

## Minnesota amends its agricultural contracts statute

Since 1990 Minnesota has regulated agricultural production contracts. Because the Minnesota "Agricultural Contracts" statute was the first in the nation, its provisions have served as a model or point of reference for similar legislation in other states. See generally Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. Memphis L. Rev. 1051, 1074-1093 (1995) (discussing the Minnesota, Wisconsin, and Kansas production contract statutes and legislative proposals in other states). In its most recent legislative session, the Minnesota Legislature substantially amended the statute so that its regulation of the contractor-producer relationship will become even more comprehensive.

The original statute had seven main features. First, it required an arbitration or mediation clause in agricultural production contracts. Minn. Stat. § 17.91. Second, it limited the contractor's ability to terminate or cancel a contract that required the producer to make a capital investment in buildings or equipment costing \$100,000 or more. In such cases, subject to exceptions, the contractor was required to give at least 180-day advance written notice of the termination or cancellation to the producer and to reimburse the producer "for damages incurred by an investment in buildings or equipment that was made for the purposes of meeting minimum requirements of the contract." *Id.* § 17.92(1). Third, subject to exceptions, contractors were required to give notice and the opportunity to cure deficiencies to producers who had breached their contracts. *Id.* § 17.92(2). Fourth, parent company responsibility was imposed for the contracts of subsidiaries. *Id.* § 17.93. Fifth, the statute imposed the U.C.C. 1-201 implied promise of good faith on all parties to a production contract and authorizes attorney fee awards against the breaching party. *Id.* § 17.94. Sixth, the Minnesota Commissioner of Agriculture was given the authority to adopt rules prohibiting unfair trade practices. *Id.* § 17.945. Finally, the statute created an ombudsman position within the Minnesota Department of Agriculture to investigate complaints and facilitate dispute resolutions. *Id.* § 17.95.

In 1999, a separate statute was enacted prohibiting anti-disclosure provisions in contracts entered into, renewed, or amended on or after July 1, 1999, between producers and agricultural processors. *Id.* § 17.710. However, in its 2000 Regular Session, the Minnesota Legislature directly amended the Agricultural Contracts

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## D.C. Circuit rules meat inspectors must "inspect" meat, not "observe" it

During the past several years, the USDA has been in the process of shifting the responsibility for making post-mortem inspections of livestock and poultry from inspectors employed by the USDA's Food Safety and Inspection Service (FSIS) to the employees of meat and poultry processors. This new inspection regime is based on systems and standards promulgated by the USDA in its Pathogen Reduction/Hazard Analysis and Critical Control Points (HACCP) final rule, 61 Fed. Reg. 38,805 (1996). As announced in the USDA's HACCP-Based Meat and Poultry Inspection Concepts: In-Plant Slaughter Inspection Models Study Plan, 63 Fed. Reg. 40,381 (1998), the new inspection regime contemplates essentially two roles for FSIS inspectors—oversight and verification.

As overseers, FSIS inspectors will observe industry employees as they make carcass-by-carcass inspections. As verifiers, FSIS inspectors will randomly sample and examine carcasses to ascertain whether the establishment has been properly inspecting carcasses. In neither role will FSIS inspectors continue to do what they have done for almost a century—inspect carcasses on a carcass-by-carcass basis.

A group of FSIS inspectors, their union, and a consumer advocacy group filed suit

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statute in several important respects.

First, effective January 1, 2000, new or substantially amended Minnesota agricultural production contracts must be accompanied by "a clear written disclosure setting forth the nature of the material risks faced by the producer if the producer enters into the contract." *Id.* § 17.91(2). This disclosure, and the contract itself, "must be in legible type, appropriately divided and captioned by its various sections, and written in clear and coherent language using words and grammar that are understandable by a person of average intelligence, education, and experience within the industry." *Id.* § 17.943(1). A disclosure statement may consist of a written statement or a checklist and may be developed with the assistance of producers or producer organizations. A "safe harbor" is provided in that if a contractor submits a sample disclosure statement to the Commissioner and, if the Commissioner either approves it or does not respond within 30 days from its receipt, the statement is deemed to comply with the disclosure requirement, including its incorporated "plain language"

requirement. *Id.* § 17.91(2).

