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The Law and Constancy of Change

by Daniel J. Schwartz

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Scholars and leaders from antiquity to contemporary times have often reflected on the inevitability of change. The Greek philosopher Heraclitus is credited with the quote, "Change is the only constant in life." Centuries later, our own President John F. Kennedy went so far as to say, "Change is the law of life."

By any measure, agriculture is no exception to the law and constancy of change. When many of our grandparents and great-grandparents first started farming, they were still using threshing machines to separate the wheat from the chaff. When I was a kid (which doesn't seem that long ago), it was not uncommon for pigs to be raised in makeshift, partially roofed barns. Today, fields are planted and harvested using GPS-guided tractors and combines. And pigs are housed in climate-controlled barns equipped with structures and technologies to protect them from the elements and disease. I'm sure many of our readers could share their own anecdotes proving the law and constancy of change and its impact on farming and agriculture over the course of their own lifetimes.

The laws shaping how farming may be practiced and how farmers may conduct their business are also ever evolving. And rapidly so. Since our last edition of DIRT, the United States Supreme Court issued a decision that (at least for the time being) will allow the State of California to dictate how farmers in Minnesota and other states manage their commercial sow farms. Closer to home, Governor Walz signed into law what has been characterized by some legal commentators as one of the strictest state non-compete laws in the U.S. This edition of DIRT offers insights into how these and other developments in the law will impact the clients we serve and the agricultural communities in which we live and work.

Livestock Risk Protection Insurance: An Alternative Risk-Management Tool

by Daniel J. Schwartz

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"Expect the best. Prepare for the worst. Capitalize on what comes." This is but one of the many pieces of sage advice shared by author and motivational speaker, Zig Ziglar, with his audiences and readers over the course of his distinguished career.

On the forefront of what farmers might expect, prepare for, and capitalize on is the price they will receive for the livestock they raise and sell. A common practice employed by farmers to prepare for declining livestock prices is to buy and sell financial instruments called "derivatives," such as futures contracts and options. While participating in the derivatives market may be an acceptable risk-management tool for some, there are several downsides as well, including the possibility of margin calls.

The U.S. Department of Agriculture (USDA) offers farmers an alternative to trading in derivatives through its Livestock Risk Protection (LRP) insurance program. This article summarizes what LRP insurance is, how it may be obtained, and some of its benefits and drawbacks that livestock farmers may want to consider before deciding to purchase coverage.

What is LRP Insurance?

LRP insurance is a federally sponsored program available for farmers who raise and sell swine, fed cattle, and feeder cattle. It is designed to protect against declining market prices for periods when producers typically sell market weight livestock. Policies range from seventy percent (70%) to one hundred percent (100%) of the expected value of the covered animal at the end of the insured period. Plans are available throughout the year with endorsements covering spans of 13, 17, 21, 26, 30, 34, 39, 43, 47, or 52 weeks, which may be limited based on insured type. When the actual ending value falls below the coverage price, the policy pays out the difference between these two values.[1]

While perhaps obvious to some, farmers must be aware that LRP insurance protects against declining market prices only. LRP insurance does not cover other causes of loss, such as

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[1] Actual ending value is based on the weighted prices from the U.S. Dep. of Agriculture's Agricultural Marketing Service. *See* Livestock Reports, U.S. Dep. of Agriculture Risk Management Agency, available at https://www.rma.usda.gov/Information-Tools/Livestock-Reports (last visited Aug. 7, 2023).

mortality, disease, or physical damage to livestock. While there may be other insurance available to protect against such losses, farmers should not rely on LRP insurance for this purpose.

What is the Process of Obtaining LRP Insurance?

To receive coverage for LRP insurance, a farmer must first seek out a Risk Management Agency (RMA)-approved livestock insurance agent.[2] Producers must then submit a one-time application for the type of coverage they desire, whether that be swine, fed cattle, or feeder cattle. After the application is accepted by the RMA, a producer may then buy specific coverage endorsements throughout the year, up to the following amounts:

- Feeder Cattle (expected weight up to 1,000 pounds): 12,000 head per endorsement; 25,000 head annually.[3]
- Fed Cattle (weighing between 1,000 and 1,600 pounds): 12,000 head per endorsement; 25,000 head annually.
- Swine: 70,000 head per endorsement; 750,000 head annually.

LRP insurance for feeder cattle,[4] fed cattle,[5] and swine[6] is available in all counties in all states within the U.S. Feeder cattle plans also provide two weight ranges: 100-599 pounds (Weight 1), and 600-1,000 pounds (Weight 2).

While you may fill out an application for LRP insurance at any time, the insurance does not attach until you purchase a specific coverage endorsement. A single application can cover multiple coverage endorsements. However, protection does not start until the day you buy coverage, and the RMA approves the purchase.

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[2] *See* Agent Locator, U.S. Dep. of Agriculture Risk Management Agency, available at https://www.rma.usda.gov/en/Fact-Sheets/National-Fact-Sheets/Livestock-Risk-Protection-Swine (last visited Aug. 7, 2023).

[3] It should be noted that each LRP insurance year runs from July 1 of a calendar year to June 30 of the following calendar year.

[4] *See* Livestock Risk Protection Feeder Cattle, Risk Management Agency Fact Sheet, available at https://www.rma.usda.gov/Fact-Sheets/National-Fact-Sheets/Livestock-Risk-Protection-Feeder-Cattle (last visited Aug. 7, 2023).

[5] *See* Livestock Risk Protection Fed Cattle, Risk Management Agency Fact Sheet, available at https://www.rma.usda.gov/Fact-Sheets/National-Fact-Sheets/Livestock-Risk-Protection-Fed-Cattle (last visited Aug. 7, 2023).

