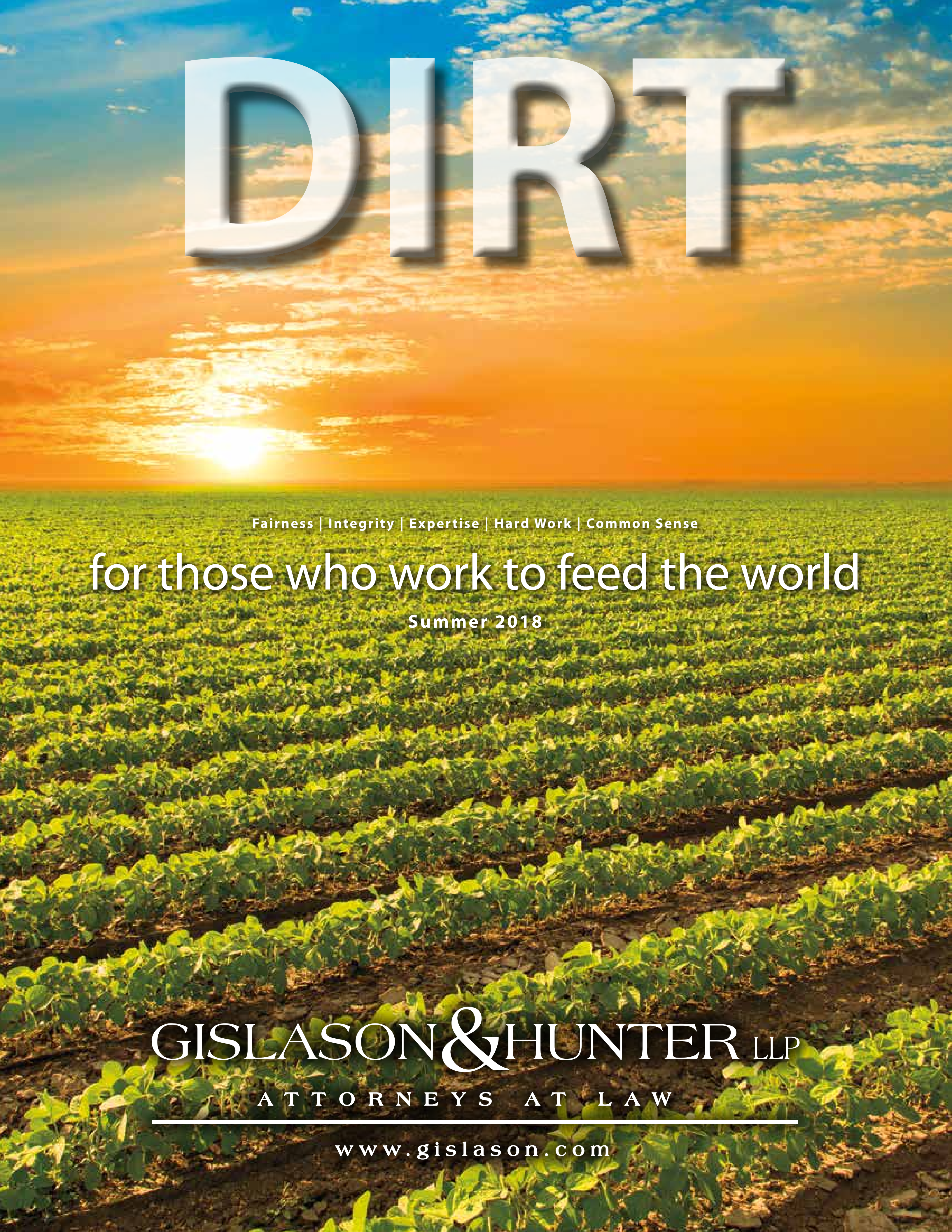


DIRT

Fairness | Integrity | Expertise | Hard Work | Common Sense

for those who work to feed the world

Summer 2018

GISLASON & HUNTER LLP

ATTORNEYS AT LAW

www.gislason.com

Gislason & Hunter is pleased to have supported these important Agriculture Events

Michael Dove with Mary Buschette and Guests at the Taste of Elegance

MN Pork Producers TASTE of ELEGANCE
January 2018
Minneapolis Hilton

Wine Sponsor and everyone's favorite stop for chocolate

Maureen Gustafson and Jennifer Lurken sharing chocolate treats

G & H Attorney David Kim pictured with Mr. & Mrs. Brian Schwartz of Schwartz Farms and Jay Moore of New Fashion Pork

Attorney Brittany King-Asamoa answers questions in the trade show booth

Ag Expo
Corn: Soybean Growers

Sponsor

Jeff Braegelmann, Dean Zimmerli, Kaitlin Pals and Chris Bowler attend the Ag Expo Luncheon sponsored by Gislason & Hunter LLP

Ag Expo Luncheon

Sponsor

Farm Bureau Leadership Program Scholarships

January 2018

GREENSEAM™

Agriculture Issues Forum

February 2018

Sponsor

Ag Practice Group Chair Matt Berger converses with conference attendees

Grain and Feed Association Annual Meeting Reception

Mystic Lake Conference Center
March 2018

Gislason & Hunter is pleased to have supported these important Agriculture Events

Kaitlin Pals, Michael Dove, Jeff Braegelmann and Chris Demet attend the Poultry Growers Conference Dinner at the Minneapolis Hilton

Midwest Poultry Association Convention and Trade Show
Minneapolis Convention Center
March 2018

Brittany King – Asamoa presented on a variety of employment law topics pertaining to ag businesses.

Farm Bureau National Employment Law Conference
Eagan Minnesota
April 2018

Gislason & Hunter LLP Continues to sponsor Minnesota FFA

Silver Sponsorship

Upcoming Events:

Minnesota Bankers Association Annual Conference
June 10-12
Brainerd MN
Gislason & Hunter will be sponsoring the Ag Lending portion

Farmfest 2018
Morton MN
August 7 - 9

Gislason & Hunter will be participating in a variety of events during Farmfest week

Independent Community Bankers Association
August 9 – 12
Mystic Lake Conference Center

Gislason & Hunter will be presenting an Ag Lending Round Table

Gislason & Hunter Ag Lending Conference
Thursday September 6
New Ulm Event Center

GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

LOCATIONS

NEW ULM
2700 S. Broadway
P.O. Box 458
New Ulm, MN 56073-0458
P 507-354-3111
F 507-354-8447

MINNEAPOLIS
701 Xenia Ave. S., Suite 500
Minneapolis, MN 55416
P 763-225-6000
F 763-225-6099

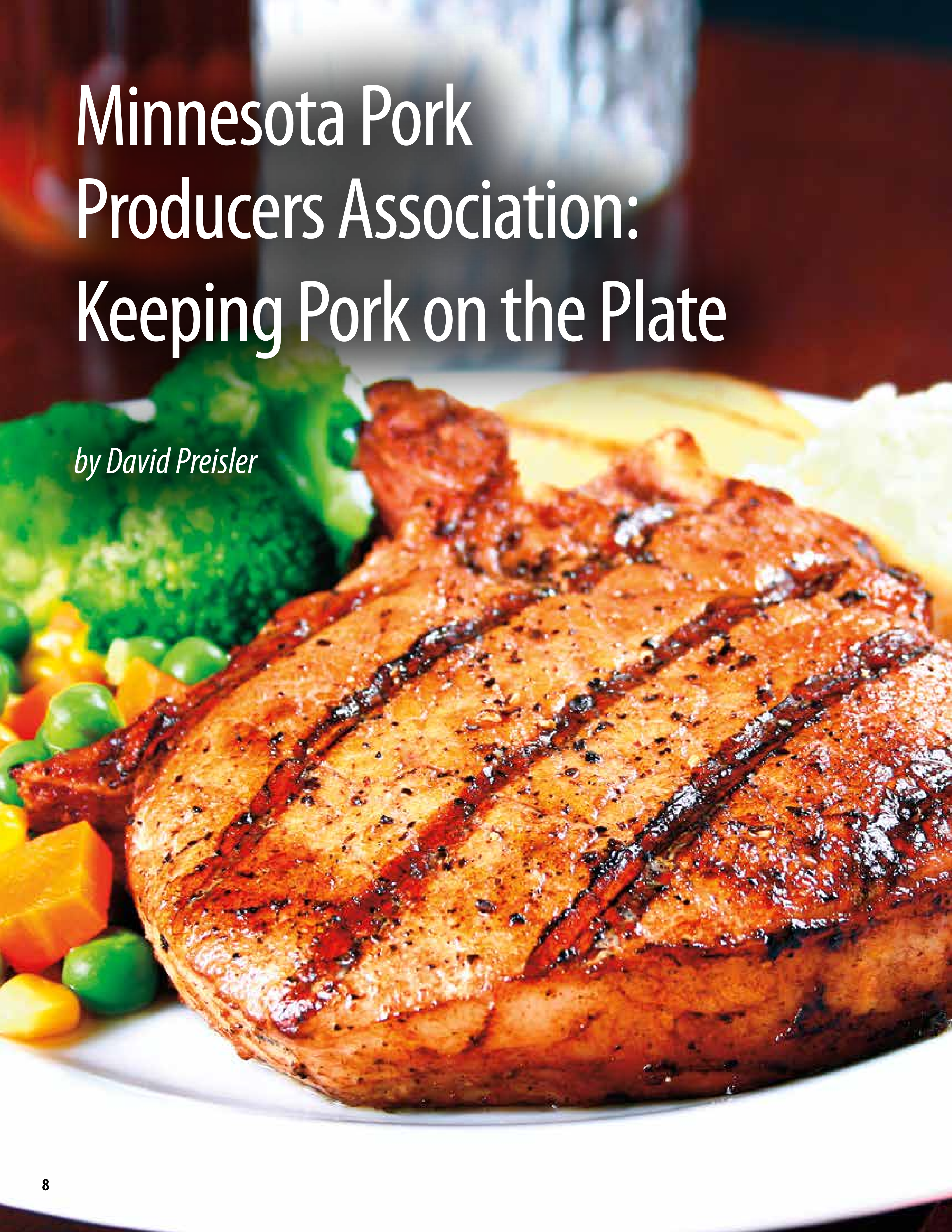
MANKATO
Landkamer Building, Suite 200
124 East Walnut Street
Mankato, MN 56001
P 507-387-1115
F 507-387-4413

DES MOINES
Bank of America Bldg.
317 Sixth Avenue, Suite 1400
Des Moines, IA 50309
P 515-244-6199
F 515-244-6493

www.gislason.com

CONTENTS

SUMMER 2018



Minnesota Pork Producers Association: Keeping Pork on the Plate

by David Preisler

Minnesota pork production has grown to a $2 billion-a-year industry, with a market that spans the globe. Minnesota ranks second in the nation in the value of pigs sold and third in the number of pigs raised.

But while economic conditions for the pork industry have improved in recent years, Minnesota pork producers still face many challenges.

The Minnesota Pork Producers Association (MPPA) is involved in a variety of initiatives designed to bring greater opportunity to the Minnesota pork farmers and producers who have set the standard for excellence around the world.

We consider Minnesota to be a state made for pig production, with more than 3,200 innovative and experienced pig farming families, abundant corn and soybean supply for quality feed, ample cropland to utilize pig manure, and vast resources that include internationally renowned swine veterinarians and researchers.

Not only is Minnesota good for pig production, but pig production has been very good for Minnesota. In addition to the more than $2 billion a year in income from the sale of the 16 million pigs produced in the state each year, economic activity related to pig farming generates a total of more than $6 billion a year in the state. Pig farmers create more than 22,000 jobs directly related to the farm in rural communities.

The MPPA is committed to building a bright future for Minnesota pork farmers and producers through a variety of important goals.

David Preisler has been serving Minnesota's pig farmers for more than 20 years as CEO of the Minnesota Pork Producers Association (MPPA) and Minnesota Pork Board (MPB), where he oversees projects associated with the two organizations carried out by the seven-member staff at the Mankato-based MPPA/MPB office.

As MPPA CEO, Preisler advocates for pork producers and educates public policy makers, as well as other audiences, on pork production and its value to Minnesota and its economy. His legislative work takes place at the local, state, and national levels. MPPA is a voluntary membership organization comprised of pork producers, contract growers, farm employees, and allied industry partners.

As the MPB CEO, Preisler oversees the management of educational, promotional and research programs funded with mandatory Pork Checkoff dollars.

Prior to becoming MPPA and MPB CEO, Preisler worked for the University of Minnesota Extension Service and as an agricultural education teacher. He graduated from North Dakota State University in Fargo, and experienced farming firsthand while growing up on a diversified livestock and crop farm in northwestern Minnesota.

