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DIRT

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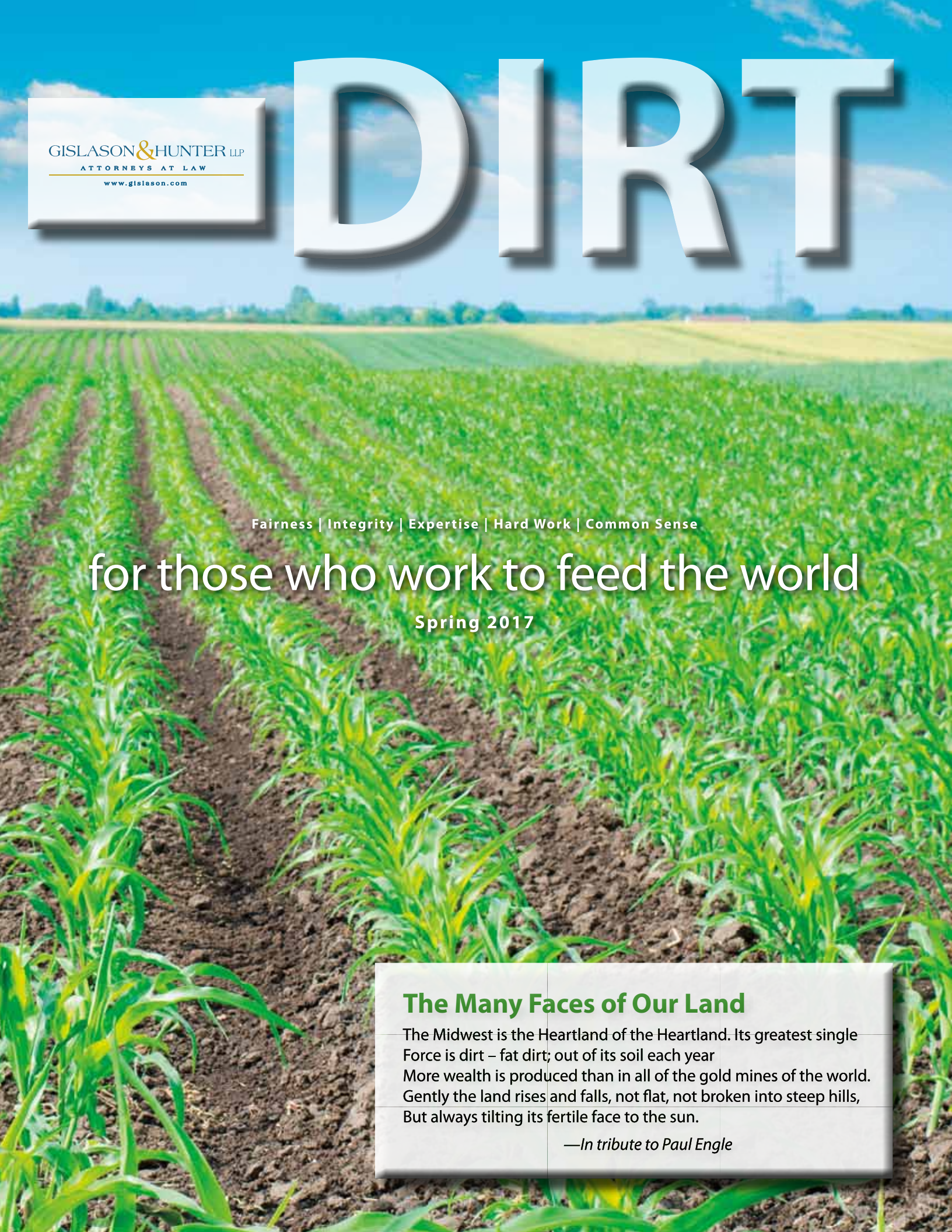
Spring 2017



The Many Faces of Our Land

The Midwest is the Heartland of the Heartland. Its greatest single
Force is dirt – fat dirt; out of its soil each year
More wealth is produced than in all of the gold mines of the world.
Gently the land rises and falls, not flat, not broken into steep hills,
But always tilting its fertile face to the sun.

—In tribute to Paul Engle

Gislason & Hunter LLP is pleased to support these Agriculture Events and Programs

Gislason & Hunter LLP was pleased to have been a sponsor of the Minnesota Pork Producers TASTE of ELEGANCE
January 16
Minneapolis Hilton

Guests were treated to wine, chocolate and specialty cookies.

Kaitlin Pals was a presenter at the AG EXPO
January 26 & 27
Verizon Civic Center, Mankato.

She presented on Ag Business Succession Planning. Gislason & Hunter was also the sponsor of the trade show reception.

Attorneys Matt Berger and Kaitlin Pals presented at the annual GRAIN and FEED ASSOCIATION ANNUAL MEETING on the topic of Due Diligence in Coop Transactions.

Gislason & Hunter LLP was also the sponsor of the trade show reception.

Upcoming Events

A salute to Gary Koch
Thursday, March 30
Turner Hall, New Ulm
5:00 – 7:30 p.m.

Webinar – Farmer/Lender Mediation
Wednesday, April 5
11:00 a.m. to noon

For Ag Lenders.
RSVP: jdonner@gislason.com

Employment Law Conference
Tuesday, April 25
Courtyard Marriott in Mankato
Offering a session on Animal Sabotage

Sabotage in the Workplace – It is no secret that employees can be a company's biggest asset… and liability. In recent years, with employees using their cell phone cameras to take undercover photographs and videos allegedly showing abuse, employers need to be even more vigilant in their hiring and training practice

National Pork Conference
July 9–11
Wisconsin Dells

Sponsor

Ag Summit – Planning for the Financial Future of Agriculture
Tuesday, July 25
Courtyard Marriott, Mankato

Sponsor
Registration information on page 6

GREENSEAM™

Gislason & Hunter LLP Ag Lending Conference
Thursday, September 7
New Ulm Event Center

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LOCATIONS

NEW ULM
2700 S. Broadway
P.O. Box 458
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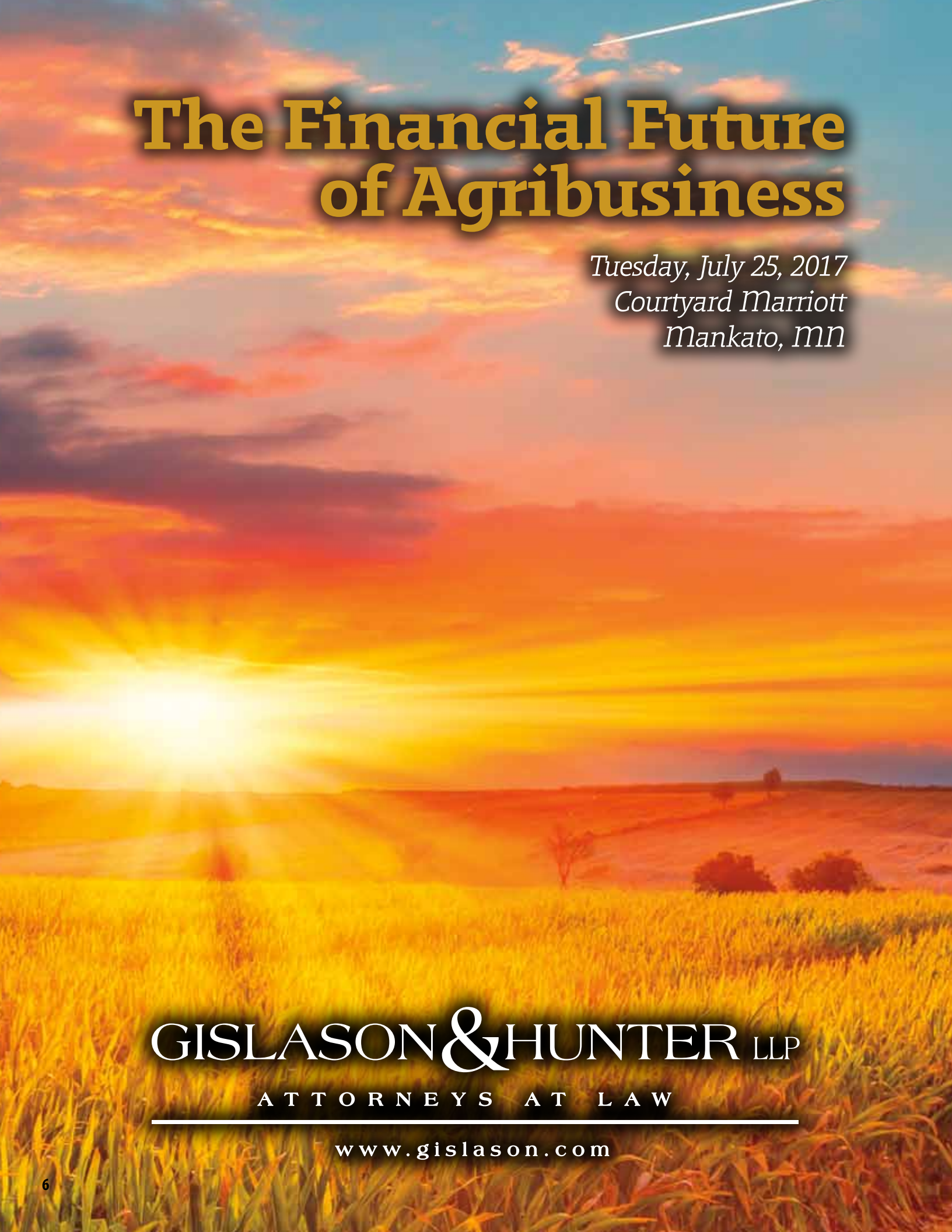
SPRING 2017


The Financial Future of Agribusiness
Tuesday, July 25, 2017
Courtyard Marriott
Mankato, MN
GISLASON & HUNTER LLP
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Eide Bailly, Gislason & Hunter LLP and Profinium Bank are pleased to present

The Financial Future of Agribusiness

Tuesday, July 25, 2017

Courtyard Marriott | 901 Raintree Road, Mankato, MN 56001

A day-long conference for ag professionals, ag producers and those in the ag industry.

Topics to include:

- Diversifying Businesses
- Succession Planning
- Estate Tax Issues for Farmers
- Technology and Cyber Security
- Farming Entity Options and Related Tax Considerations
- Tips on Dealing with the IRS
- Record Keeping and Documentation
- Buy-Sell Agreements
- Employment Law Issues
- Farm Divorce
- Insurance and Liability

All panels and keynotes will be presented by legal and financial professionals.

Reception with:

GREENSEAM™

4:00 – 6:00 p.m.

GreenSeam, the host entity, is a regional initiative dedicated to educating on agriculture issues important to the region, advocating for the ag industries and individual producers in the region, and marketing these industries to the rest of the world. This event will bring all entities together to strengthen our region's position in the marketplace.

Proceeds from this event to benefit the work of GreenSeam.

REGISTRATION IS $50.00 WHICH INCLUDES:
Online access to all materials
Continental Breakfast
Lunch
Networking Breaks
Social at the end of the day

Register at www.eidebailly.com/agribusiness

Reception Only: $30.00

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Reflections on 30 Years of Serving American Farmers

by Gary Koch

In looking back on my career as a lawyer, serving American agriculture, there is a quote by Margaret Mead that captures the pride I have had in my work and in the people I have represented: "Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has." In none of our great country's endeavors has this been truer than as applied to the men and women who have devoted their lives to agricultural success.

American farmers and ranchers have a purpose that is as old as the scriptures and as ennobling as any endeavor; that is to feed a growing world. By almost any measure, American farmers and ranchers in the United States have met the challenge. To use just a few examples of farm productivity, in 1982 American farmers produced 8.40 billion bushels of corn and 2.28 billion bushels of soybeans. By 2016 those numbers rose to 15.2 billion bushels of corn and 4.06 billion bushels of soybeans. In 1982, American farmers harvested protein from 82,843,678 head of swine. In 2016, that number rose to 116,500,000 head. The world needs food, and American agriculture is the bedrock in meeting this demand.

In carrying out its mission, agriculture's contribution to our nation's economic health cannot be overlooked. Productivity of American agriculture has grown faster than domestic demand. Consequently, as the world buys American farm products, the agriculture sector, unlike many other American industries, has consistently shown a positive trade surplus. Moreover, for every $1 of agricultural exports, another $1.27 of business activity is generated in the United States. In 2014, $150 billion in agricultural exports generated an additional $190.6 billion in economic activity in the United States. Our farmers and ranchers are a driving force in the overall health of the American economy.

