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8

CONTENTS

02 **Sponsorships**

Pork Producers Taste of Elegance Wine and Chocolate

GreenSeam Legislative Forum

2019 Ag Expo at the Verizon Center in Mankato

Annual Leadership Conference

AgriGrowth Annual Meeting

Governor Tim Walz addresses the group at the Ag Innovation Conference

Minnesota Bankers Association Ag Conference/Annual Meeting

04 **Upcoming Events**

ICBM Ag Conference

Gislason & Hunter LLP Ag Lending Conference

Farm Succession and Ag Planning

GreenSeam Ag Legislative Forum

08 **Minnesota FFA**

by Adam Kroll

FFA cultivates leadership skills and community ties, preparing students for careers in agriculture

10 **Efficiently effective New MSGA, MSR&PC organization having an impact**

by Doug Monson

Since 2017, AMS has helped ag organizations manage finances, communication and administration duties.

SUMMER 2019

14 **Minnesota State University, Mankato Promoting Careers in Agriculture**
by Dr. Shane Bowyer
Creation of a Business minor degree program leads to collaboration with groups promoting ag careers.

20 **Insurance Coverage Issues**
by Dustan Cross and Mark Ullery
Points to consider when regularly reviewing insurance coverage.

26 **Wetland Banking – An Overview**
by Dean Zimmerli
Reaping the benefits of low-lying cropland and being environmently responsible at the same time.

30 **Legislative Update: Trade Tariffs and Challenges Result in Uncertainty for U.S. Agriculture**
by Brian M. Foster
Overview of U.S. trade policies and how agriculture has been affected; update on current status.

34 **Legislative and Regulatory Update**
by Matthew Berger
A brief update regarding important statutory and regulatory changes that may impact your farming operation.

38 **March 2019 Rule Proposals for the Fair Labor Standards Act**
by Brittany King-Asamoa
Proposals to change items related to overtime pay - evaluate status of your employees.

42 **Banking Minnesota's Newest Cash Crop**
by Rhett Schwichtenberg
Navigating the financing of industrial hemp production.

46 **Case Law Update**
by by Rick Halbur, Christopher Kamath and Mark Ullery

Airport Hazard Determination

Challenge In-State Sourcing Requirements For Producing Wine

Organic Farmers & Pesticide Drift

Endangered Species Critical Habitat Designation

Easement Dispute

Breach-of-Warranty-Deed Claim

MINNESOTA FFA

by Adam Kroll

For many students, choosing a career path is a daunting task. With thousands of options, it's no wonder it can be such a struggle. FFA and agriculture education help students to discover their inner potential and possible careers in the growing agricultural job market while preparing them for a lifetime of success.

Agricultural Promotion

As the country's population becomes increasingly disconnected with agriculture, so do the students – the ones we need in the agricultural workforce of the future. This is evident as recent nationwide studies show that less than 3% of college students pursue agricultural careers. Meanwhile, USDA reports that more than 20,000 agricultural jobs go unfilled each year, and 25% of the agricultural workforce is over age 55. There is tremendous opportunity in agriculture, but it is nearly impossible for students to take advantage of these opportunities if they are unaware of them.

FFA recognizes that we can't wait for the students to come to agriculture; we need to bring agriculture to the students. Today, the National FFA Organization reaches over 669,000 members across the nation. Local chapters can be found anywhere from rural school districts to the nation's largest metropolitan areas.

Career Exposure

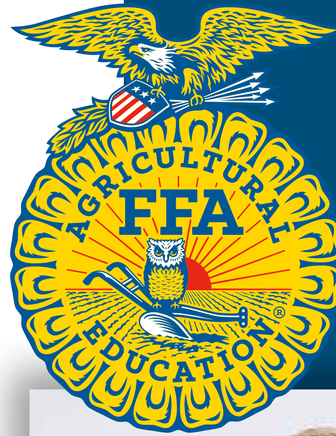
When students join FFA, they start their journey to discovering themselves and the opportunities available to them in agriculture. This often begins in an agriculture class. Agriculture education consists of classroom and laboratory instruction, career exploration through FFA, and work-based learning. This combination creates an environment to apply concepts learned in other core classes, think critically, and discover more specific interest areas.

As students advance, they can learn about a broad range of topics or focus their attention on a specific area. This allows the students that "don't want to waste time learning things they'll never use" to dive into topics that excite them while still providing opportunities for students who want to further explore their options. The flexibility, life skills, and hands-on learning that agriculture and technical education offers engages students. As a result, students involved in career and technical education programs are 10% more likely to graduate high school than the national average.

Leadership Development

FFA isn't just about exposing students to careers – it's about preparing the next generation of leaders to motivate, innovate, and serve in a variety of capacities. So far, it's

working. Nearly 100% of surveyed alumni attribute their leadership abilities to their time in FFA.



Every member has the opportunity to develop leadership skills by participating in leadership conferences and competitive events, as well as serving in various leadership roles within the organization. Leadership conferences empower students to work collaboratively, resolve conflicts, and make values-based leadership decisions while competitive leadership development events showcase members' abilities to speak, debate, or interview. Students engaged in Supervised Agricultural Experiences (work-based learning known as SAE) or competitive career development events learn to work with other people and businesses while learning technical skills relevant to agriculture. Additionally, FFA members can serve in leadership roles at the chapter, regional, state, and national levels. FFA officers benefit from additional training that prepares them to serve the members they represent to the best of their ability.

The Power of People

As an FFA member, I have had countless opportunities to connect with other members as well as industry and political leaders. I can throw statistics around all day about why FFA and agriculture education benefits students and the agricultural economy, but the people were the reason that I became so involved in FFA. Through FFA, I've met students from across the nation who are interested in agriculture and leadership; met alumni in various agricultural career fields; and developed lasting friendships and interpersonal skills.

These interpersonal skills give FFA members a leg up as they start their careers. Many have learned to recruit for their chapter, make friends with strangers, or speak with local professionals to purchase supplies for their work-based projects. Through these interactions, they have learned how to connect with people on a personal level – so much so that I've heard many members refer to their chapter as their "FFAmily". They have found their chapter to be a place to belong and to grow – just like home. By helping students feel at home in our agricultural organization, we give them a glimpse of agriculture's culture.

Conclusion

Over the course of my year of service as a state officer, one of the most common questions people have asked is "What is your favorite part of FFA?" While it has taken some time to refine all of my favorite elements into just one thing, I have found it to be opportunity. The National FFA Organization gives students opportunities to learn, grow, connect, and discover that there is a place in agriculture for them. Through the programming offered by FFA, students are prepared for agricultural careers and given leadership skills that will make them shine.

Adam Kroll was raised on a crop farm in Royalton, Minnesota where he learned about the operations and management of production agriculture. He attended Pierz Healy high school and joined FFA in 8th grade. During his time in FFA, Adam served as the Chapter Secretary and two terms as the Chapter President. He also attended conferences such as the Washington Leadership Conference, the State Leadership Conference for Chapter Leaders, and the National FFA Convention and Expo. He currently serves as the Minnesota FFA State Treasurer. Adam is a senior at North Dakota State University where he studies agricultural economics with hopes of pursuing an agricultural career.

Efficiently effective New MSGA, MSR&PC organization having an impact

by Doug Monson

Tucked away under a soybean field in a very rural area of Minnesota is an underground bunker with agriculture's equivalent of the nuclear football. The bunker contains everything needed to execute a complex and intricate plan – technology, codes, regulations and people.

Ok, not really. The soybean field is the Saint Andrews Court business development in Mankato; the bunker is a corner office at the Ag Management Solutions (AMS) headquarters; and the nuclear football is the U.S. Department of Agriculture checkoff compliance codes.

Like any bureaucratic process, it's full of red tape.

"When the Soybean Promotion and Research Order was established, it was written in such a way that it protected farmers' checkoff money from going to lobbying or political activity," says Scott Miller, Chief Financial Officer for AMS. "For Minnesota, we have a sticky situation in that our staff works for two boards, one checkoff related and one lobbying related."

Let's translate that for a moment: What Miller is saying is states with soybean production will likely have a board of elected farmers who oversee the investment of federal soybean checkoff dollars, none of which can be spent on lobbying or political activities. Those same states likely have a lobbying entity as well, which is an entirely different organization made up of volunteers who pay dues. Different books, different farmer boards, different revenue and expenses – but in Minnesota's case, same staff.

"USDA compliance is complex," Miller says. "We strategically developed this model to address these complexities, give the Growers Association and the Council the firewalls they needed, and set ourselves up for success."

Tom Slunecka, CEO of MSGA, credits the vision of farmer leaders from the Minnesota Soybean Growers Association and the Minnesota Soybean Research & Promotion Council with creating AMS.

Leading Minnesota's soybean industry

For the past seven years, Tom Slunecka has been changing the face of Minnesota Soybean. A longtime figure in the ethanol industry, he took on the challenge at Minnesota Soybean because he saw potential in the two organizations: Minnesota Soybean Growers Association and the Minnesota Soybean Research & Promotion Council.

"Anytime you take over for a leader who has held a position for a very long time, there are going to be bumps," Slunecka says. "When I started, we often were joked about as being the b-squad of Minnesota ag commodity groups. I think it is safe to say, that joke no longer rings true."

In seven years, Slunecka has ushered in Ag Management Solutions, LLC, a management firm that oversees MSGA, MSR&PC, the Specialty Soya and Grains Alliance, and four additional clients.

In addition to growing AMS, Slunecka has grown a talented, award-winning staff of experts. In 2018, MSR&PC appeared in two episodes of Discovery's hit show "Diesel Brothers." MSGA garnered more than 1.3 billion media impressions in 2018 and just this past legislative session, successfully advocated for $5 million in funding for the Soy Innovation Campus in Crookston. Both organizations are now regarded as leaders in the state and the nation.

Even with success, Slunecka knows the organizations AMS manages have more in store for farmers: a plasma technology for creating biodiesel; TruSoya, a non-GMO high oleic soybean variety, which is the first of several varieties coming through the pipeline; and $1.5 million grant from the Agriculture Trade Program to brand U.S. IP products.