[6] *See* Livestock Risk Protection Swine, Risk Management Agency Fact Sheet, available at https://www.rma.usda.gov/en/Fact-Sheets/National-Fact-Sheets/Livestock-Risk-Protection-Swine (last visited Aug. 7, 2023).

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What are the Benefits of LRP Insurance?

A main benefit of LRP insurance is that it limits the risk of market declines while still allowing a farmer to benefit from potential price increases. For instance, assume a Minnesota farmer producing feeder cattle took out a thirteen (13) week policy on August 5, 2022, for steers weighing between 100-599 pounds (Weight 1, explained above) at a coverage level of 99.1%. The coverage price for that cattle was set at $203.87, while the actual end value of the cattle was only $194.60.[7] The farmer who took out the policy would have received a $9.27 per hundredweight (cwt) payment under the policy.[8] If in this same example the markets had improved and the end value exceeded the coverage price of $203.87, the farmer would not have received any insurance payment. But the farmer would still be able to receive the benefits of increased prices for the cattle he ultimately sold. Moreover, unlike certain derivatives instruments, the farmer would not have the added burden of paying unpredictable margin calls on its short positions. The premium the farmer paid for the coverage is a definite, fixed amount, thereby allowing the farmer to more easily predict and manage his cash-flow for the duration of the policy.

LRP insurance also affords producers a significant degree of flexibility to tailor coverage and manage risk to their particular operation and needs. There is no minimum head count. A farmer could literally insure a single animal. Farmers with varying numbers of livestock, thus, all stand to benefit from LRP insurance. Further, because insurance may be purchased for 10 different coverage periods spanning from 13 weeks to 52 weeks on almost any given weekday, farmers can choose a coverage period based on the particular circumstances and risks their operation is facing at different points in time during the year.

What are the Drawbacks of LRP Insurance?

One obvious drawback of LRP insurance is that obtaining coverage is not free. Producers must pay a premium in order to obtain coverage. The amount of the premium is expressed on a per hundredweight (cwt) basis and is a function of the coverage level, endorsement length, and date of purchase. As might be expected, the premium increases as the coverage level increases. However, a portion of the premium is subsidized by the USDA. The amount by which the USDA will subsidize premiums has increased in recent years, which has made LRP insurance a more attractive option.

LRP insurance also has potential traps for the unwary. For example, if a farmer sells covered livestock more than sixty (60) days before the end of the coverage end date, the farmer risks forfeiting any insurance indemnity payment despite having to pay the entire insurance premium. Other events that could cause a loss or adjustment in the amount of insurance payment include failing to meet minimum targets weights at the coverage end date or failing to provide ownership records for covered livestock.[9]

Conclusion.

As set forth above, LRP insurance has attributes that may make it a more attractive alternative to certain livestock farmers when compared to derivatives-based risk management options. Coverage comes at a cost, however, and failure to adhere to the conditions to obtaining and maintaining LRP insurance could cause a loss or reduction in coverage. Farmers considering LRP insurance should discuss plan options with an RMA-approved insurance agent to determine whether there is a plan that suits their needs.

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[7] *See* LRP Coverage Prices, Rates, and Actual Ending Values – Report for 08/05/2022, available at https://public.rma.usda.gov/livestockreports/LRPReport.aspx (last visited Aug. 7, 2023).

[8] The farmer's total payment would depend on the total pounds for which he sought coverage Thus, if the farmer obtained coverage for 10,000 pounds of cattle, the $9.27 per hundredweight (cwt) difference between the coverage price and the actual end value would result in the farmer receiving total insurance proceeds in the amount $927.

[9] *See* United States Department of Agriculture, Livestock Risk Protection (LRP) Insurance Standards Handbook, 2023 and Succeeding Crop Years, at pp. 6-7, available at: https://www.rma.usda.gov/-/media/RMA/Handbooks/Privately-Developed-Products---20000/Livestock-Risk-Protection/2023-20010-Livestock-Risk-Protection.ashx?la=en.

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Staying Fit While Farming

by Randy Krzmarzick

Randy Krzmarzick
Guest Author, Sleepy Eye, MN

You might have heard. Exercise is good for you. I wish it were otherwise and that sitting around watching a ballgame with a beer was good for you. Perhaps in another dimension.

The good news is that what counts for exercise has broadened. You don't need a gym membership or a $2,000 elliptical. We've come to find out doing anything helps. Walking out the driveway to get the mail is exercise. Driving out in the car is not. Going upstairs to get a book is exercise. Asking your wife to do it is not. Pulling weeds in the garden is exercise. Thinking about is not.

Doctors report that exercise is like a prescription-free medicine. It can lower your risk of cardiovascular disease, stroke, and cancer. Our bodies weren't designed for lengthy periods of stasis. A nice way of saying it is, "Move it or lose it." Or less subtly, "Get off your fat rear end and do something."

There are exercise-deniers just like there are climate change-deniers. A friend of mine, who is both coincidentally, points out that the inventor of the treadmill died at the age of fifty-four. The inventor of Kentucky Fried Chicken lived till ninety-four. A hyperactive rabbit will live two years while the non-exercising turtle can live two hundred. I'm not sure about his extrapolations. Take them with a grain of salt. Unless you have high blood pressure. Then take them with a grain of salt substitute.

I try to jog, walk, or bike a few times a week. That used to be on the shoulder of Highway 14 near Sleepy Eye where I live. That road has gotten busier through the years, plus speeds have increased. I began to fear being sucked into the wake of a semitruck and ending up in Brookings.

Fortunately for me, Sleepy Eye built a paved trail around the lake. We call it the Lake Trail as part of it runs along comely Sleepy Eye Lake. But it is the Corn and Soybean Trail on the back side. Regardless, it beats an eighteen-wheel Peterbilt hurtling past you at sixty-eight miles per hour.

