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Ag Lending portion of the Minnesota Bankers Association Annual Conference
June 2018
Brainerd

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Jeff Braegelmann pictured with Jeff Grev, Vice President of Legislative Affairs Hormel Foods Corporation

Reception for the Ag Mafia Dinner prior to Farmfest with Eide Bailly

Co-Sponsor

Matt Berger

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Host

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December 7, 2018
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Speaker - Matt Berger

Minnesota Grain and Feed Association Annual Meeting
March 4 - 6, 2019
DoubleTree, Bloomington

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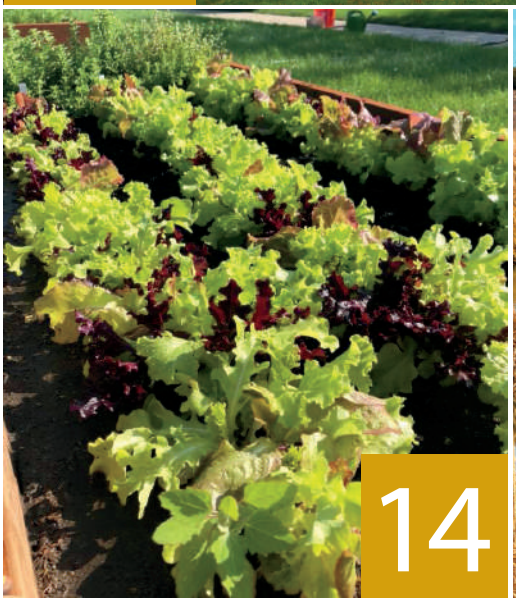
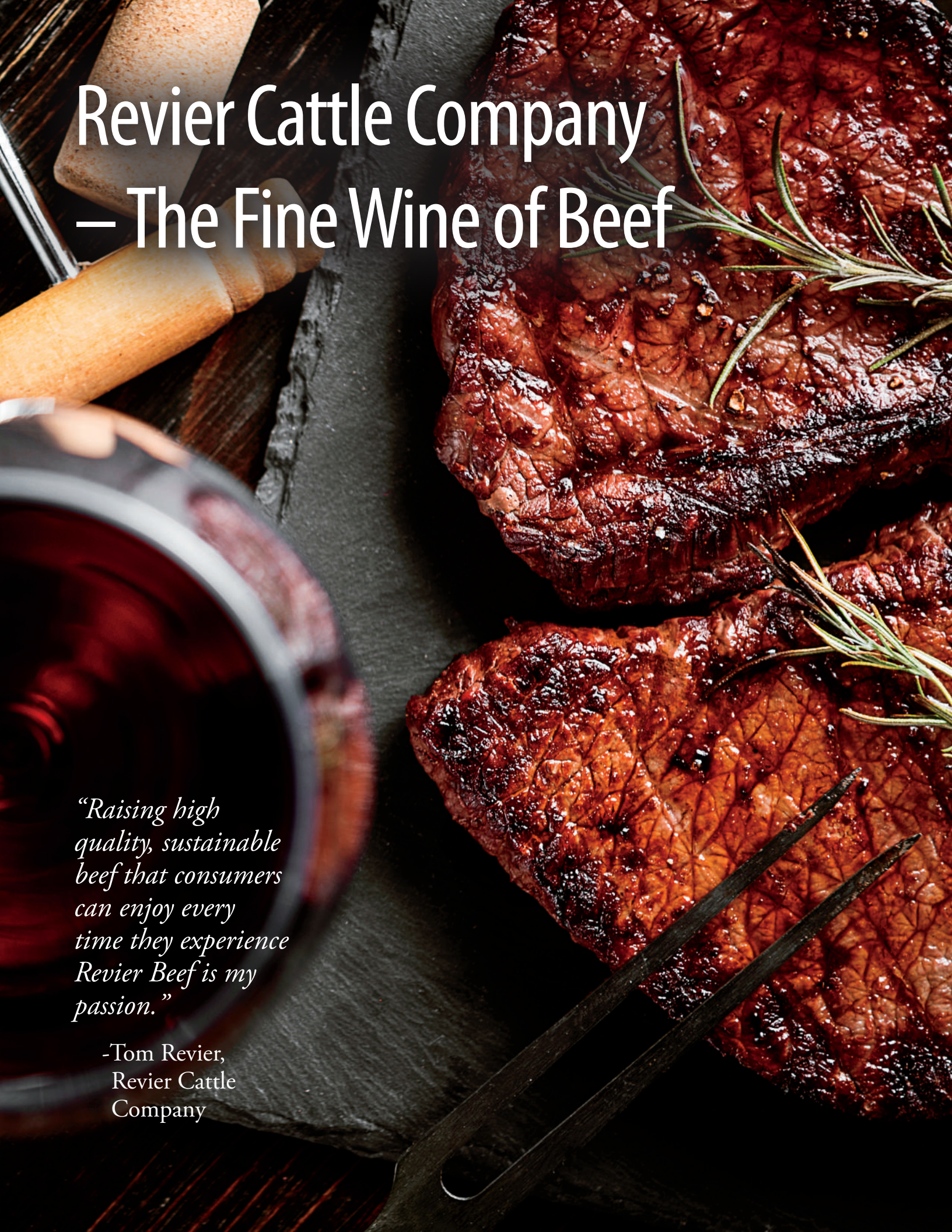


FALL 2018

Revier Cattle Company — The Fine Wine of Beef



"Raising high quality, sustainable beef that consumers can enjoy every time they experience Revier Beef is my passion."

-Tom Revier, Revier Cattle Company

REVIER CATTLE COMPANY®

OLIVIA, MN . SINCE 1867

Partners Tom Revier and Paul Hillen with their unique red, white and blue Revier Beef Box.

Whether you're looking for the finest wine or the perfect cut of steak, environmental conditions can make all the difference.

For instance, for the perfect Cabernet, Napa Valley offers the ultimate combination of Mediterranean climate, geography and geology to produce ideal wine grapes. But if you're looking for the perfect slice of beef, the Revier Region of Minnesota provides a superior combination of premium northern genetics, proprietary diet grown in the region, sustainable farming practices, and total livestock care using patented facilities and differentiated techniques.

What do restaurants such as the Lexington in St. Paul MN, Chef & Farmer in Kinston NC and Gibsons Steakhouse in Chicagoland all have in common? They serve high quality beef from Revier Cattle Company.

For five generations the Revier family has raised beef on the 150 year old family farm just outside of Olivia Minnesota, the Corn Capital of the World. The formula for success:

Premium Cattle + Excellent Feed and Facilities = High Quality Sustainable Beef which has led to their beef being featured in many of the very best steak houses across the country.

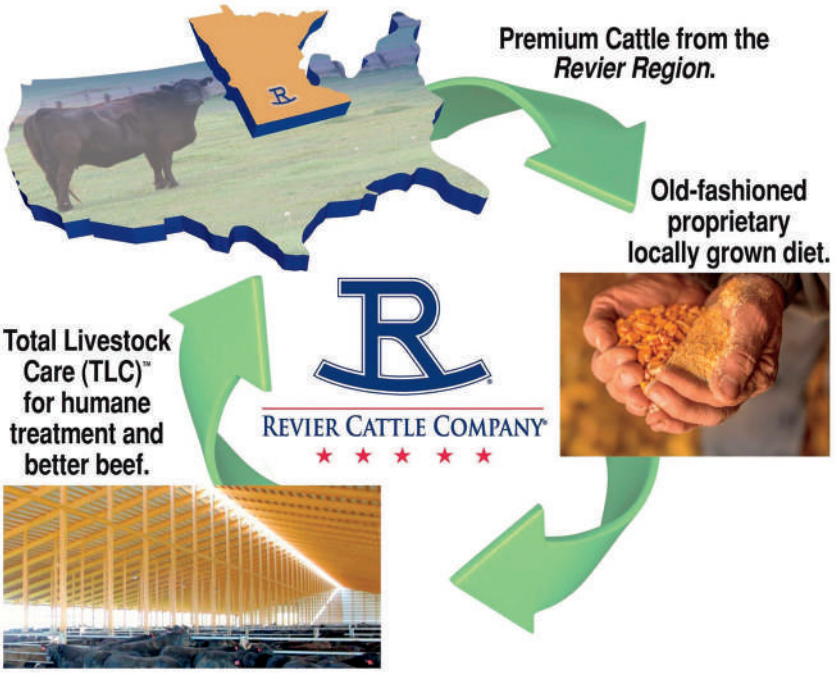
First, the breeding, only the best bloodlines with unique northern black angus genetics are developed. All of Revier's purebred black angus operations seed stock is developed with no expense spared to achieve the highest quality beef. With decades of cattle raising experience, the Revier Cattle Company is a true expert when it comes to choosing and nurturing Premium Cattle. The feed for Revier Cattle includes locally grown, high protein ingredients – some of which are grown by Revier Farms. The crops are raised on soil enhanced with manure from the cattle operations. Cattle feed is blended and fed fresh daily for the highest nutritional value to the animal.

Find Revier Beef at These Fine Restaurants

Admiral's Steak & Seafood Restaurant
Burger Burger
Bento Café
Chef & the Farmer
Cobb's Landing
Cooper Pub
District Fresh Kitchen + Bar
Exchange Food & Drink
Farm & Vine Bistro
Fire Lake
Gibsons Steakhouse
Green Mill
Holman's Table
The Lexington
Morgan's Farm to Table
Pittsburgh Blue
La Taverne
Rock Elm Tavern
Summer House Steak & Seafood
Treo Restaurant
Zelo

Find Revier Beef at These Fine Retailers

Bonngard's
Borchert's Meat Market
Duff's Meats 2
Erdman's County Market
Greg's Meats
Hagberg's
HomeTown Meats
Jordan Meats & Deli
Korte's Supermarket
Lonsdale Country Market
Manea's Meat Market
Ready Meats
Superior Meats
Widmer's Supermarket
Ye Olde Butcher Shoppe

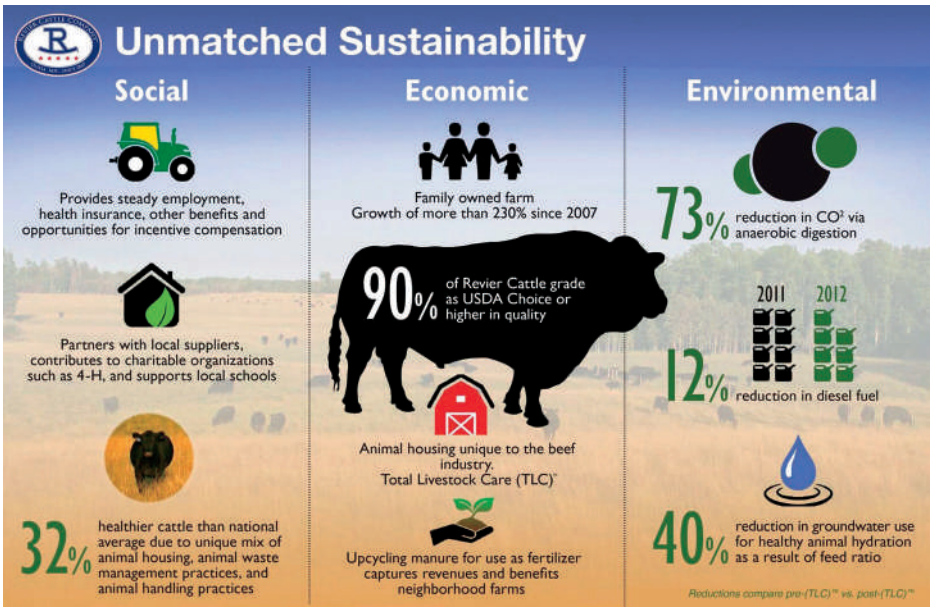


Finally, the Revier facilities are like no other. They range from open-air concrete yards to partial confinement pens to totally enclosed, patented barns. Global research, data, and experience show that there are benefits to each approach. All of these practices are done in an environmentally conscious way that allows Revier to have the highest proven sustainability in the industry. The combination of the patented barn design, up-cycling manure, capturing greenhouse gases, and anaerobic digester are technologies Revier uses to deliver 73% reduction in greenhouse gases, 12% less energy, and 40% less groundwater .

Tom Revier, a fourth generation family member who runs the cattle operation said, "Our facilities give cattle the space to move around from large grassy pastures to totally enclosed patented buildings with incredible air quality. Global research shows these are the best conditions for raising healthy cattle yielding great tasting tender beef." Revier continued, "And of course, our total livestock care (TLC) patented facilities are unlike any other in the world. Our cattle are 32% healthier than national average. This is because they live virtually stress free and are kept safe from harsh climates whether it be summer sun to winter storms. Cattle live in an environment conducive to the highest animal welfare."

The family started out in cattle and through the decades stayed in cattle. Since 2007, we have experienced growth of more than 230%. The year 2007 may sound familiar, the great recession kicked in and many businesses were lost or struggling to hang on. Revier went against the grain, and decided to expand.

The idea to launch a Revier brand of beef started years ago when they weregetting requests for their meat to be made available in butcher shops and restaurants. Two sides of beef had been donated to Jack Pot Junction in Morton for a charity event. The chefs



Kim Mackenthun of Mackenthun's Grocery Store visits Tom Revier at the Revier Farm in Olivia, MN

wanted "that meat" going forward. Revier started marketing directly to high end steak houses and nearly every door they knocked on resulted in business.

