covered by Title VI, but are usually covered by clauses within their authorizing legislation prohibiting discrimination. Fifth amendment due process assertions are also applicable.<sup>20</sup>

### III. HEIR PROPERTY

To determine the impact of heir property on black ownership, Congress in 1978 authorized the U.S. Department of Agriculture to study the problem (Pub. L. No. 95-577), and the Emergency Land Fund (ELF) contracted to perform the research. The study produced three major significant findings.<sup>21</sup>

1. There are over ten million acres of rural land owned by Black Americans in the Southeastern region of the U.S.
2. Forty-one percent of Black landholding is intestate realty, commonly known as "heir property"; and
3. The overwhelming majority of the respondents to the survey (81.6%) stated that they have not made a will, from which fact it can be reasonably assumed that most rural landowners will die without having made valid wills.

Heir property, because of its usually extended, undivided ownership base, is peculiarly susceptible to being lost through a variety of legal procedures. Most notable among these are: 1) sales for partition and division, 2) tax sales, and 3) adverse possession. For the most part, these laws are uniform in application, which results in significant loss of heir property.<sup>22</sup>

Heir property is easy prey for swindlers and speculators, who purchase an heir's interest with the deliberate intention of forcing a partition sale.<sup>23</sup> The partition sale is the most common way blacks lose their land. Partition is the process by which undivided interests in land are severed between two or more persons jointly owned by them as co-partners, joint tenants or tenants in common.<sup>24</sup> An average of eight persons jointly own each of these parcels, and an average of five out of these eight owners live outside of the Southeast. Frequently, a speculator's first act is to acquire the interest of an absentee heir<sup>25</sup> who does not know the value of the property he has inherited; the speculator then offers to buy the remaining tracts from the other

19. *Id.* at 135. 42 U.S.C. §§ 2000d to 2000d-4 (1976). 7 C.F.R. Part 15, subpart A, Appendix (1980).

20. *Bolling v. Sharpe*, 347 U.S. 497 (1954). *The Decline of Black Farming*, *supra* note 1, at 136-46. In the case of the Farmers Home Administration, recipients of direct assistance provided by farm loan programs are protected under the Equal Credit Opportunity Act of 1974 as amended (ECOA) which covers all lenders, including the Federal Government. 15 U.S.C. §§ 1691-1691(f) (1976).

21. *The Impact of Heir Property on Black Rural Land Tenure in the Southeastern Region of the United States* (a condensed version) 1980 [hereinafter cited as *Impact of Heir Property*].

22. *Id.* at 40.

23. McDougal, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. AND SOC. CHANGE 34 n.2 (1979-80) [hereinafter cited as *Black Landowners Beware*]. Titles to the interest become "marketable" because the petition action conveys to the purchaser all rights, title, and interest of all heirs who are party to the action. 68 C.J.S. Partition § 202 (1950).

24. *Id.* at footnote 25, 132. Heirs who take land simultaneously through descent and distribution laws (intestate succession statutes) presently take land as tenants in common in all jurisdictions. See C.J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 224 (1st ed. 1962). Any heir, as tenant in common, can force a partition sale, regardless of the size of his interest.

25. *Id.* at footnote 40, 134. The purchaser of the interest of any tenant in common succeeds to

ascertainable heirs. Threatened with expensive and protracted litigation, the heirs generally concede.<sup>26</sup> Eventually, through partition sale, outright purchase, or other means, the speculator secures a clear title, usually at far below market value.<sup>27</sup>

The Model Heir's Property Act and the Uniform Probate Code are two suggested sources of legislative remedies to the heir's property problem.<sup>28</sup>