One thing about exercise, it becomes a conversation with your body. It helps if your brain and your body get along. If I have some difficult task, like shoveling grain in a bin on a hot summer day, my body will ask "What's this all about?" I explain that we have to do this and that if it cooperates, we'll have a beer later. That usually mollifies my body.

If I start to run, about a quarter mile in, my body asks if there's some point to this? I don't have a good answer. My body turns grumpy after that. We agree to disagree while I trudge forward the next three miles.

I sometimes complain to my wife after a jog that I feel old and fat and slow. It has long been a goal of mine to be young and thin and fast. At 67, I realize that might not be attainable anymore. I was young once, but never thin and fast. You can't give up on these things, though.

I have an app on my phone that measures speed and distance while I am running. Sadly, it has become a chronicler of my decline. It lets me see graphically my slower pace year by year. I know it's just being truthful with me. But it makes me think that we shouldn't necessarily keep track of things as we get older. Maybe it's best to lie to ourselves a bit. You know, fudge the numbers, cook the books.

When I was young (but not fast and thin), Jack Lalanne was on TV. Jack was a voice in the wilderness then, talking about exercise and nutrition and saying what everybody says now. I remember watching "The Jack LaLanne Show" after school because there wasn't anything else on. Literally. We only got one channel. I sat

on the couch watching with a bag of potato chips. Looking back, I wasn't really getting Jack's message.

Later came Richard Simmons. By then, we had more channels, and I could click past him sweatin' to the oldies. Besides, watching Richard's hair flop around was exhausting. Later came Jane Fonda's workout. I confess to enjoying those because I had a crush on Jane. Who didn't?

I grew up on the farm where I live and work now. Like most farms in the middle of the last century, there were multiple enterprises. My dad, Sylvester, had dairy, steers, sows, chickens, oats, hay, and corn. I never heard him talk about "exercising." When you work 12 to 14 hours of manual labor, the idea of going for a morning run doesn't calculate. There was cardiac in feeding the cows and strength training in shoveling manure.

I should add my mother Alyce here, too. Like most farmwives of that generation, she helped with all the farm enterprises. In addition, she attended to the care and feeding of seven children. My mom never expressed a desire to go to the gym.

When I was growing up, my parents were always willing to find ways for me to express myself physically. We called that "chores." Chores can keep a lad humble. I am thankful for lessons learned at the end of a scoop shovel and pitchfork.

As I reached the age of transgressing, I got to experience getting up early after stumbling home late. It was a common way my parents' generation taught my generation that life was not all fun and games. Now that I am older with some wherewithal, I probably could live a life of fun and games. But I go to bed by ten nowadays. That puts a cap on any fun and games.

Speaking of work on the farm, I feel cheated in this. When I was a kid, Harmon Killebrew was my favorite ballplayer. Still is. I remember reading those muscular arms that propelled Harmon's 573 major league homeruns could be credited to a youth spent baling hay in Idaho. I baled hay and hit one homerun in high school. I get that Harmon had talent, and I didn't. But it still seems patently unfair.

Like most farms today, I grow corn and soybeans. There are long days and hard work, but nothing comparable to my parents' world. A lot of hours are spent on a tractor. Thankfully, I have opportunities to get out of the cab to pick up rocks and to check how things are working on the ground. If not for those chances to climb down and up the tractor steps, my risk of developing "tractor butt" would be higher. Tractor butt is to farmers what scurvy was to sailors, a hazard of the occupation. Neither is pretty.

Speaking of exercise, I came across this cartoon. These two lawyers are walking along, and one says to the other, "I'd exercise more if it were billable." Ha! I love a good lawyer joke. I thought I should include that since this is for Gislason and Hunter. Lawyers have a sense of humor, right?

So, if you have read this far, I'd encourage you to get up and walk around a while. Maybe get a snack. Piece of fruit, not a candy bar. Then do some pushups. Well, that might be a bit much. But you get the idea.

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Expansion of the Beginning Farmer Tax Credit: What is the BFTC Program and How Can It Benefit You?

by Alexander H. Asawa

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It is no secret that the average age of the Minnesota farmer has steadily increased in recent years. With that in mind, the question of how to incentivize younger generations to start farming has become increasingly prevalent. With high start-up costs and fluctuating markets, getting new farmers in to agriculture is challenging.

However, Minnesota recognized these difficulties and launched the Beginning Farmer Tax Credit ("BFTC") in 2017. According to the Minnesota Department of Agriculture, the BFTC "provides an annual state tax credit to landlords and sellers who rent or sell farmland, equipment, livestock, and other agricultural assets to beginning farmers." A beginning farmer is defined as a Minnesota resident who: (1) wants to start farming or has started farming within the last 10 years; (2) provides the majority of labor and management on a farm

located in Minnesota; (3) provides positive earnings statements; (4) has a net worth of less than $979,000; and (5) enrolls in or has completed a farm business management program ("FBM").[1] A beginning farmer must apply as an individual, so if the farmer structures their business through a business entity, the farmer must be listed on the lease or sale documents and not their business entity.

Expansion to Tax Credits under the BFTC Program

Under the recent expansion to the BFTC program, landowners are further incentivized to sell land to beginning farmers. Elligible asset owners may claim the tax credit for as many years as the beginning farmer they work with is eligible. Here are the current tax credits available to asset owners under the BFTC:

	Tax Credit Amount	Maximum Tax Credit
Cash Rentals	10% of annual rental income.	$7,000
Share Crop Rentals	15% of annual rental income.	$10,000
Farmland Sales	8% of sale price, or 12% if the buyer is an emerging farmer.[2] (This is increased from a flat 5% previously.)	$50,000 (**increased from $32,000 previously.**)
All Other Sales (equipment, livestock, etc.)	5% of sale price	$32,000

Asset owners eligible for the BFTC may be an individual, trust, LLC, LLP, partnership, S-Corp, or other qualified pass-through entity; unfortunately this does not include c-corps. In May 2023, the MDA expanded the eligibility for individuals to include parents, grandparents, and siblings who sell farmland to a direct family member. This does not include non-land sales. This means that for the first time since the creation of the BFTC program, individually owned land can be sold to a direct family member while still taking advantage of the tax credit.