Getting the product from the farm to the table took the addition of new found talent to the operation, and an innovative business plan.

The new found talent came in the form of Paul Hillen a full time partner with 32 years of experience in the food and beverage industry with corporate leaders such as Procter & Gamble and Cargill. Paul's experience includes general management, brand management, strategy, innovation, sales, marketing and business development.

Hillen's vast knowledge of the food industry has proven essential in the branding of Revier beef and distribution channels for getting the product from the barns to retailers and restaurants. Hillen handles much of the business side of the Revier Branded beef business.

Libby Revier, Tom's wife, is also very involved in the business. She coordinates promotional materials, grocery in-store demonstrations, hosts and coordinates farm tours, works with the grocers and restaurants and heads customer relations. Farm to Fork is a popular dining trend, and as a result chefs, restaurant owners, and grocersare regular visitors to the farm where they are treated to a tour and meal featuring the home grown beef. These tours and visits allow the visitors to tell their patrons, "I know where our beef comes from!"

Revier beef is now being distributed in 17 states with more coming on soon through a network of independent distributors, including Swanson Meats, right here in Minnesota. "It is has been great to see our product in grocery stores, butcher shops and restaurants across the country. The reception from the market place has been exceptional, and we continue to grow each week as more restaurants and supermarkets taste our beef", said Hillen.

Jack Riebel, Executive Chef at the Lexington in St. Paul understands the home grown philosophy, "As a chef it is a pleasure to showcase a quality product such as Revier Cattle Company that provides locally sourced beef from Minnesota that is raised on locally grown seed stock developed to create a High Quality, Sustainable Beef that also reduces the carbon footprint. Revier beef is consistently high in quality and the taste is unmatched. Our customers love it."

Secrets of the City is a web site, Facebook page and Twitter feed that provides a daily digest of Minneapolis arts and culture. In April, one of bloggers went on a quest to find the perfect hamburger. The winner was found at Shake Shack in the Mall of America. "The meat," the author reported is from local legends the Revier Cattle Co. and they set the farm bar pretty high in Minnesota."

For more information Revier Cattle Company, and where to buy Revier Beef, including online, visit www.RevierCattle.com

Benefits of Organizing an Entity

by Kaitlin Pals and Chris Kamath

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A farm is a business unlike any other. Not only must farmers contend with the extraordinary risks created by weather and natural disasters, farmers must deal with and plan around volatile agricultural markets. Structuring the farm's ownership and operation with the use of business entities can help protect the farmer's personal assets from these hazards, provide tax advantages, and ease transitioning the farm to the next generation.

Benefits of Farming with an Entity (Or Two)

When a farmer forms a business entity, the farmer transfers farm assets out of his name and into the name of the business entity. In exchange for the contribution of farm assets, the farmer receives ownership interests in the business entity, in the form of shares of

stock, membership units or partnership interests, depending on the type of entity.

This structure can provide a wide array of benefits. Many types of business entities provide liability protection, shielding the farmer's assets held outside the entity from lawsuits and debts arising out of the farming operation or the assets held in the entity. For example, if a farmer places all of his farming assets in a corporation and an employee of the corporation injures someone while operating a tractor owned by the corporation, the injured person's recovery is limited to the assets of the corporation. She cannot recover from the farmer's personal assets held outside the corporation. This is one reason why many farming operations use two or more business entities, one for the operation itself (which has the highest risk of being involved in a lawsuit) and a separate entity to own the land.

Farming through one or more business entities provides effective ways to transfer the family farm to the next generation, while also providing an income to the retiring farmer. The transition of the farm from one generation to the next is usually accomplished through piecemeal sales or gifts of the shares or ownership interests in the entity over time to the retiring farmer's children. It is much easier to transfer shares of stock little by little over time than gifting one or two acres at a time.

Also, the retiring farmer can make a gift of part of the farm without giving up control. Business entities can be structured so that only some shares or ownership interests have voting rights. The retiring farmer typically gives away or sells his non-voting shares first, retaining the voting shares and thus the control over the operation.

Having voting and non-voting shares also allows farm families to divide up the economic benefits of the farm among farm and non-farm children while keeping control with the farm successor. For example, a farmer wanting to treat his children equally but also wanting to make sure the one child who is the farm successor can continue to operate the farm may structure his estate plan so that each child receives an equal percentage of the ownership of the business entity, but only the farm successor receives voting shares.

Using business entities in farm succession planning can also minimize gift and estate tax. As a general rule, for gift and estate tax purposes, transfers of interests in closely-held businesses like family farms are valued at their fair market value. Unlike shares in a public corporation, there is no readily available market for the sale of interests in closely-held business entities. The sale of such interests can be expensive, uncertain, and time-consuming. Consequently, a farmer may be able to discount the value of the interest transferred for this lack of marketability. Discounts may also be applied for non-controlling or minority interests.

Entity Types

There are many different types of entities used in farming operations. Each comes with its own set of positives, negatives and tax consequences:

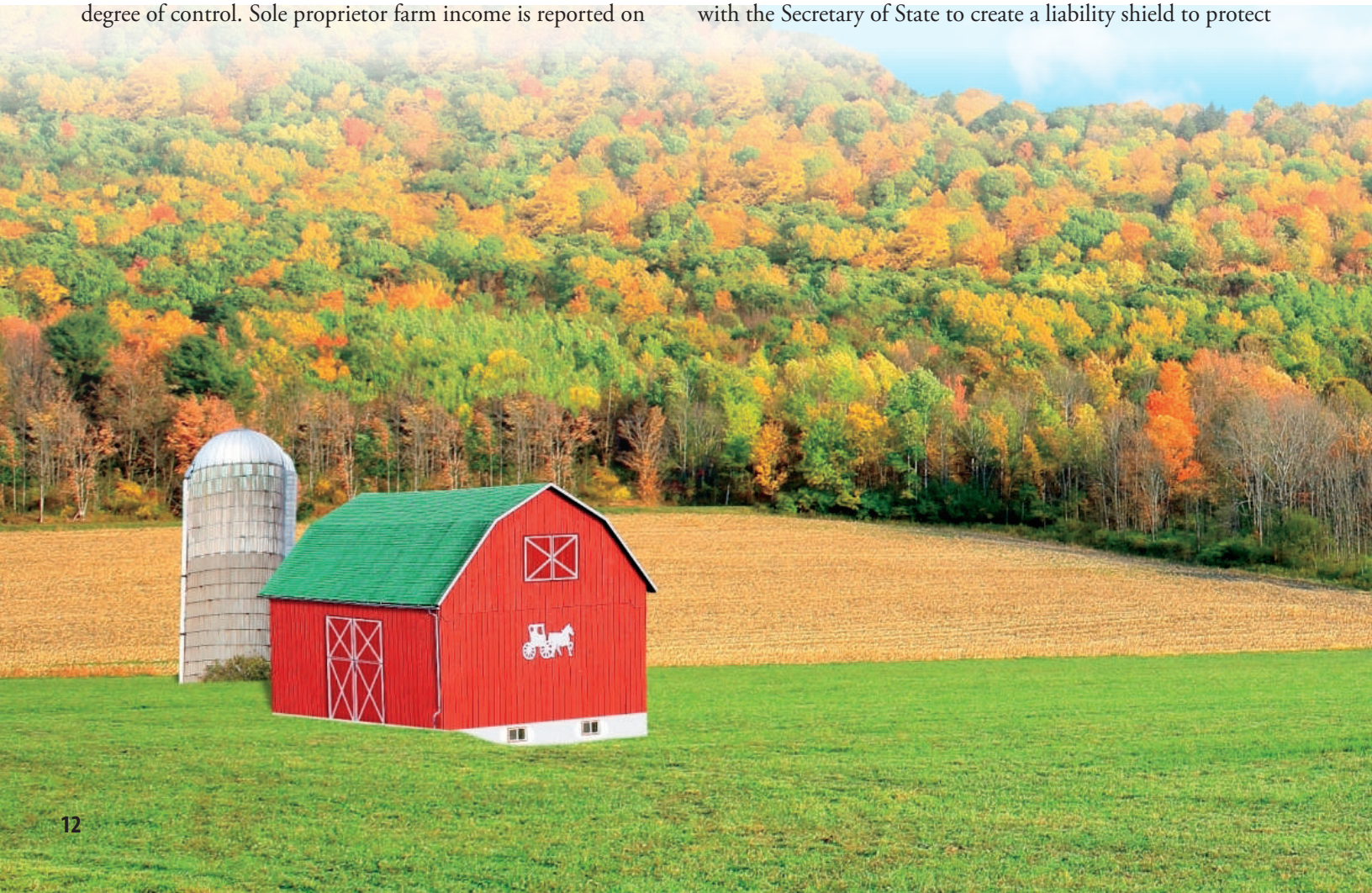
Sole Proprietorship. The sole proprietorship is the most common type of business structure among farms, and is not technically a legal entity at all. A sole proprietorship is an unincorporated business owned and operated by a single person for profit. No organizational documents are required.

Sole proprietorships are the simplest business form that a farmer can utilize, and they provide the owner with a high degree of control. Sole proprietor farm income is reported on Schedule F of the farmer's individual tax return. However, a sole proprietorship does not provide any liability protection. The personal assets of a farmer are not shielded from liability arising from the operation of the farm under this structure.

Partnerships. A partnership is formed when two or more people carry on as co-owners a business for profit. There are many types of partnerships. General partnerships are the simplest. No formal written agreement is needed between the partners, and each partner has equal rights to make decisions for the partnership. General partnerships do not provide liability shields; the partners are generally liable for all debts and obligations of the partnership.

In contrast, limited partnerships have at least one general partner and one limited partner. The general partners have the ability to make decisions on behalf of the partnership; the limited partners do not have any management or voting rights. The general partners are jointly and severally liable for all obligations of the limited partnership, but the personal assets of the limited partners are shielded from the obligations and debts of the limited partnership. Limited partnerships are typically governed by written partnership agreements, and must file a Certificate of Limited Partnership with the Secretary of State.

Both general partnerships and limited partnerships can register with the Secretary of State to create a liability shield to protect



the general partners' personal assets. These partnerships are referred to as limited liability partnerships (LLP) and limited liability limited partnerships (LLLP).

All partnerships are taxed as pass through entities. The partnership's income, losses, deductions and credits flow through to the individual partners' returns and are taxed at each individual's rate.

Corporations. Corporations are the most formal business structure for farming. The corporation's shareholders elect a Board of Directors, who are in charge of making all major decisions for the corporation. The Board of Directors in turn appoints Officers, including a President and Treasurer, who carry out the Board's decisions, sign documents and take other actions on behalf of the corporation. The rules for how the corporation conducts business and makes decisions are usually set out in the Articles of Incorporation filed with the Secretary of State and written By-Laws. Corporations offer strong asset protection, but must strictly comply with certain formalities, such as holding shareholder and director meetings.

Corporations can elect to be taxed a C corporations or S corporations. With a C corporation, the corporation must pay taxes on income when it is earned, and the shareholders must pay tax on the same income when distributed to them in the form of dividends. In contrast, with an S corporation, income and deductions flow through to the individual shareholders, similar to taxation of partnerships.

Limited Liability Companies. Limited liability companies (LLCs) are the newest and most flexible form of business entity used in farming operations. An LLC can have one or more owners, called "members." Minnesota permits an LLC to be run by its members (similar to a general partnership), by one or more managers (similar to a limited partnership), or by a board of governors (similar to a corporation). The members can also customize any of these three structures by drafting their own, personalized governance rules in a document called an operating agreement. Limited liabilities companies are formed by filing Articles of Organization with the Secretary of State, and the personal assets of the members of the LLC are shielded from the liabilities and debts of the company.

An LLC with only one member is treated as a "disregarded entity" for tax purposes, unless the LLC elects to be taxed as an S corporation. A disregarded entity is totally ignored for tax purposes; all income and deductions of the LLC are reported directly on the member's individual tax return. If it has more than one member, the LLC can elect to be taxed as a partnership or S corporation.

Income Tax and Other Considerations

Each of the above entity types has its own benefits and disadvantages. There is no definitive answer for which type works best for a particular farming operation. The type of entity selected by a farmer ultimately depends on the business's assets, the type of activity it is engaged in, and the farmer's goals for succession planning.

With the passage of the 2017 Tax Cut and Jobs Act, the corporate tax rate was reduced from a high of 35 percent to a flat rate of 21 percent. Many farmers now wonder if the time is right to establish a C corporation. Even with the lower corporate tax rate, most farmers are still likely better off being taxed as a sole proprietorship or disregarded entity, or electing a form of pass-through taxation.

Even though the corporate income tax rate is now 21%, C corporation income is still subject to double taxation. A C corporation's income is taxed at both the corporate and shareholder levels. The corporation only pays 21% tax on net taxable income each year, but shareholders pay additional tax of up to 20% on dividends distributed out from the corporation to them. In comparison, income tax on an S corporation's income is paid at only one level, by the shareholders. Also, while the shareholders may pay tax at a higher rate than a C corporation, a new deduction under Section 199A of the Tax Cut and Jobs Act somewhat offsets this. While a full explanation is beyond the scope of this article, Section 199A allows individual taxpayers to take a deduction equaling approximately 20 percent of "qualified business income," which can include certain income from a sole proprietorship, disregarded entity, partnership or S corporation.