"We are presented with a very challenging ag economy right now," he says. "We will continue to look at opportunities to add value to the products our farmers produce."

In September of 2017, AMS was formed to assure the organization remained focused on Minnesota agriculture. The AMS board is made up of two directors from MSGA – Paul Freeman of Starbuck and Mike Skaug of Beltrami – and two from MSR&PC – Jim Call of Madison and Rob Hanks of LeRoy.

Slunecka commends the leadership of the AMS board for staying focused on Minnesota agriculture. Essentially, he says, these farmer leaders hold the key codes to the proverbial nuclear football, and they aren't shy about deploying an arsenal of talented staff and ample resources to better serve the Minnesota ag community.

"Like all farmers, these four directors have a strong entrepreneurial spirit," Slunecka says. "They recognize how to use resources to get the best value."

Slunecka likens AMS's added capabilities to those of a farmer who might venture into custom farm work.

"Just like when you buy a combine or a planter slightly larger than your operation needs, you find ways to help out your neighbors or do custom work on the side. The same is true of AMS and its resources."

He also points to AMS strengths, such as technology and software, advanced communications and staff capabilities, as areas where the organization can help others grow. Already in its short existence, AMS has been able to quickly and efficiently reach out and help ag groups in various roles, such as communications, finance and administrative duties. Currently, AMS works with seven ag organizations.

"It is an unfortunate reality that agriculture continues to consolidate," he says. "It is equally unfortunate that the number of groups that want to cut down agriculture are growing stronger. Farmer and ag co-ops alike have consolidated to maximize their effect. The same should be true for ag organizations."

For more information, contact the SSGA office at 507-385-7555.

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Minnesota State University, Mankato Promoting Careers in Agriculture

by Dr. Shane Bowyer

The recent strategic plan of Minnesota State University, Mankato identified agriculture as an area of distinction with tremendous growth opportunities. As a result, the College of Business has been taking steps to enhance programming and explore future opportunities in agriculture for business students.

Assistant Professor of Management, Shane Bowyer, is the faculty lead for developing agriculture opportunities for the College of Business (COB); however, he is the first to admit the process involves many more people.

"Development of the agriculture program is definitely a college-wide initiative," Bowyer said. "There are faculty members from accounting, business law, finance, marketing and international business who are engaged. We all see the career opportunities for our students, and at the same time we want to help combat the workforce shortage in the ag industry in southern Minnesota."

The initial accomplishment of the College of Business was to start the first ag-focused business course in the spring of 2018. The interest from the students led the COB to pursue and develop an academic program; thus, the University recently approved the first agriculture minor. The Agriculture and Food Innovation Minor encompasses the strengths of the COB around business skills and entrepreneurship with the workforce demand in the agriculture industry. This step in creating a minor will have a direct, positive impact on the agriculture industry.

During the past 18 months, numerous companies have engaged with the COB and have expressed their excitement for the

college's entrance into the agriculture realm. As a result, many companies are eager to help educate and mentor students about the career opportunities in agriculture as well as startups.

One example is the participation in **1Million Cups**. The 1Million Cups events bring together entrepreneurs, investors and community professionals on the first Wednesday of each month at the College of Business' Center for Innovation and Entrepreneurship (CIE). A number of the sessions have focused on ag-related businesses.

A primary goal of **Big Ideas** is to encourage students to apply their problem-solving and venture creating skills to issues that are significant," CIE Director Yvonne Cariveau said. "Adding an Agriculture/Food and Beverage division to the Big Ideas Challenge is part of university-wide efforts to connect students with these industries that are critical to the economy of this area and to the country."

Another example is the engagement with **GreenSeam**. Executive Director Sam Ziegler has been active with various classes and the student AgToday club, assisting with various ag-focused activities. He deals with agriculture companies across southern Minnesota and sees MSU, Mankato as an integral part in growing the economy.

"The biggest hurdle we have in the GreenSeam to see our businesses grow is the shortage of talent. MSUM has been a leader and at our table working with us to find new and unique ways to increase the talent pipeline," Ziegler said. "Thanks to

the College of Business for creating an Ag Biz in the Modern Economy course, built around agribusiness presentations. In addition, the Computer in Society course is now working with us to bring more agribusiness to the forefront, and the students are very engaged."

The most important aspect to starting an ag and food program is making sure the Minnesota State, Mankato students are in a position to graduate with the skills and attitudes to be successful in the agriculture and food industries. According to the COB Director of Corporate Partnerships, Luke Howk, one key factor to success is that the new minor requires an internship in agriculture.

"Students who are able to get their hands dirty in an internship, both figuratively and literally, develop skills, workplace acumen, and a deeper understanding of their industry," Howk said. "Their internship experiences can ease the transition from student to professional life for both the student and the employer."

The College of Business is not the only college at Minnesota State, Mankato furthering agriculture. Other majors are also beginning to explore programming in the agriculture realm. The University is located in the heart of agricultural life and has a history of providing a skilled workforce for ag-related industries. However, the students did not have an actual degree or minor in agriculture. Now, the College of Business is taking the first step to address that issue with the Agriculture and Food Innovation Minor.

If you or someone you know might have questions about the agriculture programming within the College of Business at Minnesota State, Mankato, please contact Shane Bowyer at shane.bowyer@mnsu.edu or 507-389-5347. *And remember, we are always looking for internships and jobs for our students to keep southern Minnesota thriving!*

AgToday Student Club

The AgToday Club was started by a core group of students in the fall of 2017 and became an official Recognized Student Organization (RSO) in January 2018. The club held a number of meetings and visited ag-related businesses. One interesting note about the make-up of the club is over 50% of the members are female.

AgToday is an organization designed to promote the growth and awareness of economic vitality shaped by the opportunities within agriculture. The organization strives to build and foster relationships with industry leaders, explore agricultural opportunities and educate students on the impact of agricultural economy.

AgToday club president, Sam Schrauth, explains the cheese industry to two local ag bankers during the final presentation of the Agribusiness in the Modern Economy.

MSU students spread the word about ag jobs

First-time event explores agribusiness opportunities

AgToday club officers Jennifer Oelfke and Alli Theis talk to faculty members about their experiences with the club after an event.

Harvest Bowl Involvement

The College of Business was involved with the inaugural Harvest Bowl Maverick football game. In addition, students from the COB Professional Selling courses sold tickets for a hog raffle which raised more than $4,000 for student activities in agriculture. Promotions were announced throughout the game and the winners were drawn at halftime on the field. (See pictures at right.) The hog was donated by Christensen Farms. Alum and COB Advisory Council Chair, Glenn Stolt, is the CEO of Christensen Farms.

COB Agriculture-Related Events

The Agriculture, Food and Beverage Division was added to the Big Ideas Challenge in 2018. A $2,000 prize was awarded to the winners.

Angie Bastian, founder of Boom Chicka Pop, was the featured executive for the Richard and Mary Schmitz Food Entrepreneurship Lecture Series in 2018. In 2019, Frank Jackman, alum and CEO of Local Crate, was the featured food entrepreneur.

Students displayed their food business ideas in the Centennial Student Union during the Entrepreneur Fair.

The China Town Hall has focused on agriculture and trade the past two years. The keynote in 2018 was Minnesota Department of Agriculture Commissioner Dave Frederickson.

Four students talked about their summer internships in agriculture at a career and internship event.

MAELC Grant

The COB was awarded a grant from Minnesota Agriculture Education Leadership Council (MAELC). The grant was designed to promote agriculture careers to the COB students, high school students, and high school teachers in southern Minnesota.

In May, a workshop was held at the Center for Innovation and Entrepreneurship for high school teachers and included a trip to Christensen Farms.

Participants at the MAELC teacher workshop discussed career opportunities with industry professionals with the goal of taking the information back into the high schools and colleges to inform their students.

MSU students from the Agribusiness in the Modern Economy course displayed their final presentations and interacted with District #77 students. The judge in this picture is COB alum Mark Greenwood, who is a vice president at Compeer Financial.

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David Ross, COB alum and Tony Downs Foods Human Resource Director, was a judge for the Ag course final presentations.

Three ag lenders from different banks presented to a class. Veronica Bruckhoff of Profinium, Joseph O'Sullivan of MinnStar and Wally Thomas from Bremer discussed with the students the skills needed in the ag banking industry.

Minnesota Pork Executive Director, Dave Priesler, Matt Burkett of Christensen Farms, and US Meat Export Executive Director Bruce Schmoll discussed the pork industry with a class.

Dr. Shane Bowyer is an Assistant Professor of Management at Minnesota State University, Mankato. His focus areas are in entrepreneurship, innovation, and agriculture. Bowyer is the faculty lead for ag and food innovation initiatives across the College of Business. Before returning to the classroom two years ago, he was the Director for Strategic Partnerships for the University.

Prior to Minnesota State, Mankato, Bowyer was the Glen Taylor Chair of Business and Leadership at Bethany Lutheran College. In addition, Bowyer held other positions at Minnesota State before the BLC stint, as he was the Assistant to Vice President for Student Affairs and the College of Business Development Director.

Currently, Bowyer is a member of the 2018–20 Minnesota Agriculture and Rural Leadership (MARL) program. He has also been involved with the GreenSeam Business Development and Education committees.

Bowyer has started four businesses and was named the Greater Mankato Growth Entrepreneur of the Year in 2009.

INSURANCE COVERAGE ISSUES

by Dustan Cross and Mark Ullery

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A crucial part of disaster preparation is having an understanding of what insurance coverages you have and what they will, or will not, cover. Unfortunately, insurance policies are often lengthy and complex. They may include multiple parts and incorporate language which can be difficult to understand. Although it can be time consuming as well as frustrating, it is important to consider and review the adequacy of your insurance coverages on a regular basis, and obtain satisfactory answers to any questions you may have.

