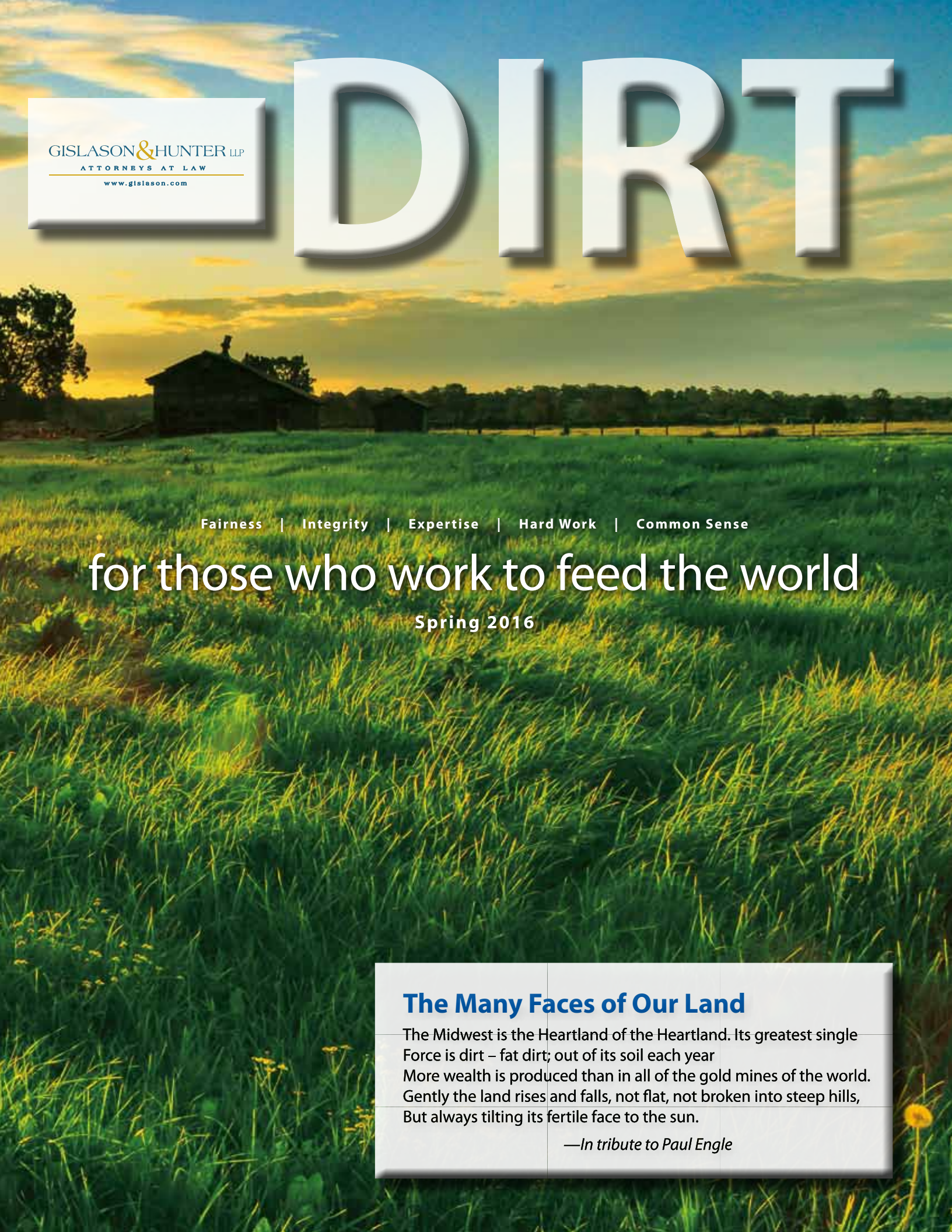


GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com

DIRT

Fairness | Integrity | Expertise | Hard Work | Common Sense

for those who work to feed the world

Spring 2016

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 2016 Agriculture Events and Programs

Southern Minnesota Business Summit
Host
Tuesday, June 7
Courtyard by Marriott, Mankato
(for full program information see page 45)

Minnesota Bankers Association Ag Conference
Sponsor/Speaker
Monday–Tuesday, June 13–14
Kahler Grand Hotel, Rochester

National Pork Industry Conference
Sponsor/Speaker
Monday–Wednesday, July 11–13
Kalahari Resort, Wisconsin Dells, WI

Minnesota Pork Producers Banking Conference
Presentor
Tuesday, July 19
Mankato

Minnesota Ag Education

The very first time I stepped foot on the University of Minnesota's St. Paul Campus, I was a freshman in high school attending the Minnesota State FFA Convention. Realistically, I was terrified of being on an actual college campus, but I quickly found myself falling in love with everything about it. The beautiful scenery, the true sense of community, and the agricultural setting had me wishing I could start my college career that day. Now here I am, five years later, nearing the end of my freshman year at the U wondering where in the world that time has gone.

My passion for agriculture was ignited by growing up on a corn and soybean farm just outside of Dunnell in Martin County, Minnesota. My decision to pursue a degree in Agricultural Education stemmed from my experiences in FFA, as well as from living in such a tight-knit, farming community. There is no doubt that we need strong individuals in the agriculture industry who can advocate for everything agriculture provides and stands for. My hopes for my future in the agriculture industry include working with farmers and community members in a rural setting, hopefully in my hometown community. I do not have an exact dream job pinpointed just yet, but there is no question in my mind that I want to be a strong leader within the agriculture industry, and the Ag Ed program is preparing me to be just that.

The Agricultural Education program prepares students for careers focused around high school-based teaching, but some students may pursue related career paths. As students, we take courses that focus on topics such as economics, horticulture, animal science, food science, natural resources science, communications, marketing, and even agricultural mechanics. That is really the beauty of an Ag Ed degree: you're a "jack of all trades" and can find a job anywhere in agriculture that interests you.

With the help of amazing professors such as Dr. Amy Smith and Dr. Rebecca Swenson, I feel like I have a purpose in the agriculture industry and I know that I will be prepared for whatever the world might throw my way. In addition to amazing faculty, the Minnesota Agricultural Education Leadership Council (MAELC) is also housed on campus in the Ag Ed Department. Both Sarah Dornink and Kari Schwab are incredible resources when it comes to scholarships, internships, or just an extra contact with a listening ear. The entire faculty and staff truly care about each of us as a student and as a person, and they are true advocates for agriculture and Agricultural Education.

In closing, it is extremely important to stress the impact that agriculture has on our everyday lives. The University of Minnesota and the Agricultural Education program challenge students to think deeply about those impacts. They are preparing us to be leaders in an ever-changing world, and we are taught how we, as future generations, can use our voices and our talents to continue leading the amazing industry that we call agriculture.

By Ellyn Swanson

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

LOCATIONS

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

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

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

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

www.gislason.com

6

CONTENTS

02 **Sponsorships**
Southern Minnesota Business Summit
Minnesota Bankers Association Ag Conference
National Pork Industry Conference
Minnesota Pork Producers Banking Conference

03 **Agricultural Education**
By Ellyn Swanson
FFA Program

06 **Uniting Stakeholders in Support of Agricultural Development**
by Sam Ziegler
Director of Project Ag Business Epicenter (ABE) at Greater Mankato Growth
Supporting and publicizing the success of Southern Minnesota agribusiness.

10 **Electronic Storage of Contracts**
by Gary Koch
Eliminating the clutter while retaining the contracts – legal and practical considerations.

16 **Navigating the Enforcement Maze**
by Matt Berger
An overview of enforcement procedures used by the Minnesota Pollution Control Agency.

SPRING 2016

20 **Like-Kind Exchanges of Agricultural Property: Trap for the Unwary**
by Kaitlin Pals
Complexities to be aware of when contemplating a 1031 (like-kind) exchange.

24 **Renting Farm Land – Farm Lease Agreements**
by Michael Dove
Reducing ambiguities and potential disputes by constructing good leases.

28 **Farm Insurance Policies**
by Timothy Tobin
Examples of coverage issues that may arise under farm insurance policies.

32 **Buying Farm Machinery and Equipment**
by Jeff Braegelmann
A guide to warranties, remedies, and limitations.

38 **Overview of the "Buy-the-Farm" Law in Minnesota**
by David C. Kim
Eligibility for and exercise of the statutory put option regarding eminent domain.

46 **Federal Issues Update**
by Brian Foster
- Congress – notable recent accomplishments
- Trans-Pacific Partnership
- Looking ahead – federal issues for the rest of 2016

50 **Case Law Update**
by Brittany King-Asamoa and Dean Zimmerli
- EPA Does Not Have a Duty to Regulate Air Pollutants Emitted from Animal Feeding Operations
- Public Utility Could Be Required to Purchase Entire Parcel under Buy-the-Farm Statute, Even if Arguably "Unreasonable" or "Unfair."
- Update: Court Concludes that Plaintiffs Are Likely to Succeed on Constitutional Challenge to Vermont's GMO Labeling Law
- Farm Tenant May Have Crop Damages Claim Against Pipeline
- Sixth Circuit Rules On Its Power to Decide on Clean Water Act Rule.
- Evergreen Clause Violates State Constitution's Limits on Farm Leases

Uniting Stakeholders in Support of Agricultural Development

by Sam Ziegler

Let me begin a bit unconventionally by providing you the conclusion first. The Southern Minnesota Agricultural Region is revered as being a global leader in Food, Feed, Fiber and Fuel. All stakeholders need to unite and wave our flags high in order to raise the visibility and collective success of the region. By unifying, we will have the ability to make a positive impact on our region's future. Our voices can be magnified by speaking as one, which in turn will raise the awareness of who we are as well as the impact and role we have. By raising awareness, we can attract the talent businesses need to grow and expand. Let's put our heads together to solve problems that are coming our way and overcome the hurdles currently facing us.

"65% of Minnesota's total Agbioscience is generated in our region," according to the U of M Extension *Economic Contribution of the Agbioscience Industry in Greater Minnesota* report.

Maybe this is something you already have thought about. However, I talk with people all the time who have a hard time recognizing the importance, prominence and diversity of agriculture across this region. No one walks around with a sign that says "I am in the business of agriculture." We need to embrace it locally and share our story globally, and then people may begin to recognize the potential and the horsepower this industry boasts.

In southern Minnesota we have a resilient and diverse agriculture-based economy. The ag umbrella spans a wide array of businesses – so vast, in fact, it can be hard to grasp. This has indeed been a barrier in the past, keeping those in the industry from uniting and speaking in one collective voice. With today's workforce challenges, global competition and the world's climbing population (estimated to grow to 9 billion people by 2050), it will take an even greater commitment to overcome these challenges.

We often do not think about the impact each of us makes on the larger community. Consider the sheer size and scope of your own career and business(es) as they relate to food, fuel, feed and fiber; it may surprise and challenge your previous perceptions when the word "agriculture" is spoken. Rather than thinking in silos, let's unite and raise our flag high for all to see the vibrant businesses and communities that exist or thrive in one way or another due to our agriculture ties. We can be proud of our heritage and excited about the future when we leverage our collective strengths.

"$10.1 Billion of economic impact is represented in the area of the economic continuum from production, education, research, manufacturing and more in south central MN alone," according to the *Ag Snapshot* report compiled by Greater Mankato Growth.

Sectors of the Economy

One can look at the local, national or global economies and break each down into five sectors. These same sectors can be used to assess the ag economy as well. In looking at our region, one will find we have a presence in all five sectors, unlike a place such as Singapore where they are missing the primary sector. You could also look at a place like Brazil and find they are challenged in the tertiary sector; but here we have a tremendous competency in all five sectors.

Primary Sector

The first sector – the Primary sector – begins with natural resources, plants and animals, which we can credit to an amazing soil profile and ample rainfall. With this we are able to raise a diverse healthy mix of plants and animals. Within plants alone we have quite diverse crops such as honey, grapes, field corn, sweet corn, peas, soybeans, alfalfa, apples, wheat, oats and more. The primary sector is the beginning of the pipeline of adding value to our region. Think about it for a moment: why are you located here? Why was this area settled? It most likely wasn't because of the snow or the free land, but instead it was because of the warm summer sun, fertile soil and abundant water. With these basic necessities, our ancestors were able to take their entrepreneurial skills and add value by growing crops and animals.

Secondary Sector

The Secondary sector of any economy is the manufacturing, engineering and construction industry. This sector was built around adding value to all of the things we grow and raise. For example, we have soybeans – a protein-rich crop easily used in food, fuel, fiber and feed. First, they must be processed with heat similar to a potato; then they can be divided into protein, oil and fiber, which adds value to the crop and also to the livestock and renewable fuels markets. You cannot have a sophisticated processing plant without strong engaging engineering firms, construction businesses and manufacturing expertise.

Tertiary Sector

This third (Tertiary) sector is all about the professional services and transportation/ logistical services. It comes right after the manufacturing sector purposefully, as many need accountants, financial institutions, attorneys and logistical experts to be successful. This sector amazes me: think about all the jobs in our area that often get overlooked, because they are not a traditional ag business. Since we have a strong professional services sector with an emphasis in agri businesses, this region has been able to solve problems that other regions may not, making us a leader in the industry.

Quaternary and Quinary Sectors

Lastly, do not underestimate the value of these final sectors. The Quaternary is the research, education, communications services and financial planning businesses. The final sector in an economy, the Quinary sector, is built around government and nonprofits which are derived from decision makers and leaders in the community. To continue on the growth path, we need the education systems to provide the learning tools for the next generation of workforce. The researcher that can be attracted to this region may figure out how to overcome challenges or develop an entirely new tool. In every region there are problems to be solved, and when you can put many leaders and decision makers in a room, amazing ideas can surface. Many times these ideas lead to the creation of a nonprofit organization with a vision for helping the region, as well as utilizing the government in its obvious role as well.

We are all in this together

You are involved in what is likely the most noble profession in the world, that of providing your family, your community and families around the world with food, feed, fuel and fiber.

Agriculture does not end at the farm, it only just begins.

Let's stand together as one and support agriculture.

I challenge you to open your minds and think about how you impact the business of agriculture. After you have thought about it, what ideas would you share that will elevate and unify our region?

Sam Ziegler

Sam Ziegler is the Director of Project Ag Business Epicenter (ABE) at Greater Mankato Growth. Sam has a passion for all things related to agriculture. Being a part of providing food, feed, fuel and fiber to families in our area, and to families abroad, is a gratifying profession to Ziegler. In this position he works with key ag stakeholders building coalitions, along with developing and executing key strategic initiatives that are essential components to realizing the aspirations of Project ABE. Sam spent nearly 10 years with the Minnesota Soybean Research & Promotion Council and Minnesota Soybean Growers Association, and is a fourth generation partner and operator of Ziegler Farms, located near Good Thunder. Sam enjoys being a father and a husband, and for fun he likes playing baseball, hanging at the lake or hunting.

About Project ABE

Project Ag Business Epicenter (ABE) is an initiative of Greater Mankato Growth convening the southern Minnesota and northern Iowa region. The initiative seeks to build on the existing ag business prominence and maximize a growing economic marketplace in order to be "The Premier Ag Business Epicenter in the United States", i.e., the most diversified, balanced and sustainable.

The four main areas of focus include:

1. **Increasing the awareness of and enthusiasm toward the ag industry**
2. **Magnifying our voice**
3. **Fostering an environment and garnering support conducive to development**
4. **Developing talent to grow businesses from both inside and outside the region**

Using the potential of ag to fuel economic growth, Project ABE currently is finalizing work plans on all four areas of focus, and we are beginning to implement the first action steps. We will be unveiling the official brand of the initiative this summer.


Appli ation Form

ELECTRONIC STORAGE OF CONTRACTS:

Eliminating the Clutter Without Eliminating Your Contracts

by Gary Koch

I. <u>Introduction.</u>

In an era of ever-increasing "paperwork," there is a continuing emphasis on finding alternatives to the old filing cabinet. The reliability of computers makes electronic storage an attractive alternative to filing hard copies; but use of electronic storage is not without risk where proper record retention procedures are not followed.