Strategic planning process

One of our key commitments is to help develop a more business-friendly environment for farmers to operate. We are accomplishing that in several ways:

More interactions with policymakers. We have been actively encouraging more interaction between policymakers and our farmers and staff so the people responsible for making government policy decisions understand the most important issues pork producers face. By keeping our elected officials, agency workers (such as USDA, EPA, and FDA), and U.S. trade representatives abreast of our key concerns, we believe they can be more helpful in addressing those concerns.

A more comprehensive marketing strategy. We have been developing a broader and more focused marketing strategy to get our point of view in front of the public. This involves more direct communication with policymakers, with more targeted and more frequent communications. This also happens within the communities where pig farmers operate.

Counteracting misinformation. Advocacy groups opposed to meat production have become more aggressive in their public relations efforts, so we need to become better prepared in anticipating and responding to those groups. We recognize that we can't control the media, but we can control the message we send to policymakers and other influencers.

Education. We encourage continuing education and certification programs to help pig farmers in all areas of their farm, including marketing, human resources management, health management, and finance.

Promoting a healthy trade policy. Trade agreements in past years have helped Minnesota pork producers market their products more successfully throughout North America and around the world. But the recent threats of international tariffs and the discontinuation of the NAFTA trade agreement (North American Free Trade Agreement) could severely jeopardize future success.

China's threat to impose high tariffs on U.S. pork imports to counter the president's proposed steel import tariff could have a dramatic effect on the bottom line of Minnesota pork producers. China has been an important market for pork products that are not valued as highly elsewhere in the world, including ears, tails, snouts, feet, and organ meat. While those products would still find a market elsewhere, such as pet food and fertilizer, they would not bring as high a value in those markets as they do in the Chinese consumer market.

The dissolution of NAFTA would be a far bigger issue for U.S. pork producers. Mexico is our number one market for pork and corn, and Canada is the fifth largest market for U.S. pork. Disrupting the current level of trade among North American nations could cut significantly into the profits of Minnesota farmers.

Action Steps to Promote Pork Production

Working in conjunction with the Minnesota Pork Board, we have identified some of the key issues that affect Minnesota pig farmers, and laid out a series of action goals to address those issues in four primary areas:

1. Help farmers engage with external audiences through several initiatives, including:
   - Organize four farm tours per year with key influencers in connection with the legislators' tours.
   - Enhance our social media presence by increasing our own efforts to communicate important issues, as well as by empowering farmers and influencers to upgrade their online strategy.
   - Step up hand-to-hand "oink outings" to provide more face-to-face opportunities with farmers and consumers to share the pig farming message.
   - Increase local funding support for farms and county organizations.
2. Enhance human capital development, retention and recruitment by:
   - Developing best practices in on-boarding to overcome loss in the first three months.
   - Supporting farms by communicating the industry story as a viable career choice.
3. "Balance" the conversations by advocating for increased agricultural literacy by:
   - Increasing funding to Minnesota Agriculture in Classroom Foundation to improve education for K-12 students.
   - Pursuing opportunities with state colleges, such as Minnesota State Mankato, to improve exposure to agricultural issues for higher education students.
4. Finally, we plan to partner with regional end-users to promote Minnesota pork producers by:
   - Complementing the National Park Board business-to-business strategy
   - Getting a better understanding of the needs of retail grocers and meat markets through focus groups involving store managers, meat department managers and dieticians.

By continuing to find new and better ways to communicate our message to policymakers and consumers, and by providing educational and marketing opportunities for our members, the MPPA plans to help Minnesota pork producers grow and thrive in the years ahead.

DISASTER PLANNING

by Matthew Berger and Dean Zimmerli

Matthew C. Berger
507-354-3111
mberger@gislason.com

Dean Zimmerli
507-354-3111
dzimmerli@gislason.com

Benjamin Franklin once stated that "if you fail to plan, you are planning to fail." Planning is an integral part of every farming operation. Farmers must regularly engage in advance planning to determine the crops they will plant or livestock they will raise, ensure access to necessary inputs, and determine the timing and manner in which they will market their harvested crop or finished livestock. But while most farmers are experienced at planning for their operational needs during good times, fewer farmers invest the time to prepare in advance to respond to challenges that may arise.

Unfortunately, farming operations are exposed to a wide variety of potential disasters. Natural disasters such as floods, drought, frost, extreme temperatures,

hail, and wind can damage crops, injure livestock, or destroy farm buildings or equipment. Insect infestations, disease outbreaks, and quarantines also pose significant threats to farming operations. And fires, explosions, ventilation system failure, chemical releases, and other mechanical failures can occur at any time and imperil both the safety of farmers and economic health of the business. While these dangers can never be completely eliminated, planning in advance to respond to foreseeable threats to your farm operation may limit the long-term harm that these disasters pose to your business and reduce the stress that these disasters can cause. This article will provide a checklist of steps that you can take to prepare yourself and your farm to respond to these challenges.

1. Identify Potential Risks

The first step in preparing a comprehensive disaster response plan is to evaluate your operation to determine the specific types of disasters that may arise and the impact that each type of disaster may have on your operation.

Identify specific facilities or equipment that may pose a risk of catastrophic failure that could cause significant damage to people, property, or the environment (such as the failure of a manure storage facility or the explosion of a grain bin). You should also identify external events that would cause a significant disruption to your farming operation (such as extreme adverse weather or disease outbreaks) and the portions of your operation that may be susceptible to these threats.

The number, type, and scope of potential risks that are identified will vary significantly among operations. For example, a business consisting of one hog finishing barn that is operating under an independent contractor agreement will generally have significantly fewer and less varied risks than a larger, integrated operation that combines a livestock operation with multiple barns on multiple sites and a crop operation with significant equipment and grain storage facilities.

2.Review Contracts

After identifying potential risks that may impact your farming operation, the second step in preparing a comprehensive disaster response plan is to review ongoing contractual obligations to assess the impact that each of the potential disasters may have on your operation. Specifically, many farming operations may routinely have contracts to either purchase supplies or services used in the farming operation or to market and sell crops, livestock, or other products that are produced in the farming operation. In reviewing each of these types of contracts, you should consider the following questions:

- Does this contract require you to purchase specific quantities of supplies or sell specific quantities of farm products on an ongoing basis or at some future date, or does the contract merely provide general terms for future purchases or sales that will be determined based on actual needs in the future? For example, a marketing contract may require a farmer to deliver a specific quantity of grain or livestock each month the contract is in force. Alternatively, the contract may establish price and other general terms for the amount of grain or livestock that is actually produced by the farm during the specified period.

- What are the circumstances under which the contract may be terminated? For example, a contract may allow either party to terminate the contract at any time after giving a specified period of notice (e.g., contracts that may be terminated on 30 days or 1 year written notice to the other party). Other contracts may specify certain conditions that would allow either or both parties to terminate the contract (either immediately or after some notice period). Yet other contracts may only allow early termination in the event of a default of the contractual obligations (and then only by the party who is not in default).

- Does the contract allocate the risk of loss associated with future events that may occur? For example, some contracts include “force majeure” clauses that excuse one or both parties from continued performance under the contract or allows termination of the contract without penalty if certain “acts of God” (e.g., fires, natural disasters, disease outbreaks, war, labor strikes, etc.) interfere or make the ongoing performance of the contract impracticable.

The answers to these questions will determine the amount of future financial or legal exposure to which your farming operation may be exposed if a disaster substantially impacts your operation and reduces the amount of services or supplies that you need or the amount of farm products that you will have available to market.

In addition to these production contracts, farmers should also carefully review the terms of any promissory notes, loan agreements, security agreements, and other loan documents to assess the impact that disasters may have on the operation. For example, many loan documents include provisions that require farm business to maintain minimum financial ratios (e.g., debt-to-equity or debt-to-income ratios) or a borrowing base. Most loan documents also require the borrower to protect collateral and notify the lender of any material adverse events that may impact the operation. A farmer should be aware of any applicable requirements imposed by such loan documents and consider whether each particular potential disaster may implicate such requirements.

3.Review Insurance Coverage

In addition to reviewing potential liabilities that may arise from a disaster, farmers should also review their insurance policies to confirm that their property is adequately protected and they have sufficient liability protection for risks that may arise from foreseeable disasters. Common insurance questions that should be considered as part of disaster planning include the following items:

- Do any crop or livestock insurance policies provide adequate coverage to meeting ongoing financial obligations of the farming operation in the event of losses to growing crops or livestock from a disaster?

- Do property insurance policies provide coverage for damage to or losses of property used in the farming operation resulting from foreseeable disasters? In addressing this issue, it is important to review any policy conditions, exceptions, and exclusions that may limit insurance coverage for certain events.

- Do property insurance policies provide an adequate amount of coverage for damage to or losses of property used in the farming operation? In particular, it is important to consider whether the policy merely covers the value of the property or whether the policy instead covers the cost to replace the property.

- Do property insurance policies provide coverage for lost revenue or profits that are suffered as a result of an insured lost?
- Do liability insurance policies provide coverage for damages that may be incurred by third parties as a result of foreseeable disasters? For example, an explosion at a farm facility may cause harm to employees, other persons or nearby property. Again, in addressing this issue, it is important to review any policy conditions, exceptions, and exclusions that may limit insurance coverage for certain events. In particular, farmers should be aware of issues related to any pollution exclusions to determine the impact that such provisions may have on coverage from the routine application or use of manure, fertilizer, pesticides, herbicides, or other common farm chemicals.
- Who is covered by liability insurance policies? This includes both the scope of persons whose actions will be covered if they cause liability and the universe of persons who may submit claims if they are damaged under the policy. It is important to review policy coverages to make sure that all necessary owners, officers, and employees are covered.

In addition to reviewing coverage issues, farmers should review insurance policies to determine any applicable reporting and claim submission requirements in the event of a disaster or other insured loss. Most insurance policies include strict timing requirements within which reports or claims must be submitted following events that may cause an insured loss.

4. Regulatory Reporting Requirements

Farming operations are increasingly subject to permitting and regulatory requirements imposed by federal, state, and local governmental agencies. These regulatory requirements may include reporting obligations that can be triggered by certain disasters (or if certain events occur as part of certain disasters). For example:

- Releases of Hazardous Substances: Two separate federal laws—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA)—require persons in charge of facilities to report any releases of hazardous substances in excess of specified thresholds to the National Response Center (operated by the United States Coast Guard), the Minnesota Duty Officer, and applicable local emergency response officials. These requirements apply to all such releases of hazardous substances, including releases that occur as the result of natural disasters or actions by a third party. For example, if a release of anhydrous ammonia (which has a reportable quantity of 100 pounds, or approximately 18 gallons) occurs at a farm—whether because of a leak or other equipment failure, natural disaster, or even an intentional act of a third party such as attempted theft—the farmer is required to report the release to the applicable emergency response agencies.
- Animal Disease Outbreak: Farmers are required to report a suspected or clinically-diagnosed case or positive test result for certain animal diseases to the Minnesota Board of Animal Health, Minnesota Poultry Testing Laboratory, and/or the Minnesota Duty Officer.

Farmers should review all applicable permit conditions and regulatory reporting obligations in advance of a disaster and prepare a list of those requirements (and the

necessary contact information) to ensure that these obligations are satisfied.

5. Prepare a Written Disaster Plan

After identifying potential risks that may impact your farming operation and reviewing the potential harms and reporting obligations associated with each such risk, you should prepare a written disaster plan that provides a step-by-step response plan for each potential disaster or emergency. The plan should include all legal, regulatory, and contractual reporting obligations and provide the specific contact information to be used in making the reports. The plan should also identify potential outside vendors or service providers who may be necessary to implement the plan. The plan should also identify particular persons who will be responsible for implementing each step of the plan and the timing in which the step should be completed. Trade or commodity groups, industry experts, and governmental agencies may have useful guidance regarding requirements and best practices that can be considered in preparing your disaster plan to respond to specific disasters.

Copies of the disaster plan should be kept at all facilities so that the plan is readily available in the event of an emergency. The plan should also be clearly communicated to employees who will be responsible for implementing the plan.

6. Prepare for the Financial Impact of a Disaster

Even after the immediate emergency conditions of a disaster have been addressed, farmers must also be prepared to address the long-term operational impacts of the disaster. For example, once the smoke clears or the debris is cleaned up, debt payments will still need to be made, employees will still have to be paid, and other expenses will continue to be incurred.