Some things to keep in mind regarding your insurance coverages include the following:

1. Basic Types of Insurance. As a very general proposition, insurance can be divided into two basic categories: property damage coverage and liability coverage. Property damage coverage protects against losses arising from damage to or destruction of property owned by the insured as a consequence of perils such

as fire, wind, or accident. Liability insurance protects the insured against legal responsibility for unintended injuries or damages to others caused by the insured's actions or omissions, and includes a duty to defend the insured. There are many varieties and offshoots of these basic forms of coverage (including federally subsidized crop and livestock insurance) which can be quite complicated, but are also important risk management tools for farming operations. Although there are certain standardized forms which are used, insurance policies can vary significantly from company to company in terms of the scope of the coverage provided and coverage exclusions.

2. Review the Policy Declarations as a Starting Point. Insurance policies generally include what are referred to as policy declaration pages – sheets which identify the coverage being provided and set forth other basic information specific to that coverage. This information will generally include the name and address of the insured or insureds, the starting and ending dates of the coverage, premium information, the amounts or limits of the coverage, the forms and endorsements which make up the policy, and, in the case of property insurance, the premises or locations which are covered. You should carefully review the declarations as a starting point and make sure that the information provided is consistent with your understanding of the coverages you have purchased. You should receive a policy declaration when the policy is first purchased, as well as each time it is renewed.

3. Review the Forms and Endorsements. As noted above, the policy declarations will identify the forms and endorsements which make up the entire policy. Often there will be a basic policy form for property coverage and another basic form for liability coverage, which are supplemented, and in many cases amended, by multiple other forms or endorsements. Each form or endorsement will generally be labeled by a code printed on it consisting of a combination of numbers and letters followed by a month and year abbreviation, and you should confirm that what you have been given matches up with what is listed on the policy declarations. If you are missing any of the forms or endorsements identified on the declarations, you should ask your agent or broker to obtain them for you. The forms and endorsements making up the policy will explain the specifics of the coverage being provided, including information as to who is covered by the policy (you want to make sure that all necessary owners, officers, and employees are included), the circumstances that will trigger coverage, exclusions that apply to the coverage (policies typically contain multiple exclusions, including exclusions relating to pollution), how property damage payment amounts will be calculated (for example, does the policy provide for payment of only the actual cash value of property or does it provide for replacement

cost?), and definitions of the terms used in the policy. If the insurer decides to make a change in the coverage going forward, you should receive written notice of the change at the time the policy is renewed. Although insurers commonly make minor changes to policy language, they will sometimes make changes that can have a significant impact on the coverage being provided, and it is therefore important to review any notices you may receive.

4. Do Not Hesitate to Ask Questions. As also noted above, insurance policies are often voluminous and include language which is not easy to understand. This can be particularly true when it comes to coverage exclusions. It is a good practice to meet with your insurance agent or broker on at least an annual basis to review your coverages and ask any questions you may have. The discussion should include not only the amounts of coverage which you currently have and whether those amounts should possibly be adjusted, but also a general overview of the type and nature of your coverages. If you have questions about your coverages which you do not feel have been adequately answered by your agent or broker, consider contacting an attorney who is knowledgeable about insurance. Although the terms of insurance policies typically cannot be negotiated, there are nevertheless risk management steps you can take to address coverage gaps if you are aware of what those gaps are.

5. Keep Your Insurer Updated. You should also make sure to promptly advise your insurer of any significant changes to your operation including, for example, the addition of any land, buildings, or significant machinery/equipment. Don't wait for an annual meeting or the policy renewal time to do this. There is also particular information which must be provided relative to crop and livestock insurance, and you should

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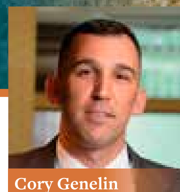
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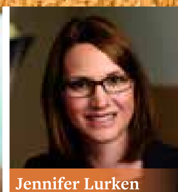
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work closely with your agent to make sure that is done on a timely basis.

6. Be Familiar with Loss Notification and Cooperation Requirements, and Make Sure You Comply With Them. As part of your policy review, you should make sure you are familiar with what needs to be done by you in the case of a loss or an event that could give rise to a claim against you. Insurance policies include specific requirements regarding prompt notification to the insurer of losses and claims (including potential claims), as well as other duties that the insured has in such circumstances; these duties include a duty to reasonably cooperate with the insurer.

7. Be Cautious of Specialty Policies. Minnesota allows insurance companies who are not licensed in this state to provide coverages which are unavailable from licensed insurers. These companies are referred to as surplus lines insurers. One example we have encountered are policies which provide coverage for losses resulting from particular swine diseases. Policies issued by surplus lines insurers are generally not subject to the rates or forms required by Minnesota insurance laws. Although not required to do so, a surplus lines insurer can seek to be recognized by the state as an "eligible" surplus lines insurer, a process which requires the insurer to meet certain minimum financial requirements and other standards. Whether or not the insurer is recognized as "eligible," the payment of claims by a surplus lines insurer is not guaranteed in the event the insurer becomes insolvent. You should be cautious when considering purchasing this type of insurance. You may want to first investigate the insurer's reputation and financial condition, and possibly have an attorney review the policy provisions.

Insurance considerations are an important part of disaster planning and response. Insurance can provide important protections, but there are also limitations to it. Maximizing the protections, while at the same time understanding and acting upon the limitations, can make a significant difference in the impact a disaster may have on your operation.

GREENSEAM

37TH ANNUAL RURAL LEGISLATIVE FORUM

Thursday December 5, 2019
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Verizon Center Mankato

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

Wetland Banking – An Overview

by Dean Zimmerli

Water quality regulation and conservation continues to be a prominent topic for the agriculture industry. Much of the focus has revolved around regulatory incursions on agricultural operations, ranging from federal Clean Water Act regulations on feedlots and livestock facilities, to the impact of Total Maximum Daily Load Studies on irrigation and cropping practices, to Minnesota's recent "Buffer Law." However, there are a number of voluntary government programs that encourage farming practices aimed at improving water quality that producers can opt in to. For example, the Conservation Stewardship Program compensates farmers for adopting farming practices such as planting cover crops, employing limited tillage methods, and similar practices. The Conservation Reserve Program—CRP—is also a familiar program which encourages producers to remove marginal land from production and establish conservation areas.

These and other voluntary programs can provide a valuable alternative income stream while contributing to water quality and environmental protection. Another, perhaps less common, voluntary program available to producers or other landowners is to restore or preserve wetlands through Minnesota's Wetland Banking program. Under the wetland banking program administered primarily by the Board of Soil & Water Resources (BWSR), a landowner restores wetlands on his/her property and obtains "credits" in Minnesota's wetland bank which can later be sold to developers or government entities that fill or damage wetlands through construction projects or similar development. Particularly where continued low commodity prices and recent wet crop seasons have made farming low-lying land a losing proposition, landowners might consider establishing wetlands and selling the resulting wetland credits as an alternative method of profiting from their land.

Although straightforward at first glance, establishing wetland credits takes more than just plugging tile and waiting for the land to fill with water. Landowners must work closely with a number of government entities to ensure their wetland project meets program guidelines, and is ultimately approved, to be included in the wetland bank. Establishing a wetland and selling wetland credits can be a profitable opportunity, but landowners should be aware of the risks, costs, and process before embarking.

Assembling a Team

Establishing a wetland to sell wetland credits is a complicated process. Not only does the process involve coordination between multiple federal, state, and local governmental agencies, it also requires technical expertise in designing and implementing the restoration project. Before beginning a wetland restoration project, landowners should first consult with experts in wetland banking projects, as well as legal and accounting experts. Engineering firms can often provide technical expertise in designing the restoration project and can also provide project management throughout the process. Legal experts can provide advice on regulatory questions that arise and assist with resolving disputes that might come up in the process. Financial experts can help assess the financial viability and potential return for a wetland project under various scenarios. Selecting a team of experts can help the landowner determine whether to move forward with the project and will help ensure a successful restoration.

Plan Application and Approval

Unsurprisingly, the first step in moving forward with a wetland restoration is to plan the project. This involves selecting the site and determining the activities necessary to restore the land to a wetland state. Often this may include breaking or blocking existing drainage tile, or otherwise limiting drainage through ditches or streams so that water backs up, rather than draining off the land. In some situations, the construction of a berm or dike is required to impound water. Beyond impounding water, consideration must be given to the establishment of native plants, control of invasive species, and formation of upland buffers to protect the newly established wetland. An engineer specializing in hydrology and wetland projects is usually the best resource for this aspect of a wetland project.

The plan application process generally is a three-step process. First, a draft Prospectus is typically submitted to the local government unit responsible—usually the county or city where the proposed project is located. This draft Prospectus can be prepared without professional consultants. The draft Prospectus is an initial rough overview of the proposed project. The local government unit, in concert with a technical evaluation panel made up of technical experts from BWSR, the soil and water conservation district, and for some projects

the Department of Natural Resources, will review the draft Prospectus and provide preliminary feedback. Based on this feedback, the landowner can make a better informed decision about whether to move forward.

A final Prospectus is then prepared. This document, often prepared by or in consultation with expert consultants, provides a conceptual overview of the project, with additional detail concerning the proposed project. Generally the local government unit and technical evaluation panel at this point will be able to provide more definitive feedback to the landowner regarding any concerns with project design, as well as proposed boundaries for the project, amount of expected wetland bank credits to be awarded, a credit release schedule, and other miscellaneous details.

Under Minnesota's Wetland Conservation Act, the draft Prospectus and final Prospectus are not required to be submitted. However, for landowners who hope to have their wetland credits available for development projects governed by the Army Corps of Engineers, these initial steps are mandatory under the Army Corps' wetland banking rules.

Finally, the landowner will submit a full Mitigation Plan for review and consideration by the responsible local government unit. The technical evaluation panel will review the application and plan and provide findings and recommendations to the local government unit on whether the plan complies with state regulations. The local government unit provides the final approval for the plan and generally must issue its decision in 60 days.

Grant of a Conservation Easement

As part of a wetland banking project, the landowner must grant the government a permanent conservation easement across the property to be converted to the wetland bank area, which will include wetlands as well as upland buffers surrounding the wetlands. The conservation easement has two general components. The first limits the ability of the landowner (or future landowners) to use the property for other purposes or remove the wetland, and the second includes a positive obligation to maintain the wetland functions. While areas converted to wetlands can be used for some limited hunting and other recreation, the use of the land will be severely restricted by the terms of the easement.