Second, producers will have a right to cancel a production contract "by mailing a written cancellation notice to the contractor within three business days after the producer receives a copy of the signed contract, or before a later cancellation deadline if a later deadline is specified in the contract." *Id.* § 17.941. This right to cancel and the cancellation deadline must be disclosed in every agricultural contract. *Id.*

Third, agricultural contracts must have a "cover sheet." *Id.* § 17.942(1). This cover sheet must contain the following:

(1) a brief statement that the document is a legal contract between the contractor and the producer;

(2) the statement "READ YOUR CONTRACT CAREFULLY. This cover sheet provides only a brief summary of your contract. This is not the contract and only the terms of the actual contract are legally binding. The contract itself sets forth, in detail, the rights and obligations of both you and the contractor. IT IS THEREFORE IMPORTANT THAT YOU READ YOUR CONTRACT CAREFULLY.";

(3) the written disclosure of material risks ...;

(4) a statement detailing, in plain language, the producer's right to review the contract...; and

(5) an index of the major provisions of the contract and the pages on which they are found, including:

(i) the names of all parties to the contract;

(ii) the definition sections of the contract;

(iii) the provisions governing cancellation, renewal, or amendment of the contract by either party;

(iv) the duties or obligations of each party; and

(v) any provisions subject to change in the contract.

*Id.* § 17.942(2).

Fourth, contractors may submit their contracts for review by the Commissioner, who can certify a contract's compliance with the statute. *Id.* § 17.944(2). Among matters required for compliance is the adequate "readability" of the contract, an attribute partially based on its Flesch scale analysis readability score. *Id.* § 17.944(3). Certification by the Commissioner "does not constitute an approval of the contract's legality or legal effect." *Id.* § 17.944(5).

Fifth, a court reviewing a production contract may change the contract's terms or limit its provisions "to avoid an unfair result" if the court finds the following: the contract violates the statute's contract format requirements, including the readability requirements; the violation caused the producer to be confused about the contract's provisions; and "the violation has caused or is likely to cause financial detriment to the producer." *Id.* § 17.944(8). In reforming a contract or limiting its provisions, courts may make orders necessary to avoid unjust enrichment. In addition, relief cannot be granted unless the claim is brought before the contract has been fully performed, and the bringing of a claim for relief "does not entitle a producer to withhold performance of an otherwise valid contractual obligation." *Id.*

Finally, other provisions of the amended statute provide for specific contractor defenses, limitations on attorney fee awards, and limitations on producer actions for breach of the contract format provisions. See *id.* § 17.9441. Additional provisions exclude certain types of contracts from certain provisions in the statute and provide that any contract that purports to waive the statute is void. See *id.* §§ 17.9442, 17.9443.

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**Meat inspectors/Cont. from p. 1**

to enjoin the Secretary from authorizing any departure from carcass-by-carcass inspections by FSIS inspectors. They contended that the new regime violated both the Meat Inspection Act (FMIA), 21 U.S.C. § 604, and the Poultry Products Inspection Act (PPIA), 21 U.S.C. § 455. Though unsuccessful before the district court, their argument prevailed before the D.C. Circuit, which recently held that "[d]elegating the task of inspecting carcasses to plant employees violates the clear mandates of the FMIA and PPIA." *American Federation of Government Employees, AFL-CIO v. Glickman*, No. 99-5320, 2000 WL 793966 (D.C. Cir. June 30, 2000).

The outcome turned on the meaning of

"inspection" in both the FMIA and the PPIA. Both statutes essentially seek to prevent adulterated meat from being marketed to consumers. In relevant part, the FMIA provides that "the Secretary shall cause to be made by inspectors appointed for that purpose a post-mortem examination and inspection of the carcasses and parts thereof of all [livestock] to be prepared at any slaughtering ... or similar establishment." 21 U.S.C. § 604 (emphasis supplied). The PPIA provides that "[t]he Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed...." 21 U.S.C. § 455(b) (em-

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## Denial of payments to cotton exporter upheld

