STATUTORY AND CONTRACTUAL ISSUES IMPACTING AGRICULTURAL LAND OWNERSHIP

Real Estate Transactions
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1. Farm Tenancies.

1) Farm leases are created by contract as with other tenancies. However, Iowa law provides that the termination date for farm tenancies must be March 1 in the year the lease terminates. See Iowa Code § 562.5 which provides:

> "In the case of a farm tenancy, the notice must fix the termination of the farm tenancy to take place on the first day of March, except in cases of a mere cropper, whose farm tenancy shall terminate when the crop is harvested. However, if the crop is corn, the termination shall not be later than the first day of December, unless otherwise agreed upon."
> Also, see Iowa Code §562.6:
> "If a written agreement is made fixing the time of the termination of a tenancy, the tenancy shall terminate at the time agreed upon, without notice. Except for a farm tenant who is a mere cropper or a person who holds a farm tenancy with an acreage of less than forty acres where an animal feeding operation is the primary use of the acreage, a farm tenancy shall continue beyond the agreed term for the following crop year and otherwise upon the same terms and conditions as the original lease unless written notice for termination is served upon either party or a successor of the party in the manner provided in section 562.7, whereupon the farm tenancy shall terminate March 1 following. However, the tenancy shall not continue

because of an absence of notice if there is default in the performance of the existing rental agreement."

Note: In the 2016 legislative session, the Iowa legislature enacted, HF 2344, in response to some confusion generated by the *Auen v. Auen* case (cited and discussed below) requiring that an agreement to terminate a lease for farmland be in writing.

Iowa Code §562.1A defines a farm tenancy as "a leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land, including by grazing or supplying feed to the livestock." This section also defines an animal feeding operation the same as defined in section 459.102 ("a lot, yard, corral, building, or other area in which animals are confined and fed and maintained for forty-five days or more in any twelve-month period, and all structures used for the storage of manure from animals in the operation. Except as required for a national pollutant discharge elimination system permit required pursuant to the federal Water Pollution Control Act, 33 U.S.C. ch. 26, as amended, an animal feeding operation does not include a livestock market.")

Foster v. Schwickerath, 780 N.W.2d 746 (Iowa Ct. App. 2009). Landlord notified tenant of termination of the tenancy before Sept. 1, but the notice stated the tenancy would terminate at the end of the calendar year. The court noted that the notice of termination of farm tenancy must fix the termination on the first day of March. However, even though the notice improperly set the termination date at the end of the calendar year, the court ruled that a wrong termination date did not nullify the notice and that the notice of termination was valid for a termination date of March 1.

2) Crop Residue. In 2010 Chapter 562 was amended to add the following section on legal rights to crop residue:
"562.5A Farm tenancy — right to take part of a harvested crop's aboveground plant. Unless otherwise agreed to in writing by a lessor and farm tenant, a farm tenant may take any part of the aboveground part of a plant associated with a crop, at the time of harvest or after the harvest, until the farm tenancy terminates as provided in this chapter."

3) Termination

a. When and How

Iowa Code §562.7 provides:

"Written notice shall be served upon either party or a successor of the party by using one of the following methods:

1. By delivery of the notice, on or before September 1, with acceptance of service to be signed by the party to the lease or a successor of the party, receiving the notice.

2. By serving the notice, on or before September 1, personally, or if personal service has been tried and cannot be achieved, by publication, on the same conditions, and in the same manner as is provided for the service of original notices, except that when the notice is served by publication no affidavit is required. Service by publication is completed on the day of the last publication.

3. By mailing the notice before September 1 by certified mail. Notice served by certified mail is made and completed when the notice is enclosed in a sealed envelope, with the proper postage on the envelope, addressed to the party or a successor of the party at the last known mailing address and deposited in a mail receptacle provided by the United States postal service."

Note: Certified mail is the most often used option for method to give notice of termination. Iowa Code §618.15(1) defines certified mail as mail service provided by the U.S. Post Office where the sender is provided with a receipt to prove mailing. Note that notice of termination is not required by 562.7(3) to be delivered by restricted certified mail (defined in 618.15(2) as certified mail "delivered to addressee only"). Also, acceptance of the notice is not required for completion of service by certified mail. However, the sender must have proof of refusal, e.g., notice marked by postal service as "Returned to Sender", to have completion of service. See Long v. Crum, 267 N.W.2d 407 (Iowa 1978) and Escher v. Morrison, 278 N.W.2d 9 (Iowa 1979) interpreting previous version of current law.

Note: The validity of the certified mail termination procedures for farm tenancies have come into question following the Iowa Supreme Court's decision in War Eagle Village Apartments v. Plummer, 775 N.W.2d 715 (Iowa 2009). In this case the court found that notice of FED hearing by certified mail in a residential lease violated Due Process under the Iowa Constitution. While there may be concerns that the War Eagle analysis could be applied to farm lease terminations, it would appear that the circumstances under farm lease terminations are distinguishable from FED hearings – primarily because of the much shorter time period involved in notice of FED hearings, because there is no hearing for farm lease terminations, and because there are generally no tenant defenses to a farm lease termination notice.

b. Effect of Failure to Terminate

Under 562.6, a farm lease for a term of years continues past the contractual term on a year-to-year basis unless it is terminated prior to September 1 of the final year of the contractual term. While usually it is the landlord who desires to terminate a lease and is therefore required to give notice of termination, 562.6 also applies to tenants who wish to terminate a farm lease. *Pollock v. Pollock, 72 N.W.2d 483, 485 (Iowa 1955).* In *Pollock*, the court rejected the argument that if notice of termination is not given in the final year of a lease, the lease would continue for only one year and then terminate automatically without notice. *Id.* at 485-486. The court ruled that a farm tenancy continues year to year until notice of termination is given. *Id.*

c. Effect of Tenancy on Forfeiture or Foreclosure

In *Ganzer v. Pfab, 360 N.W.2d 754 (Iowa 1985)*, a contract vendee entered into a one-year farm lease with a third-party tenant. The one-year lease was not terminated by the contract vendee prior to September 1 of the year of the lease. The contract vendor served notice of forfeiture on the contract vendee and the tenant in March of the next year. The court ruled that the lease was not properly terminated prior to September 1, stating: "The broad protection the statute provides for farm tenants should not, absent a clear statement of legislative intent, be subjected to a judicial exception in cases where the landlord's rights in the premises are cut off by a forfeiture occurring after the statutory notice date for termination of farm tenancies."

In *Jamison v. Knosby, 423 N.W.2d 2 (Iowa 1988)*, a contract vendee entered into a three-year lease with a third-party tenant just prior to defaulting on the underlying installment real estate contract. The lease was recorded with the county recorder. The contract vendor attempted forfeiture of the real estate contract by serving the contract vendee with notice of forfeiture. However, the tenant was not served. The tenant considered the forfeiture ineffective because he had not been served with notice of forfeiture of the real estate contract or notice of termination of farm tenancy. *Id.* at 4. The contract vendor considered the tenant's rights extinguished by the forfeiture. *Id.* The court ruled that the tenant was a person in possession of the farm and "[f]ailure to serve notice of forfeiture on a person in possession under Iowa Code section 656.2 renders the forfeiture

ineffective. *Fulton v. Chase, 240 Iowa 771, 773-74, 37 N.W.2d 920, 921 (1949).*" *Id.* at 5.

However, a tenant under an oral lease where no factors existed to give the foreclosing creditor notice that the tenant was a party in possession was not entitled to notice of forfeiture. *Dreesen v. Leckband, 479 N.W.2d 620 (Iowa App. 1991).*

In *Kansas City Life Ins. Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)* a foreclosing creditor failed to terminate a farm tenancy created by the appointed receiver. The creditor contended that the filing of the foreclosure petition and its subsequent indexing in the *lis pendens* index provided the tenant with constructive notice of the foreclosure. *Id.* at 891. However, the court upheld the tenant's rights under the lease.

4) Exceptions to Notice Requirements.

a. Sharecropper

Chapter 562 excludes "mere croppers" from requirements for termination date and notice of termination. While "mere croppers" are not defined in the Code, the Iowa Supreme Court distinguished croppers from tenants on the basis that a tenant has an interest in the land and a property right in the crop while a cropper has no such interest but receives a portion of the crop as pay for labor. *Dopheide v. Schoeppner, 163 N.W.2d 360, 362 (Iowa 1964).* Custom farming agreements (i.e., contractual arrangements where an operator is hired to perform specific crop raising services) are extensively used today in Iowa and like cropper agreements are not subject to Iowa's farm tenancy law.

b. Failure to Occupy and Cultivate – exception deleted by 2006 legislation.

Before July 1, 2006, Iowa Code §562.6 required that a farm tenant occupy and cultivate farmland for the notice of termination requirements to apply. See *Morling v. Schmidt, 299 N.W.2d 480, 481 (Iowa 1980)* (notice of termination for an oral lease for pastureland was not required because "notice under section 562.5 is required only when the land is both occupied and under cultivation. The land in question was not cultivated. It was used for grazing only."), *Dorsey v. Dorsey, 545 N.W.2d 328, 331-332 (Iowa App. 1996),* (the court ruled that pasture land was not under cultivation.), and *Garnas v. Bone, 637 N.W.2d 114 (Iowa 2001)*(tenant's mowing of land pursuant to a CRP agreement was not cultivation so as to require notice of termination under the statute).

As of July 1, 2006, Iowa Code §562.1A defines farm tenancy as a "leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land, including by grazing or supplying feed to the livestock."

c. Acreage of Less Than 40 Acres – exception deleted by 2013 legislation (except for animal feeding operations)

Senate File 316 effective July 1, 2013 amended Iowa Code §562.6 (Agreement for Termination) which requires written notice of termination of farm leases by Sept. 1 of the final year of the lease. This legislation eliminated the long-standing exemption to the Sept. 1 farm rental termination notice requirements for farms of less than 40 acres, with one exception. To avoid impacting hog barn, cattle feedlot or other animal feeding operation leases, the amendment does not apply to farms of less than 40 acres where the primary use is an animal feeding operation as defined by Iowa Code §459.102. An animal feeding operation is a lot, yard, corral, building or other area where livestock are confined and fed and maintained for 45 days or more in a 12-month period. An animal

feeding operation does not include pasture or any other area where there is vegetation, forage growth or crop residue.

In summary, after July 1, 2013, written notice must be given by Sept. 1 of the final year of a farm lease to terminate the lease for the following crop year for all farm leases, except for farms of less than 40 acres where the primary use is an animal feeding operation. Pastures are not animal feeding operations and therefore pasture leases, as well as crop leases, of less than 40 acres are now subject to the Sept. 1 termination deadline. If there is no termination notice by the Sept. 1 deadline, the farm lease automatically continues under the same terms and conditions for the next crop year.

d. Default

Iowa Code §562.6 provides that a farm "tenancy shall not continue because of absence of notice if there is default in the performance of the existing rental agreement." The most obvious default is failure to pay rent. If failure to pay occurs before September 1 of a one-year lease, then the landlord can easily give notice of termination and need not depend on the default exclusion to notice of termination. However, if the failure to pay occurs in other than the last year of a multi-year lease or after the September 1 deadline for notice, the landlord must depend on the exclusion to terminate the lease.

While there can be defaults other than failure to pay rent, termination based on such defaults run the risk of being considered by the courts as attempts to terminate a lease after the September 1 deadline has passed. To avoid this situation, tenants should be given notice of default as soon as the landlord is aware of the default and be allowed a period of time to correct the problem. See *Village Development Co., Ltd. v. Hubbard*, 214 N.W.2d 178 (Iowa 1974) and also *McElwee v. Devault*, 120 N.W.2d 451 (Iowa 1963), a case in which the landlord notified the tenant of several defaults of the lease in the middle of the first year of a three-year lease. The court supported eviction of the tenant and found that the tenant's actions, "while not a flagrant violation of the lease" were nonetheless violations and the landlord was fair in giving timely notice to the tenant. *Id.* at 454. The court seemed to indicate that the decision might have been different if this had been a one-year lease when it noted that the landlord should not have to put up with such a tenant for the remaining two crop years of the lease.

What conduct by the tenant constitutes default? In *Thompson v. Mattox*, *2005 Iowa App. LEXIS 125 (Feb. 24, 2005)*, the court discussed the duty of a tenant to farm in a competent manner. Because the parties in *Thompson* did not have a written lease, the court found that the landlord did not have a right to "control and supervise" the tenant Mattox's farming practices. *Id.* The landlord brought suit for breach of contract, alleging numerous deficiencies in the way Mattox conducted his farming activities, that he failed to use nitrogen, use proper equipment, and plant crops on time. Mattox offered evidence to rebut each and every claim of the landlord, arguing that his above average yields, appearance in *Wallaces' Farmer* magazine, and his ability to survive the farm crisis were evidence of his proficiency as a farmer. *Id.* The trial court found in favor of Mattox, agreeing with his quote: "there's a lot of right ways to farm." The Court awarded Mattox damages of $62,054.21 on his counterclaims, which requested damages for lost profits from not farming the farm in 2002, as well as damages for emotional distress as a result of wrongful removal. The Court of Appeals affirmed, taxing the costs of the appeal to the landlord. *Id.*

e. Agreement to Terminate

Prior to July 1, 2016, Iowa Code section 562.6 provided in part: "If an agreement is made fixing the time of the termination of a tenancy, the tenancy shall terminate at the time agreed upon, without notice." As noted previously, in 2016 the Iowa legislature amended Iowa Code §562.6 to require an agreement to terminate a lease for farmland be in writing, in response to *Auen v. Auen*, No. 13-1501, 851 N.W. 2d 547 (Iowa Ct. App. May 14, 2014) (table, unpublished disposition). This amendment went into effect on July 1, 2016.

(1) The right of parties to a lease to waive the notice requirements in Iowa's farm tenancy statute was the issue in *Schmitz v. Sondag, 334 N.W.2d 362 (Iowa App. 1983)*. The defendant landlord argued that the notice to terminate requirements of 562.6 did not apply because of the following clause in the lease:

> The second party [lessee] covenants with the first party [lessor] that at the expiration of the term of this lease he will yield up the possession to the first party, without further demand or notice ... and second party specifically waives any notice of cancellation or termination of said lease and specifically agrees that this lease shall not be extended by virtue of failure to give notice of cancellation or termination thereof. *Id*. at 364.

The court ruled that the clauses in the lease could not nullify the tenant protections in section 562.7. *Id.* at 365.

The court has upheld the right of the parties to agree to terminate without statutory required notice. *Id.* at 365; *Crittenden v. Jensen, 1 N.W.2d 669 (Iowa 1942)*. In that case the parties entered into an agreement to terminate the lease during the crop year after the original written lease was signed. The court ruled:

> The tenancy was thus ended, and the statute has no application. After the lease had been thus terminated by agreement of the parties, no further notice was required. This statute does not mean that a landlord and tenant cannot agree to cancel or terminate a lease, and that such termination can only be brought about by serving the notice provided for in the section. *Id.* at 670.

Note: The agreement for termination was executed by the parties before the statutory deadline for notice of termination. However, no subsequent notice of termination was given. The court did not discuss whether the fact that the agreement to terminate was executed before the statutory deadline entered into its decision.

Note: Rather than relying on the validity of an agreement to terminate the lease after execution of the lease, some landlords simply enter into one-year farm leases and routinely give written notice of termination every year before September 1. This provides the landlord with the flexibility to evaluate the tenant's performance and the terms of the lease after each crop year. If the landlord is satisfied, another lease with the same tenant and with the same terms can be executed. If not, the landlord may negotiate another lease. However, this practice puts tenants in a position of not being able to plan for the next crop year, particularly if the landlord delays making a decision for a substantial period of time.

f. Waiver and Estoppel

The parties to a farm lease may also waive their rights to statutory notice of termination. In *Laughlin v. Hall, 20 N.W.2d 415 (Iowa 1945)*, the court ruled noted that when the landlord told the tenant she would get another tenant, the tenant did not object and in fact

agreed that it was best for the landlord to get another tenant. *Id.* The court ruled that the tenant consented to the lease to the new tenant and waived statutory notice of termination *Id.* at 417.

g. Life estates and farm leases. Iowa Code section 562.8, Termination of life estate — farm tenancy, provides:

"Upon the termination of a life estate, a farm tenancy granted by the life tenant shall continue until the following March 1 except that if the life estate terminates between September 1 and the following March 1 inclusively, then the farm tenancy shall continue for that year as provided by section 562.6 and continue until the holder of the successor interest serves notice of termination of the interest in the manner provided by section 562.7. However, if the lease is binding upon the holder of the successor interest by the provision of a trust or by specific commitment of the holder of the successor interest, the lease shall terminate as provided by that provision or commitment. This section does not abrogate the common law doctrine of emblements."