The grant of the easement itself is a complicated process. The land must be surveyed and a detailed legal description of the wetland bank area must be prepared by the surveyor. In addition, the landowner must obtain a title insurance commitment and establish that the landowner indeed has good title and is able to grant the easement. If there are mortgages on the property, the landowner must secure agreements with the mortgage lender to consent to the grant of the easement. If the lender will not consent, the landowner may be required to refinance the mortgage with another lender. Prior utility easements, tax liens, and severed mineral rights must also be dealt with as part of this process. Once the state is satisfied that the landowner has good title and can grant the easement, the landowner will sign the easement and it will be recorded in the county records.

Dealing with Public Drainage Systems

Occasionally the land that will be converted to wetlands is drained by a public drainage system such as public tile or a county drainage ditch. When this is the case, it may be necessary as part of the project to obtain permission from the responsible drainage authority to abandon or reroute the drainage system so that the proposed wetland area can be inundated with water but that surrounding

properties can still be served by the system. This process will require a petition to the drainage authority that complies with Minnesota's drainage statutes.

Construction and Completion

If the wetland plan calls for the construction of berms, water control structures, or other construction activities, the local government unit will review construction progress to ensure such construction is completed in accordance with the plan. In addition, the local government unit will review evidence of seeding and planting where the establishment of new vegetation is called for in the plan. When these activities are complete, the local government unit will notify the landowner of its approval.

Depositing Wetland Credits

Once construction is complete, the landowner must then submit an application to deposit project wetland credits into the landowner's account at the state's wetland credit bank, administered by BWSR. Generally a landowner cannot deposit all credits associated with the project at once; instead, around fifteen percent of the credits can be deposited upon the completion of construction, and the remaining credits associated with the project are available for deposit over time.

Once the wetland credits have been deposited into the wetland credit bank, the landowner can deal directly with potential developers or others who need to obtain wetland credits to mitigate (replace) wetlands that are being filled or damaged as part of a new building project, highway, or similar construction. The landowner and developer negotiate on the price and terms. In addition, credits can simply be sold to others with wetland credit accounts for agreed-upon amounts. Thus, the value of a wetland credit fluctuates with the market, and varies by location. When construction activity is strong, wetland credits may be very valuable; but prices may slump when construction activity slows.

Conclusion

For landowners and farmers facing continued low crop prices and who are frustrated by regular drowning of their crop, establishing a wetland for the purpose of obtaining wetland bank credits to sell has the potential to be a profitable alternative. However, before setting off down that path, landowners should be aware that the process can take several years, and there are substantial costs to plan and complete the project. With a team of experts, and some patience, wetland banking might be a financially and ecologically beneficial alternative.

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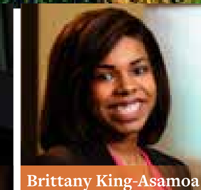

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Legislative Update

Trade Tariffs and Challenges Result in Uncertainty for U.S. Agriculture

by Brian M. Foster

It is difficult to write about agricultural trade issues these days as reports of progress (or not) from negotiations between the Trump Administration and our trading partners emerge daily, and sometimes even several times in one day. It has been about a year now since the Trump Administration initiated a major trade policy change (some use the term "war") with respect to China, so this article will provide *Dirt* readers with an update of the agricultural trade landscape as we see it today.

First, some context - trade is critically important to the $19 trillion U.S. economy. The total value of trade for the U.S. with all countries (imports and exports of goods and services) is over $5.5 trillion per year. Since 2000, the U.S. has run significant trade deficits (imports greater than exports), ranging from just under $400 billion to almost $800 billion per year. The U.S. trade deficit has *increased* from $502 billion in 2016, to $552 billion in 2017, to $621 billion in 2018, of which $400 billion was with China.

Of total U.S. trade, $250 billion is in agricultural and food products; the U.S. runs a trade ***surplus*** in agriculture of about $20 billion per year; since 2000, that surplus has ranged from a low of $4 billion in 2005 to a high of $40 billion in 2013. Mexico and Canada, the U.S. partners in NAFTA, are our two leading agricultural export destinations, while China ranks fifth.

President Trump has used tariffs as his policy tool of choice for bringing trading partners in line with the Administration's stated goals of gaining more open and fair markets and reducing the U.S. merchandise (goods) trade deficit. Keep in mind, tariffs on imported goods raise the prices of those goods to U.S. consumers; Americans paid $14.4 billion in added costs from tariffs in 2018 due to the Administration's tariff policies.

China

In March 2018 President Trump exercised executive authority under Section 232 of the Trade Expansion Act of 1962 and placed import tariffs on Chinese aluminum and steel; Section 232 allows tariffs to be used in cases where U.S. national security is threatened. The President then also utilized Section 301 of the Trade Act of 1974 to place additional tariffs on Chinese goods in response to years of complaints from American businesses that Chinese policies force the transfer of technology and intellectual property in exchange for access to Chinese markets.

In response to the U.S. tariffs on Chinese goods, China placed significant retaliatory tariffs on hundreds of U.S. agricultural and food products, with most additional tariffs set at between 5 and 25 percent. As a result, the value of all U.S. agricultural exports to China fell by about $10 billion in 2018 (see Figure 2).

U.S. soybeans and pork have been especially hard hit; U.S. pork now faces total Chinese tariffs of 62 percent. Figure 1 below shows a 21 percent decrease in the value of U.S. pork exports to China from 2017 to 2018. In recent weeks, the U.S. pork market has rallied significantly on emerging news of massive culling of the Chinese pork herd due to African Swine Fever, with the result that U.S. pork exports have significantly increased to that country in 2019.

U.S. soybeans now face a total 28 percent tariff going into China. The U.S. historically exported about one-third of the soybean crop, with over half of those exports going to China. The import tariff has essentially priced U.S. soybeans out of the Chinese market and handed the market to competitors, especially Brazil (see Figure 3).

President Trump's March 1, 2019 deadline for progress in trade talks with China has come and gone, and with it, almost daily reports emerge of either optimism or pessimism from on-going talks. The Chinese tariffs on U.S. products are unlikely to come off until the U.S. steel and aluminum tariffs are lifted and/or a comprehensive trade deal is agreed. At the same time, a bi-partisan group of U.S. Senators, led by Iowa Senator Chuck Grassley, Chairman of the Senate Finance Committee, is making an effort to restrict the Executive's use of national security to impose Section 232 tariffs in the future.

Canada and Mexico

Under the North American Free Trade Agreement (NAFTA), in place since 1994, tariffs and other trade barriers among the U.S., Canada and Mexico were gradually reduced or eliminated. Regional trade under NAFTA increased sharply from $290 billion in 1993 to over $1.1 trillion in 2016, with much of U.S. agriculture benefiting from increased exports.

Critics of the trade deal, however, blame NAFTA for the loss of manufacturing jobs and wage stagnation in the U.S. When President Trump came into office, one of his first actions on trade was to withdraw the U.S. from the Trans-Pacific Partnership, negotiated by the Obama Administration, and to announce he would engage Canada and Mexico in talks to improve and modernize NAFTA. The result of those talks is the U.S.-Mexico-Canada Agreement (USMCA) that maintains many of the trade benefits for agriculture from NAFTA, while making some moderate improvements, including for U.S. dairy exports. The biggest changes in USMCA revolve around labor issues in manufacturing and auto industry "local content" rules.

To go into effect, the USMCA must be ratified by the legislatures of all three countries. In the U.S. Congress, House Speaker Pelosi has said that she (and by extension a significant portion of the House democrat caucus) will oppose the new agreement until both labor and environmental measures in the agreement are strengthened. In fact, the Speaker has announced the creation of four House task forces to examine key components of the agreement, including labor standards, environmental issues, pharmaceuticals and the creation of a verifiable enforcement mechanism to hold Mexico accountable for promised changes to labor laws and other provisions in the deal.

The Mexican lower house of its legislature has responded by recently passing legislation to reform the Mexican labor market, as required under USMCA, and the Canadian Parliament is currently considering ratification of the USMCA.

Proponents of free trade cheered the recent announcement that the Trump Administration had lifted tariffs on Mexican and Canadian aluminum and steel, resulting in those countries lifting import duties on American agricultural products. Now farmers and ranchers could find themselves back in the thick of trade tension with Mexico after Trump threatened to slap tariffs on all Mexican goods unless the country curbs illegal immigration into the U.S., a move that would likely invite trade retaliation on U.S. agricultural products once again.

Other countries

The new Asia/Pacific trade agreement (CPTPP), without the U.S., went into effect January 1; the U.S. agricultural community is on the outside looking in on markets that include Japan, **Vietnam**, Mexico, and Canada because President Trump withdrew from the Trans-Pacific Partnership (TPP) trade agreement as one of the first acts of his presidency.

Japan began implementing its new trade agreement with the European Union on February 1; Japan's tariffs for many imported agricultural and food products from the U.S. are now considerably higher than tariffs on products from the CPTPP and EU countries. Trade talks for a new U.S.-Japan free trade agreement kicked off April 15. President Trump's recent trip to Japan resulted in a positive announcement for U.S. beef; Japan will remove age restrictions on U.S. beef going into that country.

There has been talk about starting negotiations on a new U.S.-**EU** free trade agreement, but to date the Europeans are insisting that agriculture not be included and the U.S. insisting agriculture is included; these talks look to be in suspension for now.

In some rare good trade news, the U.S. and **South Korea** last September signed a revised free trade agreement that maintains access to that market for many U.S. agricultural products; note the strong increase (41 percent) in pork export value to that country in 2018 (Figure 1).