In order to prepare for the financial impact of a disaster, you should evaluate your liquidity or working capital position. Cash is king when dealing with a negative cash flow situation resulting from a disaster. So you should know how much available working capital you have, and what sources you have to obtain cash, including deposit accounts, lines of credit, receivables, and other sources. If you have excess inventory on hand, you may need to liquidate some to provide cash in the short term.

Next you must calculate your working capital "burn rate." Total all of your unavoidable expenses and debt payment requirements, along with any additional expenses related to responding to the disaster, to determine how much cash will be going out each month. Compare this to any remaining income you have and your available working capital, and this will determine how long you can continue to operate. For example, if your monthly cash flow is negative ($20,000), you will deplete $200,000 of working capital reserves in just ten months. If you expect your operations to continue to be impacted beyond ten months, then you must consider other options such as additional loans to be able to continue operations.

Through all of this you should also carefully review your loan agreements or other contracts. Many loan agreements have terms and conditions that may cause an event of default in the case of a disaster. You should not ignore these terms; instead, it is

best to be proactive and sit down with your lender to negotiate a modification that might delay payments or modify the loan while your work through recovery from the disaster. Particularly when lenders are comfortable that insurance may eventually compensate for damage or losses, they will often be willing to work out extensions to allow time for claims to be processed through insurance.

Conclusion

Many disasters that may impact a farming operation are simply unavoidable, and some level of stress and difficulty is unavoidable when disasters strike. But with advanced preparation, the immediate stress of many disasters can be reduced and will allow a farmer to respond in a deliberate manner that will mitigate some of the potential harms that could arise.

SEXUAL HARASSMENT POLICIES

by Brittany King-Asamoa

Brittany King-Asamoa
507-387-1115
bking-asamoa@gislason.com

A sexual harassment policy is one policy every employer should have. This statement is probably not news to any employer reading this article today, given the highly-publicized terminations of Matt Lauer, Charlie Rose, and the like. But, what employers may not know is that sexual harassment policies can substantially minimize an employer's liability by (1) defining sexual harassment for employees; (2) informing employees that sexual harassment is prohibited; and (3) establishing steps an employee may take to report sexual harassment. Employers utilizing such a policy may qualify for an affirmative defense (depending on the circumstances) that may eliminate or limit their damages.

Components of a Sexual Harassment Policy.

The next logical question is: What should I include in a sexual harassment policy? Three elements of the policy were outlined above—(1) a definition of sexual harassment; (2) a declaration that sexual harassment is strictly prohibited; and (3) avenues of how to report claims of sexual harassment. Additional components of the policy that are recommended, and blessed by the U.S. Equal Employment Opportunity

Commission (the federal agency tasked with enforcing Title VII of the Civil Rights Act of 1964 and other federal anti-discrimination laws), include the following:

- Anti-retaliation provision – Explicitly state that an employee reporting sexual harassment will not be retaliated against.
- Two avenues for reporting – In the event an employee feels his or her direct supervisor has engaged in harassing behavior, the policy should allow the employee to make a report of harassment to another individual. However, the individuals identified should be in management to ensure reports are properly and timely investigated.
- Investigation procedures – Outline that investigations will be completed promptly and on a case-by-case basis and identify what they may include or require.
- Confidentiality – Advise that confidentiality regarding any report of harassment cannot be guaranteed, but information regarding the report will be kept private to the extent doing so does not impede an investigation or violate applicable law.

- Disciplinary procedures – Forewarn about the consequences of engaging in sexually harassing behavior. It is recommended that employers do not develop stringent or rigid progressive discipline procedures, unless there is a reservation for the employer to terminate an employee immediately if the circumstances render such action appropriate.

Disseminate the Policy.

Once an employer has established a sexual harassment policy, he or she is tasked with ensuring that all employees know about the policy. This is simple. First, the policy should be added to the employer's employee handbook. And, as with any new policy addition or refresh to an employee handbook, employees should be provided a copy of the policy, instructed to review the policy, and asked to execute a document acknowledging that they received, reviewed, and will comply with the policy. Then, the employer should periodically instruct managers to review the sexual harassment policy with their team on a bi-annual or more frequent basis. This step should be taken to heart because it would be a shame to have a well-established policy that your employees never knew existed. Plus, a failure to inform employees of your sexual harassment policy and procedures would exclude you from utilizing the *Faragher/Ellerth* affirmative defense.

I Didn't Really Mean to Gift the Farm to My Ex-Daughter-In-Law

by Andrew W. Tatge

Andrew W. Tatge
507-354-3111
atatge@gislason.com

Farm families usually intend for the family farm, and the benefits and fruits of the family farm, to pass down to the next generations. Sometimes, however, things do not go as planned.

Divorce is a fact of life. For a farmer, the prospect of cutting the farm in half cannot only cause great financial pain, but emotional pain as well. I have seen too many farmers' financial prospects worsened because simple steps were not previously taken to protect the family farm.

In Minnesota, property that was owned by a party before marriage or was acquired during the marriage as a gift, bequest, devise, or inheritance made by a third party to one but not to the other spouse is nonmarital property and, generally speaking, does not get divided or accounted for when dividing the parties' property. In other words, it is the separate property of the party who received the gift. However, the burden of proof is on the party asserting that property is a gift to that person alone, meaning that he or she needs to show that the gift was meant for only one of the parties. Proof can be difficult to obtain. People die and cannot be called upon to testify. In addition, in a divorce setting, as you can imagine, people's alliances change and they may testify that property was meant solely for their children who are divorcing and not the soon-to-be-ex-spouse. Judges are skeptical by nature and sometimes credibility is called into question.

The best way to document that a gift is to only one spouse is through the spouses themselves entering into a postnuptial agreement to that effect. However, those documents can be expensive to draft, a spouse may not want to enter such an agreement, and it may not be worth the effort—that analysis may change if the gift is of significant value. Otherwise, for most gifts, a simple written statement, maybe even made in the presence of witnesses, stating clearly and precisely that the donative intent of the person making the gift is for the gift to be to only one of the couple and is that person's nonmarital property can be of tremendous value. Better yet, have the other spouse sign an acknowledgement of that fact.

This simple tool can save a significant amount of time and money if a divorce occurs and a fight ensues about whether or not property was a gift to one or both spouses.

Andrew M. Tatge is a partner and chair of the Family Law and Divorce Practice Group at Gislason & Hunter LLP (www.gislason.com). He regularly represents farmers, business owners, professionals, and other high income and high net worth individuals (or their spouses) in divorce and related actions. He also writes and speaks regularly on divorce issues related to business owners and family farm issues and he regularly presents seminars on Divorce for Farmers. Andrew can be reached at atatge@gislason.com or (507) 387-1115.

This information is general in nature and should not be construed for tax or legal advice.

New Section 199A Qualified Business Income Deduction for Farmers: Is COOP still Worthwhile?

by David C. Kim

David C. Kim
507-354-3111
dkim@gislason.com

The Tax Cuts and Jobs Act (the "**Act**") made effective on December 22, 2017, repealed the old Section 199 of the Internal Revenue Code of 1986, which used to provide for an income tax deduction equal to approximately 9 percent of the "qualified production activities income" from the taxpayer's domestic production ("**DPAD**") subject to a 50 percent W-2 wage limitation. Instead, the Act has introduced a new Section 199A of the Code providing for a new income tax deduction to unincorporated taxpayers approximately equal to 20 percent of the taxpayer's "qualified business income," with respect to certain qualified trade or business excluding certain specified service trade or business. This deduction is also subject to a limitation based on the greater of 50 percent of W-2 wages with respect to the qualified trade or business or the sum of 25 percent of the W-2 wages plus 2.5 percent of the unadjusted basis of all qualified property.

In addition, Section 199A as originally enacted (the "**Old 199A**"), also allowed additional deduction of 20 percent of the "qualified cooperative dividends" that a cooperative patron receives from a cooperative subject to taxation under Subchapter T of the Code, without being subject to the wage or capital limitation.

On March 23, 2018, the Consolidation Appropriations Act of 2018 was signed into law, providing for technical corrections to the Act including the portion of the Old 199A allowing the additional 20 percent of the qualified cooperative dividends and replacing it with a set of new provisions of Section 199A (the "**New 199A**" or "**Coop Fix Legislation**"). New 199A provides for an additional deductions to specified agricultural or horticultural cooperatives and their patrons that is similar but not identical to (or better or greater than) DPAD. This article introduces brief discussions on: (i) how these multiple levels of tax deductions under the New 199A may impact or benefit farmers and farming business entities, (ii) what issues need to be considered to take the most advantage of the New 199A, and (iii) whether or not transacting with or through agricultural cooperatives still provides additional benefits to the producers of agricultural products even after the Coop Fix Legislation.

I. **Eligible Taxpayers and Trade/Business**.

a. **Unincorporated Taxpayers**. The deductions under the New 199A are available for taxpayers who are engaged in qualified trade or business as a sole proprietor partnership or S corporation. However, C corporations are not eligible for those deductions under the New 199A. Instead, under the Act, C corporations received their tax rate reduction from a top rate of 35 percent to a flat rate of 21 percent. Understandably, the New 199A has been enacted to provide tax benefits to unincorporated taxpayers corresponding to the rate reduction made solely for C corporations.

b. **Non-Service Trade/Business; Exception**. In order to be eligible for the New 199A deductions, the taxpayer must be engaged in a "qualified trade or business." A qualified trade or business is "any trade or business" other than: (A) a specified service trade or business; or (B) the trade or business of performing services as an employee. Under the New 199A, excluded "specified service trade or business" means (x) any trade or business involving the performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees or owners; or (y) any trade or business which involves the performance of services that consist of investing and investment management, trading, or dealing in securities (which includes futures contracts, swaps, and financial derivatives).

This exclusion is subject to an exception based on the taxpayer's taxable income. The specified service trade or business exclusion does not apply if taxable income is below $157,500 for single return filers and $315,000 for joint return filers.

In general, most farming trade or business involving the production of agricultural commodities will be eligible for the deduction sunder the New 199A. Eligibility issues may arise concerning the following areas in agriculture:

(i) **Owner Compensation**. If a partner of a farm partnership receives a guaranteed payment from a farm partnership in exchange for such partner's service as an employee of the farm partnership or if a shareholder of a farming S corporation receives wages (including commodity wages) from the S corporation, the guaranteed payments and wages will not be eligible for deduction under the New 199A. Subsection (c)(4) of the New 199A specifically excludes the following from "qualified business income" :

(A) reasonable compensation paid to the taxpayer by any qualified trade or business of the taxpayer for services rendered with respect to the trade or business;

(B) any guaranteed payment described in section 707(c) of the Code paid to a partner for services rendered with respect to the trade or business; and

(C) to the extent provided in regulations, any payment described in section 707(a) of the Code to a partner for services rendered with respect to the trade or business.

(ii) **Ag Engineering/Architect Services**. Any trade or business characterized as engineering or architecture services provided by a farming entity or a construction subsidiary or affiliate of a farming entity will not be a qualified trade or business under the New 199A. Any items of income, gain, deduction, or loss from engineering or architecture services will not be considered in determining the deductions available under the New 199A.

(iii) **Marketing Services**. Business income from purely marketing function (e.g., entering into a procurement agreement with a meat packer, performing as a grain broker) performed by a farming entity or a separate subsidiary or affiliate of a farming entity does not qualify for the deductions under the New 199A.

(iv) **<u>Risk Management Services</u>**. Business income from risk management services (e.g., managing lean hog futures, spreads, and swaps) performed by a farming entity or a separate subsidiary or affiliate of a farming entity does not qualify for the deductions under the New 199A.

II. **<u>Deductions under the New 199A</u>**. For the taxpayers in agriculture, there are three categories of deductions provided under the New 199A:

a. **<u>20 Percent QBI Deduction / 11 Percent QBI Deduction</u>**. In general, with respect to each and every qualified trade or business, each determined separately first and combined later, an eligible taxpayer under the New 199A is entitled to a deduction in the amount of 20 percent of the taxpayer's "qualified business income from the qualified trade or business" (the "QBI Deduction") "Qualified business income" ("**QBI**") means, in general, the net amount of qualified items of income, gain, deduction, and loss effectively connected with the conduct of a trade or business within the United States. The QBI Deduction is limited and reduced as follows:

(i) **<u>First Tier Limitation; Exception</u>**: The QBI Deduction is first limited to the ***greater*** of: (A) 50 percent of the W-2 wages with respect to the qualified trade or business or (B) the sum of 25 percent of the W-2 wages with respect to the qualified trade or business, plus 2.5 percent of the unadjusted basis immediately after acquisition of all qualified property (the "**Wage/Investment Limitation**"). However, the Wage/Investment Limitation does not apply to any taxpayer whose taxable income for the taxable year does not exceed $157,500 for single return filers and $315,000 for joint return filers, which amount will be increased after 2018 based on a cost-of-living adjustment. Also, taxpayers with taxable income in excess of the threshold amount up to $50,000 for single return filers and $100,000 for joint filers may still get some deduction subject to the phase-in of such limit based on the degree of such excess.