Iowa Code section 562.10, Rental value, provides:

"The holder of the interest succeeding a life estate who is required by section 562.8 or 562.9 to continue a tenancy shall be entitled to a rental amount equal to the prevailing fair market rental amount in the area. If the parties cannot agree on a rental amount, either party may petition the district court for a declaratory judgment setting the rental amount. The costs of the action shall be divided equally between the parties."

Iowa farm lease appellate court decisions:

(1) *Gansen v. Gansen*, No. 14-2006 (Iowa January 22, 2016). The Iowa Supreme Court ruled that two five year farm leases that renewed for four successive five year terms at the sole option of the tenant violated the Iowa Constitution provision (Article I, section 24) restricting ag land leases to terms of no more than twenty years, to the extent the leases exceeded twenty years. The Court noted: (1) a lease that potentially lasts longer than twenty years is not invalid from its inception, but only becomes invalid after the expiration of a twenty-year period; (2) A critical fact was that the landlord was locked in for 25 years at the discretion of the tenant and that Article I, section 24 does not prohibit a landlord and tenant from mutually agreeing to renew a lease beyond twenty years; and (3) Article I, section 24's prohibition on lease terms of over twenty years protects landlords as well as tenants.

(2) *Wischmeier Farms, Inc. v. Wischmeier*, No. 15-0221 (Iowa Ct. App. April 6, 2016). This case involved a family dispute over a farm lease agreement. The lease was a 10-year crop-share lease executed between the Plaintiff farm corporation and the defendant who was the Plaintiff's son. The principal in the farm corporation was the father who died two years into the lease term. Following his death, the non-farming siblings took control of the corporation and filed suit contesting various provisions in the farm lease. On appeal the Court interpreted alleged ambiguities in an addendum to the standard ISBA form lease regarding the tenant's right to use the landlord's farm equipment on other land the tenant farmed that was not owned by the Landlord corporation and the tenant's obligation for maintenance of that equipment. The Court ruled that the

lease did not restrict the use of the farm equipment on other land and that any ambiguity was to be construed against the drafter, the landlord. Further, the Court noted that the tenant had in fact used the equipment on other land prior to his father's death. The Court also ruled the landlord could not sell the equipment that the tenant used in his farm operation. The Court also ruled that maintaining the equipment included making repairs to the equipment. The Court also ruled that as is standard practice in crop share leases, fuel costs were part of machinery and equipment costs to be paid by the tenant and not a crop input to be shared 50-50. The Court then ruled that although the tenant's father had paid one-half of the grain hauling expense, the lease clearly required the tenant to pay this expense. The Court also interpreted a lease provision allowing the tenant to pasture cattle or till the land under lease as would be consistent with good husbandry and "the best crop production that the soil and crop season permit" and rejected the landlord's claims that it could determine which land could be pasture or tilled. The Court then remanded the case to the trial court for a determination of attorney fees and costs under the lease's terms.

(3) *Porter v. Harden*, 891 N.W.2d 420 (Iowa Mar. 10, 2017). The Iowa Supreme Court vacated the May 11, 2016 Iowa Court of Appeals decision finding that one horse qualified a rural acreage verbal rental agreement a "farm tenancy" subject to farm tenancy termination requirements.

The relevant Iowa Code section 562.6 provides, in relevant part:
"Except for a farm tenant who is a mere cropper or a person who holds a farm tenancy with an acreage of less than forty acres where an animal feeding operation is the primary use of the acreage, a farm tenancy shall continue beyond the agreed term for the following crop year and otherwise upon the same terms and conditions as the original lease unless written notice for termination is served upon either party or a successor of the party in the manner provided in section 562.7." (underline added)
In Iowa Code section 562.1A(1) a "farm tenancy" is defined as:
"a leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land, including by grazing or supplying feed to the livestock.

The tenants on a rural acreage (of less than 40 acres) objected to eviction arguing a "farm tenancy" that required statutory termination notice before Sept. 1. They argued that because they grazed one horse on the acreage it qualified as a farm tenancy which required statutory notice of termination before Sep. 1 or it continued for another year. The district court ruled that the grazing of the horse did not establish a farm tenancy, but the appeals court disagreed ruling that although the tenants grazed a horse, "an animal feeding operation" was not "the primary use of the acreage" Thus, the appeals court concluded: "We are left with unambiguous statutory language rendering this acreage a 'farm tenancy.' Under the plain terms of sections 562.5 and 562.7, a September 1 notice of termination of the tenancy as of March 1 would appear to be required, even though the farm tenancy is premised on the grazing of a single horse."

Upon application for further review, the Iowa Supreme Court ruled that "reading the statute as a whole," "land which is not devoted primarily to the production of crops or the care and feeding of livestock cannot be the foundation of a chapter

562 farm tenancy." The Court adopted a "primary purpose test" requiring that under the statute 'land be mostly or primarily devoted to crops or livestock." The Court found that this test "avoids two unreasonable endpoints: (1) that a farm tenancy would not exist unless every acre were turned over to agricultural use or, alternatively (2) that devoting a tiny portion of the property to agricultural use would bring about a farm tenancy." The Court then ruled that the "an" in front of "animal" in the statutory list of species falling within the definition of livestock did "not establish a no-exceptions, single animal rule of qualification." The Court recognized that there may be a time when the raising of a single animal could be deemed a farm tenancy because the lease of a tract of land devoted to maintaining a championship stallion could qualify as a farm tenancy if that was the primary purpose that the tenant occupied the land. The Court also ruled that the legislature could not have intended to exempt animal feeding operations from the termination notice requirements but at the same time require termination notice for a tenancy that would be a farm tenancy because of one horse.

Note: Although it would not have changed the outcome under either the Appeals Court's or Supreme Court's analysis, the grazing of a horse is not an animal feeding operation as defined in section 459.102(4), incorporated by reference in section 562.1A(1). An "animal feeding operation" is defined in section 562.1A(1) as " the same as defined in section 459.102" In section 459.102, an "animal feeding operation" is defined as " a lot, yard, corral, building, or other area in which animals are confined and fed and maintained for forty-five days or more in any twelve-month period, and all structures used for the storage of manure from animals in the operation. . . . "In Chapter 459, an animal feeding operation is a confinement feeding operation which is a totally roofed animal feeding operation. Further, under Iowa Code section 459A.102(17) an "open feedlot operation" is " an unroofed or partially roofed animal feeding operation if crop, vegetation, or forage growth or residue cover is not maintained as part of the animal feeding operation during the period that animals are confined in the animal feeding operation." Because the horse was grazed, i.e., vegetation or forage growth, the tenant's activity keeping the horse should not have qualified as an animal feeding operation under 562.1A(1).

(4) *Hettinger v. City of Strawberry Point*, No. 15-0610 (Iowa Ct. App. May 11, 2016). In this case involving a lease for 85 acres of farmland owned by municipality of Strawberry Point, the primary issues were the town's termination of the farm lease. Specifically, the court ruled:

(a) The lease termination sent by the city clerk was valid.

(b) The tenant was not entitled to the corn stover under Iowa Code §562.5A or as part of the crop. Rather, it belonged to the landlord under the terms of the lease.

(c) The tenant was entitled to the pro-rated unused value of the lime which he had applied in a previous crop year. A lease amendment allocated lime and trace materials over seven years and the tenant was to me reimbursed for any unused portion.

(5) *Hope K. Farms, LLC. v. Gumm*, No. 14-1371 (Iowa Ct. App. June 29, 2016). In this case the tenant farmed his mother's land and after she died the land passed to a trust in which he was a co-trustee. The co-trustees could not agree and

litigation resulted. In that litigation the tenant's current lease was extended through March of 2015 with a new owner of the farm. There were disagreements under the crop share lease with the new owner. In June of 2013, a court ordered the tenant to allow the landlords to farm the farm for that crop year because he had not planted any crops as of that date. Bench trial was held in 2014 and the court ruled:

> ". . . Gumm had materially breached the lease by refusing to communicate with the plaintiffs regarding the farm operation; ignoring written and spoken directives regarding preparation of the real estate for planting, type of seed to be planted, and application of anhydrous, liquid nitrogen, and fertilizer; failing to seek authorization from the plaintiffs regarding expenses; failing to prepare the land and plant crops in a timely fashion; and impeding the plaintiffs' right of entry and inspection. The court found that Gumm had no right, interest, or ownership of the crops harvested in the 2013 or 2014 crop year due to his material breach and his failure to cure the breach in spite of multiple opportunities to do so. The court terminated his lease and ordered Gumm to pay court costs and $1000 in attorney fees to both the Schillings and Hope K. Farms."

The appeals court affirmed the district court ruling that there was sufficient evidence that the tenant had breached the lease. The court also rejected the tenant's claims of waiver by the landlords because it was not raised as an affirmative defense, and even if it was not waived, the court stated that there was no evidence of waiver by the landlord or the preceding family trust.

(6) *Iowa Arboretum, Inc. v. Iowa 4H Foundation*, No. 15-0740 (Iowa Sup. Ct. Oct. 28, 2016). The Iowa Supreme Court, reviewing a 99-year lease, ruled that Iowa Const. art. I, § 24 which limits a "lease or grant of agricultural lands" to a term of no more twenty years does not apply to land under lease if the land that could be used for agricultural purposes is in fact leased and used for nonagricultural purposes.

(7) *Gent. v. Gent*, No. 17-1677 (Iowa Ct. App. Oct. 10, 2018). Gent entered into a 20 year lease with his parents. His brother challenged the lease on several grounds, including that Gent was committing waste because he removed terraces, didn't clear downed trees, and removed a building without permission of the landlords, and requested a permanent injunction. The Court overturned the District Court's decision and ruled for Gent finding the brother's testimony not credible and that Gent would have no economic reason to harm the land since he had a 20 year lease. The court also found that if Gent violated the lease, the brother had other adequate legal remedies at law.

5) Practical Resources and Considerations regarding Farm Tenancies and Leasing:

a. While there are numerous references on farm leasing and Iowa farm lease law, the Center for Agricultural Law and Taxation at Iowa State University published an article entitled, "Iowa Farm Leases: A Legal Review," available at www.calt.iastate.edu/article/iowa-farm-leases-legal-review. The article provides helpful links to the Iowa State University Extension Service Ag Decision Maker forms database and discusses issues such as the death of a party to a lease, holdover tenants, and issues involving breaches of farm leases, including nonpayment of rent. Another unique website of particular interest to some landowners and their attorneys is the Drake University Agricultural Law Center's Sustainable Agricultural Land Tenure Initiative. As stated

on the homepage, "[t]his site is intended to assist landowners and farmers develop farm lease arrangements that are profitable and sustainable for the landowner, the farmer, the community, and the land." The site includes a guide entitled "The Landowner's Guide to Sustainable Farm Leasing."

b. Additional resources: Farm Lease Forms Available:
    i. Iowa Farm Lease Forms:
        1. Iowa Cash Rent Farm Lease (Short Form), available at http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-16.html
        2. Iowa Cash Rent Farm Lease (Long Form), available at http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-12.html
    ii. Midwest Forms:
        1. Midwest Plan Service Farm Lease Forms, available at https://www-mwps.sws.iastate.edu/
            a. Forms available: Cash Farm Lease, Crop-share or hybrid lease, irrigation crop-share or cash lease, pasture lease, farm building or livestock facility lease, farm machinery lease
    iii. North Central Farm Management Extension Committee Forms, available at http://aglease101.org/DocLib/default.aspx

6) Trends in farm leasing: There is a wealth of information available regarding farm lease statistics and information. Some good sources: Iowa State University Extension Ag Decision Maker Website, available at http://www.extension.iastate.edu/AGDm/wdleasing.html.

- Hybrid/Flex Lease: A flexible cash lease allows for the final rental rate to be determined by a formula that takes into account "actual yields" and "actual selling prices" available to the tenant during the crop year. Cash rents may be flexed for changes in crop price only, both crop price and yields, yields only, or flexing rent on changes in costs of inputs. An attorney might think about including some type of "Variable Cash Rent Agreement" section in the farm lease.

ii. Flex leases enable a landowner to share in the additional income and benefit in times of above-normal yields

iii. Risk may be reduced for the operator, but parties need to communicate and the flex leasing agreement needs to be in writing

iv. Additional reporting requirements

b. Lease Supplements:

i. Tile and Drainage Improvements

(1) Lease Supplement for Use in Obtaining Tile and Drainage Improvements between Land Owners and Tenants, available at http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-29.html

(2) In an agreement for tile and drainage improvements between Landlords and Tenants, the signers agree that the improvements (they agree upon and list in the written farm lease) will be completed on the described farm on or before a specific date listed.

(3) The Landlord and Tenant agree on who will pay the costs necessary to complete the improvement, who will provide labor, the estimated value of the project, and whether the tenant's contribution will reduce the cash rental rate. This agreement can be signed as a separate contract or a supplement to the written farm lease.

ii. Lease Supplement for Obtaining Conservation Practices and Controlling Soil Loss, publication available at http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-08.html

(1) Landlord and Tenant agree to follow specific conservation practices that will control soil loss for a field or farm.

(2) Contains provisions relating to ground cover, cost-share payments available through the Natural Resource and Conservation Service (NRCS), soil loss limits, cropping practices that will be required by Landlord, such as contour planting and tiling, no-till on designated fields, etc.

(3) The purpose is to encourage cooperation between landlords and tenants to maintain conservation practices. The theory is that a tenant is not likely to make a significant contribution to soil conservation unless the costs are shared and tenant is assured repayment, etc.

iii. Investing in improvements

(1) The parties agree, in writing, on the improvements to be made to the property. The parties will want to agree to a rate of depreciation on the improvement and the estimated value of the tenant's investment. William Edwards, an extension economist at Iowa Statute University recommends that livestock production facilities are depreciated over 10-29 years at a rate of 5-10%. Machinery storage and grain bins should be depreciated over 15-20 years at a 5-7% rate. Tile should be depreciated over 10-15 years at a rate of 7-10%. Fences should be depreciated over 15-20 years at an annual rate of 5-7%. Lime should be depreciated over 3-5 years at an annual rate of 20-33%.

(2) What are some typical improvements?

(a) Farm structures and repairs

(b) Limestone

(c) Commercial fertilizer

c. Checklist: Does your written lease discuss when and how rent will be paid and penalties for non-payment, sub-leasing of the property, assignment of the lease, insurance on the property and crop, FSA program payments, termination, reimbursement for crop nutrients, such as lime, default, operation and maintenance, good husbandry, settlement of differences, noxious weed control, prohibited farming practices, fencing, soil conservation provisions, etc.?

d. Analyzing rights and duties of the landlord/tenant and how to handle restrictions on the property**:**

i. Hunting: Does the lease specify who is allowed to hunt on the property? Typically, the tenant is in possession of the property and would enjoy hunting rights. If the landowner wants to retain the right to hunt or possess the property in some way, they should negotiate a provision allowing for hunting in the farm lease.

ii. Fencing: Who is responsible for maintenance of fence? There should be a clear understanding. Typically, the tenant is in possession and would be responsible for the creation or maintenance of fences. Attorneys will want to familiarize themselves with their state's fencing laws. Is your state a fence-in or fence-out state?

e. FSA Compliance:

i. Flexible cash rent leases and FSA Farm Programs. Significant increases in crop prices over the last year have farm landlords and tenants with cash rent leases interested in finding alternative cash rent lease arrangements that allow for a more equitable adjustment of rental rates than available under traditional flat cash rent leases without the detailed involvement by the landlord in traditional crop share lease arrangements.

Before entering into any alternative flexible cash rent leases, both parties must make sure their lease will qualify as a cash rent lease under FSA regulations. Under FSA regulations, cash rent tenants are entitled to all of the federal farm program payments while payments under crop share leases must be allocated between the landlord and tenant in the same ratio as the crop is divided. If the lease is reported to FSA as a cash rent lease (with the tenant receiving all program payments) but it does not meet FSA cash rent lease requirements, the tenant could be disqualified from receiving federal farm program payments and required to repay payments already received.