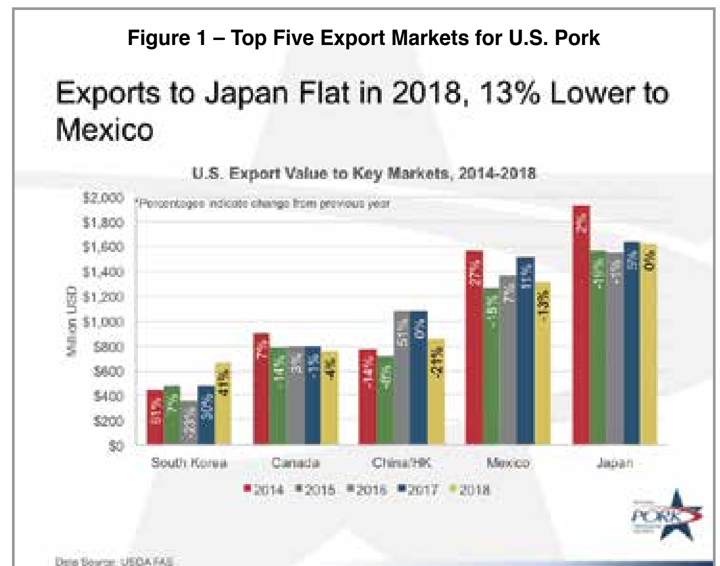

Figure 1 – Top Five Export Markets for U.S. Pork

Figure 2. U.S. Exports to China - Value of Aricultural Total

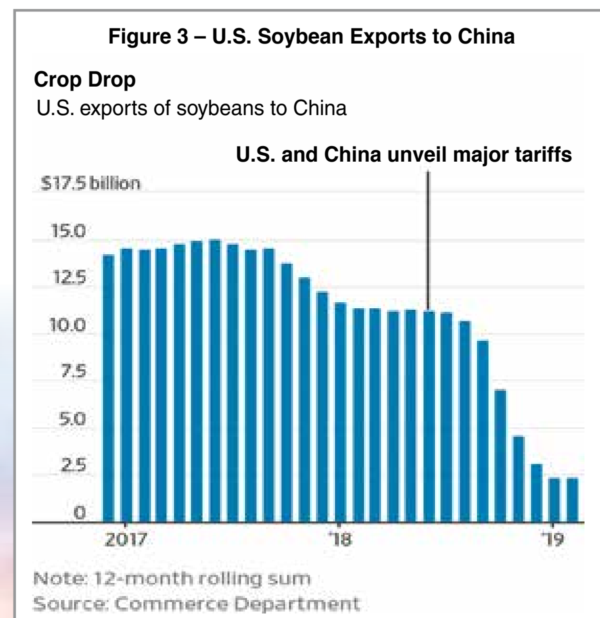

Figure 3 – U.S. Soybean Exports to China

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Legislative and Regulatory Update

by Matthew Berger

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The last few months have seen several significant developments in the laws and regulations that govern farming operations in Minnesota (and, in some cases, across the country). This article will provide a brief update regarding important statutory and regulatory changes that may impact your farming operation.

Environmental Review Process – Public Comment Period

Minnesota law establishes a two-part environmental review process that must be completed as part of certain projects involving animal feedlots (including the construction of a new feedlot with a capacity of 1,000 or more animal units or the expansion of an existing feedlot by 1,000 or more animal units). The first part of this environmental review process requires the completion of an environmental assessment worksheet, or EAW, which is a brief document that sets out the basic facts about a proposed project. The EAW must be submitted to the responsible governmental unit (in the case of feedlots, this is generally the Minnesota Pollution Control Agency) and published for public comment. After the comment period expires, the responsible governmental unit must determine whether the project has a potential for "significant environmental effects." If so, a comprehensive environmental impact statement, or EIS, must be completed for the project; if not, a "negative declaration" on the need for an EIS is issued, and the project may proceed with the normal permitting and approval process to begin construction.

Existing Minnesota statutes and regulations established a 30-day period following publication of an environmental assessment worksheet during which comments could be submitted to the responsible governmental unit. But the Minnesota Pollution Control Agency routinely extended the 30-day comment period for EAWs on feedlot projects (often for several months)—this practice caused significant delays and uncertainty for farmers seeking to construct new feedlots or expand existing feedlots.

The Minnesota Legislature addressed this issue during the recent special session by amending the statute to specifically provide that the 30-day comment period for an EAW may be extended one time for up to 30 additional days but that any additional extension would require approval from the project proposer. While not perfect, this amendment will provide certainty as to the maximum length of time that the comment period (and thus the environmental review process) will take and will better allow farmers to plan the timing of proposed feedlot construction projects.

Definition of "Pasture"

Minnesota laws and regulations impose extensive legal requirements that govern the construction and operation of animal feedlots. In contrast, the Minnesota Legislature has consistently recognized that "pastures" should be exempt from the legal and regulatory requirements applicable to feedlots. Over the years, the Legislature has repeatedly amended the statutes to re-affirm this basic principle. Unfortunately, the bureaucrats at the Minnesota Pollution Control Agency believe that they know better than our elected representatives and have consistently sought to grant themselves greater authority to regulate pasture-based farming operations that Legislature has sought to exempt from the feedlot requirements. This back-and-forth struggle between the Legislature and the Minnesota Pollution Control Agency resulted in multiple pasture definitions in various parts of the statutes and greater confusion (which the agency sought to exploit further).

During the recent special session, the Minnesota Legislature again addressed this issue by consolidating the several existing definitions of "pasture" into a single definition. In doing so, the Legislature also recognized—and approved—the traditional practice of confining cattle to small "sacrificial" areas of a pasture during adverse weather conditions (such as the annual spring thaw) to protect the integrity of the pasture as a whole. This additional clarification was adopted to address situations where the Minnesota Pollution Control Agency has claimed that such sacrificial areas constituted "feedlots" and attempted to impose monetary penalties against pasture-based farming operations that did not obtain feedlot permits for these sacrificial areas.

Specifically, the new statute recognizes that a pasture can include either (i) "areas, including winter feeding areas as part of a grazing area, where grass or other growing plants are used for grazing livestock and where the concentration of animals allows a vegetative cover to be maintained during the growing season"; or (ii) "agricultural land that is used for growing crops during the growing season and is used for grazing of livestock on vegetation or crop residues during the winter." The new statute also specifically recognizes that "a cover of vegetation or crop residues is not required" in certain areas, including "the immediate vicinity of supplemental feeding or watering devices," corrals and chutes, access lanes, and "sacrificial areas" that "are used to temporarily accommodate livestock due to an extraordinary situation" for up to 90 days and "on which the vegetation is naturally restored or replanted after the adverse soil or weather conditions are removed and the livestock are moved to other areas of the pasture."

Hopefully, these statutory changes will (finally) force the Minnesota Pollution Control Agency to recognize the Minnesota Legislature's long-standing policy decision that pasture-based operations should not be regulated as feedlots.

School Building Bond Agricultural Tax Credit

In 2017, the Minnesota Legislature adopted a new tax credit that reduces the real estate taxes on agricultural property for school building bonds. The credit—which became effective for taxes payable in 2018—was equal to forty percent (40%) of the tax on agricultural property (excluding any house, garage, and one acre of land for an agricultural homestead) that is attributable to school district bonded debt levies (both existing and new levies) and provided reimbursement from the state to local school districts for the lost revenue.

The Minnesota Legislature substantially increased the amount of this tax credit for future years from forty percent (40%) for taxes payable in 2018 and 2019 to seventy percent (70%) for taxes payable in 2023. This increase will be phased in as follows:

2020 . . . . . .50%
2021 . . . . . .55%
2022 . . . . . .60%
2023 . . . . . .70%

This change will provide a significant tax benefit for Minnesota farmers.

Agricultural Homestead

Existing Minnesota tax laws provide significant tax benefits for property that is classified as an agricultural homestead. But the Minnesota Department of Revenue and several counties interpreted the existing law to exclude farming operations conducted by business entities (such as family farm corporations, partnerships, and limited liability companies) from obtaining the tax benefits for agricultural homestead. This interpretation forced many farm families to unnecessarily choose between the tax benefits that could be obtained for an agricultural homestead and the liability protection and succession benefits that could be achieved by forming a business entity.

The Minnesota Legislature addressed this issue by amended the existing statute to specifically state that homestead treatment will apply even if property is owned or farming operations are conducted by a family farm corporation, joint family farm venture, partnership, or limited liability company in many circumstances. Again, this statutory change should provide significant tax benefits for many Minnesota farmers.

Nitrogen Fertilizer Rule

As noted in the last issue of *Dirt*, the Minnesota Department of Agriculture has been working on proposed regulations that would govern the application of commercial fertilizers to certain crop fields in Minnesota. Specifically, the proposed rules would generally prohibit the application of nitrogen fertilizer in the fall in vulnerable groundwater areas (as indicated on a map to be prepared and published each year by the Minnesota Department of Agriculture) and in drinking water supply management areas where nitrate-nitrogen levels have been measured at a level of at least 5.4 mg/L at any point in the previous ten years. The proposed rules would also allow the Minnesota Department of Agriculture to designate a mitigation level for drinking water supply management areas where nitrate-nitrogen levels exceed certain thresholds and, if the nitrate levels in these areas are not reduced, to eventually impose additional restrictions on the use of nitrogen fertilizer. The proposed rules do not regulate the application of manure (which is separately regulated by the Minnesota Pollution Control Agency) or designate mitigation levels or additional restrictions based on test results from private wells.

Immediately following the recent legislative session, the Minnesota Department of Agriculture announced that it was proceeding to finalize the proposed rules. These rules are slated to become effective on January 1, 2020. Nonetheless, this rule may be subject to judicial challenge.

March 2019 Rule Proposals for the Fair Labor Standards Act

by Brittany King-Asamoa

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Proposed Rule to Change Minimum Salary Threshold.

On March 7, 2019, the United States Department of Labor ("DOL") proposed a new minimum salary threshold for white collar overtime exemptions. Under the exemptions, individuals employed in a bona fide executive, administrative, or professional capacity that earn a specified minimum salary are not entitled to overtime pay under the federal Fair Labor Standards Act ("FLSA"). The DOL recently proposed a new minimum salary of $679 per week for executive, administrative, or professional employees, which is the equivalent of $35,308 per year. The minimum salary for highly - compensated employees exempt from overtime would be $147,414 per year.

