AGRICULTURAL LAW

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CONTENTS

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

[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).

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

[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).

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.

2. 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).

2017 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.

3. Farm Tenancies.

For a more complete discussion of Farm Tenancies including 2016 case law, see Drake General Practice Review on Agricultural Law, Dec. 9, 2016, pp. 1-14 . This outline will focus on termination issues and a 2017 Iowa Supreme Court opinion overturning a 2016 Iowa Appeals Court decision.

Farm Lease Termination

a. 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."

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. Exceptions to Notice of Termination Requirements.

1) 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). Note: 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.*

2) 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 pasture land 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."

3) 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.

Note: 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.

4) 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."

5) 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." 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.

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 a clause in the lease waiving the notice of termination requirements. 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.

d. 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."

2017 Iowa farm lease appellate court decisions:

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).

4. Livestock Contract Feeding – Insurance.

All farmers must carefully consider and review their insurance policies to make sure they are covered for insurable risks that are critical to their operations and financial situation. Livestock producers who feed hogs or other livestock owned by someone else under contract in the producer's buildings have insurance issues to be aware of in addition to the usual concerns with property casualty coverage for buildings and other facilities, liability coverage for accidental injuries and property damage, and worker's compensation. Those issues are potential lack of liability coverage for livestock death loss, damages due to environmental contamination, and liabilities assumed under the contract.

a. Exclusion to liability coverage for property under the "care, custody and control" of the insured. One of the most troubling legal situations for contract livestock feeders is when livestock have suffocated in the contract feeder's buildings. Often the death loss is due to something that the feeder failed to do correctly (for example, failing to properly ventilate the building when agitating the pit for manure application). When this happens, the contract feeder assumes there is insurance coverage under his or her liability insurance policy. However, unless the feeder has specific coverage for this situation, the contract feeder is surprised to learn that there is no coverage because of what is called the "care, custody or control exclusion." This exclusion

means that there is no liability coverage for loss of property (hogs in this case) owned by someone else but in the care, custody or control of the insured. The basic premise of the "care, custody or control exclusion" is that there is only liability insurance coverage when the person who caused the loss of property owned by someone else is not in control of that property when the loss occurs.

Many farm liability policies also exclude coverage for custom farming operations as non-farming business pursuit. See *McNeilus Hog Farms v. Farm Bureau Mut. Ins. Co.,* 781 N.W.2d 101 (table, unpublished disposition)(Iowa Ct. App. 2010), where court found no liability insurance coverage for hog suffocation death loss for contract feeder due to business pursuits exclusion in the policy.

The Iowa Supreme Court denied a contract feeder liability insurance coverage for his losses for 535 nursery pigs that died in his building due to suffocation from manure pumping, even though Boelman had purchased a "custom feeding endorsement" to his farm liability policy. *Boelman v. Grinnell,* 826 N.W.2d 494 (Iowa 2013).

The Boelmans were aware that they would not have coverage under their standard policy and purchased a custom feeding endorsement that they understood would cover the hogs they were contract feeding under their "care, custody and control." The Supreme Court found that the language of the policy was not ambiguous and that the policy language was clear that the endorsement would not provide coverage for pig death losses. The Appeals Court had characterized Grinnell's denial of coverage as gutting the endorsement and withdrawing "with the policy's left hand what is given with its right." However, the Supreme Court overruled the Appeals Court and found that the Boelmans did get what they paid for in the endorsement – liability protection for third party losses. For example, the Supreme Court said, "if their custom farming operation caused an explosion, damaging a third person's car parked on the Boelman's property" the policy with the endorsement would have provided coverage. *Id.* at 503. The Court also rejected Boelman's argument under the reasonable expectations doctrine. In addition to relying on its finding that the policy was not ambiguous, the Court found that the record lacked any evidence that the Boelmans "expected the endorsement's dominant purpose was to provide coverage for the hogs in their care, custody, or control." *Id.* at 506.

Schulz v. IMT, 2017 Iowa App. LEXIS 11, Jan. 11, 2017. The Iowa Appeals Court confirmed the district court and denied a contract feeder liability insurance coverage for his losses for 837 market weight hogs that died in his building due to a breaker tripping. In this case, Schulz's contract feeder was aware that he would not have coverage under his standard policy and purchased a custom feeding endorsement. The custom feeding endorsement stated that the policy exclusions "pertaining to 'custom feeding' are deleted". The Iowa Court of Appeals ruled that the term "pertaining to" removed only the custom feeding exclusion but did not delete other policy exclusions such as the exclusion for property "in the care of' the contract feeder. The Court ruled that the endorsement insured Schulz's contract feeder for "damages caused by the hogs, but not damage done to the hogs." The Court also noted that Schulz's contract feeder paid an additional premium of $118 for the custom feeding endorsement and that this amount of additional premium "does not correspond with the additional risk of insuring the health of the hogs, but does correspond with the additional risk of damage caused by the hogs."

This case, like *Boelman*, illustrates the importance of carefully reviewing and understanding custom feeding insurance policy endorsements. One of the critical factors in these two court decisions appears to be the amount of premium charged for the endorsement. Contract feeders

should have their policies reviewed and if there are coverage questions, a written coverage opinion specific to contract feeding pig losses should be obtained from the insurance company.

b. Pollution exclusion. Most standard liability policies exclude coverage for injury or property damage from situations described in policies as pollution. Pollution is often defined as any solid, liquid, gaseous or thermal contaminant, including smoke, vapor, soot, fumes, odor, and waste. This is the exclusion that most often prevents producers from having coverage for odor nuisance lawsuits. As with other exclusions in standard liability policies, there are endorsements that provide coverage for so-called pollution events and livestock producers who are concerned about nuisance and other environmental risk should evaluate this coverage.