Notwithstanding provisions of the Tax Cut and Jobs Act, the assets and activities of a farming operation usually provide compelling reasons to choose one entity type or tax election over another. For example, it is usually safest to hold land in an entity taxed as a partnership rather than as an S corporation or C corporation. Appreciable assets like land can move freely in and out of a partnership without triggering any tax. In general, the tax is deferred until sale of the real estate. In contrast, although contributing assets to a corporation is usually a tax free event, getting appreciated property out of a corporation is usually a taxable event. If the property has been owned by the corporation for a long time and risen in value, the shareholder will likely have to pay a substantial tax liability to get the property out of the corporation even though she has not received any income from the transaction.

S corporations are typically more suited for the operational side of farming. One of the main benefits of establishing an S corporation is the possibility to save on payroll taxes (Social Security and Medicare). In a typical scenario, the farmer is paid a reasonable salary for services provided to the corporation. These wages are subject to payroll taxes; however, distributions of profits from the S corporation is not considered a wage and thereby avoids imposition of payroll taxes. This is different from partnership taxation. Typically, all income to a general partner is subject to payroll taxes.

Conclusion

Although farming is a business unlike any other, it is still a business, and therefore, can benefit from sound planning and management. One of the critical decisions every farmer must make is whether or not to operate their farm through a business entity. And while there is no definitive answer to which type works best for farmers in general, entity formation may provide real benefits in terms if limited liability protection, tax savings, and succession planning. Farmers should consult with their attorney or CPA to help determine which option is best for them.

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Growing Opportunities at South Central College

by Brad Schloesser

High Tunnel Greenhouse construction during Fall of 2018 supporting intensive sustainable micro-farming.

Veterans to Agriculture – Farming and agricultural services are among Southern Minnesota's strongest industries and South Central College offers a quick-start program that helps people with interest in the farming and agribusiness professions get started. Two surveys of regional companies indicate a need for skilled individuals to replace retiring individuals. Companies are looking for talented individuals with both agronomy and business skills to fill their employment needs. The Agribusiness Agronomy Certificate provides an ideal entry into plant and soil career pathways.

People new to the ag industry will benefit from this short-term program that includes the basics of agricultural commerce, theory, operations, and technology.

With smaller class sizes, affordable tuition and experienced instructors, South Central College is a great place to learn and prepare any veterans that have an interest in living, working and supporting communities in Southern MN.

Children's Museum of Southern Minnesota – Sponsor, Advocate and Idea Generator for the Children's Museum. We promote agricultural literacy as a partner. Provide connections to ag resources, ideas, animals and topic areas that will enlighten and excite the public regarding agriculture, food and natural resources.

Outreach & Recruitment for the Southern Agricultural Center of Excellence:
Participated in 30+ Career Expos focusing on Ag, Food & Natural Resources (AFNR) and 4 Camps hosting K-12 education students and educators focusing on AFNR career awareness. Social media communications daily supporting the activities that multiple platforms disseminate to varied audiences increasing awareness about agricultural opportunities and highlights. Working with six MN State Partner Institutions and many business & industry partners to meet workforce needs in agriculture.

Professional Development for Agricultural Educators – CASE Institutes, (Curriculum for Agricultural Science Education) at SCC we host during the summer months (80 hour – 10 day sessions) of Teacher preparation for delivery of a multitude of ag career pathways.

Farm Transitioning Workshops – hosting and supporting farm business succession and family estate planning. Intended to be useful for established farm owners, for their successors, and for beginners. Topics include:

- the stages of succession planning
- balancing the interests of on-farm and off-farm heirs
- the importance of family communication
- effective goal setting
- contribution and compensation
- tax credit programs
- use of trusts, life estate deeds and business entities
- buy-sell agreements
- asset protection
- taxation
- balancing intergenerational expectations and needs

Agribusiness Programs:
PATHWAYS TO AGRICULTURE
Signup online for an Explore SCC session at:
www.southcentral.edu/visit

• Ag Service Technician – related employment in for graduates from 2017 = 100%
Turn your mechanical aptitude into a successful career working on agriculture equipment and vehicles. With both gasoline and diesel, equipment maintenance becoming increasingly complex, expert technicians are in high demand. Graduates are prepared to work with farm equipment and industrial dealers, food processing companies, independent repair shops, trucking and bus companies, as well as related diesel industries. Based on the current and projected strength of this field, motivated employees can move up rapidly in their career.

• Ag Chemical Applicator - related employment in for graduates from 2017 = 100%
The use of sophisticated, high tech chemical application equipment provides many opportunities for trained technicians. South Central College will prepare you for a position with farm cooperatives, fertilizer and herbicide companies.

• **Ag Service & Management -** related employment in for graduates from 2017 = 100%
A wide variety of agriculture focused businesses need individuals to deliver services or sell their products. The Agribusiness Service & Management program will prepare you for a career with fertilizer and ag chemical companies, farmer cooperatives, feed suppliers, grain elevators, farm service and supply centers and other ag-related enterprises.

• **Ag Production -** related employment in for graduates from 2017 = 100%
Opportunities abound in Agribusiness Production. South Central College can prepare you for success in these rewarding career fields. Whether you like to work with your hands or people, there's a program at SCC that will yield positive results: Given the increasing focus on productivity, efficiency and consolidation, formal training is almost a requirement for anyone interested in production agriculture. With emphasis in both plant and animal production, South Central College's Agribusiness Production program will prepare you for a career as a self-employed farmer, partnership farmer or farm manager.

• **Ag Education Technology 2 + 2 Program -** related employment in for graduates from 2016 = 100%
The shortage of agricultural educators was the catalyst for the creation of a unique partnership between South Central College and SMSU-Marshall, University of MN-Crookston, and the University of Minnesota Twin Cities. This "2 + 2" programs enables you to complete your first two years at South Central College and apply all your credits toward a 4-year degree in Ag Education from the University of Minnesota or UMC and now within MN State at SMSU-Marshall. This is your chance to make a significant impact on the lives of individuals and a positive contribution to the field of agriculture.

• **Ag Office Specialist/Manager**
The Agribusiness Office Specialist/Manager program prepares learners with the understanding, knowledge and skills to manage or staff a modern farm or agribusiness firm office. The program provides specific office skills necessary to function in an agribusiness office setting, as well as the agricultural background to work with producers and customers.

• **Farm Business Management Program**
The Farm Business Management (FBM) program is designed for those actively engaged in the operation and management of a farm business. The purpose of the program is to develop the manager's ability to organize resources in order to meet business and family goals. Management is the utilization of resources to maximize the return to the scarcest resource which is a continuous decision-making process. The program emphasizes goal setting, the identification of resources, records management, business analysis and interpretation. SCC FBM education is supported by 14 Faculty in the South Central region of Minnesota, last year over 600 farmers were enrolled in the program which, grew by three percent enrollment.

• **Viticulture –** Science of Growing Grapes
The viticulture program provides students with the knowledge required to gain employment and maintain vineyards in Minnesota and throughout the Midwest. Practical hands-on field experiences in vineyards and wineries is a key component of the viticulture program. Specific attention is given to varietal selection, soil preparation and pest management, as well as the science, agricultural and business skills necessary to succeed in the viticulture business.

• **Professional Swine Manager**
The Professional Swine Manager Education Program is a comprehensive work-study program focusing on modern pork production. It helps prepare you to manage a sow farm, grow-finish units or departments within each type of production systems. Courses emphasize the science and knowledge that will position you for promotions and allow you to make better decisions as a production manager.

The program was created by the Pork Checkoff in conjunction with the National Pork Board. The courses for the Professional Swine Manager program are delivered in partnership with South Central College in North Mankato,

SCC Ag Day on Campus – dates for visits with students and faculty designed for exploration of the best agricultural education College in Southern Minnesota.
December 13, 2018 | January 17, 2019 | March 5, 2019 | March 14, 2019

Partnering In Agribusiness – November 9th, 2018
An initiative to bring current agricultural internship site managers and employers on Campus to meet and network with Agribusiness students for the purpose of preparing for the spring internships that begin in mid-April and run through the month of July. The Partnering Event allows industry partners to identify their needs for human resources and gives SCC students studying agriculture the opportunity to discover the many varied careers that are possible and ways to gain experience in the respective business setting. All students in the SCC Agribusiness Program are required to complete an internship in a capacity different than what they have experienced before enrolling at the College.

Ag Symposium – New Tools for New Rules – February 21, 2019 We are Ag at SCC!

Brad Schloesser is Dean of Agriculture and Director of the Minnesota State Southern Agricultural Center of Excellence. In this role, he is providing oversight of budgets exceeding three million in funds and supporting over 25 faculty and staff. Prior to accepting the role as Dean/Director of Ag Division at South Central College and the Center of Excellence in Agriculture in 2013, he served as an Agribusiness faculty member at South Central College, teaching post-secondary agribusiness courses and advising students in the Professional Agriculture Student (PAS) Organization. Prior to post-secondary level education he taught high school agri-science in Minnesota, concurrently serving as FFA advisor. Brad has focused on teaching and learning in agriculture since 1983.

As Director of the Agricultural Center of Excellence, Brad's major responsibilities are to enhance the capacity and enrollment in comprehensive agricultural education from K-12, through post-secondary to industry. Workforce development includes building partnerships, developing seamless educational pathways, and informing audiences of the agricultural/food web that surrounds every person nourished by a good meal and an environment that is sustainable.

Schloesser has provided national leadership as Program Manager for the Curriculum for Agricultural Science Education (CASE) a special project of The National Council for Agricultural Education. He is the MN State Leader for CASE and hosted over fifteen CASE Institutes for teachers attracted from across the nation. Brad has served as the President of the National Council for Agricultural Education providing leadership for excellence in agricultural education at the middle and high school levels as well as encompassing post secondary and adult agricultural education in agriculture, food, and natural resources. Brad continues to be a lifelong learner, promoting agriculture and supporting the industry.

Today, he works as a thought leader in agriculture and education assisting in uniting industry and education through agriculture. Brad is blessed with 36 years of marriage to his wife LuAnn, they have two married daughters both involved in agriculture and have 8 grandchildren. They live near Saint Peter, on a farm, growing grapes, producing lamb and wool and support our natural resources in the MN River Valley with lots of timber on their property.

New Drainage System Considerations

by Jeff C. Braegelmann

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Let's assume you bought some farm ground adjacent to your existing farm. We will call it your "New Forty." You want to improve the drainage on your New Forty by installing drain tile and connecting it to a tile system on your existing farm. Or, perhaps you do not have a New Forty to tile, but simply want to add additional tile to your existing farm and drain an area that was not previously or adequately drained. Under either scenario, the new tile you plan to install will connect to an existing tile on your farm that has been there for years, long before you started farming your property. You won't go on anyone else's property to do this tiling, and you will pay all the expense. You plan to consult a drainage contractor to help you design and install the new tile, and you plan to do only what you think is reasonable and necessary to improve your drainage and not harm or burden anyone else. Nothing could possibly go wrong, right? Well hold on. Let's ask some questions to help you further plan your work and hopefully avoid stepping into something worse than a wet spot on your farm.

Buying Property and Adding it to Your Existing Drainage System.

You have purchased your New Forty. You want to tile it, or add more tile to it, and connect it to the existing tile system on your farm. What questions should you ask?

What is the "outlet" for the new tile I will install? In our example, you will connect to an existing drain tile on your farm. However, look beyond the borders of your farm. Where will the water eventually move to? Where does it end up? Does it connect to some other tile beyond your farm? Does it outlet into a river or creek? The tile on your farm very likely is part of a drainage system extending beyond the borders of your farm. Once you understand how your tile fits within the larger system, ask a few more questions.

Is my drainage system public or private? Is your existing farm drained by a drainage system administered by the county or a watershed district? If you don't know, ask your county. Visit with the auditor, drainage inspector, environmental services office or perhaps the county engineer or county highway department to determine the status of the drainage system on your farm. These offices usually have maps of public drainage systems to help you identify the systems' boundaries. Check with the county auditor to see whether your farm is assessed for benefits in any public drainage system.

If my existing tile is part of a public drainage system, is my New Forty also part of that public system? Again, check with the county offices mentioned above for this information. If the New Forty is assessed into the same public system that you will connect to on your farm, then the New Forty has a right to use that public system for drainage. However, that use is limited to the number of benefited acres in the New Forty. Prior drainage proceedings should have determined the number of acres in the New Forty that are benefited by the public system, and it might not be all 40 acres. The auditor should be able to check the benefit rolls for the public system and tell you how many acres in your New Forty are benefited. Even though the assessment roll might describe the entire New Forty, and even though repair assessments are levied against the entire New Forty, it might turn out that only 22 acres, for example, were determined to be benefited. You have the right to drain those 22 benefited acres all you want, including installing additional tile to those 22 acres. But that does not necessarily give you the legal right to install additional tile to drain the other 18 acres that have not been determined to be benefited.