This is substantially different from the salary threshold issued by the DOL in May 2016, and enjoined from implementation in November 2016 by the United States District Court of Eastern District of Texas Judge Amos Mazzant. The newly proposed rule increases the minimum weekly salary of executive, administrative, and professional workers by nearly 50%, from the current enforced minimum of $455 per week. The highly - compensated employees' proposed salary minimum is actually greater than that proposed in 2016.

The comment period for the proposed rule remained open until May 21, 2019. Employers were encouraged to comment on this rule and the impact such a change will have on their business, the workforce, and/or their respective industry. Public comments were submitted at the following web address: https://www.regulations.gov/document?D=WHD-2019-0001-0001.

Employers should also utilize this time to reevaluate their workforce and employment positions to (1) ensure employees are accurately identified as exempt or non-exempt for purposes of overtime pay; and (2) determine which employees will become eligible for overtime pay if the proposed rule becomes final. Remember that in addition to meeting the minimum salary, the employee must primarily perform duties consistent with being employed in a bona fide executive, administrative, or professional capacity. Those primary duties break down as follows:

- Executive capacity – the employee primarily manages the business or a department thereof, supervises at least two full-time employees or the equivalent, and makes employment decisions or recommendations;
- Administrative capacity – the employee primarily performs non-manual/office work related to management of the business or its customers and routinely exercises independent judgment or discretion; and
- Professional capacity – the employee primarily performs work of an intellectual character that requires advanced knowledge in a field of science or learning, and that knowledge is acquired traditionally through prolonged study or instruction.

A highly-compensated employee must primarily perform non-manual/office work related to management of the business or its customers and performs at least one other duty required under the duties tests for the executive, administrative, and professional exemptions.

Proposed Rule to Clarify Regular Rate of Pay.

After more than 50 years, the DOL announced that it plans to "clarify" what truly constitutes an employee's "regular rate of pay" for purposes of calculating overtime. On March 28, 2019, the department released its proposed rule to clarify the extensive list of exceptions to the regular rate of pay calculation set forth in the FLSA at 29 U.S.C. § 207(e).

Much-needed clarification is intended for the exception established for discretionary bonuses. Helpful proposed clarifications include examples of discretionary bonuses excludable from regular rate of pay, such as "employee-of-the month bonuses, bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, bonuses for overcoming stressful or difficult challenges, and similar bonuses . . ." Regular Rate Under the Fair Labor Standards Act, 81 Fed. Reg. 11,888, 11,899 (proposed March 29, 2019). The rule would also reiterate that excludability of a bonus is determined based on the facts under which the bonus is supplied, not what the employer calls the bonus.

The proposed rule would also clarify the following:

- that the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services may be excluded from an employee's regular rate of pay;
- that payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay;

- that reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate;
- that reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that meet other regulatory requirements may be excluded from an employee's regular rate of pay;
- that employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA; and
- that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

Fact Sheet: Notice of Proposed Rulemaking to Update the Regulations Governing the Regular Rate under the FLSA, U.S. Dep't of Labor (March 2019). The comment period for the proposed rule will remain open until May 28, 2019. Public comments may be submitted at the following web address: https://www.regulations.gov/document?D=WHD-2019-0002-0001.

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Banking Minnesota's Newest Cash Crop *by Rhett Schwichtenberg*

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On December 20, 2018, President Trump signed into law the Agricultural Improvement Act of 2018, more commonly known as the 2018 Farm Bill. With the 2018 Farm Bill came the legalization of industrial hemp. Although many states – including Minnesota – had already legalized industrial hemp production, federal banks and FDIC-insured institutions remain subject to federal law and could not legally offer banking services to hemp businesses. Now that hemp is federally recognized as an agricultural commodity, banking industries are free to engage in banking hemp businesses – with some strings attached.

What is Hemp?

Today, the terms hemp and marijuana are used interchangeably to refer to the psychoactive drug. Although the two plants come from the same family of cannibis, *Cannibis sativa L.*, marijuana and hemp share an important difference. Marijuana is high in a psychoactive chemical called delta-9 tetrahydrocannabinol ("THC"). Hemp, on the other hand, is high in a non-psychoactive chemical called cannabidiol, or "CBD."

Before the 2018 Farm Bill was passed, hemp was listed as a Schedule 1 controlled substance along with marijuana, under the Controlled Substances Act. The Controlled Substances Act defined marijuana as "all parts of the plant Cannibis Sativa L," which includes hemp. The passage of the 2018 Farm Bill reclassified hemp as an "agricultural commodity," removing it from Schedule 1 classification and the Controlled Substances Act entirely.

Under the 2018 Farm Bill, hemp is now defined as any *Cannabis sativa L.* plant with a THC content of 0.3 percent or less.

Banking Hemp Pre-2018 Farm Bill

Prior to the 2018 Farm Bill, providing banking services to hemp producers was a violation of federal law; yet, national and FDIC-insured banks felt safeguarded from the potential of prosecution. In 2013, Attorney General Cole issued what is known today as the "Cole Memo" in light of states passing marijuana legalization laws. The Cole Memo instructed federal prosecutors to focus marijuana prosecution only on particularly heinous cases and allow the states to police all other cases under their own laws. While essentially deferring to state law in most marijuana cases, the Cole Memo stated that it does not in any way limit the federal government's ability to enforce any federal marijuana law.

Post-Cole Memo guidance provided by FinCEN (the United States Treasury Financial Crimes Enforcement Network) noted that the

decision to open, close, or refuse any particular account or relationship is up to the individual financial institution. The FinCEN guidance discusses the procedure for financial institutions serving marijuana-related businesses. The guidance requires those banks to file Suspicious Activity Reports ("SARs") with FinCEN. There are three categories of SARs: (1) Marijuana Limited (filed when business is complying with state laws); (2) Marijuana Priority (filed when business is not complying with state laws); and (3) Marijuana Termination (filed when business violates one of the criteria in the Cole Memo, necessitating state involvement). Despite the FinCEN guidance, transacting with a business that engages in "marijuana-related businesses" is a violation of federal drug and money-laundering laws, specifically the Bank Secrecy Act of 1970, and could always be prosecuted by the federal government.

On January 4, 2018, former Attorney General Jeff Sessions issued a memorandum rescinding previous guidance on federal marijuana enforcement, including the Cole Memo. Although this memorandum further opened the door to potential prosecution, current Attorney General William Barr has reaffirmed the Cole Memorandum, writing "I do not intend to go after parties who have complied with state law in reliance on the Cole Memorandum."

Banking Hemp in 2019

Under the 2018 Farm Bill, hemp (including hemp-derived CBD) is no longer a controlled substance under the Controlled Substances Act. Instead, it is now federally recognized as an agricultural commodity. In other words, there are no criminal implications of industrialized hemp production so long as the hemp producer has the requisite licensure and does not willfully violate any state or federal hemp laws. As such, banks no longer need to file SARs when providing banking services to industrial hemp producers as long as the producer is licensed and the bank has no knowledge – or reason to believe – that the producer is willfully violating any laws.

Licensing Process

The 2018 Farm Bill enables individual states to submit a plan to the USDA Secretary that, upon approval, allows that state to be the primary regulator of hemp in that state. If a state does not submit a plan, or the plan is denied, hemp producers in that state will need to obtain a federal license issued by the USDA Secretary via a licensing procedure that is still forthcoming.

Given these new licensing laws, the Minnesota Department of Agriculture stated that individuals and businesses in Minnesota must be licensed under the Minnesota Pilot Program to grow and process hemp in 2019. There are two different licenses available under the Minnesota Pilot Program; a license to grow hemp, and a license to process it. Producers wishing to both grow and process hemp must hold both licenses. Minnesota's Pilot Program will continue until the USDA approves Minnesota's hemp plan. After Minnesota submits its plan, the USDA has 60 days to approve or reject it.

Minnesota Statutes Section 18K.04 discusses licensing, stating, "[a] person must obtain a license from the [Minnesota Commissioner of Agriculture] before growing industrial hemp for commercial purposes." The application "must include the name and address of the applicant and a legal description of the land area or areas where industrial hemp will be grown by the applicant." The Minnesota Department of Agriculture has further specified that "[a]nyone who wishes to grow or process industrial hemp in Minnesota must obtain a hemp pilot license. Anyone who sells hemp seed for planting, process[es] hemp materials, conduct[s] laboratory testing, or handle[s] raw, viable hemp must also obtain a license."

CBD Products

Although the 2018 Farm Bill legalizes the growth and processing of industrial hemp, it does not authorize the sale of CBD products, explicitly preserving the FDA's power to do so.

Guidance involving the sale and marketing of hemp-derived CBD products is hazy, as the FDA has not issued new regulations since the 2018 Farm Bill passed. The FDA Commissioner issued a press release on December 20, 2018 (the day President Trump signed the 2018 Farm Bill). The Commissioner explained that under the Federal Food, Drug, and Cosmetic Act and Section 351 of the Public Health Service Act, it is illegal to introduce CBD into the food supply, market CBD products as dietary supplements, or market CBD products with a claim of therapeutic benefit or any other disease claim before going through the FDA approval process. He highlighted that the 2018 Farm Bill has no impact on these regulations but did state that the FDA is working on new regulations in light of the new

laws. The Commissioner was expected to address CBD regulations at a public meeting in April 2019.

In the meantime, financial institutions should review the business and marketing materials of businesses selling CBD products to consumers before providing banking services to them.

Medicinal and Recreational Marijuana

The 2018 Farm Bill did not address the use of marijuana for medicinal or recreational purposes. Any *Cannabis sativa L.* plant with a THC content greater than 0.3 percent still remains a Schedule 1 drug under the Controlled Substance Act. Although legal in Minnesota, any financial institution providing services to medical marijuana businesses should continue filing SARs with FinCEN until federal law decriminalizes marijuana.

On February 13, 2019, the Subcommittee on Consumer Protection and Financial Institutions, a new congressional subcommittee, held their first hearing on challenges and possible solutions to providing banking services to cannabis-related business. Although most subcommittee members agreed that change is needed to protect cannabis-related businesses, many stated that such change needs to start with the Controlled Substances Act, decriminalizing and rescheduling marijuana, not with banking legislation. On March 7, 2019, U.S. Representative Ed Perlmutter introduced House Bill H.R. 1595 titled the Secure and Fair Enforcement Banking Act of 2019 (the "SAFE Act"). If passed, the SAFE Act will provide a safe harbor to financial institutions providing banking services to cannabis-related businesses.