Production Marketing, L.L.C., is an Alabama cotton broker. In 1998, it enrolled in the Upland Cotton User Marketing Certificate Program. Authorized by the Federal Agricultural Improvement and Reform Act of 1996, this program subsidizes domestic exporters of upland cotton under certain market conditions. See 7 U.S.C. § 7236(a). These subsidies are intended to make domestic upland cotton and domestic upland cotton exporters more competitive in international markets. When the program was originally authorized, total program expenditures were capped at \$701 million for fiscal years 1996 through 2002. *Id.* § 7236(a)(5). This cap was eliminated in 1999. See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-78, tit. VIII, § 806(a)(4), 113 Stat. 1135, 1180. For Production Marketing, however, the demise of the cap came too late. As recounted in a lengthy opinion in *Production Marketing, L.L.C. v. Commodity Credit Corp.*, No. 99-A-1453-N, 2000 WL 1160432 (M.D. Ala. Aug. 8, 2000), Production Marketing learned that the generosity of federal appropriations has its limits: sometimes the money runs out before one can get to it.

The Upland Cotton User Marketing Certificate Program turned out to be remarkably popular. Indeed, the enthusiasm for its payments was sufficient to exhaust the entire \$701 million allocated for fiscal years 1996 through 2002 by December 14, 1998, at 4:22 p.m. Any application for benefits that had not been filed in complete and correct form by that day, hour, and minute was denied, for the money was gone.

At the moment the funds were exhausted, Production Marketing had sev-

eral applications for payments pending. These applications covered upland cotton that had been exported to Mexico a few weeks earlier. Unfortunately for Production Marketing, the Kansas City Commodity Office (KCCO), which was administering the program, deemed these applications to be incomplete or incorrect. Although the KCCO had previously returned other applications to Production Marketing for correction and re-submission, it did not do so for the applications pending on December 14. Instead, since all of the available funds had been spent to make payments on complete and correct applications, the KCCO simply denied the applications.

Production Marketing was not pleased, for the denial meant the loss of \$273,676.34. In addition, Production Marketing could point to the Upland Cotton Domestic User/Exporter Agreement that it had entered into with the Commodity Credit Corporation (CCC). In relevant part, this Agreement provided that applications for payment must be submitted within 60 days after the cotton was exported and that applications would be processed in the order that complete applications were received. It also contemplated, however, that incomplete applications would be returned to the exporter for correction and re-submission.

Production Marketing therefore appealed to the USDA National Appeals Division (NAD) where it found short-lived relief. The NAD Hearing Officer sided with Production Marketing. The Hearing Officer found that, up to the impending exhaustion of the available funds, the KCCO had immediately notified exporters if their payment applications were complete or incorrect. Export-

ers were then permitted to re-submit the applications once the deficiencies were corrected. The Hearing Officer reasoned that because Production Marketing had not received immediate notification of the deficiencies in its applications it had not been treated in the customary manner.

The NAD Director, on his review of the Hearing Officer's decision, took a different view of Production Marketing's plight. The Director found that the applications were deficient on their face and therefore were not "complete applications" warranting payments. Moreover, according to the NAD Director, Production Marketing was on notice that the funds were being rapidly depleted.

There was no dispute that Production Marketing knew that the funds were running low. A KCCO memo sent to it and other program participants had said as much. In addition, the memo had stated that complete applications would be processed in the order they were received and that incomplete applications would not be processed until they were completed or corrected. Production Marketing had received this memo before it made the exports covered by the denied applications.

The NAD Director ruled against Production Marketing. Production Marketing then sought review under the judicial review provisions of the Administrative Procedure Act (APA), 7 U.S.C. §§ 701-706. From the start, however, the review did not proceed as Production Marketing had desired. As to the threshold issue of the applicable standard of review, Production Marketing argued that review should be de novo because the essential question was a matter of contract law involving the interpretation of its Agree-

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Meat inspectors/*Cont. from page 2*  
phasis supplied).