The importance of the wording of the pollution exclusion has been illustrated, unfortunately to the detriment of the producer. The contract feeder knew of the "care, custody and control" exclusion in standard policies and bought an insurance endorsement that specifically provided liability coverage for contract feeding hogs. When the feeder pumped the manure pits, as he had been done many times before without problems, several hundred market weight hogs suffocated because of improper ventilation. Despite the contract feeding endorsement, the insurance company denied coverage under the pollution exclusion. The company's analysis was that because the veterinarian's necropsy report confirmed that the pigs died of asphyxiation from manure pit gases, and because the hogs' death was property damage, the hogs' death was due to pollutants and the pollution exclusion in the policy precluded coverage. Again, producers and their advisors must carefully review the language of the policy and any endorsement.

c. Contract liability. Some contracts shift legal liability from one party to the other through risk of loss, indemnification, or other similar clauses that make a party liable for something they would not otherwise have responsibility. In these cases, many standard liability policies exclude coverage for these losses that the insured would not have been liable for if they hadn't signed the contract. Contract feeders need to carefully review their contracts regarding contract liability and more importantly, have their insurance company review the contract and give them a determination as to coverage.

Practical issues in analyzing contract feeders' insurance risk.

a) Unfortunately, the contract feeders in the cases noted in this outline were not provided with the coverage they needed. But contract feeders should not shy away from getting coverage. Livestock death losses from ventilation system failure can be a staggering economic loss and there are good policies available that provide liability coverage for those losses.
b) Producers must read and understand the policy and have an advisor review the policy carefully. Better yet, get written assurance from the insurance company stating that livestock death losses from ventilation system failure are covered.
c) If an endorsement is for custom farming, review the definition of custom farming and make sure contract feeding livestock is included.
d) Make sure an endorsement for contract feeding overrides any general policy exclusion for damage or loss to property in the insured's "care, custody or control."
e) Make sure all potential causes of livestock injury or death loss (for example, asphyxiation, hypothermia, hyperthermia and suffocation) are covered and not excluded under a policy exclusion such as the care, custody and control exclusion or the pollution exclusion. The best approach is to make sure the terms asphyxiation, hypothermia, hyperthermia and suffocation are listed under coverages.
f) Under the Supreme Court's ruling in *Boelman* and the Appeals Court's ruling in *Schulz*, the contract feeder would not have had coverage for third-party losses without the endorsement.

Contract feeders who do not have a custom feeding endorsement should at a minimum review their liability policy to make sure they have protection for claims by anyone who might get hurt in or near their livestock operations.

g) Producers who own livestock being contract fed may have insurance coverage for livestock death losses. Some contract feeders wrongfully assume that if the livestock owner has coverage, they don't need liability coverage under a custom feeding endorsement. It is critical that the parties understand that if the contract feeder is responsible for livestock losses, the livestock owner's insurance company may cover the loss but then demand reimbursement from the contract feeder for the loss. Without their own insurance coverage, the contract feeder could be forced to pay the producer's insurance company.

h) Some feeding contracts require the feeder to have custom feeding liability coverage. Contract feeders may mistakenly view this as requiring them to insure the owner's livestock. Rather, livestock losses are a significant potential liability for the feeder. Insurance can protect against those losses as well as avoiding a contract feeding dispute.

5. Nuisance.

For a more complete discussion of Iowa Nuisance law, see Drake General Practice Review on Agricultural Law, Dec. 12, 2014, pp. 18-28 and . This outline will focus on recent cases and key issues of interest in 2017.

Statutory Nuisance Defenses - Right-to-Farm Laws.

i. Constitutionality of Iowa's Ag Area Law – Iowa Code section 352.11.

Bormann v. Board of Supervisors of Kossuth County, 584 N.W.2d 309 (Iowa 1998). The Iowa Supreme Court ruled that Iowa's Agricultural Area Law nuisance defense (Iowa Code section 352.11(1)(a)) was a per se taking of neighbors' private property. In its analysis, the court first found that the property interest involved was an easement. *Id.* at 315-316. "This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance." *Id.* at 315. The court concluded: "In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation." *Id.* at 321.

The court ruled "When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.. . . [W]e are convinced our responsibility is clear because the challenged scheme is plainly -- we think flagrantly -- unconstitutional." *Id* at 322.

ii. Constitutionality of Iowa's Animal Feeding Operations Nuisance Defense – Iowa Code section 657.11.

(1) *Gacke v. Pork Xtra, LLP*, 684 N.W.2d 168 (Iowa 2004).

Iowa's most recent right-to-farm law was adopted in 1995 and amended in 1998 and applies to both open feedlots and confinement operations. To qualify for the nuisance defense, the alleged nuisance cannot arise out of a failure of the livestock operation to comply with federal or state law. In addition, to defeat the defense the plaintiff must prove the animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the person's life or property and failed to use existing prudent generally accepted management practices reasonable for the operation. Iowa Code section 657.11(2)(b). This nuisance defense

applies regardless of the established date or expansion of the operation, i.e., the livestock operation does not have to be "first in time." Activities involved with livestock production are covered by the defense, including the treatment, disposal, transportation, and application of manure. Iowa Code section 657.11(4).