On April 2, 2007, FSA issued Notice DCP-172 to clarify what constitutes a cash rent or crop share lease under federal farm program payment regulations. The Notice gives examples of leases that qualify, and don't qualify. In general, if rent is linked to a farm's yield or crop revenue from the individual farm, the lease is a crop share lease. However, if the flexible rental paid is based on factors not linked to the individual farm (for example, county average yields or an average price in the county or at a particular elevator, etc.), it should qualify as a cash rent lease. A copy of Notice DCP-172 may be found at: http://www.fsa.usda.gov/Internet/FSA_Notice/dcp_172.pdf.

ii. FSA Power of Attorney: FSA Form 211 is used to appoint someone to act on behalf of another as attorney-in-fact. Grantors must have their signature witnessed by an FSA employee or notarized. By signing the form, a landlord gives a tenant on the farm the ability to make most of the decisions with the FSA regarding farm programs. A cash rent landlord is not eligible for farm program payments because the tenant is deemed "at-risk" in this situation. FSA-211 Form available at, http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_018134.pdf.

iii. FSA Payment Limitation Rules: Attorneys should be aware of the FSA provisions and modifications implemented under the 2008 and 2014 Farm Bill. Publication available at https://www.calt.iastate.edu/congress-passes-new-farm-bill

iv. Sodbuster/Swampbuster Compliance: Landlords and tenants should ensure they are in compliance with NRCS Conservation provisions, such as wetlands or highly erodible land requirements. Legal Issue: What if a landlord decides to install additional tile and NRCS makes a determination that the installation of tile and tenant's subsequent farming of the property violate Swampbuster? Is tenant ineligible for farm program payments?

2. Iowa Statutory Landlord Liens.

a. State Statutory Ag Liens Under Article 9. Article 9, as revised and effective July 1, 2001, applies to agricultural liens. Iowa Code §554.9109(1)(b).

b. Iowa Statutory Liens Qualifying as Agricultural Liens:

i. Landlord's Lien, Iowa Code Chapter 570.
ii. Agricultural Supply Dealer's Lien, Chapter 570A.
iii. Harvester's Lien, Chapter 571.
iv. Custom Cattle Feedlot Lien, Chapter 579A.
v. Commodity Production Contract Lien, Chapter 579B.
vi. Lien for Services of Animals, Chapter 580. (owner, keeper or artificial inseminator has prior lien on progeny of a stallion, bull, or jack)
vii. Veterinarian's Lien, Chapter 581.

c. Filing Required to Perfect Ag Liens. Iowa Code §554.9310 provides:
(1) "A financing statement must be filed to perfect all . . . agricultural liens."
(3) "If a secured party assigns a perfected security interest or agricultural lien, a filing under this Article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor."

d. Maintaining a Perfection of an Ag Lien When the Collateral is Moved to Another State. Iowa Code §554.9302 provides: "While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products."

Note: This section provides a different choice of law for ag liens than for security interests under Iowa Code §554.9301 (general rule is that perfection and priority of security interests are governed by the law of the jurisdiction where the debtor is located.)

If agricultural lien collateral leaves the state, the agricultural lien must be perfected in the state where the collateral is moved. If the lien is not perfected in that state, the lien loses its priority during the time the collateral is in that state. See Iowa Code section 554.9302 ("While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.") Also see UCC 9-316, Official Comment 7, Example 10.

e. Continuation of Perfection of Ag Lien Upon Sale and Attachment to Proceeds. Iowa Code §554.9315: "Except as otherwise provided in this Article and in section 554.2403, subsection 2:
a. a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and
b. a security interest attaches to any identifiable proceeds of collateral."

Note: Reading Art. 9 literally, an agricultural lien does not attach to proceeds by the provisions of Art. 9. Any attachment to proceeds by an agricultural lien must arise from the lien statute itself. See 9-322 Official Comment 12. In addition, courts have ruled that an ag lien can attach to proceeds due to the underlying policy of the lien statute and because comment 9 to 554.9315 states that Article 9 does not determine whether a lien extends to proceeds of farm products subject to an ag lien. See In Re Schley discussed below.

Note: Because of the requirements in the two previous sections, one commentator has stated: "In light of the limit on proceeds, and the different filing rules, it might be wise for a creditor relying on an agricultural lien to also get a consensual security agreement. There is no prohibition to having two bites at the apple. Even without a security agreement, if the statute creating the agricultural lien contains an enforcement mechanism, the creditor should be able to enforce its statutory lien under either Part 6 of Article 9 or the statutory mechanism." The Law of Secured Transactions Under the Uniform Commercial Code, Barkley Clark, paragraph 8.09, p. 8-121.

f. Federal Food Security Act and Written Notice – Not Applicable to Ag Liens. Iowa Code §554.9320, Buyer of Goods, provides: "Buyer in ordinary course of business. Except as otherwise provided in subsection 5, a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence."
7 U.S.C. §1631 provides that a buyer who in the ordinary course of business who buys a farm product from a seller engaged in farming operations takes free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest unless, in states such as Iowa, the seller has provided direct written notice of the security interest to the buyer.
Iowa Code §554.9102(4) provides: "For purposes of the Federal Food Security Act, 7 U.S.C. § 1631, written notice shall be considered to be received by the person to whom it was delivered if the notice is delivered in hand to the person, or mailed by certified or registered mail with the proper postage and properly addressed to the person to whom it was sent. The refusal of a person to whom a notice is so mailed to accept delivery of the notice shall be considered receipt."
Note: Compliance with direct notice provisions of Iowa and Federal law to preserve an agricultural lien in proceeds should not be required because the Federal Food Security Act refers to security interests (security interest is defined as an interest in farm products that secures payment or performance of an obligation) and because the Food Security Act has been interpreted to apply to consensual liens, but not nonconsensual liens. See 7 U.S.C. section 1631(e)(refers to security interests created by the seller) and Farm Financing Under Revised Article 9, Linda J. Rusch, American Bankruptcy Law Journal, Vol. 73, p. 211, 245-246 (1999). However, from a practical perspective, in certain situations a producer may want to voluntarily notify a buyer of farm products of the producer's ag lien.

g. Termination. Within 20 days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if there is no obligation secured by the collateral remaining. Iowa Code §554.9513.

h. Priority of Ag Liens. Iowa Code §554.9322(7) provides that a perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien gives priority.
The following chart shows the priority of perfected Iowa Ag Liens in addition to the priority over later perfected UCC security interests and UCC liens:

Iowa Code Chapter	Lien	Priority as provided in statute
570	Landlord's Lien	Any prior security interest and prior perfected lien, except Harvester's Lien, Mechanic's Lien, Custom Cattle Feedlot Lien, Commodity Production Contract Lien, or Veterinarian's Lien. IC 570.1(2)

570A	Ag Supply Dealer's Lien	Feed: Any prior perfected lien or security interest to the extent of the difference in the acquisition price of the livestock and the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater IC 570A.5(3) Other ag supplies: Equal priority to prior perfected lien (except LL's lien or Harvester's lien) and security interest if certified notice sent IC 570A.5(2)
571	Harvester's Lien	Any prior perfected security interest or Landlord's lien IC 571.3A(2)
579A	Custom Cattle Feedlot Lien	Any prior perfected security interest or lien other than a perfected Vet's lien or Emergency care of livestock lien IC 579A.2(5)
579B	Commodity Production Contract Lien	Any prior perfected security interest or lien other than a perfected Vet's lien or Emergency care of livestock lien IC 579B.4(4)
581	Veterinarian's Lien	Any prior perfected security interest or lien except Emergency care of livestock lien IC 581.2(2)
717	Emergency Care of Livestock	Any prior perfected security interest or lien IC 717.4(5)

i. Landlord's Lien, Iowa Code Chapter 570.

(1) A landlord has a lien for the rent on crops grown on the premises, and on any other personal property of the tenant which has been used or kept on the leased premises which is not exempt from execution. Iowa Code §570.1(1).

(2) Iowa Code §570.1, expressly provides that a landlord's lien on farm products has priority over conflicting perfected Article 9 security interests, including those perfected before the landlord's lien was created, if the landlord's lien is perfected by filing a financing statement with the Iowa Secretary of State when the tenant takes possession of leased premises or within 20 days after the tenant takes possession. Iowa Code §570.1(2).

(3) Section 570.1(3) requires that a financing statement "include a statement that it is filed for the purpose of perfecting a landlord's lien." A financing statement perfecting a Landlord's Lien is effective until a termination statement is filed.

(4) The lien continues for one year after the rent is due or six months after the end of the lease, whichever is earlier. Iowa Code §570.2.

(5) The lien may be enforced as follows:

1. Under Iowa Code §570.5, "by the commencement of an action, within the period above prescribed, for the rent alone, in which action the landlord shall be entitled to a writ of attachment, upon filing with the clerk a verified petition, stating that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the petition; and the procedure thereunder shall be the same, as nearly as may be, as in other cases of attachment, except no bond shall be required."
2. Under the general Art. 9 provisions for enforcement of an agricultural lien as provided in chapter 554, article 9, part 6.

Note:

a. Iowa farm lease law requires that the termination date for farm tenancies be March 1 in the year that the lease terminates. Iowa Code §562.5. Thus, because most farm leases begin on March 1 and a tenant takes possession on that date, a financing statement perfecting a landlord's lien on farm products would have to be perfected by March 20 in the year which the lease begins. Under 570.1, a landlord's lien can be perfected prior to

the date of the tenant's possession. It would appear that the landlord's lien would become effective at the time the debtor (tenant) takes possession, normally when the lease begins. Iowa Code §554.9509(1)(a) provides that a financing statement may be filed to perfect an agricultural lien that has not become effective only if the debtor (tenant) has authorized the filing in an authenticated record. Thus, a landlord may file a financing statement prior to the beginning of the lease only if the tenant has so authorized in the lease or in a separate authenticated record.

b. Landlord lien filings do not lapse after five years. However, as a precaution to avoid disputes, landlords may want to file a continuation statement for UCC-1's that remain in effect and have been on file five years.

c. Under Iowa farm lease law, a farm lease for a term of years continues past the contractual term under the same terms and conditions on a year-to-year basis unless it is terminated before September 1 of the final year of the contractual term. Iowa Code §562.6 and Pollock v. Pollock, 72 N.W.2d 483, 485 (Iowa 1955). The question is whether a landlord under a lease that continues pursuant to 562.6 must perfect a landlord's lien by filing every year. In addition, even if a new lease is entered into between the same landlord and tenant for the same land, must a financing statement be filed to perfect a landlord's lien under the new lease?
While Chapter 570.1 and Article 9 do not expressly answer this question, the safest course of action is to file each year within twenty days after the lease term begins.

d. A properly perfected landlord's lien has priority over a conflicting security interest or lien, including a prior perfected security interest ("super priority") and other ag liens except a properly perfected Harvester's Lien, Mechanic's Lien, Custom Cattle Feedlot Lien, Commodity Production Contract Lien, or Veterinarian's Lien.

e. Although Iowa Code §570.1 does not expressly provide that the lien attaches to proceeds, the Iowa Supreme Court has ruled (before Rev. Art. 9 was adopted) that the lien created by Iowa Code section 570.1 extends to proceeds of crops grown on leased premises and has priority over a prior perfected security interest. Meyer v. Hawkeye Bank & Trust Co., 423 N.W.2d 186, 188-189 (Iowa 1988) and Perkins v. Farmers Trust and Savings Bank, 421 N.W.2d 533, 534-535 (Iowa 1988).

f. Under Art. 9, a landlord may file a financing statement to perfect a security interest in crops or livestock granted in a lease. (This may be done because Bankruptcy Code section 545 may be interpreted to allow a bankruptcy trustee to avoid a landlord's lien.) This financing statement perfects a security interest and not an ag lien. Such a perfected security interest does not have the super priority provided by the landlord's lien.

j. Custom Cattle Feedlot Lien, Chapter 579A.

(1) A custom cattle feedlot operator has a nonpossessory lien on cattle and identifiable cash proceeds for the amount of the cost for the care and feeding of the cattle. Iowa Code §579A.2(2).

(2) The lien is effective when the cattle arrive at the feedlot and continues for one year after the cattle leave the feedlot. Iowa Code §579A.2(3)(b).

(3) The lien is perfected by filing a financing statement with the Secretary of State within 20 days of the arrival of the cattle at the feedlot.

(4) The lien may be enforced under Iowa Code §579A.3 as follows:
"While the cattle are located at the custom cattle feedlot, the custom cattle feedlot operator may enforce a lien created in section 579A.2 in the manner provided for the enforcement of an agricultural lien as provided in chapter 554, article 9, part 6. After the cattle have left the custom cattle feedlot, the custom cattle feedlot operator may enforce the lien by commencing an action at law for the amount of the lien against either of the following:

1. The holder of the identifiable cash proceeds from the sale of the cattle.
2. The processor who has purchased the cattle within three days after the cattle have left the custom cattle feedlot."

(5) With the exception of a perfected Veterinarian's Lien, a perfected Custom Cattle Feedlot lien has priority over other statutory liens and Art. 9 security interests, regardless of when they are perfected. Iowa Code §579A.2(5)(a).

(6) Waivers of rights provided by the chapter are void. Iowa Code §579A.4.

(7) A custom cattle feedlot operator may file and enforce a lien under 579A or 579B, but not both. Iowa Code §579A.5.

Note: Unlike a financing statement perfecting a Landlord's Lien, an express statement that a Feedlot Lien is being perfected is <u>not</u> required.

Note: Some Iowa custom cattle feeders provide financing to the owners of the cattle placed in their feedlots for the purchase price of the cattle. This loan is then repaid upon sale of the cattle. These custom cattle feeders must be advised that neither the Custom Cattle Feedlot Lien nor the Commodity Production Contract Lien provides a lien for financing of the cattle. To obtain a priority security interest in the cattle for the amount financed, the cattle feeders must follow other procedures such as obtaining a purchase money security interest in livestock under Iowa Code 554.9324(4) or obtaining a subordination agreement from prior perfected secured parties.

k. <u>Commodity Production Contract Lien, Chapter 579B</u>.

(1) A producer feeding another person's cattle, sheep or swine (poultry are not included) or raising another person's crop on the producer's farm (crops are defined to include "a plant used for food, animal feed, fiber, or oil . . ." Note that crops used for other purposes such as seed or pharmaceuticals are not included) has a nonpossessory lien on the livestock or crop and cash proceeds for the amount of the services provided. Iowa Code §579B.2 and .3.

(2) If the livestock or crop is sold by the contractor, the lien shall be on cash proceeds from the sale. Cash held by the contractor shall be deemed to be cash proceeds from the sale regardless of whether it is identifiable cash proceeds. Iowa Code §579B.3.

(3) If the livestock is slaughtered or the crop is processed by the contractor, the lien shall be on any property of the contractor that may be subject to a security interest as provided in section 554.9109. Iowa Code §579B.3.

(4) The lien is effective when the livestock arrive at the farm or when the crop is planted and continues for one year after the livestock or crop leave the control of the producer. Iowa Code §579B.4.

(5) The lien is perfected by filing a financing statement with the Secretary of State within 45 days of the arrival of the livestock or planting of the crop.

(6) In addition, if there is "continuous arrival" of livestock at the animal feeding operation (monthly or more frequent as provided by contract), the lien may be perfected by filing within 180 days after the livestock's arrival.

(7) With the exception of a perfected Veterinarian's Lien, a perfected Commodity Production Contract Lien has priority over other statutory liens and Art. 9 security interests, regardless of when they are perfected. Iowa Code §579B.3.

(8) The lien may be enforced under Iowa Code §579B.5 as follows:
"Before a commodity leaves the authority of the contract producer as provided in section 579B.3, the contract producer may enforce a lien created in that section in the manner provided for the enforcement of an agricultural lien as provided in chapter 554, article 9, part 6. After the commodity is no longer under the authority of the contract producer, the contract producer may enforce the lien in the manner provided in chapter 554, article 9, part 6."

(9) Waivers of rights provided by the chapter are void. Iowa Code §579B.6.

(10) A custom cattle feedlot operator may file and enforce a lien under 579A or 579B, but not both. Iowa Code §579B.7.