As the D.C. Circuit noted, since 1907 an "inspection" under the FMIA has meant that a federal inspector used his or her sight, touch, and smell to examine each slaughtered carcass. While acknowledging this to be true, the Secretary claimed that this meaning of the term was not an exclusive one. According to the Secretary, the statutory requirement of an "inspection" could also be satisfied by a federal inspector watching someone else view, touch, and smell each carcass. By watching what the other person was doing, the Secretary maintained, the federal inspector would necessarily see the carcass that the other person was viewing, touching, and smelling. The Secretary also claimed that he was entitled to interpret "inspection" in this manner because neither Act defined the term.

The D.C. Circuit was unpersuaded by the Secretary's arguments. As to the Secretary's logic, the court observed that "[o]ne might as well say that umpires are pitchers because they carefully watch others throw baseballs." *American Fed. of Gov't Employees v. Glickman*, 2000 WL 793966 at \*3. It then noted that the lack of a statutory definition does not render a term ambiguous. Instead, [i]t simply leads us to give the term its ordinary, common meaning." *Id.* (citation omitted).

For the court, the ordinary and common meaning of the term "inspection" did not encompass the Secretary's position that an inspector's "observation" of a carcass was statutorily sufficient. Drawing a distinction between "inspection" and "observation," the court reasoned:

Every inspection entails an observa-

tion, but not every observation amounts to an inspection. One may observe something without paying close attention to it, and without giving it a critical appraisal, although that is what these statutes demand. The military commander may observe his troops without inspecting them. The foreman of an assembly line may do the same with widgets.

*Id.*

On this basis, the court concluded that "[b]oth statutes clearly contemplate that when inspections are done, it will be federal inspectors—rather than private employees—who will make the critical determination whether the product is adulterated or unadulterated." *Id.* (footnote omitted).

—Christopher R. Kelley, Asst. Prof. of Law, University of Arkansas

# Crop share rental arrangements and sample lease

By Paul A. Meints, Esq., CLU, ChFC

The following Crop Share Lease with provisions for cattle has its origin in the Illinois Cooperative Extension's form that was developed many years ago, being updated for items and farming practices that have changed in the interim, and which, in its author's opinion, are outdated or missing in the older format.

## Crop Share Farm Lease

This **Crop Share Lease** and its provisions for Livestock is effective as of January 1, 2000, between **CATHERINE A. CATTLEMAN**, acting individually and as designated Trustee by and on behalf of the **CATTLEMAN FAMILY LAND TRUST**, and **ANGUS PINZGAUER** whose current mailing address is Rural Route #3 - Box 123, Anytown, Illinois 61XXX (Telephone: 111-111-1234). **CATHERINE A. CATTLEMAN** resides at Rural Route #3 - Box 124, Anytown, Illinois 61XXX, (telephone: 111-111-4321) and is, from time to time, herein referred to as the "Lessor." **ANGUS PINZGAUER** is, from time to time, herein referred to as the "Lessee."

**Consolidation:** This Consolidated Lease of land and improvements (hereinafter from time to time referred to as "land") is for the land owned by the **CATTLEMAN Family Land Trust** and the land owned by **CATHERINE CATTLEMAN** that is designated in Appendix "A" at the end of this Crop Share Leasing agreement.

**Leasing Land and Improvements:** The Lessor rents and leases the land and related improvements to the Lessee to use for lawful agricultural purposes only. The Lessee agrees to rent the land from the Lessor on the terms of this lease. All hunting rights for the Land are reserved to and by the Lessor. The exclusive and unrestricted use of the Lessor's residence, garage, and playhouse are also reserved to and by the Lessor.

**Term of Lease:** The term of this Lease shall be from March 1, 2000 to February 28, 2001, and shall continue automatically from year to year after the initial term unless written notice to terminate is given by the Lessor or the Lessee to the other on or before September 1, except that in the year of death for **CATHERINE A CATTLEMAN** and for the following year, notice to terminate may occur at any time prior to the start of the new lease term.

*Paul A. Meints, CLU, ChFC, Country Companies-Financial Services, Bloomington, IL.*

**Future Changes and Alterations:** This Lease can be altered and amended only in writing.

## Section 1 - Division of Crops, Livestock, Rents, and Other Lease Payments

A. **Crop Share Rent.** The Lessee agrees to pay rent to the Lessor, to the Lessor's agent, or to the Lessor's assign according to the following shares of crops grown:

1. