



## 29th Annual Agricultural Law Symposium in Minneapolis October 24 - 25, 2008



The 29th Annual Agricultural Law Symposium will be held October 24-25, 2008 at the Downtown Marriott Hotel in Minneapolis, MN. The program includes annual updates of 2008 developments in several areas of agricultural law and features several panel discussions on important areas of environmental law, governmental regulation, food safety, and natural resource law, among others. Attendees include national academic, governmental, and private practitioner experts in many fields of agricultural law. Information about the symposium program and registration materials are available at <http://www.aglaw-assn.org/aalaEvents.htm>. Contact Robert Achenbach, Jr., AALA Executive Director, at [RobertA@aglaw-assn.org](mailto:RobertA@aglaw-assn.org) or 541-466-5444 to receive a brochure.

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## EPA Actions Impact Agriculture

Gary Hansen, Risk Management Officer, AgriBank, FCB, St. Paul, MN

The following is a summary of significant Environmental Protection Agency actions impacting agriculture:

### EPA Proposes Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste on Farms

The U.S. Environmental Protection Agency (EPA) issued a proposed rule, 72 Fed. Reg. 73,700, published on December 28, 2007 to eliminate requirements for farms to disclose air pollution from animal waste. Currently, farms must report to federal, state, and local officials

when emissions of hazardous substances like ammonia and hydrogen sulfide exceed certain levels. However, administrative exemptions from particular notification requirements are authorized under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, and the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 *et seq.*

In proposing the rule, the EPA commented that the existing requirement creates an unnecessary burden for farms, and that it

is unnecessary for the EPA to respond to reports of air releases from animal waste on farms. According to the agency, the proposed rule will enable response authorities to better focus their attention on hazardous substance releases that require emergency response. Notifications to emergency response authorities will still be required when hazardous substances are released to the air from sources other than animal waste (e.g., ammonia tanks), as well as releases of hazardous substances to soil and water.



## Significant Changes to Interest Assistance for FSA Guaranteed Loans

*Karen R. Krub, Senior Staff Attorney, Farmers' Legal Action Group, Inc., St. Paul, MN*

On June 8, 2007, a new rule went into effect making significant changes to the Interest Assistance program for Farm Service Agency (FSA) guaranteed loans. The rule was published beginning on page 17,353 of Volume 72 of the *Federal Register* on April 9, 2007, and is available on the Internet at [www.gpoaccess.gov/fr/index.html](http://www.gpoaccess.gov/fr/index.html).

The FSA guaranteed loan program is intended to ensure that credit is available to family farmers and ranchers who are unable to obtain commercial credit at reasonable rates and terms, while imposing a reduced administrative and fiscal burden on the government compared to the direct loan program. The interest rate on an FSA guaranteed loan is usually negotiated between the borrower and lender.

Interest Assistance is intended to provide extra assistance to farmers who, although otherwise eligible for a guaranteed loan, could not cash flow a loan at the lender's regular agricultural interest rate. Through the Interest Assistance program, borrowers receive a 4 percent reduction in the negotiated interest rate. FSA makes annual payments to the lender equal to the amount of the interest reduction on the loan, subject to availability of appropriated funds.

This important program can make the difference in loan eligibility and financial feasibility for many farmers. However, there are some noteworthy limitations to the program. For several years, it has been FSA policy to make Interest Assistance available only on new Operating Loans (OL). This meant there was no Interest Assistance available for real estate [Farm Ownership (FO)] loans and that Interest Assistance was unavailable as a form of debt restructuring (unless the original loan had interest assistance and the 10-year limit hadn't yet been reached). Beginning in 1999, it also became FSA policy to impose a life-

time 10-year limit on any single borrower's eligibility for the program. This meant that a borrower could receive Interest Assistance on one or more guaranteed loans in a 10-year period, but would not be eligible for Interest Assistance ever again once that period expired. This was the case even if the borrower did not receive Interest Assistance in each of the 10 years during the period.

The new rule formalizes FSA's policy of limiting the use of Interest Assistance to new guaranteed OL loans. The rule further reduces the lifetime limit on borrower eligibility for Interest Assistance down to five years, except for beginning farmers who will have an opportunity to renew for another five years. This article discusses these new limits and other changes to Interest Assistance in the new rule.