The Iowa Supreme Court first noted that for purposes of constitutional analysis, section 657.11 is not distinguishable from the Ag Area Law nuisance defense. *Id.* at 172-173. The Court ruled that the exception to the nuisance defense in the Ag Area law for negligent operations is analogous to the exception in section 657.11 for failure to use "existing prudent generally accepted management practices reasonable for the operation." *Id.* The Court ruled that based on *Bormann's* interpretation of the Ag Area Law, "the reasonable-and-prudent-management-practices exception" in the AFO nuisance defense does not prevent it from being an unconstitutional taking. *Id.*

Although the Court stated it was not "retreating" from its decision in *Bormann*, it did rule that section 657.11 is a taking only as to any reduction in property value of a neighbor's residence. *Id.* 174-175. The nuisance defense can apply to all other non-property value type damages (loss of personal use and enjoyment, mental distress, punitive damages, etc.). *Id.*

The Court then ruled that section 657.11 is unconstitutional in this case because it violates the Inalienable Rights Clause of the Iowa Constitution (All men are, by nature, free and equal, and have certain inalienable rights — among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.). *Id. at 175-179.* The Court ruled that this constitutional provision is not absolute and is subject to "reasonable regulation by the state." *Id.* While the Court noted the public purpose of section 657.11 in protecting livestock producers from defending nuisance lawsuits, it ruled that in this case section 657.11 was unduly oppressive and outweighed the public purpose of the law. *Id.* at 178-179. The Court noted: "Unlike a property owner who comes to a nuisance, these landowners lived on and invested in their property long before Pork Xtra constructed its confinement facilities." *Id.* at 179. The Court also ruled that the law did not provide any benefit to the Gackes other than the public benefit. *Id.* at 178-179. The Court ruled that the nuisance defense could not be relied on in this case, but expressed no opinion "as to whether the statute might be constitutionally applied under other circumstances." *Id.* at 179.

(2) *McIlrath v. Prestage Farms of Iowa*, 889 N.W.2d 700 (Iowa Ct. App. Nov. 23, 2016). See the discussion of district court decisions below for the background facts of this case. On appeal, the court affirmed the district court's ruling finding section 657.11 unconstitutional under the holding of *Gacke*. The court agreed with the district court that the facts in this case were substantially similar to the facts of *Gacke* so that section 657.11(2) was unconstitutional as applied to this case. McIlrath received no benefit from section 657.11. Further, McIlrath lived on and made substantial improvements to her property long before Prestage Farms constructed the hog confinement.

In addition, the court rejected Prestage Farms' claims for a new trial based on irregularity and misconduct at trial. Specifically, the court found:

(a) Prestage Farms failed to preserve error regarding McIlrath counsel's statements in closing appealing to the passions and prejudices of the jury when it did not object nor file a motion for mistrial.

(b) McIlrath counsel's attempted questioning of Prestage Farms' witness about an email that was ruled inadmissible in a ruling on a motion in limine was not grounds for a new trial because Prestage Farms' counsel at trial asked only for relief that the trial go forward without reference to the inadmissible email.

(c) McIlrath counsel's questioning of one of McIlrath's neighbor witnesses about mediation was not grounds for a new trial based on settlement efforts since there was only a brief mention of mediation and McIlrath's counsel moved on to a new subject as directed by the trial judge.

(d) McIlrath counsel's questioning of Prestage Farms' general manager about the Iowa Code definition of nuisance was not grounds for a new trial. Upon objection by Prestage Farms' counsel, the trial court sustained the objection and, out of the presence of the jury, admonished McIlrath's counsel that what he was doing was improper and borderline unethical. Prestage Farms counsel did not request a mistrial and the appeals court rejected Prestage Farms' request on appeal for a new trial because it did not move for a mistrial and because the trial judge had instructed the jury that the court is responsible for instructing as to Iowa law.

(e) McIlrath counsel's questioning of Prestage Farms' general manager about his position that McIlrath should sell her home or attempt to sell her home was not grounds for a new trial. After the trial court sustained Prestage Farms' objection because this was the basis for a motion for summary judgement but mitigation of damages had not been raised in the case, McIlrath's counsel terminated the cross examination of the witness. The appeals court denied the motion for new trial because the termination of the cross examination was the relief requested by Prestage Farms at trial.

Finally, the appeals court rejected Prestage Farms' claims that the verdict was not supported by sufficient evidence in the record or was contrary to law and that the damages were excessive.

The Defendant's application for further review by the Iowa Supreme Court is pending.

(2) On July 15, 2016, the Supreme Court granted an Application for Interlocutory Appeal filed in the *Dovico et al v Valley View Swine et al*, currently pending in Wapello County. Defendants in the underlying case are appealing the District Court's Ruling on Defendant's Motion for Summary Judgment. In the ruling, the District Court found that 657.11 was unconstitutional on its face without considering any circumstances of each of the individual plaintiffs. As stated above, the Supreme Court in *Gacke* found the statute unconstitutional as applied to the facts in that particular case but expressed no opinion as to whether the statute could be constitutionally applied in other situations. Appellants therefore contend that the District Court's ruling is contrary to the Supreme Court's holding in *Gacke.* The Iowa Pork Producers Association and Iowa Farm Bureau Federation have joined as amicus curiae parties and all briefs in the case have been filed. This case has not yet been set for oral argument.

iii. Senate File 447, effective Mar. 29, 2017.

a. The bill establishes a new section in the Iowa Code, section 657.11A. It does not amend and leaves in place the current Animal Feeding Operations nuisance defense, section 657.11.

b. The bill:

"Section 1. NEW SECTION. 657.11A Animal agriculture ——promotion of responsible animal feeding operations.

1. a. Findings. The general assembly finds that important public interests are advanced by preserving and encouraging the expansion of responsible animal agricultural production in this state which provides employment opportunities in and economic growth for rural Iowa, contributes tax revenues to the state and to local communities, and protects our valuable natural resources.

b. Purpose. The purpose of this section is to encourage persons involved in animal agriculture to adopt existing prudent and generally utilized management practices for their animal feeding operations, thereby enhancing the fundamental role of animal agriculture in this state by providing a reasonable level of protection to persons engaged in animal agricultural production from certain types of nuisance actions.

c. Declaration. The general assembly has balanced all competing interests and declares its intent to preserve and enhance responsible animal agricultural production, specifically animal agricultural producers in this state who use existing prudent and generally utilized management practices reasonable for their animal feeding operations.

2. Except as otherwise provided by this section, an animal feeding operation, as defined in section 459.102, found to be a public or private nuisance under this chapter or under principles of common law, or found to interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action, shall be conclusively presumed to be a permanent nuisance and not a temporary or continuing nuisance under principles of common law, and shall be subject to compensatory damages only as provided in subsection 3.

3. Compensatory damages awarded to a person bringing an action alleging that an animal feeding operation is a public or private nuisance, or an interference with the person's comfortable use and enjoyment of the person's life or property under any other cause of action, shall not exceed the following:

a. The person's share of compensatory property damages due to any diminution in the fair market value of the person's real property proximately caused by the animal feeding operation. The fair market value of the real property is deemed to equal the price that a buyer who is willing but not compelled to buy and a seller who is willing but not compelled to sell would accept for the real property. The person's share of any compensatory property damages must be based on the person's share of the ownership interest in the real property. For purposes of this section, ownership interest means holding legal or equitable title to real property in fee simple, as a life estate, or as a leasehold interest.

b. The person's compensatory damages due to the person's past, present, and future adverse health condition. This determination shall be made utilizing only objective and documented medical evidence that the nuisance or interference with the comfortable use and enjoyment of the person's life or property was the proximate cause of the person's adverse health condition.

c. The person's compensatory special damages proximately caused by the animal feeding operation, including without limitation, annoyance and the loss of comfortable use and enjoyment of real property. However, the total damages awarded to a person under this paragraph "c" shall not exceed one and one-half times the sum of any damages awarded

to the person for the person's share of the total compensatory property damages awarded under paragraph "a" plus any compensatory damages awarded to the person under paragraph "b".

4. This section shall apply to an animal feeding operation in the same manner as section 657.11, subsections 4 and 5. [4]

5. This section shall not apply if the person bringing the action proves that the public or private nuisance or interference with another person's comfortable use and enjoyment of the person's life or property under any other cause of action is proximately caused by any of the following:

a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.

b. The failure to use existing prudent generally utilized management practices reasonable for the animal feeding operation.

6. This section does not apply to a person during the time in which the person is classified as a habitual violator pursuant to section 459.604.

7. This section does not apply to a cause of action that accrued prior to the effective date of this Act.

Sec. 2. EFFECTIVE DATE. This Act, being deemed of immediate importance, takes effect upon enactment."

iv. Constitutionality of Missouri's Ag Nuisance Defense Statute. On April 14, 2015 in the case of *Labrayere v. Bohr Farms*, 458 S.W.2d 319 (Mo. 2015), the Missouri Supreme Court ruled that a 2011 Missouri law that established a nuisance defense for Missouri livestock and crop farms limiting lawsuit damages to loss of property value and medical costs is constitutional. The Missouri Supreme Court decision is contrary to two Iowa Supreme Court decisions in 1998 and 2004 which found Iowa nuisance defense statutes unconstitutional.

The Missouri nuisance defense law went into effect in August of 2011 and limits damages in a nuisance lawsuit against an agricultural operation to any reduction in fair market value or rental value of the plaintiff's property (the reduction cannot exceed the fair market value of the property). In addition, the law allows documented medical costs caused by the nuisance and damages for annoyance, discomfort, sickness or emotional distress due to a cause of action other than nuisance, such as negligence. In other words, this law eliminates money damages for a nuisance for loss of use and enjoyment of property or for personal inconvenience, discomfort, or emotional distress. These types of damages are often the lion's share, and sometimes even the entire amount, of damages awarded in ag nuisance cases.

In this case Bohr Farms contract feeds 4,000 finishing hogs for Cargill Pork, LLC. Labrayere and the other plaintiffs sued Bohr Farms and Cargill Pork for nuisance and challenged the constitutionality of the 2011 nuisance defense law alleging that it was a taking of their private

[4] Iowa Code section 657.11,subsections 4 and 5:
"*4. This section shall apply regardless of the established date of operation or expansion of the animal feeding operation. A defense against a cause of action provided in this section includes but is not limited to a defense for actions arising out of the care and feeding of animals; the handling or transportation of animals; the treatment or disposal of manure resulting from animals; the transportation and application of animal manure; and the creation of noise, odor, dust, or fumes arising from an animal feeding operation.*
5. If a court determines that a claim is frivolous, a person who brings the claim as part of a losing cause of action against a person who may raise a defense under this section shall be liable to the person against whom the action was brought for all costs and expenses incurred in the defense of the action."

property rights without just compensation. The Court denied this claim ruling that the law "is plainly aimed at promoting the agricultural economy to create a public advantage or benefit." The Court went on to rule that "the fact that some parties will receive direct benefits and others will sustain direct costs does not negate the public purposes advanced by [the law]."