The following is a general summary of considerations for electronic record retention of contracts. For purposes of this discussion, we will assume that hard copies, with original signatures, have been secured. The following will discuss electronic storage of those hard copies; with the hard copies ultimately being destroyed.

II. <u>Why Does It Matter How Documents Are Stored?</u>

There are three important reasons document retention and the form of retention of documents matter.

First, there may be a law or regulation that requires retention of documents. The law may dictate whether electronic storage is permissible; or the law may require retention of hard copies; and the law may dictate how documents are stored / retained.

Second, there may be an operational need. Certain documents may need to be saved so they can be referred to at a later date in order to follow procedures or to fully perform obligations of a company.

Third, documents, such as grower agreements, packer agreements, and/or supply contracts may represent future obligations of not only a company but also contractual counterparties. In the event of a legal dispute, the stored documents become evidence. In the case of contracts, the stored contractual material is the main evidence by which the dispute may be resolved. For example, if there is a dispute over whether or not a packer agreement is in default, it is the contract that determines what constitutes default.

This article focuses on the third consideration. How does one "prove" the company and a contractual counterparty signed the documents that have been electronically stored? How does one prove that the document that is stored is the complete agreement of the parties – that there are no other versions or edits that have been omitted from electronic storage?

III. The Law.

A. What Does the Law Permit?

What does the law say about electronically stored signatures and documents? It is necessary to look to the law of the state(s) where the contracting parties are located and/or doing business. However, for the most part, unless there is a statute that requires saving a hard copy original, an electronic record cannot be denied validity or enforceability just because it is in an electronic format. The following are some of the established statutory and regulatory provisions that so provide:

1. Minnesota Business Corporation Act (Minn. Stat. § 302A). A record or signature may not be denied legal effect or enforceability solely because it is in electronic form (Minn. Stat. § 302A.021, subd. 2(1)).

2. Court Rules.

   a. 28 U.S.C. § 1732 (Judicial Procedure); Minn. Stat. § 600.135 (Uniform Photographic Copies of Business and Public Records Act):

   - Any business that in the regular course of business or activity keeps or records any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, or in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, optical disk imaging, or other process which accurately reproduces or forms a durable medium for reproducing the original – **the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law.** Minn. Stat. § 600.135, Subd. 1. (28 U.S.C. § 1732 makes a similar pronouncement).

   - The reproduction – when satisfactorily identified – is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not. *Id.*

   - An enlargement or facsimile of a reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court. *Id.*

   - "Regular course of business" is to be "construed to include reproducing at any time and destroying at any time, respectively, if done in good faith and without intent to defraud." Minn. Stat. § 600.135, Subd. 2.

   - The manner in which an original is destroyed, whether voluntarily or by casualty or otherwise, does not affect the admissibility of a reproduction. *Id.*

   b. Federal Rules of Evidence 1003; Minnesota Rules of Evidence 1003.

   - Rule 1003, Minnesota Rules of Evidence provides that a "duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." The Federal Rules of Evidence set out a similar proposition.

   - "Duplicate" means a "counterpart produced by means of, among other things, photography, including enlargements and miniatures, or by mechanical or electronic recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Rule 1001(4), Minnesota Rules of Evidence.

   - In *State v. Brown,* 739 N.W.2d 716 (Minn. 2007) the Minnesota Supreme Court had the opportunity to opine on the admissibility of a digital copy of a surveillance videotape. Defendant's counsel had objected to its admissibility. The Supreme Court deemed the digital copy a "duplicate", writing "unless there is a genuine issue as to the authenticity of the original recording or unfairness in the admission of the digital copy that qualifies as a duplicate, the properly authenticated digital copy is generally admissible." *Id.* at 722.

3. Transactional. Uniform Electronic Transactions Act (UETA) (Minn. Stat. Ch. 325L).

   - Under the UETA, a signature (or an electronic record) will be attributable to an individual if it can be shown in any manner to have been the act of the individual, including through the efficacy of a "security procedure."

- A "security procedure" is any procedure used to verify an electronic signature, record, or performance, including procedures that require use of algorithms or codes, identifying words (or numbers), encryption or call back, or other acknowledgement procedures.

4. IRS.

- The IRS requires that some records must be maintained as hard copies.
- Procedures for allowing destruction of hard copies of business records and using electronically stored copies in lieu thereof are set forth in IRS Revenue Rulings.
- The IRS procedures are set forth at Rev. Proc. 98-25 (retention – basic requirements) and Rev. Proc. 97-22 (electronic storage guidance). These Revenue Procedures, summarized below, are helpful in determining best practices for electronic record retention.

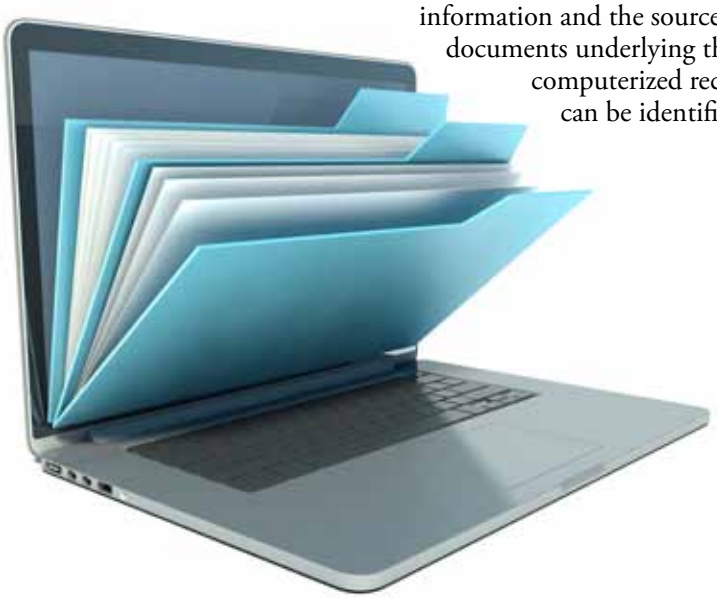
IV. Rev. Proc. 98-25 and Rev. Proc. 97-22: Procedures for Electronic Storage.

Summary of Rev. Proc. 95-25:

Requirements for Maintaining Computer Records.

Basically, most businesses are subject to the IRS computer record retention rules. Rev. Proc. 98-25 is summarized as follows:

- Computerized records must provide sufficient information to support and verify entries made on a taxpayer's returns and to determine the correct tax liability.
- Computerized records must contain sufficient transaction-level detail to ensure that the information and the source documents underlying the computerized records can be identified.



- All computerized records must be made available to the IRS upon request and must be capable of being processed. In addition, the taxpayer must provide the IRS with the resources to enable it to process the computerized records.
- Taxpayers using the computer-to-computer exchange of information (Electronic Data Interchange or EDI) must retain the records that alone, or in combination with any other records, contain all the information that the IRS requires of hardcopy books and records.
- Taxpayers must promptly notify the IRS if any computerized records are lost, stolen, destroyed, otherwise no longer capable of being processed, or found to be incomplete or materially inaccurate.

The IRS can modify or waive any part of the computerized record retention requirements to which a taxpayer is subject by way of a record retention limitation agreement with the taxpayer. Failure to comply with the record retention requirements for computerized systems may subject the taxpayer to significant penalties and fines.

Summary of Rev. Proc. 97-22:

Electronic Storage Systems - Guidance.

The IRS has also issued guidance on using electronic storage systems to satisfy record keeping requirements. Rev. Proc. 97-22 applies to income tax records of taxpayers who are required to maintain books of account or records. In general, these rules state that an electronic storage system must:

- Ensure an accurate and complete transfer of the hard copy or computerized books and records to an electronic storage medium;
- Index, store, preserve, retrieve, and reproduce the electronically stored books and records;
- Include reasonable controls to ensure the integrity, accuracy, and reliability of the electronic storage system and to prevent and detect the unauthorized creation of, addition to, alteration of, deletion of, or deterioration of the electronically stored books and records;
- Include an inspection and quality assurance program evidenced by regular evaluations of the electronic storage system, including periodic checks of electronically stored books and records;
- Include a retrieval system that has an indexing system;

- Exhibit a high degree of legibility and readability when displayed on a video display terminal and when reproduced in hard copy; and
- Provide support for the taxpayer's books and records.

For each electronic storage system used, the business must maintain, and make available to the IRS upon request, complete descriptions of the electronic storage system including all procedures relating to its use and the indexing system.

In addition, an electronic storage system cannot be subject to any agreement that would limit or restrict the IRS's access to and use of the electronic storage system on the business's premises or any other place where the electronic storage system is maintained.

Once a taxpayer has verified that the storage system complies with, and will continue to comply with, the Rev. Proc. 97-22 requirements, the taxpayer may destroy the original hard copies and delete the original computerized records other than certain machine-sensible records that must be retained. But since each state may have its own guidelines for storing and processing records in an electronic format, it is important to review applicable state law when using electronic storage systems.

V. <u>Processes for Moving Toward Electronic Storage.</u>

Based on the foregoing, the following processes are recommended in establishing a proper record retention program using electronic storage of documents:

A. Inventory Contract Documents.

- The documents need to be inventoried.
- Prior to electronic storage there should be verification that the documents are complete.

B. Outsource for Support.

- Given the need to authenticate electronically stored signatures/documents, it is necessary to have a data entry and storage process that is reliable and secure.
- Recommendations of the experts retained to assist in these matters will become part of the Record Retention Policy. Experts will include persons or companies that specialize in offering record retention services. Experts must include your local counsel.

C. Adopting a Record Retention Policy.

a. General Policy Requirements

- A record retention policy ("Policy") must establish the procedure(s) for converting to electronic storage. Following a set procedure is integral to evidencing the reliability and trustworthiness of the stored materials. A witness for a company must be able to testify to the Policy. The Policy must be followed in order to authenticate signatures and/or testify as to the reliability of the stored record.
- The Policy procedure needs to have a set time for converting hard copy to electronic.
- The Policy procedure must identify an information officer; limit access/passwords; set out the procedures to ensure that the electronic documents cannot be changed.
- The Policy procedure must be able to reliably reproduce the stored information in a clearly legible format.
- The Policy must have a procedure to deal with disaster recovery.
- The Policy must have safeguards in place to prevent premature or unauthorized deletion.

b. Specific Policy Requirements

- The Policy procedure should consider the use of "hash values" as numerical identifiers for stored files or portions of files.
- The Policy procedure should consider prohibiting company personnel from making any handwritten edits/amendments to contracts; or, if allowed, require that all parties concerned initial each edit/amendment.
- The Policy procedure should consider whether the company should provide the contractual counterparty with a copy of the electronically stored document as it is placed in the storage system.
- The Policy procedure should consider whether there is a recitation as to the number of pages with each page initialed by both parties.
- The Policy must give consideration to how long the hard copy will remain in existence after a copy is stored electronically.

- If there are a large number of contracts already in existence, a record should be kept of how they were converted to electronic storage – in other words, new contracts can be contemporaneously stored when signed which will be stated in the Policy; but a company needs to describe steps to be taken to verify completeness of older material when placed in electronic storage.
- The Policy should include a statement on inspection and quality assurance.
- The stored materials require an index.
- In developing the Policy, consideration must also be given to whether there are any other related materials (for example, envelopes with date stamps to show expiration of right of rescission) that should be stored.

VI. Summary.

Electronic storage is a viable and useful tool for record retention. Space can be saved; records indexed and made easier to find; and a process put in place that encourages standardization of documents. However, electronic storage must be done in a way that satisfies the need to know that the documents stored are accurate and complete reproductions of the original documents. Failing in this regard can put a company, and the ability to enforce its agreement(s), at risk.

Gary W. Koch
507-354-3111
gkoch@gislason.com

Gary Koch brings a rare level of knowledge, skill and insight to the full spectrum of legal issues faced by businesses today. Born and raised on a farm, he is a leader in the field of agribusiness law, helping clients meet the challenges of the Midwest agricultural economy in every aspect of farming enterprise. The same range of expertise makes him a formidable advocate for businesses of all kinds.

Gary's agricultural practice covers financial, corporate and administrative law, and commercial litigation. He has been instrumental in the development of integrated agricultural production systems, and has extensive experience in environmental and land use cases.

On the financial side, in addition to working with institutions providing financing to agricultural producers and processors, Gary has successfully litigated virtually every type of commercial case. This includes several multi-state bank/commercial cases relating to competing secured claims. Gary lectures extensively throughout Minnesota on commercial, environmental and agricultural matters.

by Matthew Berger

NAVIGATING THE ENFORCEMENT MAZE –

An Overview of Enforcement Procedures Used by the Minnesota Pollution Control Agency

Matt Berger
507-354-3111
mberger@gislason.com

Over the past several years, the federal and state governments have dramatically increased their regulations of agricultural operations. These new governmental regulations impose both substantive restrictions on day-to-day farm activities (e.g., restrictions on the amount, location, and timing of manure application to crop fields) and new administrative burdens with which farmers must comply (e.g., requirements to file annual registrations, log inspections of certain farm facilities, and maintain records of certain farm activities). In Minnesota, the Minnesota Pollution Control Agency (MPCA) is the primary agency charged with implementing and enforcing the federal Clean Water Act and similar state laws and regulations, including permit requirements for livestock operations, restrictions on the application of manure to crop fields, and control of runoff from agricultural facilities.

Unfortunately, the pace of new governmental regulations continues to increase with no sign of any end in sight. As the sheer volume of governmental regulation of agricultural operations continues to increase, the opportunities for farmers to inadvertently or unknowingly violate these requirements also continue to increase. Thus, constant vigilance of regulatory compliance matters is required, and even a momentary lapse may cause a farmer to step on a regulatory landmine.

Once a violation occurs, the regulatory enforcement process is a complex and confusing maze through which farmers must navigate. And while farmers are generally unfamiliar with this process, the government employees enforcing the regulations work on these issues on a daily basis and know all of the pitfalls that may trap an unsuspecting farmer. This article seeks to close this information gap by providing a brief overview of the enforcement processes that the MPCA utilizes to respond to alleged regulatory violations.

Alleged Violations Letter

The first step in the MPCA's enforcement process is often an Alleged Violations Letter. This letter will identify and describe violations that the MPCA believes have occurred, and invite a written response to the alleged violations from the farmer, including a detailed response explaining why the farmer believes any of the alleged violations are inaccurate. In essence, an Alleged Violations Letter invites the alleged violator to provide his side of the story with respect to the issues raised in the letter. An Alleged Violations Letter may also include certain "corrective actions" that the MPCA wants the farmer to complete. Finally, an Alleged Violation Letter may include a request for specific documents or information related to the alleged violations. In many cases, the production of this information will be required by state statute and/or conditions of a permit.

An Alleged Violations Letter is an informal process and is not a final or formal enforcement action by the MPCA. Nonetheless, a farmer's response to an Alleged Violations Letter, including both information submitted regarding the alleged violations and voluntary implementation of the corrective actions proposed by the MPCA, will be used by the agency in deciding whether, and to what extent, to take further enforcement action or to impose monetary penalties in the future.

Notice of Violation/ Noncompliance

As an alternative to an Alleged Violations Letter, or as a second step in an escalating enforcement process, the MPCA may send a Notice of Violation, or a Notice of Noncompliance, that identifies and describes specific violations that the MPCA alleges to have occurred. Like an Alleged Violations Letter, a Notice of Violation or Notice of Noncompliance will generally invite a written response if the farmer denies the alleged violations, and may request the submission of specific documents or information. A Notice of Violation or Notice of Noncompliance may also include an Order directing that certain corrective or remedial actions be taken, but will not impose a financial penalty for the alleged violations. Thus, while a Notice of Violation or Notice of Noncompliance represents a more formal and more serious enforcement action than an Alleged Violations Letter, the focus of each of these enforcement actions remains on establishing compliance rather than on punishing violations of regulatory requirements.