### **Limitation to Operating Loans Made Part of Rule**

As mentioned above, the new rule explicitly states that Interest Assistance will only be available on new guaranteed OLs.

### **Debt-to-Asset Ratio Added as Eligibility Factor**

As mentioned above, eligibility for Interest Assistance has been based on a guaranteed loan borrower's inability to repay a loan at the lender's regular interest rate. This has required detailed cash flow analyses. The new rule continues the eligibility requirement that the borrower needs the interest rate reduction to cash flow the loan and adds the requirement that the borrower have a debt-to-asset ratio of greater than 50 percent. This calculation includes the borrower's personal debts and personal assets as well. For entity borrowers, all members' debts and assets will be considered.

In remarks accompanying the rule, FSA explained that it had analyzed the financial characteristics of borrowers in the guaranteed loan program and had determined that applicants with a debt-to-asset ratio at or below 50 percent should have the financial strength to restructure their debt and obtain financing without an interest rate reduction. The new eligibility requirement was adopted to further limit Interest Assistance to those guaranteed loan borrowers most in need of the limited program funds.

Recognizing that beginning farmers are often in the unique situation of having limited debt but still requiring assistance to become financially viable, FSA included an exception in the new rule for these borrowers. If a borrower qualifies as a beginning farmer or rancher, the eligibility requirement of a debt-to-asset ratio greater than 50 percent will not apply.

### **Automatic Annual Renewal But Five-Year Lifetime Limit**

Under the prior Interest Assistance rule, an annual review of the borrower's financial circumstances was required to ensure that the borrower still needed the interest rate reduction in order to cash flow. As FSA acknowledged in its remarks accompanying the proposed and final new rule, these annual reviews had become more or less a formality, with 93 percent of borrowers receiving renewals. Rather than admit it had failed in its oversight of the program, FSA concluded that the "significant administrative burden has not been cost effective and is not warranted." The new rule eliminates the requirement for an annual review to determine whether the borrower still needs the interest rate reduction. Instead, once a borrower is approved for Interest Assistance, annual renewal is automatic.

## Valuation of Plowback and Fertilizer in an Escalating Market

Matt Benda, Peterson Savelkoul & Benda, Ltd., Albert Lea, MN

The increased cost of fuel as an agricultural input has resulted in substantially increased production costs throughout the farm community. While crop prices have reached record levels, margins have disappeared quickly as input costs have increased. Many cite increased costs of transportation, labor, energy and raw materials, as well as the weakened U.S. dollar as the cause of this run-up. In some cases, the cost of fertilizer has doubled.

During this recent run up, farmers who applied inputs early had the benefit of lower gas and fertilizer prices. This so called "competitive advantage" certainly helped farmer's bottom line this year and may allow them to effectively hedge their costs for the life of the fertilizer.

This investment, however, can be easily put at risk as the competition for leased ground continues across

the countryside. A farmer who "captures" new farm ground may reap the benefit of the investment made by the previous tenant. Generally speaking, the value of plowback and fertilizer is an easy calculation in a flat market. This calculation is not so easy, however, when the value of the plowback and the fertilizer has escalated dramatically. Under these circumstances, the old and the new tenant may be at odds on the valuation of this asset. Proper lease documentation can alleviate any ambiguity. Traditional farm leases contain a clause where the landlord/tenant can agree on a per acre plowback figure. Again, this figure assumes a flat input cost. Also, many leases do not contain such a provision for the value of fertilizer. If they do, escalators are rarely included.

Absent such lease language, the losing tenant is not without remedy. Instead, the tenant has a potential claim for unjust enrichment. As set

forth in the case of Dale v. Fillenworth, 162 N.W.2d 234 (Minn. 1968), the departing tenant has a claim for the reasonable value of his labor and materials. Such claim is based upon a theory of unjust enrichment, which can be relied upon to overcome any statute of frauds defense. In terms of valuing the input, the general rule for unjust enrichment is that damages are based upon the value of what the person received rather than what the opposing party has lost. See Georgopolis v. George, 54 N.W.2d 137 (Minn. 1952). Of course, any equitable theory is fact driven and all parties' actions will need to be considered in a fact finding exercise.