In *Gacke v. Pork Xtra* the Iowa Supreme Court went beyond the takings analysis and found that the Iowa law violated the Inalienable Property Rights Clause of the Iowa Constitution: The Missouri Supreme Court was not presented with a constitutional challenge like Iowa's Inalienable Property Rights Clause but ruled just the opposite of *Gacke* and *McIlrath* in finding that the effects of Missouri's law on individuals did not negate the public purpose and benefit of the law and therefore there was no unconstitutional taking.

v. Recent Iowa District Court Ag Nuisance Cases.

a.. *McIlrath v. Prestage Farms of Iowa*, Poweshiek County District Court, Feb. 4, 2015. This case was tried to a jury in Poweshiek County. The plaintiff who lives less than 1,000 feet northeast of Prestage's 2,400 head hog operation alleged the operation was a nuisance. The jury returned a verdict in favor of the plaintiff finding the operation was a permanent nuisance and awarded plaintiff $100,000 for loss of past enjoyment, $300,000 for present value of loss of future enjoyment, and $125,000 for diminution of property value, for total damages of $525,000. In response to a post-trial motion, the district court reduced McIlrath's damage award for diminution of property value by one-half ($62,500) because McIlrath owned the property jointly with her husband who was not a plaintiff. The jury's verdict was upheld on appeal as discussed above.

b. *Pauls v. Warren*, Wapello County District Court, February 1, 2016. This case was tried to a jury in Wapello County. The action was originally filed by 42 Plaintiffs against the pork producer, Warren, who owned the hog barns and against Cargill (now JBS Live Pork, LLC) who owned the pigs being fed by Warren under contract. The court instituted a bellwether structure, requiring the Plaintiffs to choose 2 households and the Defendants to choose 2 households. The case proceeded to trial against JBS (Warren's $60,000 pre-trial offer to confess judgment was accepted by the plaintiffs) with 9 bellwether plaintiffs. The closest Plaintiff lived over 1 mile from the hog facility. The jury returned a verdict in favor of the Defendant JBS finding that the operation was not a nuisance.

vi. Iowa Appellate Court Decision. *Freeman v. Grain Processing Corporation,* 895 N.W.2d 105 (Iowa May 12, 2017). In this case that is not a farm nuisance case but rather involves approximately 4,000 residents of Muscatine who are claiming nuisance and other nuisance related claims against a corn wet milling facility, the Court approved a class action nuisance lawsuit. The case was originally filed in 2012 by eight residents. The Supreme Court approved the class action based on (1) common issues of law or fact (air pollution and the district court created two sub-classes, one including those plaintiffs living in close proximity to the plant and another including those plaintiffs living in peripheral proximity, alleviated the potential for great disparity in the impact of the emissions on the class plaintiffs), (2) individual issues did not predominate (the court noted the plaintiffs would have to submit common proof of defendant's interference with "a normal person on the community's" use and enjoyment of his or her property and that the plaintiffs could meet this key standard because they chose not to seek damages for

physical harm or for diminution in value of their property which require more individualized proof) and Due Process (again, the Court not the "normal person" standard).

6. Manure Easements/Application Agreements. For a complete discussion of Manure Easements/Application Agreements, see Drake General Practice Review on Agricultural Law, Dec. 9, 2016, pp. 17-27. This outline will focus on two recent cases.

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).
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> 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.

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.

7. Current Issues and Enforcement of Statutory Agricultural Liens. For a complete discussion of Statutory Agricultural Liens, see Drake General Practice Review on Agricultural Law, Dec. 9, 2016, pp. 27-38. This outline will focus particular perfection and priority issues and note a recent case on the Agricultural Supply Dealer's Lien, Chapter 570A.

a. 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.

b. 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, 509 B.R. 901 (Bankr. N.D. Iowa Apr. 18, 2014).. 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.

c. 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.

d. 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)

Federal Food Security Act and Written Notice – Not Applicable to Ag Liens. 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) 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.

2017 case:

Schley v. Peoples Bank (In re Schley), 565 B.R. 655, 2017 Bankr. LEXIS 115 (Bankr. N.D. Iowa Jan. 13, 2017). The court ruled that the Iowa Code Chapter 570A Ag Supply Dealers Lien for feed applied to all feed that the feed supplier provided and attached to the full value of livestock that consumed the feed. The secured lender had argued that the feed supplier had a lien pro rata on each head of hogs for the amount of feed the hog consumed.

8. Iowa Agricultural Law Update.

a. *In re Syngenta AG MIR 162 Corn Litigation.* Syngenta has brands of genetically modified seed corn named "Duracade" and "Viptera". China was opposed to corn with these GMO traits and in November 2013, began rejecting any corn shipment with Duracade and Viptera or corn containing these traits. The allegations in this litigation are that China's rejection of these corns caused U.S. corn prices to drop and thus monetary damages to U.S. corn producers and ag businesses. Numerous lawsuits were filed against Syngenta in various state and federal courts. On June 23, 2017 a jury in Kansas federal district court rendered a verdict for the Class Plaintiffs for $217,700,000. Then, in Minnesota federal district court trial in another bellwhether case began on Sep. 11, 2017 and was halted mid-trial when a settlement was reached. The details of that settlement won't be known until signed settlement agreements are filed with the court. For detailed summaries and updates of this litigation, see the Iowa State University Center for Agricultural Law and Taxation website: http://www.calt.iastate.edu.

b. *Board of Water Works Trustees of the City of Des Moines v. Sac County Board of Supervisors, as Trustees of Drainage Districts 32, 42, 65, 79, 81, 83 and 86*, et. al., 890 N.W.2d 50 (Iowa Supreme Court Jan. 27, 2017).
Opinion of Justice Waterman, joined by Justice Mansfield and Justice Zager (Justice Appel and Chief Justice Cady filed a concurring in part and dissenting in part opinion and Justice Wiggins and Justice Hecht took no part in the decision.)

The Court began its 41 page majority/plurality opinion by expressly answering the questions certified by the U.S. District Court:

"Question 1: As a matter of Iowa law, does the doctrine of implied immunity of drainage districts as applied in cases such as Fisher v. Dallas County, 369 N.W.2d 426 (Iowa 1985), grant drainage

districts unqualified immunity from all of the damage claims set forth in the complaint (docket no. 2)?
Answer: Yes. As explained below, drainage districts have a limited, targeted role—to facilitate the drainage of farmland in order to make it more productive. Accordingly, Iowa law has immunized drainage districts from damages claims for over a century. This immunity was reaffirmed unanimously by our court just over four years ago.

Question 2: As a matter of Iowa law, does the doctrine of implied immunity grant drainage districts unqualified immunity from equitable remedies and claims other than mandamus?
Answer: Yes. Again, Iowa precedent, reaffirmed unanimously by our court just four years ago, recognizes that drainage districts are immune from injunctive relief claims other than mandamus.

Question 3: As a matter of Iowa law, can the plaintiff assert protections afforded by the Iowa Constitution's inalienable rights, due process, equal protection, and takings clauses against drainage districts as alleged in the complaint?
Answer: No. Although these constitutional clauses are fundamental to our freedom in Iowa, they exist to protect citizens against overreaching government. Generally, one subdivision of state government cannot sue another subdivision of state government under these clauses. And even if they could, an increased need to treat nitrates drawn from river water to meet standards for kitchen tap water would not amount to a constitutional violation.

Question 4: As a matter of Iowa law, does the plaintiff have a property interest that may be the subject of a claim under the Iowa Constitution's takings clause as alleged in the complaint?
Answer: No, for the reasons discussed in the answer to Question 3."

In finding the Drainage Districts are immune from DMWW's claims for money damages, the Court noted that drainage districts have had immunity for "over one hundred years" and that there was no basis to change that legal precedent. The Court noted that the Iowa legislature had created drainage districts for a very limited purpose – to drain and therefore make productive land that was otherwise unproductive. The Court also ruled that downstream property owners cannot sue drainage Districts for injunctive relief and that mandamus is the only proper remedy. Finally, the Court emphasized that this case was a dispute between public entities and ruled that the DMWW, as a government entity, cannot bring claims under the Iowa Constitution against the Drainage Districts as another government entity, e.g., "[t]his case involves public water supplies, not private property. There can be no taking of a public resource."

More specifically, the Court ruled:

a. The Drainage Districts have no authority under state law to regulate farmer nitrate use and that lack of control means the Districts cannot be held liable for the discharges – "liability is premised on control" the Court stated.
b. Well established Iowa court decisions favor placing liability on the party who can avoid the harm at the least cost. As has been emphasized by the scientific and agricultural community, the Court ruled that because the Drainage Districts' drainage systems were not designed or intended to filter out nitrates, the "least-cost avoider" for removing nitrates from drinking water may well be DMWW, the party which is already required by law to provide safe drinking water to its customers. The Court reinforced this point stating that DMWW "itself at times has lawfully deposited back into the Raccoon River the very nitrates it removed" and "[t]he DMWW's claim that putting nitrates into the Raccoon River creates a public nuisance is at odds with its own practice of depositing those nitrates back into the same river."

c. Iowa law gives farmers who comply with fertilizer label instructions immunity from liability for nitrate contamination and that reinforces the Drainage Districts' immunity from DMWW's claims. As the Court stated, claims for nitrate contamination against drainage districts would be a way to get "backdoor relief against farmers that the legislature has specifically barred through the front door."
d. Iowa law only authorizes drainage districts to assess costs to landowners to drain land, not to assess costs to redesign drainage systems to abate nitrates.
e. Drainage Districts could not get liability insurance for DMWW's claims, presumably because of the immunity provided by Iowa law.

Concurrence in part and dissent in part by Justice Appel joined by Chief Justice Cady.
Justice Appel's 60 page opinion concurring in part and dissenting in part concluded as follows:
" . . . I would answer the certified questions as follows.
Question 1: As a matter of Iowa law, does the doctrine of implied immunity of drainage districts as applied in cases such as Fisher v. Dallas County, 369 N.W.2d 426 (Iowa 1985), grant drainage districts unqualified immunity from all of the damage claims set forth in the Complaint (docket no. 2)?
Answer: Yes as to money damages generally. No as to just compensation that might arise from a takings claim.
Question 2: As a matter of Iowa law, does the doctrine of implied immunity grant drainage districts unqualified immunity from equitable remedies and claims, other than mandamus?
Answer: No.
Question 3: As a matter of Iowa law, can the plaintiff assert protections afforded by the Iowa Constitution's inalienable rights, due process, equal protection, and takings clauses against drainage districts as alleged in the complaint?
Answer: Yes with respect to the takings clause, no with respect to all other clauses.
Question 4: As a matter of Iowa law, does the plaintiff have a property interest that may be the subject of a claim under the Iowa Constitution's takings clause as alleged in the complaint?
Answer: Possibly, depending on further factual development.
In summary, I would find that DMWW's lawsuit should be allowed to proceed. Of course, I express no view on the merits of the litigation."