It has been suggested that enactment of a Model Heir's Property Act would avert partition sales by protecting the rights of those heirs who occupy and utilize land while providing an inexpensive, equitable, and constitutional method of clearing title.<sup>29</sup> Such an act, to be effective would: 1) provide for compulsory administration of estates within one year of the landowner's death; 2) protect any improvements made by a co-tenant in possession against claims by other cotenants; 3) enable a long-standing heir in possession to purchase the interests of his co-tenants at a private sale, with proceeds held in escrow for the other heirs and the unclaimed portion ultimately refunded to the heir in possession; 4) create in any heir a superior right to a voluntary partition vis-a-vis any non-heir owner; 5) provide that the amount any heir received as a result of a partition sale would be credited against any sums which would normally be paid into court; 6) simplify the method of adversely possessing against an absentee heir; 7) provide that the minimum bid at a partition sale equal or exceed the fair market value of the land; 8) create a special court to administer the statute with simplified procedures; 9) enable the state attorney general or local district attorney to initiate actions, upon the request of an heir in possession, to determine the identity of all ascertainable heirs and the extent of their interests, thus reducing the costs of "quiet title" actions and partition sales; 10) permit heirs in occupancy to tack (add on earlier periods of time) the occupancy of their immediate predecessors in title, thus allowing the occupant heir to accumulate time toward the statutory period for adverse possession.<sup>30</sup>

It has been suggested that a Model Heir's Property Act might also provide that the heirs each be given the right to buy out their co-tenants' interest before any partition could take place. The state of Alabama enacted such a statute in 1979.<sup>31</sup> When families cannot agree on the provisions for a buy-out of any heir's interest, the court could arrange for a condemnation of that interest. Fair market value would be paid to the heir with funds secured by an assessment against all remaining heirs. Such a remedy is drastic, and it

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all that tenant's rights including the right to force a partition sale. See C.J. MOYNIHAN, *supra* note 24.

26. *Id.* at 134.

27. *Id.* at 114.

28. *Id.* at 135-39.

29. *Id.* at footnote 48, 135. The basic format of the Model Heirs Property Act was developed by the staff of the Emergency Land Fund, especially, Judith Bourne, Esq. of Charleston, South Carolina, between 1971 and 1974. See also Farmers Home Administration Housing Authorizations: Hearings Before the Subcomm. on Rural Housing of the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess. (March 9-10, 1978).

30. *Id.* at 135-36.

31. In Alabama, on July 17, 1979, a new law was enacted allowing heir owners to buy out the interest of a departing heir by purchasing the heir's share at a price determined by a court appointed appraiser. Under this law, a partition sale results only if none of the heirs wish to purchase the departing heir's interest, or if the heirs fail to meet the deadline for payment. Ala. Code, § 35-6-100 (Supp. 1980).

should only be available in special circumstances, such as when more than two-thirds of the heirs petition to the court for such action.<sup>32</sup>

In addition, it has been suggested that until such statutes are enacted, heirs could be encouraged to deed their interests for a minimal price to a small number of family members or to one member of the family as trustee so that the land need not be sold.<sup>33</sup> In so doing, a small land trust could be established to further facilitate land finance development for participating family members.

A more general approach to the effective distribution of property than that of the Model Heir's Property Act is that of the Uniform Probate Code (the Code). The Code is a comprehensive treatment of the substantive and procedural law relating to the two principal areas of probate: 1) devolution of property at death, whether by testate or intestate succession and 2) protection of the property of minors and disabled or incapacitated heirs, including provision for their maintenance.<sup>34</sup>

The Code provides a flexible system for administration of intestate estates and for the probate of wills. The Code provides for three types of procedures: "informal," "formal," and "supervised."<sup>35</sup>

Uniform Probate Code § 3-1203 provides that when the value of the estate, less liens and encumbrances, does not exceed the amounts the Code sets aside for protection of the family, burial of the deceased, and payment of medical bills associated with the terminal illness of the decedent, the administrator can distribute the estate to the heirs immediately and inexpensively without notice to creditors.<sup>36</sup>

On the other hand, unsupervised (by the courts) probate proceedings may give rise to unscrupulous abuse. According to ELF, one probate judge who entered public office owning an "insignificant (small) amount of land now owns in excess of 15,000 acres in a county that is eighty percent black."<sup>37</sup>

Tax sales occur when landowners fail to pay property taxes. Heir property is particularly susceptible to conflict or confusion regarding tax responsibility. Heirs may have different sized shares in the property and different interests in maintaining it. Often, one heir occupies the property and pays the taxes. Upon his or her death, or in the event that this heir fails to keep up on tax payments, confusion among the other, often widely dispersed, heirs may immobilize them from taking the action necessary to save the land.<sup>38</sup>

Since taxes on rural land in the south tend to be low, it is not unusual for valuable properties to be offered at public real estate auctions for minimal amounts. The successful bidder receives an interest in the land similar

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32. *Black Landowners Beware*, *supra* note 23, at 136.