(ii) **<u>Second Tier Limitation</u>**: The QBI Deduction is further limited to the ***lesser*** of: (A) the QBI and (B) 20 percent of the excess (if any) of the taxable income of the taxpayer for the taxable year over the sum of any net capital gain of the taxpayer for the taxable year (the "**Capital Gain Exclusion**"). The Capital Gain Exclusion is designed to disallow any deduction under the New 199A income that is taxed at the capital gains rate, which rate is lower than ordinary income tax rate.

(iii) **Cooperative Payment Reduction**: In the case of any taxpayer who receives qualified payments from a specified agricultural or horticultural cooperative, the general QBI Deduction (i.e., 20 percent of QBI) shall be ***reduced by the lesser of***: (A) 9 percent of so much of the QBI with respect to such trade or business as is properly allocable to qualified payments received from such cooperative or (B) 50 percent of so much of the W-2 wages with respect to such trade or business as are so allocable. Accordingly, to the QBI Deduction allocable to such coop payments is 11 percent instead of 20 percent.

b. **9 Percent QPAI Deduction to Ag Coops**. The Coop Fix Legislation added a new subsection (g), providing for a deduction to a "specified agricultural or horticultural cooperative" equal to 9 percent of the "qualified production activities income" of the taxpayer for the taxable year (the "**QPAI Deduction**"). "Qualified production activities income" ("**QPAI**") means an amount equal to the excess of the taxpayer's "domestic production gross receipts" over the sum of the cost of goods sold and other expenses, losses, or deductions allocable to such receipts.

"Domestic production gross receipts" means the gross receipts of the taxpayer which are derived from any lease, rental, license, sale, exchange, or other disposition of any agricultural or horticultural product which was manufactured, produced, grown, or extracted by the taxpayer in whole or significant part within the United States, except: (i) any gross receipts from the lease, rental, license, sale, exchange, or other disposition of land and (ii) any gross receipts of the taxpayer derived from property leased, licensed, or rented by the taxpayer for use by any related person. "Specified agricultural or horticultural cooperative" means an organization to which part I of subchapter T of the Code applies which is engaged in (x) the manufacturing, production, growth, or extraction in whole or significant part of any agricultural or horticultural product, or (y) the marketing of agricultural or horticultural products. In determining whether a specified agricultural or horticultural cooperative has manufactured, produced, grown, or extracted any agricultural or horticultural product, the New 199A provides that the specified agricultural or horticultural cooperative "shall be treated as having manufactured, produced, grown, or extracted" the agricultural or horticultural product marketed by the specified agricultural or horticultural cooperative which "its patrons have so manufactured, produced, grown, or extracted."

(i) **First Tier Limitation**: The QPAI Deduction is first limited to the 50 percent of the W-2 wages of the specified agricultural or horticultural cooperative.

(ii) **<u>Second Tier Limitation</u>**: The QPAI Deduction is also limited to the lesser of: (A) the QPAI and (B) the taxable income of the taxpayer for the taxable year.

c. **<u>QP Deduction to Coop Patrons</u>**. Any "eligible taxpayer" who receives a "qualified payment" from a specified agricultural or horticultural cooperative is entitled to a deduction (the "**QP Deduction**") in an amount equal to the portion of the QPAI Deduction which is (i) allowed with respect to the QPAI to which such qualified payment is attributable (the "**QP**") and (ii) identified by such cooperative in a written notice mailed to such taxpayer during the payment period beginning with the 1st day of such taxable year and ending with the 15th day of the 9th month following the close of such year. "Eligible taxpayer" here means a taxpayer other than a C corporation or a specified agricultural or horticultural cooperative. "Qualified payment" means a patronage dividend, qualified written notice of allocation, per-unit retain allocation paid in qualified per-unit retain certificates, and other property received from a specified agricultural or horticultural cooperative attributable to the QPAI with respect to which the QPAI Deduction is allowed to such cooperative.

(i) **<u>Limitation</u>**: The QP Deduction is limited to the taxable income of the taxpayer determined without regard to the QP Deduction and after taking into account any QBI Deduction allowed to the taxpayer.

III. **<u>Agricultural Cooperatives</u>**. So, will transacting with or through agricultural cooperative still provide additional benefits to producers of agricultural products even after the Coop Fix Legislation? It appears that there could be some tax advantages in transacting with or through agricultural cooperatives subject to certain qualifications.

a. **<u>Size of Coop Payment Reduction</u>**. As discussed above, the reduction of the QBI Deduction under the New 199A is by 9 percent of qualified business income, whereas the QP Deduction that the taxpayer dealing with an agricultural cooperative receives may be 9 percent of the QPAI. To simply put, the reduced 9 percent of qualified business income is based on the farmer/taxpayer's net income subject to 50 percent of the W-2 wages of the farmer. On the other hand, the 9 percent QP Deduction made available to the taxpayer delivering products to the cooperative is based on the QPAI, which is the cooperative's net income, and is subject to the 50 percent of the W-2 wages of the cooperative.

For example, the reduction amount under 26 U.S.C. § 199A(b)(7)) is $0 if the W-2 wages of the farmer is $0 (i.e., sole proprietor). Likewise, it is possible that the amount of the reduced 9 percent of the farmer's QBI may be less than the QP Deduction made available or pushed down from the cooperative. Accordingly, there will be situations where the farmer may qualify for the full 20 percent QBI Deduction plus the QP Deduction flowing from the cooperative.

b. **Example #1**. Farmer Joe is farming corn in 2018 as his sole trade and business and will pay no wages to third parties. Assume Farmer Joe's taxable income and QBI determined without considering the QBI Deduction is $500,000 for 2018. Assume Farmer Joe sells enough corn that he may receive a QP Deduction of $50,000 if he delivers his corn to a local cooperative. If Farmer Joe decides to sell corn to a non-cooperative buyer, the QP Deduction is not available. Under these assumptions, Farmer Joe will be better off by selling corn to the cooperative:

   Case #1: Delivery to Coop: The total deduction available to Farmer Joe for 2018 is $150,000, which is the sum of $100,000, the QBI Deduction (20% of $500,000) plus $50,000 QP Deduction.

   Case #2: Delivery to Non-Coop: The total deduction available to Farmer Joe for 2018 is $100,000, which is his QBI Deduction (20% of $500,000).

c. **Example #2**. Farmer Sam is farming corn in 2018 as his sole trade and business and will pay wages to third parties in the amount of $100,000. Assume Farmer Sam's taxable income and QBI determined without considering the QBI Deduction is $500,000 for 2018. Assume Farmer Sam sells enough corn that he may receive a QP Deduction of $50,000 if he delivers his corn to a local cooperative. If Farmer Sam decides to sell corn to a non-cooperative buyer, the QP Deduction is not available. Under these assumptions, Farmer Sam will be better off by selling corn to the cooperative:

   Case #1: Delivery to Coop: The total deduction available to Farmer Sam for 2018 is $105,000, which is the sum of $55,000, the QBI Deduction (11% of $500,000) plus $50,000 QP Deduction.

   Case #2: Delivery to Non-Coop: The total deduction available to Farmer Sam for 2018 is $100,000, which is his QBI Deduction (20% of $500,000).

d. **Example #3**. Farmer Tom is farming corn in 2018 as his sole trade and business and will pay wages to third parties in the amount of $100,000. Assume Farmer Tom's taxable income and QBI determined without considering the QBI Deduction is $500,000 for 2018. Assume Farmer Tom sells enough corn that he may receive a QP Deduction of $30,000 if he delivers his corn to a local cooperative. If Farmer Tom decides to sell corn to a non-cooperative buyer, the QP Deduction is not available. Under these assumptions, Farmer Tom will be worse off by selling corn to the cooperative:

Case #1: Delivery to Coop: The total deduction available to Farmer Tom for 2018 is $85,000, which is the sum of $55,000, the QBI Deduction (11% of $500,000) plus $30,000 QP Deduction.

Case #2: Delivery to Non-Coop: The total deduction available to Farmer Tom for 2018 is $100,000, which is his QBI Deduction (20% of $500,000).

e. **Example #2**. Farmer Mike is farming corn in 2018 as his sole trade and business and will pay wages to third parties in the amount of $70,000. Assume Farmer Mike's taxable income and QBI determined without considering the QBI Deduction is $500,000 for 2018. Assume Farmer Mike sells enough corn that he may receive a QP Deduction of $40,000 if he delivers his corn to a local cooperative. If Farmer Mike decides to sell corn to a non-cooperative buyer, the QP Deduction is not available. Under these assumptions, Farmer Mike will be better off by selling corn to the cooperative:

Case #1: Delivery to Coop: The total deduction available to Farmer Mike for 2018 is $105,000, which is the sum of $65,000, the QBI Deduction ($100,000 (=20% of $500,000) less $35,000 (50% of wages)) plus $40,000 QP Deduction.

Case #2: Delivery to Non-Coop: The total deduction available to Farmer Mike for 2018 is $100,000, which is his QBI Deduction (20% of $500,000).

Tax Cuts and Jobs Act: Highlights for Farmers

by Kaitlin Pals

Kaitlin Pals
507-354-3111
kpals@gislason.com

The Tax Cuts and Job Act of 2017 is the most dramatic change to the U.S. Tax Code since 1986. This wide-reaching, complex tax reform passed in such a hurry at the end of 2017 that many business owners, including farmers, are still trying to figure out what the law's impact will be on their 2018 tax returns. Below are some of the key changes most likely to affect farmers:

Individual Income Taxes: Standard Deduction and Bracket Changes

The Tax Cuts and Jobs Act replaced the old individual brackets (10%, 15%, 25%, 28%, 33%, 35%, 39.6%) with a new set of brackets (10%, 12%, 22%, 24%, 32%, 35%, 37%). While most taxpayers see some reduction in overall tax rates, the biggest rate reductions accrue to taxpayers in the former 39.6% tax bracket (over $418,400 for single taxpayers and over $470,700 for married filing jointly).

The new tax law also eliminates the personal exemption and nearly doubles the standard deduction, to $12,000 for single taxpayers and $24,000 for married filing jointly taxpayers. The theory behind increasing the standard deduction is it should make tax filings simpler, as fewer taxpayers will benefit from itemizing.

Corporate Tax Rate Lowered…For Some

The change to the corporate tax rate was touted as one of the biggest selling points of the Tax Cuts and Jobs Act. Under prior tax law, the top corporate tax rate was 35%. The new law drops that rate down to 21%.

In practice, the new corporate tax rates only benefit medium-to-large corporations. Corporations with around $80,000 or less taxable

income actually pay tax at a *higher* effective rate than under previous law. This is because the new 21% tax rate is a flat rate, whereas the old corporate tax regime had graduated rates. The *top* tax rate under the old tax law was in fact 35%, but that rate only applied to taxable income in excess of $10 million. Under the old law, the first $50,000 of corporate income was taxed at only 15%.

Many farming operations taxed as C-Corporations fall within this income range, and some even actively plan to achieve net income under $100,000 specifically to take advantage of the lower tax brackets.

Qualified Business Income Deduction

The drafters of the Tax Cuts and Jobs Act wanted to provide a benefit similar to the corporate tax rate reduction to businesses organized as sole proprietorships or "pass-through" entities, namely partnerships, S-Corporations and most LLCs. This couldn't be accomplished by lowering a tax rate, because pass-through entities are not subject to income tax at the entity level. Instead, the income and deductions of the pass-through business are divided among the business's owners and flow through to each owner's individual tax return.

Thus, the Qualified Business Income Deduction was born. The Qualified Business Income Deduction is a completely new concept to the Tax Code. At its most basic level, the Qualified Business Income Deduction is a deduction equal to 20% of all "qualified business income" generated by a pass-through entity and flowing to an owner's tax return.

However, as with many tax deductions, the devil is in the details. The definition of "qualified business income," phase-outs and other restrictions make this section of the tax law extremely complicated. Also, unlike the corporate tax rate reduction, the Qualified Business Income Deduction will sunset in five years unless re-approved by Congress.