Tax credits are funded on a first come first serve basis so there is no guarantee that the tax credit will be available when you file. Therefore, the MDA recommends applications be submitted early in the year.[3] The application for the BFTC is in two parts, requiring both the beginning farmer and the asset owner to submit corresponding applications. More information and the online

[1] Beginning farmers are eligible for a nonrefundable tax credit equal to their FBM tuition, up to a maximum of $1,500. This tax credit is available for up to three years. Beginning farmers may also request to waive the FBM requirement if they have a 4-year agricultural degree, reasonable work experience in agricultural finance, or have already completed an approved FBM program. Starting in 2023, if a beginning farmer has already completed 30 credits of FBM courses, or the equivalent hours in another FBM course, the beginning farmer does not need to register for additional courses to satisfy the FBM requirement.

[2] Emerging Farmers include farmers or aspiring farmers who are women, veterans, persons with disabilities, American Indian or Alaskan Natives, members of a community of color, young (35 and younger), identify as LGBTQIA+, urban (reside in cities with a population over 5,000), and any other emerging farmers as determined by the commissioner.

application portal may be found at: www.mda.state.mn.us/bftc.

If you or your family own farmland individually or through a pass-through entity like an LLC or an LLP, and you know that a younger member of the family is interested in becoming a farmer or purchasing the family farm to take over operations, there is a potential tax credit available to take advantage of. If you have any questions regarding the BFTC program, you are encouraged to call the Minnesota Department of Agriculture, Beginning Farmer Tax Credit phone number: 651-201-6316 or email at mda.bftc@state.mn.us. If you are interested in selling your farmland and have questions on how to facilitate the sale or have questions on how a potential sale may affect your estate plan, there are many attorneys available who specialize in real property transactions and estate planning that would be happy to assist you further.

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[3] As of the time of publication, the due date for applications under the BFTC for 2023 has passed. The due dates for applications are generally around the same time each year. For reference, the due date for 2023 applications for cash rentals and share crop rentals was July 17, 2023; and the due date for applications for land sales, other sales, and Beginning Farmer FBM tuition reimbursement was November 1, 2023.

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Redtape Meets Wetlands: The Confounding Maze of Wetland Regulation

by Dean M. Zimmerli

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Many landowners might have read the headlines about the Supreme Court's wetland decision this year – *Sackett v Environmental Protection Agency* – and breathed a sigh of relief: "Finally, we can fill a little puddle on our own property without the government intruding on our private property!" But despite this decision, grain farmers and other landowners, particularly in Minnesota, need to pause. The web of wetland regulation is complicated, overlapping, and confusing, and the penalties for even accidental violations can be severe.

This confusion is understandable, and stems from the duplicative nature of wetland regulation and the lack of communication between multiple regulators, often resulting in violations even by landowners who try to follow the rules. The most familiar wetland regulations are the so-called Swampbuster rules enforced by NRCS and USDA. However, federal Clean Water Act rules also apply to some wetlands, though less now following the Sackett decision. At the state level, Minnesota's Wetland Conservation Act severely limits activity in protected areas. Finally, there may be wetland conservation easements granted in favor of state or federal governments which protect wetlands on particular pieces of property as a matter of contract. While these various regulations all have a similar goal of protecting wetland areas, which areas are protected and what activities are limited can vary from program to program, making it a difficult job to comply with all of them.

Federal Regulation: the Clean Water Act

Since 1972, the Clean Water Act ("CWA") has regulated the discharge of pollutants into "Waters of the United States." While the CWA applies to the industrial discharge of chemicals, it also applies to the placement of dredged material or other fill into waters. Thus, if a water is under the jurisdiction of the CWA, it cannot be filled without meeting certain regulations and obtaining a permit from the Environmental Protection Agency ("EPA") and/or Army Corps of Engineers ("ACOE").

These rules have been particularly contentious when applied to wetlands and small ponds that are not obviously connected to larger, navigable waters. The EPA and ACOE have historically applied an expansive scope of the CWA, seeking to regulate activities in even small wetlands so long as there was a

"significant nexus" to a navigable water, meaning the wetland had a significant effect on the chemical, physical, and biological integrity of a navigable water. This was applied to many wetlands and ponds on the theory that groundwater or similar connections caused an effect on nearby regulated waters. Thus, filling a small pond or slough in your backyard could require a costly and time consuming permit application.

In the Sackett decision earlier this year, the Supreme Court limited the reach of the CWA, holding that it does not apply to wetlands, temporary streams and similar water features unless there is a continuous surface water connection between the wetland or other water feature and a traditionally navigable waterway. This severely limited the number and types of wetlands that ultimately may be regulated by the EPA.

While the Sackett decision does allow landowners to breath some relief that filling and modifying their wetlands may be allowed without federal oversight, as will be seen below, there are a number of other regulations to contend with yet. Further, if the wetland or pond in question does have a surface water connection to a larger waterbody, a permit under the CWA may still be required.

Regulation by the USDA: Swampbuster Rules

Since the 1980s, farmers have had to comply with the so-called Swampbuster rules, first introduced in the 1985 Farm Bill. In general, the Swampbuster provisions prohibit a farmer from converting a wetland to make farming possible or from planting a crop on a wetland that was converted after 1985. A farmer who violates these provisions will be ineligible for farm program benefits until they comply, which includes federal crop insurance, other crop disaster programs, and FSA loan programs, including guaranteed loans and commodity loans. These financial consequences can be severe.