33. *Id.* at 136.

34. *Id.* at 137.

35. *See generally*, UNIFORM PROBATE CODE, Article 3 (1977).

36. The administrator would then file a closing statement pursuant to § 3-1204. Since the probate of many decedents will not exceed the amount specified in the statute, this section will prove useful in many estates. UNIFORM PROBATE CODE § 3-1203, Comment (1977).

37. *The Impact of Heir Property*, *supra* note 21, at 45, 291. *See also The Decline of Black Farming*, *supra* note 1, at 68.

38. *The Decline of Black Farming*, *supra* note 1, at 68.

to a lien.<sup>39</sup> During a statutory redemption period,<sup>40</sup> the owner continues to hold title to the property. He can regain clear title by reimbursing the purchaser for the price paid and by paying interests, penalties, and other legal costs. Landowners typically delay tax payments until the last minute, redeeming their property at the auction sale or during the redemption period. If the rightful owner fails to redeem the property during the statutory period, he loses his entire interest in the property.

Under this system of tax sales many black-owned properties are irretrievably lost. Many black landowners have no working understanding of how taxes are assessed, what the consequences of nonpayment are, and what their rights of redemption may be should there be a forced sale for delinquent taxes.<sup>41</sup> In some cases the owner does not know he owes taxes, much less that his property is being sold. He/she may be elderly and forgetful, he may never have received a tax bill or a notice of the delinquency sale, or he may be illiterate. When a taxpayer, having missed one year's payment, comes to pay taxes for the current year, the clerk may fail to inform him that he must pay the taxes still outstanding from the previous year if he wishes to cure his delinquency. If the missed payment is not made, the land subsequently may be sold to recover this delinquency, although taxes from succeeding years have been paid.<sup>42</sup>

Another pattern by which black-owned land is lost occurs when blacks lease land and the tenant agrees to pay the taxes. Some tenants not only fail to pay the taxes, they actively conceal the tax notices. The tenant can then buy the property when it is auctioned for delinquent taxes. Absentee heir ownership also exacerbates the problem.<sup>43</sup>

Proposals to alleviate this problem ordinarily involve differential tax assessment, i.e., the application of the lower assessment rate to property such as agricultural, forest, or residential land. This would shift a part of the tax burden in order to distribute it more equitably or to encourage a more desirable pattern of land use.<sup>44</sup>

Techniques of differential assessment enacted in the various states can be categorized as preferential taxation, deferred taxation, or restrictive agreements. Preferential assessment bases the taxable value of land which has been in agricultural use for a fixed period of time on the land's estimated value for that use, thereby ignoring more lucrative, speculative uses to which the land could be put, the so-called "higher and better uses."<sup>45</sup>

Deferred taxation gives each piece of farm property two assessed values: market value and use value. Market value is the price the property would bring in an arm's length transaction. Use value is the capitalized value of the land when used for agriculture. As long as the property remains in agricultural use it is taxed at the low rate, based on use value. If the land is converted to a more intensive use, the owner is required to pay taxes equal

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39. See, e.g., *Kenon v. Crenshaw*, No. 79-498 (Fla. Cir. Ct. May 31, 1979).

40. The period usually lasts from one to three years.

41. See R. S. BROWN, *ONLY SIX MILLION ACRES: THE DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH* (1973).

42. *Black Landowners Beware*, *supra* note 23, at 141.

43. *Id.* at 141.

44. *Id.* at 142.