Finally, consideration should be given to these factors in representing parties in an agricultural land sale. Buyer and seller should see that this issue is revolved adequately at closing to avoid any lingering disputes.

## Walz Urges USDA to Approve Minnesota's Application for Split State Status

*Says Bovine TB in northwestern counties causing undue hardship for southern Minnesota farmers*

In a letter to the U.S. Department of Agriculture sent last week, Rep. Tim Walz urged USDA officials to expedite the consideration of Minnesota's application for Split State Status to help address the recent discovery of Bovine Tuberculosis in some parts of northern Minnesota.

Bovine Tuberculosis (TB) was discovered in cattle in northwestern Minnesota in 2005 and since that time has remained isolated to two counties in that region of the state. Under the National Tuberculosis Eradication Program, positive Bovine TB test results lead to additional regulations that require all Minnesota cattle and dairy farmers to undertake additional food safety screenings before exporting their animals and/or meat and dairy

products outside of Minnesota.

"For the areas where Bovine TB has been found, these additional screening measures are necessary. All appropriate precautions are being taken to protect the public from eating contaminated food," said Congressman Walz, a member of the House Agriculture Committee. "However, the vast majority of Minnesota is free of this disease. It doesn't make sense to burden all cattle and dairy farmers in our state with excessive regulations just because they live in the same state."

"The Split State Status would allow our animal health professionals to use precious resources in the most efficient and effective way," continued Walz, "which is why I'm encouraging USDA to quickly consider and

approve this application for Split State Status. Minnesota farmers who have consistently demonstrated their herds are free of Bovine TB and who are not in close proximity to the disease should have this burden eased so they can compete during these challenging economic times."



## EPA Actions Impact Agriculture *continued from Page 1*

Opponents of the proposed rule say the reports are one of the few tools that rural communities have for holding large livestock operations accountable for pollution that they produce.

More information on the proposed rule is available at:

[http://www.epa.gov/emergencies/content/epcra/cercla\\_dec07.htm](http://www.epa.gov/emergencies/content/epcra/cercla_dec07.htm)

The proposed rule can be accessed at:

<http://www.epa.gov/fedrgstr/EPA-AIR/2007/December/Day-28/a25231.pdf>

### **EPA Announces Guidelines for More Frequent NPDES Inspections of Smaller "Wet Weather" Sources**

In an October 17, 2007 memorandum to its regional offices, the EPA announced guidelines for more frequent inspections of certain facilities subject to National Pollutant Discharge Elimination System permitting under the Clean Water Act § 402(a), 33 U.S.C. § 1342(a) (2006). The EPA's new guidance, directed to smaller "wet weather" sources, including concentrated animal feeding operations (CAFOs), is titled the *Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring Strategy for the Core Program and Wet Weather Sources* (CMS).

The CMS establishes national goals at permitted and unpermitted CAFOs for the first time. The CAFO guidelines include measures to ensure compliance with existing NPDES permits and to determine whether facilities are discharging without a permit. The CMS recommends one inspection every five years at medium and large CAFOs operating under NPDES permits. More frequent inspections are recommended at facilities that are exceptionally large, have a history of noncompliance, are located in areas of significant environmental concern or with water quality impairment, or

are subject to additional state requirements. The CMS also recommends inspections of all large and medium CAFOs to determine whether they discharge pollutants without permits.

The CMS guidelines will be effective beginning October 1, 2008, but states may begin implementing them during fiscal year (FY) 2009.

The CMS memorandum and monitoring guidance can be accessed at:

[http://www.epa.gov/compliance/resources/policies/monitoring/cwa/npd\\_escms.pdf](http://www.epa.gov/compliance/resources/policies/monitoring/cwa/npd_escms.pdf)

### **EPA Considers Input for Greenhouse Gas Rule**

Pursuant to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), a FY 2008 Consolidated Appropriations Amendment mandated that the EPA create new rules to require reporting of greenhouse gas (GHG) emissions above "appropriate thresholds" in all sectors of the economy. The EPA is charged with using existing authorities under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, that allow data collection, measurement, and recordkeeping from stationary or mobile related sources. The agency's objective will be to provide data that will "inform and support development of national climate policy."