Conclusion

Although the federal government has legalized hemp, it is important for financial institutions to perform due diligence on potential hemp clients to ensure they have the requisite licensure under state and federal law and maintain compliance with those laws. Financial institutions should be cautious when entering into a business relationship with after-market CBD businesses prior to additional guidance from the FDA. Lastly, the 2018 Farm Bill does not affect the legality of marijuana for medicinal or recreational purposes. Marijuana is still a Schedule 1 drug under the Controlled Substances Act and financial institutions that wish to provide banking services to marijuana businesses should follow FinCEN guidance, but risk federal prosecution despite the Cole Memorandum and assurances by Attorney General Barr.

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CASE LAW UPDATE

by Rick Halbur, Christopher Kamath and Mark Ullery

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Family Ordered to Remove Grain Leg System

by Rick Halbur

Carroll Airport Commission v. Danner et al., No 17-1458, 2018 WL 4360933 (Iowa Ct. App. Sept. 12, 2018).

THE PARTIES: The plaintiff/appellee, the Carroll Airport Commission ("**Commission**"), is an appointed airport commission vested by the City of Carroll, Iowa to control and manage the Arthur N. Neu Municipal Airport. The defendants/appellants, Loren W. Danner and Pan Danner (collectively the "**Danners**"), are Carroll County landowners who built a grain leg in the summer of 2013.

THE FACTS: In January 2013, the Danners applied for and obtained a permit from the Carroll County Zoning Administrator to build a grain leg. The permit was not provided to the Commission at the time that it was issued to the Danners. After the Danners finished building the grain leg in June 2013, the Commission contacted the Federal Aviation Administration ("**FAA**") and asked this federal agency to complete an aeronautical study of the grain leg and its impact on flying near the airport. The FAA completed its study and subsequently issued a letter stating that the grain leg exceeded obstruction standards, but the structure would not be a "hazard to air navigation" so long as the Danners painted the grain leg and added red lights to it. The Danners complied with these two conditions, and the FAA also increased the minimum descent altitude for the airport, meaning that pilots had to approach the airport at higher altitudes. Despite the FAA's findings and the Danners' compliance with the FAA's conditions, the Commission filed a lawsuit against the Danners alleging that the grain leg was an "airport hazard" under applicable local ordinances and Iowa law. Further, an "airport hazard" under local and state law also constitutes a "public nuisance" under state law. The district court agreed with the Commission and found that the grain leg was a "public nuisance" that needed to be removed or modified at the Danners' expense. The projected cost to tear down the entire grain leg was projected to be in excess of $300,000.00. The district court also imposed a $200.00 per day fine upon the Danners from May 1, 2018 until the date the grain leg is taken down.

THE DISPUTE: The Danners appealed from a district court's order requiring the Danners to abate the public nuisance (i.e. remove the grain leg structure or modify the same to be in compliance with local and state zoning ordinances and statutes).

LEGAL ISSUES: The primary issue before the Iowa Court of Appeals was whether the FAA's determination that the grain leg was not a "hazard to air navigation" preempted the Commission's enforcement of state law and local ordinances. If the FAA's determination preempted state law and local ordinances, then the Commission could not require the Danners to remove or modify the grain leg. However, if the FAA's determination did not preempt state law and local ordinances, then the Commission could require the Danners to remove or modify the grain leg.

CONCLUSIONS: The Iowa Court of Appeals held that the state law and local ordinances defining the Danners' grain leg as an "airport hazard" and "public nuisance" were not preempted by the FAA's determination that the grain leg was not a "hazard to air navigation." Thus, the Iowa Court of Appeals held that state law and local ordinances could be enforced against the Danners such that they would be required to remove the grain leg structure or modify the same to be in compliance with local and state zoning ordinances and statutes. The Court of Appeals arrived at this conclusion on the basis that federal law did not "expressly" or "impliedly" preempt state law and local ordinances. The Court of Appeals determined that federal law sets minimum standards for aviation safety, but state and local governments are free to impose stricter safety standards for airports than required by the FAA. The Danners appealed the Court of Appeals decision to the Iowa Supreme Court, and oral arguments were subsequently held on January 23, 2019. The Iowa Supreme Court has not yet ruled on the appeal.

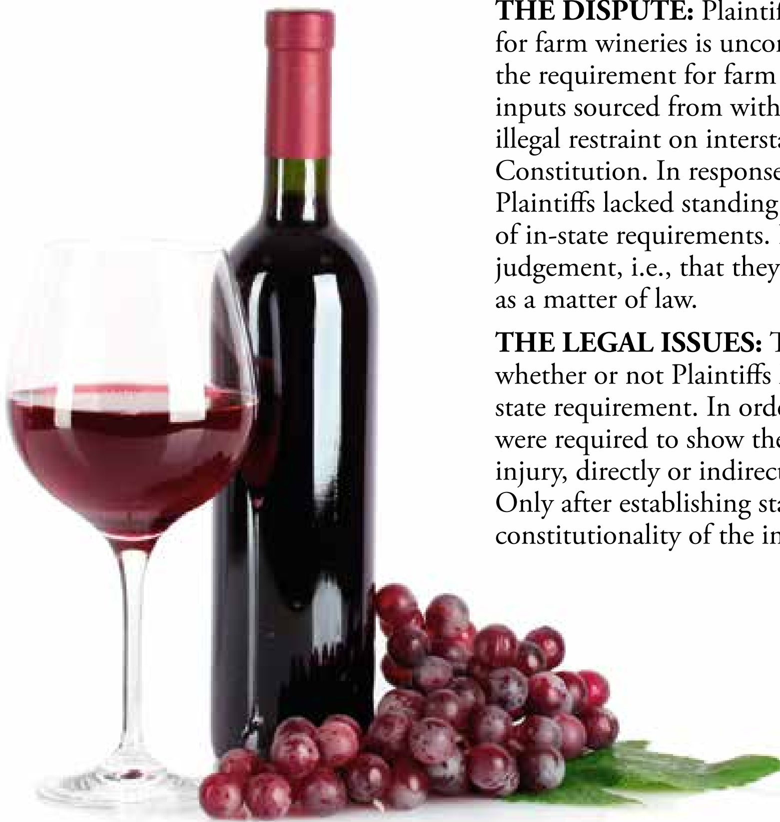
Farm Wineries Lacked Standing to Challenge In-State Sourcing Requirements For Producing Wine.

by Christopher Kamath

Alexis Bailly Vineyard, Inc. & The Next Chapter Winery, LLC, Plaintiffs, v. Comm'r of the MN Dep't of Pub. Safety, Defendant., No. 17-CV-0913, (D. Minn. 2018)

THE PARTIES: Plaintiffs, Alexis Bailly Vineyard, Inc. and The Next Chapter Winery, LLC are farm wineries located in the State of Minnesota. A "farm winery" is a winery operated by the owner of a Minnesota farm that produces table, sparkling, or fortified wines with a majority of the ingredients grown or produced in Minnesota. Defendant is the Commissioner of the Minnesota Department of Public Safety. The Department of Public Safety, through its Division of Alcohol and Gambling Enforcement, oversees the enforcement of the Minnesota's liquor licensing provisions.

THE FACTS: Minnesota uses a three-tier licensing system to regulate the manufacture and sale of alcoholic beverages. Under this system, separate licenses are required for manufacturing, wholesale distribution, and the retail sale of alcohol. A business may only hold one license, which authorizes different types of sales. For example, a wine manufacturer may sell its products to wholesalers, but not directly to consumers. However, Minnesota provides an exception for farm wineries, which may sell directly to wholesalers, to retailers, and to consumers. Plaintiffs operate as farm wineries and claim they cannot expand their operations because they cannot consistently obtain the necessary quantity and quality of inputs to support expanding their operations if 51% of the inputs must originate in Minnesota.



THE DISPUTE: Plaintiffs argued that the in-state requirement for farm wineries is unconstitutional; more specifically, that the requirement for farm wineries to use a majority of the inputs sourced from within the state to produce wine is an illegal restraint on interstate commerce in violation of the U.S. Constitution. In response, the Commissioner argued that the Plaintiffs lacked standing to challenge the constitutionality of in-state requirements. Both parties moved for summary judgement, i.e., that they were entitled to a ruling in their favor as a matter of law.

THE LEGAL ISSUES: The primary issue before the court was whether or not Plaintiffs had standing to challenge the in-state requirement. In order to establish standing, the Plaintiffs were required to show they suffered some kind of economic injury, directly or indirectly, from the challenged regulation. Only after establishing standing would the court consider the constitutionality of the in-state requirement.

CONCLUSION: The court held that the Plaintiffs had, in fact, suffered an economic injury; however, the injury was not caused by the in-state requirement but their choice to remain farm wineries. The court reasoned that the Plaintiffs could give up their farm winery licenses and become wine manufacturers, which are not subject to the in-state sourcing requirements. The Plaintiffs countered that they would lose the right to sell directly to consumers if they became wine manufacturers. The court found this argument unpersuasive because the claimed injury was Plaintiffs' ability to expand their business operations and not their ability to sell directly to consumers. According to the court, there is no right to sell wine directly to the public, and the state is not required to configure its licensure statutes to allow Plaintiffs to conduct business in any fashion they choose. Plaintiffs subsequently appealed the decision and the case is pending review before the 8th Circuit Court of Appeals.

Organic Farmers Cannot Recover Damages in State Court For Loss of Organic Certification Caused By Pesticide Drift

by Christopher Kamath

Johnson v. Consumers Coop. Ass'n of Litchfield, No. A18-0517, (Minn. Ct. App. 2019)

THE PARTIES: Oluf and Debra Johnson are organic farmers operating farm fields located in central Minnesota ("Johnsons"). Consumers Cooperative Association is an agricultural cooperative (the "Cooperative").