However, most farmers are familiar with how to comply with these rules. A landowner planning on adding new drainage to farmland can visit their local FSA office and request a certified wetland determination for their property by submitting a form AD-1026. The Natural Resource Conservation Services ("NRCS"), a group under the USDA, will evaluate the property and make several different classifications of land including wetland, farmed wetland, and non-wetland/prior converted.

Wetland areas cannot be farmed and cannot be drained and converted to non-wetland areas under the Swampbuster rules. Farmable wetlands are areas that have wetland characteristics including soil types, presence of water near the ground surface, and wetland plants, but have been partially drained or altered to allow crop production; these areas can generally be cropped, and existing drainage infrastructure can be repaired but not improved. Prior converted areas include areas that were wetlands but converted prior to 1985 and are treated the same as non-wetland areas; these lands are not subject any restrictions and can be cropped, drained, and improved without any problem with Swampbuster rules.

Regulation by the State of Minnesota: the Wetland Conservation Act.

Separate from federal protections, the State of Minnesota has its own Wetland Conservation Act ("WCA") which generally prohibits draining, filling, or otherwise impacting wetlands in Minnesota. The WCA is often enforced by county soil and water conservation districts, but may also be enforced by other county staff, cities, or watershed districts, depending on the location of the project.

In general, landowners seeking to complete a drainage project or other work that may impact wetlands can apply to the local government unit responsible for WCA enforcement (the "LGU") to determine the existence of a wetland (a wetland boundary and type application) or to determine whether the proposed activity will impact the wetland or fall under an exemption (as no-loss application). In a wetland boundary and

type application, the LGU applies guidance from the US Army Corps of Engineers on delineating wetlands to determine their scope and boundary. Like wetland determinations under the Swampbuster Act, the focus is on the existence of saturated soils and the presence of water-loving vegetation during normal conditions. And while the focus is on similar criteria, because the actual guidance documents relied on in applying the Swampbuster Act are different from the guidance applied under the WCA, so there are some wetlands that might be protected under the WCA even if not protected under the Swampbuster Act, or *vice versa*.

For a no-loss or exemption application, the LGU will determine whether the proposed activity will not cause a loss or impact to a protected wetland and is therefore permissible, or whether the activity may fall within one of several exemptions allowed under the rules. One such exemption relates to the repair or maintenance of an existing drainage system, so long as the maintenance does not drain wetlands that have existed 25 years before the activity. Therefore, landowners can generally repair and maintain existing drainage systems; but if those systems have been neglected for so long that new wetlands have formed or re-formed more than 25 years ago, repair work that ends up draining those wetlands may be prohibited.

It is important to note that some drainage work outside of the physical boundary of a wetland can still be prohibited by the WCA, if it nonetheless impacts and drains a wetland. The most common example is the installation of perforated drainage tile, which will have a "lateral effect," draining land on either side of it, sometimes from a surprising distance, depending on soil types and the depth of the tile. Landowners should carefully plan tile installation near wetlands or consult with the LGU to avoid inadvertent violations.

Regulation by Contract: Conservation Easements

There is finally the possibility that the land may be encumbered by voluntary conservation easements which protect wetlands or other habitat. One of the most common types of conservation easements across the upper Midwest are wetland easements granted by landowners to the US Fish and Wildlife Service (USFWL) for "prairie potholes." These easements were conceived as a way to protect small intermittent ponds which serve as important habitat for migratory waterfowl. Beginning in the 1960s, USFWL obtained easements over millions of acres of wetlands throughout the upper Midwest. Under these easements, landowners are contractually barred from taking activity that would fill or drain these protected easements.

Similar easements may be granted under various other programs. For example, Minnesota Reinvest in Minnesota easement program allows landowners to sell conservation easements in favor of the state of Minnesota, which could cover wetlands as well. Some local governments, tribes, or conservation groups may similarly be willing to purchase easements to protect wetlands or other important habitat. If violated, these easements can be enforced by a court, or may subject the landowner to criminal penalties.

Summary

The maze of regulation that applies to wetlands particularly in Minnesota is extensive. Even if a landowner thinks they have complied with one set of rules, they might be in violation of another. With drainage, erosion, and water quality increasingly becoming a focus of environmental groups and regulators, the emphasis on protecting wetlands is expected to increase. Landowners should be careful before undertaking drainage or other projects that have the potential to impact areas that may qualify as wetlands.

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Minnesota Law Changes in 2023 that All Employers Should Know

by Brittany R. King-Asamoa

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Legislation impacting all workplaces throughout the state and beyond was passed during Minnesota's 2023 legislative session. This article highlights three employment law changes with widespread impact that all employers should know but may not have seen in the 279-page Minnesota labor omnibus bill Governor Tim Walz signed on May 16, 2023.

Minnesota Noncompete Ban

The Minnesota legislature banned covenants not to compete signed on or after July 1, 2023. Covenants not to compete (or noncompetes) in any agreement or contract with an employee or independent contractor signed after this date are void and unenforceable, unless they meet limited exceptions involving a business sale or dissolution. Minnesota's law, codified at Minn. Stat. § 181.988, has no effect on agreements entered before July 1, 2023.

Employers cannot circumvent the new law with choice of law and venue provisions in employee contracts because the new law also limits choice of law and venue provisions. An employee primarily residing and working in Minnesota may now void any provision of an agreement or contract with the employer that: "(1) require[s] the employee to adjudicate outside of Minnesota a claim arising in Minnesota; or (2) deprive[s] the employee of the substantive protection of Minnesota law with respect to a controversy arising in Minnesota."[1]

Minnesota Pregnancy and Parenting Leave

As of July 1, 2023, Minnesota employees are eligible for up to 12 weeks of unpaid pregnancy and parenting leave as of the first day of their employment. This is a stark difference from previous eligibility requirements for this leave.

Previously, employees had to work for an employer with 21 or more employees for at least 12 months working an average number of hours equivalent to the employer's full-time employee to be eligible for this leave. The labor bill revised the definitions of "employee" and "employer" used in Minn. Stat. §§ 181.940 to 181.944, which encompasses Minnesota's pregnancy and parenting leave statute. Now, all employers having at least one employee must provide this leave to employees regardless of their length of service or hours worked for the employer.

Minnesota's pregnancy and parenting leave is unpaid leave that may be taken for the following reasons:

- By an employee who is the biological or adoptive parent (employee is adopting a child) in conjunction with the birth or adoption of that child; or
- By a female employee for prenatal care, or incapacity due to pregnancy, childbirth, or related health conditions.

Leave under this law "may be reduced by any period of: (1) paid parental, disability, personal, medical, or sick leave, or

[1] Minn. Stat. § 181.988, subd. 3.

accrued vacation provided by the employer so that the total leave does not exceed 12 weeks";[2] or (2) leave taken under the Family and Medical Leave Act of 1983 (FMLA) for the same qualifying reason available under Minnesota's pregnancy and parenting law.

Minnesota Earned Sick and Safe Time (ESST)

Beginning January 1, 2024, employees working at least 80 hours a year in Minnesota must earn paid ESST. The leave shall be earned by those employees regardless of their classification as full-time, part-time, or temporary employees.[3] ESST is defined to include all the employers paid leave systems. Thus, employers may satisfy ESST obligations by modifing current PTO policies rather than creating new leave.

ESST shall be available for the employee's use for any of the following reasons:

(1) Employee's own
   a. Mental or physical illness, injury, or health condition;
   b. Need for medical diagnosis, care or treatment of a mental or physical injury, or health condition; or
   c. Need for preventative medical or health care.

(2) To care for a family member
   a. With a mental or physical illness, injury, or health condition;
   b. Who needs medical diagnosis, care or treatment of a mental or physical injury, or health condition; or
   c. Who needs preventative medical or health care.

(3) Absence due to domestic abuse, sexual assault, or stalking of the employee or employee's family member for the purpose of:
   a. Seeking medical attention related to physical or psychological injury or disability caused by domestic abuse, sexual assault, or stalking;
   b. Obtaining services from a victim services organization;
   c. Obtaining psychological or other counseling;
   d. Seeking relocation or taking steps to secure an existing home due to domestic abuse, sexual assault, or stalking; or
   e. Seeking legal advice or taking legal action, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from domestic abuse, sexual assault, or stalking.

(4) Closure of the employee's place of business due to weather or other public emergency

(5) To care for a family member whose school or place of care closed due to weather or other public emergency

(6) Employee is unable to work or telework because the employee is:
   a. Prohibited from working by the employer due to health concerns related to the potential transmission of a communicable illness related to a public emergency; or
   b. Seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, a communicable disease related to a public emergency and such employee has been exposed to a communicable disease or the employee's employer has requested a test or diagnosis.

(7) Absence due to the proper health authorities or a health care professional determining that the presence of the employee or a family member of the employee in the community would jeopardize the health of others because of the exposure of the employee or family member to a communicable disease, whether or not the employee or family member actually contracted the communicable disease.

Employees have the right to use ESST "in the smallest increment of time tracked by the employer's payroll system, provided such increment is not more than four hours."[4] This paid leave must be provided at the employee's hourly rate of pay. Employers cannot require an employee to find

[2] Minn. Stat. § 181.943(a).

[3] Independent contractors and certain air carrier flight deck and cabin crew employees are excluded from eligibility for ESST.

[4] SF 3035-4 at 130.1-3 (to be codified at Minn. Stat. § 181.9447, subd. 5).

a replacement worker to use ESST. There are also strict requirements on when and what documentation employers can require to produce confirming leave is taken for an ESST-qualifying reason. Notably, the ability to ask for documentation is not available to the employer unless the employee uses ESST for more than three consecutive days.

Three options for ESST earning schedules are itemized in the statute. Employers can implement any of these options or provide greater benefits to employees.

- **Option 1**: Employees must earn one (1) hour of ESST for every 30 hours the employee works in Minnesota up to a maximum of 48 ESST hours earned per year.[5] Unused ESST shall carry over to the next year for the employee to use up to a maximum of 80 hours.
- **Option 2:** Employee earns 48 ESST hours on January 1[6] (or first day of year[7] determined by the employer), which are available for immediate use. Unused ESST will be paid out to the employee on December 31 (or end of the year). The cycle repeats each year.
- **Option 3:** Employee earns 80 ESST hours on January 1 (or first day of year determined by the employer), which are available for immediate use. Unused ESST are forfeited as of December 31 (or end of the year).

Employers rehiring an employee within 180 days of termination, however, must restore the employee's unused ESST existing at the time of termination and make those hours available for immediate use upon rehire.

This article highlights only three employment law changes. Many more were made during the 2023 legislative session. Employers are encouraged to review this guidance and consult with a Gislason & Hunter LLP attorney to ensure best practices are used.

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[5] Exempt employees working in bona fide executive, administrative, or professional capacities, or as an outside salesperson exempt from overtime under the federal Fair Labor Standards Act (29 U.S.C. § 213(a)(1)) are considered to work 40 hours per week for purposes of this law "except that an employee whose normal workweek is less than 40 hours will accrue earned sick and safe time based on the normal workweek." SF 3035-4 at 127.11-12 (to be codified at Minn. Stat. § 181.9446(c)).

[6] For simplicity sake, this article uses a calendar year. Employers may use a fiscal year, anniversary year, etc.

[7] "Year" is defined in the ESST law as "a regular and consecutive 12-month period, as determined by an employer and clearly communicated to each employee of that employer." SF 3035-4 at 126.18-19 (to be codified at Minn. Stat. § 181.9445, subd. 11).

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The United States Supreme Court Addresses Laws Impacting Farmers

by Matthew C. Berger

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The United States Supreme Court is generally asked to hear approximately 7,000 to 8,000 cases each year but only grants review and hears approximately 80 of these cases. And many of the cases the Court reviews involve appeals in criminal cases and other high profile constitutional issues. Given the small number of cases heard and the breadth of the issues those cases generally involve, it is unusual in most years for the Supreme Court to decide cases that will directly impact farming operations.

But this year was an exception to this general trend. In its most recent term from October 2022 through June 2023, the Supreme Court heard and decided two cases that are significant to farmers: (1) *National Pork Producers Council v. Ross* (i.e., the Proposition 12 case); and (2) *Sackett v. Environmental Protection Agency* (i.e., the Waters of the United States, or WOTUS, case). This article will summarize these important decisions and their likely impact on your farming operations.

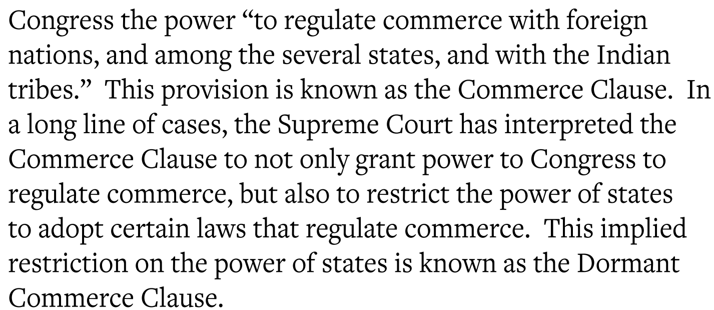
CALIFORNIA PROPOSITION 12 – *NATIONAL PORK PRODUCERS COUNCIL V. ROSS*

In November 2018, California voters passed a ballot initiative known as Proposition 12, which generally prohibits a business from "knowingly engag[ing] in the sale within California" of pork that the business "knows or should know is the meat of a [breeding pig] who was confined in a cruel manner, or is the meat of immediate offspring of a [breeding pig] who was confined in a cruel manner." The law provides that a breeding pig is "confined in a cruel manner" if it cannot lie down, stand up, fully extend its limbs, or turn around freely (i.e., without touching the side of its pen or another pig) or, after December 31, 2021, if it has "less than 24 square feet of usable floorspace per pig." As a practical matter, Proposition 12 directly regulates the manner in which hog farmers in other states (and other countries) manage their sow farms. And the regulations California has adopted to enforce this law would require sow farms around the world to register with the State of California and subject their farms to inspections by an agent of the State of California at least annually.

The National Pork Producers Council and American Farm Bureau Federation challenged Proposition 12, arguing that it violates the Dormant Commerce Clause in the United States Constitution. The federal district court for the Southern District of California dismissed the challenge to Proposition 12 on the face of the National Pork Producers Council's complaint, and the Ninth Circuit Court of Appeals affirmed that dismissal. The Supreme Court granted review and issued its decision on May 11, 2023. In a decision that Justice Kavanaugh charitably described as "fractured," a bare majority of the Court (five justices) affirmed the dismissal of the National Pork Producers Council's complaint even though a majority could not agree on the reason for the dismissal.

What is the Dormant Commerce Clause?

An examination of this case must begin with a general summary of the Dormant Commerce Clause. The Constitution grants



Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This provision is known as the Commerce Clause. In a long line of cases, the Supreme Court has interpreted the Commerce Clause to not only grant power to Congress to regulate commerce, but also to restrict the power of states to adopt certain laws that regulate commerce. This implied restriction on the power of states is known as the Dormant Commerce Clause.

The Supreme Court's Dormant-Commerce-Clause decisions fall into a couple of categories. First, the Court has struck down state laws that, on their face, directly discriminate against business from other states. For example, in *Baldwin v. G. A. F. Seelig, Inc.*, the Court struck down New York laws that prohibited out-of-state dairy farmers from selling their milk in New York for a price that was less than the minimum price that New York law guaranteed to its in-state producers. The Court held these laws violated the Dormant Commerce Clause because they " 'plainly discriminate[d]' against out-of-staters by 'erecting an economic barrier protecting a major local industry against competition from without the State.' "

In other cases where an intent to discriminate against out-of-state businesses is not apparent on the face of the law, the Court has applied a balancing test that looks at the practical effects of the challenged law. In *Pike v. Bruce Church, Inc.*, the Court considered an Arizona order requiring that cantaloupes grown in the state must be processed and packaged in the state. The Court recognized that the state order, on its face, regulated in-state and out-of-state business in an even-handed manner to achieve a legitimate local public interest. But the Court held that such a law may nonetheless violate the Dormant Commerce Clause based on its "practical effects" if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." This standard has become known as the *Pike* balancing test.

What did the Supreme Court decide in this case?

The National Pork Producers Council first challenged the constitutionality of Proposition 12 on its face. Although it conceded that Proposition 12 does not discriminate between California hog farmers and out-of-state hog farmers, the National Pork Producers Council argued that Proposition 12 violates the Dormant Commerce Clause because the law, on its face, only regulates commerce that occurs outside of California. The Supreme Court characterized this argument as an effort to adopt a new standard that would expand the scope of the Dormant Commerce Clause, and the Court unanimously rejected this argument.

The National Pork Producers Council also argued that Proposition 12 violates the Dormant Commerce Clause under the *Pike* balancing test. With respect to this issue, four justices (Justices Gorsuch, Thomas, Sotomayor, and Kagan) held that the district court properly dismissed the National Pork Producers Council's claim because the complaint did not sufficiently plead facts indicating that Proposition 12 imposes "substantial burdens" on interstate commerce." But four justices (Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson) disagreed and concluded that the National Pork Producers Council's complaint had sufficiently alleged facts showing a substantial burden on interest commerce. Accordingly, these justices would have reversed the dismissal and sent the case back to the lower courts to balance these burdens on interstate commerce against the purported local benefits of the law.

This four-to-four tie was broken by Justice Barrett, who (along with Justices Gorsuch and Thomas) concluded that it is impossible for a court to balance the purely economic costs imposed on pork producers by Proposition 12 against the purported noneconomic benefits of the law. These justices would have effectively eliminated the *Pike* balancing tests and allowed states to impose their noneconomic moral preferences on the marketplace as long as those states impose those requirements equally on in-state and out-of-state businesses. Thus, these justices would have affirmed the dismissal of these claims, but on broader grounds than the procedural defects found by the four-justice plurality who held that the National Pork Producers Council did not sufficiently allege a substantial burden on interstate commerce.

What is the practical effect of this decision?

The practical effect of the Supreme Court's decision in *National Pork Producers Council v. Ross* is that this specific case has been dismissed and is dead. But because the dismissal was based on narrow procedural grounds—i.e., that the National Pork Producers Council did not allege sufficient facts to show a substantial burden on interstate commerce—this decision did not determine that Proposition 12 is constitutional on the merits and does not directly impact other legal challenges to the law.

In particular, the Iowa Pork Producers Association filed a separate lawsuit challenging Proposition 12 in the Central District of California. This lawsuit included broader allegations

and claims under the Dormant Commerce Clause and also challenged the law under other legal theories (many of which were identified by Justice Kavanaugh, in his dissenting opinion, as alternative reasons that Proposition 12 may be unconstitutional). The federal district court dismissed this lawsuit before the Supreme Court agreed to hear the National Pork Producers Council's case, and the appeal of this dismissal was stayed until the Supreme Court issued its decision. That appeal will now move forward.

Additionally, Triumph Foods and its members recently filed a lawsuit challenging a Massachusetts law that is similar to California's Proposition 12. Triumph Foods' claims are also broader than the allegations made by the National Pork Producers Council and assert that the Massachusetts law discriminates against out-of-state pork producers and violates both the Dormant Commerce Clause and other constitutional provisions. This lawsuit will also move forward.

In the meantime, however, the requirements of California Proposition 12 are now in effect, and all pork sold into California as of July 1, 2023, must meet the space and turnaround requirements imposed by the law (pork products that were purchased and in inventory prior to July 1, 2023, may still be sold through the end of this year). Further, hog farmers who will sell pigs that may be used to produce pork products to be sold in California must be certified by January 1, 2024.

WATERS OF THE UNITED STATES – *SACKETT V. ENVIRONMENTAL PROTECTION AGENCY*

The Environmental Protection Agency's regulatory authority under the Clean Water Act is generally limited to "navigable waters," which is broadly defined to mean "the waters of the United States, including the territorial seas." The inherent ambiguity of these terms resulted in significant litigation (the Supreme Court addressed the issue multiple times over the past 40 years) and several rulemaking proceedings since 2015. This regulatory background, including the new WOTUS rule that was published by the Biden administration earlier this year, was discussed in the Federal Regulatory Update in our last issue of Dirt.

On May 25, 2023, the United States Supreme Court issued its decision in *Sackett v. Environmental Protection Agency* that finally resolves this protracted controversy. In 2004, Michael and Chantell Sackett purchased a small lot in Idaho and began backfilling the property with dirt and rocks to build a house. A few months later, the Environmental Protection Agency ordered the Sacketts to restore the property to its original condition because the property contained wetlands that the EPA determined were protected by the Clean Water Act.

The wetlands on the Sackett's property were on the other side of a road from an "unnamed tributary" that feeds into a non-navigable creek, which itself feeds into Priest Lake (which the EPA designated as "traditionally navigable"). The EPA found that the wetlands were "waters of the United States," and thus subject to the EPA's regulatory authority under the Clean Water Act, because the wetlands (when combined with other nearby wetlands) had a "significant nexus" with traditional navigable waters.

In *Sackett*, the Supreme Court squarely rejected the broad definition of waters of the United States that the Environmental Protection Agency applied. The Court also, for the first time, adopted a clear definition of this term. First, the Court held that the term "waters of the United States" "encompasses 'only those relatively permanent standing or continuously flowing bodies of water forming geographical features that are described as streams, oceans, rivers, and lakes.' " And although this term also includes some wetlands that are "adjacent" to such waters, only those wetlands that have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins," may be deemed to be "waters of the United States." Because the wetlands on the Sackett's property did not meet this definition, the Court held that the EPA did not have authority to regulate the Sackett's wetlands under the Clean Water Act.

The *Sackett* decision significantly reduces the scope of the Environmental Protection Agency's regulatory authority under the Clean Water Act. This limitation is significant to livestock farmers because the Clean Water Act prohibits a discharge of pollutants to "waters of the United States" from a "point source" without an NPDES permit and because a Concentrated Animal Feeding Operation (i.e., a feedlot that confines 700 or more mature dairy cattle, 1,000 or more beef cattle or cow/calf pairs, 2,500 swine weighting more than 55 pounds, or 55,000 or more turkeys, among others) is a "point source" under the Act. Thus, *Sackett* narrows the number of feedlots that may require a federal NPDES permit. And although some of these feedlots in Minnesota will still require a similar SDS permit, the limitation on the EPA's authority gives producers more flexibility to consider which permit is best for a particular operation.

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