Do I need to petition for an outlet? Suppose the New Forty has not been assessed any benefits for the public system, or that only a portion of it has been assessed benefits and you want to drain all of it. Our drainage code prohibits non-benefited acres from being drained by a public system. After a public drainage system is established, no public or private drainage system that drains property not assessed for benefits for the established public system may use the public drainage system as an outlet without permission to use the public system as an outlet. In such a case, you must petition for an outlet and get permission to drain those additional acres in the New Forty. This involves filing a written petition with the drainage authority, which will then conduct a public hearing on your petition. Notice will be given to other landowners in the system. At the hearing, the drainage authority must consider the capacity of the existing public drainage system and determine whether it is adequate to handle your additional acres. This usually involves some level of investigation and a report by an engineer, done at your expense. Before granting your outlet petition, the drainage authority must set terms and conditions, such as payment of an outlet fee and requiring you to pay costs of the proceedings. The drainage authority also must set the benefits for the new acres being added, which usually means the drainage authority will appoint a viewer to make a report of benefits. If your outlet petition is granted, those new benefits will be added to the drainage system. After that, your New Forty will be assessed for its share of future repair costs based on the benefits assigned to it. The consequences of out-letting to a public system without first petitioning for an outlet can be difficult and expensive. The drainage authority can issue an order directing you to disconnect and block your connection to the public system and keep it blocked until you get permission to use the public system, but there is no guarantee you will get that permission. If you refuse to block the unauthorized connection, the drainage authority must order the work necessary to block your connection and assess those costs against your property. Also, you can face a misdemeanor charge for unauthorized use of a public drainage system.

What if my existing drainage system is entirely private? In this case, you need not deal with a drainage authority, but that does not mean you are free to do whatever you wish. Is there an agreement governing use of the private drainage system on your property? If so, and if the agreement was prepared carefully, it essentially will be an easement over your farm that governs how you and others can use the private system. If you do not know whether there is an agreement, check the real estate records to see if anything is recorded against your property. However, an unrecorded agreement can be enforceable if you had notice of it when you purchased your farm. A well-drafted private drainage agreement typically will limit the properties and number of acres that can be drained through the private system and will prohibit adding new properties or additional acres. Such agreements are contracts which can be amended if all parties to the contract agree to the changes. But you risk getting sued by another party to the private drainage agreement if you connect the New Forty without permission from the other parties. If they give you that permission, you should document it in a signed amendment to the private drainage agreement that describes the new property being added to the system, specifies the number of acres that can be drained, and describes how the new property will share in future repair expenses.

But I Just Want to Install More Tile in My Existing Farm.

Suppose you don't have a New Forty to tile, but instead simply want to add more tile to your existing farm, and perhaps drain some areas not previously tiled. You should ask yourself the same questions about the drain tile on your existing farm. If it is part of a public system, how many benefited acres have been determined for your farm, and are you proposing to drain any additional acres not previously assessed for benefits? If you are simply adding more tile to acres already determined to be benefited, you don't need permission from the drainage authority (but do read through the remaining list of questions in this article). Draining new acres not previously determined to be benefited will require permission from the drainage authority. If your farm is not part of a public system, investigate whether your property is subject to a private drainage agreement and whether it restricts how you can drain your farm.

What Else Should I Consider to Avoid Problems?

So far, our questions have centered on whether you have the legal right to add property to a drainage system and if not, how to obtain that right. But even if you have secured that right, there are other potential missteps you could make during your project. So consider a few more questions that might help keep you out of trouble.

Is my property in a watershed district? Watershed districts are entities separate from your county or county board. If your property is in a watershed district, the watershed district may have rules that could affect your proposed project. The watershed district might require that you obtain a permit before tiling, and it might have limits on the capacity (drainage coefficient) for the system you propose to install, whether it is a public or private system. Some watershed districts have rules requiring notice to neighbors as part of your application for a permit to do your tiling.

Have I talked with FSA/NRCS? Many farmers are enrolled in some type of farm program administered by the USDA. You can lose your eligibility for farm program benefits if you conduct certain prohibited activities in wetlands, including draining in or around the wetlands. Check with your local FSA office and submit a Form AD1026 to certify your compliance with farm program requirements and to obtain a determination whether your proposed drainage project will impact any wetlands. The NRCS has delineated the wetlands on most farms. It will review your proposed work and identify any wetlands on your property, evaluate whether your project will impact any wetlands, and identify any steps you must take to avoid impacting those wetlands. If you proceed without these determinations and violate any of the program's restrictions on impacting wetlands, the results can be costly and severe. You could be required to sever, disable, or remove any tile you installed without prior approval, you could become ineligible for farm program benefits, and in some circumstances risk having to repay benefits already received. Talk to your local FSA office before starting your drainage project.

Does my farm contain any wetlands protected by the Wetland Conservation Act? The WCA is a state law that prohibits draining or filling wetlands unless you "replace" the impacted wetlands by restoring or creating wetlands somewhere else or by purchasing wetland credits. Some drainage activities are exempt from these requirements. If your drainage project impacts a wetland and your project is not exempt, you risk an enforcement action by the State of Minnesota. You could be required to undo, sever, or abandon the new tile you installed. Seeking after-the-fact approval of a replacement or mitigation plan can be extremely time-consuming and expensive. You also risk a cease-and-desist order and criminal charges from the Department

of Natural Resources if you run afoul of the WCA. Therefore, you really need to know in advance whether your project will impact any wetlands or whether your project might be exempt. And you might be surprised to learn what can constitute a "wetland" under the WCA. This law is administered by a combination of state and local agencies. Your local Soil and Water Conservation District office is a good place to start for information regarding the existence and status of any wetlands on your property and whether your project will comply with the WCA.

Will I be doing work in any public waters? Other statutes in Minnesota prohibit doing work in public waters without first obtaining a permit from the DNR. The DNR maintains an inventory of public waters. These requirements are separate from the wetland rules mentioned above under the WCA. A tiling project confined to your farm may not involve any work in a public water, but you should at least investigate whether any public waters are on your property so you can plan accordingly. Start on the DNR website and search for its Public Waters Inventory (PWI) Map and the county-by-county lists of public waters maintained there. These maps and lists of public waters usually also are available at your county auditor's office, your county SWCD office, and DNR offices.

Is there any chance I will run afoul of the Clean Water Act? This is a federal statute that generally prohibits the discharge of materials into the waters of the United States. Drainage of water does not necessarily trigger this law, but sometimes the work associated with drainage projects can, such as dredging or excavating soil and placing it in waters that are regulated by this law.

Why don't these agencies talk to each other? Establishing compliance with one of these laws, or obtaining a permit from one of these agencies, likely will mean nothing to any of the other agencies. The DNR generally will not care whether FSA and NRCS have given the green light to your project. One agency's determination that there are no wetlands on your property, or that there is a wetland but that your project will not impact it, will not bind the other agencies. If necessary, each will do its own investigation and determination of the type and size of the wetland on your property (a delineation), and those results can vary between agencies. Talk to your local agencies, SWCD, drainage inspector, county environmental office, etc., to get information about these various requirements and who administers them in your county. Also, consider consulting an engineer, wetland specialist or, dare I say, a lawyer, to help navigate these requirements. Upfront investment in a good drainage plan can save you money and headaches in the long run.

Trucking Regulations in Agriculture

by Brittany King-Asamoa

Trucks are a vital component of agriculture. The heavy vehicles are used to remove crops from fields, transport livestock, and deliver product. The transportation vessel is also overwhelmingly regulated. This article will brief a few of those regulations that all agricultural operations should be mindful of.

Controlled Substance and Alcohol Testing.

Not surprisingly, laws prohibiting individuals from driving under the influence of drugs and alcohol extend to employees operating trucks in agriculture. But, beyond this the United States Department of Transportation (DOT), through the Federal Motor Carrier Safety Administration (FMCSA) has implemented regulations prohibiting drug and alcohol use at all times an individual performs or may be expected to perform safety-sensitive functions on a commercial motor vehicle used in interstate commerce. A "safety-sensitive function" includes:

(1) All time at an employer or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;

(2) All time inspecting equipment as required by [49 C.F.R.] §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All time spent at the driving controls of a commercial motor vehicle in operation;

(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of [49 C.F.R.] § 393.76 of this subchapter);

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(5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

49 C.F.R. § 382.107. Employers should be mindful that interstate commerce, the activity DOT is authorized to regulate, expands beyond an employee's travel across state lines. Interstate commerce also includes the trade, traffic, or transportation of property between two places in a state "as part of trade, traffic, or transportation originating or terminating outside the State or United States." 49 C.F.R. § 390.5 (emphasis added). In other words, this would include crop grown in one state and sold in a supermarket in another state if the farmer that harvested that crop did not employ the commercial motor vehicle driver that ultimately delivered the crop to the supermarket.

With regard to alcohol use, commercial motor vehicle drivers are also prohibited from performing safety-sensitive functions within four (4) hours of their last drink of alcohol. And, even more encompassing, an individual that uses any Schedule 1 drug/substance cannot even report to work to perform a safety-sensitive function. Schedule 1 drugs and substances are set forth at 21 C.F.R. § 1308.11 of the federal regulations. An individual that uses a non-Schedule 1 drug/substance without or not in accordance with instructions from a licensed medical practitioner "who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle," is also prohibited from performing safety-sensitive functions. Employers must comply with these prohibitions and refrain from allowing employees that violate the regulations to perform safety-sensitive functions. Employers failing to comply with the regulations will face civil penalties.

In addition to prohibitions regarding a commercial motor vehicle driver's use of alcohol and controlled substances, federal law requires employers to perform specific testing. This testing includes, (1) pre-employment for controlled substance use only; (2) post-accident; (3) random testing in accordance with 49 C.F.R. § 382.305; (4) reasonable suspicion testing; (5) return to duty; and (6) follow-up testing. Under federal law, an employer may terminate anyone that refuses to submit to the required testing. 49 C.F.R. § 382.211.

Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by The Civil Penalties Inflation Adjustment Act Improvements Act of 2015 ("FCPIAA"), an employer that fails to implement these testing procedures may be subject to a civil penalty up to $14,739 for each violation. An additional penalty for failing to maintain accurate records regarding testing may also be imposed under the FCPIAA at a rate of $1,214 per day for up to $12,135.

See the brochure Federal Drug & Alcohol Testing Regulations: Be a Driver in the Know, U.S. DOT: FEDERAL MOTOR CARRIER SAFETY ADMIN. (Revised Sept. 2016), at https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Drug%20and%20Alcohol%20Brochure%20for%20Drivers.pdf for more information.

Maximum Hours of Service.

Federal law also imposes maximum hours of service for drivers of commercial motor vehicles. A driver of a property-carrying vehicle subject to DOT regulations may only drive a total of 11 hours during a 14-hour period, so long as he had at least ten (10) consecutive hours off duty before beginning his travel. The driver must also take rest breaks of at least 30 minutes every eight (8) hours. Property-carrying motor vehicle drivers are also prohibited from being "on duty" more than 60 hours in any consecutive 7-day period for motor carriers operating every day, or 70 hours in any consecutive 8-day period for motor carriers that do not operate every day. An individual is deemed "on-duty" during the following times:

(1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;

(2) All time inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All driving time as defined in the term driving time;

(4) All time in or on a commercial motor vehicle, other than:

(i) Time spent resting in or on a parked vehicle, except as otherwise provided in [49 C.F.R.] § 397.5 of this subchapter;

(ii) Time spent resting in a sleeper berth; or

(iii) Up to 2 hours riding in the passenger seat of a property-carrying vehicle moving on the highway immediately before or after a period of at least 8 consecutive hours in the sleeper berth;

(5) All time loading or unloading a commercial motor vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

(6) All time repairing, obtaining assistance, or remaining in attendance upon a disabled commercial motor vehicle;

(7) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, to comply with the random, reasonable suspicion, post-crash, or follow-up testing required by [49 C.F.R. § 382, et seq.] when directed by a motor carrier;

(8) Performing any other work in the capacity, employ, or service of, a motor carrier; and

(9) Performing any compensated work for a person who is not a motor carrier.

49 C.F.R. § 395.2. Employers utilizing a driver's service for the first time or intermittently must "obtain from the driver a signed statement giving the total time on duty during the immediately preceding 7 days and the time at which the driver was last relieved from duty prior to beginning work for the motor carriers." 49 C.F.R. § 395.8(j). The FCPIAA imposes a civil penalty of up to $14,739 for each violation of these maximum service hours committed by an employer. Moreover, an employer found to have required or permitted a driver to exceed the maximum time by more than three (3) hours will face a greater penalty. A driver may face civil penalties of up to $3,685 for his violation.

There are numerous exceptions to the maximum hours of service regulations. A vehicle is considered a "covered farm vehicle," exempt from the maximum hours of service regulation, if it is registered or otherwise designated by the state as a farm vehicle, operated by a farmer or its employee, utilized to transport agricultural commodities, machinery, livestock or supplies to or from the farm; and is not utilized for for-hire motor carrier operations. If the gross weight of the vehicle is 26,001 pounds or less this exemption applies anywhere

in the United States. If the gross vehicle weight is more than 26,001 pounds, the exemption applies anywhere in the state where the covered farm vehicle is registered and within 150 air-radius miles of the farm where the crop originated.