c. *Bd. of Water Works Trs. of Des Moines v. Sac Cnty. Bd. of Supervisors As Trs. of Drainage Dists. 32*, 2017 U.S. Dist. LEXIS 39025, (March 17, 2017) Following the Iowa Supreme Court decision, U.S. District Court Judge Leonard Strand dismissed the Des Moines Water Works citizen suit that was filed in March 2015 under the federal Clean Water Act (CWA) against 10 drainage districts in Sac, Calhoun and Buena Vista counties. The federal court cited the Jan. 27 Iowa Supreme Court ruling that found the Drainage Districts were immune from the DMWW's claims for money damages and other legal claims. The federal court ruled that because of this immunity under state law, the Drainage Districts had no power to regulate farmer nitrate use within their districts and, thus, no power to "redress" the DMWW's alleged injuries.

In its ruling the U.S. District Court cited the Iowa Supreme Court's ruling that Iowa law does not grant the Drainage Districts control over the use of the land in the districts and therefore the Districts cannot be held liable for the discharges. The U.S. District Court also emphasized that Iowa law does not require drainage districts to "filter out nitrates. Rather, chapter 468 simply requires drainage districts to maintain drainage systems to keep the water flowing to drain lands. . . . No provision in chapter 468 authorizes drainage districts to mandate changes in farming practices to reduce fertilizer runoff or to assess farmers for the costs of removing nitrates from waters flowing through agricultural drainage systems."

The U.S. District Court's ruling also included two points of practical importance to all Iowa farmers, not just those in the Drainage Districts, and to Iowa policymakers:

- The Court ruled that the DMWW may well have suffered an injury, but the Drainage Districts lack the legal ability to redress that injury. Following the U.S. District Court's ruling the point has been made that the court did not address the DMWW's claim that the Drainage Districts are point sources under the CWA and that they therefore should be required to obtain federal discharge (NPDES) permits for the tile line discharges of nitrates to waters of the U.S. The DMWW alleged that drainage districts have been overlooked as point sources but that they should qualify because they are "elaborately engineered government drainage systems". It is correct the court did not reach this issue when it first ruled that the Drainage Districts had no authority over tile line discharges. However, it must also be noted that the DMWW specifically chose not to sue individual farmers as point sources under the CWA and instead sued the Drainage Districts. Because of this strategic approach by the DMWW in the lawsuit, and the lack of control by the Drainage Districts over tile line discharges, the U.S. District Court could not rule on the CWA point source issue.
- The Court also dismissed the DMWW's claims that Iowa's drainage district law violated the U.S. Constitution. In making that ruling, the Court addressed the DMWW's criticism of the Iowa Nutrient Reduction Strategy. The DMWW argued that the Iowa Nutrient Reduction Strategy "seeks a 45% reduction of nitrate and other nutrient pollution." The DMWW then argued that the Nutrient Reduction Strategy estimates that 8% of nitrate comes from regulated sources such as sewer systems and 92% comes from unregulated sources, namely agriculture. The DMWW concluded: "It strains rationality to believe that 8% of the problem can create 45% of the solution." The U.S. District Court quoted these arguments by the DMWW in its ruling but noted that these are not federal Constitutional arguments. Instead, the Court stated, they are policy arguments that are best directed to the Iowa legislature.

The U.S. District Court's ruling dismissing the case was not appealed by the DMWW.

d. Federal EPA Air Emissions Reporting for Animal Feeding Operations. On Oct. 26, as a result of an April 11 federal appeals court decision, EPA issued a notice directing all livestock farms emitting more than 100 pounds of ammonia or hydrogen sulfide in a 24 hour period to report continuous air emissions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See http://tinyurl.com/AFO-Guidance
The federal appeals court's original deadline for livestock farms to comply was Nov. 15 but the mandate enforcing the April 11 order had not issued as of then and on Nov. 22 the court granted a stay of the issuance of the mandate until Jan. 22.
In December of 2008 the EPA issued a rule exempting livestock farms from continuous air emissions reporting requirements under CERCLA but required those livestock farms with more than the equivalent of 1,000 animal units to report under the Emergency Planning and Community Right to Know Act's (EPCRA). Environmental groups filed suit against the EPA and on April 11 the federal appeals court, acting on original jurisdiction, invalidated EPA's 2008 rule, requiring EPA to once again establish new air emissions reporting protocols for livestock farms.
In the its Guidance requiring CERCLA reporting, EPA is exempting livestock farms from the previously required EPCRA reporting based on the premise that livestock farms use these substances in "routine agricultural operations" (the reporting requirements are the same except that under EPCRA state and local emergency authorities must be notified in addition to federal

notification). EPA also stated that livestock farms who signed and comply with the 2005 Animal Feeding Operation Air Compliance Agreement "are not expected to report" under CERCLA at this time.

To comply with the court's order and EPA's Guidance, livestock farms must:

1. Estimate the emissions of ammonia and hydrogen sulfide from their individual operations, using the best scientific information available, to determine if their operation emits more than 100 pounds of ammonia or hydrogen sulfide in a 24 hour period. EPA has provided information, including examples, in their Guidance at http://tinyurl.com/AFO-Guidance.

