

# AGRICULTURAL LAW NEWSLETTER



Winter 2006/Spring 2007

*Update from the Minnesota State Bar Association's Agricultural Law Section*

## This Issue:

<i>Resources For Dairy Farmers Interested In Organic Certification</i>	1
<i>A Word From The Chair</i>	2
<i>Wind Electric Generating Opportunities</i>	2
<i>Legal Resources For Hmong Farmers</i>	4
<i>New Developments In UCC Financing Statement Law</i>	4
<i>Agricultural Law Section Financial Report</i>	7
<i>Newsletter Contact Information</i>	7

## RESOURCES FOR DAIRY FARMERS INTERESTED IN ORGANIC CERTIFICATION

**Jill E. Krueger**, *Senior Attorney, Farmers' Legal Action Group, Inc., St. Paul, MN*

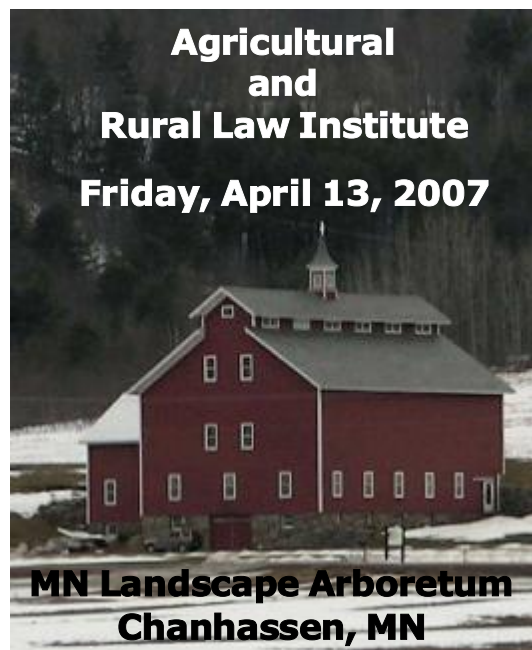
Minnesota attorneys who represent dairy farmers may want to be aware of a new bibliography entitled Considering Organic Dairy? Resources for Minnesota Farmers, available at <http://www.mda.state.mn.us/esaporganicorganicdairyresources.pdf>. It is a short, two-page list of up-to-date resources for organic farmers who may have heard of the great demand and higher price received for their milk, but have questions about necessary changes in farming practices, finding buyers for organic milk, how to access technical assistance, as well as, cost-share and grant assistance during the transition to organic production. Additional resources on organic farming are posted on the Minnesota Department of Agriculture's Organic Production and Certification Web page, at <http://www.mda.state.mn.us/esap/organic/default.htm?SEARCH.X=10&SEARCH.Y=8>.



MSBA



[www.mnbar.org](http://www.mnbar.org)



## A WORD FROM THE CHAIR

I am excited to take over the reins of the Agricultural Law Section of the Minnesota State Bar Association. I have been practicing law in Greater Minnesota for over 10 years and I am constantly amazed at the diversity of work that crosses my desk. The Agricultural Law Section recognizes that to represent farmers, agricultural business, or rural citizens, attorneys must be armed with a wide array of resources.

We hope to assist with this challenge by providing quality educational and networking opportunities to assist with the broad scope of our profession.

This newsletter is one way to assist Ag practitioners. Please consider submitting an article or case review for future issues.

In addition, we are again hosting our 16<sup>th</sup> Annual Agricultural and Rural Law Institute. This year's program will be held on April 13<sup>th</sup> at the Minnesota Landscape Arboretum in Chanhassen. Mark your calendars and watch your in-boxes and mail-boxes for more details.

**Matt Benda, Esq.**

Peterson, Savelkoul & Benda, Ltd.  
Chair of the Agricultural Law Section  
507-373-6491  
[mbenda@pssdlaw.com](mailto:mbenda@pssdlaw.com)



## WIND ELECTRIC GENERATING OPPORTUNITIES

*Richard J. Savelkoul, Felhaber, Larson, Fenlon & Vogt, P.A., St. Paul, MN*

Wind electric development has taken off in recent years, driven both by improvements in technology as well as by legislation that has created financial incentives (through tax credits, subsidy/incentive payments, mandates, and renewable goals that are set by the legislature). This article will primarily discuss the financial incentives that exist to aid wind projects.

Many times a project moves forward led by a farmer/owner group, with land for sighting necessary facilities, partnering with a developer and ultimately a company to finance a project. Owners/developers get the project rolling by providing appropriate initial feasibility, engineering, and inter-connection studies. The project owners then negotiate with a utility for a power purchase agreement (PPA) on projects of more significant size. After these steps are taken, the owners will search for a financing partner/entity.