The EPA will have some flexibilities and areas for interpretation of the Congressional mandate, including deciding the thresholds of emissions above which reporting would be required, as well as the frequency of reporting. Agricultural interests are working to inform the agency regarding the difficulty of accurately and consistently measuring emissions from biogenic sources such as agricultural production (e.g., inability to measure emissions of nitrogen oxides from plowing or methane emissions from rice production or animal agriculture).

*"Although the proposed rule would allow qualifying CAFOs to operate without a wastewater permit, it would not shield them from liability if an accidental discharge occurs."*

Appropriations language mandates that the EPA propose a draft rule by September 2008 and finalize a rule by June 2009. The agency encourages industry input to assist in meeting these deadlines. An outline of GHG rule considerations is available at:

<http://www.epa.gov/air/caaac/mstsr/sept2007/bynum.pdf>

### **EPA Publishes Supplemental Notice of Proposed Rulemaking Regarding Proposed CAFO Wastewater Discharge Rule**

On March 7, 2008, the EPA published a supplemental notice of proposed rulemaking (SNPRM), 73 Fed. Reg. 12,321, in response to comments elicited by the agency's June 30, 2006 notice of proposed rulemaking (NPRM) revising the National Pollutant Discharge Elimination System permitting requirements for CAFOs. That rulemaking was in response to the order issued by the Second Circuit Court of Appeals in *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005). In the NPRM, the EPA proposed to require only CAFOs that discharge or propose to discharge to seek coverage under a permit. Comments prompting the SNPRM were requests to clarify the circumstances when an NPDES permit is necessary.

In the SNPRM, the EPA proposes a voluntary option for a CAFO to certify that it does not discharge or propose to discharge based on an

## Notes from the Chair

Gary Hansen, Risk Management Officer, AgriBank, FCB

Welcome to what promises to be an eventful and exciting year for the Agricultural and Rural Law Section in 2008-09. Our goal is to build on our past successes and provide value to our members. We thank Matt Benda for his leadership as Section Chair for the past two years in setting a solid foundation for our continued success.

As Minnesota's professional association of agricultural and rural law practitioners, the Section is pleased to welcome and participate in sponsoring the American Agricultural Law Association (AALA) Annual Agricultural Law Symposium, which will be held at the Downtown Marriott Hotel in Minneapolis on October 24-25. This two-day event is an excellent opportunity for agricultural law continuing legal education.

The AALA Symposium will feature presentations by national and international experts providing extensive and relevant information on agricultural law. Presenters and attendees will include academic, governmental, corporate, and private practitioner experts in many areas of agricultural law, including members of our section. This year's program will feature updates of recent developments in several areas of agricultural law as well as panel discussions of important areas of environmental law, governmental regulation, food safety, and natural resource law, among others.

I am pleased to chair a Section planning committee that has worked for several months to assist the AALA with program ideas, speakers, sponsorships, distribution of promotional materials, and related activities. I urge your participation in this premier event to help make it a great success.

We also look forward to our 18th Annual Agricultural and Rural Law Institute on April 3, 2009 in the Stockington Suite of the St. Cloud Civic Center. Watch for more news of the Institute over the next several months.

I encourage members to stay current on all of our activities by visiting the Section's Web page, at <http://www2.mnbar.org/sections/agricultural-law/index.asp> and reviewing Council Meeting minutes that are posted at <http://www2.mnbar.org/sections/agricultural-law/minutes.asp>.

Finally, thank you to Andrea Silbermann for her excellent work in producing and editing this newsletter. We encourage contributions of articles and ideas for newsletter topics as well as suggestions for ways in which the Section may be of even greater service and value to our members.

## EPA Actions Impact Agriculture *continued from Page 4*

objective assessment of the CAFO's design, construction, operation, and maintenance. This voluntary certification provides a structured, objective set of criteria for owners and operators of CAFOs to follow as they determine whether to apply for a permit. It does not, however, change the duty to apply for NPDES permits if CAFOs discharge or propose to discharge.