In some cases, the enforcement process will end, and the MPCA will move on to other matters, if the farmer complies with the corrective action measures required in a Notice of Violation or Notice of Noncompliance. But the decision on whether to end the enforcement process at this point, or to proceed to impose financial penalties or other requirement, remains in the hands of the MPCA. In making this decision, the agency will generally consider the extent of compliance with the prior corrective actions, the willfulness of the alleged regulatory violations, the degree of actual or threatened harm to the environment from the violation, any economic benefits gained from the violation, the history of past violations, and other factors that place the alleged violations in context.

Formal Enforcement Proceedings

If the MPCA decides to pursue administrative penalties or other remedies after issuing an Alleged Violations Letter and/or a Notice of Violation, the agency has a variety of formal enforcement options available at its discretion.

1. Stipulation Agreement – First, the agency may attempt to negotiate an agreement with the farmer to settle the alleged violations. Such a negotiated settlement is typically called a "Stipulation Agreement" and may

include an agreement by the farmer to pay a specified financial penalty, procedures by which a farmer may invest in environmental improvement projects on his farm and avoid portions of the financial penalty, and specific deadlines by which certain actions will be taken to bring the farm into compliance with applicable legal or regulatory requirements (referred to as a "Schedule of Compliance"). Because a Stipulation Agreement is a voluntary agreement between the MPCA and the farmer, neither side can be compelled to enter into such an agreement.

A Stipulation Agreement will generally include a description of each alleged violation and a detailed statement by the MPCA of the factual basis underlying each alleged violation. And while a Stipulation Agreement does not generally require the farmer to admit that the alleged violations actually occurred, or that the factual basis recited by the agency is accurate, the farmer will generally be required to admit that the alleged violations cannot be denied if the MPCA seeks to rely on the violations to establish prior violations, and thus increase penalties, in connection with any subsequent violations.

2. Administrative Order – If the MPCA and the farmer do not agree on the terms of a voluntary Stipulation Agreement, the agency may issue an Administrative Order that includes specific factual findings and legal conclusions establishing a violation of an applicable law, regulation, or permit condition. An Administrative Order is issued directly by the agency and may require that a farmer complete certain actions to correct the violations, and may impose an administrative penalty of up to $20,000.00. But state statute specifically provides that at least 75 percent of any such administrative penalty amount must be forgiven if the alleged violations have been corrected and the forgiven penalty amount "is used for approved measures to mitigate the violation for which the administrative penalty order was issued or for environmental improvements to the farm."

Because an Administrative Order constitutes a final action by the MPCA, a farmer against whom such an Order is issued may challenge the Order by requesting an administrative contested case hearing. A contested case hearing must be requested within the time specified by the Commissioner of the MPCA in the Order. Such hearings are conducted before an administrative law judge and are similar to a normal court trial – both the MPCA and the farmer have the opportunity to call witnesses, cross examine the other side's witnesses, and present other documents and evidence. At the conclusion of the contested case hearing, the administrative law judge will issue recommended findings of fact and conclusions of law to be considered by the Commissioner of the MPCA. The MPCA's final action is then subject to judicial review by the Minnesota Court of Appeals.

Alternatively, with respect to an Administrative Order that imposes a monetary penalty, the farmer against whom the Order is issued may skip the administrative review and instead request review of the Order in the district court. In this proceeding, the MPCA would need to present evidence to establish that the violation occurred, that the farmer against whom the Order was issued is responsible for the violation, and that the imposition of a financial penalty in the amount ordered by the agency is appropriate.

3. Civil Enforcement Action – As another alternative to an Administrative Order, the MPCA may commence a civil action in the district court to request any (or all) of the following relief: (1) a court order requiring compliance with applicable laws, regulations, and permit conditions; (2) civil penalties of up to $10,000.00 per day for each violation; and (3) an award of damages for any harm caused to the environment as a result of the violation. This action would be handled like all other civil proceedings, and the MPCA would have the burden of proving the alleged violations at trial.

4. Criminal Enforcement Action – As a final alternative to an Administrative Order or a Civil Enforcement Action, the MPCA may commence criminal enforcement proceedings to enforce requirements of applicable laws, regulations, and permit conditions. Although this remedy is rarely invoked, a "willful or negligent" violation of applicable environmental statutes or "any standard, rule, variance, order, stipulation agreement, schedule of compliance or permit issued or adopted by the [MPCA]" under such statutes constitutes a misdemeanor that may be punished by up to 90 days in jail and the payment of a fine.

In summary, the MPCA has a variety of informal and formal mechanisms available to enforce regulatory requirements against farmers. In order to minimize potential disruptions that these enforcement actions may cause to the farming operations, farmers cannot ignore informal enforcement communications from the agency in the hope that the problems will simply disappear. Instead, prompt attention and responses to alleged violations are necessary to avoid more serious enforcement consequences down the road.

LIKE-KIND EXCHANGES OF AGRICULTURAL PROPERTY: *TRAP FOR THE UNWARY*

by Kaitlin Pals

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

On first glance, 1031 exchanges, also called like-kind exchanges, look like a great way for farmers to diversify their assets without incurring tax liability. Section 1031 of the Tax Code allows a taxpayer to delay paying tax on gains on a sale of property if the taxpayer exchanges his property for property of "like kind" rather than taking cash. For example, a farmer could trade appreciated, low basis farmland and barns that no longer fit in his operation for other real estate without having to pay tax on the gain.

However, as with so many aspects of tax law, 1031 exchanges are not as simple as they look. A quirk of the Tax Code's two main depreciation recapture provisions – Section 1250 and Section 1245 – can make 1031 exchanges particularly tricky for farmers.

1031 Exchange Basics: Property of "Like Kind"

In order to qualify for a 1031 exchange, the property you own and want to exchange – called the "relinquished property" – must be "like kind" with the property you want to acquire – called the "replacement property." The rules for what property is "like kind" give owners of almost any kind of real estate a wide array of options for replacement properties, and make 1031 exchanges look deceptively simple.

Real property is like-kind to all other real property located in the United States. Unimproved real estate, such as bare farmland, is like-kind to improved real estate. Agricultural real estate is like-kind to commercial real estate, running the gamut from stores to restaurants to factories to office buildings. Both agricultural and commercial real estate is like-kind to residential real estate held for investment or used in a trade or business, such as rental properties and apartment buildings. Even perpetual easements, remainder interests, and some long-term leases qualify as like-kind to fee ownership in real estate.

However, there is another crucial tax concern to keep in mind when considering a 1031 exchange: depreciation recapture.

The Plot Thickens: Depreciation Recapture

Section 1031 is intended to let taxpayers defer recognizing gain on a sale of property as long as the taxpayer exchanges that property for something similar. That gain does not go away; it's simply delayed, to be recognized (and taxed) when the taxpayer finally sells the replacement property.

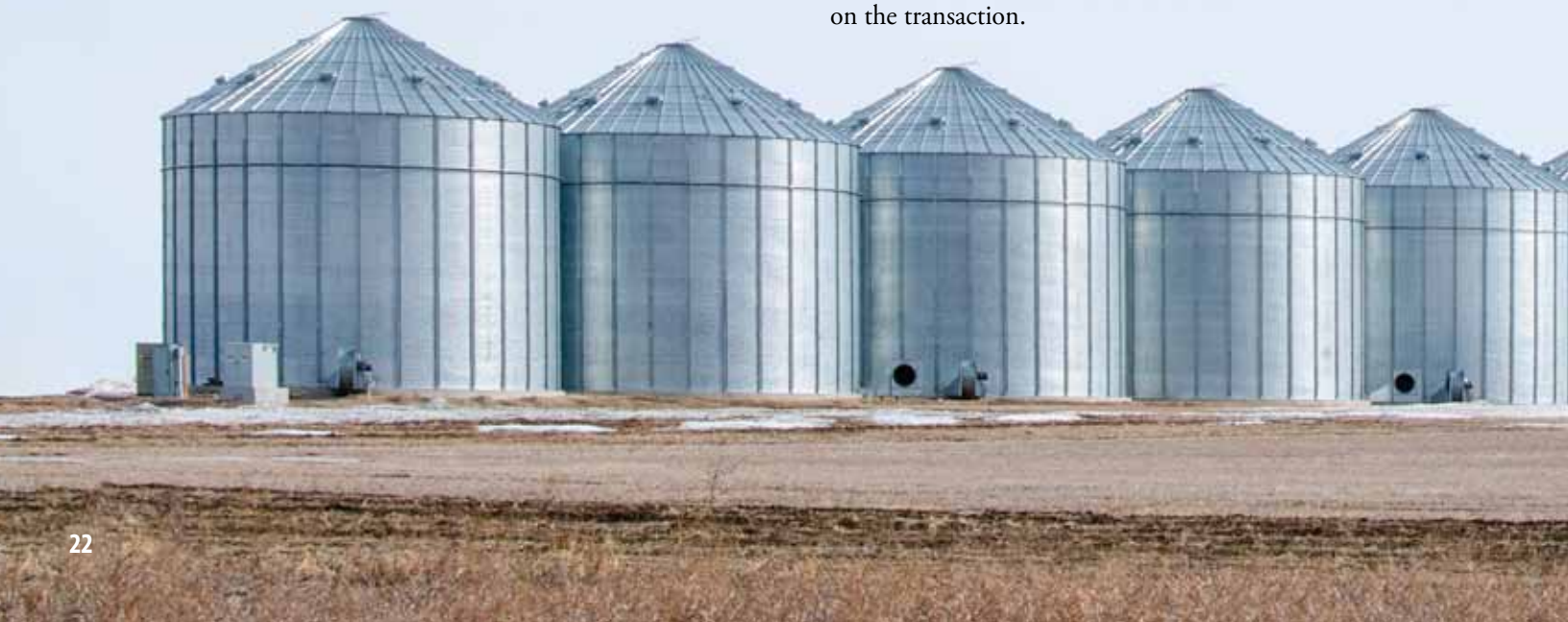
Similarly, a 1031 exchange only delays depreciation recapture. When the taxpayer finally cashes in on the replacement property, some of the gain will be a recapture of the depreciation previously taken on the property, not "true" appreciation of the property's value. This part of the gain, called depreciation recapture, is taxed as ordinary income rather than at the capital gains rate.

If a taxpayer exchanges properties that don't follow compatible recapture rules, the old property's depreciation can't be carried over to the new property to be recognized at some later date. If there is nowhere to carry over the old property's depreciation, it has to be dealt with at the time of the exchange. This usually means paying taxes on an otherwise "tax-free" exchange.

Depreciation Recapture Under Section 1245 or Section 1250: Like Mixing Oil and Water

In a simple world, all you should need to do to avoid depreciation recapture in a 1031 exchange is to avoid swapping buildings, which are depreciable, for bare land, which is not depreciable. And it is almost that simple – except for owners of agricultural buildings.

There are two main depreciation recapture provisions in the Tax Code: Section 1245 and Section 1250. Property depreciated under Section 1245 does not swap well with Section 1250 property, even if both properties are "like kind" for exchange purposes. In short, if you exchange Section 1245 property for anything other than Section 1245 property, you have to pay all depreciation recapture, at the ordinary income tax rate, up to the value of all non-Section 1245 property received in the exchange. It doesn't matter if the replacement property is "like kind" under Section 1031 – you are still paying tax on the transaction.



Why Depreciation Recapture in 1031 Exchanges Is So Tricky for Farmers: Section 1245 Depreciable Real Estate

We've established that Section 1245 and Section 1250 properties exchange with each other about as well as oil mixes with water. So, in addition to the rule of thumb of not exchanging improved real estate for bare ground, all you need to do is avoid swapping Section 1245 property for Section 1250 property, right? While true, it's far easier said than done.

Section 1250 covers almost all depreciable real property, from commercial buildings to residential rental properties. Section 1245 is generally considered the personal property (non-real estate) depreciation section, but it covers a few very narrow categories of real property, too.

Even though the universe of Section 1245 real property is very small, it includes most agricultural real estate other than bare land, such as:

- Single-purpose agricultural or horticultural structures, like:
  - Barns and other facilities used to house, raise and feed cattle, hogs, sheep or poultry
  - Milking parlors
  - Greenhouses
- Grain bins
- Tile lines
- Fences

This means that even though the world is full of properties that are "like kind" to agricultural structures, the universe of properties for which you can swap your depreciated agricultural buildings is actually quite limited. You can exchange a hog barn for a dairy barn or a greenhouse, because all are Section 1245 real property. However, you can't exchange that hog barn for an apartment building or a storefront, or most of the other myriad kinds of real estate on the market.

Takeaway

Section 1031 of the Tax Code is a handy tool, permitting taxpayers to trade business or investment properties without recognizing gain. Though the expansive definition of what is "like kind" makes it seem like you can exchange almost any kind of real estate for any other kind of real estate without paying any tax, it's vital to make sure depreciation recapture won't derail your tax strategy. This is especially crucial when dealing with agricultural real estate, because as in so many other areas of the law, agriculture plays by a different set of rules than most other commercial enterprises when it comes to depreciation recapture.

To add an extra complication to the mix, not every building on a farm site is necessarily Section 1245 property. General use buildings like shops or machine sheds are usually Section 1250 property.

RENTING FARM LAND – FARM LEASE AGREEMENTS

by Michael Dove

Michael S. Dove
507-354-3111
mdove@gislason.com

With the number of farmers declining, agriculture producers all rely more extensively on rented farm ground. And with the dynamic fluctuations in agricultural markets, it is necessary for both the agricultural producer and the landowner to have clear and concise terms regarding the lease of farm land. This article provides an introduction to general components of an agricultural farm land lease, and the steps for a landlord to obtain a first priority lien for crops produced on the leased farm land.

A. LEASED PROPERTY.

An agricultural farm lease ("lease"), as with any other contract, must meet certain requirements to be legally enforceable. Minnesota has enacted a statute of frauds at Minn. Stat. § 513.05. Under Minnesota's statute of frauds, any contract for the leasing of any land, or any interest in land, for longer than one year is ***void*** unless the contract (or some note or memorandum thereof) expressing the consideration and terms is in writing. While "handshake" or "oral" leases are enforceable on a year-to-year basis, if the landowner and/or tenant wants assurances of a lease longer than one year, the statute of frauds requires the lease to be in writing.

There are certain basic components that should be included in any farm lease.

- Identify the Proper Parties. The names and contact information of both parties should be included in the lease. Over the past decade, we've seen numerous agricultural producers form various entities to perform different parts of their agricultural operation. There is also a trend for landowners to put real estate into "trusts." So it is important that the "correct parties" are parties to the lease. Further, both parties should sign the lease to ensure its enforceability.

- Land Description. The lease should be specific enough to identify the land involved so that a stranger could review the lease and determine the property that is subject to the lease. The land description section also provides the opportunity to specify whether the rent is going to be for all the acres or only the tillable acres.

- Term/Renewal. The lease should include a provision stating the exact period of time for lease. Also, a standard term is how any renewal of the lease is going to be accomplished. For example, upon expiration of the original lease period, does the lease automatically renew on a year-to-year basis; does notice need to be given if one party doesn't want to renew the lease and, if so, when is notice required?

- Purpose. For a longer term lease, the "purpose" of the lease is an essential item. Is the purpose of the lease for crop production only, or does the tenant have the ability to utilize the property for other purposes (e.g., crop storage).

- Rent – Method and Amount. The lease should clearly identify the rental amounts and payment terms for the farm land being rented. Is the rent calculated on "cash rent," a "crop share" basis, or some other type of flexible cash rent? Establishing and clarifying the method of determining the cash rent is essential to eliminate potential disputes. The lease should also clearly state the date(s) on which any rent payments are to be made.

- Allowed/Prohibited Uses. Both the parties should understand what actions will be allowed or prohibited in the lease. For example, is there a limitation on certain items of tillage based on the soil type, a limitation of certain uses of herbicides and pesticides to eliminate carryover residues, etc.

- Fertility Maintenance. On a longer term lease, the lease should include a provision regarding maintenance of soil fertility. The lease could specifically identify testing requirements and "adjustments" for any shortfall by the tenant in maintaining agreed-upon soil fertility levels. Additionally, provisions can be included to address crop residue (e.g., harvesting corn stalks) and the like.

- Transfer of Interest. Farm leases typically contain restrictions on the ability of a party to transfer their interest in the lease. This is an important provision for landowners to ensure that a reliable tenant is operating the farm land. Additionally, to provide for continuity, many leases provide that the lease is binding on the heirs and successors of the parties.

- Remedies for Default. A lease can also contain provisions where the parties agree to their own remedies in case of a default (e.g., nonpayment of rent). These possible remedies include the landlord's right to re-enter the property without causing forfeiture of tenant's obligation to pay rent; the landlord's right to re-enter the property to care for and harvest the crops, etc.

Strong consideration should be given to using a written lease for the lease of farm land. The components set forth above provide a cornerstone in reducing ambiguities and potential disputes.

B. LANDLORD'S LIEN.

Minn. Stat. § 514.96 provides that the landlord has a lien for unpaid rent on the crops produced on the leased property in the crop year that is subject to the lease. However, the landlord's lien must be perfected in order to have a lien priority over any other competing creditor. The landlord is required to file and perfect its landlord's lien by filing the necessary paperwork within thirty (30) days after the crops become growing crops. If that time frame isn't met, the landlord will not obtain a priority lien position. Therefore, it is eminent that if the landlord wants to avail itself of this super priority lien, it comply with all the statutory requirements. The landlord has the ability to, as much as possible, ensure that it will be paid the rentals due under any farm lease, by filing a landlord's lien.

For your success and security.

We are growing our expertise to bring you focused knowledge and experience for all of your real estate title opportunities.

Title Resources is happy to announce that we have acquired the respected firm of Lamm, Nelson & Cich. Both of our firms share strong roots in our region and we look forward to growing and continuing to bring you the most progressive, reliable title services available in the market.

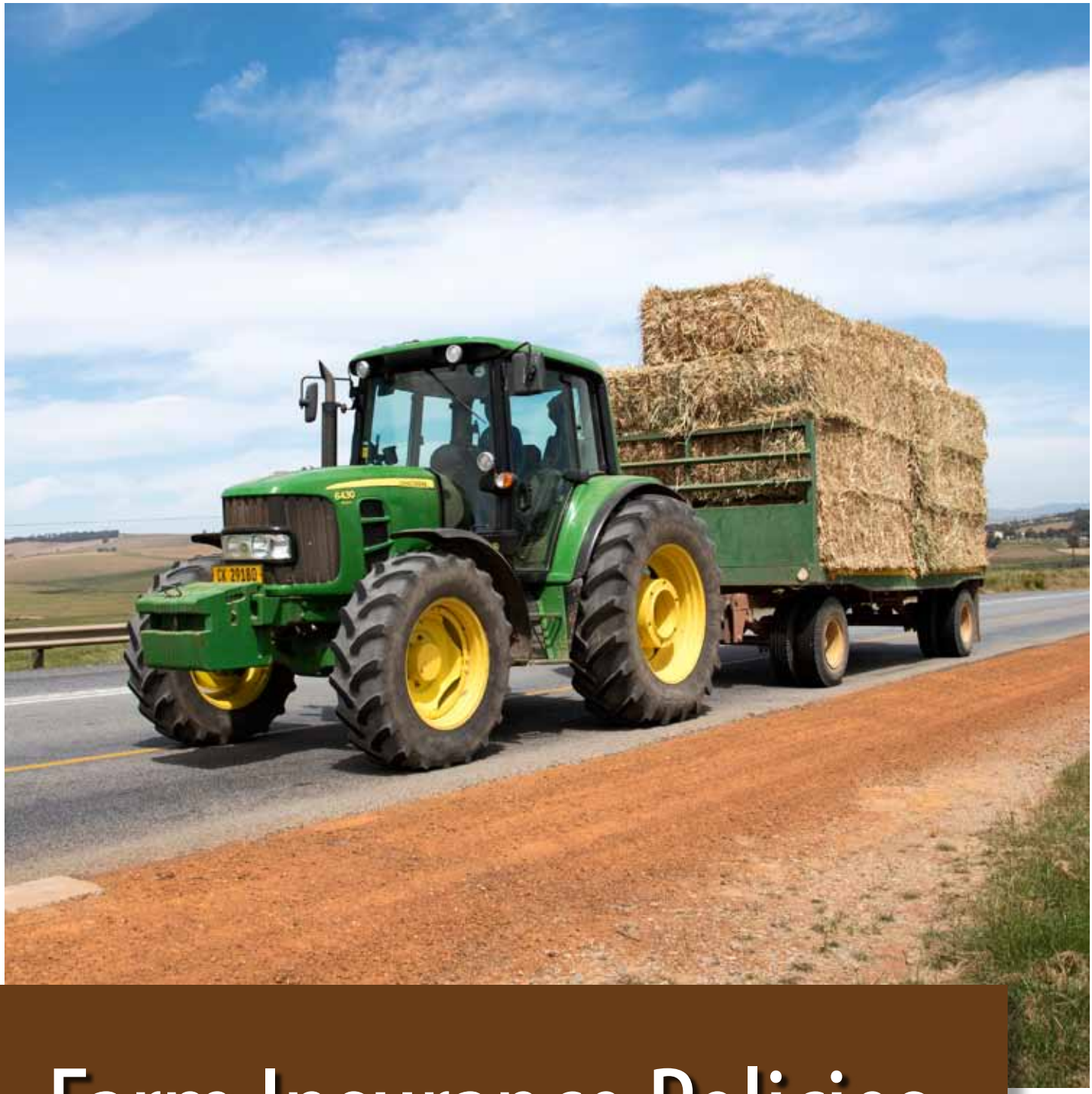
TITLE RESOURCES

New Ulm Office
(507) 388-4425
2700 S. Broadway
New Ulm, MN 56073

City Center Mankato Office
(507) 388-4425
124 E. Walnut St. # 200
Mankato, MN 56001

Hilltop Office
(507) 345-4607
151 St. Andrews Ct #1310
Mankato, MN 56001

titleresourcesllc.com



Farm Insurance Policies

by Timothy Tobin

TIMOTHY P. TOBIN
866-760-3429
ttobin@gislason.com

This article is intended to address aspects of coverage under a "Farm Insurance Policy." However, there is no one, specific "farm policy." Many insurers do sell what are typically called "Farm and Ranch" policies, but not all agricultural businesses buy those specialized policies – nor should they.

While Farm and Ranch policies can be a good fit for some operations, they are not suitable for all agricultural business. The typical "Farm and Ranch" policy is geared toward the family farm and typically offers traditional homeowners coverage together with coverage for the farming business. A standard homeowners policy contains a "business pursuits" exclusion, which eliminates coverage for risks specific to the insured's business. Thus, the Farm and Ranch policy allows the farmer to buy one policy instead of having to purchase a personal policy and a business policy.

For farm businesses that do not need the personal coverage aspect, Farm and Ranch policies may provide unnecessary coverage. Those businesses typically purchase purely commercial coverage.

Virtually all farm operations purchase a liability policy to protect against lawsuits, and an umbrella or excess policy, if higher limits are needed. Virtually all farmers also purchase "first-party" property insurance, to obtain coverage for loss due to damage to or destruction of the property owned by the business. This coverage can also provide for loss of income due to business interruption following a covered loss, or the added costs of operating the business until such time as the damaged property is repaired.

All of this coverage can be provided through a Farm and Ranch policy. For those that do not purchase those policies, a Commercial General Liability ("CGL") policy is often purchased to obtain liability coverage. For first-party personal property coverage, standard commercial property forms are often purchased.

If necessary, workers' compensation coverage should be purchased. If the business owns automobiles, standard automobile insurance should also be purchased. However, such coverage should be also purchased even if the business itself does not own any autos. This is because the business is liable for injury or damage caused by its owner or employees while operating automobiles in the course and scope of their duties for the business. This coverage is often obtained through a Hired and Non-Owned Auto endorsement to the general liability policy.

Despite the disparity in policies purchased, the language used in all policies is similar. Thus, some generalized statements can be made about the risks faced by agribusinesses, in light of the "usual" coverage provided by those policies. That said, there are differences in policy language and care must be taken not to assume that any of the following generalized statements applies to any particular policy or claim situation.

A discussion of all of the coverage issues that can arise under "farm" insurance policies is impractical. Thus, only a few of the issues that can arise will be discussed.

Property Coverage

All insurance is subject to limits. Almost all policies have separate limits for real property (structures) and for personal property. Furthermore, there are often special limits for certain types of personal property. Thus, it is critical that the insured (and the agent) make sure that those limits are adequate when coverage is first placed. The limits should be reviewed annually and whenever significant changes are made in the property owned by the business (either acquisitions or sales).

Some policies do not provide coverage for certain items of personal property unless they are "scheduled" or specifically listed on the policy. If scheduled, a limit of coverage will attach to that single item. Many Farm and Ranch policies require that the items such as grain, hay, straw, seeds, beans, feed, silage and farm equipment including machinery, vehicles, tools, and supplies be scheduled. Many policies do not insure "animals" so that coverage for livestock must be separately purchased. However, livestock coverage would also be subject to a separate limit or dollar value (e.g., so many dollars per head).

Obviously, many of these items are acquired, consumed and/or sold on an ongoing basis. Insurers understand this, so the limits applicable to these scheduled items are written on a "blanket" basis; that is, they apply to the property on hand when the loss occurs, not just to the property on hand when coverage was first placed.

However, these limits require special attention if the value of such property fluctuates greatly. For example, if the operation significantly increases its livestock inventory, it likely will increase its feed supply. Additionally, in the case of livestock, feed and other items that fluctuate greatly in price, the limits must be reevaluated whenever prices change significantly.

The Business Pursuits Exclusion

As indicated, the benefit of a Farm and Ranch policy is that the business pursuits exclusion typically found in a homeowners policy is removed in a Farm and Ranch policy for "farming" operations. However, the ways in which the words "farming" or "business" are defined can be significant. For example, in *McNeilus Hog Farms v. Farm Bureau Mut. Ins. Co.,* 781 N.W.2d 101 (Iowa App. 2010), the policy excluded business pursuits but then stated that the word "business" did not include "custom farming . . . performed by an insured where the gross annual receipts for all such activities do not exceed $3,000." Thus, any other farming activity would be a "business" and would be excluded.

The insured was raising hogs under a contract that paid more than $3,000 per year. The hogs suffocated and the owner of the hogs sued the insured. Farm Bureau denied coverage based on the exclusion.

The court agreed with Farm Bureau saying that the "business pursuits" exclusion applied and, based on that exclusion, "Farm Bureau was not obligated to defend and indemnify" the insured against the claims.

Thus, if a Farm and Ranch policy is purchased, the insured should make certain that its operations meet the terms of the business coverage under the policy. This is less of an issue if a CGL or other standard commercial liability policy is used. However, even with such policies, certain business risks may be excluded.

Machinery Coverage

Most policies distinguish between trucks, automobiles and other vehicles that must be registered and vehicles that are not registered, such as four-wheelers, tractors and other farm machinery. The latter are generally referred to in the policy as "land motor vehicles."

In the CGL policy, these machines are called "mobile equipment." The term "mobile equipment" is defined to include "farm machinery." The CGL policy excludes coverage for an "auto" owned by the insured, but the term "auto" is defined to exclude "mobile equipment." Thus, the CGL policy should provide coverage for farm machinery owned by the insured.

It is quite common for Farm and Ranch policies to exclude liability arising out of motorized machinery owned by the insured that is not scheduled for first-party property coverage purposes. It is also common to restrict coverage for automobiles and land motor vehicles. In virtually all Farm and Ranch policies, there are exclusions for liability arising out of the use of motorized farm machinery when that machinery is off the insured premises. Almost all such policies also exclude liability arising out of the ownership, maintenance or use of automobiles owned by the insured. Coverage for those risks, as noted, would have to be purchased in the form of an automobile policy.

The geographic limitation on coverage for non-registered land motor vehicles is generally enforced in a strict manner. For example, in *Haworth v. Jantzen,* 172 P.3d 193 (Okla. 2006), the Farm and Ranch policy at issue excluded coverage for bodily injury arising out of the operation of land motor vehicles "if the bodily injury . . . occurs away from the insured premises." The accident at issue occurred as the insured was backing a truck out of a field (which was part of the "insured premises") onto the adjacent county road. An oncoming motorcyclist was then hit and killed.

The accident occurred to the right of the centerline on the county road and the Court went through

a detailed analysis of property law, ultimately concluding that Oklahoma law provided that "an owner of land bound by a highway is presumed to own the property to the center of the road" and that a "road is generally only an easement for public use and fee simple title is vested in the abutting landowners." Thus, since the accident happened on the side of the roadway "owned" by the insured, the Court held that the exclusion did not apply and that coverage existed.

Some policies provide coverage when the accident occurs on the insured premises or within so many feet of the insured premises. Other policies define the "insured premises" to include "private approaches," such as driveways or access easements. In all cases, the exact location of the accident is critical to coverage and the courts will strictly enforce these terms. There are ways to insure vehicles such as ATV's, tractors and other farm machinery so that this geographic limitation is removed. That should be considered if such machinery is regularly driven on roads or across property that is not part of the "insured premises."

The Pollution Exclusion

Most Farm liability policies contain some type of "pollution exclusion." These exclusions generally prohibit coverage for bodily injury and property damage arising out of the release, escape or discharge of a "pollutant." A "pollutant" is generally defined to mean a solid, liquid or gaseous contaminant or irritant. Under Minnesota law, this definition will be given its "common, everyday" meaning.

The significance of the pollution exclusion in an agricultural insurance policy can be shown by two cases. The first is *Wakefield Pork, Inc. v. Ram Mut. Ins. Co.,* 731 N.W.2d 154 (Minn. App. 2007). Wakefield was a pork producer that hired contract growers. Because of odors emanating from the grower's manure lagoon, neighboring landowners sued Wakefield and the grower under theories of negligence, nuisance and trespass. Wakefield tendered the lawsuit to its insurance company which denied coverage based on its pollution exclusion. The Minnesota Court of Appeals agreed and held that the claims at issue "fell squarely within the . . . pollution exclusion."

The policy at issue also contained a provision that allowed coverage when there was a release, escape or discharge of "agricultural chemicals, liquids or gases" but only if the release was "both sudden . . . and accidental." The Court held that odor from a manure lagoon was not released suddenly or by accident and that this coverage did not apply for that reason.

The second case is *Wilson Mut. Ins. Co. v. Falk,* 360 Wis. 2d 67, 857 N.W.2d 156 (Wis. 2014). In that matter, Robert and Jane Falk operated a dairy farm in West Bend, Wisconsin. As part of the normal operation of the farm, they spread liquid cow manure onto their farm fields for the purpose of fertilization. Manure from the Falks' farm contaminated wells owned by the Falks' neighbor and they were sued as a result.