Wind projects have grown in fits and spurts over the last 15 years, following incentive programs and credits. In 2005, the energy bill again kick-started wind projects extending the federal production tax credit through 2007. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. Farmers often have a hard time using the tax credit and end up partnering with corporations that have taxable income that can utilize the credit.

Minnesota is one of several states that have mandates for a public utility company, as well as being one of many states that provide property tax relief for wind energy projects. Minnesota is one of at least fourteen states that exempt wind energy equipment from sales tax and/or provide property tax relief, and one of several states that have provided incentive funds for clean, renewable energy. More information is available on the Windustry Web page at

[www.windustry.org](http://www.windustry.org). Additionally, Minnesota's distributed generation tariffs make planning a project a more smooth and predictable process.

The following is a summary of incentives that exist to promote wind electric development in Minnesota.

### **Federal Production Tax Credit.**

A federal tax credit of 1.9 cents per kilowatt hour exists for the first ten years a project is in operation (provided the project is installed by December 31, 2007). See Energy Policy Act of 2005. Tax Form 8835 should be filed with the IRS to obtain the credit. This credit has been in place since 1992, but has been set to expire several times. This unreliability has caused problems for long term planning and has prevented steady market development.

### **Minnesota Production Incentive.**

Minnesota had an incentive program

*See "Wind Electric" on page 3*

*“Wind Electric” continued from page 2*

offer that provided an incentive payment between 1 and 1.5 cents per kilowatt hour for the first ten years a project was in commercial operation. This program was limited to projects for less than 2 megawatts of nameplate capacity. There was a subscription list to receive the incentive payment, but the subscription list was closed as of January 1, 2005. The Minnesota Department of Commerce has posted information on this program, at <http://www.state.mn.us/portal/mn/jsp/content.do?id=536881350&subchannel=536881511&contentid=53688591&contenttype=EDITORIAL&programid=536885394&sp2=y&agency=Commerce>.

Though it is currently not available, each year there is a push at the legislature to renew this program with new funding.

**Property Tax/Production Tax.** Minnesota Statutes, section 272.02, subdivision 22 creates a real and personal property tax exemption for the value of the personal property added to the real property. The underlying real property is still taxed. Minnesota Statutes, section 272.029 creates a small wind production tax credit which was implemented in lieu of the property tax as follows: (1) projects greater than 12 megawatts of nameplate capacity receive 0.12 cents per kilowatt hour (kWh); (2) projects from 2 to 12 megawatts of nameplate capacity receive 0.036 cents per kilowatt hour; (3) all projects from 0.25 to 2 megawatts per nameplate capacity receive 0.012 cents per kilowatt hour; and (4) projects of less than 0.25 megawatts of nameplate capacity are property tax exempt. Minnesota Statutes, section 272.028 enables local counties to negotiate and relieve projects from the production tax.

**Minnesota Sales Tax Exemption.** Minnesota Statutes, section 297A.68, subdivision 12 gives the buyer of wind energy conversion systems an exemption from sales tax.

**Federal and Minnesota Depreciation.** Five-year modified accelerated cost recovery system (MACRS) double-declining balance depreciation is allowed for all equipment used for electric production in a wind generating system. I.R.C. § 168(e)(3)(B)(vi). Both federal and Minnesota rules permit this depreciation.

**Net Metering.** Minnesota Statutes, section 216B.164 and Minnesota Rule 7835 provide that projects with nameplate capacity of less than forty kilowatt (40 kW) are eligible for net metering. The electricity produced is netted against total purchases for the generating party, so regardless of the time the wind has been produced, a credit is received against the energy used for the party with the project. This is a significant benefit, since ordinarily parties are obligated to purchase power under standby and supplemental tariffs with rates that are significantly higher for shortfalls when the wind is not blowing.

**Clean Renewable Energy Bonds (CREBs) Program.** An interest-free bond program was created for governmental subdivisions, cooperatives, school districts and some other non-profits. See Energy Policy Act of 2005. It is meant to provide an incentive comparable to the federal tax credit, which is given to for-profit ventures, although it is also available for all renewable projects not just wind. There is a limited pool (\$800 million) available for these projects, and the Secretary of the Treasury will allocate the pool so that small projects are given funding prior to larger projects.