Although the proposed rule would allow qualifying CAFOs to operate without a wastewater permit, it would not shield them from liability if an accidental discharge occurs. In other words, under the certification program, a CAFO could be liable under the Clean Water Act 33 U.S.C. § 1251 *et seq.*, for an unpermitted discharge, but not for the act of failing to obtain a permit. The proposal has drawn criticism from both environmental groups and the regulated community.

Environmental groups are concerned about the voluntary submission procedure for the proposed certifica-

tion. The proposal does not require a permitting agency to review the certification to assess its veracity, nor does it require submission of a nutrient management plan (NMP), which a CAFO must develop, implement, and maintain in compliance with specified regulatory requirements. In addition, the proposal does not provide an opportunity for public comment on the certification or the supporting documents, including the NMP.

Industry groups are concerned that the rule still requires permits for potential, as opposed to actual, discharges. Under the proposed rule, a CAFO still may be liable for failing to apply for a permit if, after a discharge, the EPA determines that "the CAFO could have reasonably foreseen that the discharge would occur and did not seek permit coverage prior to discharge." 73 Fed. Reg. 12,327. An industry concern is that the rule does not quantify how probable an unplanned discharge must be to necessitate a permit. Another concern is the EPA's indi-

cated intent to determine on a case-by-case basis whether accidental discharges invalidate a certification.

The SNPRM can be accessed at: [http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=513895311116+21+1+0&WAIAction=trieve](http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=513895311116+21+1+0&WAIAction=retrieve)

**Gary Hansen is Risk Management Officer at AgriBank, FCB where he is responsible for statutory and regulatory interpretation and formulation of lending policies, standards, and risk management strategies, including environmental risk management. He is a past Chair of the Minnesota State Bar Association's Environmental, Natural Resources and Energy Law Section and current Chair of the Agricultural and Rural Law Section. Mr. Hansen can be reached for questions or comments at (651) 282-8406.**

## “Significant Changes” *continued from Page 2*

FSA justified the abdication of its responsibility for ensuring that limited program funds go to borrowers who actually need them by concluding, “the few producers who may receive a subsidy payment at a time when they may not need it is far outweighed by the improved delivery and more equitable distribution of the program throughout the country that will result from these reduced annual review requirements.”

Recognizing that automatic renewal is subject to abuse, FSA then concluded that the best way to conserve the program’s limited resources is to simply shorten the period in which assistance is available. As mentioned earlier, under the new rule borrowers will have a lifetime limit of five consecutive years of Interest Assistance eligibility. Once a borrower is approved for Interest Assistance, the five-year period begins. Even if the borrower does not receive Interest Assistance in each of the five years – for example, if the borrower has a three-year operating line of credit – the borrower would never again be eligible for Interest Assistance.

The rule provides two exceptions to the five-year lifetime limit. The first is for Interest Assistance agreements already in effect on June 8, 2007. These agreements will continue to be governed by the 10-year limit under the prior rule. (These agreements will also continue to be subject to the annual review

requirement under the prior rule.) The second exception is for beginning farmers. Although FSA concluded that, in general, five years is an adequate period for a distressed farming operation to eliminate the need for interest rate reduction, the agency determined that five years may not be enough time for a beginning farmer or rancher to accumulate assets and reduce debt load to the level necessary for financial viability. Thus, the new rule allows beginning farmers and ranchers to receive a second five-year period of Interest Assistance if at the end of the first five-year period their cash flow still shows a need for interest rate reduction and they still qualify as a beginning farmer or rancher.

### **\$400,000 Cap on Loan Amount Eligible for Interest Assistance**

FSA reports that in recent years, funds appropriated for Interest Assistance have been depleted early each year. This is because the amount of funds appropriated for Interest Assistance has not increased, while guaranteed loans have gotten significantly larger. In an attempt to distribute the limited Interest Assistance funds to more eligible borrowers and target those funds to the borrowers with the most need, the new rule sets a maximum annual Interest Assistance benefit of \$16,000 for each of the five years of eligibility. Because the Interest Assistance benefit is a 4% interest rate reduction, this means that a borrower may receive

Interest Assistance on up to \$400,000 in guaranteed debt. This may involve multiple loans. Borrowers will not be limited to \$400,000 in total loan amounts, but the amount of any guaranteed debt over \$400,000 will not receive the interest rate reduction.