Increasing productivity has not come without challenges. As policy makers and interest groups focus on agricultural production practices, farmers have had to learn a whole new lexicon—and have found themselves in the historically unusual position of defending their business policies and production practices. A careful review of the facts shows that American agriculture is meeting the challenges brought forward by its critics.

Concerns are raised under the label of sustainability. This term is susceptible to a number of meanings; but if we define sustainability as the faithful stewardship of our land and water resources, the continuing work of the agricultural community is striking. From a global perspective, increased productivity of agriculture in the United States is an essential component of sustainability. The United States possesses the climate, land, and water resources best suited to raising food. The better we do in the United States, the lesser the need to overburden soil and water resources in countries that

do not have the natural resources to develop "sustainable" agriculture; areas where intensive farming would create its own local crises in land and water management.

Here at home, the record of improvement in sustainability is impressive. Farmers and ranchers produce increasingly record yields using more or less consistent acreage. Improvements in production practices and genetics allow American agriculture to meet world food demand on a historically consistent basis.

Agricultural production practices also emphasize efficiency in water and energy use. Businesses as diverse as confinement livestock production and ethanol plants have markedly increased efficiency in use of water resources. Fuel-efficient farm equipment and modern design of production facilities reduces demand for energy.

Crop and livestock farming practices emphasize the management of farms on a farm-specific basis. Farm fields are literally tested on a grid pattern each few square feet in order to maintain health of soil and water by matching specific soil conditions with crop nutrient needs. The result is use of land in a way that controls runoff, prevents overapplication of commercial fertilizer and manure resources, and preserves organic material in soils—all of which enhance the sustainable use of land resources year over year.

All must recognize that sustainability, whatever its definition, is a process and not something achieved overnight. The examples referred to above are only a few of the initiatives being undertaken by farmers and ranchers. But with many production practices in use today, and as further refined over time, the commitment of American farm families to protect the resources in the communities in which they live is undeniable.

Critics of American agriculture draw attention to issues relating to consumer choice and consumer health. Consumers increasingly want to know where their food comes from, how it is produced, and whether it is safe.

No system is perfect. But a look at the record shows that farmers and ranchers are mindful of those concerns—and take their responsibilities to the consuming public very seriously. As for consumer choice, no better system exists than our competitive marketplace for creating and offering choice. Continued competition in the form of lean, natural, organic, and other food offerings show that the agricultural community is responding to consumer demand. As for safety, America has the safest and most traceable food production and processing complex in the world. For example, use of pesticides on crops is strictly regulated. Antibiotics are used only as prescribed by a veterinarian—and there can be no traces of antibiotic residue in meat when inspected at the time of processing.

This, of course, is one reason why the world wants to buy food from America: because it is safe to eat.

Finally, critics talk about social justice and ask if American agriculture is responsive to the social needs of its communities and workers. While I cannot speak to all circumstances, I know from the people I have worked with that they exemplify what to me is best about American business. They pay their taxes, they support their local schools and churches, and they run businesses that survive and prosper; and in all of this, they create economic opportunity for all people—irrespective of race or gender.

I have seen the many success stories of people who got a chance with a job on the farm and then rose to become successful with their own careers and families. I am proud to say that America's farmers and ranchers gave so many this hand up.

So, as I finish my career in the private practice of law, I close with what is most exciting and perhaps that of which I am most proud. That is the next generation of America's farmers and ranchers. As much as their parents and grandparents may have accomplished, the next generation will do even more. They are educated, talented, and diverse. They appreciate the legacy on which they will build. But they understand the world, and their responsibilities as custodians of a proud agricultural heritage. I know that with their talent, hope, and optimism, our future as the greatest food producing nation is in good hands.

A TRIBUTE TO A REMARKABLE CAREER

In 1978, the late radio broadcaster, Paul Harvey, delivered a speech to the Future Farmers of America in which he described the many virtues of American farmers. Mr. Harvey's famous speech began as follows:

> And on the 8th day, God looked down on his planned paradise and said, "I need a caretaker"
>
> —so God made a Farmer.
>
> God said, "I need somebody willing to get up before dawn, milk cows, work all day in the fields, milk cows again, eat supper, then go to town and stay past midnight at a meeting of the school board"
>
> —so God made a Farmer.

Gary Koch joined Gislason & Hunter in 1984. During these 32 years, farming operations have grown in both size and complexity as American farmers have worked tirelessly to feed a growing global population. As a result of this evolution, farmers have faced more and more complex business challenges and market pressures, increased governmental regulation, and escalating opposition from environmental and animal rights activists who seek to ignore modern reality in pursuit of their extreme political agendas.

During this tumultuous period, Gary Koch dedicated his legal career at Gislason & Hunter to serving and protecting farmers against these growing

challenges. In doing so, Gary embodied many of the same virtues that Paul Harvey recognized in American farmers. Gary began many days at work before the sun rose, ended many days at work long after the sun set, and in between worked tirelessly to help his clients to negotiate deals and defend their business against repeated attacks from regulators and outside interests. But Gary also recognized the importance of contributing to the life and well-being of the community.

Gary Koch's contributions to the agricultural and legal communities cannot be overstated. Working hand-in-hand with his clients, Gary helped to pioneer a new model of vertical integration within the swine industry in the Midwest that has improved business efficiencies for his pork producing clients. In doing so, Gary's agricultural clients have described Gary as a passionate advocate for farmers who exuded "militant optimism" and inspired their confidence to take on new challenges and achieve greater success. But Gary also exhibited common-sense pragmatism in his work, recognizing that many successful deals would require ongoing, harmonious relationships among all sides of a transaction. Gary developed close personal relationships with his clients that focused on the overall well-being of his clients and their families and that transcended their businesses. In short, Gary was the quintessential "caretaker" of the agricultural community.

All of us at Gislason & Hunter have had the opportunity to learn from Gary, a true "lawyer's lawyer," who is master of the legal craft and who dedicated his career to serving the needs and advancing the interests of American farmers. As Gary retires from our firm and moves to the next phase of his career, all of us will use both the legal knowledge and the common sense that Gary has taught to continue his legacy of serving the needs and advancing the cause of farmers throughout the Midwest. On behalf of all of us at Gislason & Hunter, THANK YOU, GARY, for the lessons that you have taught us and for all of your service to the agricultural community.

PIERCING THE CORPORATE VEIL—WHAT IT IS AND HOW TO PROTECT AGAINST IT

by Dustan Cross and Dean Zimmerli

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Organizing a farm or other business operation into a corporation, limited liability company, or similar limited liability entity is a familiar practice for many producers and business owners. While estate planning or tax considerations may influence the decision to set up a separate legal entity, a primary reason many choose to incorporate their business or form an LLC is the liability shield which protects the personal assets of the business owners from the debts and liabilities incurred by the corporation. Although these legal entities do offer substantial protection for business owners, occasionally creditors are able to convince a court to ignore the liability shield in order reach assets personally held by the owners—a

concept known as "piercing the corporate veil." While eliminating this risk entirely may be difficult, there are a variety of steps that business owners can take to protect themselves from an attempt by a plaintiff to pierce the veil and reach the owners' personal assets.

The liability protection afforded by certain legal entities is set out in statute. Minnesota's corporation law provides that "a shareholder of a corporation is under no obligation to the corporation or its creditors." Minnesota's LLC law sets out similar protections for members of LLCs, specifying that "the debts, obligations, or other liabilities of a limited liability company…do not become the debts, obligations, or other liabilities of a member." Similar laws exist in other states as well. These statutes dictate, for example, that if ABC Corp. is found liable for breaching a contract or for negligently injuring a person, only ABC Corp. is responsible for paying damages, and the shareholders of ABC Corp. are not liable by reason of their being shareholders.

Even this broad liability protection cannot completely shield a business owner from being held liable for the debts and obligations of a limited liability entity. A business owner will be held responsible for a business's obligations if the owner agrees to be, such as when the owner co-signs a promissory note or personally guarantees a loan to the business. A business owner could also be held liable if he personally injured another person; for example, if a business owner caused a car accident while on business, he could be personally liable for his own negligence, even if he was working on behalf of the entity at the time.

Finally, an owner might be held responsible for the debts of a limited liability company or corporation if a court determines to pierce the corporate veil.

As noted above, a court has the ability in certain cases to hold the business owner responsible for the entity's debts, notwithstanding the liability shield. Businesses may already have large debts or their assets may be encumbered by mortgages and security interests. When this is the case, it may be difficult for successful plaintiffs to recover from the entity itself. Plaintiffs will often ask a court to pierce the veil when they believe the corporation or other entity lacks financial resources or when they believe the owner may be easier to collect from.

The concept of piercing the veil has generally been created by judges, who developed the remedy in a series of cases where equity convinced them that it would be unfair to protect an owner. While the concept was created with respect to corporations, Minnesota law specifies that a veil piercing theory can also be applied to LLCs. Because this is judge-made law, the application can vary from state to state, but similar themes apply in most states.

In Minnesota, the courts focus primarily on two main issues: whether the owners kept the entity sufficiently separate from themselves, and the equities or fairness at stake with respect to the plaintiff in the particular case. Generally these factors are the same regardless of whether the business entity is a corporation, or another limited liability entity.

As a business owner, the best way to avoid or successfully defend a veil piercing attempt is to establish a pattern of treating the corporation as a separate, ongoing entity. One of the primary factors considered by courts in evaluating the separateness of the entity and the owner is whether the finances of each are treated and kept separate. Where business owners treat the entity's cash as their own, a court is more likely to determine that piercing the veil is appropriate. To return cash to owners who may be relying on the business as their primary source of income, it is appropriate for a corporation to declare and pay a dividend on a regular basis, or to actually employ the owners and pay them a salary. For LLCs, making regular distributions to owners is appropriate. On the other hand, if shareholders simply withdraw funds at their discretion to pay their personal expenses, a court will be more willing to pierce the veil. Owners should avoiding using the business checking account or credit card to pay personal expenses, and similarly should avoid routinely paying expenses of the entity from their personal accounts. Separate financial records should be kept, and separate tax returns should be filed, unless IRS law allows a single tax return such as with a single-member LLC. Having an accountant who will be able to provide guidance regarding what tax filings are necessary for the entity is useful.

In a similar vein, corporate assets and personal assets should also be treated as distinct and separately owned. When a new entity is formed for an existing business operation, assets used in that business operation should be formally transferred to the new entity through a bill of sale or deed. Alternatively, lease agreements can be created to have the entity rent assets belonging to the owners personally. Assets that are owned by the corporation should not generally be used at will for personal matters or for unrelated businesses. While occasional intermingled use of a few assets might not be fatal, extensive use of many assets makes it appear as if the owners do not regard the entity as separate from themselves, potentially leading a court to conclude likewise.

Another factor evaluated by courts is whether the limited liability entity has adequate capital, both at the time of formation and at the time the debt or liability is incurred. Thus, an entity that is formed and purposefully undercapitalized in relation to potential liabilities that may be incurred is more likely to have the liability shield ignored by a court, although this may be countered somewhat by carrying sufficient insurance. While this factor does not necessarily mean a limited liability entity must keep excess capital on hand to satisfy potential claims, if an entity willingly incurs obligations far beyond its ability to satisfy, or drains its assets in the face of potential liability, this may weigh strongly in favor of piercing the veil and holding the owners liable.

Courts also look at whether business owners observe and follow "corporate formalities," although it should be noted that the LLC statute expressly states that this factor should not be considered in cases seeking the pierce to liability shield of an LLC. Corporate formalities include all of the formal steps that should be taken when operating a corporation and making decisions on behalf of a corporation. For example, formal bylaws should be adopted by the corporation and actually followed. Officers of a corporation such as president, treasurer, and secretary should be formally appointed by board of directors through resolutions. If a corporation's bylaws call for annual meetings, the meetings should be actually held and minutes of the meeting prepared and approved. Where necessary, decisions of the corporation should be made in formal resolutions or unanimous written actions, as appropriate. While some courts downplay this factor, recognizing that many small corporations are run fairly informally, it is still good practice to follow such formalities, particularly for unusual or particularly large or important transactions or decisions. Records documenting these formalities should be kept.

Similarly, courts also consider whether officers and directors actually fulfil or are allowed to fulfil their duties, or if the corporation acts primarily through one or more dominant shareholders. For example, if dominant shareholders or majority owners appoint family members and friends to officer or board positions, but still exclusively manage the entity, ignoring input of those nominally responsible, a court may find that the business was not kept sufficiently separate. If separate individuals are named as board members, officers, or managers of an entity, those positions should come with some actual authority and responsibility. On a related note, if family members are simply appointed to such positions to collect paychecks from the entity, this may be additional evidence that a dominant business owner is not treating an entity's financial assets as separate from his own.

Generally, proof that a corporation or LLC was deficient in one of these categories will not, by itself, lead to a court piercing the corporate veil. Rather, a plaintiff will need to establish several, showing that in the particular case it is fair to disregard the limited liability shield because of how the business owners operated the entity. This is a doctrine that a judge has discretion in applying, judging all of the factors; put another way, it is a situation where a judge can "know it"—that piercing the veil is appropriate—"when he sees it." Following the recommendations above—keeping assets and finances separate, avoiding undercapitalization and insolvency of the entity, and observing corporate formalities—will help eliminate some of the risk that a judge will see an opportunity to pierce the corporate veil when reviewing your own business operation.

Planning for Success: Farm Estate and Succession Planning Basics

by Kaitlin Pals and Rick Halbur

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It's an inescapable question for every farmer: "What is going to happen to my farm when I no longer operate it?" At the same time, it can be all too easy to forget about (or willfully ignore) important matters such as who would or could take over your farming business in the future.

That is where estate and succession planning is critical to the continuation of your farming operation. Establishing an estate and succession plan can ensure that your long-term goals for the farm are met and that the next generation of farmers has a solid basis to start out on their own. However, each person's legal and business needs are unique.

I. Start With the Basics: Power of Attorney, Health Care Directive and Will

One of the biggest obstacles farmers face in estate and succession planning is not knowing where to start. With the veritable alphabet soup of planning tools available (should I have an LLC? An LP? CRATs? GRATs?), it's easy to become overwhelmed. If you have never done any estate planning and don't know what to do, start with the basics: a Will, health care directive and power of attorney.

A. If You're Reading This, You Need a Will

One of the most commonly used and well-known estate planning instruments is called a Last Will & Testament. A Will is a document that provides legally binding instructions for how your property should be dealt with and distributed at your death.

Wills allow you to customize your estate plan to fit the needs of your family and farm. Wills can do everything from creating trusts to hold and protect your property for the benefit of minor children, specifying particular assets to go to each of your children, and restricting land sales with options or rights of first refusal, to minimizing estate taxes. Your Will also lets you pick who you want to be in charge of making sure your wishes are carried out after your death.

Minnesota law does not require that every person have a Will. However, if you do not have a Will or an alternative estate planning tool like a revocable trust, your property will pass as provided by Minnesota intestacy law. The intestacy statute is a sort of "one size fits all" estate plan for people who die without a Will. In most cases, intestacy law will divide a person's property evenly among that person's closest living relatives.

B. You (and Your Kids) Need a Power of Attorney and Health Care Directive, Too

A critical part of any farm estate and succession plan includes a power of attorney and health care directive. The maker of a power of attorney, called the principal, authorizes another person, the attorney-in-fact, to act

on the principal's behalf in financial matters. The principal gets to decide the scope of the powers he wants to grant to the attorney-in-fact.

A general power of attorney authorizes the attorney-in-fact to step into the principal's shoes and conduct the principal's entire business affairs, except for health care decisions. A general durable power of attorney can be especially critical if the principal becomes incapacitated and is unable to manage the family farm, pay bills or sign documents at the FSA office.

A health care directive is a separate document that instructs your family and health care providers as to what kind of medical care you want if someday you need care but cannot communicate.

Health care directives are important estate planning tools even for people who may not have significant assets—in other words, not only for you, but potentially for your adult children and grandchildren as well. If a person does not have a health care directive and power of attorney and becomes incapacitated, there may not be anyone with legal authority to take care of their finances or make health care decisions for them. Often the only solution is to go to court and have a guardian and conservator appointed. This process is long, complicated and often expensive.

II. Turning Your Estate Plan into a Farm Succession Plan

The basics of an estate plan—a Will, health care directive and power of attorney—are a crucial first step, but rarely the last step for farm families. The next stage is to take your basic estate plan and craft it into a farm succession plan.

Succession planning is about more than just distributing your property to your heirs at death. A succession plan is a business and estate plan that sets out a clear path for transitioning the farm operation and ownership from one generation to the next. A solid succession plan should embody the goals and wishes of the older, transitioning generation while meeting the needs of the incoming farmer and appropriately balancing the interests of on-farm and off-farm heirs, all in a tax-efficient manner.

Succession planning is a long-term, ongoing process with many important phases:

- **Getting Real:** Dealing with tough questions about the future of the farming operation: Is there a farming successor in the family? Who is the successor, and how should they be treated relative to off-farm children? How important is it to keep land in the family long-term, even if or when there is no farmer in the family?
- **Planning for Change:** Using the wide variety of legal tools available to move responsibility, income, control and/or ownership of the farm operation and/or land in a tax-efficient manner and on a schedule that meets the transitioning generation's needs and desires.
- **Setting Expectations:** Once the transitioning generation has made core succession plan decisions, communicating with family and any other key players so there are no "surprises" when the transitioning generation is gone.
- **Moving from Plan to Action:** Implementing the plan on a going-forward basis, regularly reviewing how it is working in practice and revising the plan accordingly.

As for that niggling question, "What is going to happen to my farm when I no longer operate it?", the goal of farm estate and succession planning is to find an answer to that question that you can feel good about. It may look daunting, but it's never too early—and rarely too late—to take that first or next step in the process.

BUYING FARM LAND – WHAT TO LOOK FOR

by Reed Glawe and Seth Harrington

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No two pieces of farmland are the same. Each has its own unique location and features. At no time is that fact more pertinent than when purchasing farmland. What factors should someone consider when buying farmland, so as to know if they are getting what they believe they are buying, while at the same time trying to minimize the risk of any future surprises? While not entirely exhaustive, the following is intended to provide a checklist of things to consider when buying agricultural real estate.

Manure Easements

For many livestock facilities, the Minnesota Pollution Control Agency (MPCA) requires a manure management plan (MMP) in conjunction with state law and the National Pollutant Discharge Elimination System (NPDES) permit. MMPs are required to ensure a livestock facility is

complying with regulations, protecting state waters, and maximizing the benefits of applying manure to cropland. Generally, MMPs describe how manure generated at a livestock facility will be managed, handled and applied to farmland (Application Land) during future crop years. That's where manure easements come into play.

Manure easements are written agreements between the owner of cropland and the owner/operator of a livestock facility. Typically they are recorded in the real estate records of the county where the Application Land is located. Because manure easements create certain rights or burdens to the Application Land, they are not extinguished when the Application Land is sold. This means farmland can be bought already burdened with a manure easement. Such easements may give the livestock facility owner/operator certain rights or privileges in terms of when and how the manure gets applied, who is responsible for applying the manure, who is responsible for testing the soil to determine its current nutrient needs, and how manure application issues between the crop owner and the manure owner are addressed. The owner of the Application Land also may be required to purchase the manure from the facility owner.

The existence of manure easements, whether recorded or not, is an important factor to consider when looking at a particular piece of farmland.

Tiling/Tile Agreements

Another important feature to look at is whether the land is tiled. Tiling consists of buried tubes which help to drain wet soils which are not otherwise conducive to growing crops, or to lower the subsurface water level to an optimal depth for increasing crop yields. Tiling has been around for, many years, with earlier tile systems consisting of clay or concrete tiles as compared to perforated PVC/plastic tubing today. Older tile systems usually consisted of tile inlets in low areas of a field connected by branches to larger "mains," which then drained by gravity to an "outlet," which might consist of a lake, private ditch, public ditch or other discharge point. More recently, system tiling, which consists of burying tubes in parallel every so many feet across an entire field, have been employed to manage subsurface moisture levels and thereby improve crop yields. System tiling makes land more valuable over the traditional branch line systems, and branch line systems add more

value compared to land which has no tiling at all. If the land is not tiled, determining whether a suitable outlet for discharging drained waters is available and whether a parcel can be tiled at all is critical if someone is considering buying the parcel with the intent of installing tile in the future. If it is unclear whether a parcel has tile, the local county NRCS/FSA office may have information regarding recent or past tiling projects along with tiling maps.

Additionally, similar to manure easements, oftentimes there are tile agreements associated with farmland between multiple owners. Such tile agreements generally allow one landowner to connect his or her tile line to a downstream landowner's tile line or main, or discharge into a privately owned ditch. They typically will address the use, repair, maintenance, and preservation of the tile main or system by each landowner and the sharing of maintenance/installation costs, and also may include an ingress/egress easement to enter onto the subject property for purposes of performing maintenance, repair or replacement. Tile agreements generally come in the form of a written agreement, recorded with the county recorder in the county where the land is located, which means any buyer of the land takes title subject to those rights and burdens contained therein. Knowing whether a prospective parcel is tiled or has tile agreements in place is critical from a buyer's perspective.

Crop Productivity Index/Crop Equivalent Ratings

The National Commodity Crop Productivity Index (CPI) ratings are compiled by the Natural Resources Conservation Service (NRCS) and are used to estimate the potential crop production for a given soil type. CPI ratings range from 0 – 100; the higher the rating, the higher the production value. The rating itself is compiled using both physical and chemical properties of the soil, and also considers flooding, ponding, and surface saturation. The public can easily access the CPI rating for a given area of interest through the NRCS's Web Soil Survey, available at https://websoilsurvey.nrcs.usda.gov/app/. CPI ratings have long been used by appraisers and assessors when determining the value of agricultural real estate.

Crop Equivalency Ratings (CER) are ratings which are prepared by each county to determine the quality of the land for purposes of determining assessed values. These also are a good indicator for estimating the quality and type of soil associated with a particular parcel. The CER rating can be obtained from county assessor/treasurer offices. However, in Minnesota, the CER ratings are not always uniform between counties; each county may use a slightly different approach in determining CER. There are private businesses which can provide CER ratings across county lines (i.e.

SURETY) to provide consistency when comparing the quality of land located in different counties. The quality of the land is obviously another important feature when trying to evaluate the quality of a particular piece of farmland.

Boundary Line Encroachments

Back in the early days of farming, almost every farmer had livestock, and consequently, almost every farm was fenced to keep the livestock in. Those fence lines often became the visible markers of boundary lines between one landowner and the next. Over time, as the production of livestock has become more centralized, the need for fencing has disappeared along with the physical fences themselves and, in the interest of maximizing production, farmers have plowed and planted right up to property lines. With the visible markers gone, it sometimes occurs that one farmer's crops may "creep" onto the land of a neighbor. Over time, this can result in a change of the occupation lines from only a couple feet to as much as 10 or 15 feet.

A continuous occupation by the encroacher over time can create property rights or title in the name of the encroacher (called adverse possession). As a prospective buyer of a piece of farmland, it is important to do a visual inspection of the land and to try to locate the historical government survey corners or legal parcel corners to determine whether there is any encroachment onto the land being purchased. This may be very critical where the land is being purchased based on a per-acre price. Oftentimes, purchase agreements will include a disclaimer that the purchase price is not based on a certain number of tillable acres.

Depending on the transaction, it may be prudent to insist upon a survey prior to the closing which may be a condition of the sale, and paying for the survey is often negotiable between the sellers and buyers. If there is an encroachment, there may be a defect in the title to the real estate and, depending on the circumstances, a quiet title action may be necessary to reestablish the true boundary lines.

Underground Storage Tanks

Underground Storage Tanks (USTs) can serve a variety of functions including petroleum storage, oil storage (used or unused), hazardous waste storage, storm water collection, or as part of a septic system. The MPCA regulates these underground storage tanks; however, it is worth noting that many tanks are excluded from regulation (for example, all underground tanks with a capacity of 110 gallons or less). Property owners must disclose the existence of USTs when selling the property, and must also record the following information with the county where the tank is located: (1) a legal description of the property; (2) a description and location of the tank; (3) any known releases of regulated substances from the tank; (4) a description of any restrictions currently in force; and (5) the name of the tank owner. Additionally, the MPCA has compiled a database of leak sites and tank sites, available at https://www.pca.state.mn.us/waste/storage-tanks. If the purchase agreement does not address the existence of underground storage tanks, the seller should be required to verify in the purchase agreement or at closing the existence of any underground storage tanks on the property and consideration should then be given as to whether removal or cleanup/abatement may be required.

Any current or future owner of a property containing an underground storage tank can be required by the MPCA to shoulder the costs for removal and any cleanup resulting from leakage.

Wells

With the decrease in rural farm populations and in the number of rural farms, many farm building sites have been removed. However, almost every building site inevitably had a water well. With that in mind, a seller of farmland is required to disclose the number and status (in use, not in use, sealed) of all wells located on a property. In addition, a seller is required to provide a map showing the location of each well. A well which is no longer used is required by law to be sealed by the owner, which can have a significant cost. Whether a person is buying a piece of farmland which has an existing building site or one which once had but no longer has a building site, the existence of abandoned or unused wells is important, because the cost of sealing such a well can fall upon subsequent owners.

Crop Insurance

Crop insurance is a necessary risk management tool for crop farmers and landowners. Whether the insurance is designed to protect crop yield, revenue, or some hybrid, a key factor in determining coverage and payment guarantee is the Actual Production History (APH) of a farm—that is, historical records of crop yields. Proving APH requires at least four years of yield records. A farm's APH impacts numerous aspects of crop insurance, including revenue guarantee, premiums, and discounts. The APH provides valuable information about the quality of the farm ground based on the farm's crop production history. When considering purchasing a piece of farm ground, a buyer should ask the seller for the APH or obtain a written release from the seller allowing the prospective buyer to obtain that information directly.

FSA Records

Another valuable resource for investigating farmland is the USDA Farm Service Agency (FSA). FSA provides general public data for planted acreage sorted by state, county and crop (at https://www.fsa.usda.gov/index). Also, specific information pertaining to the parcel in question, such as certified tillable acres, cropping history and production information, can be obtained directly from the local county FSA office with a release signed and provided by the seller. Topography and soil type information can also be obtained.

Wrap Up

When considering the purchase of farmland, in addition to the information provided by the seller, considerable information about the quality and features of the land in question can and should be obtained from the local county recorder's office, county assessor, FSA, and NRCS, and from a visual inspection of the property itself.

THE CONTINUED STRUGGLE AGAINST GOVERNMENT OVERREGULATION OF AGRICULTURAL OPERATIONS

by Matthew Berger

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Little Rock Creek is a small stream in central Minnesota. Although relatively unknown outside of the immediate area, Little Rock Creek became a battleground that illustrates the continuing struggle against the increasing scope of governmental regulation of agricultural land uses and practices under the federal Clean Water Act.

Background of the Clean Water Act

The Clean Water Act was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and established a complicated maze of regulations by both the federal government and the several states. The Act directly regulates "point sources," including concentrated animal feeding operations, by requiring a National Pollutant Discharge Elimination System (NPDES) permit before any pollutant may be discharged from such sources into the "waters of the United States."

In contrast, the Clean Water Act does not directly regulate other, "nonpoint" sources of water pollution. Instead, the Act establishes various requirements and grants to promote the regulation of these nonpoint sources by the various states. Specifically, the Act requires each state to "establish water quality standards" for each body of water within its borders and then prepare a list of each body of water that does not attain such standards. Each state must then establish the "total maximum daily loads" (TMDL) for each such "impaired" body of water. Each stage of this process is subject to review and approval by the federal Environmental Protection Agency (EPA).

Under Minnesota law, a TMDL is defined as "a scientific study that contains a calculation of the maximum amount of a pollutant that may be introduced into a surface water and still ensure that applicable water quality standards for that water are restored and maintained." But the "natural condition" of some water bodies may have water quality characteristics or chemical concentrations approaching or exceeding the water quality standards established by the state. In such circumstances, the natural background levels of pollutants may be substituted for other water quality standards. In other words, the regulations (at least as written) reflect a common-sense policy that the government should not impose regulations to require a higher standard than established in nature.

Little Rock Creek TMDL

Little Rock Creek is a perennial stream that flows southward through Morrison County and Benton County before flowing into Little Rock Lake and, ultimately, the Mississippi River. Approximately 50 percent of the land in the watershed consists of tillable farmland, and approximately 16 percent of that farmland is irrigated. Under the water quality standards adopted by the MPCA, Little Rock Creek is classified for cold-water sport fish and drinking water uses. Despite the fact that the fish had been artificially introduced and were not native to the stream, Little Rock Creek was identified as impaired because it lacked a reproducing population of brown trout.

In February 2013, the MPCA published a draft TMDL study for Little Rock Creek and opened the draft study for public comment. The draft TMDL addressed impairments and established maximum loads in the creek for dissolved oxygen, nitrate, and temperature. In establishing the maximum pollutant loads, however, the draft TMDL did not calculate or separately account for the "natural background" levels of these pollutants in the creek; instead, the draft TMDL concluded that it was impossible to determine the natural background levels of pollutants in the stream and instead adopted combined allocations for the natural background and all nonpoint sources. Further, in analyzing potential options to implement the maximum daily loads, the draft TMDL did not address any strategies to reduce discharges of pollutants, but instead focused on regulating water and land uses in the watershed—to increase water flow in the stream.

Despite public comments from several local farmers and property owners criticizing the MPCA's failure to separately analyze the natural background levels of pollutants in Little Rock Creek, the MPCA issued an order in December 2015 that approved (without a hearing) the draft Little Rock Creek TMDL for submission to the EPA. A group of local property owners sought judicial review of the MPCA's approval of the Little Rock Creek TMDL. Although the Minnesota Court of Appeals concluded that the property owners had the right to challenge the approval of the TMDL, the Court ultimately affirmed the MPCA's approval of the draft TMDL.

Significance of the Little Rock Creek TMDL

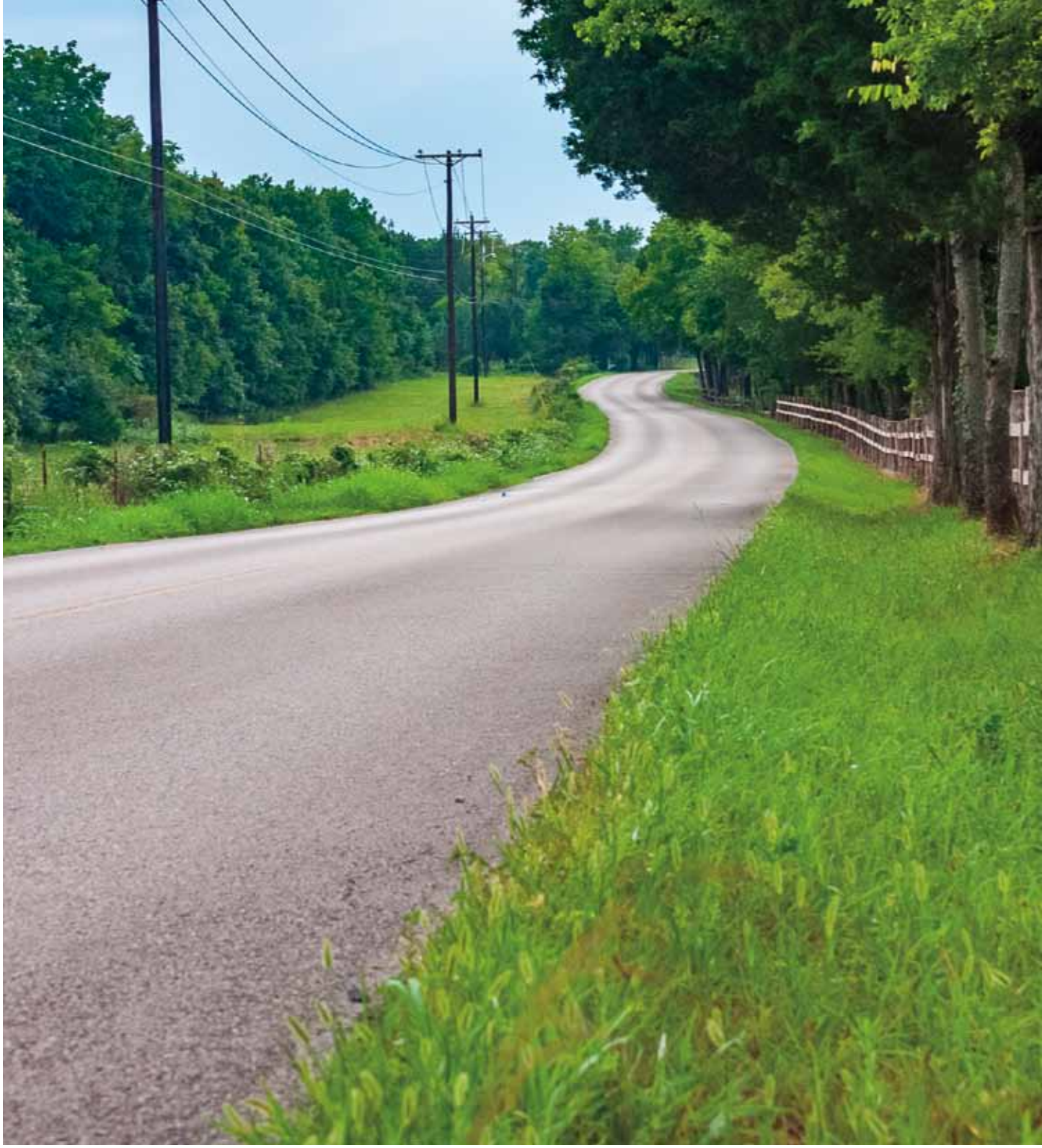
The significance of the Little Rock Creek TMDL extends far beyond the narrow borders of the creek's watershed. First, the MPCA approved this draft TMDL without any real effort to separately identify the natural background levels of pollutants and by ignoring the longstanding agricultural uses

of surrounding land. In doing so, the MPCA departed from principles and limitations that have long been recognized in implementing the Clean Water Act. This departure represents a significant expansion of the agency's authority and erodes the policy that the government may not impose stricter water quality standards than the natural conditions of the water.

The implementation strategies outlined in the draft Little Rock Creek TMDL are even more troubling. The federal statute specifically provides that it regulates the discharge of pollutants to "waters of the United States" and does not regulate other water-related issues, including water use allocations or land use decisions. The implementation options set forth in the draft Little Rock Creek TMDL, however, do not address pollutant discharges at all but instead focus on water and land uses. In this way, the approval of the draft TMDL represents an overt attempt by the MPCA to expand the scope of its regulatory authority under the Clean Water Act to include water and land uses. If successful, this action would provide the MPCA with a back-door method to regulate manure application and other agricultural practices for all farmers, including small hog producers who do not operate concentrated animal feeding operations or require an NPDES or State Disposal System (SDS) permit.

What Can You Do?

Despite the MPCA's ultimate approval of the draft Little Rock Creek TMDL, agricultural producers must continue to hold the MPCA accountable for its obligations to consider the natural background characteristics of water bodies, and to limit the scope of implementation strategies, by participating in all stages of the regulatory process under the Clean Water Act. This includes participating in the public hearings and submitting information and comments when water quality standards are adopted, TMDLs are being prepared and approved, and the load allocations are being implemented. Information about pending TMDL projects is available on the MPCA's website at https://www.pca.state.mn.us/water/total-maximum-daily-load-tmdl-projects.



Federal Issues Update

by Brian Foster

THE LONG AND WINDING ROAD TO A NEW FARM BILL

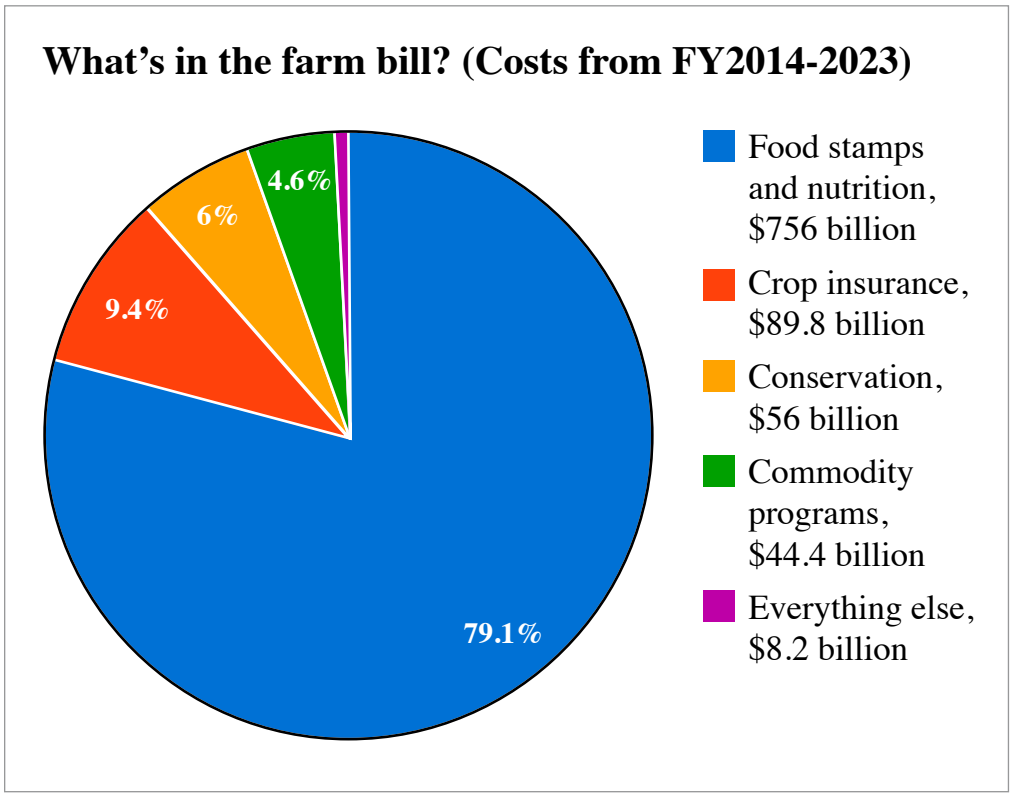
The long and arduous process of developing, and then passing, new Farm Bill legislation has begun, with the first U.S. Senate and House hearings taking place in late February in Kansas and Washington, D.C. Members of Congress will use a series of hearings to gather information and testimony from farmers, farm groups and the public about specific Farm Bill policy "asks."

Most of the commodity programs authorized in the Farm Bill expire September 30, 2018, which serves as a deadline to get a new five-year bill passed. The Farm Bill is an authorization bill, meaning that for most programs created or extended in the Farm Bill, the Congressional appropriations committees must also pass specific spending bills, making federal funds available to implement those programs.

The Farm Bill consists of a number of sections, or "Titles," that authorize many different farm, conservation, and feeding programs. The "Agricultural Act of 2014" (the 2014 Farm Bill) included the following titles:

1. Commodities (farm programs)
2. Conservation
3. Trade
4. Nutrition (SNAP and other feeding programs)
5. Credit
6. Rural Development
7. Research, Extension, and Related Matters
8. Forestry (the U.S. Forest Service is part of the USDA)
9. Energy
10. Horticulture
11. Crop Insurance
12. Miscellaneous (including a Livestock subtitle)

Outlays over 10 years for the 2014 Farm Bill programs break down as follows:



The latest thinking on development of the 2018 Farm Bill envisions a number of House and Senate field and committee hearings during calendar year 2017, and development of draft Farm Bill language early in 2018, with committee and then floor deliberations beginning by March 2018 in order to get a bill passed by both houses of the Congress and to the President for signing by summer.

Readers of *Dirt* may recall that back in 2013 an amazing and unprecedented thing happened when the U.S. House voted down a new Farm Bill: a combination of Tea Party Republicans, opposed to Farm Bill spending, and liberal Democrats, disappointed with the level of SNAP (Food Stamps) funding, combined to defeat the bill on the floor of the U.S. House. Long-time observers of Farm Bill deliberations opined that we had reached a watershed in Farm Bill development that would suggest a future separation of farm, rural development, and feeding programs.

Current thinking is that the 2018 Farm Bill will, as has been the case historically, include both farm and nutrition programs in order to garner enough votes for passage. Note in the graph above the portion of Farm Bill spending that goes toward nutrition and feeding programs.

Regulatory Reform under the new Trump Administration

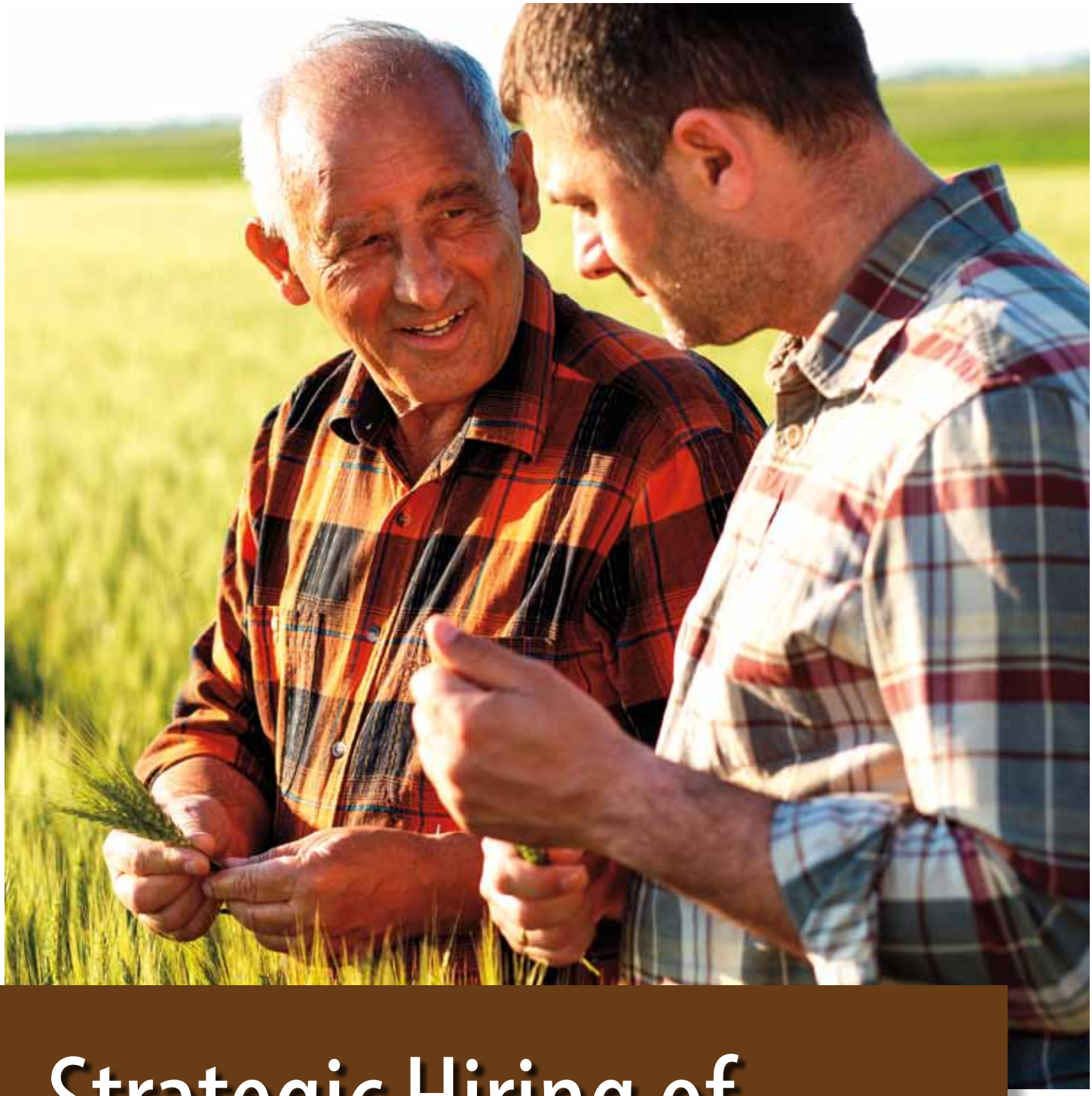
President Trump has already made several moves to reduce or eliminate the regulatory burden on agriculture and business. Among the actions in his first days of office:

- In one of his first moves as President, Trump issued an executive order requiring that for every new regulation finalized, two old ones must be rescinded.
- President Trump issued an executive order that begins the process of rescinding or rewriting the controversial Waters of the United States (WOTUS) rule, which would have given the federal government broad jurisdiction over land and water. The order directs the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to conduct a formal review of the WOTUS rule, which took effect August 28, 2015, but has been tangled up in various court proceedings since.
- The Trump administration has extended the deadline for comments on the "Farmer Fair Practices" regulations, the Obama-era GIPSA rule; comments are now due March 24. Most livestock producers strongly oppose the set of proposed regulations, and an Informa Economics study found that the rule would cost the U.S. pork industry more than $420 million annually in compliance costs.
- The new administration will likely soon begin the process of reviewing the North American Free Trade Agreement (NAFTA) among the United States, Canada and Mexico. It appears the Commerce Department will formally notify Congress in mid-March that it will renegotiate the 23-year-old agreement, but actual changes to the trade agreement will have to be agreed to by Congress. This move is of special concern to pork producers in the U.S.; the American pork industry exports around one-fourth of all product, with Mexico and Canada currently among the top four markets for U.S. pork.

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

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

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



Strategic Hiring of Farm Workers

by Jennifer Lurken

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It is no secret that employees can be a company's biggest asset…and liability. In recent years, with employees using their cell phone cameras to take undercover photographs and videos allegedly showing abuse, employers need to be even more vigilant in their hiring and training practices. Employers need to ensure they are hiring employees who share the employer's values and goals of caring for the health and well-being of their animals. Once hired, employers need to properly train employees on the employer's policies to prevent animal abuse.

1. Hiring the Right Person

Many employers conduct a cost-benefit analysis of the level of research to perform on potential employees. While conducting that analysis, employers should keep in mind that it takes a lot less time and money to research employees on the front end than to wage a public relations war after the fact. The following hiring practices may assist an employer in making educated and sound hiring decisions.

First, be consistent across the board when researching applicants and hiring. Make sure you are asking the same base questions of all applicants. For example, you cannot ask only certain applicants if they have been involved with animal rights groups; you have to ask everyone.

Second, make sure your application asks the right questions. With respect to membership organizations, an employer should not ask an applicant a general, overreaching question requesting all clubs, societies, lodges, etc. to which the individual belongs. The general thinking is that by posing general questions about organizations, it may indirectly solicit information about a person's economic or social class, race, color, creed, sex, marital status, religion, national origin, or other protected class. However, inquiring about membership in organizations, the names of which do not point to or indicate the applicant is a member of a protected class, is acceptable. Therefore, you can ask whether the applicant is a member of specific groups such as PETA or the Humane Society of the United States.

Furthermore, in your application, have applicants swear they have told the truth on their employment application under penalty of perjury. Including this on the written application and having a policy that allows for disciplinary action, up to and including termination, if false information is provided, gives the employer grounds for termination if an applicant is not truthful.

Third, don't rely on the application. Do your own research. Don't just call and check references; make sure the phone numbers provided for references actually go to the company where an applicant says he or she previously worked. Call the main office number and ask to be transferred to the reference, rather than calling the direct number listed. When speaking to references ask the hard questions, don't just confirm employment. Verify prior employment on an applicant's resume and question gaps between jobs. Also, consider having a professional conduct a background check.

A conflict of opinion arises when it comes to researching a potential candidate on the Internet and through social media. As discussed above, it is important to not solicit information about whether an applicant is a member of a protected class. However, by conducting Internet and social media searches, an employer may discover that an applicant is a member of a protected class. If the applicant is then not hired, an argument may be made that the failure to hire the applicant was discrimination. Conversely, Internet and social media searches can reveal connections with animal rights organizations, potentially preventing a public relations fiasco. It is important for an employer to consciously decide whether an Internet and social media search will be conducted and, if so, to consistently conduct the search for all applicants to guard against claims of discrimination.

Once the data has been collected on an applicant, watch out for:

- Applicant applying for work below his or her skill level;
- Applicant with prior employment unrelated to agricultural work; and
- Applicant who offers to work for little or no pay, after hours or do the work no one else likes to do.

2. Policies to Prevent Animal Abuse

After putting so much time and energy into researching employees, you should adopt policies and train employees to support the company's values.

Employers should enact policies in their own barns prohibiting the photography or videography of livestock. Policies should limit the use of cell phones while on the job or even require cellphones to be left in vehicles or lockers. Employers may also implement policies that unauthorized photographs or videos are property of the employer.

A handful of states have enacted laws in recent years prohibiting the photography or videography of livestock without the consent of the owner. Those laws have been challenged in some states as a violation of the First and Fourteenth Amendments. Even if you are in a state with such a law, it is important to also have a policy in the employee handbook and to post the policy at all of your facilities. Taking these steps ensures that all employees are aware of the law and policy and the consequences of violation.

Once these policies are set, an employer must strictly enforce the policies, as well as any other rules and regulations for the humane treatment of animals. Make sure to post policies against animal neglect and abuse, including phone numbers to call to report animal neglect. Have long-time, loyal employees keep a lookout for problems such as animal abuse, neglect or maltreatment or employees taking videos of the animals. If you see employees on the premises when they shouldn't be or in areas where they shouldn't be, question the employees.

Farmer-Lender Mediation

by Michael S. Dove

In the early 1980s, the rural economy suffered a significant economic recession. Farmers and all rural businesses were adversely affected by low farm commodity prices, escalating high interest rates, and reduced net farm income.

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In response to the farm crisis, the Minnesota Legislature enacted the Farmer-Lender Mediation Act (the "Act") to provide "an orderly process . . . to adjust agricultural indebtedness" and "to prevent civil unrest and to preserve the general welfare and fiscal integrity of the state". See Minn. Stat. § 583.21. Although the Act was to be "temporary" in nature, the Minnesota Legislature has always extended the statutory expiration date of the Act before it expired. Creditors have become accustomed to the practice and now accept it as part of the collection process.

This article will provide a broad overview of the statutory maze of the Act (codified at Minn. Stat. Chapter 583), identifying key provisions that may affect agricultural producers, lenders, and other individuals or entities.

When is Mediation Mandatory?

Mediation is mandatory under the Act when all of the following requirements are present:

- A "collection action" will be commenced against "agricultural property";
- The party commencing the action is a "creditor" within the scope of the Act;
- The "debtor" is within the scope of the Act; and
- The "debt" is within the scope of the Act.

Who is a Creditor?

A "creditor" for purposes of the Act is:

- "[t]he holder of a mortgage on agricultural property, a vendor of a contract for deed of agricultural property, a person with a lien or security interest in agricultural property, or a judgment creditor with a judgment against a debtor with agricultural property." See Minn. Stat. § 583.22, Subd. 4.

Additionally, the Act only applies to "creditors" who are:

- The United States or an agency of the United States;
- A corporation, partnership or other business entity; or
- An individual. Minn. Stat. § 583.24, Subd. 1(a).

Given the Act's broad definition of "creditor", it is difficult to imagine a creditor that would not be subject to the Act.

Who is a Debtor?

Under the Act, a "debtor" is a:

- Person operating a family farm;
- A family farm corporation; or
- An authorized farm corporation (all as defined under Minn. Stat. §500.24, Subd. 2). See Minn. Stat. § 583.24, Subd. 2(a).

In essence, a debtor is an actual agricultural producer.

The Act does not apply to a person who leases agricultural land to another and does not "actively engage" in the farming operation (e.g., planting, harvesting crops) unless such person resides on the land. Additionally, the Act does not apply to a debtor who owns or leases less than 60 acres of real property, and has less than $20,000.00 in gross sales of agricultural products in the preceding year.

What Collection Remedies Require Offering Mediation?

Under the Act, offering mediation is mandatory before a creditor can initiate the following collection mechanisms:

- Enforcement of security interest in agricultural property under Article 9 of the Uniform Commercial Code if the debt secured is more than $5,000.00. (Minn. Stat. § 336.9-601(h)
- Beginning proceedings to foreclose a mortgage on agricultural property that secures debt of more than $5,000.00. (Minn. Stat. § 582.039, Subd. 1)
- Termination of a contract for deed to purchase agricultural property where the remaining balance is more than $5,000.00. (Minn. Stat. § 559.209, Subd. 1)
- Attachment of, execution on, levy on, or seizure of agricultural property securing a debt of more than $5,000.00. (Minn. Stat. § 550.365, Subd. 1)

Under this provision, mediation is not required prior to the commencement of an action to obtain a money judgment against a debtor. Once a money judgment is obtained, however, the statutory mediation requirements apply to the enforcement of that judgment if the creditor was seeking to enforce the judgment by attaching/executing or levying on agricultural property.

What Encompasses Agricultural Property?

Under the Act, "agricultural property" is defined as:

- Real property that is principally used for farming;
- Personal property that is used as security to finance a farm operation;
- Personal property that is used as part of a farm operation (e.g., equipment, crops, livestock, etc.). See Minn. Stat. § 583.22, Subd. 2.

Agricultural property does not include personal property subject to a possessory lien, leased property (other than removable agricultural structures under lease with option to purchase); and farm machinery that is primarily used for custom field work.

Exceptions to Mediation

There are various exceptions when the Act does not apply, to include:

- When a Proof of Claim was filed by a creditor or the debt was listed as a scheduled debt in a bankruptcy proceeding filed by the debtor;
- When the creditor received a mediation proceeding notice when the debt was in default, and the creditor filed a claim form, when the debt was mediated during an applicable mediation period;
- When a creditor has served a mediation notice and the debtor has failed to make a timely request for mediation, within 60 days after the debtor failed to make a timely request the creditor began a proceeding to enforce the debt against the debtor's agricultural property;
- Where the debtor and creditor restructured the debt and signed a separate mediation agreement.

In addition, the Act does not apply to a debtor who fraudulently conceals, removes, or transfers agricultural property in which the debtor knows there is a security interest. The debtor is ineligible for mediation under the Act if such actions were in violation of the security agreement, and the debtor failed to remit the proceeds to the secured party. To avoid mediation in this scenario requires the creditor to initiate an action (lawsuit) in District Court in the county of the debtor's residence. This action must be brought within one year after the alleged conversion and before any mediation notice is served on the debtor. See Minn. Stat. § 583.27, Subd. 7.

Mandatory Mediation – Notices and Filing

Before a creditor can initiate an action to enforce debt against agricultural property (as earlier described), the creditor must serve the applicable mediation notice on the debtor. The creditor must serve the appropriate mediation notice (there are different notices for real estate foreclosure, enforcement of security interest, termination of contract for deed, and garnish, levy or attachment of a judgment) on the debtor. The debtor must be served via the following methods:

- Personal service;
- Service by certified mail, restricted delivery;
- Actual delivery with a signed receipt; or
- If unsuccessful attempt is made, service may be made by mail to the debtor's last known address, but must include a certificate of mailing.

If there are multiple debtors, each debtor (or obligor in event of a guaranty) must be separately served and notified. Failure to serve all debtors will only result in having to repeat the mediation process for any debtor not originally served.

Mediation Request

The debtor must file a Mediation Request Form with the Director of the Minnesota Extension Service within 14 days after receiving a mediation notice. The request form must state all known creditors with debts secured by agricultural property and all unsecured creditors who are necessary (in the debtor's discretion) for the farming operation.

The debtor may withdraw the mediation request at any time before 14 days after receiving the notice. The debtor's withdrawal must be in writing and constitutes a waiver of the debtor's right to mediate the debt that initiated the service of the mediation notice under the Act, unless the debtor re-files the mediation request within the 14 days permitted to file the original mediation request.

Failure to Request Mediation

If the debtor fails to file a timely mediation request or withdraws the mediation request, the debtor waives the right to mediation under the Act. The Director is then required to send a notice of the debtor's failure to request mediation to the debtor and the creditor who served the mediation notice. The notice of the debtor's failure to request must be sent within 20 days after service of the mediation notice on the debtor, or within 3 days after the creditor's filing of the service of mediation notice with the Director, whichever is later.

The Mediation Process

Within 10 days after receiving the mediation request, the Director must send mediation notice to the debtor and all creditors identified by the debtor.

Upon receipt of a mediation notice, a creditor may not initiate or continue proceedings to enforce or collect a debt that is subject to the Act, until 90 days after the filing of a mediation request—unless the debtor and creditor sign an agreement allowing the creditor to enforce the debt, subject to a 5-day waiting period. The initial meeting must be held within 20 days of the mediation proceeding notice.

Participation in the Mediation

After the mediation request has been filed, the creditor must provide the debtor, by the initial mediation meeting, with copies of notes and contracts subject to the Act, along with a statement of interest rates, delinquent payments, unpaid principal and interest

balances, the creditor's value of the collateral and any available debt restructuring programs. The debtor is supposed to also provide financial information at the first meeting.

Other than the initiating creditor, and in lieu of attending the initial mediation meeting, a creditor may file a proof of claim before the initial mediation meeting. A creditor who files such a claim will be bound by a mediation agreement, unless that creditor objects within 10 days after receiving notice of a mediated agreement.

During the mediation meetings, all parties must mediate in good faith. Failure to attend or participate in mediation meetings, failure to provide information regarding financial obligations, failure of a creditor to designate a representative with authority to make binding commitments, and failure to permit the creditor to inspect collateral, or the debtor allowing waste of the property securing the debt, violate the good faith obligation.

Termination of Mediation / Agreement

The mediation period lasts for 60 days from the initial mediation meeting. Within 90 days after the debtor files a mediation request, the mediator must sign and serve a termination statement that acknowledges the mediation has ended and describes any agreement (if applicable) entered into between a creditor and the debtor or amongst other creditors.

If an agreement is reached during the mediation, the debtor, the creditor(s) and mediator must sign a written mediation agreement outlining the agreement. This agreement will be binding upon the debtor, creditors who approve the agreement, and any creditor who filed a claim form and failed to object to the agreement. Further, any party to the agreement may enforce the mediation agreement as a legal contract.

Finally, if a mediation agreement is reached, the mediation agreement must be enforced by the District Court in accordance with its terms. (Minn. Stat. § 583.31)

Recent Developments

The Minnesota Legislature added a provision in the 2016 Agricultural Policy Bill to establish an advisory task force to provide recommendations to the Minnesota Legislature regarding the Act. The task force was comprised of 14 members, including the Commissioner of Agriculture, along with various agricultural representatives and advocates.

On February 28, 2017, Minnesota Agriculture Commissioner David Frederickson presented the task force report to members of the House Ag Policy Committee. In making the report, Commissioner

Frederickson called it a "consensus report" and identified the various recommendations agreed to by the task force members, to include:

- In accepting mediation, the same debtor should not be eligible for mediation with the same creditor within a two-year period of acceptance.
- The minimum debt levels for mediation (currently $5,000 in the Act), if increased, should be adjusted for inflation in an amount not to exceed $13,800. The Department of Agriculture determined that $13,800 was the equivalent of $5,000, after adjusting for inflation.
- The amount released for a debtor's living expenses in mediation should be increased to current cost of living standards, and adjusted for inflation in subsequent years.
- If accepting mediation, to assist in completing the financial statement prior to the first mediation meeting, the ability to perform a credit search and financial statement verification, as necessary, should be available to the mediator. If the debtor fails to report significant amounts of unsecured debt, that may be a reason for the mediator to declare bad faith and end the mediation.
- An "in a timely manner" provision should be added into Minn. Stat. § 583.27, Subd. 1(a)(2). Thus, if a debtor didn't provide all necessary financial statements "in a timely manner" such actions would violate the good faith requirements.

Summary

Notwithstanding the changes proposed by the task force, the Farmer Lender Mediation Act has, in reality, become a permanent fixture for agricultural producers and lenders. All agricultural producers and lenders need to be aware of the specific statutory requirements under the Act prior to taking action in collecting against agricultural property.


TAX

Tax Reform

by David C. Kim

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The outcome of the November 8, 2016 election made a major overhaul and substantial changes in the United States Tax Code not only possible but almost inevitable. During his presidential campaign, President Trump proposed a tax plan (the "Trump Plan") to simplify tax reporting, substantially reduce corporate and individual tax rates, and adopt a flat rate tax on pass-through business income. Previously, on June 24, 2016, House Republicans also released a report titled "A Better Way – Our Vision for a Confident America" as an outline plan for comprehensive tax reform (the "House Plan"). Albeit not identical, President Trump's tax plan and House Republicans' reform share pretty dramatic philosophical changes underlying the tax system, namely: (a) shifting the macroeconomic policy of the country from a redistribution-centered policy, as had previously been pursued by the Obama Administration, to a capitalistic growth-oriented policy by reducing tax burden on taxpayers across the board; (b) a partial shifting from a complete income tax regime to a mixture of cash-flow or consumption tax and income tax regime; and (c) a change from the current source-based or residence-based taxation to a "destination-based" or "place of consumption-based" taxation. This article is to introduce a brief summary of the Trump Plan and the House Plan.

I. Individual Tax Reform.

a. Ordinary Income Tax Rates. The Trump Plan and House Plan will change the current seven-tier bracket system to a more simplified three-tier tax rate system. For married couples filing jointly, the tax rates under the current Tax Code are as follows:

Taxable Income	Ordinary Income Tax Rate
Up to $18,550	**10%**
$18,551–$75,300	$1,855 plus **15%** of the amount over $18,550
$75,301–$151,900	$10,367.50 plus **25%** of the amount over $75,300
$151,901–$231,450	$29,517.50 plus **28%** of the amount over $151,900
$231,451–$413,350	$51,791.50 plus **33%** of the amount over $231,450
$413,351–$466,950	$111,818.50 plus **35%** of the amount over $413,350
$466,951 or more	$130,578.50 plus **39.6%** of the amount over $466,950

Under the Trump Plan, the tax table will change as follows:

Taxable Income	Ordinary Income Tax Rate
Up to $75,000	**12%**
$75,001—$225,000	$9,000 plus **25%** of the amount over $75,000
$225,001 or more	$46,500 plus **33%** of the amount over $225,000

Although the House Plan does not specify the exact taxable income level for each of the three brackets, it does propose: **12%**, **25%**, and **33%** of tax rates for the three-tier system.

b. Long-Term Capital Gains Tax Rates. Under the Trump Plan the current three-tier rate structure for long-term capital gains tax will continue at slightly different taxable income levels. By contrast, the House Plan does not propose a separate long-term capital gains tax rate distinct from the ordinary income tax rate. Instead, the House Plan allows exclusion of **50%** of individual tax payers' investment income, including long-term capital gains, qualified dividends, and interest income from the taxable income subject to tax at the ordinary income tax rate. Economically, the **50%** exclusion is equivalent to taxing the investment income at **6%**, **12.5%**, and **16.5%** at each income bracket. A comparison of the current rate system to the Trump Plan is as follows:

2016 Long-Term Capital Gains Rate		Trump Plan Long-Term Capital Gains Rate	
Taxable Income	**Rate**	**Taxable Income**	**Rate**
Up to $37,650	0%	Up to $75,000	**0%**
$37,651–$233,475	15%	$75,001—$225,000	**15%**
$233,476 or more	20%	$225,001 or more	**20%**

c. Net Investment Income Tax Repeal. Under the current Tax Code as introduced by the Patient Protection and Affordable Care Act of 2010 (a/k/a ObamaCare), for individual taxpayers filing a joint tax return as a married couple, Net Investment Income Tax applies if their modified adjusted gross income exceeds $250,000. The current Net Investment Income Tax applies at the rate of **3.8%** upon the Net Investment Income of individual taxpayers and upon the undistributed Net Investment Income of estate and trust taxpayers. Net Investment Income includes gross income from interest, dividends, annuities, royalties, rents, substitute interest payments, and substitute dividend payments. It also includes gross income derived from passive activity and net gain from disposition of property held in a passive activity or a trade. Under the Trump Plan and the House Plan, the Net Investment Income Tax will be completely repealed.

d. Itemized Deductions. Itemized deductions are an area where the House Plan deviates from the Trump Plan as follows:

House Plan	Trump Plan
Eliminate all itemized deductions except deductions for: (i) mortgage interest on principal residence; (ii) charitable contributions; and (iii) retirement savings.	Maintain current itemized deductions but cap itemized deductions at $200,000 for married couples and $100,000 for individuals.

e. Standard Deduction; Personal Exemption. Under both House Plan and Trump Plan, the standard deduction and personal exemption will be combined into a single but larger standard deduction, but at different amounts as follows:

House Plan	Trump Plan
$24,000 for married individuals filing jointly, $18,000 for single individuals with a child in the household $12,000 for other individuals.	$30,000 for married couples filing jointly $15,000 for other individuals.

f. Alternative Minimum Tax (AMT) Repeal. Under both House Plan and Trump Plan, individual AMT will be repealed.

g. Estate Tax; Gift Tax; and Generation-Skipping Transfer Tax. The House Plan repeals the estate tax and generation-skipping transfer taxes. The Trump Plan also proposes to repeal the estate tax and gift tax. However, under the Trump Plan, stepped-up basis will not be allowed on assets over $10 million (for a married couple) held until death. Instead, assets over $10 million (for a married couple) will be subject to capital gains tax.

II. **Business Tax Reform**.

a. C Corporation Income Tax Rate. The House Plan and Trump Plan both propose dramatic reductions to the corporate tax rate as follows:

House Plan	Trump Plan
20% flat rate.	Reduce the top rate from the current 35% down to **15%** and eliminate most tax brackets.

b. Alternative Minimum Tax (AMT) Repeal. Under both House Plan and Trump Plan, corporate AMT will be repealed.

c. Pass-Through Business Income Tax Rate. The House Plan and Trump Plan both propose lowering top rate for active pass-through business income from sole proprietorships, partnerships, and S corporations as follows:

House Plan	Trump Plan
Do not apply the 33% top rate for individual income tax. Instead, apply active pass-through business income rate at **25%** as the top rate.	Do not apply the 33% top rate for individual income tax. Instead, apply active pass-through business income rate at **15%** as the top rate.

d. Income Taxation vs. Cash-Flow Based Taxation; Immediate Write-Off of Business Investments. The House Plan proposes a change from the current U.S tax system which taxes business "income" to a cash-flow based approach. Under the current tax system in the U.S., taxable income is generally defined to be gross income less allowed deductions, which is determined based on the policy reflected in what the Tax Code allows or disallows for a given tax year. Accordingly, not all business costs and expenses are deductible in the same year when business investment is made. Rather, the Tax Code requires taxpayers to differentiate purchases of assets used as raw materials for their goods sold versus purchases of assets with a useful life sufficiently long for capitalization. Also, it requires a distinction between repayment of the principal amount of a business loan versus payment of interest thereon. Under cash-flow based taxation, taxing is not based on income but pure cash flow to the business, and none of those distinctions among various categories of expense items matters. Instead, all business investments will be deducted just like all wages and costs-of-goods-sold will be deductible. For instance, the House Plan and Trump Plan both provide for immediate cost recovery and expensing as to capital expenditures and business investments as follows:

House Plan	Trump Plan
Full and immediate write-off or expensing will be allowed as to business investments in tangible property (such as equipment and buildings) except land and intangible assets (such as intellectual property).	US-based manufacturers will be allowed to elect full and immediate write-off or expensing of business investments in plants and equipment. Once election is made for immediate expensing, it can be revoked within the first three years.

e. Deductibility of Interest Expense. The House Plan specifies that no immediate deduction will be allowed for the net interest expense incurred to finance business investment. Instead, any interest expense will be allowed to be carried forward indefinitely for deduction against net interest income in future years. This is justified in light of the full and immediate expensing (as compared to the current rule requiring cost recovery over useful life) of such investment. The Trump Plan also provides that if a US-based manufacturer elects full and immediate expensing of business investment, then it will not be able to deduct interest expense incurred to finance such investment.

f. Special-Interest Deductions and Credits. The House Plan proposes to eliminate most of the current special-interest deductions and credits, such as the domestic production deduction under the current Tax Code Section 199, in exchange for overall tax rate reduction for all businesses. The only exception that the House Plan refers to is the research and development credit, which will be continued under more effective and efficient rules. Similarly, the Trump Plan proposes to abolish most of the current tax law provisions allowing business expenditure deductions except for the research and development credit.

g. Destination-Basis Taxation; Boarder Tax Adjustments. Many foreign countries imposing value-added taxes allow border tax adjustments exempting gross receipts from exported goods and services while taxing imported goods and services. The root of the border tax adjustment is "destination" or "destination of consumption" basis (as compared to a "place of production" basis taxing principle). In other words, under a destination-basis approach, taxation is based on the location of consumption rather than the location of production, which, in principle, goes together with cash-flow basis taxation. Accordingly, under the House Plan, businesses exporting products to foreign countries will be able to fully deduct foreign sales from their taxable cash flow, whereas businesses importing raw materials from foreign countries will not be able to deduct the imported materials.

h. Territorial Taxation on Foreign Earnings. In taxing foreign earnings made by the subsidiaries or affiliates of U.S. companies, the current Tax Code uses a so-called worldwide tax system or residence-based principle under which such foreign earnings are taxed at 35% tax rate. The current tax law charges tax on those foreign earnings when they are brought back to the U.S., save and except for a foreign tax credit for taxes paid in foreign countries. Understandably, that is why the U.S. companies have not brought back such foreign earnings to the U.S. for investment and job creation in the U.S. Currently, such accumulated untaxed foreign earnings are close to $2.6 trillion. The House Plan proposes to abolish the worldwide tax system and adopt a territorial tax system that taxes U.S. domestic income but not foreign income made by the U.S. persons in other countries. For instance, the House Plan will provide 100 percent exemption for dividends from foreign subsidiaries of U.S. companies.

i. Repatriation Tax. With respect to U.S. companies' foreign earnings of more than $2 trillion currently locked outside of the U.S., the Trump Plan proposes a one-time 10 percent tax on the repatriated foreign earnings. On the other, under the House Plan, the current accumulated foreign earnings will be subject to a repatriation tax at the rate of 8.75 percent on cash or cash equivalents and 3.5 percent on other assets, which may be payable over an eight-year period. As discussed above, under the territorial taxation principle, the House Plan proposes no more tax to be imposed on foreign earnings made in the form of dividends from foreign subsidiaries of U.S. companies.

III. Conclusion; Impact on Agricultural Businesses.

In sum, the Trump Plan and House Plan call for:

- Simplifying tax law
- Lowering tax rates across the board
- Cash-flow basis taxation
- Destination of consumption basis taxation
- Territorial taxation

What does this mean to our farm and agricultural businesses? Although it is too early to tell, a few practical changes may be concluded out of these reform efforts:

- Tax calculation may become significantly simpler.
- Necessary tax planning efforts may be lessened.
- Tax-oriented spending or investment decisions may be replaced by pure economic consequence-driven decisions.
- Overall effective tax rate under a C corporation, even after considering the double-taxation effect, for the first time, may be competitive with other forms of business entities such as S corporations, partnerships, or sole proprietorships.
- Choice of organizational form for business entities, which used to be driven by tax considerations, may be simplified and primarily driven by non-tax factors.
- Exporting agricultural products to foreign countries may generate additional after-tax income.
- Tax incentives for moving profits offshore by engaging in cross-border transactions will be substantially lessened.

CASE LAW UPDATE

"Des Moines Water Works" Case Dismissed in Its Entirety After Input from the Iowa Supreme Court.

***Bd. of Water Works Trustees of the City of Des Moines, Iowa v. Sac Cty. Bd. of Supervisors Drainage Districts 32, 42, 65, 79, 81, 83, 86,* No. C15-4020-LTS, 2017 WL 1042072 (N.D. Iowa Mar. 17, 2017).**

THE PARTIES: Des Moines Water Works (**"DMWW"**) is a municipal water utility that provides water services in Iowa to Des Moines, Polk County, Windsor Heights, and the Warren County Water System. The other parties to the dispute are 13 drainage districts in Sac County, Iowa; Calhoun County, Iowa; and Buena Vista County, Iowa (collectively, the **"Districts"**).

THE FACTS: DMWW obtains its water supply from the Raccoon and Des Moines Rivers, into which the upstream Districts drain. Under federal law, DMWW must meet maximum contaminant level standards and thus remove nitrates from its water supply before providing that water to the public.

THE DISPUTE: Just over two years ago, DMWW filed a lawsuit against the Districts in federal court, claiming that (a) fertilizer runoff from farms within the Districts increases nitrate levels within the water DMWW relies on in providing its services and (b) the Districts should be required to alleviate contaminant levels and compensate DMWW for damages it has incurred.

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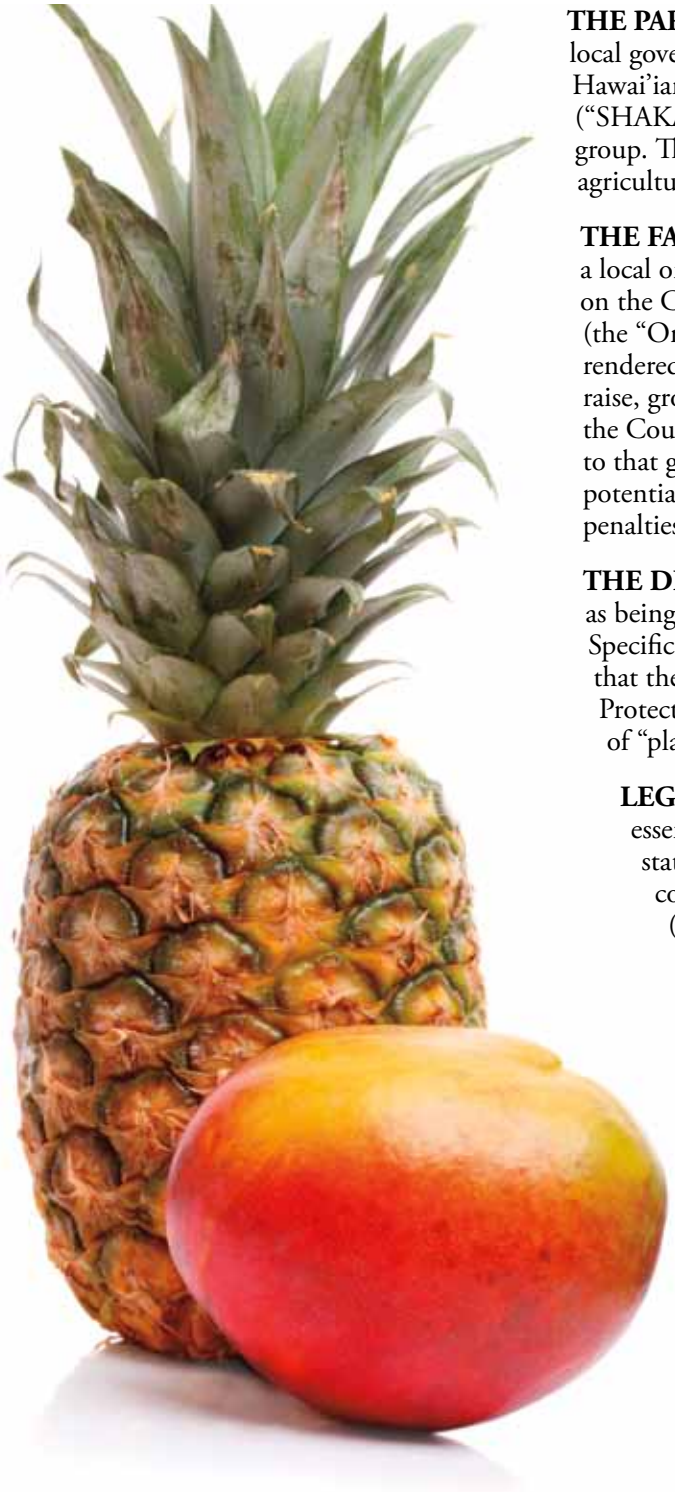
LEGAL ISSUES: In January of 2016, the federal district court that heard this case asked the Iowa Supreme Court to answer specific state-law questions related to some of the claims alleged by DMWW and the issue of whether the Districts can be required to actually pay money for any damages they have caused DMWW to incur. On January 27, 2017, the Iowa Supreme Court answered those questions in favor of the Districts. However, DMWW argued that it could still bring claims against the Districts based on the United States Constitution and that the federal district court can still force the Districts to undertake non-financial remedial efforts to decrease pollution.

CONCLUSIONS: On March 17, 2017, the federal district court sided with the Districts and dismissed all of DMWW's claims. In doing so, the court found that (1) while DMWW may have been injured, the Districts were unable to take actions that would "redress" DMWW's alleged injuries due to the Districts' limited powers and duties and (2) DMWW was not entitled to relief under the United States Constitution's Equal Protection, Due Process, or Takings Clauses.

While this dispute may appear to be over at present, DMWW may continue its legal fight by appealing the federal district court's decision to the Eighth Circuit Court of Appeals. It also remains to be seen whether the Iowa legislature will take any actions as a result of the federal district court's decision. Thus, many will continue to closely follow this case's aftermath in light of its potential ramifications.

Local Ordinances Banning Use of GMOs Invalidated as Preempted by Federal Law.

Atay v. Cty. of Maui, 842 F.3d 688 (9th Cir. 2016).



THE PARTIES: The County of Maui (the "County") is a local governance entity in the state of Hawaii. The Sustainable Hawai'ian Agriculture for the Keiki and the 'Aina Movement ("SHAKA") is a Hawaiian environmental advocacy group. The "GE Parties" are a group of farmers in favor of agriculture utilizing genetically modified products.

THE FACTS: The County, via a ballot initiative, passed a local ordinance entitled "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms" (the "Ordinance"). As its name suggested, the Ordinance rendered it unlawful for any entity to "propagate, cultivate, raise, grow, or test Genetically Engineered Organisms within the County of Maui," and only provided a few exceptions to that general ban. Violation of the Ordinance carried potentially heavy civil penalties and moderate criminal penalties.

THE DISPUTE: The GE Parties challenged the Ordinance as being beyond the County's ordinance authority. Specifically, the GE Parties argued, among other things, that the Ordinance was invalid as preempted by the Plant Protection Act, a federal law that regulates various aspects of "plant pests" and noxious weeds in the United States.

LEGAL ISSUES: "Preemption" is a legal doctrine that essentially prevents lower levels of government (e.g., states or local governments) from passing laws that contradict laws passed by higher levels of government (e.g., the federal government). Federal law can preempt state or local laws in various types of ways, such as when a federal law explicitly says that it preempts such laws. Important here, the Plant Protection Act contains a clause stating that it expressly preempts certain non-federal laws similar to it.

CONCLUSIONS: The Ninth Circuit invalidated the Ordinance as being expressly preempted by the Plant Protection Act because the Ordinance categorically deemed GMOs to be "plant pests"—things that are also regulated by the Plant Protection Act. Thus, given the overlap between the Ordinance and the Plant Protection Act, as well as the Plant Protection Act's preemption provision, the Court held that the Ordinance was expressly preempted by federal law.

Although the Ordinance was enacted thousands of miles away, this decision has relevance in the Midwest, as the reasoning behind the Ninth Circuit's decision, as discussed above, would presumably apply all over the United States.

Chapter 12 Bankruptcy Case Dismissed Despite Policy in Favor of Farm Reorganization.

In re Milky Way Organic Farm, LLC, No. 12-10742, 2017 WL 598473 (Bankr. D. Vt. Feb. 14, 2017).

THE PARTIES: Milky Way Organic Farm was a farming operation run by Robert Clark, Sr., Mary Saceric Clark, and Robert Clark, Jr. The United States Department of Agriculture Farm Service Agency, People's United Bank, and the Vermont Agricultural Credit Corporation (together, the "Creditors") were institutions that provided credit to the farming operation.

THE FACTS: While experiencing financial difficulties, Milky Way Organic Farm filed for Chapter 12 bankruptcy, which is reserved for family farmers and fishermen. After much negotiation, Milky Way Organic Farm and the Creditors stipulated to a repayment plan, which the bankruptcy court approved. Unfortunately, Robert Clark, Sr., died a few years later while the plan was still in place. At that time, Milky Way Organic Farm had serious difficulties in complying with the terms of the plan.

THE DISPUTE: The Creditors moved to dismiss the plan, which, if successful, would allow them to proceed against the assets of Milky Way Organic Farm.

LEGAL ISSUES: Milky Way Organic Farm argued, among other things, that the plan should not be dismissed because Chapter 12 of the Bankruptcy Code prioritizes the protection of farmers.

CONCLUSIONS: The bankruptcy court agreed with the Creditors and dismissed Milky Way Organic Farm's Chapter 12 plan, finding that the farm's defaults under the plan were material and gave rise to dismissal. Commenting on the general policy behind Chapter 12 bankruptcy, the Court stated that "[i]n order for Chapter 12 to work, . . . creditors must be persuaded that the remedies set out in Chapter 12 will be available if Chapter 12 debtors fail to meet their obligations under confirmed plans." The Court also found that the Creditors had been patient, flexible, and supportive of the farming operation throughout the bankruptcy process, so that notions of equity did not prevent dismissal of the Chapter 12 plan.

This case stresses the importance of abiding by the terms of a Chapter 12 plan, regardless of the favor that farmers enjoy under Chapter 12 of the Bankruptcy Code.

Minnesota Pollution Control Agency Again Given Wide Discretion in Granting NPDES Permits.

Minnesota Ctr. for Envtl. Advocacy v. City of Winsted, No. A16-0854, 2017 WL 393897 (Minn. Ct. App. Jan. 30, 2017).

THE PARTIES: The Minnesota Center for Environmental Advocacy is a Minnesota environmental advocacy group. The City of Winsted is a city in Minnesota. The Minnesota Pollution Control Agency (the "MPCA") is a state agency that enforces environmental regulations in Minnesota.

THE FACTS: The City of Winsted applied to the MPCA for a National Pollutant Discharge Elimination System/State Disposal System ("NPDES/SDS") permit for its wastewater treatment plant. On April 22, 2016, the MPCA issued an NPDES/SDS permit to the city, and the permit required the city to update facility technology and to move the facility's discharge location by March 31, 2021. Upon moving the discharge location, discharge from the facility was to flow through six reaches of water and eventually into the South Fork of the Crow River (the "South Fork") watershed. Before issuing the permit, the MPCA concluded that a water-quality-based effluent limit ("WQBEL") was necessary to protect the South Fork and set a monthly average concentration limit for phosphorus of 630 micrograms per liter.

THE DISPUTE: The Minnesota Center for Environmental Advocacy challenged the issuance of the NPDES/SDS permit.

LEGAL ISSUES: In challenging the NPDES/SDS permit, the Minnesota Center for Environmental Advocacy argued that the MPCA did not consider sufficient information in setting the WQBEL and that the MPCA erred in estimating the background concentration of phosphorus in the South Fork.

CONCLUSIONS: The Minnesota Court of Appeals upheld the issuance of the NPDES/SDS permit. In doing so, the Court found that the federal regulations applicable to issuance of the permit were ambiguous as to what information the MPCA was to consider in determining whether activity under the permit would cause or contribute to a violation of water quality standards. As a result, the Court deferred to the MPCA's decision to issue the NPDES/SDS permit.

This case provides yet another example of the deference that Minnesota courts often grant to decisions of the MPCA.

Minority Owners of Farmland Unable to Veto Majority Owners' Productive Use of Land.

Hazelton v. Hazelton, No. 61 WDA 2016, 2016 WL 7176950, (Pa. Super. Ct. Dec. 9, 2016).

THE PARTIES: The parties were individuals who owned, as tenants in common, different percentages in the "Hazelton Farm"—a piece of property that had been owned by members of the Hazelton family for more than 100 years and farmed for much of that time.

THE FACTS: The Hazelton Farm was owned by nine individuals. The "minority owners" owned 13.34% of the property, and the other "majority owners" decided to lease the Hazelton Farm to a third-party farm tenant.

THE DISPUTE: The minority owners sought to prevent the other owners of the Hazelton Farm from leasing the property for cultivation.

LEGAL ISSUES: Tenants in common have the equal right to generally possess and enjoy the entire jointly-owned property. Typically, this means that one or more co-tenants cannot take actions that would deprive other co-tenants of their right to the property—such as executing a lease—without agreement by all co-tenants.

CONCLUSIONS: The Court held that while the minority owners did have a right to possess and enjoy the entire property, it would be highly inequitable for the minority owners to veto the majority owners' productive use of the land and thereby allow the land to become fallow and uncultivated. Thus, the Court allowed the majority owners to lease Hazelton Farms to a third-party farm tenant.

While the result of this case may not be universally applied, it serves as an example of how courts consider principles of equity when determining disputes between tenants in common who own farm property.

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Ag Practice Services

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

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

REPRESENTATIVE MATTERS

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


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