45. *Id.* at 143.

to the difference between the two rates for a specified period of time, called a "roll-back period." The theoretical advantage of this type of assessment is that it gives no incentive to speculators who intend to convert farmland to nonfarm uses in the near future. However, it does not prohibit such changes of use as would be prevented by other methods of land use control such as zoning.<sup>46</sup>

Restrictive agreements do not operate through assessment of taxes per se. Rather, the state or local government contracts with eligible farmers, or purchases easements from them, allowing their land to be used only for specific purposes such as farming. If the farmer violates the terms of his contract, the tax benefit he has received throughout the contract period becomes payable with interest.<sup>47</sup>

State tax reforms which would provide exemptions for small landowners and for owners who are unable to pay property taxes in full because of physical, mental, or economic incapacity have also been suggested. A state-wide tax exemption of the first fifty to one hundred acres of each landowner's agricultural property would provide the necessary benefits for small landowners while preventing large landowners with property in several counties from receiving multiple exemptions. The acreage limitation would ensure the greatest tax relief to the small landowners who are most in need. Further, if the exemption applied to individuals and not to property, a landowner could not multiply exemptions by subdividing his land.<sup>48</sup>

Other tax reforms could include extending the period for redemption from tax delinquent status, and providing special extensions for the period of time during which a property owner who was previously disabled (due to infancy or incompetence) could, after the removal of his disability, redeem property foreclosed for tax delinquency. Federal estate tax reforms related to heir farm property have also been proposed.<sup>49</sup>

Idle and neglected land, often characteristic of heir property, falls prey to the claims of the adverse possessor. When lands have been in actual, open peaceable, notorious and continuous possession, under claim of ownership for a statutorily required number of years, no suit may be brought for recovery of the land. Most states require that the heirs have no notice of the other co-tenants or any reason to know of their existence. Since the deed provides the grantee with color of title, the normal statutory period required for adverse possession is shortened. This could certainly work a hardship for the out-of-possession co-tenants who may not have any knowledge or notice of the conveyance. Also, a co-tenant in exclusive possession can repudiate the co-tenancy and, in effect, oust his co-owners of possession.<sup>50</sup>

The government, pursuant to its sovereign power over all lands within its jurisdiction, can take private property for a public use upon payment of "just compensation," a value determined administratively but subject to ju-

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46. *Id.* at 143.

47. *Id.* at 143.

48. *Id.* at 146-47.

49. *Id.* at 147.

50. *The Impact of Heir Property*, *supra* note 3, at 41-42. See also, *id.* at 158; while a statutory presumption exists against adverse possession by co-tenants, a creditor who succeeds to a cotenancy in heir's property might force a partition of the property.

dicial review.<sup>51</sup>

A particularly dramatic example of unfairness to black landowners in the administration of the law of eminent domain occurred in Harris Neck, Georgia, during World War II.<sup>52</sup> On July 26, 1942, one hundred black farmers were forcibly removed from 2,681 acres of prime land on Georgia's south coast, ostensibly to make way for the construction of an Army base.<sup>53</sup> The bulk of the land apparently first came into black hands as a result of Sherman's Special Field Order No. 15; adjoining parcels were later purchases by black families and the Harris Neck site eventually took shape.<sup>54</sup> Local whites, including the county sheriff, had conspired to take the land away from the black owners long before condemnation. The owners were forced to vacate on the threat that their homes would be torn down and burned, and were paid only ten dollars an acre in compensation. The land, however, was never developed for an airport. It was eventually turned over to the county as surplus federal property, subject to restrictions which were generally designed to preserve the property. The county did not abide by these restrictions: local officials cut nearly all the timber off the property and grazed their livestock on it. After fifteen years of misconduct by county officials (some houses were even removed entirely to the land of the local sheriff) the federal government finally took the property back and turned it over to the United States Fish and Wildlife Division on May 25, 1962.<sup>55</sup>

The former residents of Harris Neck have brought suit in federal court for damages and for return of their land.<sup>56</sup> Although Representative Ginn of Georgia introduced a bill into Congress in 1968 to convey the disputed lands to the original owners, the bill died in committee.<sup>57</sup> Representatives Ginn and Fauntleroy, of the District of Columbia, introduced a similar bill in 1979.<sup>58</sup>