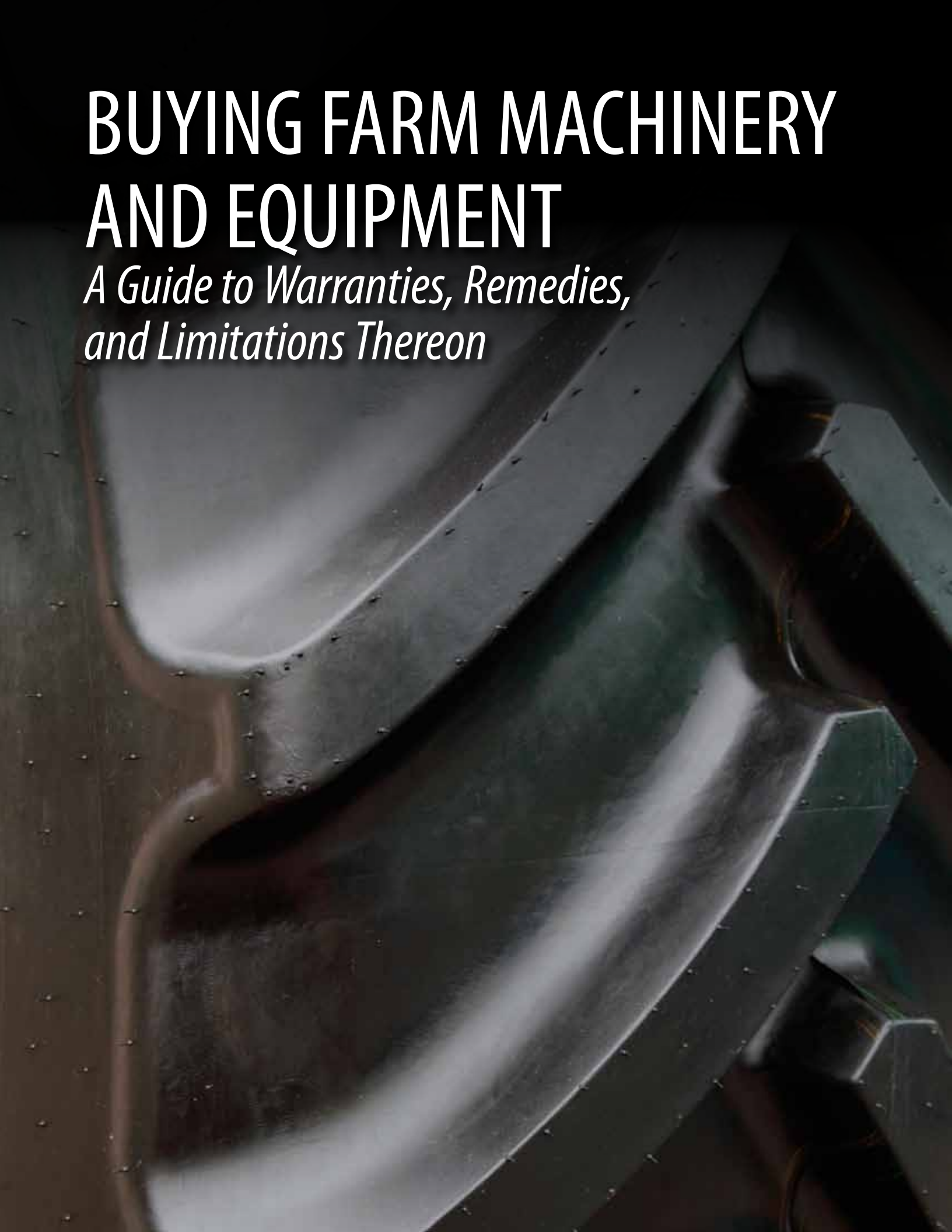
The Falks were insured by Wilson Mutual under a policy that contained a pollution exclusion. The Wisconsin Supreme Court held that cow manure was a "pollutant," even though Wisconsin law provides that substances are not pollutants unless a "reasonable insured" would consider the substance to be a pollutant. This "reasonable expectations" standard is contrary to Minnesota law.

Like the Ram Mutual policy at issue in *Wakefield Pork,* many policies provide limited pollution coverage (e.g., for chemical spills) and there are significant variances in the coverage provided. Before reaching any conclusion as to the extent of pollution coverage, the exact language of the policy must be reviewed.

As indicated, it would be impossible to discuss all of the coverage issues that could arise under farm insurance policies. The foregoing discussion was only intended to give some examples of the coverage issues that can arise under a farm insurance program. The reader is encouraged to avoid coverage shortfalls by having a policy review and risk analysis conducted by an insurance agent or a lawyer with the necessary expertise.

BUYING FARM MACHINERY AND EQUIPMENT

A Guide to Warranties, Remedies, and Limitations Thereon



A poke is a bag or sack. If you buy a pig in a poke, you can't know what you've bought until you open the poke, and you shouldn't expect much recourse if you are disappointed with your purchase.

Jeff C. Braegelmann
866-760-3429
jbraegelmann@gislason.com

That principle plus the "buyer beware" rule gives you a beginning knowledge of warranties. But it is one thing to buy a pig in a poke and quite another to buy farm machinery that way. This article discusses warranties applicable to purchases and sales of farm machinery and equipment: what they are, how they work and what to expect from them. We will go beyond the pig-in-a-poke and the buyer-beware rules to give you a better understanding of what you are buying, what recourse you have if something goes wrong and how to protect yourself.

A "Lemon Law" for Farm Tractors

Minnesota was the first state to adopt a so-called "lemon law" applicable to farm tractors. It has applied to farm tractors sold since January 1, 1987. As with most laws, the law's definitions determine its scope and what transactions it impacts. The law is codified at Minn. Stat. § 325F.6651-.6659.

The law applies to purchasers of a new farm tractor, but not if the purchaser buys the farm tractor for purposes of reselling it. The law defines a "farm tractor" as any self-propelled vehicle designed primarily for pulling or propelling agricultural machinery and implements used principally in the occupation or business of farming. That might seem a pretty straightforward definition of a farm tractor, but note that it applies only to purchasers who buy new farm tractors for purposes of farming and not for purposes of resale. Additionally, the farm tractor definition includes implements of husbandry that are self-propelled. The law can provide protections if the farm tractor suffers from a "non-conformity," which the law defines as any condition of the farm tractor that makes it impossible to use for its intended purpose.

The law requires the manufacturer to provide a particular notice to the buyer at the time of purchase. It must be a written notice on a separate piece of paper reading substantially as follows:

> IMPORTANT: IF THIS VEHICLE IS DEFECTIVE, YOU MAY BE ENTITLED UNDER STATE LAW TO REPLACEMENT OF IT OR A REFUND OF ITS PURCHASE PRICE. HOWEVER, TO BE ENTITLED TO REFUND OR REPLACEMENT, YOU MUST FIRST NOTIFY THE MANUFACTURER, ITS AGENT, OR ITS AUTHORIZED DEALER OF THE PROBLEM IN WRITING AND GIVE THEM AN OPPORTUNITY TO REPAIR THE VEHICLE.

The law imposes certain duties on manufacturers to repair farm tractors that do not conform to express written warranties the manufacturer may have provided in connection with the sale. The purchaser must report the problem to the manufacturer and its authorized dealer within a certain time limit. That time limit is the earlier of the term of the express written warranty provided by the manufacturer or during the period within one year of the original delivery of the farm tractor to the purchaser. If the buyer gives proper notice, the manufacturer or its authorized dealer is required to make repairs necessary for the farm tractor to conform to the express written warranties. For a self-propelled vehicle, this protection is limited to warranties on the engine and powertrain.

If the manufacturer or its authorized dealers cannot bring the farm tractor into conformity with any express written warranties, they may have to refund the purchase price or replace the farm tractor. However, the nonconformity or problem with the farm tractor must substantially impair the use or market value of the farm tractor to the purchaser. Also, the duty to refund or replace does not arise unless the manufacturer or its authorized dealers are unable to fix the farm tractor so it complies with the written warranty within the same one-year period discussed above. Additionally, the nonconformity or problem at issue must have been subject to repair four or more times by the manufacturer or its authorized dealer and still continue to exist after those attempts, or the farm tractor must have been out of service for repairs for the same nonconformity for 60 or more cumulative business days. Again, for a self-propelled vehicle, these potential remedies are limited to warranties on the engine and powertrain. With either the refund or replacement remedy, the manufacturer may charge or deduct a reasonable allowance for the customer's prior use of the farm tractor. A customer can bring a lawsuit to enforce these obligations, but only if the customer has first given the manufacturer a written notice and an opportunity to cure the problem within 60 days.

The statute also permits a manufacturer to establish an informal dispute settlement procedure. The procedure must contain certain provisions and requirements set by law. If the manufacturer establishes an adequate dispute settlement procedure, a consumer cannot seek refund or replacement unless the consumer first uses the informal dispute settlement procedure. The law also permits a manufacturer to assert certain affirmative defenses to the remedies a consumer might claim under the statute. One affirmative defense is that the alleged problem does not substantially impair the use and market value of the farm tractor. Another affirmative defense is that the problem

complained of is the result of abuse or neglect or from modifications or alterations of the farm tractor not authorized by the manufacturer. The statute has a pretty short limitations period. Any action brought to enforce the statute must be started within 6 months after expiration of a manufacturer's express written warranty or 18 months following the date of original delivery of the farm tractor to the customer, whichever is later.

One way to think about it is that the law does not require your sales contracts to contain all these provisions, but the law will put these provisions in your contract unless you specify otherwise.

Other Warranties

While the so-called lemon law discussed above is rather narrow in scope, applying as it does to only certain types of new farm tractors, other laws, arising principally under Article 2 of the Uniform Commercial Code, can potentially insert warranty provisions into all contracts for the sale of farm machinery and equipment. This article next discusses how these warranties arise, what they warrant, how they can be limited, modified, or waived, and what remedies they provide.

1. How They Arise. By statute in Minnesota, certain warranty provisions apply to all contracts for the sale of goods, which includes sales of farm machinery and equipment. This can include sale transactions between private parties and does not require that one of the parties be a manufacturer, dealer, or merchant, or be in the business of selling farm machinery and equipment. Generally, these statutory terms and warranties apply to such sale contracts unless the parties somehow change, limit, or do away with them in their contract. One way to think about it is that the law does not require your sales contracts to contain all these provisions, but the law will put these provisions in your contract unless you specify otherwise. Therefore, whether you are a buyer or a seller, it is helpful to have at least a general understanding of what they are and how they work.

2. What Are These Warranties and What Do They Warrant?

   Title. The handful of warranties which the law inserts in a contract, unless the parties specify otherwise, begins with a warranty of title. There is an implied warranty by the seller that the seller has good title, has the right to transfer title, and that title will be free of any security interest or lien which the buyer did not know about when the contract was made.

   Express Warranties. Next, express warranties by the seller can be created and become part of the contract in several ways. If the seller makes some affirmative factual statement or promise to the buyer relating to the goods and that statement becomes part of the basis on which the deal was made, this constitutes an express warranty that the items being sold will conform to that statement or promise. Similarly, a description of the goods creates an express warranty that the goods meet that description if the description was part of the basis on which the deal was made.

   Implied Warranties. After express warranties come a couple of potential implied warranties. These do not depend upon the seller making any particular statement or promise about the condition of the goods. For example, if the seller is in the business of selling farm machinery and equipment and therefore is a "merchant," the law implies a warranty that the goods are in fact merchantable. This can mean generally that the goods must meet the contract

description and be fit for the ordinary purposes applicable to such types of farm machinery and equipment. Other implied warranties can arise, for example, from a course of dealing between the parties or if the seller knows that the equipment was being purchased for some particular purpose and that the buyer was relying on the seller's skill or judgment in selecting machinery or equipment suitable for that purpose.

Cumulative Warranties. Protections. These various warranties are not mutually exclusive. In fact, the law tells courts to construe these warranties as being cumulative if it is reasonable to do so. If there are inconsistencies in the various warranties, a court must try to determine which warranty the parties intended to be dominant. Also, the protection the warranties provide can extend beyond the particular buyer who was the direct party to the sales contract. The seller's warranties can extend to any person who may reasonably be expected to use the equipment and who is injured by a breach of the warranty.

The scope of these express and implied warranties can be extensive, and the law inserts them in many sales contracts automatically. However, the law permits the parties substantial freedom to modify or even eliminate them.

3. How Can They Be Limited, Modified, or Waived? Many relieved sellers and many frustrated buyers have learned that this broad range of warranties can be limited, or even eliminated, with a little bit of careful language in the parties' contract. For example, a merchant can exclude warranties of merchantability or fitness of the equipment for some particular purpose by including in the contract some simple, conspicuous language which says there are no such warranties. All the various implied warranties can be excluded and eliminated by expressions such as "as is" or "with all faults" or other such language which brings the exclusion to the buyer's attention and makes it plain that there are no implied warranties. Also, if a buyer has a full opportunity to examine the goods or has refused to examine them before entering into the contract, this can eliminate any implied warranty regarding defects the buyer would have discovered through such an examination. The law does not require an all-or-nothing choice between having the full force of these warranties in the contract or none at all. By contract, the parties can agree to keep various warranties as part of their bargain, but limit the nature and extent of the damages the seller must pay or the recovery the buyer may obtain if a warranty is breached.

4. What Remedies Do They Provide? What Must a Buyer Do to Recover?

Notice. From a buyer's perspective, claiming that your seller breached a warranty is claiming that your seller breached the contract. Unless the contract permits return as a remedy, a buyer often cannot simply return goods when a seller has breached a warranty. As a practical matter, breaches of warranty typically arise after the buyer has the equipment for a while. Under these laws, once a buyer has accepted and taken delivery of an item of equipment, the buyer generally is precluded from rejecting or returning that equipment. Instead, having accepted and taken delivery of the equipment, the buyer must seek recourse for breach of warranty, and **an important first step is to notify the seller of the claimed breach**. The buyer must notify the seller within a reasonable time after the

buyer discovers or should have discovered any breach. There is no set timeframe for this, but a prudent buyer will notify the seller immediately of any claimed or suspected breach of warranty or problem with any equipment purchased. And this is best done in writing. Also, once the buyer has accepted the equipment, the burden will be on the buyer to establish any breach of warranty.

The buyer can claim so-called incidental damages resulting from the seller's breach. These can include any reasonable expenses related to the breach of warranty.

Damages. If a buyer has accepted the equipment and has given the seller notice of the claimed breach of warranty, then the buyer may seek damages for that breach of warranty. Damage claims can come in several types. The law begins by saying that damages for breach of warranty are measured by the difference in value between the equipment as it is and its value as it should be if it complied with the warranty. In most instances, this will be measured by the repair costs. Obviously, a tractor with a particular defect or problem is not as valuable as the same tractor without that defect or problem. If a court is asked to measure the difference in value between the two tractors, it typically will ask what it will cost to repair the problem or defect and thereby return the tractors to equal value. But other damages may be claimed as well. The buyer can claim so-called incidental damages resulting from the seller's breach. These can include any reasonable expenses related to the breach of warranty. Consequential damages can include other expenses or lost profits resulting from requirements and needs the seller was aware of and which the buyer could not reasonably prevent by "cover" or otherwise. Cover means finding a temporary replacement. So, for example, a seller of a corn planter knows that the buyer needs it to plant corn. If the planter has a defect which constitutes a breach of some warranty and that defect prevents the planter from working at corn planting time, the seller could face a claim for consequential damages such as lost profits. However, the buyer cannot recover such damages if the buyer could have reasonably prevented them by cover or otherwise; i.e., renting a different corn planter to put in the crop while the buyer pays someone to fix his corn planter. The buyer may claim the repair and the rental expense as damages, but the buyer cannot simply sit out the season and seek damages for a lost corn crop.

Tips

Given all this, here are some things to keep in mind.

- Read and save all your sale documents.
- Send prompt written notice of any problem or defects.
- Keep accurate records of repairs, rental expenses, down time, number of trips to the repair shop, etc.
- Remember that unauthorized work or modifications can void warranties.
- Watch out for language that limits remedies, such as repair or return only, or which excludes incidental or consequential damages.
- Even if you are not in the business of selling equipment, when you do sell a piece of equipment, prepare at least a simple memorandum of sale with some "as is – where is" language to protect yourself.

Overview of the "BUY-THE-FARM" Law in Minnesota Statutory Put Option in Certain Eminent Domain Cases

by David C. Kim

Minnesota has a unique law that provides special protection to farmers when eminent domain power is exercised by any private or public utility company to construct a high-voltage transmission line. This special protection is known as the "Buy-the-Farm" election and has been codified in Section 216E.12, Subdivision 4 of the Minnesota Statutes. The Buy-the-Farm provision was originally a part of Minnesota Statutes in 1977 as an amendment to the Power Plant Siting Act and since then has gone through several legislative amendments and high court interpretations.

In general, the statute provides that when a utility exercises eminent domain power to acquire a right-of-way easement on a certain type of land (e.g., agricultural homestead) to construct a site or route for a high-voltage transmission line with a capacity of 200 kilovolts or more, the Buy-the-Farm Statute allows the owner of the land to exercise a statutory election requiring the utility to purchase the fee title to such land, together with any other contiguous and commercially viable land that the owner owns along with such land.

Under the Buy-the-Farm Statute, there are several statutory elements that have been frequently in dispute between landowners and the utilities. This article discusses the statutory framework and the legislative and judicial interactions and interpretations surrounding the Buy-the-Farm Statute.

I. What Triggers the Election?

Not all takings under the eminent domain power trigger the statutory election under the Buy-the-Farm Statute. Instead, the statute applies only to cases where the taking is by a utility for a "high-voltage transmission line with a capacity of 200 kilovolts or more." The election is not available when real property is being condemned for any other purpose. By example, if an easement on real property is condemned by the State of Minnesota for a highway purpose, the landowner cannot force the State to condemn or purchase the owner's contiguous land.

II. Who Is Eligible?

Not only is the election not available in every eminent domain proceeding, not every landowner is eligible for the statutory election under the Buy-the-Farm statute. The statutory election is limited to only those who own fee title to certain types of land, which are:

(a) agricultural or nonagricultural homestead,
(b) nonhomestead agricultural land,
(c) rental residential property, and
(d) commercial and noncommercial seasonal residential recreational property.

The Buy-the-Farm Statute itself does not define these terms (e.g., agricultural land). However, the Buy-the-Farm Statute relies on the definitions used in Minn. Stat. § 273.13, a section of the Minnesota Statutes that sets out the classification of

property for property tax purposes. Under Minn. Stat. § 273.13, Subd. 23(a), an agricultural homestead consists of class 2a agricultural land that is homesteaded, along with any class 2b rural vacant land that is contiguous to the class 2a land under the same ownership.

An owner of "agricultural land" is eligible for the statutory election whether it is homestead or non-homestead property to the owner. Under Minn. Stat. § 273.13, Subd. 23(e), agricultural land means:

(i) contiguous acreage of ten acres or more, used during the preceding year for agricultural purposes; or

(ii) contiguous acreage used during the preceding year for an intensive livestock or poultry confinement operation, provided that land used only for pasturing or grazing does not qualify under this clause.

The term "agricultural purposes" as used in Minn. Stat. § 273.13 means the raising, cultivation, drying, or storage of agricultural products for sale, or the storage of machinery or equipment used in support of agricultural production by the same farm entity.

The term "agricultural products" as used in Minn. Stat. § 273.13 includes production for sale of livestock, dairy animals and products, poultry and poultry products, but excludes trees sold for timber, lumber, wood, or wood products.

Minn. Stat. § 273.13, Subd. 23(c) in turn provides that class 2b rural vacant land consists of parcels of property, or portions thereof, that are unplatted real estate, rural in character and not used for agricultural purposes, including land used for growing trees for timber, lumber, and wood and wood products, that is not improved with a structure. If rural vacant land is contiguous to agricultural land under the same ownership, it could be classified as part of an agricultural homestead, which is covered by the Buy-the-Farm Statute. On the other hand, if a rural vacant land does not qualify as an agricultural homestead, the statutory election under the Buy-the-Farm Statute may not apply. By way of explanation, in *Northern States Power Company v. Williams,* 343 N.W.2d 627 (Minn. 1984), the Supreme Court of Minnesota concluded that the owner of rural lands used for the purpose of growing Christmas trees and nursery stock trees was not eligible to elect the statutory election under the Buy-the-Farm Statute. In *Williams,* the owners owned approximately 155 acres, 40 of which were tillable with 20 acres devoted to growing and harvesting Christmas trees and 5 acres devoted to nursery stock. The owners also owned approximately 237.5 acres, of which 196 were tillable and 4 were occupied by buildings and roads. Christmas trees were grown on 146 acres of this parcel and nursery stock on 50 acres. Northern States Power Company initiated a condemnation proceeding to construct a high voltage power line over both parcels owned by the Williamses. In response, the Williamses elected under the Buy-the-Farm Statute, demanding that Northern States Power Company condemn the fee interest in the entire two parcels. Concluding that the Christmas trees and nursery stock were timber and not agricultural products, the Supreme Court held that the Williamses were not owners of protected property within the meaning of the Buy-the-Farm Statute.

III. <u>Who Is the Owner?</u>

The Buy-the-Farm Statute allows the statutory election for fee owners of the protected classes of property.

In addition to fee owners, the statute expressly includes contract for deed vendees as "owners" protected under the Buy-the-Farm Statute if the fee owner provides written consent. Before the most recent amendment to the Buy-the-Farm Statute in 2013, there was some ambiguity as to whether or not other holders of beneficial interests in the affected property would also be qualified to elect the statutory election. Prior to the 2013 amendment, the Buy-the-Farm Statute did not include a definition of "owner." This resulted in the argument that, based on the definition of "owner" found in other relevant portions of the Minnesota Statutes, not only fee owners but other beneficial interest holders were entitled to the statutory benefit of the Buy-the-Farm Statute.

Of particular relevance is Minnesota's eminent domain statute (Minn. Stat. § 117, *et. seq.*) which broadly defines "owner" to include "all persons with any interest in the property subject to a taking, whether as proprietors, tenants, life estate holders, encumbrancers, beneficial interest holders, or otherwise."

In 2013, the Minnesota legislature amended the Buy-the-Farm Statute to include an express definition of "owner":

> For purposes of this subdivision, "owner" means the fee owner, or when applicable, the fee owner with the written consent of the contract for deed vendee, or the contract for deed vendee with the written consent of the fee owner.

With the 2013 amendment to the statute, only the fee title owner (and the contract for deed vendee upon written consent by the fee owner) may make the Buy-the-Farm election, and no others.

IV. Size of the Option Property.

The Buy-the-Farm Statute provides that, if successful, the owner in a condemnation proceeding may force the utility to purchase a "fee interest in any amount of contiguous, commercially viable land which the owner wholly owns in undivided fee." Probably, one of the most contested issues between owners and utilities has been the amount of land required to be condemned under the Buy-the-Farm Statute. The statute states that it can be "any" amount of land so long as it is contiguous, commercially viable and wholly owned by the same owner. The statute does not speak to a reasonableness standard or set an amount necessary to adequately protect the owner. This question has been the subject of three Minnesota Supreme Court cases.

In its first foray, in *Cooperative Power Ass'n v. Aasand,* 288 N.W.2d 697 (Minn. 1980), the Supreme Court of Minnesota seemed to interpret the Buy-the-Farm Statute to require that utilities purchase only that amount of contiguous land that bears a reasonable relationship to the amount of property proposed to be condemned by the utilities. The Supreme Court noted:

> "The enactment of [the Buy-the-Farm Statute] reflects a creative legislative response to a conflict between rural landowners and utilities concerning right-of-ways. Opponents of the utilities, resisting further encroachments upon the rural landscape and fearing the effects upon the rural environment and public health, not only challenge the placement and erection of high voltage transmission lines, but question whether the rural community's sacrifice to the commonweal serves a greater social good. The legislature, sensitive to these concerns but perceiving the occasion as demanding the construction of additional power-generating plants and high voltage transmission lines, enacted [the Buy-the-Farm Statute] in partial response….In this manner, the legislature affords landowners not wishing to be adjacent to such right-of-ways the opportunity to obtain expeditiously the fair market value

of their property and go elsewhere. The statute, in so doing, responds to parties most affected by the operation of high voltage transmission lines; the statute eases difficulties of relocation by shifting the transaction cost of locating a willing purchaser for the burdened property from landowner to utility."

Based on its understanding of the legislative background, motive, and purpose, the Supreme Court went on to state that "[n]otwithstanding its ability to constrain the power of condemnation, the legislature may not impose unreasonable restraints rendering the exercise of the delegated power unduly burdensome and fundamentally unfair. Hence, the constitutionality of [the Buy-the-Farm Statute] rests ultimately upon the reasonableness of the condition it imposes upon the exercise of the power of eminent domain."

Aasand did not end the debate. The Supreme Court had not elaborated as to what constitutes a "reasonable" or "unreasonable" amount of the contiguous land required to be condemned under an election made pursuant to the Buy-the-Farm Statute. Nor had it provided any guidelines, factors, or formulae to determine the reasonableness of the amount of the land required to be taken. The facts in *Aasand* are illustrative on this point. In *Aasand,* Cooperative Power and United Power Associations initiated a condemnation proceeding against the landowners to take a 160-foot-wide easement encompassing roughly 13 acres running along the southern edge of the owners' property for the purposes of a high voltage transmission line right-of-way. In response, the landowners exercised their statutory right of election under the Buy-the-Farm Statute requiring the utility to condemn a fee interest in the owners' entire 149.17-acre farm. Upholding the Hennepin County District Court's conclusion, the Supreme Court held that (i) the Buy-the-Farm Statute is constitutional so long as reasonableness is read into it and (ii) the landowners' exercise of the statutory right with respect to the entire 149.17 acres when the right-of-way easement proposed by the utility was for 13 acres, roughly 8.7% of their ownership, was reasonable and satisfied the reasonableness requirements under the Buy-the-Farm Statute.

Aasand was followed by *Williams* which shed some additional light on the question of reasonableness, though did not settle the issue. In *Williams,* while the Supreme Court concluded that the owners of the land were not entitled to the statutory election under the Buy-the-Farm Statute, as the property in question was not agricultural property, the Supreme Court nonetheless touched on the question of reasonableness. It observed that the test of reasonableness would not be met when a total of 387.5 acres worth from $690,000 to $1,700,000 would have to be acquired as a result of the condemnation of an easement of 12.69 acres.

The Minnesota Supreme Court had another opportunity to speak to the question of reasonableness in *Great River Energy v. Swedzinski,* 860 N.W.2d 362 (Minn. 2015) in which it explained its prior holdings in *Aasand* and *Williams* and seems to have at least clarified if not resolved the question. At issue in *Swedzinski* was a Buy-the-Farm election and, with that, whether the condemnation of an 8.86-acre easement obligated Great River Energy to purchase the owners' 218.85-acre plot. Great River Energy argued that the election was not reasonable, in part because the land subject to the election was so much larger than the land needed for its easement. It relied on the holdings in *Aasand* and *Williams.* The district court sided with landowners; the Minnesota Court of Appeals affirmed, approving the landowners' election; and, the Minnesota Supreme Court agreed.

Throughout the proceedings Great River argued that there should be a "totality-of-the-circumstances reasonableness analysis" of any Buy-

All rights and protections provided to an owner under the "Eminent Domain Statutes" apply to acquisition of land or interest in land under the Buy-the-Farm Statute.

the-Farm election. Not so, said the Supreme Court, writing that such an analysis is not found in the statute.

The Supreme Court went on to explain its conclusion against the backdrop of *Aasand* and *Williams.* The Court "acknowledged that it had read a reasonableness requirement into the prior version of the Buy-the-Farm statute" but that in *Aasand* its discussion was "limited to, consideration of the commercial viability of the land subject to the election." It also noted that, "despite the elected parcel's size difference from that of the easement," the Court approved the election. With respect to *Williams,* the Supreme Court said that the Court's reference to the size of the election, was a "reference to the statutory exclusion of timber, which reflected the Legislature's concern that landowners would abuse the Buy-the-Farm Statute to compel purchases of vast timberland." *Williams,* said the Court, did not touch on the size of farmland in a Buy-the-Farm election; and the Court has "no authority to superimpose size limitation into the language of the statute under the guise of statutory interpretation."

V. <u>Exercise of the Option.</u>

Under the Buy-the-Farm Statute, the owner has to exercise the statutory election within 60 days after receipt of the notice of the condemnation petition filed by the utility. The owner's exercise should be in writing and should identify all contiguous land that the owner is intending to transfer to the utility. The owner has only one option and may not expand or otherwise modify an election without the consent of the utility. Within 60 days after receipt by the utility of an owner's election to exercise the statutory election, the utility must provide written notice to the owner of any objection the utility has to the owner's election, and if no objection is made within that time, any objection is deemed waived. Within 120 days of the service of an objection by the utility, the district court having jurisdiction over the eminent domain proceeding is required to hold a hearing to determine whether the utility's objection is upheld or rejected. If the court rejects the utility's objection, the easement interest over and adjacent to the lands designated by the owner to be acquired in fee, sought in the condemnation petition for a right-of-way is automatically converted into a fee taking.

VI. Other Eminent Domain Rights and Protections.

The Minnesota legislature further amended the Buy-the-Farm Statute in 2013 to specify that all rights and protections provided to an owner under Chapter 117 of the Minnesota Statutes (the **"Eminent Domain Statutes"**) apply to the acquisition of land or interest in land under the Buy-the-Farm Statute. Examples of those rights and protections include:

(a) minimum compensation required under Section 117.187 of the Eminent Domain Statutes; and

(b) relocation assistance required under Section 117.52 of the Eminent Domain Statutes.

Section 117.187 of the Eminent Domain Statutes provides that:

> "When an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community and not less than the condemning authority's payment or deposit under section 117.042, to the extent that the damages will not be duplicated in the compensation otherwise awarded to the owner of the property. For the purposes of this section, "owner" is defined as the person or entity that holds fee title to the property."

Accordingly, the statutes assure a replacement cost to be paid to the owner exercising the statutory election under the Buy-the-Farm Statute as a minimum amount. In addition, under Section 117.52 of the Eminent Domain Statutes, when there is no federal financial participation in a project that requires real property acquisition, a Minnesota utility has an obligation to provide the same relocation assistance to a displaced person that federal authorities would be required to provide under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-55.

In *Northern States Power Company v. Aleckson,* 831 N.W.2d 303 (Minn. 2013), the utility took the position that the minimum compensation and relocation assistance requirements under the Eminent Domain Statutes apply only when the owner "must" relocate and does not apply to the owners who "elect" to relocate by exercising their statutory Buy-the-Farm election.

Reasoning that the courts have determined compensation at the time of the taking and not the date the condemnation proceedings commence, the Supreme Court concluded that, in the case of taking the fee title due to the owner's exercise of the statutory election under the Buy-the-Farm Statute, the time of taking is when title to and possession of the property passes to the utility, and at which time the owner "must" relocate. Based on this rationale, the Supreme Court held that the owners exercising their statutory right of election under the Buy-the-Farm Statute should be entitled to the minimum compensation and relocation assistance requirements under the Eminent Domain Statutes. This law has been codified into the Buy-the-Farm Statute by the 2013 amendment.

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

Based on his prior experiences as an investment banker, David brings a unique balance between the law and business into his practice, which centers heavily around representing businesses and entrepreneurs in a wide range of areas including manufacturing, engineering, bio-science, financial and agricultural industries. Through his financial and legal career for over twenty years, David has accumulated expertise in corporate and commercial matters and regularly advises clients on $200-million to $500-million transactions each year. David often leads complex transactions across the U.S., as well as in growing markets overseas such as Central and South America and Asia.

3rd Annual

SOUTHERN MINNESOTA BUSINESS SUMMIT

Evolving With Your Business

Tuesday June 7, 2016 | 8:00 a.m. – 4:00 p.m. with social to follow
Courtyard by Marriott | Mankato, MN

TOPICS TO INCLUDE:

2016 Human Resources Topics
Fraud Prevention
Dispute Resolution and Family Matters
1031 Exchange Update
Buying a Business/The Life Cycle of a Business
Real Estate Issues
Cybersecurity, Risk and Liability

REGISTRATION: $50

To register go to
www.eidebailly.com/events
click on June 7

EideBailly℠
CPAs & BUSINESS ADVISORS

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

Federal Issues Update

by Brian Foster

CONGRESS – NOTABLE RECENT ACCOMPLISHMENTS

Last December, the U.S. Congress repealed Mandatory Country-of-Origin Labeling (M-COOL) legislation for meats, which had been opposed by most mainstream livestock producers since the legislation was included in the 2002 Farm Bill and regulations finally put into place in 2008.

Congress also made permanent the extension of a number of tax provisions favorable to agriculture, including the Section 179 maximum deduction of $500,000, and the 50-percent bonus depreciation provision for the purchase of new capital assets, including agricultural equipment.

The general agriculture community was pleased with the final release of the 2015 Dietary Guidelines for Americans that came back to focus solely on nutrition as well as including lean meats in the recommendations for a healthy diet. Earlier drafts of the guidelines, updated by the federal government every five years, had de-emphasized the role of meat as a source of nutrients, and had, for the first time, proposed to consider production sustainability as a guiding principle.

Child nutrition reauthorization legislation has recently been passed and is generally positive for the U.S. livestock and meat sector and the legislation provides for an agreement on sodium levels, including a two-year delay of new stricter ("Tier II") standards and a study to examine food costs, food safety, product availability, student participation, and whether nutrition science indicates a further reduction would be beneficial for school-aged children.

The legislative compromise also allows deli meat and other meat products to continue to be part of children's and school nutrition programs, and it updated federal statute across the board to remove outdated nutrition language such as the term "low-fat" that may cast meat in a negative light.

Trans-Pacific Partnership

Congress granted the President trade promotion authority (TPA), also known as fast track authority, last summer by votes of 218–208 in the U.S. House and 60–37 in the U.S. Senate. TPA allowed the Obama Administration to finalize negotiations on the Trans-Pacific Partnership (TPP) free trade agreement that will eventually be subject to an up-or-down (no amendments) vote by Congress.

The TPP is among the largest trade agreements ever negotiated, representing around 40 percent of world trade among 12 Pacific Rim countries. Notably absent from the TPP is China, but there are indications that once the agreement is in place, China, Indonesia and several other Asian nations may apply to join.

The most likely scenario for the final votes by Congress on TPP will be sometime in the lame duck session of Congress, that is, after the November 2016 elections.

In early April, over 225 agricultural and food organizations signed on to a letter to Members of Congress expressing support for the Trans-Pacific Partnership agreement, and urging congressional lawmakers to back the deal. "If faithfully implemented, TPP will help level the playing field for U.S. exports and create new opportunities for us in the highly competitive Asia-Pacific region," said the agricultural and food groups in the letter to Senate and House leaders.

Given the strident anti-trade rhetoric of most of the remaining candidates in both of the major parties running for President, passage of the TPP is now seen to be extremely difficult. Final votes on passage of the Trans-Pacific Partnership are sure to be razor-thin, and at this point, could go either way – to passage of an historic trade agreement that could greatly benefit American agriculture, or to failure and the prospect of new trade barriers being put into place in many markets.

LOOKING AHEAD – FEDERAL ISSUES FOR THE REST OF 2016

Following are several federal issues impacting American agriculture that Congress and the Administration will be considering the remainder of this year. One needs to keep in mind that the November elections will likely get in the way of most of this agenda. Senate Majority Leader McConnell said that his objective for 2016 is just to get the appropriations (spending) bills passed, which is a pretty limited agenda, but probably realistic.

- The Senate and the House passed Sen. Joni Ernst's (R-Iowa) joint resolution of disapproval of Waters of the U.S. rule (WOTUS), but President Obama vetoed it and there are not enough votes to override the veto. The WOTUS issue, therefore, remains in the courts, where current implementation is stayed. Both the House and Senate have the votes in the appropriations committees to continue to restrict funding for EPA/ Corps implementation of WOTUS.
- The death of Supreme Court Justice Scalia could put the WOTUS issue into additional limbo, as the usual 5–4 majority on a number of conservative issues is now looking to be a 4–4 tie. This situation in the Supreme Court would mean that for many issues either (1) the Supreme Court will refuse to take up the issue in the first place; or (2) the Court takes up the issue and rules in a tie. Under each of these scenarios, whatever lower court or appeals court ruling is in place at the time would remain in place.

Recent indication from the majority republican Senate is that any Supreme Court nominee named by President Obama will not be considered, meaning the vacancy created by Justice Scalia's death will not be filled until sometime in 2017 under a new President and Congress.

Other issues that may be impacted by the death of Justice Scalia:

- The Supreme Court refused to hear the Farm Bureau's challenge to EPA's cleanup plan for the Chesapeake Bay; the EPA approach is seen by environmentalists as a model for the rest of the country's water, including the Mississippi River watershed. The Supreme Court's decision leaves in place a lower court ruling in favor of EPA and effectively ends legal action on EPA's regulation setting so-called Total Maximum Daily Loads (TMDLs) – the amount of pollutants, including otherwise unregulated farm and agricultural storm water runoff – for the bay;

- The Obama Administration's clean power plan – the Supreme Court decided by a 5–4 margin to stay Obama's EPA climate rules, known as the Clean Power Plan; this rule would greatly restrict the use of coal to generate electricity;

- The Supreme Court is scheduled to hear arguments in a case over whether landowners can challenge in court the Army Corps of Engineers determinations about which streams and wetlands on a property are subject to Clean Water Act protections. Justice Scalia wrote the majority opinion in 2012 where justices ruled unanimously that compliance orders are reviewable.

- GMO labeling – voluntary, nationwide labeling legislation (that would preempt state laws) already passed by the U.S. House last year by a wide margin, but did not get included in the omnibus spending bill passed in December. Senator Pat Roberts of Kansas, chairman of the Senate Agriculture Committee, introduced a bill early in 2016 that would have preempted state GMO labeling laws; that legislation was passed out of the Senate Agriculture Committee on a 14–6 bi-partisan vote. The full Senate in mid-March, however, could not muster the 60 votes needed to invoke cloture and move to a vote on passage of the legislation. The bill, therefore, is dead for now, its demise due to the insistence of the leading democrat on the Agriculture Committee, Debbie Stabenow of Michigan, to push a "compromise" GMO labeling provision that would set a timetable for a "path" to nationwide, mandatory GMO disclosure, a provision the House was certain to not agree to. Vermont's mandated GMO labeling law, the only one in place in the U.S., is set to go into effect July 1. The Vermont law is being challenged in court, but it is uncertain when a ruling/injunction might be in place to halt its implementation.

- In the last Congress, both the House and Senate drafted legislation aimed at comprehensive tax reform, but leadership changes at the tax-writing House Ways and Means and the Senate Finance Committees have resulted in little action on tax reform by this Congress. At this point on the Congressional calendar, with congressional and presidential elections only months away, don't expect major action on tax reform until a new Congress and President are sworn in January of 2017.

- Likewise for comprehensive immigration reform, the presidential campaign has poisoned the water for movement by this Congress.

Brian Foster
Insight Enterprise Consulting

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

He is an agribusiness and agricultural policy consultant with international work experience in Eastern Europe, Latin America, Africa and Asia. He managed Pioneer Hi-Bred International's seed businesses in Bulgaria and Ukraine, and now provides consulting services in agricultural production and farm management, marketing, and business strategy and planning to clients around the world.

In the U.S., Foster provides business development and agricultural policy advice to clients in the livestock and meat industries. He has served as Director of Business Development and Marketing for Christensen Farms in Sleepy Eye, Minnesota, and was Legislative Assistant on agricultural issues for former U.S. Congressman Tim Penny of Minnesota.

His education includes a master's degree in Agronomy from Iowa State University and an MBA from Purdue. Foster served as a U.S. Peace Corps volunteer in Costa Rica, providing technical assistance services to dairy farmers – he speaks fluent Spanish.

RECENT CASES OF INTEREST

Brittany R. King-Asamoa
507-354-3111
bking-asamoa@gislason.com

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

EPA Does Not Have a Duty to Regulate Air Pollutants Emitted from Animal Feeding Operations. *Zook v. McCarthy,* 52 F.Supp.3d 69 (D. D.C. 2014), *aff'd* 611 Fed. Appx. 725 (6th Cir. 2015), *cert. denied,* 136 S.Ct. 421 (2015).

THE PARTIES: The plaintiffs are four Iowa citizens who worked at or had children who attended a school in Winneshiek County, Iowa, which was the subject of a study regarding the health effects of nearby animal feeding operations (AFOs). They brought a citizens' suit against the EPA and the EPA administrator.

THE FACTS: The plaintiffs relied on several studies and reports that they alleged showed negative health effects from exposure to certain substances emitted from AFOs such as ammonia, hydrogen sulfide, or particulate matter.

THE DISPUTE: The plaintiffs sued the EPA seeking to require the EPA to regulate emissions from AFOs under the Clean Air Act (CAA). After the plaintiffs filed their complaint, the EPA moved to dismiss the lawsuit.

LEGAL ISSUES: The plaintiffs' suit revolved around two legal theories. First, the plaintiffs argued that EPA has a duty to recognize that emissions from AFOs are pollutants and should therefore list those pollutants and set air quality criteria under the CAA. Second, the plaintiffs contended that the EPA must also list AFOs as "stationary sources" of air pollution under the CAA.

A court can order the EPA to take actions which are required by statute, but a court cannot order the EPA to take an action which is discretionary rather than mandatory. Here, the EPA argued that the CAA allowed it discretion to decide which pollutants are harmful to public health and discretion to decide which facilities are major air pollution contributors.

CONCLUSIONS: The federal court that heard the EPA's motion to dismiss agreed that the EPA had no duty to list emissions from AFOs as pollutants under the CAA and no duty to list AFOs as stationary sources of air pollution. The court explained that the CAA only required the EPA to list emissions and set air quality standards *after* the EPA made the decision that the particular

emission was likely to endanger public health and welfare. Because the EPA has not yet made such a determination on the substances emitted from AFOs, the court could not usurp the EPA's authority and require it to list the emissions complained of by the plaintiffs. The court similarly explained that the EPA had discretion to determine whether AFOs were a significant source of pollution such that they should be regulated under the CAA. Because the EPA had not failed to perform any mandatory obligation, the court dismissed the plaintiffs' lawsuit.

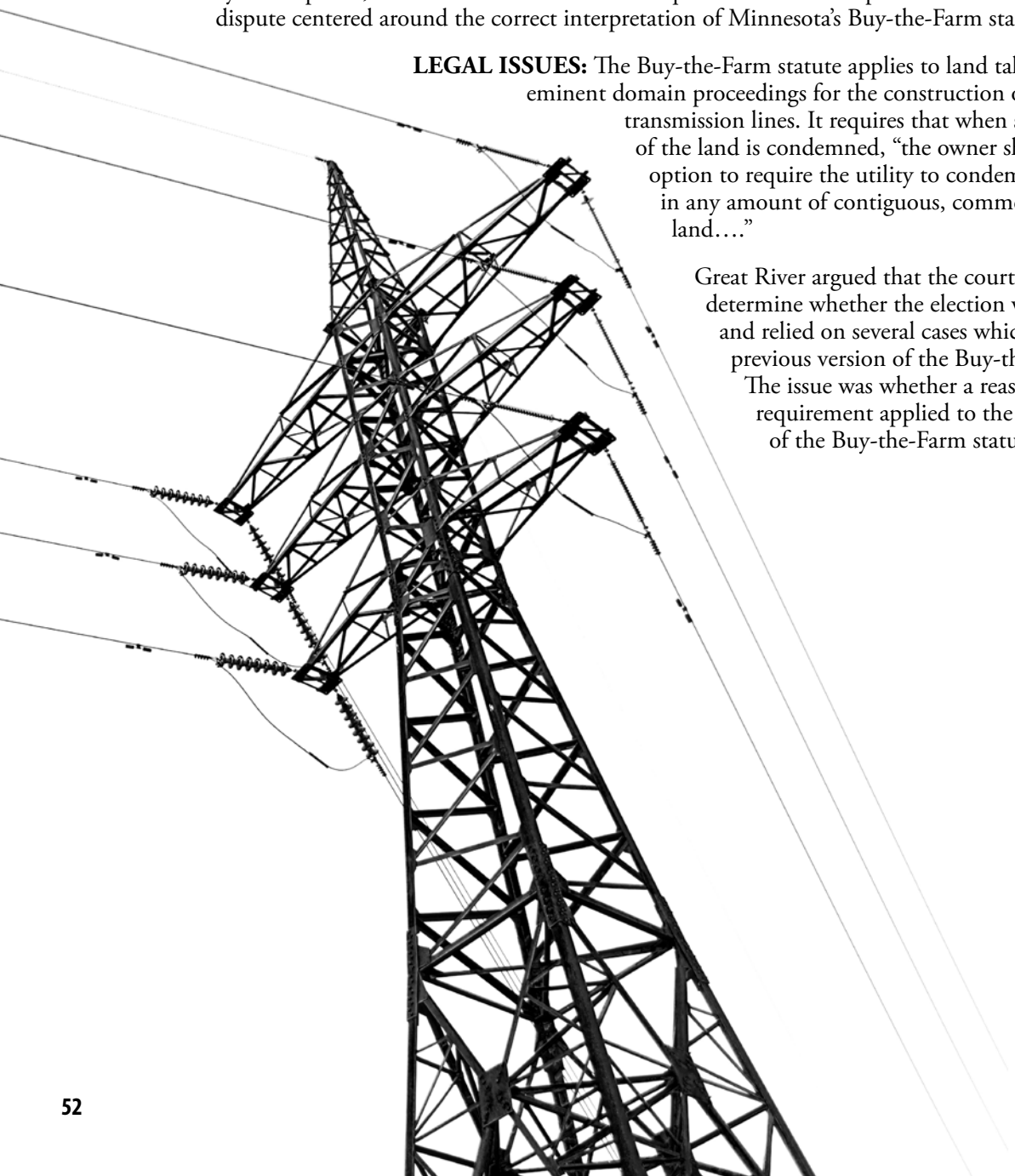
The plaintiffs appealed this decision, and the appeals court agreed that the EPA did not violate any mandatory obligation, upholding the lower court's decision. The plaintiffs then asked the Supreme Court to review their case, but that request was denied. Thus, the decision that the EPA does not currently have a duty to regulate AFO emissions stands.

Public Utility Could Be Required to Purchase Entire Parcel under Buy-the-Farm Statute, Even if Arguably "Unreasonable" or "Unfair." *Great River Energy v. Swedzinski,* 860 N.W.2d 362 (Minn. 2015).

THE PARTIES: Great River Energy and a group of other companies are public utilities which were building a high-voltage transmission line. The Tauers are landowners whose land was condemned by Great River as part of the transmission line project.

THE FACTS: Great River was installing a high-voltage transmission line from Brookings, South Dakota to Hampton, Minnesota. As part of the project, Great River had the authority to condemn land by eminent domain to place their transmission lines. The Taurers owned a 219-acre parcel of farmland which they had been leasing to a third-party farmer. Great River sought an easement over about 9 acres of the Taurers' farmland.

THE DISPUTE: The Taurers requested that Great River be compelled to purchase the entire 219-acre parcel. Great River resisted, arguing that because the easement needed was so small compared to the entirety of the parcel, it would be unreasonable to require Great River to purchase all of the land. The dispute centered around the correct interpretation of Minnesota's Buy-the-Farm statute.



LEGAL ISSUES: The Buy-the-Farm statute applies to land taken by eminent domain proceedings for the construction of high-voltage transmission lines. It requires that when some part of the land is condemned, "the owner shall have the option to require the utility to condemn a fee interest in any amount of contiguous, commercially viable land…."

Great River argued that the court should first determine whether the election was reasonable, and relied on several cases which interpreted a previous version of the Buy-the-Farm statute. The issue was whether a reasonableness requirement applied to the current version of the Buy-the-Farm statute.

CONCLUSIONS: The Minnesota Supreme Court concluded that the plain language of the current version of the Buy-the-Farm statute required only that the landowner meet certain criteria defined in the statute. If those criteria are met, the utility is required to condemn the entire parcel, and the court cannot consider whether the election to have the entire parcel condemned is reasonable. Because the Taurers met the statutory requirements and elected to have their entire parcel condemned, the Supreme Court concluded that Great River was required to purchase the entire 219 acres, not merely the 9-acre easement.

Update: Court Concludes that Plaintiffs Are Likely to Succeed on Constitutional Challenge to Vermont's GMO Labeling Law. *Grocery Manufacturers Association v. Sorrel,* 102 F.Supp.3d 583 (D. Vt. 2015).

The Spring 2015 issue of *Dirt* discussed an upcoming motion hearing on a challenge to Vermont's GMO labeling law. On April 27, 2015, a federal court in Vermont issued an order dismissing some of the plaintiff's challenges, denying injunctive relief, and concluding that the Plaintiffs were likely to succeed on some of their Constitutional claims.

THE PARTIES: The plaintiffs are several food trade groups, including the Grocery Manufacturers Association, International Dairy Foods Association, and National Association of Manufacturers. The Vermont Attorney General is defending the state law at issue in this case.

THE FACTS: In May 2014, the Vermont legislature passed a law that would require disclosure labels on any food sold in Vermont with genetically engineered ingredients. The law states that the reason for the labeling is because genetically engineered ingredients "potentially pose risks to health, safety, agriculture and the environment." The same law prohibits foods containing genetically engineered ingredients from using the word "natural" on their labels. The law is set to go into effect on July 1, 2016.

THE DISPUTE: The trade groups filed suit on the grounds that the Vermont law violated the First Amendment, unconstitutionally burdened out-of-state food companies selling in Vermont, and conflicted with Federal food labeling laws. They asked the court for a preliminary injunction, which would keep the law from going into effect until the court actually decides whether the Vermont law is constitutional. Vermont requested the court dismiss the suit.

LEGAL ISSUE: The plaintiffs argue that the Vermont law violates the U.S. Constitution in several ways. The first argument is based on the First Amendment. In general, the First Amendment does not protect "commercial speech" like product labels from government regulation to the same extent it protects other kinds of speech. One of the main arguments in the case is whether the Vermont law merely requires manufacturers make a statement of fact, or if a GMO label in practice communicates an opinion on the safety of the product. Commercial speech regulations that merely require a statement of fact are held to a much less strict constitutional standard than regulations requiring more than mere factual statements.

Second, plaintiffs argue that the law violates the Commerce Clause, unfairly burdening interstate commerce and interfering with the federal Food and Drug Administration's uniform regulation of food labeling throughout the country.

The plaintiffs also argued that the law conflicted with Federal laws dealing with food labeling requirements.

CONCLUSIONS: The court concluded that some of the law's regulation of the "natural" terminology may unfairly burden interstate commerce and thus violate the Commerce Clause. The court also concluded there may be conflicts with some federal laws which regulate labeling of meat and poultry. The court concluded that it was possible that the GMO labeling requirement might violate the First Amendment, but noted that the law was uncertain. Finally, the court concluded that regulations of the use of the term "natural" would likely violate the First Amendment.

Although the court concluded that certain parts of the law likely violated the First Amendment, because none of the plaintiffs were able to demonstrate they would be harmed, the Court denied the plaintiffs' request for an injunction. This would allow the law to go into effect while the case is pending.

The district court's decision has been appealed, but no further decisions have been made. This case will likely answer more questions regarding the constitutionality of GMO labeling laws as it progresses.

Farm Tenant May Have Crop Damages Claim Against Pipeline. *Tiemessen v. Alliance Pipeline (Iowa) L.P.,* No. 14-1727, 2016 WL 351471 (Iowa Ct. App. Jan. 27, 2016).

THE PARTIES: The Plaintiff, Roger Tiemessen, is a tenant-farmer of his parents' land in Iowa. The defendants, Alliance Pipeline L.P. and Alliance Pipeline, Inc., own the Alliance Pipeline system, a pipeline that transports natural gas from British Columbia and Alberta through Canada and the upper Midwest United States to Chicago.

THE FACTS: In 1999, Roger Tiemessen's parents granted an easement to Alliance for the installation of a pipeline under the tillable land. In conjunction with the easement agreement (the "Agreement"), Tiemessen's parents executed a release agreement and received a "restoration payment" for damages, including corn crop loss for two years and land restoration. The release was a release of general damages. However, the Agreement was drafted in compliance with the Agricultural Impact Mitigation Agreement (AIMA) which requires Alliance to compensate landowners for damages, including damages for "loss of crops," caused by its pipeline.

In 2013, Tiemessen sued Alliance for breach of contract as a third-party beneficiary of the Agreement. He claimed that operation of the pipeline continued to reduce the yields on the easement property. His damages stemmed from the operation of the pipeline and caused annual crop losses which he must be compensated for pursuant to the Agreement. Alliance argued, and the district court agreed, that Tiemessen's claim was not for damages to his crops but rather to the land itself. As a tenant, Tiemessen had no legal interest in the land itself, and the landowners, his parents, had released all of their rights to additional damages under the Agreement. Therefore, the district held that such damages were not recoverable and entered summary judgment in favor of Alliance. Tiemessen appealed.

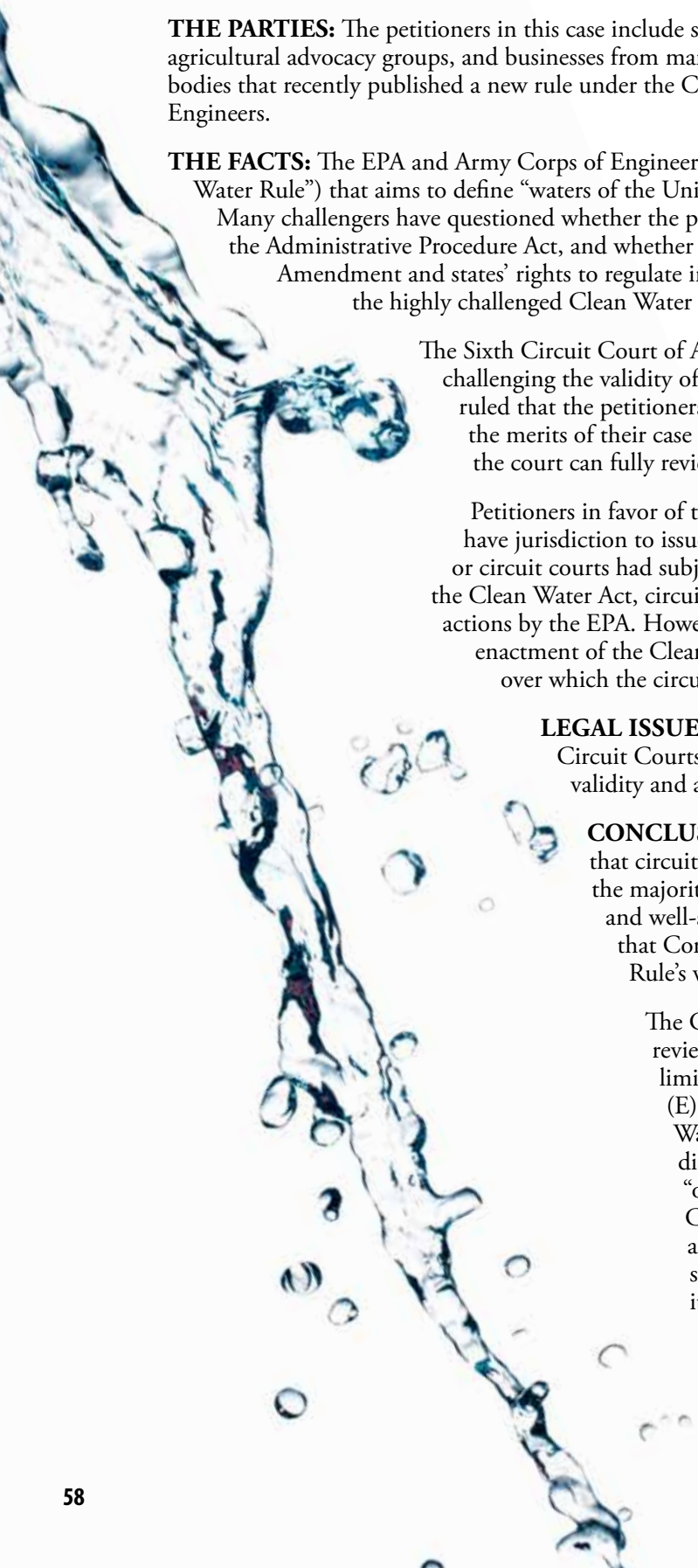
THE DISPUTE: Tiemessen presented evidence from an experienced crop adjuster who claimed the variation in crop yield between on- and off-easement property is substantial and caused by the heat the pipeline generates, which dries the soil and reduces his crop yields. In opposition to this argument, Alliance argued that the "loss of crops" considered in the Agreement for reasonable compensation included only physical damage to the crops themselves. It also argued that increased soil temperatures, caused by pipelines, have little to no impact on crop yields.

LEGAL ISSUES: The issue before the appeals court was whether crop losses identified by comparing crop yield on the easement property versus off-easement property is "damages to crop" or losses due to "soil productivity." If it is "damages to crop," then Alliance may be obligated to pay Tiemessen damages. If it is loss due to "soil productivity," then only the landlord has a right to damages; and since the landlords already released their rights to damages, Alliance would not have to pay damages.

CONCLUSIONS: The Iowa Court of Appeals reversed and remanded the case back to the lower court. Based on expert testimony presented by Tiemessen, the court found that a material issue of fact existed regarding whether the damages were crop damages or soil damages. The court concluded that despite Alliance's arguments, Tiemessen presented credible evidence, and case law supported a possible finding that the damages claimed were recoverable crop losses even without physical injury.

Landowners entering easement agreements and accepting payments similar to the restoration payments provided in *Tiemessen* should pay special attention to the language presented in the agreements. Consider whether you will be releasing claims for foreseeable reductions in crop yields that you have not contemplated by signing the agreement or accepting the payment. Also consider whether "loss of crops" or "damages to crops" is defined in your agreements. A definition was not provided in the Agreement contemplated by *Tiemessen*, which left open the question of whether a physical injury to the crops was necessary for recovery under the Agreement and AIMA.

Sixth Circuit Rules On Its Power to Decide on Clean Water Act Rule. *In re U.S. Dep't of Defense & U.S. E.P.A. Final Rule: Clean Water Rule,* No. 15-3751, 2016 WL 723241 (6th Cir. Feb. 22, 2016).



THE PARTIES: The petitioners in this case include state governments, environmental advocacy groups, agricultural advocacy groups, and businesses from many different sectors. The respondents are the governmental bodies that recently published a new rule under the Clean Water Act, the EPA and the Army Corps of Engineers.

THE FACTS: The EPA and Army Corps of Engineers recently published a new administrative rule ("the Clean Water Rule") that aims to define "waters of the United States" as contemplated under the Clean Water Act. Many challengers have questioned whether the process of the Clean Water Rule's enactment violated the Administrative Procedure Act, and whether the Clean Water Rule would infringe on the Tenth Amendment and states' rights to regulate intrastate waters. Lawsuits regarding the enforcement of the highly challenged Clean Water Rule have been initiated around the country.

The Sixth Circuit Court of Appeals consolidated the numerous petitions filed challenging the validity of the Clean Water Rule. In 2015, the Sixth Circuit had ruled that the petitioners opposing the Clean Water Rule were likely to succeed on the merits of their case and ordered that enforcement of the Rule be delayed until the court can fully review the validity of the Clean Water Rule.

Petitioners in favor of the Clean Water Rule argued that the Sixth Circuit did not have jurisdiction to issue this order. The key question was whether district courts or circuit courts had subject-matter jurisdiction to hear the complaints. Under the Clean Water Act, circuit courts of appeal have original jurisdiction over certain actions by the EPA. However, various parties contend that it is unclear whether the enactment of the Clean Water Rule and its enforcement are the sorts of actions over which the circuit courts would have jurisdiction.

LEGAL ISSUE: The issue was whether U.S. District Courts or U.S. Circuit Courts of Appeal have original jurisdiction to determine the validity and application of the Clean Water Rule.

CONCLUSIONS: In a 2–1 decision, the Sixth Circuit concluded that circuit courts have original jurisdiction on this issue. Writing for the majority, circuit Judge McKeague found the most compelling and well-supported interpretation of the Clean Water Act was that Congress intended circuit courts to have direct review of the Rule's validity.

The Clean Water Act provides for the circuit courts' direct review of actions "approving or promulgating any effluent limitation or *other limitation* . . ." 33 U.S.C. § 1369(b)(1)(E) (emphasis added). Given the indirect effect the Clean Water Rule has on permit issuers' authority to restrict discharges into covered waters, the Rule ultimately creates "other limitations" contemplated by this section of the Clean Water Act. Thus, Congress must have intended that any challenge to a rule creating such a limitation must be subject to direct review in the same courts as the limitation itself – circuit courts.

The majority also found that the circuit courts had original jurisdiction pursuant to another section of the Clean Water Act, as the Clean Water Rule governed the actions of the EPA which were functionally similar to denying permits. Dissenting Judge Keith, however, noted that pursuant to this reasoning, all rules that merely relate to permits under the Clean Water Act would therefore be deemed to govern or regulate the issuance of permits, which would in turn eliminate the purpose for listing specific actions of the EPA as reviewable by circuit courts.

Numerous parties have requested an *en banc* review (review by all the judges on the Sixth Circuit, not just the three-judge panel) of the decision. Many petitions regarding the validity of the Clean Water Rule have since been stayed pending the outcome of the rehearing.

Evergreen Clause Violates State Constitution's Limits on Farm Leases. *Gansen v. Gansen,* No. 14-2006, 2016 WL 275295 (Iowa Jan. 22, 2016).

THE PARTIES: The plaintiff was a trust created by a relative of the tenant, which owned 200 acres of Iowa farmland. Defendant James Gansen was the tenant in two agricultural leases with the Trust.

THE FACTS: In 1997, the Trust and Gansen entered into two leases with an initial term of five years for $120 per acre. Each lease was thereafter set to automatically renew for four additional terms of five years unless Gansen provided adequate notice terminating the lease. The leases also contained a renegotiation clause that allowed Gansen and the Trust to negotiate the rental payment on an annual basis. If Gansen and the Trust failed to agree to a new rental rate, the rate for the previous year remained in effect. The Trust claimed that Gansen had failed to negotiate rental increases in good faith. Following the parties' second disagreement regarding the rental rate, the Trust filed suit against Gansen and sought early termination of the lease because Gansen's refusal to negotiate was a breach of the lease, and the lease violated the state constitution by exceeding the 20-year limitation on agricultural leases.

LEGAL ISSUE: Article 1, section 24 of the Iowa Constitution prohibits agricultural leases for periods longer than 20 years. The question in this case was whether an agricultural lease containing an evergreen provision that could extend the lease beyond the constitutional 20-year cap is invalid. If so, the leases in this case would terminate in February 2017.

CONCLUSIONS: The court held that although Gansen's leases were not invalid at the outset, they would become invalid or "expire" 20 years after their creation, in 2017. However, the Iowa Supreme Court specifically addressed the ability of parties to a lease to mutually agree to renew a lease in a tenant-landlord relationship that ultimately extended beyond 20 years. The court held that the clear distinction between the two scenarios is that the Iowa Constitution prohibits the creation of a lease term for greater than 20 years, not the duration of a mutually renewed relationship.

Many states have constitutional limitations on agricultural leases: California, Minnesota, New York, North Dakota, South Dakota, and Wisconsin, to name a few. Given the popularity and ease of evergreen provisions, landlords and tenants in states containing limitations on agricultural lease terms should carefully consider whether they wish to have their leases automatically terminated once they exceed the constitutionally approved duration. Keep in mind that for some leases the acceptable time period is a lot shorter than that included in *Gansen*.

Gislason & Hunter
AGRICULTURE PRACTICE GROUP

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


Minneapolis, MN


New Ulm, MN


Des Moines, IA

Mankato, MN

Ag Practice Services

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

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

REPRESENTATIVE MATTERS

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


2016 Gislason & Hunter
Agricultural Lending
Conference
Thursday, September 8, 2016
New Ulm Event Center
GISLASON & HUNTER LLP
ATTORNEYS AT LAW
www.gislason.com