THE FACTS: In June 2014, the Cooperative sprayed a conventional farm field next to the Johnsons' organic alfalfa field. While spraying, wind caused some of the pesticide to drift onto Johnsons' organic field, contaminating their crops. The Minnesota Department of Agriculture inspected Johnsons' farm the next day and found the presence of pesticides. The Johnsons were ordered to destroy the contaminated crops and the Cooperative was issued a civil penalty. Johnsons subsequently contacted their organic certifier to determine if the field could remain certified as organic. The National Organic Program, an agency within the USDA, reviewed the matter and suspended the field's certification for three years based on federal regulations in the Organic Foods Production Act.

THE DISPUTE: Johnsons sued the Cooperative for damages related to nuisance and negligence, and requested a declaratory judgment that the Cooperative caused the field's organic certification to become suspended. The district court dismissed the claims related to the loss of the field's organic certification. The Johnsons appealed.

THE LEGAL ISSUES: All of the claims brought by the Johnsons required them to prove that the Cooperative was the proximate cause of their damages. In other words, that it was reasonably foreseeable that the Cooperative's spraying would cause the claimed injury.

CONCLUSION: The court held that pesticide drift cannot "cause" loss of organic certification as a matter of law. In 2012, the Minnesota Supreme Court interpreted the federal regulation at issue as only applying to the intentional application of pesticides by the organic producer and held that organic certifiers were not allowed to decertify a field because of accidental pesticide drift. The Johnsons argued that the Minnesota Supreme Court erred in its interpretation of the regulation. Further, that the USDA has since issued two enforcement manuals showing that accidental pesticide drift can cause certification loss. Unfortunately, the Minnesota Court of Appeals is bound by Minnesota Supreme Court precedent, not the manuals of the USDA. The true cause of Johnsons' damages was the erroneous decertification by the National Organic Program. The Johnsons must seek remedy in federal district court or appeal to the Minnesota Supreme Court.

Under the Endangered Species Act, An Area of Land is Eligible for Designation as "Critical Habitat" Only if it is "Habitat" for the Species

by Mark Ullery

Weyerhaeuser Company v. United States Fish and Wildlife Service, 139 S. Ct. 361 (2018).

THE PARTIES: This case involves private landowners who sued the U.S. Fish and Wildlife Service (the "Service") after the Service proposed designating a parcel of land owned by them (referred to as "Unit 1") as "critical habitat" for an endangered frog. The Service administers the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., (the "ESA") on behalf of the Secretary of the Interior.

THE FACTS: In 2001, the Service listed the dusky gopher frog as an endangered species under the ESA, which required the Service to designate "critical habitat" for the frog. The Service proposed to designate Unit 1 as critical habitat, even though the frog had not been seen there since 1965 and the land would require modification in order to support a sustained population of the species.

THE DISPUTE: The landowners challenged the proposed designation, arguing that the frog could not currently survive on Unit 1, but the Fifth Circuit Court of Appeals rejected the suggestion that the definition of critical habitat requires any habitability requirement. The landowners also challenged the Service's decision not to exclude Unit 1 from the designation based upon the negative economic impact the designation would have on them.

LEGAL ISSUES: The United States Supreme Court granted certiorari to consider (1) whether "critical habitat" under the ESA must also be habitat; and (2) whether the Service's decision not to exclude a certain area from critical habitat because of the economic impact of such a designation is reviewable by the federal courts.

CONCLUSIONS: The Supreme Court held that an area is eligible for designation as critical habitat under the ESA only if it is habitat for the species. The Court also held that the Service's decision not to exclude Unit 1 from the frog's critical habitat was subject to judicial review. The Court remanded the case to the Fifth Circuit for further proceedings, to include interpreting the term "habitat" (an undefined term under ESA) which the Fifth Circuit had not done given its erroneous conclusion that "critical habitat" designations were not limited to areas that qualified as habitat.

Language in Deed Did Not Create an Express Easement Benefiting Grantee's Property

by Mark Ullery

Kalahar-Grissom v. Stroschein, 2019 WL 510055 (Minn. App. 2019).

THE PARTIES: This case involves an easement dispute between two siblings owning adjoining parcels of land (referred to as "Parcel A" and "Parcel B").

THE FACTS: Through various deeds, the parties' mother conveyed Parcel A to her daughter and Parcel B to her son, while retaining ownership of other parcels, including "Parcel C." Parcel A adjoins and is located directly to the west of Parcel B. Parcel A also adjoins and is located directly to the north of Parcel C. Both Parcel A and Parcel C are landlocked. The deed conveying the southern half of Parcel A to the daughter stated that it was "subject…to a 33 foot wide easement for ingress and egress" across an area running along the southern edge of Parcels A and B and connecting to a public road on the east side of Parcel B.

THE DISPUTE: Some years after the conveyances, the son denied the daughter access across Parcel B, and the daughter sued him, alleging that the deed language created an express easement benefiting her parcel. She also sought an easement by necessity (implied easement). The District Court granted summary judgment in her favor on her express easement claim, and the son appealed.

LEGAL ISSUE: The issue presented was whether the District Court had properly determined that the mother's deed created an express easement benefiting the daughter's property across the son's property.

CONCLUSIONS: The Minnesota Court of Appeals reversed the District Court, concluding that the deed did not create an express easement benefiting Parcel A. The Court noted that the deed's language did not state that the easement was for the benefit of Parcel A or that Parcel B was intended to be the burdened or "servient estate"; to the contrary, by using the language "subject to," the deed unambiguously described an easement for the mother's benefit, i.e., for the benefit of Parcel C, with Parcel A being the servient estate. However, since the District Court had not decided the alternative implied easement claim, the Court of Appeals remanded the case to the District Court for further proceedings on that claim, as well as on a related nuisance claim.

WMG Appeals the Grant of Summary Judgment to one of its Members on a Breach-of-Warranty-Deed Claim

by Rick Halbur

Goche v. WMG, L.C., No. 18-0793, 2019 WL 1057105 (Iowa Ct. App. March 6, 2019).

THE PARTIES: The defendant/appellant, WMG, L.C. ("**WMG**"), is a limited liability company owned by four siblings – Joseph Goche, Michael Goche, Jeanne Goche-Horihan, and Renee Afshar. One of the siblings, Joseph, is the plaintiff/appellee in this appeal.

THE FACTS: WMG previously owned farmland in Iowa and was managed by Joseph. In February 2017, WMG announced a special meeting. The meeting notice contained several proposed resolutions, including removal of Joseph as a manager of WMG and a pro rata distribution of WMG's real property to the four members (i.e. the four siblings). One resolution proposed that "Members and Managers acknowledge, consent, and agree that the Parcels shall be distributed to the Members via warranty deed and subject to existing liens for real estate taxes and special assessments ...." At the special meeting, three of the four members voted to remove Joseph as a manager. Also during the February 2017 meeting, three of four members voted to distribute the farmland by warranty deed to the members, effective March 2, 2017. Joseph cast the sole dissenting vote in both instances. Michael, as manager of WMG, executed the warranty deeds on February 25, 2017. The warranty deeds inaccurately stated that the real estate was "free and clear of all liens and encumbrances." The property was actually encumbered by unpaid property taxes in the amount of $1,689.00 and unpaid drainage assessments of $31,572.59. In April 2017, Joseph filed a lawsuit alleging that WMG owed him damages based on the inaccurate information in the warranty deed. WMG answered and sought reformation of the warranty deed. Joseph then sought summary judgment on his breach-of-deed claim. The district court granted partial summary judgment to Joseph and awarded him $ 32,216.59 in damages. WMG subsequently appealed to the Iowa Court of Appeals.

LEGAL ISSUES: The primary issue on appeal was whether the district court properly granted summary judgment in a favor of Joseph and against WMG. WMG argued that the district court improperly granted Joseph's summary judgment motion because there was a genuine factual dispute as to whether the warranty deed reflected the "true intent" of the parties in conveying the real estate. Specifically, WMG argued that a fact finder could determine that the true intent of the parties was to convey the real estate subject to existing liens and assessments. In support of this argument, WMG argued that the February 2017 meeting resolution expressly stated that any distribution of real estate would be "subject to existing liens for real estate taxes and special assessments." Joseph argued that the district court correctly determined that the legal doctrine of "merger" applied such that above-referenced resolution language "merged" into the warranty deed, which provided that no such liens and/or assessments existed at the time of the conveyance. Joseph argued that the language of the warranty deed governed the dispute and that he was harmed in excess of $30,000.00 because the subject real estate was not conveyed to him "free and clear of all liens and encumbrances," contrary to the express language of the warranty deed.

CONCLUSIONS: The Iowa Court of Appeals agreed with WMG and reversed the district court's grant of summary judgment in favor of Joseph. Specifically, the Court of Appeals found that WMG had shown the existence of a genuine fact issue regarding the true intent of the parties in conveying the real estate and whether the warranty deed should be reformed to reflect that the real estate should be conveyed subject to existing liens and assessments. The Iowa Court of Appeals determined that the district court improperly granted summary judgment because the district court erroneously determined that there was no genuine issue of material fact where, in fact, such a dispute existed. Specifically, the Iowa Court of Appeals found that a fact finder could discern that the evidence proffered by WMG showed that all of the parties understood that the real estate would be conveyed subject to existing liens and assessments such that the warranty deed's language to the contrary may be subject to reformation as requested by WMG.

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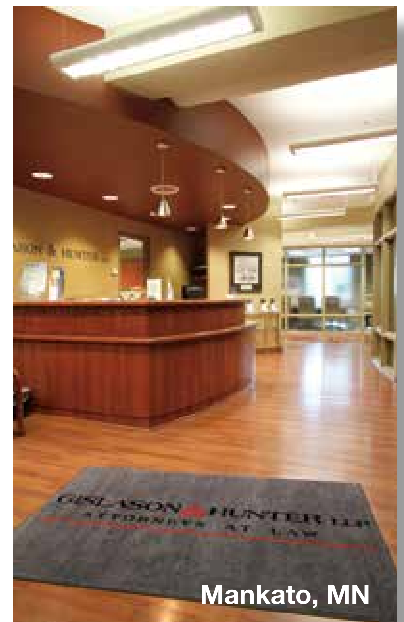

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