For example, suppose that a farmer eligible for Interest Assistance has a \$500,000 loan and the lender’s normal agricultural interest rate is 9%. The farmer would be eligible for Interest Assistance on \$400,000 of the loan amount and would be charged 5% interest on that amount (9% - 4% interest rate reduction = 5%). The farmer would have to pay the full 9% interest on the remaining \$100,000 of the loan.

### **Less Documentation Needed to Apply**

The new rule reduces the amount of documentation that must be submitted with an application for Interest Assistance. Most significantly, the new rule eliminates the requirement to submit a repayment schedule and a projected monthly cash flow budget on lines of credit.

### **Lenders May Not Charge Fees for Interest Assistance Claims**

The new rule also prohibits lenders from charging a borrower any fees for preparing the documentation and claims for interest payment that the lender submits to FSA.

**Join us for the Agricultural and Rural Law Institute on April 3, 2009 at the St. Cloud Civic Center**



## Enforceable Grain Contracts in Minnesota?

Joel J. Dahlgren, *Stoel Rives, L.L.P., Minneapolis, MN*

Volatile but generally strengthening grain markets sometimes cause agricultural producers to regret earlier marketing decisions. Occasionally, producers will ignore delivery obligations under grain contracts when they can secure higher prices in the cash market. Although producers are rational when they ignore delivery obligations, they are required by law to pay your company the damages it incurs from having to cover the producers' obligations by procuring grain and lifting hedge positions.

In these instances the key issue for your company is whether it has an enforceable grain contract under which to pursue damages, which are measured by the profits your company expected to generate under the contract. Obviously, producers who ignore delivery obligations are unlikely to voluntarily reimburse your company its damages. Your company must then initiate litigation to recover its damages from the producer.

One of your best opportunities to prepare for such litigation is by creating an enforceable grain contract between your company and producers. One of the first contract provisions to provide for is the recovery of attorney fees in the event that litigation ensues against the producer. Under Minnesota's Uniform Commercial Code (UCC), which typically governs grain contracts, attorney fees are not recoverable as part of your damages unless your grain contract specifically requires the producer to pay attorney fees and costs. Attorney's fee provisions will improve the economics of recovering damages from grain producers who ignore their delivery obligations.

Another significant contract enforcement issue is whether the written grain contract is actually signed by the producer. Under the law, not all grain contracts must be signed by the producer. "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing. MINN. STAT. §

336.1-201(37) (2002). For example, the UCC does not require signed contracts between "merchants" if one merchant sends a confirmatory memorandum to the other merchant, and that party does not object within ten days of receiving the memorandum. See MINN. STAT. § 336.2-207. (Referred to in this article as a transmittal or confirmation correspondence.)

In other words, if the producer is not a "merchant," the producer must sign the contract if it turns out later that your company desires to enforce the contract against the producer. On the other hand, an enforceable contract does not require the producer's signature if he or she is a "merchant." Your company must then show (1) that the producer received a confirmatory memorandum from your company after the contract was negotiated, (2) that the producer did not object within ten days, and (3) that the producer is a "merchant."

The UCC defines a merchant as:

a person who deals in goods of the kind or otherwise by occupation holds out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by employment of an agent or broker or other intermediary who by occupation holds out as having such knowledge or skill. MINN. STAT. § 336.2-104(1).

At first glance you might think that all agricultural producers are "merchants"; certainly all producers regard themselves as business men or women. As we will show next, the legal analysis is more difficult and nuanced, and requires that we evaluate the producer's stature as a grain marketer.