Qualified business income is especially complicated to calculate for farmers, due to how sales to co-ops are treated. This section has already been amended once, to fix a major drafting error in the original law. "New Section 199A Qualified Business Income Deductions for Farmers: Is Coop Still Worthwhile?" on Page 27 discusses this issue in more detail.

Section 179

Section 179 allows taxpayers to expense most types of tangible personal property used in a business in the year it is purchased

rather than depreciating it over time. This deduction is especially important to farmers, as grain bins and single-purpose agricultural or horticultural structures can take advantage of Section 179 as well. This includes buildings like hog or chicken facilities, milking parlors and commercial greenhouses.

Previously, a taxpayer could expense up to $500,000 in new and used machinery and other qualifying property, subject to a phase-out beginning for taxpayers who spent more than $2 million on Section 179 property in one year.

Under the new Section 179, a taxpayer can expense up to $1 million in qualifying property, and the phase-out begins for taxpayers who spend more than $2.5 million in qualifying purchases in one year.

Bonus Depreciation

Changes to bonus depreciation are even more significant than the changes to Section 179, and in some ways decrease Section 179's importance at least through the end of 2022.

Bonus depreciation used to permit depreciating 50% of a qualifying asset's cost in the first year it is put into service. This benefit was only available for new property with a depreciation recovery period of 20 years or less, plus certain improvements to non-residential real estate.

The Tax Cuts and Jobs Act increased bonus depreciation to 100% of the asset's cost and expanded to include both new and used property. However, unlike Section 179, the changes to bonus depreciation will phase down 20% each year after 2022 and fully sunset at the end of 2027 if not renewed by Congress.

Tax-Free Exchanges of Personal Property Eliminated

Section 1031 of the Internal Revenue Code used to allow a taxpayer to trade or exchange property for property of "like kind" without paying capital gains tax on the transaction. The

theory behind Section 1031 like-kind exchanges was it didn't make sense to tax someone if they were going to put the "income" from the "sale" of a piece of property right back into other, similar property used in their business.

Under the previous Code, personal property exchanges were more restricted than real property exchanges. Tax-free personal property exchanges were still very common in agriculture when trading machinery.

The revised Section 1031 limits like-kind exchanges to real property. This means that the trade-in value of depreciated equipment will at least in theory be taxable gain—which makes the changes to Section 179 and bonus depreciation even more important.

State and Local Tax Deductions Limited

In previous years, taxpayers could deduct state and local property taxes and either sales or income taxes in unlimited amounts on their Federal tax returns. Under the new tax law, the state and local tax deduction for income tax on wages, property tax on personal residences and similar non-business items is capped at $10,000.

State and local taxes directly related to a business activity are still deductible as business expenses, so farmers should still be able to deduct property tax on farmland, sales tax on farm machinery and vehicles, and other local and state taxes attributable to the farming operation.

Income Interest Deduction Limited

The Tax Cuts and Jobs Act limits most businesses' ability to deduct interest as a business expense, but the limitation will seldom apply to farmers. Under the new law, the deduction for interest paid on business-related debt is capped at 100% of the taxpayer's *income* from business interest, plus 30% of adjusted taxable income.

However, the limitation does not apply to any business, including farming businesses, that averaged less than $25 million in gross receipts over the previous three years.

Large farmers and cooperatives can also elect for the income interest limitations not to apply, if they also agree to use the alternative depreciation system to stretch out the depreciation recovery period for assets with a recovery period of 10 years or more.

Cash Accounting for Farmers Remains

Generally, businesses have to use either the cash method or accrual method when filing taxes. Under the cash method, income is considered received when the taxpayer receives payment; on the other hand, accrual method requires income to be recognized when the taxpayer first *earns* the income. Most farmers rely on the cash method of accounting as a part of their tax planning strategy, using prepaids and deferred payment contracts to manage when income and deductions are recognized.

Under the new law, any business that averaged less than $25 million in gross receipts over the previous three years can use the cash method. The Tax Cuts and Jobs Act also retained an existing exception permitting large farmers operating as partnerships or S-corporations to use the cash method.

Federal Issues Update – May 1, 2018

by Brian M. Foster

In this issue of *Dirt*, we'll discuss the controversy surrounding the House Agriculture Committee version of the 2018 Farm Bill, the federal omnibus budget bill that included several provisions of interest to the agricultural community, and the potential for a troubling trade war with China.

Farm Bill

The "Agricultural Act of 2014", better known as the 2014 Farm Bill, expires September 30, 2018. Republicans on the House Agriculture Committee recently passed out of committee their version of the 2018 Farm Bill, but with no democrat support. In fact, the democrat House minority leader Nancy Pelosi has circulated a strongly-worded letter to all House democrats to oppose the Farm Bill.

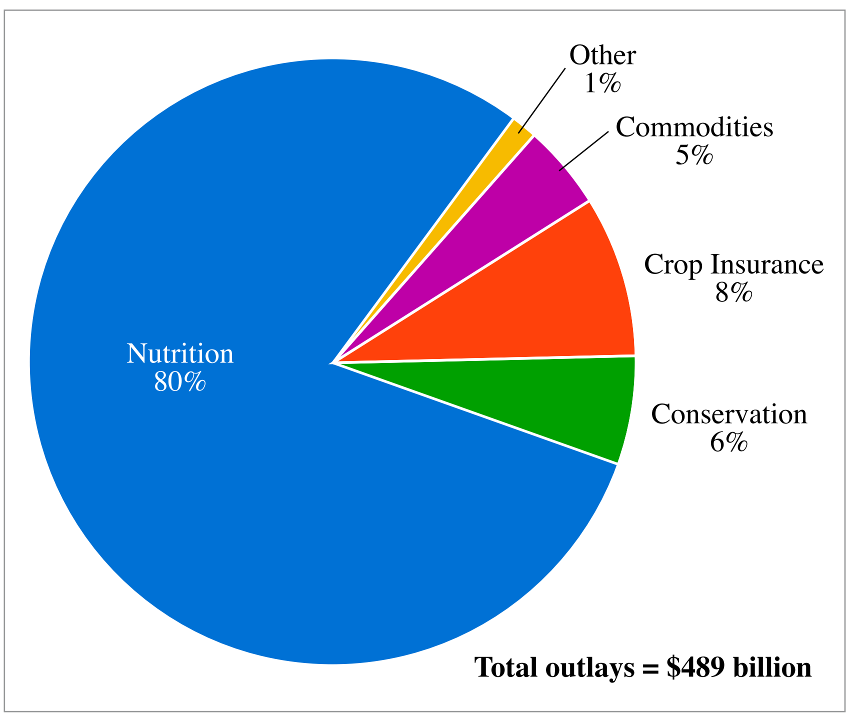
The reason for the acrimony in the House is due to reforms proposed by Agriculture Committee Chairman Conaway to the work requirements for eligibility in the Supplemental Nutrition Assistance Program (SNAP) program, opposed by the democrats. Chairman Conaway and his ranking member Representative Collin Peterson of Minnesota attempted to work out their differences at the committee level, but that effort failed. Chairman Conaway is trying to maintain a schedule that would see the House approve a Farm

Bill in May, but if no democrats support the Farm Bill and if hardline republicans opposed to Farm Bill spending also oppose the bill, it will not pass on the floor of the House.

As regular readers of *Dirt* know, around 80 percent of Farm Bill funding is for food and nutrition programs, including SNAP (food stamps), WIC, and school feeding programs. As a reminder, see the graphic below of projected budget outlays under the 2014 Farm Bill. Historically, a coalition of farm state legislators supporting farm programs, crop insurance and conservation measures has allied with their urban colleagues who support food and nutrition programs to get Farm Bills passed. That coalition fell apart in a dramatic and unprecedented way in 2013 when the Farm Bill was defeated on the floor of the U.S. House.

To date, Senate Agriculture Committee Chairman Pat Roberts of Kansas has insisted that the Senate will produce a bipartisan Farm Bill that will be considered and pass the Senate in May. It is almost certain that the Senate version of the Farm Bill will not include the changes to work requirements for SNAP that the House Agriculture Committee has approved. Differences in the two bills, once passed by the full chambers, will have to be reconciled in conference committee and then passed again in each chamber, and signed into law by the President. There is still a long ways to go in the legislative process, and if no new Farm Bill is passed into law, an extension of existing law will have to be passed before September 30. We will provide an update of proposed 2018 Farm Bill provisions in the next issue of *Dirt*.

Projected outlays under the 2014 Farm Act, 2014–2018



Source: USDA Economic Reasearch Service using data from Congressional Budget Office, Cost Estimates for Agricultural Act of 2014, Jan 2014.

Budget

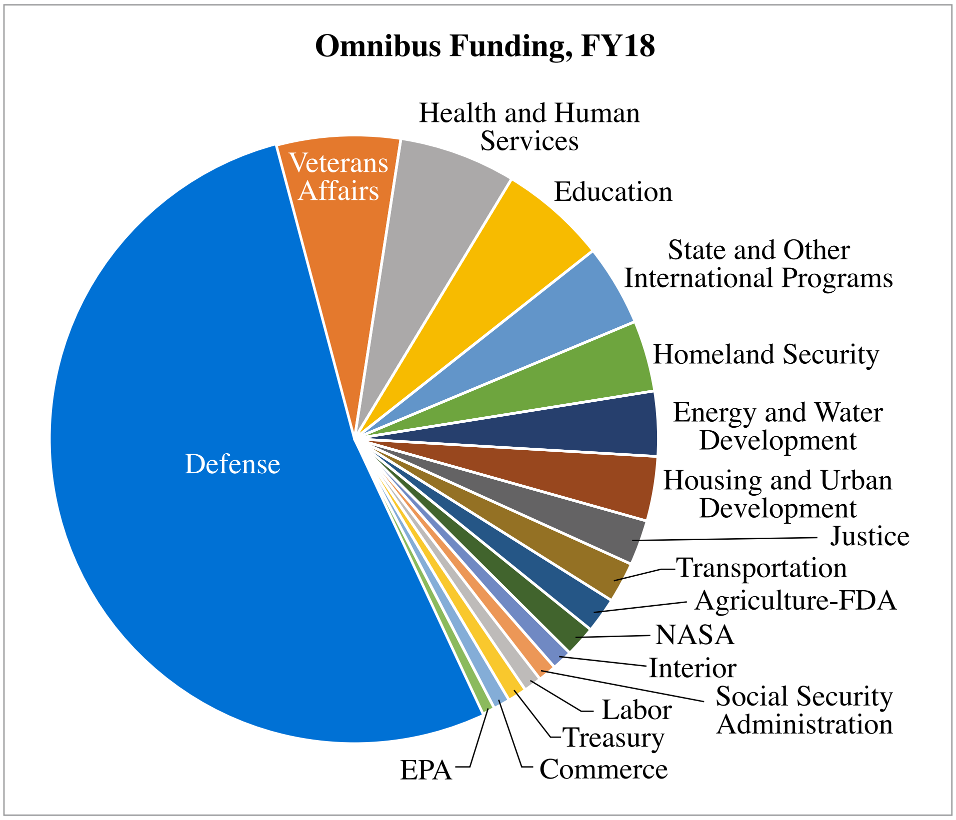
A day before a federal government shutdown and immediately before Congress left Washington, DC for its Easter recess, Congress passed and the President signed into law a $1.3 Trillion omnibus budget bill that funds the federal government through the end of Fiscal Year 2018 (September 30, 2018). The graphic below illustrates the breakdown of discretionary funding in this massive budget bill.