**Utility Company Purchases/Interconnection.** Minnesota Statutes, section 216B.1691 establishes a renewable energy mandate for Xcel and other regulated utilities to have a Renewable Energy Objective retail sales target of 10% by 2015. Increases to 25-30% have been proposed for the 2007 legislative session. Xcel has standard purchase tariffs for projects less than two megawatts (MW) of nameplate capacity. In addition, all public utilities have standard tariffs for purchase/sale and interconnection of distributed generation facilities of 10 MW or less (Distributed Generation Tariffs), which are mandatory for use in connecting to the transmission grid and a public utility's system. Minnesota Statutes, section 216B.1611 creates the requirement for the Distributed Generation Tariffs. Many unregulated cooperatives and municipal utilities also have voluntarily created these tariffs. These tariffs take the question out of what projects are able to receive for each kilowatt hour of wind energy generated.

**Community-Based Energy Development (C-BED).** In 2005, Minnesota enacted C-BED legislation. MINN. STAT. § 216B.1612. C-BED is a statute which is meant to encourage local development and ownership. Though it is not mandatory, Minnesota's largest utility, Xcel Energy, has made a commitment to purchase 500 MW of capacity under this statute by 2010. The statute permits a utility to use a "front-end loaded rate" as opposed to a level rate, which enables earlier retirement of debt for the owner.

---

*Richard J. Savelkoul is an attorney with Felhaber, Larson, Fenlon & Vogt, P.A. in the St Paul office, practicing in the areas of business and energy law and can be contacted at [www.rsavelkoul@felhaber.com](mailto:www.rsavelkoul@felhaber.com).*

## LEGAL RESOURCES FOR HMONG FARMERS

Jill E. Krueger, Senior Attorney, Farmers' Legal Action Group, Inc., St. Paul, MN

Minnesota has one of the largest populations of Hmong people in the United States. Many Hmong people seek to succeed in America while honoring their agrarian cultural heritage through farming. Yet cultural and linguistic barriers can impede their success. Farmers' Legal Action Group and the Minnesota Family Farm Law Project are working to create legal resources for Hmong farmers and create partnerships with Hmong organizations in order to disseminate the information in culturally appropriate ways. These resources may be useful to attorneys who are contacted by Hmong farmers or attorneys working with beginning farmers in general.

Resources available on the Publications & Articles Web page of the FLAG Web site, at <http://www.flaginc.org/topics/pubs/index.php> include:

- ***Resources for Hmong Farmers:*** A list of contacts for Hmong farmers seeking information in such areas as legal assistance, beginning farmer programs, and lending resources.

- ***Understanding Farmers' Market Rules:*** A guide to provisions commonly included in farmers' market rules, contracts, and producer association bylaws
- ***Terms Used in Minnesota Farm Law:*** A basic list of agricultural law terms and their meanings.
- ***Contract Poultry Growers Have Rights under Federal Law:*** This short guide to farmers' rights and responsibilities under the Packers and Stockyards Act is available in English and has also been translated into the Green Hmong dialect.

Southern Minnesota Regional Legal Services also has an informational flyer describing the services it provides to family farmers through the Minnesota Family Farm Law Project which has been translated into Hmong.

Some Minnesota agricultural lawyers may be aware that there has been a large-scale recruiting effort by realtors and poultry integrators in Arkansas, Oklahoma, and Missouri to recruit

members of Minnesota's Hmong communities as poultry growers over the past few years. Media coverage, including a front page article in the St. Paul Pioneer Press in May 2006 indicates that the move has been a financial disaster for many of the new growers. *Farm Of Failed Dreams Bankruptcy Ends A Hmong-American Family's Quest For Success On A Poultry Farm In The Ozarks. Other Families With The Same Story Have Sued, Alleging Real Estate Agents And Banks Misled Them*, St. Paul Pioneer Press, May 17, 2006, at A1. A host of lawsuits alleging fraudulent and inflated appraisals and intentionally or recklessly inaccurate cash-flow projections by lenders participating in the Farm Service Agency Guaranteed Loan Program are currently pending. While the outcome of the specific lawsuits in the Ozarks may not be known for some time, the need for farm business management training and legal information about Farm Service Agency Direct and Guaranteed Loan Programs in the Hmong farming community is clear. Agricultural attorneys in Minnesota can help to meet that need.

## NEW DEVELOPMENTS IN UCC FINANCING STATEMENT LAW

Michael S. Dove, Partner, and Mary Kay Mages, Associate, Gislason & Hunter LLP, New Ulm, MN

Three recent cases in three different jurisdictions have addressed unique UCC financing statement issues. One case found that an "in lieu of continuation" financing statement's failure to list the subject collateral rendered the financing statement ineffective. A second case forced a creditor to forego any interest in collateral listed in the financing statement that was not also listed in the underlying secu-

rity agreement. A third case found that a minor misspelling of the debtor's first name deemed the entire financing statement "seriously misleading," and thus wholly ineffective.