Minnesota case law resolves the "merchant" issue by finding that agricultural producers who are sophisticated grain marketers are

"merchants." On the other hand, unsophisticated producers are not merchants. Non-merchants must have signed the contract for it to be enforced against them for any breach of contract, including a failure to deliver grain. See *Tisdell v. ValAdCo*, 2002 WL 31368336 (Minn. Ct. App. Oct. 16, 2002); Compare also *Didion v. Prohaska*, No. 97-3531 (Wis. Ct. App. Apr. 8, 1998) with *Harvest States Cooperatives v. Anderson*, 577 N.W.2d 381 (Wis. Ct. App. 1998).

Notice that the producer's grain marketing sophistication has nothing to do with the producer's skill as a grain producer. The producer might be a terrific grain producer, but if every bushel of corn is marketed through the producer's livestock enterprise, your first instinct should be to doubt whether a court would find the producer to be a merchant.

Under the circumstances above, you might well conclude the best practice is to insist that the producer sign the grain contract. This approach has the advantage of being conservative and it avoids making the wrong judgment about whether the producer is a "merchant."

If you did not obtain the producer's signature, we might still show the producer is a skilled marketer of livestock and attempt to argue the skills of marketing livestock and grain are virtually identical. We would hope that a court would determine the producer is a "merchant" and that a signed contract is unnecessary before the contract could be enforced against the producer.

You can see from the discussion above how nuanced and complex the issue of whether a producer is a "merchant" is to resolve, but consideration of other factors might assist you in making a judgment about whether the producer is a merchant.

## Enforceable Grain Contracts in Minnesota? *continued from Page 7*

These factors include size of operation, age of producer, and most importantly the producer's historical approach to grain marketing, specifically the complexity of that approach compared to the terms of the grain contract you seek to enforce against the producer.

For example, unloading the crop as it is harvested in the fall into the cash market or using a deferred payment contract to push the receipt of income into the following year are far less complex in their approach than hedge-to-arrive contracts or other marketing approaches that utilize options and/or futures markets allowing the establishment of price or basis by the producer. A producer using hedge-to-arrive contracts for the first time after years of deferred payment contracts should not be viewed as a "merchant" until the producer will take responsibility for his or her own basis and/or price determinations.

Even if your company does not have a signed contract and finds itself initiating litigation against a producer who is not a "merchant," the doctrine of part performance may allow you to prevail against the producer anyway. When grain companies make commitments to buy grain from producers, the companies manage price risk with back-to-back sales of that grain or by taking positions in the futures market that provide protection from adverse price movements. Those transactions are made in reliance on the producer's contractual commitment, and can be used to argue that grain companies partially performed those contracts. When successful, the law will ignore the producer's protests about the lack of a signed contract.

Part performance is not an easy legal defense because the transactions made on the back-side to protect companies against adverse price movements are almost never identical to the commitments made with producers. Hedges and back-to-back sales are typically much larger in size than the individual commitments made with producers because

the hedges and back-to-back transactions are accumulations of all purchases made during the day or portion of a day. Consequently, the number of bushels hedged on any particular day or portion of a day will not be perfectly align with commitments because, for example, futures contracts are 5,000 bushel in size.

### Recommendations:

**Signed Contract Avoids Incorrect Merchant Judgment.** In this day of electronic communication facilities, it is better to error on the side of insisting on the execution of a signed grain contract.

**Merchant Seller.** When your company buys grain from a producer you believe to be a "merchant," immediately mail (see below about certified mail) a copy of the signed contract to the producer. Also send the contract by e-mail if you have the producer's electronic address, or fax it if you have the producer's fax number. If the contract is e-mailed, you should attached a scanned copy of the contract so that your company's signature block shows that the contract was signed by an authorized officer or employee of your company.

**Letter Confirming Contract.** Prepare a short letter to accompany the signed contract. The letter should state that you are enclosing a copy of the signed contract for the producer's records and as confirmation of the agreement made with the agricultural producer. Further, include an explanation that in response to the agreement your company has made offsetting transactions to protect your company from adverse price movements. This may be an obvious point with "merchant" producers, but the notation strengthens the later argument of part performance by your company. The producer has ten days from receipt of the contract to object, but the return of a signed contract is not required if the producer is a "merchant."