Note: Unfortunately, the information available on emission levels is not as clear and concise as was the 1,000 animal unit EPCRA reporting threshold in the 2008 EPA rule that the court invalidated. In any event, producers must do their best to estimate emissions with the information available.

2. For those farms qualifying to report under No. 1, determine who is required to report. EPA's Guidance references a "facility owner or operator." However, under CERCLA the term used for the person required to report is the "person in charge of a facility". In this situation, a "person in charge" is:
   a. For owner/operator farms, the owner/operator.
   b. For farms operated under a production contract, in a 2003 U.S. district court the federal court ruled that the contract grower and the contractor (owner of the livestock, poultry in that case) were both persons in charge. *See Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693 (U.S. District Court, Western District of Kentucky Nov. 7, 2003)
      Note: Per that court decision, both the contract grower and the contractor could be responsible for CERCLA reporting, depending on the terms of the production contract. To ensure compliance, at least one must report for the farm.
   c. For farms operated under a lease, the tenant is a person in charge who must report but the 2003 U.S. district court ruled that a landlord with no active role in managing the farm is not a person in charge and has no responsibility to report. *See Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693.
      Note: This again depends on the terms of the individual lease.

3. Livestock farms qualifying to report under No. 1 and livestock producers on those farms qualifying to report under No. 2 must begin the continuous release reporting process by placing a telephone call to the federal NRC at 1-800-424-8802 or sending an email. This is the only initial notification required – because EPA Guidance is not requiring EPCRA reporting, producers need not call Iowa DNR or any local authorities. The EPA Guidance instructs producers to inform NRC:
   a. That they are making an "initial continuous release notification".
   b. The "name and location of the farm." In the Guidance EPA states: "The NRC does not require personally identifiable information, such as an address for a private residence. As an alternative, a generic location (such as name of city/town and state) may be sufficient."
   c. The "name(s) of the substance(s) released" (ammonia, and possibly hydrogen sulfide depending on the emissions estimate in No. 1).

The NRC representative is to give an ID number (called a CR-ERNS) for the farm. This number will be needed for the follow-up written reports.

CERCLA reporting requires a written report to be filed within 30 days after the initial continuous release notification and a follow-up status report within one year after the first written report. On

Nov. 22, EPA amended its Guidance to state that initial continuous reporting is not required until the court issues its mandate, now set by the court for Jan. 22. EPA has verbally advised that the 30-day written reports are not required until 30 days after the federal appeals court mandate is entered. As of the date of this outline, the EPA Guidance had not been amended to clarify that verbal advice.

e. Dicamba herbicide. Claims of crop damage from the herbicide dicamba are increasing following its marketing for new uses this past year. In addition to state and federal regulatory actions and private lawsuits for damage from spray drift, attorneys apparently are preparing a mass tort action against the companies who marketed dicamba and are seeking clients in Iowa. Also, on Oct. 13, 2017, EPA issued a press release which included: "EPA has reached an agreement with Monsanto, BASF and DuPont on measures to further minimize the potential for drift to damage neighboring crops from the use of dicamba formulations used to control weeds in genetically modified cotton and soybeans. New requirements for the use of dicamba "over the top" (application to growing plants) will allow farmers to make informed choices for seed purchases for the 2018 growing season." For a discussion of this issue, see "Dicamba Drift: What are the Legal Remedies?, CALT, September 14, 2017, by Kristine A. Tidgren at https://www.calt.iastate.edu/blogpost/dicamba-drift-what-are-legal-remedies.

f. Real Estate Partition Actions.
   1) *Newhall v. Roll,* 888 N.W.2d 626 (Iowa Dec. 23, 2016). The Iowa Supreme Court reaffirmed that Iowa law favors partition by sale. A brother and sister owned two separate farms by gift and by inheritance, as tenants in common. They could not agree on partition so the brother filed an action for partition by sale of both farms. The sister had an emotional attachment to one farm and sought partition in kind. Because one farm was worth more than the other, she proposed that she either make an equalization payment to the brother or give him 70 acres from the farm she would receive. The Supreme Court outlined Iowa Code §§ 651.1– 651.6 and IRCP. 1.1201–1.1228, but also noted that Iowa law, unlike the law from most other states, is "unequivocal in favoring partition by sale." The Court noted partitions in kind are not favored if: 1)a division into separate parcels would depreciate their aggregate value or 2) partition in kind is impracticable and cannot be done without sacrifice in value and to the best interest of all parties. Using these principles, the Court rejected partition in kind and ruled for the brother.
   2) *Wihlm v. Campbell,* 2016 Iowa App. LEXIS 943 (Iowa Ct. of Appeals Sep.14, 2016) Analyzing the statutory and IRCP factors for partition actions, as well case law factors which favor partition by sale, the court granted a sister's action for partition in kind allowing her to keep and live on the "home place" noting that it was equitable and practicable in this case. This case is on further review to the Iowa Supreme Court.

g. House File 410, effective July 1, 2017. This bill makes Palmer Amaranth a primary noxious weed and a prohibited invasive plant. A person who fails to comply with an order from the county weed commissioner to destroy Palmer Amaranth will be subject to daily fines for up to 10 days and then the county weed commissioner can destroy the weed and assess the costs against the landowner. The bill prohibits the weed control program established from applying to the control of Palmer Amaranth on land enrolled in the federal Conservation Reserve Program.

For a complete listing and summaries of agricultural related court decisions and other agricultural law resources in Iowa, see the Iowa State University Center for Agricultural Law and Taxation website: http://www.calt.iastate.edu/