1. ***In re Duesterhaus Fertilizer, Inc., 347 B.R. 646 (C.D. Ill. 2006)*** *In re Duesterhaus Fertilizer, Inc.* addressed "in lieu of continuation" financing statements. In the end, *In re*

*Duesterhaus Fertilizer, Inc.* is a warning to creditors to carefully review any "in lieu of continuation" financing statements which they may have already filed.

*Duesterhaus Fertilizer, Inc.* (Duesterhaus) was an Iowa corporation with its principal place of business in Illinois. It dealt with agricultural chemicals and provided related

*See "New Developments" on page 5*

*“New Developments” continued from page 4*

services to farmers. Prior to 2002, the Small Business Administration (SBA) loaned money to Duesterhaus in exchange for a security interest in Duesterhaus’s inventory, accounts receivable and other assets. At the time of the SBA loan, a UCC-1 financing statement was properly filed with the Illinois Secretary of State. The SBA assigned the loan to Capital Crossing, who properly filed UCC-3 continuation statements with the Illinois Secretary of State.

In 2002, both Iowa and Illinois adopted Revised Article 9 of the Uniform Commercial Code. In order to comply with Revised Article 9, Capital Crossing filed an “in lieu of continuation” financing statement with the Iowa Secretary of State. Pursuant to Revised Article 9, Capital Crossing’s “in lieu of” statement referenced both the original financing statement and the continuation which were filed with the Illinois Secretary of State. The “in lieu of” statement did not recite a description of the secured collateral.

Duesterhaus filed for bankruptcy in 2005. Acting as the debtor in possession, Duesterhaus filed an adversary complaint against Capital Crossing, seeking an order that the “in lieu of” statement was defective on account of its failure to recite the secured collateral. Capital Crossing asserted that the “in lieu of” statement fully complied with Revised Article 9 as adopted in Iowa.

The bankruptcy court first noted that Revised Article 9, as adopted in both Iowa and Illinois, allows pre-Revised Article 9 financing statements to retain their priority only when the “in lieu of” statement contains certain information about the initial filing and

also meets Revised Article 9 requirements for a new financing statement. One Revised Article 9 requirement for a new financing statement is that it must “indicate[ ] the collateral covered by the financing statement.” Iowa Code § 554.9502(1)(c) and 810 ILCS § 5/9-502(a)(3). Since Capital Crossing’s “in lieu of” statement did not recite the secured collateral, it did not meet the requirements for a new financing statement and was therefore not effective in retaining Capital Crossing’s priority position.

**2. Allete, Inc. v. GEC Engineering, Inc., 726 N.W.2d 520 (Minn. Ct.App. 2007)**

The Allete, Inc. v. GEC Engineering, Inc. court determined that the creditor does not have a security interest in certain collateral when that collateral is referenced on the UCC financing statement, but not in the underlying security agreement executed by the debtor and creditor.

Allete, Inc. (Allete) loaned money to GEC Engineering, Inc. (GEC) in exchange for a security interest in all of GEC’s “equipment and inventory located at 510 W. 3<sup>rd</sup> Avenue North, Aurora, Minnesota” and both parties executed a security agreement to that effect. At the time of the transaction, GEC was located at 116 Holloway Road, Ballwin, Missouri but was planning to move to its new location in Aurora, Minnesota, within the next several months. Allete properly completed a UCC-1 financing statement and filed it with the Minnesota Secretary of State, listing all of GEC’s “equipment and inventory located at 510 W. 3<sup>rd</sup> Avenue North, Aurora, Minnesota” as the secured collateral.

GEC did not move to the Aurora, Min-

nesota location as anticipated, but remained in Ballwin, Missouri. Allete immediately and properly completed a new UCC-1 financing statement and filed it with the Minnesota Secretary of State. This new financing statement listed “all equipment and inventory located at Borrower’s facility located at 116 Holloway Road, Ballwin, MO” as the secured collateral. GEC eventually ceased operations and became insolvent.