**Return Receipt Requested.** Because your company will need to show that the producer received the

correspondence and signed contract from your company to enforce the contract against the producer, you should consider sending the contract by certified mail and requesting a return receipt. If a return receipt is not obtained, the producer could deny receipt of the correspondence and contract. Recognizing that certified mail is both costly and administratively time-consuming, you could consider reserving the use of certified mail for your largest producers with whom your largest contracts are written because your financial exposure is highest with these producers if contract enforcement becomes an issue. Ultimately, the decision whether to use certified mail will turn on your judgment between the legal risk of not enforcing the contract and the business risk of financial loss.

**First Class Mail OK if Producer Signs and Returns.** Note the distinction between regular first class mail and certified mail. If you send a contract to the producer fully expecting that he or she will sign it and return it to you, first class mail will suffice for this purpose. A return receipt is necessary only when you rely on the "merchant" exception, mail a signed contract with the transmittal letter described above to the producer, and you are not anticipating the return of a signed contract from the producer. If you are not sure whether a signed contract will be returned from the producer, and want to rely on the "merchant" exception to a signed contract, follow the process outlined in this article and use certified mail, return receipt requested, particularly for your largest grain contracts. Remember, if the producer is not a "merchant," the producer must sign the contract, and someone must follow-up to see that the signed contract is returned.

**Contemporaneous Record of Information.** Record the name of the person with whom the contract was made, the time of day when that conversation occurred, the name of the individual who negotiated for the Seller, and that person's phone number, e-mail address and fax number.

## AGRICULTURAL AND RURAL LAW SECTION FINANCIAL REPORT

### Financial Activity Report for the Twelve Months Ending June 30, 2008

**Gary H. Petersen**, Section Treasurer  
*Southern Minnesota Regional Legal Services, Inc., Mankato, MN*

	Month	YTD
	<u>Actual</u>	<u>Actual</u>
Beginning Balance 7-1-2007		\$6,856.94
REVENUES:		
Membership Dues	_____	<u>1,085.00</u>
Total Revenue		\$1,085.00
EXPENSES:		
MSBA Internal Section Invoices		11.12
Catering		23.77
Refunds/Reimbursements	36.63	198.50
Administrative Fees	1.35	6.81
Miscellaneous/Other	_____	<u>6.96</u>
Total Expenses	\$37.98	\$247.16
Ending Balance	<u>(\$37.98)</u>	<u>\$7,694.78</u>
Ending Balance Including Investments	(\$37.98)	\$7,694.78

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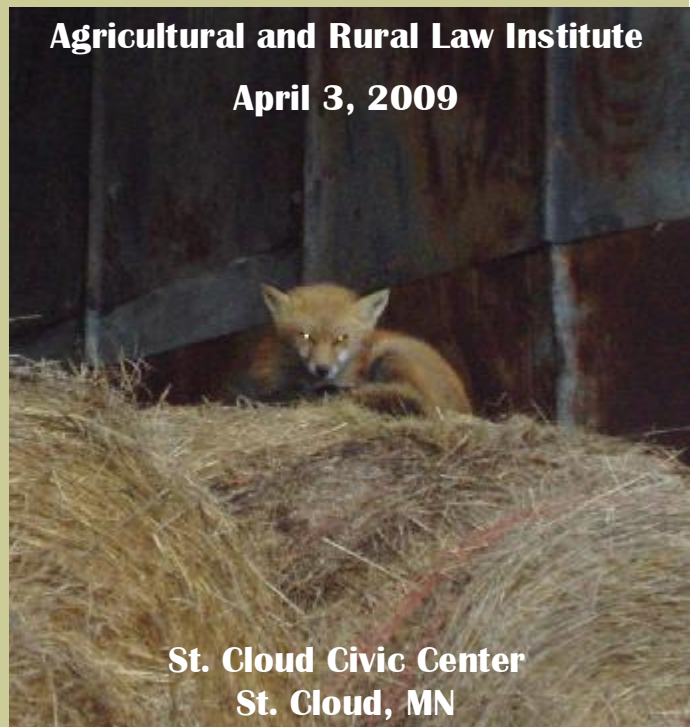
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**Agricultural and Rural Law Institute**

**April 3, 2009**



**St. Cloud Civic Center**  
**St. Cloud, MN**