Vehicles engaging in short-haul operations are not required to have rest breaks every eight hours. These operations are defined in 49 C.F.R. § 395.1(e). And, probably the most important exception to the maximum hours of service regulations is that the regulations do not apply during planting and harvest periods to drivers transporting the following:

(1) Agricultural commodities from the source of the agricultural commodities to a location within a 150 air-mile radius from the source;

(2) Farm supplies for agricultural purposes from a wholesale or retail distribution point of the farm supplies to a farm or other location where the farm supplies are intended to be used within a 150 air-mile radius from the distribution point; or

(3) Farm supplies for agricultural purposes from a wholesale distribution point of the farm supplies to a retail distribution point of the farm supplies within a 150 air-mile radius from the wholesale distribution point.

49 C.F.R. § 395.1(k). Harvest and planting periods are determined by the state in which the commodities or supplies are transported.

Electronic Logging Devices.

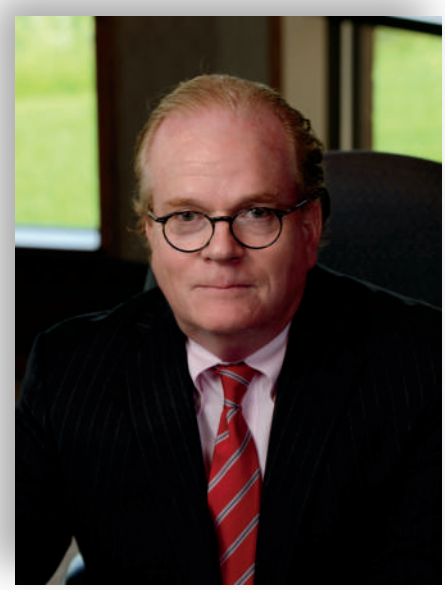
Employers are responsible for ensuring each and every driver subject to the federal maximum driving regulations that were briefly discussed above, records his duty status via an electronic logging device (ELD). Absent certain exceptions, ELDs must be installed into motor vehicles to monitor driving status. This requirement was implemented by the FMCSA to be complied with no later than December 18, 2017. If another automatic on-board recording device was utilized by the motor carrier before this date, the motor carrier has until December 16, 2019 to install the ELD. Additional exceptions to required installation of an ELD are set forth at 49 C.F.R. § 395.8. A notable exception is for vehicles manufactured before 2000. A back-up copy of all data collected by the ELD must be stored and maintained on a separate device for at least six (6) months.

The hefty civil penalties under the FCPIAA associated with the use and maintenance of an ELD include a recordkeeping penalty of $1,214 for every day the violation continues up to $12,135 and up to $14,739 civil penalty for other violations of ELD regulations.

Finally, in regard to all regulations discussed in this article, the FMCSA may impose a civil penalty of $12,135, against any person or entity found to knowingly falsify, destroy, manipulate, or change any record or report pertaining to drug testing, driver's service time, status, or ELD in violation of the regulations discussed herein.

Employment and Immigration

by David Sturges



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A SHORTAGE IN THE WORKFORCE – FARMERS NEED HELP

Despite an unemployment rate of 3.7%, the lowest since 1969, farmers – both in Minnesota and nationwide – are struggling to find labor to work on their farms. By all accounts, the crunch appears to be long term. Avoiding the issue has potentially severe negative economic results – crops left unharvested; cows not milked, and hogs not tended to. At risk too are the farmers' livelihood, higher consumer prices for goods and reduced availability of goods.

Lead-Up to Workforce Shortage

An aging population is one of the several causes of the workforce shortage, with large numbers of people retiring from the workforce. Add to that a population growing at a pace that is significantly slower then growth rates from previous years. Industrial mechanization, and computerization in most industries, to include the agricultural sector, compound the problem. Off-shoring is another factor though not so much a player in the agricultural sector.

Significant to the agricultural sector, the United States Department of Agriculture (USDA) has reported that the mixture of self-employed farm operators, family members and hired workers making up the agricultural workforce has changed markedly since 1950 with a significant reduction in self-employed farm operations and family member employees. Data from a recent National Agriculture Statistical Service's (NASS) Farm Labor Survey bears this out reporting that the "number of self-employed family farm workers [has] declined from 7.60 million in 1950 to 2.06 million in 2000." During this timeframe, there has also been a decline from 2.33 million to 1.13 million hired farm workers.

Filling the Gap – Most Likely Foreign-Born Labor

As in the past, migration to jobs, be it non-foreign-born or foreign-born labor has buffered workforce shortages. Indications now though, are that home-grown labor will not likely provide the necessary labor to fill these gaps especially in the agricultural sector. Instead, foreign-born labor appears to be the most likely source of workers and with that all of the attendant and unresolved issues that surround any discussion about immigration – and immigrant labor.

In a recent study titled Immigrants and Minnesota's Workforce, Ryan Allen underscored this prediction, explaining that it is probable that Minnesota will be dependent upon immigrants for future population growth. Explaining Allen wrote: "In order to maintain the current average annual 0.5% growth of rate of the labor force in Minnesota, the state will need to attract about four and a half times the current number of people who move to the state." He goes on to conclude that the "prevailing trend of net migration to Minnesota is wholly comprised of international migration [and] that it is likely [therefore] that any additional migrants that [Minnesota] attracts in the future will be disproportionately foreign-born."

Steven Hine, Director, Labor Market Information Office, at the Minnesota Employment and Economic Development Office has similarly observed that "In a tight labor market, immigrants are a vital source of talent for Minnesota employers [and that] foreign-born workers now account for 10% of the state's labor pool." He goes on to posit that "it has become increasingly evident that immigration has been and will continue to be a vital source of the workforce that employers need to succeed in [Minnesota]."

Neither Allen's nor Hine's predictions of reliance on foreign-born labor to fill workforce shortages is new. The reliance on foreign-born workers to fill the labor gap for an extended period of time into the future though is new. Relying on foreign-born labor has been a part of the workforce for many years. During World War I and World War II for example, the U.S. entered into so-called bracero programs with Mexico to secure much

needed labor for the manufacturing sector and the agricultural sector, due to the loss of labor due to commitments to the war efforts by large numbers of the workforce. Both programs were temporary requiring workers to return to Mexico in the case of agricultural workers upon completion of harvest.

The immigration question has been fraught with strident and divisive discussion focused in major part on whether foreign-born workers are taking jobs from non-foreign-born workers. The evidence does not seem to support the argument but remains at the heart of most arguments against using foreign-born labor. Wages too are central to any argument; namely whether foreign-born labor is working for a lesser wage than non-foreign-born labor.

Immigration Laws and Foreign-Born Workers

U.S. immigration laws provide a variety of means by which foreign-born workers may come to the United Sates to work. An early immigration law – The Immigration and Nationality Act of 1965 (INA) set the tone, in the regard and was significant in that it changed the then existing immigration allocations which up to that point in time had been based almost entirely on national origin. While retaining the per country quota of prior legislation, the INA implemented preference visa categories with a focus on – job skills and family relationships – which focus remains today.

Almost 30 years later, came the Immigration Reform and Control Act (IRCA) which was the first U.S. immigration law to prohibit the employment of unauthorized alien workers in the United States. The IRCA makes it unlawful for a person – "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an authorized alien with respect to such employment."

With the enactment of the IRCA, also came the advent of employment eligibility verification; by way of the so-called Form I-9. The Form I-9 was implemented – as a major means of enforcement (and remains so) of the IRCA's prohibition against hiring and recruiting unauthorized aliens for employment in the United States.

The IRCA is backed up by the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) which, among other things, implemented a pilot employment verification process colloquially known as E-Verify. A mostly voluntary program, the E-Verify pilot program remains in place today and is administered by the Department of Homeland Security (DHS).

Foreign-Born Worker Visas – Skilled Workers

Against this backdrop of immigration laws and labor needs lies a broad variety of non-immigrant, i.e. temporary, visa categories which permit non-U.S. citizens to legally work in the United States. These include the EB, H-1B, L-1 and TN visas. These four primary visa categories are for skilled workers, though, and each is applicable in different situations, for different skill sets and different skill levels.

By quick way of review, the EB category is an employment based visa focusing primarily on professional employees; the H-1B visa permits foreign nationals working in specialty applications to work in the United States on a temporary basis; the L-1 visa in turn, is available to managers, executives and specialized workers of multi-national companies to transfer from a foreign company to a U.S. subsidiary. Lastly, the TN visa is available under the terms of the North American Free Trade Act (soon to be the United States – Mexico – Canada Agreement or USMCA). As with the other three categories, the TN visa is available to professional workers from Mexico and Canada looking to work in the United States.

Foreign-Born Worker Visas – Lower Skilled Workers: Agriculture

None of the visa categories discussed above help fill the important need for agricultural labor. That remains the sole province of the so-called H-2A visa.

The H-2A visa permits a U.S. employer to hire foreign workers on a temporary basis to perform agricultural work when there are not sufficient U.S. workers available.

The H-2A was slow to take off, but over the years the number of petitions granted has continued to increase at a significant pace. Since 2001, there has been a 106% increase in H-2A certifications. By 2017, the U.S. Department of Labor (DOL) certified approximately 200,000 positions. In 2018, the DOL is on track to certify more than 242,000 positions. (Unlike most other visa programs, the H-2A Program is presently not subject to numeric caps).

While the H-2A Program continues to grow to help fill vacant labor positions, many employers complain that the administrative process is time consuming and expensive and that it does not fill enough positions and should permit longer stays. Worker advocates on the other hand complain the Program fails to adequately protect the workers.

The Program requires that before a visa petition for H-2 workers may be issued that the employer must first receive a temporary labor certification from the DOL. The labor certification is based upon a finding that qualified U.S. workers not available for the job and the employment of temporary foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

The work to be performed must be full-time and the need must be seasonal or temporary in nature. The H-2A Program imposes a number of important obligations on the employer. These include a requirement that the employer pay all of the covered workers at Adverse Effect Wage Rates (AEWR), which are minimum wage rates determined by the DOL. An employer must pay the higher of the AEWR or the federal, state or local minimum wage. The DOL set Minnesota's 2018 AEWRs at $13.00 per hour. Minnesota's minimum wage for large employers in 2018 is $9.65/hour and $7.87/hour for small employers.

In addition, an employer must provide each worker a copy of a work contract describing the terms and conditions of employment and/or a copy of the job order that was submitted to and approved by the DOL. H-2A employers must also provide the H2-A workers housing at no cost. If an employer does not have available housing and chooses to secure rental accommodations, the employer is required to pay all housing-related charges directly to the landlord/owner of the accomodation.

Housing aside, the employer is required to either provide each covered worker with three meals per day or to furnish free and convenient cooking and kitchen facilities where workers may prepare their own meals.

Workers are entitled to daily transportation between the worker's living quarters and the employer's worksite at no cost to the covered worker. Also, the employer must reimburse workers for reasonable costs incurred for transportation coming to the U.S. and return transportation at the end of the contract. Employers complain that the imposition of these requirements is expensive and drives up the cost of the labor recruited.

According to the USDA, the average duration of an H-2A certification in 2016 was 6.4 months. That having been said, the H-2A classification permits a period of employment, not to exceed one year, based upon the employer's stated need. At the end of that period of time, the employee must return to his/her home country. Extensions, though, may be granted in increments of up to one year, each requiring a new labor certification and petition. The overall maximum stay for an H-2A visa holder cannot exceed three years.

From the employer's point of view, the petition process is time consuming and the obligations of the employer significantly raise the costs of the employer, many employers viewing the H-2A wage scale as too high particularly when combined with the costs of recruitment, transportation and housing of H-2A workers. Employers also believe that the Program only authorizes a fraction of the workers needed each year.

Conclusion

Despite the immediate and long-term need for labor for the agricultural sector, a need that most agree will need to be filled by foreign-born labor, the U.S. immigration laws remain stagnant and generally unsupportive to farmers. Despite suggestions by the Administration earlier this year on an intent to improve H-2A visa programming, reduce its complexity and "modernize" it, nothing has been agreed to. That having been said, there have also been reports that the number of H-2A visas permitted for temporary agricultural workers may be reduced. Against the backdrop of what has been discussed here, that would only magnify the existing workforce shortage, and by all accounts, the future shortage as well.

Immigration aside, there appears to be a potentially different solution to the problem, namely robotic farming. A California based company – Iron Ox – recently announced that it is the first robot farm replacing humans with machines. The company claims that its hydroponic growing system uses 90% less water over traditional farming while growing 30 times the amount of crops per acre of land. The machines – the robots – basically carry out all of the work of planting and harvesting otherwise done by human workers. This may well raise a wholly different discussion about workers forced out of the workplace by robots, be they non-foreign-born or foreign-born.

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Resurvey Issues

by Sara Wilson and Chris Bowler

LAND SURVEYS IN MINNESOTA: ORIGINS, TECHNOLOGICAL CHANGES, AND IMPLICATIONS

While obtaining a new survey of farmland may appear on its face to be a simple process, it can result in confusion or dispute as to the true location of your property's boundaries. This article provides a general overview of the original surveying of Minnesota, problems that may arise upon obtaining a new survey, and what you can do to resolve a boundary line dispute.

History of the PLSS in Minnesota

With the Land Ordinance Act of 1785, the United States adopted a rectangular, coordinate-based survey system, known as the Public Land Survey System ("PLSS") that divided land into grid-shaped townships and sections. In Minnesota, original PLSS plats were created during the first government land survey conducted by the U.S. Surveyor General's Office between 1848 and 1907. The initial surveys were conducted in anticipation of the state subdividing the land for sale to settlers. With such surveys, it was easier to locate and legally describe the parcels being purchased. State land survey plats serve as the official legal land records for Minnesota, with all land titles and descriptions originating with the PLSS survey.