Displacement of rural blacks in the path of the Tennessee-Tombigbee Waterway Project (TTW), particularly by unfair condemnation practices,<sup>59</sup> is a new and particularly frightening threat to black landowners. Emergency Land Fund research efforts during 1974 and 1975, identified over 5,000 minority landowners in the sixteen-county TTW impact area for two states, Alabama and Mississippi.<sup>60</sup>

51. C. BERGER, *LAND OWNERSHIP AND USE* at 875 (2nd ed. 1975).

52. *Black Landowners Beware*, *supra* note 23, at 158.

53. *Harris Neck History, a Bureaucratic Web*, Atlanta Constitution, May 11, 1979, at 1C, col. 4.

54. N.Y. Times, May 5, 1979, § 1, at 28, col. 2.

55. *Id.* § 1, at 28, col. 2.

56. *United States v. Timmons*, No. 279-50 (S.D. Ga., filed June 12, 1979).

57. N.Y. Times, May 1, 1979, at A16, col. 1.

58. H.R. 4018, 96th Cong., 1st Sess. (1979).

59. The Tennessee-Tombigbee Waterway ("TTW") is a \$1 billion federal public works project which will link the Tombigbee and Tennessee Rivers. Located principally in Alabama and Mississippi, the Waterway will stimulate increased industrial, agri-business, and related economic growth in the Southwest Alabama and Northeast Mississippi regions through which it passes.

Construction of the 253-mile route, which is scheduled to last until the early 1980's has already commenced. Development of the project is supervised by the U.S. Army Corps of Engineers, but control will eventually be vested in the Tennessee-Tombigbee Waterway Development Authority (TTWDA), a five state compact whose directors are appointed by the governors of the states of Alabama, Mississippi, Florida, Kentucky, and Tennessee.

60. The Minority TTW Proposal includes a budget item in the amount of \$237,475 for legal

Urban renewal through condemnation/imminent domain has analogous displacement consequences for blacks in cities.

#### IV. CONCLUSION

When a hurricane or torrential rains sweep through an area causing millions of dollars in damages, disaster relief is applied for and almost always received. Special emphasis is placed on rebuilding and recapturing losses. When 6,000 acres per week of black owned land is being lost, creating projections of essentially nonownership by the year 2000, *crisis relief* is the call to alert.

There are presently numerous attorneys who have volunteered their services to the Emergency Land Fund in the representation of black landowners attempting to maintain ownership of their property. Property litigation is a very time consuming and meticulous process, which requires a great deal of research from the pre-pleading stage to the actual trial stage.

The magnitude of the crisis facing black landowners, particularly farmers, substantiates the necessity of a centralized legal research entity to step the progress of existing litigation, as well as induce expansion of litigation through new volunteers.

However, although litigation is imperative, greater capital investment through land and real estate finance is indispensable in long-term ownership maintenance. Partnerships (limited and general) could be established to capital-intensify farming entities, drawing from the agricultural managerial human resources of our black agricultural institutions. Tax advantages and government low interest financing opportunities are also incentives. Athletes and entertainers could be encouraged to invest, as past and present members of Black American Law Students Association (BALSA) pursue this area of the law as representatives. Mineral rights and leases offer a virtually untapped source of investment and capital-generation.

Joe Brooks, director of ELF has innovatively suggested that tracts of land with owners scattered all over the country should be consolidated under a family corporation (preventing individual selling of heir shares), allowing the use of the property as security or collateral for raising capital.<sup>61</sup> Land is the largest single asset that black Americans own.<sup>62</sup>

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challenges to the manner in which the Corps of Engineers has conducted the TTW project, and includes funds for legal defense against unfair condemnation practices.

61. *Black Landowners Beware*, *supra* note 23, at footnote 215, 160. Interview with Joseph Adams, Director, Emergency Land Fund, Jackson, Mississippi office (December 11, 1979).

62. *Living Off The Land*, BLACK ENTERPRISE MAGAZINE, Nov. 1982, at 52.