Note: Neither 579A or 579B allow for perfecting the lien before the lien becomes effective, even though Art. 9 (§554.9509(1)(a)) would permit this if the debtor (owner of the cattle or commodity) had authorized the filing in an authenticated record.

Note: Because a custom cattle feedlot operator may file and enforce a lien under 579A or 579B, a feedlot operator who misses the 20-day perfection period in 579A could utilize the 45-day perfection period (or 180 days if there is continuous arrival) in 579B.

Note: Unlike a financing statement perfecting a Landlord's Lien, an express statement that a Commodity Production Contract Lien is being perfected is <u>not</u> required.

l. Enforcement.
   1. Provisions of each lien statute and Iowa Code section 554.9601 - 9624 (Art. 9, part 6)
   2. Practical issues with enforcement:
      a. Proper & timely perfection of the lien by filing UCC-1
      b. Default - negotiation with debtor (& other secured creditors)
      c. Notification to buyer of farm product subject to ag lien- voluntary, not required, but helpful in enforcement
      d. Sale of collateral to create proceeds – proceeds placed in escrow pending resolution of priority of competing security interests
      e. Negotiation and/or litigation to determine priority

3. Agreements for Construction of Livestock Operations, Including Manure Easement/Agreement Terms and Litigation.

As discussed below, crop farmers' interest in manure for fertilizer, but a reluctance to engage in livestock production themselves, has led many crop farmers to seek out manure from livestock producers. Livestock producers without a land base often are interested in purchasing or otherwise securing access to a parcel of land to construct a livestock operation and provide the manure to the crop farmer selling or otherwise providing access to the parcel of land. The legal agreements required in such a transaction may include (of course, depending on the facts of each transaction, not all of these agreements are required in all transactions):

1. Land deed or long-term ground lease/building severance agreement and footprint lease
   a. Both may include rights of first refusal for the seller or grantor of the ground lease
      i. See *West Lakes Properties, L.C. v. Greenspon Property Management, Inc*. 2017 WL 4317297 (Iowa Ct. App. Sep. 27, 2017)(Court ruled that a right-of-first refusal was void and unenforceable because a verified claim under Iowa Code §614.17A was not filed within 10 years of the original filing of the right-of-first refusal notice).
2. Manure easement/agreement (see the detailed discussion in this section of the outline).
3. Non-disturbance agreement with mortgage holders on land where livestock operation is located and land where manure will be applied.
4. Building/feedyard lease or contract feeding agreement if the owner of the building/feedyard will not be feeding their own livestock
   a. Landlord's or contract feeding lien. (see previous section of this outline)
5. Regulatory requirements.
   a. Iowa DNR:
      i. Manure management plan
      ii. Construction design statement or engineering requirements
      iii. Construction permit, including master matrix

iv. Compliance with separation distances, or waivers of separation distance requirements from residence owners, business owners, and certain public use areas

Manure easements/agreements. Higher crop input prices, including fertilizer, have reemphasized livestock manure's valuable role in crop fertility. The economics of crop production are causing many crop farmers to seek out manure from livestock producers – and they are willing to pay for it. In addition to economics, the agronomic value of manure for crop production has long been known and has not changed. The terms used in manure application agreements in years past may be out of date and lead to problems in this time of demand for manure.

a. Manure application agreements are contractual agreements used when a livestock operation requires land in addition to the land owned or rented by the livestock operation to apply manure. Landowners and tenants benefit from the manure application due to the organic nutrients and organic matter in the manure which enhance crop production. These organic nutrients may take the place of all or a portion of commercial fertilizers.

b. Due to the potential legal and other consequences, all livestock producers who require additional land for manure application and landowners accepting the manure should have a written agreement. Although current DNR rules require manure application agreements to only indicate the number of acres available for manure application and the length of the agreement, the parties should include other terms in the agreement.

1. A landowner should consider the following factors:
   - Soil nutrient levels and nutrient requirements of crops.
   - Nutrient content of the manure to be applied. Some crop producers are concerned future technological advances in rations and manure treatment designed to reduce odor may lower the fertilizer value of the manure.
   - Cost of organic nutrients compared with nutrients from commercial fertilizer.
   - Potential soil compaction from application of manure.
   - Potential for increased soil erosion due to possible reduction in crop residue from the manure application.
   - Potential nuisance and other legal liability from application of manure.

2. A livestock producer should consider the following factors:
   - Removal and application of manure from the facility in compliance with Iowa and federal requirements for manure storage and application.
   - Cost of removal and application of manure.
   - Sale value of manure.
   - Potential nuisance and other legal liability from application of manure.

c. Leased farmland.

i. If the land where the manure will be applied is farmed by a tenant, the tenant's concurrence in the terms of the agreement is essential. In some cases, a tenant may be interested in signing the agreement with the livestock producer (see following discussion on Iowa DNR regulations pertaining to tenants signing manure agreements). Under general real estate law, a tenant has the legal right to possession and use of the leased premises during the term of the lease. However, a tenant's right to possession and use of the leased premises is subject to control by the landowner under the lease. Even if a tenant has the legal right to sign a manure application agreement, a tenant cannot bind a landowner beyond the term of the lease.

ii. If the landowner does not want a tenant to have the authority to sign a manure application agreement, the landowner may prohibit the tenant from doing so in the lease. Furthermore, even if a tenant has the legal right to sign a manure application agreement, a tenant cannot bind a landowner beyond the term of the lease. Thus, an agreement signed by a tenant does not "run with the land" but rather stays – or more appropriately, leaves – with the tenant.

iii. When the farmland is leased, the landlord is committed to the livestock producer for fulfilling terms of the agreement. Some of the terms may actually be fulfilled by the tenant, for example, incorporation of manure. Therefore, a landlord must ensure that the tenant is aware of and agrees to perform certain terms of the agreement. The lease between the landlord and crop tenant should address the terms of the manure application agreement which will be performed by the landlord or tenant.

iv. If the tenant is not a party to the manure agreement, the farm lease should include terms such as the following requiring the tenant to:

1. Take the manure as required by the manure application agreement.
2. Timely pay for the manure directly to the livestock operation.
3. Cooperate with the landlord in complying with the manure application agreement.
4. Otherwise comply with all requirements of the manure application agreement that are applicable to the tenant during the term of the agreement and lease.

v. Under Iowa law, if manure from a confinement feeding operation with a manure management plan will be applied on land not owned or rented by the owner of the operation, the plan must include a copy of each written agreement executed with the owner of the land where the manure will be applied. Iowa Code section 459.312(10)(d) and 567 IAC 65.17(8)(b). If manure from an open feedlot operation with a nutrient management plan will be applied on land not owned or rented by the owner of the operation, the plan must include a copy of each written agreement executed with the owner of the land or the tenant where the manure will be applied. Iowa Code section 459A.208(7)(c) and 567 IAC 65.112(8)(c). Likewise, for manure from a dry bedded confinement operation (cattle and hogs) with a manure management plan, the following Code section applies: "For purposes of a manure management plan for a dry bedded confinement feeding operation, if the application of dry bedded manure is on land other than land owned or rented for crop production by the owner of the dry bedded confinement feeding operation, the plan shall include a copy of each written agreement executed by the owner of the dry bedded confinement feeding operation and the landowner or the person renting the land for crop production where the dry bedded manure may be applied. Iowa Code section 459B.308.

d. Key points in manure agreements are:

- Who is responsible for and pays for manure application must be expressly addressed in the agreement. This often depends on whether the landowner is paying for the nutrient value of the manure. Landowners most often want the livestock producer to be responsible for manure application since the producer either has the equipment or has more expertise in hiring someone to apply the manure.
- The agreement should expressly state whether either party will receive payment. Depending on market conditions in each locality and the nutrient value of the manure, some agreements provide for no monetary payment by either party, some require the landowner to pay for the manure based on its soil nutrient value or at least for the cost of manure application, while others may require the livestock producer to pay the landowner for the use of the land (these are much less common in recent years).

- A particularly key issue as fertilizers costs increase is whether the livestock producer is required to apply a minimum amount of manure, or any manure, under the agreement. Livestock producers may have more acres than needed to be sure there is enough land for manure under all circumstances. Accordingly, agreements may include a clause stating that there is no guaranty of a minimum amount of manure or that there is no obligation to provide any manure during the term of the agreement. On the other hand, crop producers may want to be assured of a minimum amount of manure each year or may want the agreement to state that they will receive all of the manure from the hog operation for as long as hogs are raised and manure is produced by the operation. This issue needs to be discussed and the parties' agreement expressly written in the contract.
- Because manure is a variable source of crop nutrients, livestock producers may want to include a clause stating that there is no warranty as to the quality of the manure or whether the manure will achieve any particular yield results. Crop producers, on the other hand, may want a specific clause stating that the manure will meet specific standards, particularly if they are paying for and relying on the manure as part of their fertility program.
- Most livestock producers (and their lenders) want the manure agreement to remain intact if the landowner transfers the farm. Crop producers have also become interested in making sure the agreement remains in effect if the livestock operation is transferred. If so, the agreement should specify that it "runs with the land" and the agreement or a memorandum of the agreement must be recorded with the county recorder.
- The agreement should detail each party's liability under the agreement and whether the parties are indemnifying (hold harmless) each other for liability. Liability for nuisance from application of manure may be a primary concern of parties to a manure application agreement.
- The livestock producer and crop producer may want to take steps to protect against action by any mortgage holder or contract holder on the livestock operation or the crop producer's land. For example, if there is a foreclosure or forfeiture of a landowner's interest in the land, the mortgage holder or contract seller may allege that the manure application agreement is an encumbrance on the land and eliminate the manure agreement in the foreclosure or forfeiture. One way to protect against this is to obtain, before the manure agreement is entered into, a non-disturbance and attornment agreement from the livestock producer's or landowner's mortgage holder or contract seller.

e. The increase in the value of manure and the increase in pork producer input costs has increased interest in additional terms in manure agreements to reflect the changing economics. Examples include:
   i. Crop producers may want to include a requirement that the livestock producer not implement any management practices or technology that would reduce the fertilizer value of the manure. This type of clause needs to be carefully considered by the livestock producer as it may limit what the producer can do to implement new odor control or other environmentally desired practices.
   ii. A requirement that the crop producer pay for input costs that may rise as the fertilizer value of the manure rises. In addition to feed costs, LP gas for the hog unit, manure sampling, nutrient management plan preparation, and soil testing are example of expenses that the livestock producer may want to require the crop producer to pay all or part of as additional payment for the manure.
   iii. Terms that require the crop producer to guarantee that the livestock producer will have access to corn produced by the crop producer on the land that receives the manure. This clause could set the price for the corn or could simply state that the livestock producer is guaranteed the right to purchase the corn at market price.

f. Manure application agreements are often referred to as leases, easements, or licenses. Manure application agreements differ from farm leases in that the livestock operation contracts to use the land for manure application only and the owner of the land retains the use of the land for all other purposes, including crop production. Manure application agreements should not be drafted as leases in order to avoid confusion with true farm leases which are subject to specific statutory and constitutional requirements. Whether a manure application agreement is an easement or a license may be important in determining whether the agreement "runs with the land" or is personal to the parties. Generally, an easement runs with the land while a license does not. However, a license may, by its express written terms, run with the land. If the parties intend for the agreement to run with the land, such language should be expressly set out in the agreement. Finally, the distinction between an easement and a license may be important if the agreement is breached. If an easement is breached, courts may be more likely to require performance of the agreement rather than limit the judgment to money damages.

g. Terms of manure application agreement. To more specifically discuss terms of a manure application agreement, sample clauses are set out in portions of this section with discussion following each sample clause. These sample clauses are for discussion and analysis purposes only and obviously certain clauses will not apply to all situations and other clauses may be necessary in individual situations.

(1) Parties to the agreement.

(2) *Producer shall supply manure to Landowner and Landowner shall accept Producer's manure, for application on Landowner's farmland. Producer shall apply manure from the livestock operation located on land described on the attached Exhibit "A" to the land owned by the Landowner described on the attached Exhibit "B". The number of acres of Landowner's land available for application of manure is____.*

(a) Often the landowner is not concerned about the origination of the manure, and in fact is interested in receiving manure from whatever source the producer has available. In that case, the agreement may omit a description of the location of the livestock facilities.

(3) *Term and Termination. This agreement shall be for a term of ____ years beginning on ___, 20__. The agreement shall continue after the end of this period, under the same terms and conditions, for additional one-year periods unless terminated in writing by either party at least thirty days prior to the scheduled termination. The agreement shall terminate prior to the scheduled termination date only if either party assigns its interest to another party without the consent of the other party or if the Producer ceases to produce livestock at the location specified for a period of two years or more.*
Or
This Agreement shall commence on _____ and shall be in effect for as long as the Swine Operation is located on the land described on the attached Exhibit "A".

The Agreement shall terminate prior to the scheduled termination date only if (1) the Producer breaches the terms of the Agreement by ceasing to produce livestock at the location specified for a period of one year or more; or (2) upon any other breach or violation of the terms of the Agreement by any party. Termination under either (1) or (2) of this paragraph shall occur only if the non-breaching party desiring to terminate the lease provides written notice of the breach to the breaching party. The breaching party shall have 30 days from the date of notice to correct the breach or violation. If the breach or violation is corrected within this period of time, or if the

non-breaching party does not provide written notice of the breach or violation to the breaching party, the Agreement shall not terminate.

(a) Of course, the length of the agreement and events of termination are matters to be negotiated between the parties. Agreements may be permanent or for a specific number of years or months.

(b) Landowners may want to consider shorter periods to assure that they are not locked into an arrangement which is not beneficial to them. Livestock producers may want longer term agreements to assure adequate area for manure application. However, landowners or livestock producers should also consider the advisability of being locked into an agreement if they purchase or rent additional cropland.

(4) *Rights to Receive and Obligation to Accept Manure: Landowner shall have the right to and shall accept all of the manure from the Swine Operation each year to be applied to the land subject to this Agreement. If Landowner notifies Producer that Landowner desires not to accept some or all of the manure from the Swine Operation in any year, Producer may apply the manure to land other than Landowner's land. However, if Producer is unable to locate sufficient land other than Landowner's land to apply the manure that year at no additional cost to Producer, Landowner shall either accept the manure or secure written agreements for other land for Producer to apply manure and pay Producer any additional costs, including manure application costs, Producer incurs in applying the manure to the other land secured by Landowner.*

(5) *Time of application. Manure shall not be applied between the time crops are planted and harvested or when the Landowner determines that soil conditions exist which would result in manure application being detrimental to crop production. Producer shall notify Landowner at least__ days prior to manure application. Landowner shall notify Producer of conditions detrimental to crop production at least _____days prior to the designated application time, except in instances where precipitation requires delay or termination of application.*

(a) An agreement may also take into consideration that manure must be applied at a time and in a manner to allow the livestock producer to comply with state and federal regulations and permit requirements. A producer should consider soil conditions and nutrient levels when planning manure storage capacity and land available for application.

(6) *Manure Application and Cost. Producer shall be responsible for applying manure to the land. Landowner shall provide Producer with timely access to the land for application of manure. Producer shall not pile, stack, or otherwise store manure on the land. Landowner shall pay ____% and Producer shall pay for ____% of the cost of application of manure.*

(a) Often, landowners want the livestock producer to be responsible for manure application since the producer either has the equipment or has more expertise in hiring someone to apply the manure. Who pays for manure application must be expressly addressed and depends on other consideration between the parties.

(b) In addition to specifying which party will apply the manure, the agreement should specify how the manure is to be applied and whether manure is to be incorporated into the soil during or following application and which party is responsible for incorporation. The parties should also consider an alternative for times when manure must be applied but weather conditions will not allow injection or incorporation. Landowners must consider the effect of manure application and incorporation on any soil conservation plan requirements and require that all application be in compliance with such plans. The agreement should require landowners to provide livestock

operators with a copy of soil conservation plans affecting the land. Iowa law requires the manure management plan to include a summary or copy of the conservation plan for land that is highly erodible. 567 IAC 65.17(10).

(c) Also, landowners may want to address odor concerns by including terms such as requiring the livestock producer to notify neighbors prior to manure application or prohibiting certain methods of manure application (e.g., surface application) entirely or during weather conditions which are likely to cause objectionable odors to reach neighboring residences.