In a PLSS survey, the land is first divided into Public Survey Townships (which are different than political townships) by using two controlling survey lines: a baseline that runs east-west and a principal meridian that runs north-south. All distances and bearings are made from the meridians and baselines. Each such township is assigned a number, measures six miles square, and is comprised of 36 sections. Each section has an area of one square mile, or 640 acres. Sections are numbered from 1 to 36 and are labeled in a switchback pattern. Each section can then be divided into four quarters (NW, NE, SE and SE), with each quarter being 160 acres. Each quarter can then be further subdivided (ex, NW1/4NW1/4). Section corners and section quarter-corners were marked by posts or other monuments.

Surveying Techniques

Original surveys were performed using a Gunter's Chain, a 66-foot long chain, consisting of 80 links equaling one mile. The chains would be pulled taut, and attempts were made to hold the measure level in order to improve accuracy. Alignment was determined using a compass or theodolite. A surveyor's compass was used to measure horizontal angles, while a theodolite could measure both horizontal and vertical angles. In areas where measuring by chains was not possible, distances were calculated using triangulation.

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Recently, a tool known as a total station has improved on the theodolite with the addition of an electronic distance measurement device, or EDM. Total stations have gone from being mechanical or electronic devices to purely electronic systems with on-board computer and software. Global Positioning Systems ("GPS") have also increased the speed of surveying but are criticized for being less accurate than other tools.

Problems Arising from PLSS Surveys

When locating a true boundary line of any property, advances in technology can only do so much. A surveyor is bound by the original location of a government corner marker. The government corner is where the original surveyor placed it; however, over time many original government corners have been lost. If lost, a surveyor must use best evidence to determine where the original corner marker was set.

Best evidence requires a surveyor to investigate true boundaries by using plats, deeds and other documents placed of record within a county, along with monuments and other physical objects on the land itself which serve as evidence of where a boundary is located (such as a fenceline, tree, or boulder). It is not uncommon for such monuments or objects found on the land to differ from the real estate records or vice versa. Sometimes the records themselves are incomplete, ambiguous, or contradictory.

With original surveys, the science of measurement was not absolute. Certainly there were errors in measurement, but also townships necessarily vary in size and shape because meridians converge as they run north. Adjustments must therefore be made. All surplus or deficiency was allocated to the sections along the north and west boundaries of townships. For this reason, few townships are exactly 36 square miles, and sections rarely measure exactly 640 acers in size.

WHAT HAPPENS IF A NEW SURVEY REVEALS AN ENCROACHMENT?

Because of the realities of the problems resulting from PLSS survey legal descriptions, together with use of new technology, a new survey may well reveal that a boundary line is not in fact where you believed it to be. If a new survey of your land reveals that your neighbor is encroaching on a portion of your land, or vice versa, there are two potential resolutions that will determine who has a superior right to the disputed land.

First, you and your neighbor may be able to come to an agreement regarding the disputed land. That agreement could be formatted such that either the encroaching party agrees to respect the newly-discovered boundary line, or the non-encroaching party agrees to deed the disputed property to the encroaching party. Either format, however, could include a demand for financial compensation, which may not be palatable to the party from whom payment is demanded.

Second, if a suitable agreement cannot be reached, then the dispute will need to be resolved through a lawsuit. Typically, the lawsuit will be commenced by the non-encroaching party, although it is possible (and, under some circumstances, may be desirable) for the encroaching party to preemptively commence the lawsuit. But regardless of who commences the lawsuit, there are two important legal theories that the encroaching party may be able to assert to establish a superior right to the disputed land notwithstanding the results of a new survey: "boundary by practical location" and "adverse possession."

Under the theory of boundary by practical location (which was more thoroughly discussed in the Fall 2016 issue of DIRT), an encroaching party may assert that regardless of where a boundary line is as stated in a new survey, the landowners (or their predecessors) previously established an enforceable boundary even though it is at a technically inaccurate location. Commonly, an encroaching party will point to a fence to substantiate its claim of boundary by practical location. While that may seem like a commonsense way to determine how the parties established boundary lines, courts may not always agree if, for example, the current landowners have not owned the land for a long period of time, do not know who originally erected the fence, or do not know if the fence was actually used as a definitive boundary in the past. But if an encroaching party is able to establish that a fence (or some other piece of evidence) established an enforceable boundary, the theory of boundary by practical location will permit the encroachment.

The theory of adverse possession, on the other hand, allows one to acquire legal ownership of another's land if he or she, together with his or her predecessor(s), has occupied the land in a certain way for 15 years. Specifically, the occupation must be:

- Actual: the occupying party must physically occupy the land in the same manner as a property owner would;
- Open: the occupancy must be done with the landowner's knowledge or in such a way that the landowner could have such knowledge;
- Continuous: the occupation cannot be interrupted or merely sporadic;
- Exclusive: the public must not share an ability to occupy the property; and
- Hostile: the occupying party must not have the landowner's permission to occupy the property.

Arguably, the theory of adverse possession is well-suited to disputes over farmland boundaries. For example, crops will typically be planted on farmland in the same location for many years, are visible, and preclude other uses of the land over which they are planted. As a result, claims of adverse possession are common in boundary line disputes relating to farmland.

In sum, new surveys can create new issues regarding ownership, and the ultimate resolution of those issues may not always be straightforward or what one would expect. As a result, great care should be taken when interpreting the legal significance of a new survey and determining what course of action to take with regard to information contained in a new survey.

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Legislative Update – October 29, 2018

by Brian M. Foster

Regular readers of Dirt understand that federal agricultural policy-making slows to a crawl as elections approach; this year is no exception as numerous critical issues for the agriculture and food industries remain in limbo just days before the November mid-term elections.

Farm Bill Update

Passage of a new Farm Bill remains at the top of the list of major federal policy that the Congress has failed to pass on time. The "Agricultural Act of 2014", better known as the 2014 Farm Bill, expired September 30, 2018. The Senate passed its new 2018 Farm Bill in a bipartisan fashion by a vote of 86-11, but the House needed two tries and passed its 2018 Farm Bill in a highly partisan vote 213-211, with no democrats supporting it. House-Senate conference proceedings to iron out the significant differences between the two bills officially began September 5, but conferees have not yet reached agreement on a final bill.

U.S. Senators and Members of the House are now in recess and most are on the campaign trail back home, so hope for a new Farm Bill will lie in negotiations to be undertaken during a lame-duck session of Congress after the November 6 elections. Even then, given the significant differences between the two bills, it seems increasingly likely that the Congress will need to pass an extension of the existing Farm Bill in order to develop compromise legislation in the new Congress in 2019.

So, what does expiration of the 2014 Farm Bill mean to farmers, consumers and agribusiness? As noted above, the 2014 legislation generally expired at the end of FY 2018 (September 30, 2018), but commodity programs run on crop years, which vary by commodity. The first that would be affected is dairy, whose crop year ends December 31, 2018.

The funding source for Farm Bill programs matters as well, as some programs use discretionary funding, i.e. annual appropriations, and some are mandatory spending. Discretionary programs include most rural development, credit, and research programs as well as some conservation and nutrition programs. SNAP (Food Stamps) is a mandatory program that requires an annual appropriation.

Most Farm Bill programs with mandatory funding have an expiration date either in their program authority or their funding authority. These include farm commodity programs, some conservation programs, agricultural trade programs, and international food aid. For the most part, without reauthorization or an extension of the current Farm Bill, these programs will cease to operate.

For readers of Dirt wanting more detail, please refer to a recent Congressional Research Service (CRS) report, "Expiration of the 2014 Farm Bill".

A couple of programs of special interest to readers:

1. The federal crop insurance program is permanently authorized by the Federal Crop Insurance Act and therefore is not directly impacted by the Farm Bill expiration.

2. The Conservation Reserve Program (CRP) funding and program authority expired September 30th; an extension of the 2014 Farm Bill would allow the program to continue at the authorized rate of enrollment (up to 24 million acres), but without an extension or new Farm Bill, CRP would be unable to sign new contracts. It is important to note that all existing contracts stay in force and payments will continue to be made through the life of the contracts.

3. The Environmental Quality Incentives Program (EQIP), a mandatory conservation program, was extended by the last budget act and has funding authority through September 30, 2019.

4. USDA's Farm Service Agency has announced that it continues to make payments to producers through the Agricultural Risk Coverage (ARC) and Price Loss Coverage (PLC) for the 2017 crop year. Note: due to payment timing shifts made in the 2014 Farm Bill, 2018 crop year payments in ARC and PLC will not be made until FY2020 (October 1, 2019).

With respect to the 2018 Farm Bill, House-Senate conferees indicate they have made progress resolving their differences in some parts of the legislation, but it appears that significant differences remain on a few titles.

Supplemental Nutrition Assistance Program (SNAP) – the food stamps and other human nutrition and feeding programs make up about 80 percent of Farm Bill spending (see the familiar graphic, below). SNAP provided $63.6 billion in benefits to more than 42 million people in fiscal year 2017. A major roadblock to resolving this issue in a 2018 Farm Bill is the House bill's reform to work requirements for SNAP eligibility; House republicans and President Trump remain strongly committed to these reforms, while the Senate voted down (with 68 votes) an amendment with similar work conditions.

Commodities – crop commodity programs expire with crop year 2018, and if Congress does not reauthorize the programs or extend existing programs, commodity assistance is scheduled to revert to the parity system of the Agricultural Act of 1949. That scenario is highly unlikely, and if Congress cannot pass a new 2018 Farm Bill this year, it seems existing commodity programs would be extended for another year.

Complicating the House-Senate conference committee negotiations on the commodities title are several issues: 1) net farm income continues on a downward trend and is expected to fall to a 12-year low in 2018; 2) the new Market Facilitation Program (MFP), launched to counter

negative crop price impacts due to tariffs, will be paying out the biggest shares to soybean producers ($3.6 billion) in phase one; and 3) cotton, rice and peanuts—crops grown almost exclusively in the southern states and republican Congressional districts—stand to benefit disproportionately from House Farm Bill changes.

Conservation – The Environmental Quality Incentives Program (EQIP) and the Conservation Stewardship Program (CSP) are the primary working-lands conservation programs in the farm bill . The House version of the Farm Bill shifts CSP contracting authority to EQIP, essentially eliminating CSP as a separate program.

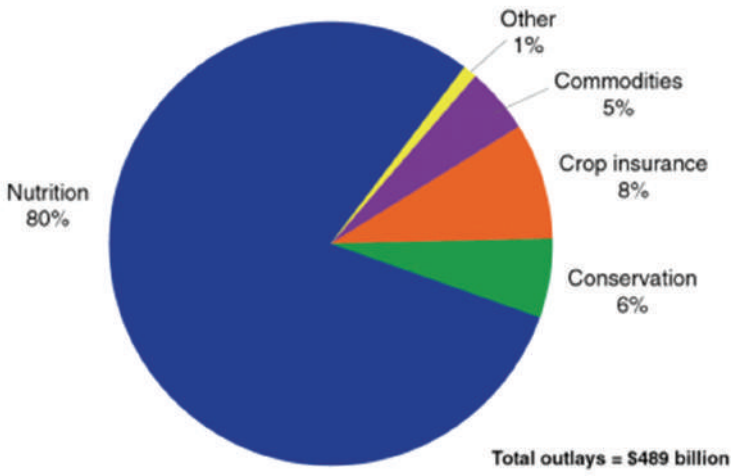
In addition, the House bill increases the Conservation Reserve Program (CRP) acreage cap from 25 million acres in 2019 to 29 million acres in 2023 (compared with 24 million acres in the 2014 legislation), but also reduces rental rates for acres re-enrolled in CRP; specifically, the House would set first-time CRP enrollment contracts at 80% of the estimated average county rental rate; for the first re-enrollment, the rental rate would be at 65% of the average, followed by 55% for the second re-enrollment, 45% for the third re-enrollment and 35% for the fourth re-enrollment. The Senate meanwhile increased the CRP acreage cap to 25 million acres and limits rental rates to 88.5% of the estimated county average rental rate .

Conclusion

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. The 2018 edition of the Farm Bill includes additional House-Senate, regional, and partisan differences that are complicating the conference committee negotiations.

Whether a compromise 2018 Farm Bill can be developed in a short period of time in a lame-duck session of Congress yet this year, an extension of the 2014 legislation is approved, or a Farm Bill re-write starts with the new Congress in 2019 remains to be seen.

Projected outlays under the 2014 Farm Act, 2014-2018



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

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Regulatory Update

by Matthew Berger

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Through much of 2018, significant attention has been focused on the midterm elections—which, in Minnesota, includes four highly contested congressional races, two United States Senate races (as a result of the resignation of Senator Franken), and an open seat for Governor. Farmers have also been closely following the negotiations in Congress regarding a new 2018 Farm Bill. But several important developments regarding key government regulations have received less attention. This article will provide a brief update regarding significant regulatory issues that may impact your farming operation.