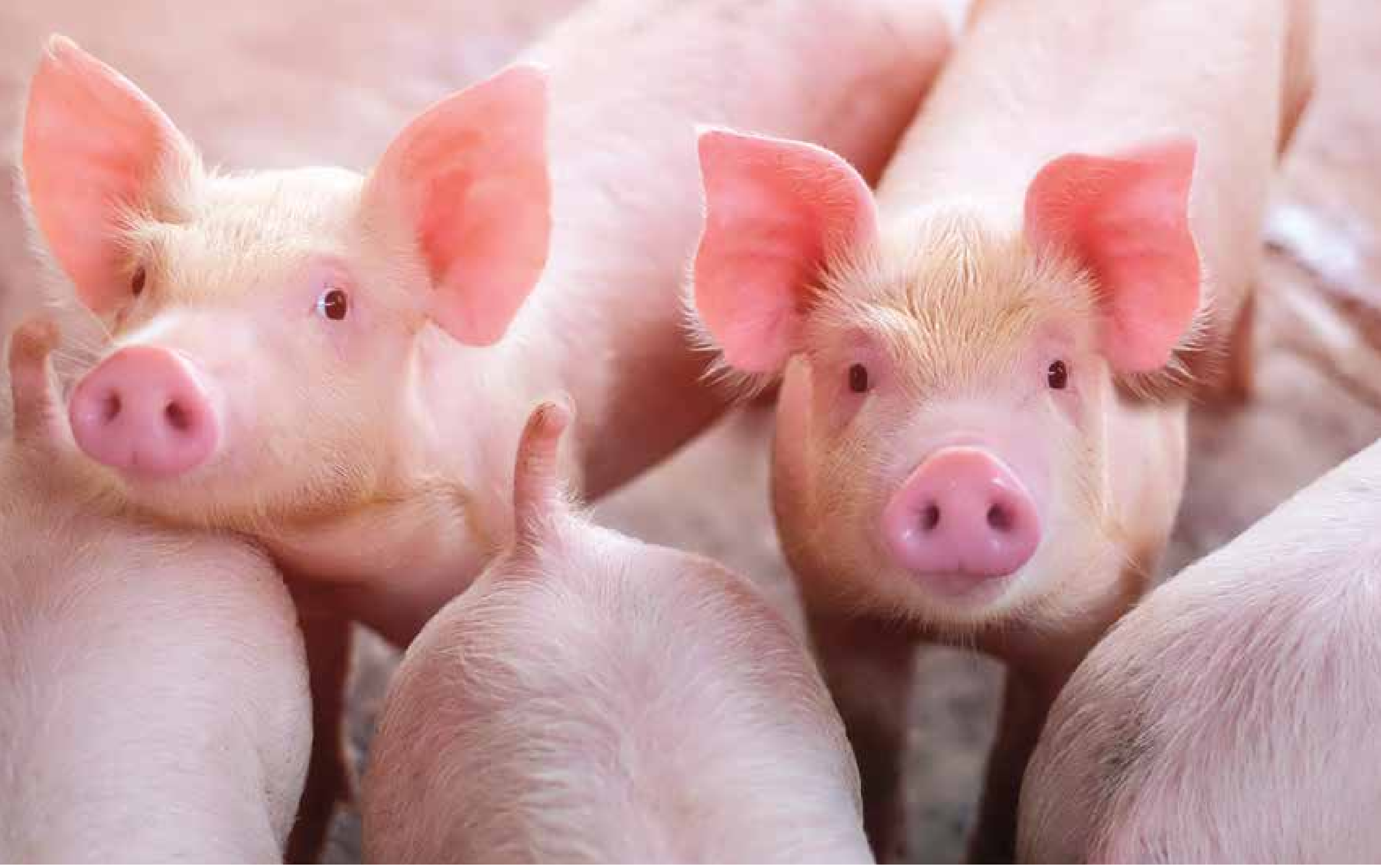
Note that this budget summary does ***not*** include mandatory entitlement spending such as Social Security payments, Medicare and Medicaid; those large outlays are paid out of trust funds that are not included in the annual budget.

Included in the budget package were three important provisions that impact agriculture:

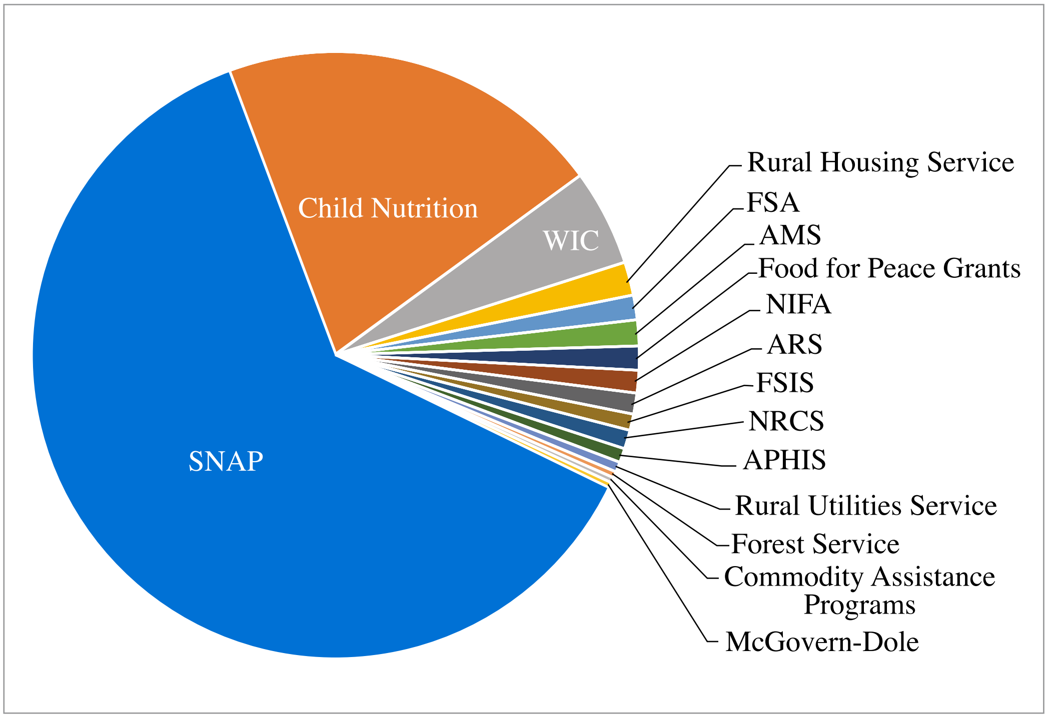
1. A legislative "fix" to the Sec. 199A "grain-glitch" in the tax overhaul law; the provision equalizes the tax treatment of commodity sales to cooperatives and non-cooperatives;
2. A permanent on-farm exemption for reporting air emissions from livestock facilities under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA); livestock producers had been gearing up to report emissions to the U.S. Coast Guard under CERCLA requirements; and
3. A provision that grants livestock haulers an exemption from the Electronic Logging Device (ELD) rules until September 30, 2018; livestock producers and truckers are hopeful that clarity is finally reached in the current hours-of-service rules that are problematic for live animal haulers.

Fiscal Year 2018 Discretionary Spending under the Omnibus Budget Act





Fiscal Year 2018 Agriculture Spending under the Omnibus Budget Act



Trade

There is no bigger news recently than talk of a trade war with China that seems to escalate daily. President Trump's assertion that trade wars are "winnable" is scary rhetoric for farmers and agriculture in general. Unfortunately for the agriculture sector, farmers and agribusinesses are on the front lines of any potential tariff escalation, as we have seen in recent days with drastic price impacts and increased volatility in the pork and soybean markets.

The Chinese have already placed a 25 percent import tariff on U.S. pork, a $1.1 Billion market, and they are threatening the same 25 percent import tariff on U.S. soybeans, this country's biggest soybean market, worth $14 Billion a year to U.S. farmers. I think the Chinese soybean tariff threat is a negotiating posture since China desperately needs soybeans to feed expanding pork and poultry industries. But given the fact that China buys one-third of the U.S. soybean crop, and that our competitors, especially Brazil and Argentina, have soybeans to sell, such a threat must be taken seriously.

In other trade news, the 11-country Trans Pacific Partnership (TPP) trade agreement is moving ahead without the U.S. as President Trump withdrew from the agreement early in his administration. The countries that remain in the new agreement must still ratify it before it takes effect. U.S. agriculture such as the pork industry worry about losing market share in the Asian and Pacific countries that remain in the agreement, particularly in Japan, their number one market by value.

In positive trade news, the U.S. and South Korea finalized a renegotiated free trade agreement (KORUS) that maintains most of the benefits for American agricultural exporters. Finally, U.S. producers remain concerned about the eventual fate of the North American Free Trade Agreement (NAFTA) with negotiators entering an eighth round of talks in April. Since entering into force in 1994, NAFTA has resulted in significant market gains for many U.S. agricultural products in both Mexico and Canada.

Brian Foster is the founder of Insight Enterprise Consulting, LLC, a government affairs and international agribusiness consulting firm.

His experience includes serving as a staff member for former Minnesota Congressman Tim Penny, director of business operations in Ukraine and Bulgaria for Pioneer Hi-Bred International, and consulting assignments in over 25 countries in Africa, Asia, Latin America and Eastern Europe.

Foster also served as director of business development for Christensen Farms, and was a Peace Corps volunteer in Costa Rica. He manages the family farm operations in Iowa, is a graduate of Iowa State University, and holds an MBA from Purdue.

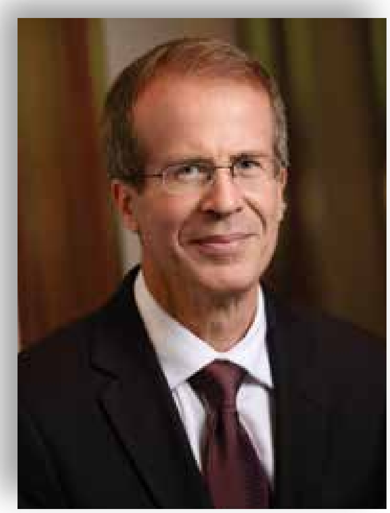
CASE LAW UPDATE *by Rick Halbur*

Nuisance Ordinance Preempted By Illinois Farm Nuisance Suit Act.

***Village of Chadwick v. Nelson*, 2017 IL App (2d) 170064 (Ill. Ct. App. Dec. 15, 2017).**

THE PARTIES: The plaintiff, the Village of Chadwick (**"Village"**), is a rural town in Illinois with a population of approximately 600 residents. The defendant, Talea Nelson (individually **"Talea"**), and her husband Dean Nelson (collectively **"Nelsons"**) are residents of the Village.

THE FACTS: In October 2014, the Nelsons purchased the subject property at issue in this dispute, a 2½–acre parcel with a single-family home, (**"Property"**) from the Village. From August 2013 until the October 2014 purchase, Dean apparently managed the Property for the Village. From August 2013 until at least March 2, 2016, the Nelsons allowed their neighbor to grow and bale hay on the Property a few times each year. The Nelsons sold this hay to their neighbor approximately twice a year, which the neighbor used



Mark Ullery
507-354-3111
mullery@gislason.com

Rick Halbur
507-354-3111
rhalbur@gislason.com

Seth Harrington
507-354-3111
sharrington@gislason.com

Christopher Bowler
507-354-3111
cbowler@gislason.com

for livestock feed. Once the Nelsons purchased the Property, they began hosting concerts and social events thereon. On March 2, 2016, the Nelsons began using the Property for the first time as a "commercial calf nursing operation." The Nelsons planned to raise and sell their calves to 4–H club members and to other local businesses. On July 11, 2016, the Village enacted an ordinance making it illegal for anyone to keep live cattle [among other animals] within Village limits (**"Ordinance"**). The Ordinance declared that "the presence of certain animals," including cattle, constituted a nuisance. The fine for possessing any prohibited animal within Village limits was between $100.00 and $750.00 per day. Twelve days after the Ordinance was adopted, the Village sheriff saw cattle on the Nelson's Property and subsequently issued a citation to Talea for keeping cattle thereon in violation of the Ordinance. There were no specific complaints about the Property apart from Talea's above-referenced violation of the Ordinance.

THE DISPUTE: The Village successfully prosecuted Talea for keeping cattle on the Property in violation of the Ordinance. The Village argued that the Property had become a nuisance due to the presence of the Nelson's cattle operation maintained on the Property. Talea appealed her conviction on the basis that the Village was preempted from enforcing the Ordinance by Illinois' Farm Nuisance Suit Act (**"Act"**). The Act protects farm owners from nuisance suits after a statutorily defined "farm" has been in operation for more than one year, so long as the "farm" was not a nuisance at the time it began operation. Talea argued that the Property had been a "farm" for more than one year prior to the July 2016 enactment of the Ordinance because the Nelsons grew hay on the Property and sold that hay to their neighbor since approximately August 2013. The Village argued that the Property had only been a "farm" since March 2016 when the Nelsons began raising cattle thereon. Thus, the Village contended that the Property was not a "farm" protected by the Act because the Nelsons first began raising calves less than a year before the July 2016 enactment of the Ordinance. As a result, the Village maintained that the Ordinance was not preempted by the Act such that Talea could be prosecuted for running a cattle operation on the Property in violation of the Ordinance. There was no dispute that the Property was within Village limits and subject to the Ordinance. Rather, the primary dispute was whether the Act preempted the Ordinance such that the Ordinance could not be enforced against Talea.

LEGAL ISSUES: The issue was whether the Property was a "farm," as defined by the Act, such that the Ordinance was preempted and unenforceable against Talea.

CONCLUSIONS: The Illinois appellate court reversed Talea's conviction on the basis that the Property was a statutorily protected "farm," as defined by the Act. The Act protects farm owners from nuisance suits after a "farm" has been in operation for more than one year, so long as the "farm" was not a nuisance at the time it began operation. There was no allegation that the Property was originally a nuisance when the Nelsons began using the Property to produce hay in August 2013. Further, the broad language of the Act contained no restrictions on the type or scope of agricultural activity necessary to qualify as a "farm" protected by the Act.

Thus, the baling of hay on the Property was a continuous agricultural use that stretched back more than one year prior to the enactment of Ordinance. The fact that the specific agricultural use of the Property had changed from producing between five to eight bales of hay on a semi-annual basis to a "commercial calf nursing operation" was immaterial for the purposes of the Act. The Village had argued that in order to be a "farm" protected by the Act, the "farm" "must bear some indeterminate level of 'operational significance.'" The Illinois appellate court refused to read such a limitation or condition into the Act's definition of a "farm" because the unambiguous language of the statute contained no such condition or limitation. Accordingly, enforcement of the Ordinance against Talea was preempted by the plain language of the Act.

Woods v. Fayette Cty.

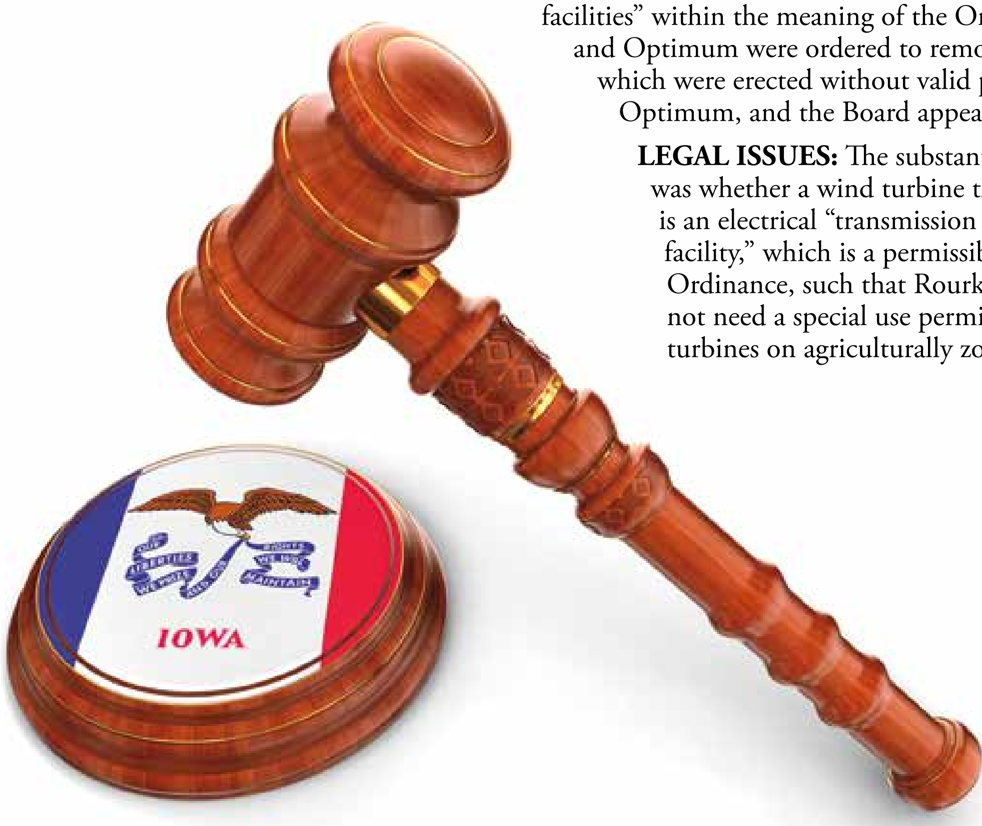
By Rick Halbur

Zoning Bd. of Adjustment, No. 17-0090, 2018 WL 1099008, slip op. (Iowa Ct. App. February 21, 2018).

THE PARTIES: This case involved a dispute between two groups of persons and entities. One group of parties included the City of Fairbank, as well as several Fairbank residents or businesses (collectively the **"City & Affiliates"**). The second group of parties included Thomas and Kimberly Rourke (**"Rourkes"**) and several wind development companies (collectively **"Optimum"**).

THE FACTS: The Rourkes granted easements to Optimum to construct three wind turbines on their agriculturally-zoned property. Rourkes and Optimum applied to the Fayette County Board of Adjustment **("Board")** for special use permits to construct the turbines. The Board denied the application. Rourkes and Optimum contested the denial of the special use permits, and the Fayette County Zoning Administrator requested a legal opinion from the county attorney. The county attorney issued a legal opinion stating that no special use permit was required for Rourkes and Optimum to construct the wind turbines because the construction of such turbines would qualify as"[e]lectrical and natural gas transmission and regulating facilities," which was one of the permitted uses allowed in the Fayette County Zoning Ordinance **("Ordinance")**. The zoning administrator subsequently approved Rourkes' and Optimum's applications for zoning compliance. The City & Affiliates appealed the approval of these applications. The City & Affiliates expressed concern that construction of the wind turbines would disrupt their use and enjoyment of their land and would diminish the value of the land in and around the City of Fairbank. After considering arguments from all sides, the Board denied the appeals. The City & Affiliates petitioned the district court for writs of certiorari. Following a hearing, the district court declared the approvals of the applications for zoning compliance to be "illegal and void." The district court found that wind turbines were not "electrical transmission and regulating facilities" within the meaning of the Ordinance. The Rourkes and Optimum were ordered to remove "all structures which were erected without valid permits[.]" Rourkes, Optimum, and the Board appealed.

LEGAL ISSUES: The substantive issue on appeal was whether a wind turbine that produces electricity is an electrical "transmission and regulating facility," which is a permissible use under the Ordinance, such that Rourkes and Optimum did not need a special use permit to construct wind turbines on agriculturally zoned property.



CONCLUSIONS: The Iowa Court of Appeals affirmed the district court's decision. Thus, pursuant to this decision and unless there is a successful appeal, Rourkes and Optimum are required to remove "all structures which were erected without valid permits[.]" The Iowa Court of Appeals acknowledged that it is "undisputed" that wind turbines "generate" electricity. However, the Iowa Court of Appeals concluded that wind turbines do not "transmit" and "regulate" electricity, as the "ordinary meaning" of those two terms are understood. Consequently, a wind turbine that produces electricity is not an "electrical transmission and regulating facility" such that the zoning administrator's approvals of Rourkes' and Optimum's applications for zoning compliance were "illegal and void."

Legal Challenge Brought to GIPSA Rules Withdrawn by Trump Administration.

By Chris Bowler

Org. for Competitive Mkts. v. U.S. Dep't of Agric., No. 17 (8th Cir. filed Dec. 14, 2017), Petition for Review available at https://democracyforward.org/wp-content/uploads/2017/12/OCM-v.-USDA-Petition-for-Review.pdf.

THE PARTIES: The Organization for Competitive Markets is a think tank based in Lincoln, Nebraska, and is joined in the action by three individual farmers (collectively, the **"Challenging Parties"**). The United States Department of Agriculture (the **"USDA"**) is the federal agency under which the Grain Inspection, Packers & Stockyards Administration (**"GIPSA"**) administers the Packers and Stockyards Act (the **"PSA"**)—a federal law.

THE FACTS: The core of the PSA is a general prohibition against unfair, unjustly discriminatory, or deceptive practices and undue preferences by packers, swine contractors, and poultry dealers. Throughout its history, federal courts have unanimously held that someone accusing a packer, swine contractor, or poultry dealer of violating one or more of these prohibitions must also show that the violation resulted in "harm to competition" within the industry. Despite the PSA's long-standing interpretation, GIPSA published two proposed rules and one interim final rule on December 20, 2016, that would lift the competitive harm requirement discussed above. In the fall of 2017, the USDA (under the new command of the Trump administration) withdrew those rules.

THE DISPUTE: Months after the USDA withdrew the GIPSA rules, the Challenging Parties filed a petition with the Eighth Circuit Court of Appeals seeking reinstatement of the rules. The action is currently pending and has not yet been resolved.

LEGAL ISSUES: The Challenging Parties argue that the withdrawal of the GIPSA rules was arbitrary and capricious—and is thus subject to reversal—for three main reasons. First, the Challenging Parties argue that the GIPSA rules are necessary to protect independent farmers from unfair practices in light of how courts have interpreted the PSA. Second, the Challenging Parties argue that the GIPSA rules resulted from a fair process undertaken in accordance with applicable law. Finally, the Challenging Parties argue that parts of the GIPSA rules were mandated by the 2008 Farm Bill.

CONCLUSIONS: Since this action is currently pending, the ultimate resolution of the challenge remains to be seen. However, the Challenging Parties face a demanding task, as GIPSA's efforts to enact the rules in the first place can be fairly categorized as inconsistent with the purpose of the PSA, both as originally enacted and as interpreted over the past ninety-five years.

Iowa Court Further Reinforces Its Policy of Favoring Partition by Sale.

By Chris Bowler

Wihlm v. Campbell, 906 N.W.2d 185 (Iowa 2018), withdrawn from bound volume.

INTRODUCTION: In the Fall 2016 edition of DIRT, the case law update included a discussion of the Iowa Court of Appeal's decision in Wihlm v. Campbell. After that decision was made, the case was appealed to the Iowa Supreme Court, which reversed the appellate court's decision. This section addresses the Iowa Supreme Court's decision.

THE PARTIES: Two siblings, Bernard Wihlm and Patricia Balek, brought a lawsuit against a third sibling, Shirley A. Campbell, seeking a partition of co-owned real estate.

THE FACTS: Wihlm, Balek, and Campbell inherited and jointly owned approximately 300 acres of farmland in Iowa, including a homestead. Two experts—a certified appraiser and an auctioneer—testified that dividing the parcel into smaller parts would have no impact on the total price that could be obtained for all of the land. Another expert—a real estate business owner—disagreed and testified that the land should be sold as one piece in order to maximize its value.

THE DISPUTE: Wihlm and Balek commenced a lawsuit against Campbell seeking a partition of the property by sale. Campbell argued that the property should be partitioned in kind. The trial court held that the property should be partitioned by sale, and the Iowa Court of Appeals reversed, holding that Campbell established that the property could be fairly partitioned in kind. The matter was then appealed to the Iowa Supreme Court.

LEGAL ISSUES: A "partition" action, as its name implies, seeks to divide real property amongst co-owners of the property. A partition can either be "in kind" or "by sale." A partition in kind divides the property into separate parcels, and each co-owner takes title to his or her own, separate parcel. Under a partition by sale, on the other hand, the property is sold, and each co-owner takes a share of the sale proceeds. While most states (including Minnesota) favor partitions in kind, Iowa favors partitions by sale.

CONCLUSIONS: The Iowa Supreme Court reversed the Iowa Court of Appeal's decision, thereby holding that the property should be partitioned by sale. In doing so, the Iowa Supreme Court noted Iowa's "unequivocal" policy favoring partitions by sale over partitions in kind and found that Campbell had not met her burden to prove that a partition in kind was fair and practicable in light of that policy. While this result would very likely not have occurred in Minnesota, Iowa real estate owners seeking a partition in kind should take note of the high burden they must overcome to achieve the same.

Denial of Conditional Use Permit for Solar Garden Affirmed

By Mark Ullery

Minnesota Solar, LLC v. Carver County Board of Commissioners, 2017 WL 6418179 (Minn. Ct. App. 2017).

THE PARTIES: Minnesota Solar, LLC (**"Minnesota Solar"**) is a solar energy equipment company. The Carver County Board of Commissioners (the ***"Board"***) is a board of elected officials which serves as the governing body for Carver County, Minnesota.

THE FACTS: Minnesota Solar submitted an application to Carver County for a conditional use permit (the **"CUP"**) to construct and operate a large energy system (referred to as a **"solar garden"**) on 35 acres of land in rural Carver County. The site of the proposed solar garden was close to two existing dairy farms. At the public hearings addressing whether or not the CUP should be approved, concerns were raised about the potential for stray voltage to be emitted from the solar garden and the effects this could have on the nearby dairy operations. On the basis of these concerns, the Board denied the CUP. Minnesota Solar then sought certiorari review by the Minnesota Court of Appeals.

THE DISPUTE: Minnesota Solar maintained that the Board's decision to deny the CUP was arbitrary, capricious, and unreasonable, and should therefore be reversed.

LEGAL ISSUES: The issues presented to the Court of Appeals in determining whether or not the decision to deny the CUP was arbitrary, capricious, or unreasonable were (a) whether the reasons given by the Board for denying the CUP were legally sufficient; (b) whether the reasons had a factual basis in the record; and (c) whether the Board's decision violated Minnesota Solar's right to equal protection on the basis that the Board had approved other allegedly similar solar garden CUP applications.

CONCLUSIONS: The Court of Appeals affirmed the Board's denial of the CUP. The Court concluded that the standards set forth in the applicable Carver County ordinance providing that a CUP must not be injurious to the public health, safety, or general welfare or incompatible with other existing land uses were legally sufficient reasons to deny the CUP. It also determined that the Board's findings that the standards were not satisfied given the risk of stray voltage were sufficiently supported by the record. The Court further rejected the equal protection argument, concluding that Minnesota Solar was not similarly situated to the other solar farm CUP applicants who had received approval. As such, the Court found that the Board had not acted unreasonably, arbitrarily, or capriciously.

Preliminary Injunction Denied in Breach of Mortgage/Implied Covenant of Good Faith Action

By Mark Ullery

Forest Lake Facilities, LLC, et al. v. Wells Fargo Bank, N.A., 2017 WL 5633095 (D. Minn. 2017).

THE PARTIES: The plaintiffs (collectively, **"Forest Lake"**) were borrowers who owned commercial property in Forest Lake, Minnesota. Wells Fargo Bank, N.A. (**"Wells Fargo"**) is a national bank.

THE FACTS: Forest Lake obtained a loan secured by a mortgage on its commercial property. It leased the property to Home Depot. The mortgage (held by Wells Fargo) provided for a balloon payment, but in order to be able to make that payment, Forest Lake claimed it needed to negotiate an extension of the lease (which would boost the value of the property) and then sell the property. However, the mortgage included a term which provided that Wells Fargo had to give its consent for any lease modification, and Wells Fargo refused to do so; as a consequence, Forest Lake did not make the payment. Wells Fargo subsequently foreclosed on the property and purchased it at the sheriff's sale. Forest Lake maintained that Wells Fargo withheld its consent in bad faith because it wanted to obtain the property and it sued Wells Fargo for, among other things, breach of the mortgage and the implied covenant of good faith and fair dealing. After commencing the action, Forest Lake was able to enter into a contract to sell the property, with the closing scheduled to take place shortly before the end of the redemption period. Forest Lake then moved the Court for a preliminary injunction seeking to extend the redemption period until the end of the litigation in order to leave open its ability to recover the property.

THE DISPUTE: Wells Fargo opposed Forest Lake's motion for the preliminary injunction.

LEGAL ISSUES: A preliminary injunction is available only if the party moving for it can establish several factors in its favor, one of which is that it is likely to suffer irreparable harm if the motion is denied.

CONCLUSIONS: The Court denied Forest Lake's motion, reasoning that Forest Lake could not demonstrate irreparable harm. The Court noted that Forest Lake's obligation to pay the balloon payment was independent of any other terms of the mortgage and therefore it was required to make the payment even if Wells Fargo had breached the mortgage by wrongfully withholding its consent to the lease modification. As a consequence, Forest Lake's only remedy was monetary damages, which meant it could not establish irreparable harm. The Court also concluded that even if Forest Lake could establish that its failure to pay the balloon payment was excused, it still could not show irreparable harm. Regardless of whether the sale was completed or fell through, a jury could calculate Forest Lake's monetary damages, and because those damages would adequately compensate it, no irreparable harm could be demonstrated.

Agricultural Interference 2.0.

Animal Legal Defense Fund v. Wasden, 878 F.3d 1184 (9th Cir. 2018).

INTRODUCTION: In the Fall 2017 edition of DIRT, the case law update included the Animal Legal Defense Fund's (the **"ALDF"**) challenge to Utah's agricultural operation interference law. At the same time, the ALDF challenged a similar law in Idaho. This section discusses the ALDF's challenge to Idaho's law, which included restrictions not found in Utah's law.

THE PARTIES: The ALDF, Mercy for Animals, and other animal rights organizations obtained an injunction prohibiting enforcement of Idaho Code § 18-7042, which criminalized making misrepresentations to access agricultural facilities and making audio or video recordings of the facility without the owner's consent. The State of Idaho was represented by its attorney general.

THE FACTS: In 2012, an animal rights activist obtained a job at an Idaho dairy farm and then filmed alleged animal abuse that occurred at the farm. The videos were released by an animal rights organization and drew national attention. The farm responded by firing employees caught on video and instituting stringent operational protocols as well as an animal welfare audit.

Two years later, the Idaho legislature passed section 18-7042 (the **"Agricultural Interference Law"**). The Agricultural Interference Law criminalized interference with agricultural production, which is defined in the law as: 1) entering an agricultural facility by force, threat, misrepresentation or trespass; 2) obtaining records of an agricultural facility by force, threat, misrepresentation or trespass; 3) obtaining employment with an agricultural facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations; or 4) making an audio or video recording of the conduct of an agricultural facility's operations without consent of the facility's owner.

THE DISPUTE: After the Agricultural Interference Law passed, the ALDF and other animal rights organizations filed suit against the Idaho Attorney General. These organizations argued that the law's prohibitions on misrepresentations violated their First Amendment (free speech) and Fourteenth Amendment (equal protection) rights. The district court ruled that each criminalized interference section noted above was unconstitutional because the sections violated the animal rights organizations' free speech and equal protection rights. Idaho appealed to the Ninth Circuit Court of Appeals.

LEGAL ISSUES: To show that the criminalized misrepresentation sections in the Agricultural Interference Law were constitutional, Idaho must show that the misrepresentations were made for the purpose of material gain, material advantage, or inflict a legally cognizable harm on the agricultural facility. The first issue is: do the misrepresentation sections meet that standard? To show that the section in the Agricultural Interference law related to an audio or video recording was constitutional, Idaho must show that the section is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. The second issue is: does the video or audio recording section meet that standard?

CONCLUSIONS: The Ninth Circuit Court of Appeals found two sections of the Agricultural Interference Law unconstitutional and two sections of the law constitutional.

The two sections deemed unconstitutional were the sections criminalizing entry into an agricultural facility by misrepresentation and criminalizing making an audio or video recording without a facility owner's consent. Regarding the entry by misrepresentation section, the court found the section was unconstitutional because the entry, in and of itself, did not provide a gain to the entering party or injure the facility. Therefore, the section could criminalize potentially innocent behavior, making it overbroad. Regarding the audio or video recording section, the court found it unconstitutional for numerous reasons including, but not limited to, it being under-inclusive (for example, it didn't

criminalize the taking of photographs) and it being over-inclusive (agricultural facilities can vindicate their rights through tort law without criminalizing protected speech).

However, the court found the sections criminalizing obtaining a facility's records by misrepresentation and obtaining employment at a facility by misrepresentation were constitutional. Regarding the obtaining a facility's records by misrepresentation section, the court found that obtaining records does provide gain to the lying party, and does inflict harm upon the facility owner. Similarly, the court found that obtaining employment by misrepresentation constituted material gain to the lying party, making the section constitutional.

The Important Difference Between a Promise and an Agreement.

Kunde v. Estate of Bowman, No. 17-0791, 2018 WL 1099489, slip op. (Iowa Ct. App. February 21, 2018).

THE PARTIES: This case involves a dispute between two neighbors. Ronald Kunde sued Arthur Bowman to enforce an oral option to purchase Bowman's property.

THE FACTS: In approximately 2007, Arthur Bowman allegedly granted Ronald Kunde an oral option to purchase Bowman's property for approximately $3,000.00 an acre at an unspecified future time. At the time of the agreement, Kunde leased Bowman's property and subsequently made substantial improvements to the property, which Kunde alleged constituted consideration for the option to purchase. The lease agreements between Kunde and Bowman described who was responsible for paying for improvements to the property. Before Kunde could exercise his option, Bowman sold the property to a third party.

After Kunde sued Bowman, a jury found in favor of Kunde on his breach of contract claim, but did not make findings regarding Kunde's equitable claims. The district court, noting there was insubstantial evidence for the jury's findings, granted Bowman's motion notwithstanding the verdict. On appeal, the Iowa Court of Appeals affirmed the district court's decision regarding the breach of contract claim but remanded for a new trial on Kunde's equitable claims. Bowman then brought a summary judgment motion on Kunde's equitable claims, which was granted by the district court.

THE DISPUTE: Kunde brought three equitable claims against Bowman: quantum meruit, unjust enrichment, and promissory estoppel. The basis for Kunde's quantum meruit and unjust enrichment claims was that Kunde believed he should be compensated for the improvements he made to Bowman's property. The basis for Kunde's promissory estoppel claim was that Bowman should be prevented from denying the option to purchase and Kunde is entitled to expectation damages for the lost opportunity to purchase.

LEGAL ISSUES: The first issue is: is Kunde entitled to judgment on his quantum meruit and unjust enrichment claims when the leases specifically determined who was responsible for the cost of improvements to the property? The second issue is: is there a fact issue related to Kunde's promissory estoppel claim that would prevent summary judgment?

CONCLUSIONS: The Iowa Court of Appeals first found that Kunde's quantum meruit and unjust enrichment claims fail because such claims are only valid if there is an implied contract. Where an express contract exists – such as the leases – these claims are legally invalid. However, the court found there were factual issues related to Kunde's promissory estoppel claim. The court of appeals found that although there may not have been a clear and definite agreement related to the oral option to purchase, promissory estoppel only requires a clear and definite promise. In other words, promissory estoppel is often appropriate when parties have not agreed on all essential terms of a transaction, such as in the Kunde-Bowman case. Because factual issues related to whether Bowman made a promise still existed, the court of appeals found summary judgment was inappropriate, and reversed the district court on the that issue.

Gislason & Hunter
AGRICULTURE PRACTICE GROUP

Daniel A. Beckman	Minneapolis Office
Matthew C. Berger	New Ulm Office
Chris Bowler	New Ulm Office
Jeff C. Braegelmann	New Ulm Office
Dustan J. Cross	New Ulm Office, Des Moines Office
Michael S. Dove	New Ulm Office
Reed H. Glawe	New Ulm Office, Des Moines Office
Rick Halbur	New Ulm Office
David Hoelmer	Mankato Office
David C. Kim	New Ulm Office
Brittany R. King-Asamoa	Mankato Office
Kaitlin M. Pals	New Ulm Office
Mark S. Ullery	New Ulm Office
Wade R. Wacholz	Minneapolis Office
Andrew A. Willaert Jr.	Mankato Office, Des Moines Office
C. Thomas Wilson	New Ulm Office
Sara N. Wilson	Minneapolis Office
Dean Zimmerli	New Ulm Office

Minneapolis, MN

New Ulm, MN

Des Moines, IA

Mankato, MN

Ag Practice Services

Gislason & Hunter is well-recognized within Minnesota and throughout the Midwest for our knowledge and experience in the agricultural industry. Our attorneys represent and advise a broad spectrum of national, regional, and local agribusiness clients – including livestock producers, packers, input suppliers, agricultural lenders, and individual farmers – in all aspects of their operations. Our work in agricultural matters includes both transactional advice and litigation in the following areas:

- Bankruptcy
- Business Formation and Restructuring
- Commercial Transactions
- Employment Issues
- Environmental Regulations
- Estate and Succession Planning
- Financing and Debt Restructuring
- Foreclosure and Debt Collection
- Governmental Regulations and Program Payments
- Insurance Disputes
- Intellectual Property Rights
- Manufacturing and Distribution
- Marketing and Production Contracts
- Personal Injury Claims
- Zoning and Permitting Issues

REPRESENTATIVE MATTERS

- Negotiated and drafted long-term marketing agreements for large, multi-state swine producers
- Drafted both turn-by-turn and long-term independent grower agreements for swine producers
- Drafted credit agreements, forbearance agreements, and other loan documents for loans to agricultural producers
- Structured multi-state production and distribution systems
- Negotiated and drafted asset acquisition and disposition agreements of all sizes
- Provided advice and representation for banks, bank participations, and bank syndications related to agricultural loans
- Litigated commercial and corporate disputes in state and federal courts throughout the Midwest
- Represented agricultural producers and allied industries before local, state, and federal regulatory agencies

2018 Gislason & Hunter Agricultural Lending Conference

Thursday, September 6, 2018
New Ulm Event Center

GISLASON & HUNTER LLP

ATTORNEYS AT LAW

www.gislason.com