(7) *Regulations, permits and manure management plan. Producer shall be responsible for obtaining and complying with government permits required for the confinement feeding operation and application of manure from the operation. Landowner shall be responsible for application of manure in compliance with applicable law or regulations, including Producer's manure management plan. Landowner shall cooperate with Producer as necessary to obtain and comply with regulations, including permits and manure management plans.*

If requested by Producer, Landowner shall keep and provide Producer with annual crop yield records, beginning three crop years before the date of this agreement if such records are available. If requested by Producer, Landowner shall keep and provide Producer with records of nutrient applications other than Producer's manure, including commercial fertilizer and manure and shall execute any documents required by Iowa DNR regarding planned or actual nutrient applications.

Pursuant to Iowa law, manure cannot be applied on cropland within 200 feet of a known sinkhole, cistern, abandoned well, unplugged agricultural drainage well, agricultural drainage well surface inlet, drinking water well, lake, farm pond, privately owned lake, watersource (creeks and other such water bodies as defined by Iowa law), major watersource (rivers and other navigable waters as defined by Iowa law, or designated wetland (as defined by Iowa law)(these areas are collectively referred to as "designated areas") or within 800 feet of a "high quality water resource" as designated by Iowa law, unless the manure is injected or incorporated on the same date of application or the land has permanent vegetation within 50 feet of the water source (manure cannot be applied within the 50 feet). Landowner shall note any designated area or high quality water resource on the map attached to this Agreement. Landowner shall also advise Producer in writing of any known dangers existing on the land. Such list shall be attached to and made part of this Agreement.

Pursuant to Iowa law, manure shall not be land surface applied without incorporation within 24 hours within 750 feet of a residence, business, church, school, or public use area (including a cemetery).

(a) The agreement could also require the livestock producer to comply with non-mandatory DNR manure application guidelines.

(b) The agreement should specify whether manure may be applied by spray irrigation and if so, any limitations on the application in addition to those in Iowa law should be expressly set out.

(8) *Level of soil nutrients. Producer shall apply manure in compliance with the manure management plan requirements. In addition, if requested by Landowner, Producer shall apply manure to the land to maximize soil fertility of other soil nutrients and prevent buildup of those nutrients or trace elements, based on soil tests conducted by a reputable soil test service at the expense of Landowner. Prior to removal of manure, Producer shall have manure tested by a*

reputable laboratory for use in subsequent applications of manure. Manure analysis shall be Producer's expense and Producer shall provide test results to Landowner upon Landowner's request. If soil tests show nutrient levels in excess of soil test recommendations and if requested by Landowner, application of manure on those specific fields shall be limited to crop utilization rates until subsequent soil tests show nutrient levels are reduced to acceptable levels. However, such a determination shall not by itself result in termination of the agreement.

Nutrient applications other than the Producer's manure, i.e., commercial fertilizers and manure from other sources, shall supplement and not replace the Producer's manure applications. Landowner shall not apply crop nutrients from other sources in excess of amounts allowed in Producer's manure management plan.

Landowner shall maintain a corn-soybean crop rotation throughout the term of this Agreement. If Landowner desires to change the crop rotation from a corn-soybean rotation, Landowner must notify Producer in writing of the proposed change in the crop rotation. If the proposed change in crop rotation will require additional acres for the application of manure from the Swine Operation, Landowner will secure written agreements for sufficient additional land for Producer to apply manure and pay Producer any additional costs, including manure application costs, Producer incurs in applying the manure to the additional land secured by Landowner.

(a) Iowa law establishes a legal limit on the amount of nitrogen from any source which can be applied on land receiving manure applications from a confinement operation with a manure management plan. Iowa law also is phasing-in phosphorus index requirements for manure management plans. The agreement must require the landowner to follow the manure management plan.

(b) To ensure compliance with the manure management plan, the agreement should state the manure from the livestock operation is given first priority in the landowner's soil fertility plan.

(c) If manure is applied under a DNR manure management plan and if actual crop yields are used to establish the yields for the manure management plan, Iowa law requires records of actual crop yields. Also, Iowa law requires credits for all nitrogen applications if manure is applied under a DNR manure management plan. Thus, the agreement should require the Landowner to keep these records.

(9) *Consideration.*

(a) The agreement should state whether either party will receive payment. Depending on market conditions in each locality and the nutrient value of the manure, some agreements provide for no monetary payment by either party, some require the landowner to pay for the manure based on its soil nutrient value or at least for the cost of manure application, while others may require the livestock producer to pay the landowner for the use of the land (these are much less common as the cost of commercial fertilizer has increased).

(10) *Warranty and disclaimer. There is no warranty, representation, or guarantee regarding the manure, express or implied, oral or written, including any warranty or guarantee of merchantability or fitness for a particular purpose of the manure or the quality or quantity of the manure or whether the manure will be beneficial or detrimental to the land, crops or other items on the land.*

(a) This clause provides that the livestock producer is not guaranteeing the quality or quantity of manure provided to the landowner. Thus, the landowner is not assured of receiving a minimum amount of manure or nutrients.

(11) *Binding Effect. This agreement shall run with the land and inure to the benefit of and be binding upon the heirs, executors, personal representatives, and successors of each party.*

(a) As previously discussed, the agreement should also specify whether it "runs with the land" or whether it is binding only upon the parties and does not create an interest in the land itself.

(12) *Limitation of liability and indemnification. Each party shall indemnify, defend and hold harmless the other parties from all costs, losses, liabilities, claims, penalties or expenses (including reasonable attorney's fees) imposed upon or incurred by or asserted against the party by reason of: a) any failure on the part of any other party to perform or comply with any of the terms of this agreement, b) any enforcement or remedial action taken by the party in the event of a failure to perform or comply with the terms of this agreement by any other party; or c) any litigation, negotiation or transaction in which the party becomes involved or concerned (without that party's fault) respecting the agreement, the described premise or the use or occupancy thereof by any other party. Without limitation of the preceding sentence, because Producer is responsible for the proper application of manure on Landowner's land, Producer expressly agrees to hold harmless and indemnify, including reasonable attorney's fees,* Landowner for *(1) any nuisance, trespass, negligence, or other action brought by a third party involving unreasonable interference with that party's reasonable use and enjoyment of their land caused by the application of manure on Landowner's land; or (2) any action brought by a third party for discharges of manure, no matter the cause or source, which may occur.*

(a) Liability for nuisance from application of manure may be a primary concern of parties to a manure application agreement. While courts generally uphold express contractual limitations of liability and indemnification clauses, in certain cases courts have refused to enforce such clauses where a contracting party is aware of and fails to take corrective action for a dangerous condition or nuisance. The Iowa Supreme Court, in *Tetzlaff v. Camp and Pangborn*, 715 N.W.2d 256 (Iowa 2006), ruled that a landlord may be liable for nuisance claims for manure application on their property if the landlord is aware of the nuisance claims before the lease was entered into or renewed and did not take steps to address the nuisance conditions.. Therefore, in addition to requiring this clause in the agreement, landowners may want to include additional terms to address potential neighbor concerns with odor.

(13) Other provisions and comments.
(a) The agreement may also contain a mediation or arbitration clause.
(b) If the agreement is intended to run with the land, the agreement or a memorandum of the agreement must be recorded with the county recorder.
(c) The livestock producer may want to take steps to protect against action by any mortgage holder on landowner's land or any contract vendor, such as a mortgagee alleging that the manure application agreement is an encumbrance on the land or if a foreclosure or forfeiture of landowner's interest in the land should occur in the future. One such step is obtaining a non-disturbance and attornment agreement from the landowner's mortgagee.

h. *Jongma v. Grand Pork, Inc*., 776 N.W.2d 886 (Iowa App. 2009). Court ruled that a reservation to the rights to all manure in the warranty deeds was not effective because the deed was only signed by the Jongmas. The court gave no analysis nor cited any authority for this ruling. Apparently the court found that the reservation to all manure was not an easement, restrictive covenant or any

other type of right that can be reserved in a deed. (For a contrary analysis, which was not cited or analyzed by the court, see *Mikesh v. Peters*,282 N.W.2d 215, 217-18). Regarding the manure easements, the court ruled that the easements clearly stated that Major Pork was not obligated to apply any manure to the Jongma's property and had full rights to determine the amount of manure to be applied.

i. *Lubbers v. MDM Pork, Inc.*, No. 15-0675, 2016 (Iowa Ct. App. Feb. 24, 2016). Lubbers sold off a parcel of his 80 acres to MDM Pork for MDM to build a hog barn. The parties signed a Real Estate Purchase Agreement that provided Buyer would "provide the necessary manure easement". The Agreement included the standard integration clause. The parties closed the real estate sale but did not sign a written manure agreement. Instead, the Lubbers received the manure from the barn at no cost by oral agreement. MDM later sold the hog barn and parcel and included in the sale contract a clause: "Buyer understands for the remainder of 2012 Paul Lubbers is entitled to the manure in the hog facility located on the property and buyer agrees to provide Paul Lubbers reasonable access to retrieve the manure." Buyer allowed Lubbers to have the manure in 2012 at no cost, but not in 2013 or after.

Lubbers filed suit alleging breach of the original Real Estate Purchase Agreement with MDM, breach of the oral agreement, and fraudulent misrepresentation. The district court ultimately granted MDM summary judgment on all claims citing the integration clause in the purchase agreement. The Court of Appeals ruled that although the purchase contract contained an integration clause, given the ambiguity in the contract, evidence of the oral agreement should have been allowed. The Court stated:

> "However, the parol-evidence rule "does not come into play until by interpretation the meaning of the writing is ascertained, and, as an aid to interpretation, extrinsic evidence is admissible which sheds light on the situation of the parties, antecedent negotiations, attendant circumstances, and the objects the parties were striving to attain." Hamilton v. Wosepka, 154 N.W.2d 164, 168 (Iowa 1967). The parol evidence rule should not be invoked to prevent a litigant the chance to prove a writing does not, in fact, represent what the parties understood to be their agreement. First Interstate Equip. Leasing of Iowa, Inc. v. Fielder, 449 N.W.2d 100, 103 (Iowa Ct. App. 1989).
>
> Although the Real Estate Purchase Agreement contained an integration clause, given ambiguity in that agreement, the Trust should not be barred from introducing evidence concerning the oral agreement for the purpose of demonstrating the Real Estate Purchase Agreement was representative of the parties' agreement. Based on the parties' past conduct (MDM allowing the manure to be removed for years at no cost), evidence of other agreements not included in the purchase agreement (attorney fees and surveyor fees), MDM's representatives' claimed lack of knowledge on why Paul was allowed to remove manure for years at no cost, and the ambiguous manure easement language in the purchase agreement, we believe material questions of fact exist regarding the oral agreement between the parties. We find MDM's motion for summary judgment on the alleged oral contract was improperly granted."

This case was set for jury trial in Sioux County District Court on Dec. 14, 2016 and was settled and dismissed with prejudice on Dec. 19, 2016.

j. *Thompson v. JTTR Enviro, LLC*, No. 16-1610 (Iowa Ct. App. July 19, 2017). Thompson purchased cropland from Langel, JTTR's predecessor in interest, who constructed a hog operation and Thompson and Langel entered into a manure agreement that ran with the land and gave Thompson the right to manure from the hog operation to cover the cropland he bought from Langel. JTTR bought the hog operation and converted it to a finishing operation. JTTR provided

Thompson with enough manure for 73 acres arguing that Thompson was to utilize a corn-soybean rotation that meant he was only entitled to enough manure to cover the one-half of the 146 acres every year that were planted to corn. Thompson sued for the value of all of the manure and the trial court ruled in favor of Thompson. On appeal, the appeals court:

a. Rejected JTTR's argument that the manure agreement as an easement only imposed a burden on Thompson, but not on JTTR. The court ruled that this agreement was a "written contract that contains the terms agreed to by the parties" and that the "terms of the agreement explicitly impose a burden upon JTTR as the successor of the Langels and reflect the parties' intent to impose such a burden."
b. Rejected JTTR's argument that because finishing manure is "more nutrient rich than manure from a farrowing barn" it was subject to a greater burden to supply manure as required by the original manure agreement. The court ruled that the manure agreement applied to manure and was not specific only to farrowing manure as opposed to finishing manure.
c. Rejected JTTR's argument that under the manure agreement Thompson was only entitled to enough manure for one-half of the 146 acres because he was to utilize a corn-soybean rotation instead of corn-on-corn rotation which required manure on all 146 acres. The court based its ruling in part on the credibility of the witnesses at trial but found more compelling the express language of the manure agreement noting there was "no reference to fertilizing taking place every other year or that fertilizing would occur on only half of the property each year."
d. Reduced Thompson's damages the district court awarded for lost fertilizer value on acres on which planted soybeans because no manure was applied to those acres.
e. Upheld the district court awarding damages for the lost crop nutrient value of the manure based on expert testimony of commercial fertilizer nutrient value.
f. Awarded attorney fees based on a clause in the manure agreement.

4. Partition in Kind of Ag Land

1) *Newhall v. Roll*, 888 N.W.2d 636, 640 (Iowa 2016).
   a) Iowa is "unequivocal in favoring *partition by sale*."
   b) According to Iowa R. Civ. P. § 1.1201(2), a party seeking a partition in kind has the burden to prove it would be both equitable and practicable.
   c) Partition in kind is not appropriate where separate parcels depreciate the aggregate value.
      i) Iowa law does not allow for "owelty," cash payment to make a partition in kind division fairer.
      ii) This economic-based approach assigns little or no value or significance to intangible characteristics, such as family history or emotional attachment
2) *Wihlm v. Campbell*, 906 N.W.2d 185 (Iowa 2018).
   a) Iowa Court of Appeals allowed a partition in kind because of the sister's sentimental attachment to the home place.
   b) Iowa Supreme Court vacated the Court of Appeals and reinstated the district court opinion which held that the sister failed to prove that the partition in kind would be "equitable and practicable" because "the volatile nature of farmland as affected by the crop prices has made a partition in kind merely guesswork when factoring in the nature and qualities of the land."
3) Iowa Code chapter 651
   a) Subchapter I provides definitions.
   b) Subchapter II provides general provisions applicable to all partitions.

i) § 651.12: the court shall file an initial decree addressing the following matters:
   (1) The shares and interests of the owners in the property must be established.
   (2) One referee is required to be appointed, unless all the owners of the property agree upon a larger number.
   (3) An appraisal is required to be ordered.
   (4) The decree is required to direct the referee to file a report setting forth the referee's recommendations for completing the partition.

ii) § 651.16: Partition in Kind Procedures
   (1) Subsection (4): referee to file a report detailing the referee's proposed division.
      (a) Authorizes the referee to "recommend owelty payments as part of the referee's recommendation for the partition in kind."
   (2) Subsections (5) & (6) provide for a court hearing on the report of the referee and decree approving the report.

iii) § 651.18: Partition by Sale Producers

iv) § 651.23: Attorney Fees Taxed as Costs
   (1) "If the plaintiff is the losing contestant in a contest arising from any partition, any of the plaintiff's attorney fees relating to such contest shall not be taxed as costs."

c) Subchapter III provides special provisions that apply only in situations where real estate defined as "heirs property," is partitioned.
   i) If all of the cotenants agree to partition by sale, none of the provisions of Division III are applicable to the partition.
   ii) § 651.27: special heirs property procedures. Applicable only where "if a cotenant requests a partition in kind in an action to partition heirs property."
   iii) § 651.28: requires the court to file an initial decree appointing a referee and ordering an appraisal. Upon receipt of the appraisal, the court is required to hold a hearing and make a determination of the fair market value of the property.
   iv) § 651.29: in cases where a cotenant requi9es partition sale, the cotenants that did not seek a sale have the right to buy out the petitioning cotenant at a price that represents the value of the petitioning cotenant's fractional ownership interest.
   v) § 651.30 requires the court to make a determination of whether to order partition in kind or partition by sale.
      (1) The court is required to order a partition in kind, unless the court determines that partition in kind would result in "great prejudice to the cotenants as a group."
   vi) § 651.31: To make this determination of partition in kind, the court gives consideration to all of the numerous factors listed in 651.31(1).
      (1) (2): "The court shall weigh the totality of all relevant factors and circumstances and not consider any one factor in subsection 1 to be dispositive."

d) The new law reorganizes and replaces the current Iowa Code chapter 651and integrates provisions from the Iowa Rules of Civil Procedure.

e) The new Iowa Code chapter 651 means that a tenant in common not wanting to sell the family farm will likely not be forced to do so.

f) A buyout or partition in kind will now be favored disposition if another cotenant seeks a partition by sale.