"Waters of the United States" Rule

On June 29, 2015, the United States Environmental Protection Agency (EPA) and the Army Corps of Engineers published a new rule to define the term "waters of the United States." This term is significant because it defines the scope of the federal government's regulatory authority under the Clean Water Act. The new regulatory definition of "waters of the United States" dramatically expanded the scope of this term beyond the historical understanding of "navigable waters" to potentially include waters that are located as far as 4,000 feet from traditional navigable waters. The new "waters of the United States" rule was slated to take effect on August 28, 2015, and would significantly increase the reach of the federal government's regulatory power.

The new "waters of the United States" rule was promptly challenged by 31 states and 53 other parties (including several agricultural trade groups) in several separate lawsuits in various federal district and appellate courts around the country. On October 9, 2015, the United States Court of Appeals for the Sixth Circuit entered a nationwide stay prohibiting the enforcement of the new "waters of the United States" rule pending a final decision on its validity.

While the nationwide stay was in effect, President Trump took office and, on February 28, 2017, issued an Executive Order with respect to the 2015 "waters of the United States" rule. The Executive Order states that "[i]t is in the national interest to ensure the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under

the Constitution." Consistent with this purpose, the Executive Order directed the EPA and the Army Corps of Engineers to undertake a two-step rulemaking process to rescind or revise the 2015 "waters of the United States" rule (Step One) and adopt a new, different definition of "waters of the United States" (Step Two).

The EPA and the Army Corps of Engineers initiated Step One of this process on July 27, 2017, by publishing for public comment a new Proposed Rule to rescind the 2015 "waters of the United States" rule and reinstate the prior standards defining the scope of "waters of the United States." The agencies published a supplemental notice requesting additional public comments on the proposed rule on July 12, 2018. This rulemaking process is still underway, and no final action on the proposed rescission of the 2015 "waters of the United States" rule has been adopted at this time.

In the meantime, on January 22, 2018, the United States Supreme Court unanimously held that the challenges to the 2015 "waters of the United States" rule were required to be brought in the federal district courts—not the federal appellate courts—and that the Sixth Circuit Court of Appeals therefore lacked jurisdiction over the cases challenging the 2015 rule. Although this decision was based on legal procedures, and not the actual substance of the 2015 rule, the Supreme Court's ruling had one important practical effect: the nationwide stay entered by the Sixth Circuit and prohibiting the enforcement of the 2015 "waters of the United States" rule was wiped out.

Anticipating the United States Supreme Court's decision, and the potential removal of the nationwide stay, the EPA and the Army Corps of Engineers published a new proposed rule on November 22, 2017, that would have delayed the effective date of the 2015 "waters of the United States" rule for two additional years to allow sufficient time for the substantive rulemaking process under the Executive Order to be completed.

Ultimately, after a brief public comment period that was limited in scope, the EPA and the Army Corps of Engineers adopted the two-year "suspension" of the 2015 "waters of the United States" rule on February 6, 2018 (only 15 days after the Supreme Court's decision). This "suspension" rule, however, was challenged in federal court by several activist groups, and on August 16, 2018, the United States District Court for the District of South Carolina issued a nationwide injunction prohibiting the enforcement of the "suspension" rule.

The end result of these legal maneuvers is a confusing patchwork of regulations in which the scope of the federal government's regulatory authority under the Clean Water Act depends on where a particular farming operation is located. Several legal challenges to the validity of the 2015 "waters of the United States" rule are pending before various federal district courts around the country. In some of these cases, the federal district courts have entered orders staying the effect of the 2015 rule in specific geographical areas. As of September 18, 2018, the 2015 rule is in effect in 23 states (including Minnesota and Illinois) and the District of Columbia. In the remaining 27 states (including Iowa, Nebraska, North

Dakota, South Dakota, and Wisconsin), the 2015 rule is not in effect, and the old standards continue to apply.

The ongoing rulemaking process by the EPA and the Army Corps of Engineers to rescind the 2015 "waters of the United States" rule offers some hope of clarity, but it is currently unclear when the agencies will issue a final rule. And when they do, it is likely to be challenged by activist groups seeking to preserve the excessive federal authority under the 2015 rule. Thus, the uncertainty over the "waters of the United States" rule appears likely to continue for the foreseeable future. Further information is available from the United States Environmental Protection Agency at https://www.epa.gov/wotus-rule (last accessed November 5, 2018).

Reporting of Air Emissions from Livestock Facilities

Two federal statutes—the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA)—generally require owners and operators of a "facility" to report releases of certain "hazardous substances" above specified quantities to the National Response Center (operated by the United States Coast Guard), the EPA, and state and local emergency planning and response agencies. Both ammonia and hydrogen sulfide are identified as "hazardous substances" and require reporting for emissions of 100 pounds per day or more.

In December 2008, the EPA published a regulation that exempted all farms from the federal reporting requirements under CERCLA—and most farms from the state and local reporting requirements under EPCRA—with respect to releases into the air of hazardous substances from animal waste. But in a legal challenge brought by several activist groups, the United States Court of Appeals for the District of Columbia ruled in April 2017 that the farm exemption to these reporting requirements was invalid.

The effect of this court decision would have been to require air emission reports by livestock facilities that emit more than 100 pounds per day of ammonia or hydrogen sulfide. This requirement would have been difficult for farmers to implement as most facilities do not routinely measure air emissions and there is no generally accepted method for estimating emissions from facilities. And while the reporting requirement also would have imposed a significant administrative burden on federal, state, and local governmental agencies that would be required to receive these reports, the intended benefits from these reports—i.e., improved information for emergency planning and responses—would not be realized in the case of reports of routine air emissions from animal waste at farms.

Recognizing these realities, the EPA published new administrative guidance indicating that routine air emissions generated from animal waste on farms do not require reports to state and local emergency response agencies under EPCRA because animal waste is a substance that "is used in routine agricultural operations" and therefore is not a substance from which reporting is required under EPCRA. In addition, Congress enacted—and President Trump signed—the Fair Agricultural Reporting Method (FARM) Act in March 2018, which specifically exempts "air emissions from animal waste (including decomposing animal waste) at a farm" from the federal air emission reporting requirements under CERCLA.

On October 30, 2018, the EPA announced that it is proposing a new regulation to formally adopt the administrative guidance and exempt "[a]ir emissions from animal waste (including decomposing animal waste) at a farm" from the state and local reporting requirements under EPCRA. The rule will be open for public comment for 30 days once the notice is formally published in the Federal Register. Further information is available from the United States Environmental

Protection Agency at https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms (last accessed November 5, 2018).

Application of Nitrogen Fertilizer

During July 2018, the Minnesota Department of Agriculture held a series of public hearings with respect to its Proposed Rules Governing Groundwater Protection (i.e., the Nitrogen Fertilizer Rule). The proposed rules would generally prohibit the fall application of nitrogen fertilizer in vulnerable groundwater areas (as indicated on a map to be prepared and published each year by the Minnesota Department of Agriculture) and in drinking water supply management areas where nitrate-nitrogen levels have been measured at a level of at least 5.4 mg/L at any point in the previous ten years. The proposed rules would also allow the Minnesota Department of Agriculture to designate a mitigation level for drinking water supply management areas where nitrate-nitrogen levels exceed certain thresholds and, if the nitrate levels in these areas are not reduced, to eventually impose additional restrictions on the use of nitrogen fertilizer. The proposed rules would not regulate the application of manure, which is separately regulated by the Minnesota Pollution Control Agency.

Following the public hearings, an administrative law judge issued a report requiring the Minnesota Department of Agriculture to make certain changes to the proposed rules. The Department also voluntarily agreed to make certain additional changes to the proposed rule based on public comments. The administrative law judge, however, generally concluded that the Department could proceed to adopt the proposed rules subject to such modifications. It is anticipated that the Minnesota Department of Agriculture will adopt a final rule restricting the use of nitrogen fertilizer prior to the end of Governor Dayton's term in January 2019. Once adopted, these rules may be subject to judicial challenge. Further information is available from the Minnesota Department of Agriculture at https://www.mda.state.mn.us/nfr.

Looking Ahead

A number of additional regulatory issues are also looming on the horizon. For example, in December 2016, during the closing days of President Obama's administration, the Grain Inspection, Packers and Stockyards Administration within the United States Department of Agriculture proposed new federal regulations on swine production and poultry grower contracts. The proposed regulations also sought to reverse longstanding federal law and would allow lawsuits under the federal Packers and Stockyards Act to be brought without any actual harm to competition in the marketplace. These rules were subsequently withdrawn in October 2017 under President Trump's administration. However, in a recent court hearing, the United States Department of Agriculture has indicated that it intends to reopen the rulemaking process on the proposed rules in the spring of 2019.

Additionally, the United States Food and Drug Administration and the United States Department of Agriculture held a joint public meeting to gather testimony and public comments regarding lab-grown protein products (i.e., fake meat). These hearings represent an early step to consider whether these lab-grown protein products may be labeled and sold to consumers as natural "meat" and the types of safety testing, regulations, and inspections that these lab-grown products will be required to pass. The public meeting may lead to a formal rulemaking process by one or both of the federal agencies regarding these issues. Some states are also considering laws or regulations regarding such fake meat products.

CASE LAW UPDATE *by Rick Halbur and Mark Ullery*

AgCountry Farm Credit Services, ACA v. Elbert, 2018 WL 2090617 (Minn. App. 2018), review denied (Minn. August 7, 2018).

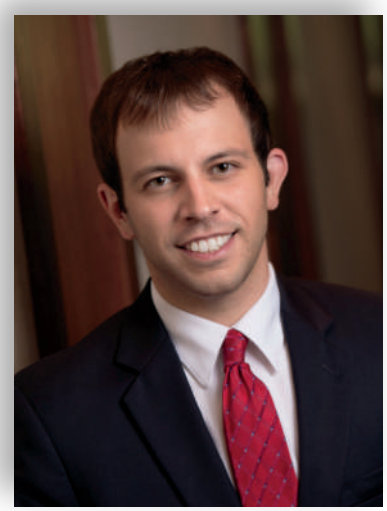
THE PARTIES: The appellant-insured in this case was Richard S. Elbert ("Elbert"), a farmer near Olivia, Minnesota. The respondent-insurer in the case was AgCountry Farm Credit Services, ACA ("AgCountry").

THE FACTS: Elbert purchased multi-peril crop insurance and hail insurance from AgCountry, successor-in-interest to United FCS, for Elbert's 2015 farming operation. Elbert failed to make his crop insurance premium payment by the contractual deadline. As a result, AgCountry filed a civil action to collect the crop insurance premium. Elbert conceded that the insurance premium was due and owing, but counterclaimed that AgCountry's damages were the result of its own negligence. Specifically, Elbert asserted that AgCountry failed to include a 118.8–acre tract of Elbert's crop land in the insurance policy. Elbert was unable to harvest the crop grown on the 118.8–acre tract and claimed that, if the land had been properly covered under his insurance policy, he would have received an insurance reimbursement.

THE DISPUTE: The district court granted summary judgment in favor of AgCountry on its breach-of-contract claim and on Elbert's counterclaim. The district court found that AgCountry satisfied its duty of care by acting in good faith and by following Elbert's express instructions, which resulted in AgCountry procuring the precise amount of insurance coverage that Elbert had requested. The district court determined that there were no genuine issues of material fact to support Elbert's negligence counterclaim and dismissed it with prejudice. Elbert subsequently appealed the dismissal of his negligence counterclaim and argued that the district court erred in determining that no genuine issues of material fact existed.

LEGAL ISSUES: The issue presented to the Court of Appeals was whether the district court erred in dismissing Elbert's negligence counterclaim against AgCountry.

CONCLUSIONS: The Court of Appeals affirmed the district court's dismissal of Elbert's negligence counterclaim. The Court affirmed the district court's decision because AgCountry satisfied its duty of care by acting in good faith and by following Elbert's express instructions regarding his insurance coverage.



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Specifically, the undisputed facts showed that Elbert submitted a crop-insurance application to AgCountry identifying the acreage that Elbert sought to have insured. AgCountry subsequently sent Elbert a letter detailing his insurance coverage based on Elbert's crop-insurance application, and the letter instructed Elbert to review the information and notify the company of any errors. Elbert did not alert AgCountry that the 118.8–acre tract of land was missing from the policy, and the final 2015 crop insurance policy did not include that parcel of land. While Elbert argued that AgCountry should have known about the applicable 118.8-acre parcel and accordingly insured the same, Elbert failed to produce any evidence in support of this argument. Rather, Elbert simply asserted that he provided AgCountry with FSA-578's that supposedly included the 118.8–acre parcel, but he failed to introduce copies of his FSA-578 forms into the record in opposition to AgCountry's summary judgment motion. Consequently, the Court of Appeals concluded that Elbert's arguments regarding the information in his FSA-578's were simply "bare allegations" that could not defeat AgCountry's summary judgment motion.

Monsanto Glyphosate Cancer Cases.

THE PARTIES: Over 8,500 plaintiffs in thousands of state and federal lawsuits across the United States are suing Monsanto alleging that the company's glyphosate-based weed-killer herbicides, including Roundup, caused cancer among the thousands of claimants. Specifically, the plaintiffs are individuals alleging that exposure to glyphosate-based sprays caused the claimants' cancer. Monsanto is a large agrochemical company.