The only asset at issue in Allete was a diesel engine which GEC purchased in Minnesota and shipped to CK Engineering (CK), an affiliate of GEC in Missouri. CK claimed an interest in the diesel engine and transferred it to Danielle Dellhomme (Dellhomme), a GEC insider. Allete initiated garnishment proceedings to collect the engine from Dellhomme, and Dellhomme resisted, arguing that Allete did not have any interest in the diesel engine. The district court and the Minnesota Court of Appeals agreed with Dellhomme. The court noted that while the Uniform Commercial Code, as adopted in Minnesota, employs a flexible definition of “security agreement,” a financing statement standing alone or only with parole evidence does not constitute a “security agreement.” There must be some other agreement between the parties before the creditor has an interest in the collateral. In this case, the only security agreement between Allete and GEC was the security agreement which gave Allete an interest in collateral at the Aurora, Minnesota location. Since the diesel engine at issue in this case was never at the Aurora, Minnesota location, Allete did not have an interest in it.

*“New Developments” continued from page 5*

**3. Pankratz Implement Co. v. Citizens Nat’l Bank, 130 P.3d 57 (Kan. 2006)**

Pankratz Implement Co. v. Citizens Nat’l Bank found that a minor misspelling of the debtor’s name on the financing statement rendered the financing statement “seriously misleading” pursuant to U.C.C. § 9-506(c), and thus the financing statement was ineffective in perfecting the creditor’s lien.

In Pankratz Implement Co., Rodger House purchased a tractor from Pankratz Implement Co. (Pankratz) and executed a note and security agreement in favor of Pankratz. In all of the documents, however, Pankratz misspelled Rodger House’s name, identifying him as “Roger House.” Nevertheless, House signed all the documents using his correct name, “Rodger House.” Pankratz assigned its interest in the documents to Deere and Company (Deere), who filed a UCC-1 financing statement with the Secretary of State, using the debtor’s misspelled name, “Roger House.” Deere subsequently reassigned the note and security interest back to Pankratz.

Some time later House obtained a loan from Citizens National Bank (Citizens) and executed a note and security agreement in favor of Citizens. Citizens prepared all of its documents using House’s correct name, “Rodger House,” and House also signed his name correctly on all of the documents. Citizens properly completed a UCC-1 financing statement, again correctly spelling House’s name, and filed it with the Secretary of State.

House eventually filed for bankruptcy and the court needed to determine whether Pankratz’s secu-

urity interest had priority over Citizens’ security interest. The Kansas Supreme Court determined that Pankratz’s and Deere’s misspelling of Rodger House’s name rendered the UCC filing “seriously misleading” pursuant to U.C.C. § 9-506(c), and that Pankratz was therefore deprived of its priority position over Citizens. It is important to note that the court came to this conclusion notwithstanding the fact that the spelling error in House’s first name did not prevent searchers from detecting Pankratz’s lien using the [www.accesskansas.org](http://www.accesskansas.org) internet search logic. However, because Kansas law also provides that the online database “shall not be considered part of the standard search logic and shall not constitute an official search by the secretary of state,” the court found the ease of identifying the financing statement through [www.accesskansas.org](http://www.accesskansas.org) to be of little importance.

**AGRICULTURAL LAW SECTION FINANCIAL REPORT**  
**Financial Activity Report for the Six Months Ending January 31, 2007**

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

	<u>Month Actual</u>	<u>YTD Actual</u>
Beginning Balance 7-1-2006		\$6339.62
<b>Revenues:</b>		
Membership Dues	<u>5.00</u>	<u>1,065.00</u>
Total Revenue	<b>\$5.00</b>	<b>\$1,065.00</b>
<b>Expenses:</b>		
MSBA Internal Section Invoices		10.50
Catering	39.56	102.85
Refunds/Reimbursements	41.40	118.12
In-House Charges	<u>0.39</u>	<u>0.78</u>
Total Expenses	<b>\$81.35</b>	<b>\$232.25</b>
Ending Balance	<u>(76.35)</u>	<u>\$7,172.37</u>
Ending Balance Including Investments	<b>(\$76.35)</b>	<b>\$7172.37</b>

**NEWSLETTER CONTACT INFORMATION**

Section Chair:

Matt Benda, Esq.  
 Peterson, Savelkoul & Benda, Ltd.  
 mbenda@pssdlaw.com  
 (507) 373-6491

Editor:

Andrea Silbermann  
 339 Wallace Hill Road  
 Randolph, VT 05060  
 ASilbermann@aol.com  
 (802) 728-5811

*Articles and comments are those of their contributors and do not represent the position of the Ag Law Section, Minnesota State Bar Association, or any governmental body. Articles, comments, and letters to the editor should be emailed with an "Ag Law" heading to: [ASilbermann@aol.com](mailto:ASilbermann@aol.com). They will be published at the editor's discretion.*



*\*All newsletter photos are the product and property of the editor*