5. Wind and Solar Energy Agreements.

Similar to manure easements/application agreements, wind and solar energy agreements allow the use of land for a limited purpose while the landowner retains the use of the land for farming. Sometimes called leases, wind and solar energy agreements present both contract issues and land use issues. A landowner enters into an agreement to allow the construction and operation of solar panels or wind powered generation equipment on their land for payment.

As with any agreement, both parties must consider their own rights but also understand that the agreement must work for both parties, or there won't be a workable deal.

In addition to general contract, lease and easement issues, some of the major issues landowners should consider are:

a. One of the major issues is the location of the solar and wind equipment and how much land will be used by the developer. Agreements often give complete control over these matters to the developer. While this is understandable from a solar or wind energy production standpoint, landowners either need some control over the location and the amount of land, or a method of being compensated according to the type and amount of land being used by the developer. The agreement should specify the type of equipment that will be installed, the exact location of the equipment, and the amount of land that will be used. Points of ingress and egress should be clearly agreed to before signing the agreement. Some agreements give the landowner authority to approve the final site plan for location of turbines and other equipment and allow the agreement to terminate if the landowner rejects the developer's site plan.

b. Negotiation as a group. Unlike many contractual arrangements, solar and wind energy agreements depend upon a minimum level of interest and participation by landowners in a geographic area. Thus, if landowners in that area negotiate payment and other contractual terms as a group, their negotiating power is greatly increased.

c. Legal fees. Landowners may be able to negotiate for payment of their legal fees by the developer for reviewing and negotiating the terms of the agreement. Of course, the attorney in this situation must be mindful of the ethical implications.

d. The length of the agreement. Some agreements are for very long periods of time, some approaching perpetual. Other agreements are for 10 to 30 year periods. Obviously, landowners need to be very careful in entering long term agreements unless they have reasonable rights of termination and/or payment escalator provisions. In addition to the length of the agreement, any rights of extension of the term by either party unilaterally must be carefully evaluated. .

e. If the feasibility of wind energy in an area is not known, a developer may ask for an option for access to the property to investigate the feasibility of constructing wind turbines. This may be a separate agreement or included in the lease/agreement itself. The terms of this option are critical so that the landowner is not tied up in the option and prevented from exploring an agreement with another company if the holder of the option does not proceed.

f. Is the agreement contingent upon the developer obtaining a minimum number of acres in the area? If so, landowners may want a clause limiting the amount of time the developer has to obtain the minimum number of acres.

g. Do the access easements for underground cables, etc. continue even if no solar panels or wind turbines are placed on the land? Most landowners don't want the disruption to their land and crops if unless they get the economic benefit of solar panels or wind turbines.

h. The form and methods of payment vary from fixed rate (per turbine, per acre of land used, or per acre of land subject to the agreement) to a combination of fixed payments and variable payments based on the production of wind energy. Some agreements also include payments for lineal feet of cable that is on the landowner's property. If so, make sure the agreement is clear as to whether the payment is for each individual cable or if it is the same per foot no matter how many cable are in the same trench. Remember, relatively small changes in the terms of variable payments based

on production can result in large differences in the amount of payment over the life of the agreement.

i. Landowners should consider a "most favored nation" clause that provides that the developer must offer any more favorable terms to the landowner that may be subsequently offered to other landowners in the project area. Also, landowners may want to request a first right of refusal clause if a competing developer offers an agreement with better terms to landowners in the project area.

j. For long term agreements, landowners should strongly consider a term for increasing the payment at various stages in the term of the agreement. Examples include a "reopener" clause, a CPI adjustment clause, or escalator clauses based on revenue from the solar panels or turbines. Any time period to determine a payment adjustment clause should begin when the agreement begins, not a later date such as when energy is begun to be produced.

k. Does the agreement restrict a landowner's use of the property to certain uses, such as agricultural and therefore prohibit construction of residences, etc.? Most agreements prohibit the landowner from obstructing the operation of the solar panels or wind turbines. While this is understandable from the developer's perspective, landowners must carefully evaluate how this may affect the future use of their property for agricultural and other uses. These non-obstruction covenants in an agreement make knowing where the solar panels or wind turbines will be located very important to the landowner.

l. Compensatory payments to landowner. Payment for crop damage, tile line damage, fence repair or replacement, or other damage to the land during exploration, construction and any future activities on the property. The developer must be required to replace all topsoil on land disturbed during construction but which can be farmed after construction. A clause should be included that covers how the loss of any federal farm program payments will be handled.

m. What rights does either party, particularly the developer, have to terminate the agreement? Landowners should consider a clause allowing them to terminate the agreement if no turbines are built within a reasonable amount of time. If the agreement includes a force majeure clause in favor of the developer, landowners should negotiate for the clause to not apply to the developer's non-monetary obligations and require the developer to continue to pay any minimum payments under the agreement.

n. Is the landowner prohibited from entering into agreements with other companies on other parcels of land? Some agreements expressly allow landowners to have their own turbines for personal energy needs.

o. Does the agreement address the filing of mechanics liens?

p. Have mortgage holders, contract vendors, or other lien holders been made aware of and consented to the agreement? Does the developer require nondisturbance agreements?

q. Does the agreement require the developer to remove all equipment and return all land to a farmable condition upon termination of the agreement? Some agreements only require the developer to remove below ground concrete or other construction materials to a certain depth and not all of the concrete, etc.

r. The agreement should require the developer to post a bond or any other type of financial assurance that will be available to the landowner for returning the land to a farmable condition upon termination of the agreement. Many developers want to delay the posting of this bond until later in the term of the agreement. Landowners should negotiate for posting of this bond as early in the agreement as possible, preferably no later than the tenth year of a long term agreement. The landowner should also address priorities to that bond payment vs. secured lenders.

s. Does the agreement address potential liabilities of each party for actions such as nuisance lawsuits?

t. Can either party, particularly the developer, assign the agreement? If so, landowners should be careful of and/or be aware of potential assignment to a developer's affiliated entities that may not

be as financially sound as the developer. Landowners need to consider how the agreement will be affected by any transfer of their land.

u. Does county zoning or other county regulation apply to the solar or wind equipment?

v. Many agreements require that the terms be kept confidential. Landowners may want to negotiate to have such clauses removed, or at least made less restrictive. Landowners must be aware of the requirements of the confidentiality clauses to avoid violation.

w. Who is liable for property taxes on the solar or wind energy equipment and improvements?

x. Who is responsible for insurance, both property casualty and liability?

Cases:

a. *Mathis v. Palo Alto Co. Board of Supervisors,* No. 18-1431 (Iowa Ct. App. May 3, 2019). County wind energy county ordinance amendment not arbitrary and capricious.

b. *Woods v. Fayette Cty. Zoning Bd. of Adjustment*, 913 N.W.2d 275 (Iowa App. 2018).

   i. A wind group applied to the Fayette Cty. Bd. of Adjustment for special use permits to construct three wind turbines. The Board denied the application.

   ii. The county attorney determined from interpretation of the county's zoning ordinance that the wind turbines would qualify as "electrical transmission and regulating facilities" so as to exempt them from the need for a special use permit. The county administrator approved this interpretation and approved the applications. The City of Fairbank appealed the approval and the Board denied the appeal.

   iii. District court declared the approvals of the applications as "illegal and void," found that a wind turbine was "not an electrical transmission and regulating facility" within the meaning of the zoning ordinance and further directed the wind group to remove the structures.

   iv. Iowa Court of Appeals affirmed the district court that a wind turbine that produces electricity is not an electrical transmission and regulating facility.

6. Fence Law and Trespassing and Stray Livestock.

1) Iowa law requires adjoining landowners to share in the construction and maintenance of partition fences, regardless of whether a party owns or keeps livestock on the property. This duty goes into effect upon the written request of one landowner to the other. See Iowa Code section 359A.1, *Grabert v. Nebergall,* 539 N.W.2d 184 (Iowa 1995), and *Duncan v. Ritscher Farms, Inc.,* 627 N.W.2d 906 (Iowa 2001). The Iowa Supreme Court emphasized in *Grabert* that "chapter 359A applies equally to all adjoining landowners without regard to the use of the land." *Grabert* at 188.

2) The requirements of a "lawful fence" are defined in detail in §359A.18. In addition, if one adjacent landowner builds a "tight fence" (a fence for sheep or swine) the other adjacent landowner must also maintain a "tight fence." See Iowa Code §§359A.20 and 359A.21.

3) Fence viewers (township trustees) are given authority to determine controversies under Chapter 359A. Iowa Code section 359A.3.

4) The Iowa Supreme Court has ruled that a district court deciding an appeal of a decision of the township trustees acting as fence viewers is required to make its own findings and decision and not rely on the fence viewer's "to be the ultimate arbitrators" of fence disputes. On the specific issues in the case, the court ruled that for a fence to be equivalent to a tight fence, it must provide a physical barrier like that of a woven wire fence. The court found that there was not substantial evidence in the record that Sayler's fence of 5 barbed wire strands provided a physical barrier. *Longfellow v. Sayler,* 737 N.W.2d 138 (Iowa 2007).

Recent Iowa appellate cases:

5) *Garret v. Colton,* 2017 Iowa App. LEXIS 78 (Iowa Ct. App. Jan. 25, 2017). Garrett and Colton entered into and recorded a written fence agreement in 2012. When Colton violated the agreement, Garrett filed suit. The District Court and the Appeals Court granted specific performance ordering Colton, who appeared pro se, to build and maintain a fence per the agreement and awarded attorney fees as provided by the agreement.

6) *Hopkins v. Dickey*, 2017 Iowa App. LEXIS 1087 (Iowa Ct. App. Oct. 25, 2017). This is a somewhat typical fence law case where one adjacent landowner who did not have cattle refused to maintain his portion of the partition fence. The adjacent fence was 600 feet total and Dickey, the cattle producer, had always maintained the 300 feet under the "right-hand rule". When Hopkins refused to maintain his 300 feet portion under the right-hand rule the matter was referred to the fence viewers who ordered to build a fence on his portion that equaled what Dickey had built. Hopkins appealed, pro se, to Johnson County District Court which issued an order consistent with the fence viewers. The appeals court affirmed the District Court and the fence viewers as follows:

a. Hopkins argument of an oral agreement that did not require him to maintain any of the fence was rejected because fence agreements must be written and recorded under Iowa Code section 359A.13.

b. Hopkins argued that he should not have been ordered to build a fence that exceeded the express requirements in the Iowa Code. The court disagreed and ruled "[t]he term 'legal fence' as defined in the statute is not a prescription, however, for how every partition fence must be constructed or what fence viewers must require, but sets forth a minimum standard for a 'legal fence.' . . . In this case, the fence viewers and the court determined Hopkins was responsible for a portion of existing fence that was in such disrepair it did not constitute a 'legal fence.' The district court ordered Hopkins to construct a new fence in keeping with the style and character of the existing fence and in keeping with the fence constructed by Dickey and approved by the fence viewers. Under these circumstances, we find no legal error."

Regarding the "right-hand rule", the Appeals Court did not address that in its analysis and ruling but in its background portion of the decision noted: "In a thorough ruling, the district court concluded Hopkins was legally obligated to maintain a portion of the fence and, based on the evidence presented, the application of the right-hand rule was both 'a customary practice' and 'fair and equitable' in the premises." Thus, although the "right-hand rule" is not in the Iowa Code, courts will respect it and it is the law if the parties have not agreed otherwise in writing and recorded that writing and it is fair and equitable to both parties.

7) Iowa Code Chapter 169C – Stray and Trespassing Livestock

(a) Iowa Code Chapter 169C requires livestock owners to restrain their livestock as follows:

1. A person (a landowner or tenant) may take possession of livestock that trespasses on their land or strays onto a public road which adjoins their land. The person may not transfer possession of the livestock to anyone other than the livestock owner or a city or county unless the livestock owner agrees.
2. A city or county may take possession of the livestock as provided by the city or county. A city or county may not transfer the livestock to anyone other than the livestock owner or a person designated by the city or county to take care of the livestock.
3. The owner of the stray livestock is liable for property damages and for costs of taking care of the livestock if a city, county, or other person have properly taken possession of the livestock.

4. A person, county or city taking possession of stray livestock must deliver written notice (in person or by certified mail) to the livestock owner within 48 hours (excluding holidays and Sundays). The notice must: (1) state the name and address of the person, county or city providing the notice; (2) describe the livestock and where it trespassed or strayed; and (3) estimate the amount of the livestock owner's liability.
5. After receiving the written notice, the livestock owner is required to pay all damages and costs. If the livestock owner does not agree with the amount of damages, a lawsuit may be filed to determine if the livestock owner is liable and, if so, the amount of the damages. This lawsuit must be filed within 30 days after the written notice is delivered.
6. Title to the livestock transfers to the person who took possession of the livestock if a lawsuit is not filed within 30 days and if:
    a. The parties fail to agree on the amount, terms, or conditions of payment; or
    b. The owner of the livestock cannot be identified.

   Any security interests or liens on the livestock remain in effect and the person receiving title to the livestock takes subject to the security interests or liens.
   If title to the livestock is transferred to a city or county, the city or county shall reimburse any person who incurred damages or expenses from the stray livestock. Reimbursement shall be from proceeds remaining from the sale of the livestock after any security interests or liens have been paid.

(b) In 2007, 169C and 359A were amended to add provisions for "habitual trespass". See sections 169C.6. and 359A.22A. Habitual trespass is defined as when livestock strays onto a neighboring landowner's land or a public road 3 or more times within the previous 12 months. Once a habitual trespass occurs, a neighboring landowner may make a written request that the responsible landowner construct a fence. If the fence is not built within 30 days, the requesting party may apply to the fence viewers under procedures in Chapter 359A. If the fence is not built as ordered by the fence viewers, the fence viewers may request that the county supervisors build the fence and assessed to the responsible landowner as unpaid property taxes.

7. Tiling and Drainage.

1) One of the most common questions from farmers regarding tile drainage: "The landowner whose land drains onto mine is adding more tile and my tile line won't be big enough to handle it. Doesn't he have to help pay for a larger tile line on my land? Can't I refuse to allow him to hook onto my tile line?"

2) Iowa Code section 468.621: "Owners of land may drain the land in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse, and if the drainage is wholly upon the owner's land the owner is not liable in damages for the drainage unless it increases the quantity of water or changes the manner of discharge on the land of another. An owner in constructing a replacement drain, wholly on the owner's land, and in the exercise of due care, is not liable in damages to another if a previously constructed drain on the owner's own land is rendered inoperative or less efficient by the new drain, unless in violation of the terms of a written contract. This section does not affect the rights or liabilities of proprietors in respect to running streams."

3) Iowa Code section 468.2(1): "The drainage of surface waters from agricultural lands and all other lands or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare." See *Wright v. Repp Farms, Inc.,* 5-205/04-0390 (Iowa App. 2005),citing *Hicks v. Franklin County Auditor,* 514 N.W.2d 431, 435 (Iowa 1994).

4) "In Iowa there is also a common law rule which provides: There has been adopted and developed in this jurisdiction what may best be characterized as a modified civil law rule which recognizes a servitude of natural drainage as between adjoining lands. Under this concept a servient estate must accept surface waters which drain thereon from a dominant estate. On the other hand, no right exists to alter the natural system of drainage from a dominant estate in such manner as to *substantially* increase the servient estate burden. *Braverman v. Eicher*, 238 N.W.2d 331, 334 (Iowa 1976). The holder of a dominant estate has a legal and natural easement in a servient estate for the drainage of surface waters. *Franklin v. Sedore*, 450 N.W.2d 849, 852 (Iowa 1990). In addition, our supreme court has held that the owner of a dominant estate is not required to retain water in ponds or depressions to his detriment. *Moody v. Van Wechel*, 402 N.W.2d 752, 757 (Iowa 1987). The owner may divert water by surface drainage even though additional water enters the servient estate. *Id.* This rule, however, is subject to limitations. A servient owner is entitled to relief if the volume of water is substantially increased, or if the manner or method of drainage is substantially changed, *and* this results in actual damages. *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 399 (Iowa Ct. App. 1997)." *Wright v. Repp Farms, Inc.*

5) An owner of a dominant estate has the right to drain land onto a servient estate even though this result in an increase in the amount of water being drained. *Dodd v. Blazek*, 66 N.W.2d 104 (Iowa 1954).

6) "The natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominant proprietor." *Thome v. Retterath*, 433 N.W.2d 51, 53 (Iowa App. 1988).

7) Analysis:
   i. Is the land in a drainage district or is there a drainage agreement between the landowners? If so, consult the statutory provisions and terms of the drainage district or the terms of the drainage agreement.
   ii. Will there be a *substantial* increase in volume or will there be a *substantial* change in the manner or method of drainage, either of which will result in actual damages?

8. Iowa Corporate Farming and Non-Resident Alien Ownership of Ag Land.

(This is discussion is intended to be a quick reference on the topic of Iowa corporate farming laws. For a more complete discussion of the relevant legal issues for practitioners, with citations to the relevant law, see Drake General Practice Review on Agricultural Law, Dec. 12, 2014, pp. 34-46.)

Iowa Code Chapter 9H - Restriction on Ownership of Agricultural Land by Legal Entities.

a. Restriction**.** Except as provided in ¶b, a corporation, limited liability company, trust, or limited partnership (including limited liability limited partnerships) cannot, either directly or indirectly, acquire or otherwise obtain or lease agricultural land in Iowa.

   Indirectly owning or leasing ag land means for an individual to own land through an interest in a business association, through one or more affiliates or intermediaries, or by any method other than a direct approach.

b. Exceptions. Legal entities that can own or lease ag land in Iowa (entities that can only own or lease ag land for livestock production are not included in this list, see Iowa Code Chapter 10) if they meet certain restrictions under Iowa Code Chapter 9H are:
   i. Family farm corporation (See ¶c)
   ii. Family farm limited liability company. (See ¶c)
   iii. Family farm limited partnership. (See ¶c)

iv. Family trust. (See ¶c)
v. Revocable trust. (See ¶d)
vi. Testamentary trust. (See ¶e)
vii. Authorized farm corporation. (See ¶e)
viii. Authorized limited liability company. (See ¶e)
ix. Authorized trust. (See ¶e)
x. Limited partnership. (See ¶f)
xi. Limited liability limited partnership. (See ¶f)

Legal ownership structures/entities that can own or lease ag land in Iowa because they are not directly regulated under Chapter 9H are:

xii. General partnership. (See ¶g)
xiii. Limited liability partnership. (See ¶g)
xiv. Individuals/sole proprietorship. (See ¶h)
xv. Individuals/tenants in common. (See ¶h)

c. Family farm corporations, LLC's, LP's and trusts. Family farm entities (i, ii, iii, and iv in ¶b) must:
    i. Be founded for the purpose of farming and the ownership of ag land
    ii. For family farm corporations, have a majority of voting investors that are related to each other as spouse, parent, grandparent, lineal ascendants of grandparents or their spouses and other lineal descendants of the grandparents or their spouses, or persons acting in a fiduciary capacity (trustee, etc.) for the related persons. For family farm LLC's, have a majority of members who are these persons. For family farm limited partnerships, have a majority of limited partners who are these persons. For family trusts, have a majority of the beneficiaries who are these persons.
    iii. For family farm corporations, have a majority of the voting stock held by persons listed in ¶c,ii. There is no such requirement for family farm LLC's. For family farm limited partnerships, the general partner and a majority of the partnership interests must be held by these persons. For family trusts, have a majority of the interest in the trust held by these persons.
    iv. Have all investors who are natural persons (i.e., no legal entities as investors)(for family farm limited partnerships, all limited partners must be natural persons & the general partner must manage and supervise the day-to-day farming operations).
    v. 60% of the gross revenues over the last consecutive 3 year period must be from farming. (Newly formed entities must only meet this requirement going forward.)

d. Revocable and testamentary trusts. Revocable trusts (a trust that the grantor can amend, modify or revoke at any time before death) and testamentary trusts (a trust created at death in a will) may own or lease ag land. There are no restrictions on beneficiaries, trust income, family relationship of beneficiaries, etc.

e. Authorized corps, LLC's, and trusts. Authorized entities (g, h, and i in ¶2) (entities that do not qualify as family entities) must:
    i. Be founded for the purpose of farming and the ownership of ag land (this does not apply to trusts)
    ii. Have no more than 25 investors
    iii. Have all investors who are natural persons.

iv. For authorized trusts, not have income which is federal or state tax exempt.
v. Own or lease no more than 1,500 acres of ag land.
vi. Have investors who are not investors in any other authorized entity or limited partnership (other than a family farm limited partnership)(the "one bite at the apple" rule).

(an entity meeting these requirements is an authorized entity by definition and no other steps or certifications from the state are required)
(a person who is not an investor but provides management services to an authorized entity is not subject to these restrictions)
(An authorized entity found in violation of the "one bite at the apple" rule is subject to a civil penalty of not more than $25,000 and divestment of land held in violation within one year after a court order. To get a court order, the attorney general or a county attorney may file a lawsuit. In addition to these penalties, the attorney general or a county attorney may petition the court to order an entity to restructure to prevent or correct violations. In addition, an investor who causes a violation of this section is subject to a civil penalty of not more than $1,000 and divestment of the investment interest. Any financial gain realized upon divestment must be forfeited to the state.)

f. LP's and LLLP's. Limited partnerships and limited liability limited partnerships (x and xi in ¶b)(other than family farm limited partnerships) must, among other requirements:
   i. Own or lease no more than 1,500 acres of ag land
   ii. Not have an investor who does not qualify to own or lease ag land (the indirect prohibition).
   iii. Not have limited partner investors who are investors in any other authorized entity or limited partnership (other than a family farm limited partnership)(general partners are not subject to this requirement, therefore, a person may be a general partner in more than one LP).

g. GP's and LLP's. General partnerships and limited liability partnerships (l and m under ¶b) are not expressly regulated by Iowa Code Chapter 9H. Therefore, requirements such as the 1,500 acre limitation, the 25 investor limit, the requirement that all investors be natural persons, or the requirement that investors not be investors in more than one authorized entity or limited partnership do not apply. However, the following restriction does apply:

h. Not have an investor who does not qualify to own or lease ag land (the indirect prohibition). Therefore, investors in a GP or LLP can be individuals, family farm entities (see ¶c), authorized entities (see ¶e), LP's and LLLP's (those that meet the requirements in ¶f), or other GP's or LLP's (those that meet the requirements of this ¶g,i).

i. Sole proprietors and tenants in common. Individuals are not regulated by Iowa Code Chapter 9H. Thus, individuals acting as sole proprietors or as tenants in common may own ag land without restrictions. Note that Iowa law does restrict ownership or leasing of ag land by foreign individuals and businesses. See discussion in the next section of this outline.

j. Development land. Any legal entity (corporation, limited liability company, limited partnership, etc.) may acquire ag land for immediate or potential use in non-farming purposes without restrictions under Iowa law. There is no limit under Iowa law on the

amount of land or the time to convert the ag land to a non-farm use.

k. Foreclosure. A corporation or limited liability company may acquire ag land by foreclosure or other "process of law in the collection of debts" without restrictions under Iowa Code Chapter 9H. Under this exemption there is no time limit on how long a foreclosing lender may possess the ag land after taking possession, nor any restrictions on the lender farming or otherwise utilizing the ag land for agricultural purposes. Although there is no time limit on possessing ag land after acquiring it in enforcement of a mortgage or other lien under Iowa Code Chapter 9H, Iowa Code §524.910(2) regulating state banks provides that real property purchased by a state bank at a foreclosure sale, or acquired for judgments for outstanding debt, or real property conveyed to the bank in satisfaction of debt, or real property obtained through redemption as a junior mortgagee or judgment creditor, "shall be sold or otherwise disposed of by the state bank within five years after title is vested in the state bank, unless the time is extended by the superintendent."

l. Federal farm program payments. The federal Farm Bill provides that a person or legal entity is not eligible to receive:
   i. Commodity program payments, if the average adjusted gross income (AGI) from nonfarm sources is more than $500,000.
   ii. Direct payments, if the AGI from farming, ranching, and forestry is more than $750,000.
   iii. Conservation program benefits or payments, if the AGI from nonfarm sources is more than $1,000,000, unless not less than 66.66% of the AGI of the person or legal entity is average adjusted gross farm income or this limitation is waived on a case-by-case basis by the FSA or NRCS.

   Average AGI is determined using a 3 year average. These income limitations apply to direct and indirect receipt of farm program payments. Any program payment received by a legal entity, general partnership or joint venture will be reduced by an amount commensurate with the direct and indirect ownership interest in the entity, partnership or joint venture of each ineligible person or entity. In other words, if a member in an LLC is ineligible, the payment to the LLC will be reduced according to the share of the ineligible member. If a landowner cash rents land and the tenant receives all of the program payments, the tenant but not the landowner must meet the income limitations.

m. IRA's. In general, investment of IRA contributions in ag land is permissible under federal income tax law and Iowa corporate farming law, but it is discouraged by some tax advisors. The income tax concerns are beyond the scope of this outline but are fully covered in Dr. Neil Harl's article, "Is It Possible (or Wise) to Put Farmland in an IRA?" Agricultural Law Digest, July 2, 2010.

   Retirement plans such as 401K's and SEP's, including solo plans, are trusts in that there is a plan administrator that acts as a fiduciary/trustee on behalf of the plan beneficiaries. Iowa law regulates the ownership of ag land by trusts under Iowa Code Chapter 9H similar to other legal entities. See ¶'s c, d and e. Authorized trusts must not have any federal or state tax exempt income. However, there is no such requirement for family trusts. Because IRA income is both state and federal tax exempt, IRA's that are authorized trusts cannot own or lease ag land in Iowa. However, IRA's that qualify as

family trusts can own ag land under Chapter 9H if, in addition to meeting the natural person and family relationship tests, the IRA also is established for the purpose of farming and at least 60% of gross revenues over the last consecutive three year period come from farming.

Summary:

- Under current Iowa corporate farming law, LLP's are not directly regulated and therefore offer the most flexibility for investor ownership of ag land. See ¶g.
- Ag land purchased for development (non-ag use) is exempt from Iowa corporate farming law restrictions and there is no limit on the amount of land or the time to convert the ag land to a non-farm use. See ¶i.
- LLC's are often used instead of corporations due to income tax advantages. As set out in ¶'s c and e, LLC's are regulated essentially the same as corporations for ag land ownership. An LLC in which less than a majority of the investors are related (authorized LLC) can own or lease ag land if the requirements in ¶e are met (e.g., no more than 25 natural person investors, individual investors can only be in one authorized LLC ("one bite at the apple"), and the LLC cannot own more than 1,500 acres of ag land). The most difficult restriction is usually the "one bite at the apple". Keep in mind that an investor can invest in one or more family farm entities as well as LLP's and still invest in an authorized entity. In other words, the "one bite at the apple" rule only applies to authorized entities and limited partners in LP's that are not family farm LP's.
- Individuals are not regulated by under the corporate farming law and therefore individuals acting as sole proprietors or as tenants in common may own ag land without restrictions. See ¶h. Accordingly, owning land directly as tenants in common gives the most flexibility looking solely at Iowa corporate farming law.
- Entities that qualify to own ag land directly can do so as a tenant in common. Family farm entities would not be restricted by the "one bite at the apple" rule.
- Entities who violate Chapter 9H are subject to a civil penalty of not more than $25,000 and divestment of land held in violation within one year after a court order. The attorney general or a county attorney may also petition the court to order an entity to restructure to prevent or correct violations. An investor who causes a violation of the "one bite at the apple' rule is subject to a civil penalty of not more than $1,000 and divestment of the investment interest. Any financial gain realized upon divestment must be forfeited to the state.

Iowa Code Chapter 9I – Non-resident Aliens – Ag Land Ownership

a) "A nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof, shall not purchase or otherwise acquire agricultural land in this state. A nonresident alien, foreign business or foreign government, or an agent, trustee or fiduciary thereof, which owns or holds agricultural land in this state on January 1, 1980, may continue to own or hold the land, but shall not purchase or otherwise acquire additional agricultural land in this state." Iowa Code section 9I.3(1)

b) "A person who acquires agricultural land in violation of this chapter or who fails to convert the land to the purpose other than farming within five years, as provided for in this chapter, remains in violation of this chapter for as long as the person holds an interest in the land." Iowa Code section 9I.3(2).

c) " 'Nonresident alien' means an individual who is not any of the following:
a. A citizen of the United States.

b. A person lawfully admitted into the United States for permanent residence by the United States immigration and naturalization service. An individual is lawfully admitted for permanent residence regardless of whether the individual's lawful permanent resident status is conditional." Iowa Code section 9I.1(5).

Note: The definition of "nonresident alien" was amended in the 2002 Legislative session (SF 2272). Prior to amendment, a nonresident alien was any person who was not a U.S. citizen or who had not been classified as a "permanent resident alien" by the U.S. Immigration & Naturalization Service. Following amendment, any person lawfully admitted into the U.S. for permanent residence by INS is not considered to be a nonresident alien regardless of whether the lawful permanent resident status is conditional.

d) 'Foreign business' means a corporation incorporated under the laws of a foreign country, or a business entity whether or not incorporated, in which a majority interest is owned directly or indirectly by nonresident aliens. Legal entities, including but not limited to trusts, holding companies, multiple corporations and other business arrangements, do not affect the determination of ownership or control of a foreign business." Iowa Code section 9I.1(3).

e) " 'Agricultural land' means land suitable for use in farming."

" 'Farming' means the cultivation of land for the production of agricultural crops, the raising of poultry, the production of eggs, the production of milk, the production of fruit or other horticultural crops, grazing or the production of livestock. Farming includes the production of timber, forest products, nursery products, or sod. Farming does not include a contract where a processor or distributor of farm products or supplies provides spraying, harvesting or other farm services." Iowa Code sections 9I.1(1) and (2).

f) Exceptions:

1) Ag land acquired by devise or descent. Iowa Code section 9I.3(3)(a). A nonresident alien, foreign business, etc. which acquires ag land by devise or descent after January 1, 1980, must divest all right, title and interest in the land within 2 years after acquisition. Divestment is not required if the land was originally acquired by a nonresident alien prior to July 1, 1979. Iowa Code section 9I.5.

2) A bona fide encumbrance on ag land taken for purposes of security. Iowa Code section 9I.3(3)(b).

3) "Agricultural land acquired by a process of law in the collection of debts, by a deed in lieu of foreclosure, pursuant to a forfeiture of a contract for deed, or by any procedure for the enforcement of a lien or claim on the land, whether created by mortgage or otherwise. However, agricultural land so acquired shall be sold or otherwise disposed of within two years after title is transferred. Pending the sale or disposition, the land shall not be used for any purpose other than farming, and the land shall not be used for farming except under lease to an individual, trust, corporation, partnership or other business entity not subject to the restriction on the increase in agricultural land holdings imposed by section 9H.4. Agricultural land which has been acquired pursuant to this paragraph shall not be acquired or utilized by the nonresident alien, foreign business, or foreign government, or an agent, trustee, or fiduciary thereof, under either paragraph "d" or paragraph "e"." Iowa Code section 9I.3(3)(c).

4) Ag land acquired for research or experimental purposes. Iowa Code section 9I.3(3)(d). Lessees of ag land for research or experimental purposes under 9I.(3)(d)(3)(land used for the primary purpose of testing, developing, or producing animals for sale or resale to farmers as breeding stock) must file an annual report with the Secretary of State on or before March 31 each year.

5) An interest in ag land, not more than 320 acres, acquired for an immediate or pending use other than farming. Iowa Code section 9I.3(3)(e). A report must be filed with the Secretary of State before March 31 of each year. Iowa Code section 9I.8. The land must be converted to a purpose other than farming within 5 years after acquisition. Iowa Code section 9I.4.
If a person or business holding ag land becomes a nonresident alien or foreign business, the person must divest interest in the land within 2 years. Iowa Code section 9I.6 .

g) A nonresident alien, foreign business, etc. owing ag land on or after January 1, 1980 must register the land with the Secretary of State. Iowa Code section 9I.7.

h) The Iowa Attorney General has enforcement authority after receiving a report of a violation from the Secretary of State. Iowa Code section 9I.10 .

i) Penalties.

a. Failure to timely file reports or registration: fine of not more than $2,000 for each offense.

b. Escheat: "If the court finds that the land in question has been acquired in violation of this chapter or that the land has not been converted to the purpose other than farming within five years as provided for in this chapter, the court shall declare the land escheated to the state. When escheat is decreed by the court, the clerk of court shall notify the governor that the title to the real estate is vested in the state by decree of the court. Any real estate, the title to which is acquired by the state under this chapter, shall be sold in the manner provided by law for the foreclosure of a mortgage on real estate for default of payment, the proceeds of the sale shall be used to pay court costs, and the remaining funds, if any, shall be paid to the person divested of the property but only in an amount not exceeding the actual cost paid by the person for that property. Proceeds remaining after the payment of court costs and the payment to the person divested of the property shall become a part of the funds of the county or counties in which the land is located, in proportion to the part of the land in each county." Iowa Code section 9I.11.

9. USDA Wetlands Conservation Compliance Appeals.

1) Conservation compliance required to receive USDA program benefits.

a) Wetlands Conservation "Swampbuster" prohibition. As of December 23, 1985, any person who produces an agricultural commodity on converted wetlands is ineligible for USDA program benefits. [1] [2] 16 USC §3821

A person shall be ineligible for all or a portion of listed USDA program benefits listed if the person produces an agricultural commodity on a wetland that was converted after December 23, 1985 or after November 28, 1990, the person converts a wetland by draining, dredging, filling, leveling, removing woody vegetation, or other means for the

[1] Comparable conservation requirements for Highly Erodible Land ("Sodbuster") are found in 16 U.S.C. §3811, 7 CFR §12.4(a)(1). Sodbuster provisions are not discussed in detail in this outline.

[2] Legal authority cited in this outline is statutory, administrative rule, or judicial decisions. NRCS and FSA personnel rely heavily on agency handbooks. However, any handbook provision which is not consistent with applicable statutes or administrative rules is void because the handbooks are not adopted under the Administrative Procedures Act. *Davidson v. Glickman*, 169 F.3d 996 (5th Cir. 1999).

purpose, or to have the effect, of making the production of an agricultural commodity possible. 7 CFR §12.4(a)

b) Definitions. 7 CFR §12.2

Wetland, except when such term is a part of the term "converted wetland", means land that -

(1) Has predominance of hydric soils;
(2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
(3) Under normal circumstances does support a prevalence of such vegetation, except that this term does not include lands in Alaska identified as having a high potential for agricultural development and a predominance of permafrost soils.

Wetland determination means a decision regarding whether or not an area is a wetland, including identification of wetland type and size. A wetland determination may include identification of an area as one of the following types of wetland -

(1) *Artificial wetland* is an area that was formerly non-wetland, but now meets wetland criteria due to human activities, such as:
  (i) An artificial lake or pond created by excavating or diking land that is not a wetland to collect and retain water that is used primarily for livestock, fish production, irrigation, wildlife, fire control, flood control, cranberry growing, or rice production, or as a settling pond; or
  (ii) A wetland that is temporarily or incidentally created as a result of adjacent development activity;
(2) *Commenced-conversion wetland* is a wetland, farmed wetland, farmed-wetland pasture, or a converted wetland on which conversion began, but was not completed, prior to December 23, 1985.
(3) *Converted wetland* is a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) for the purpose of or to have the effect of making possible the production of an agricultural commodity without further application of the manipulations described herein if:
  (i) Such production would not have been possible but for such action, and
  (ii) Before such action such land was wetland, farmed wetland, or farmed-wetland pasture and was neither highly erodible land nor highly erodible cropland;
(4) *Farmed wetland* is a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and met the following hydrologic criteria:
  (i) Is inundated for 15 consecutive days or more during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more), or
  (ii) If a pothole, playa, or pocosion, is ponded for 7 or more consecutive days during the growing season in most years (50 percent chance of more) or is saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);
(5) *Farmed-wetland pasture* is wetland that was manipulated and managed for pasture or hayland prior to December 23, 1985, and on December 23, 1985, met the following hydrologic criteria:

(i) Inundated or ponded for 7 or more consecutive days during the growing season in most years (50) percent chance or more), or
(ii) Saturated for 14 or more consecutive days during the growing season in most years (50 percent chance or more);

(6) *Not-inventoried land*, is an area for which no evaluation of soils, vegetation, or hydrology has been conducted to determine if wetland criteria are met;

(7) *Non-wetland* is;
(i) Land that under natural conditions does not meet wetland criteria, or
(ii) Is converted wetland the conversion of which occurred prior to December 23, 1985, and on that date, the land did not meet wetland criteria but an agricultural commodity was not produced and the area was not managed for pasture or hay;

(8) *Prior-converted cropland* is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:
(i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and
(ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more); or

(9) *Wetland*, as defined above in this section.

c) Exemptions.
i) The land is a prior-converted cropland (converted prior to Dec. 23, 1985, an ag commodity produced before that date, and as of that date the converted wetland did not support woody vegetation and met listed hydrologic criteria) 7 CFR §12.5(b)(1)(i)
ii) The land has been certified by NRCS to be a prior-converted cropland and NRCS determines that the wetland characteristics returned after the date of the wetland certification as a result of (1) The lack of maintenance of drainage, dikes, levees, or similar structures, (2) The lack of management of the lands containing the wetland, or (3) Circumstances beyond the control of the person. 7 CFR §12.5(b)(1)(ii)
iii) The land was determined by NRCS to be a farmed wetland or a farmed-wetland pasture and (1) the land meets wetland criteria through a voluntary restoration, enhancement, or creation action after that determination, (2) the technical determinations regarding the baseline site conditions and the restoration, enhancement, or creation action have been adequately documented by NRCS, (3) the proposed conversion is documented by the NRCS prior to implementation, and (4) the extent of the proposed conversion is limited so that the conditions will be at least equivalent to the wetland values, acreage, and functions that existed at the time of implementation of the voluntary wetland restoration, enhancement, or creation action. 7 CFR §12.5(b)(2)(iii).
iv) NRCS has determined that the conversion if for a purpose that does not make the production of an agricultural commodity possible, such as conversions for fish production, trees, vineyards, shrubs, cranberries, agricultural waste management

structures, livestock ponds, fire control, or building and road construction and no agricultural commodity is produced on such land. 7 CFR §12.5(b)(2)(iv).

v) NRCS has determined that the actions of the person with respect to the conversion of the wetland or the combined effect of the production of an agricultural commodity on a wetland converted by the person or by someone else, individually and in connection with all other similar actions authorized by NRCS in the area, would have only a minimal effect on the wetland functions and values of wetlands in the area. 7 CFR §12.5(b)(2)(v).

vi) After December 23, 1985, the Army Corps of Engineers issued an individual permit pursuant to section 404 of the Clean Water Act, or after December 23, 1985, the action is encompassed under section 404 of the Clean Water Act. 7 CFR §12.5(b)(2)(vi).

vii) The land is determined by NRCS to be:

a. An artificial wetland,
b. A wet area created by a water delivery system, irrigation, irrigation system, or application of water for irrigation,
c. A nontidal drainage or irrigation ditch excavated in non-wetland, or
d. A wetland converted by actions of persons other than the person applying for USDA program benefits or any of the person's predecessors in interest after December 23, 1985, if the conversion was not the result of a scheme or device to avoid compliance with wetland regulations. Further drainage improvement is not permitted unless NRCS determines that further drainage activities would have minimal effect on the wetland functions and values in the area. 7 CFR §12.5(b)(2)(vii).

viii) Wetlands farmed under natural conditions. Exemption for production of an agricultural commodity on a wetland if the owner or operator uses normal cropping or ranching practices to produce agricultural commodities consistent for the area, where the production is possible as a result of natural conditions, such as drought, and is without action by the producer that alters the hydrology or removes woody vegetation. 7 CFR §12.5(b)(3).

ix) Mitigation. Exemption if the wetland values, acreage, and functions are adequately mitigated through the restoration of a converted wetland, the enhancement of an existing wetland, or the creation of a new wetland. 7 CFR §12.5(b)(4).

x) Good faith. See ¶3, a., ii. of this outline. 7 CFR §12.5(b)(5).

xi) Reliance upon NRCS wetland determination.

a. A person shall not be ineligible for program benefits as a result of taking an action in reliance on a previous certified wetland determination by NRCS. 7 CFR §12.5(b)(6)(i).
b. A person who may be ineligible for program benefits as the result of the production of an agricultural commodity on converted wetland or for the conversion of a wetland may seek relief if the action was taken in reliance on an incorrect technical determination by NRCS. If the error caused the person to make a substantial financial investment for the conversion of a wetland, the person may be relieved of ineligibility for actions related to that portion of the converted wetland for which the substantial financial investment was expended. The person cannot have known or reasonably should have known that the determination was in error because the characteristics of the site were such that the person should have been aware that a wetland existed, or for other reasons. 7 CFR §12.5(b)(6)(i).

xii) Responsibility to provide evidence. It is the responsibility of the person seeking

an exemption to provide evidence, such as receipts, crop-history data, drawings, plans or similar information, for purposes of determining whether the conversion or other action is exempt. 7 CFR §12.5(b)(7).

d) Loss of program benefits: A person determined to be ineligible due to a failure to comply with Wetland Conservation requirements "shall be ineligible for all or a portion of the USDA program benefits listed in [7 CFR §12.4(d)]. 7 CFR §12.4(c).

2) NRCS determination of compliance or non-compliance. Status review. This is an inspection by NRCS personnel of an individual field or fields. Reviews can result from a complaint or can be by random selection by the local NRCS office from a list of tracts of land.

a) Preliminary technical determination. Following the status review/inspection, NRCS will issue a preliminary technical determination. 7 C.F.R. §614.7.

i) The preliminary technical determination be in writing and must inform the landowner or producer that:

(1) The preliminary technical determination will become final after 30 days if the landowner or producer do not arrange with NRCS for either or both of the following:

(a) A field visit to the site to gather additional information and to discuss the facts of the preliminary technical determination. The NRCS district conservationist may include the area conservationist at this visit.

(b) Mediation.

(i) A landowner or producer may request mediation of any preliminary technical determination.

(ii) In Iowa, the mediation is conducted by the Iowa Mediation Service.

(iii) The parties shall have not more than 30 days to reach an agreement following a mediation session. Any agreement reached as a result of mediation "shall conform to the statutory, regulatory, and manual provisions governing the program."
7 C.F.R. §614.7

(2) Once the technical determination becomes final, the landowner or producer may appeal to the FSA county committee pursuant to 7 CFR part 780. Appeals to the FSA county committee must be exhausted before appealing to the National Appeals Division. Judicial review is available only as specified in 7 CFR part 11.
7 CFR §614.8

b) Final technical determinations.

i) Preliminary technical determinations become final as follows:

(1) If no field visit or mediation is requested, 30 days after receipt of the preliminary technical determination;

(2) If a field visit is requested, upon the earlier of 30 days after the field visit or receipt by the landowner or producer of a final determination from the designated conservationist; or

(3) If mediation is requested, 30 days after a mediation session if a mutual agreement is not reached.
7 CFR §614.103(a).

ii) The final technical determination shall:

(1) Set forth the decision, the basis for the decision, including all factors, technical criteria, and facts relied upon in making the decision; and
(2) Inform the landowner or producer of the procedure for requesting and pursuing further review.
7 CFR §614.103(b).

iii) Appeal.
(1) Only to the FSA county committee under 7 CFR part 780. 7 CFR §614.104(a) and 7 CFR §780.9(a).

3) Farm Service Agency Appeal.

a) Appeal to the FSA County Committee. All appeals to the FSA County Committee must be filed within 30 days after written notice of the decision appealed is mailed or otherwise made available to the producer. 7 CFR §780.8(a). Late appeals may be acted on if the County Committee believes circumstances warrant. 7 CFR §780.8(b).

i) NRCS final technical determination.
(1) If there has not been a field visit pursuant to §614.101(a), one must be completed by the district conservationist prior to the FSA county committee consideration. 7 CFR §614.104(b).
(2) Prior to considering the appeal, the FSA county committee may request review of the technical determination by the State Conservationist. 7 CFR §614.104(c). The State Conservationist may:
(a) Designate an NRCS official to gather additional information;
(b) Obtain additional oral and documentary evidence from any party with personal or expert knowledge of the facts under review; and
(c) Conduct a field visit to obtain additional information and discuss the technical determination.
The State Conservationist shall provide the FSA County Committee with a written technical determination, "including all factors, technical criteria, and facts relied upon in making the technical determination." 7 CFR §614.104(c)(3).
(3) A landowner or producer may appeal an adverse decision of the FSA County Committee to the National Appeals Division pursuant to 7 CFR part 11. 7 CFR §614.104(d).
(4) If the FSA County Committee decides for the landowner or producer, the county committee shall refer the case, with findings, to the NRCS State Conservationist to review the decision and the technical determination. The County or State Committee decision shall incorporate, and be based upon, the NRCS State Conservationist's technical determination. 7 CFR §780.9(b).

ii) Good faith.
(1) No person shall be ineligible for program benefits for production of an ag commodity on a converted wetland if FSA determines:
a. the person acted in good faith and without the intent to violate the provisions of 7 CFR part 12.
b. NRCS determines that the person is implementing all practices in a mitigation plan within an agreed-to period, not to exceed one year; and
c. The good faith determination of the FSA county or State committee has been reviewed and approved by the applicable State Executive Director, with the technical concurrence of the State Conservationist; or district director, with the technical concurrence of the area

conservationist. 7 CFR §12.5(b)(5).

(2) In determining whether a person acted in good faith the FSA shall consider such factors as whether:

a. The person should have been aware that a wetland existed
b. NRCS had informed the person of a wetland
c. The person did not convert the wetland, but planted an ag commodity on converted wetland when the person should have known that a wetland previously existed
d. The person has a record of violating the wetland provisions
e. There is other information that the person acted with the intent to violate the wetland provisions

b) Appeals to the FSA State Committee. All appeals to the FSA State Committee must be filed within 30 days after written notice of the decision appealed is mailed or otherwise made available to the producer. 7 CFR §780.8(a). Late appeals may be acted on if the State Committee believes circumstances warrant. 7 CFR §780.8(b). In appeals to the FSA State Committee, the State Committee is not bound by findings and conclusions of the county committee and may receive additional evidence.

i) Prior to appealing an adverse FSA County Committee decision to the next level, a producer may request mediation with the Iowa Mediation Service. 7 CFR §780.6. Time limitations for appeal are stayed pending mediation. 7 CFR §780.6.[3]

ii) FSA County Committee decisions on NRCS technical determinations adverse to the producer may be appealed to the National Appeals Division. 7 CFR §614.104(d). The regulations are not clear whether the producer may first appeal technical determinations to the State Committee. See the reference in 7 CFR §780.9(b) to a State Committee decision.

iii) FSA County Committee decisions on good faith adverse to the producer may be appealed to the State Committee and then to NAD or the producer may bypass the State Committee and appeal directly to NAD.

c) Reservation of authority by Secretary, Administrator of FSA, or the Chief of NRCS. The USDA Secretary, Administrator of FSA, or the Chief of NRCS may at any time determine any question arising under programs under their authority or may at any time reverse or modify any decision made by FSA or its County or State Committees. 7 CFR §780.11(b).

4) National Appeals Division Appeal and Judicial Review.
Final decisions of the FSA County or State Committees adverse to the producer may be appealed to the National Appeals Division pursuant to 7 CFR part 11. Appeals are de novo in that the NAD hearing officer is not bound by the findings of fact of FSA. 7 CFR §11.10(a). Following a hearing and decision by the NAD hearing officer, either the producer or FSA may request review of the NAD hearing officer's decision by the director of the National Appeals Division. 7 CFR §11.9. If the NAD hearing officer's decision is not appealed to the Director for review, the decision of the hearing officer is considered the final agency action. 7 CFR §11.8(f). Reconsideration of the NAD Director's decision on review may be requested. 7 CFR §11.11.

[3] While the request for mediation stops the running of the 30-day period for appeal to NAD, once mediation is concluded the producer will have only the balance of time remaining in the 30 day period to appeal to NAD. 7 CFR §11.5(c).