THE FACTS: Dewayne Johnson v. Monsanto Company, Case No. CGC-16-550128, in San Francisco, California was the first of these glyphosate cancer cases that went to trial. Mr. Johnson was a former pest control manager for a California county school system. He applied glyphosate-based sprays up to thirty times a year and subsequently developed non-Hodgkin's lymphoma, a cancer of the lymph system. Mr. Johnson alleged that his cancer was caused by Monsanto's Roundup and Ranger Pro, another Monsanto glyphosate herbicide and that Monsanto failed to warn him of the cancer risks posed by Monsanto's glyphosate sprays. Mr. Johnson's case was brought to trial in an expedited manner because his doctors said that he was unlikely to live past 2020. In August 2018, the jury in the Dewayne Johnson case awarded Mr. Johnson a total of $289 million in damages, of which $39 million was awarded as compensatory damages and $250 million was awarded as punitive damages.

THE DISPUTE AND LEGAL ISSUES: The disputes between the plaintiffs and Monsanto and the primary legal issues in these cases are (1) whether glyphosate-based herbicides cause cancer and (2) whether Monsanto failed to warn claimants of the alleged cancer risks posed by these sprays.

CONCLUSIONS: The jury in the Dewayne Johnson case agreed with Mr. Johnson and awarded him a total of $289 million in damages. Monsanto filed several post-trial motions in the Dewayne Johnson case following the August 2018 jury verdict wherein Monsanto requested a judgment notwithstanding the verdict and a new trial. Monsanto argued at trial and in its post-trial motions that at least forty years' worth of research showed that glyphosate-based herbicides are safe and do not cause cancer, including Mr. Johnson's non-Hodgkin's lymphoma. Initially, the judge issued a tentative judgement notwithstanding the verdict eliminating the full $250 million in punitive damages, but ended up reducing the punitive damages award to about $39 million.

An appeal is likely regardless of the outcome of Monsanto's post-trial motions. More lawsuits were filed against Monsanto by claimants following the multi-million dollar jury verdict in the Dewayne Johnson case. In sum, these cases are far from over, and further developments in these cases will be addressed in future DIRT articles.

Cartway Denied Across State-Owned Property Put to Public Use

In re Amended Cartway Petition of Harri, 2018 WL 2090854 (Minn. App. 2018), review denied.

THE PARTIES: The Petitioners were landowners who petitioned their town board to establish a cartway across adjoining property to a public road. The main opponent was the University of Minnesota, which owned the land over which the proposed cartway would have crossed.

THE FACTS: The Petitioners had no access to their property except over water or land owned by others. They petitioned their town board under Minn. Stat. § 164.08, subd. 2(a) to establish a cartway across several adjacent parcels of property, one of which was owned by the University of Minnesota and therefore constituted state-owned land. The University of Minnesota used its parcel for ecological and forestry research.

THE DISPUTE: The University of Minnesota opposed the petition, claiming that the cartway would adversely affect the use of its parcel for research. The town board denied the petition on the basis that it did not have legal authority to establish a cartway over state-owned land. Petitioners appealed to the district court. The district court dismissed their appeal, and they appealed to the Minnesota Court of Appeals.

LEGAL ISSUES: The issue presented to the Court of Appeals was whether the district court and the town board erroneously determined there was a lack of legal authority to establish the cartway across state-owned land.

CONCLUSIONS: The Court of Appeals affirmed the town board and the district court. The Court relied upon an earlier decision (*Silver v. Ridgeway*, 733 N.W.2d 165 (Minn. App. 2007)) in which it had determined that (1) the establishment of a cartway is an exercise of eminent domain; (2) a lesser subdivision of government may not exercise eminent domain over state-owned land absent authority expressly conferred by the legislature or clearly implied from a statute; and (3) Minn. Stat. § 164.08, subd. 2(a) does not provide such implied authority where the state-owned land is being put to public use. The Court concluded that the University was putting the parcel at issue to public use because it was using it as a research area, and that *Silver* therefore controlled even though the district court had found that the cartway would likely not destroy or impair the parcel's research value and even though there was no alternative route for the cartway.

Referees' Report in a Partition Action May Be Disregarded by the District Court Only in Extreme Cases

Neumann v. Anderson, 916 N.W.2d 41 (Minn. App. 2018), review denied.

THE PARTIES: The parties were three siblings who each owned an undivided one-third interest in two parcels of rural property. One of the siblings (Pronschinske) and her spouse lived on the property, used both parcels for their organic dairy operation, and had made substantial capital improvements to the property.

THE FACTS: One of the siblings (Neumann) commenced an action seeking partition of the two parcels. Pursuant to statute, referees were appointed by the district court. After conducting their investigation and analysis, the referees issued a report which recommended that both parcels be awarded to Pronschinske, with Pronschinske to pay Neumann and the third sibling the value of their respective one-third interests.

THE DISPUTE: Neumann brought a motion to set aside the referees' report and Pronschinske moved for it to be adopted. The district court rejected the report and concluded that the parcels should be physically divided so that each sibling would own an equal amount of property, even though the referees had concluded that such a division would be prejudicial to all three co-owners. Pronschinske then appealed.

LEGAL ISSUES: The issue presented to the Court of Appeals was whether the district court had erred by setting aside, as opposed to confirming, the referees' report.

CONCLUSIONS: The Court reversed the district court, concluding that it had failed to give proper deference to the referees' report. The Court noted that a referees' report must be given considerable deference by a district court similar to that given to a jury verdict, and may be rejected only in extreme cases where the report is based on wrong principles or where the referees have made a grossly unequal allotment. The Court found neither situation to exist in this case where the information which had been received by the referees established that Pronschinske wished to remain on the property and would sustain substantial hardship if the property were to be physically divided among the siblings, and both Neumann and the third sibling had stated that they wanted the property to be sold (despite Neumann's attorney's subsequent argument that the property should be divided). The Court also held that the district court, upon rejecting the report, acted improperly by ordering a specific partition remedy without first remanding the matter back to the referees or appointing new referees.

Challenge to Land-Use Ordinance Amendment Banning Mining of Industrial Minerals Court Rejects

Minnesota Sands, LLC v. County of Winona, --- N.W.2d --- (Minn. App. 2018).

THE PARTIES: Minnesota Sands is a mining company which challenged an amendment to a Winona County, Minnesota zoning ordinance banning industrial mineral mining throughout the county.

THE FACTS: Minnesota Sands obtained leases with a number of landowners in Winona County to mine silica sand for use in fracking operations. At the time Minnesota Sands acquired the leases, this type of mining required a conditional use permit ("CUP"). Subsequently, the county adopted an amendment to its zoning ordinance prohibiting all industrial mineral operations (including the mining of silica sand) on a county-wide basis.

THE DISPUTE: Minnesota Sands sued the county, alleging that the amendment was invalid on the grounds that it violated both the Minnesota and United States Constitutions. The county moved for summary judgment which the district court granted, and Minnesota Sands appealed to the Minnesota Court of Appeals.

LEGAL ISSUES: The issues presented to the Court of Appeals were (1) whether the amendment violated the dormant Commerce Clause of the United States Constitution; and (2) whether it constituted a regulatory taking of Minnesota Sands' compensable property interest for which Minnesota Sands was owed just compensation under both the state and federal Constitutions.

CONCLUSIONS: The Court of Appeals affirmed the district court's grant of summary judgment in favor of the county. The dormant Commerce Clause prohibits a state from unduly burdening or discriminating against interstate commerce. The Court found that the amendment did not favor in-state interests over out-of-state interests because it applied equally to both (with the party challenging the ordinance in fact being a Minnesota company located within the county). Further, even though the ordinance mentioned that silica sand is valuable for use in fracking and fracking is done only outside of Minnesota, the ordinance banned all industrial mineral mining regardless of its end use, which would include use in other industries which do exist within the state. The Court also found that the fact the county had granted a CUP to another company prior to the enactment of the amendment did not affect its analysis; restrictions imposed by governmental bodies are subject to preexisting uses which are already established.

With respect to the argument that there was a regulatory taking of compensable property, the Court concluded that Minnesota Sands did not possess any compensable property interest. Even though Minnesota Sands held leases with the property owners, it did not possess any right to mine silica sand as of the time the amendment was enacted because it had failed to obtain the required CUPs to conduct mining operations (in fact, it had not even applied for CUPs despite having had adequate time to do so).

4th Circuit Rules that Pollutant Discharge Passing Through Groundwater Having a Direct Hydrological Connection to Navigable Waters Violates the Clean Water Act

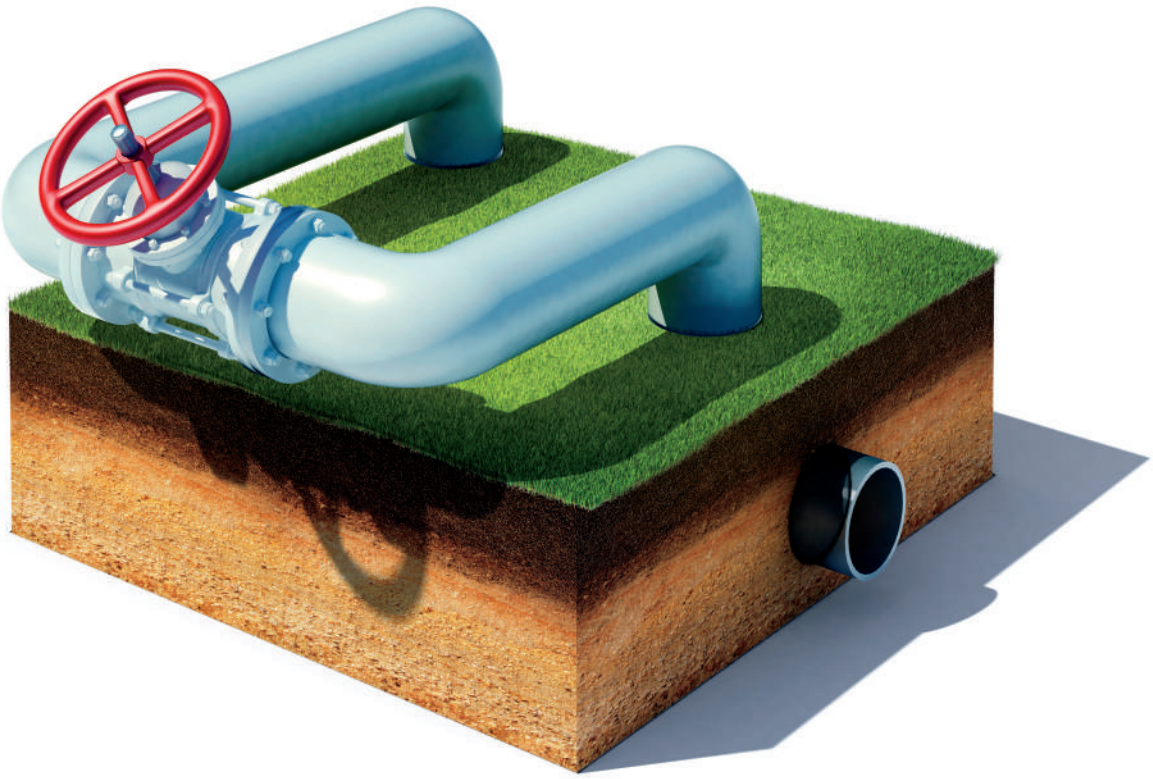
Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir. 2018).

THE PARTIES: Upstate Forever is one of two conservation groups (collectively the "Plaintiffs") which sued Kinder Morgan, the owner of an underground gasoline pipeline in South Carolina, under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 – 1387.

THE FACTS: Kinder Morgan's pipeline ruptured in 2014, spilling several hundred thousand gallons of gasoline which seeped into nearby waterways. Even after the pipeline was repaired and cleanup conducted, over 200,000 gallons allegedly remained unrecovered.

THE DISPUTE: The Plaintiffs commenced a "citizen suit" against Kinder Morgan seeking remedial relief under the CWA, which prohibits the discharge of a pollutant from a point source into "navigable waters." There was no claim that the gasoline had been discharged directly into "navigable waters." Rather, the contention was that it had reached such waters via ground water, but that this was nevertheless sufficient to state a claim. After the federal district court dismissed the action both on grounds of jurisdiction and failure to state a claim, Plaintiffs appealed to the 4th Circuit which vacated the dismissal and remanded the case for further proceedings.

LEGAL ISSUES: The primary issue considered by the 4th Circuit, which was one of first impression in that Circuit, was whether the discharge of a pollutant that moves through ground water before reaching navigable waters can constitute a discharge of a pollutant under the CWA.



CONCLUSIONS: The 4th Circuit concluded that such a discharge may constitute a violation of the CWA, but that a plaintiff "must allege a direct hydrological connection between ground water and navigable waters" in order to state such a claim. The Court noted that whether a sufficient connection exists requires a factual inquiry in which several factors are to be considered, including the distance the pollutant is alleged to have traveled. In this particular case, the Plaintiffs alleged that the pollutants traveled no more than 1,000 feet before reaching navigable waters, and the Court stated that this "extremely short distance, if proved, provides strong factual support for a conclusion that Kinder Morgan's discharge is covered under the CWA."

Kinder Morgan has asked the United States Supreme Court to review this decision.

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- Drafted both turn-by-turn and long-term independent grower agreements for swine producers
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- Structured multi-state production and distribution systems
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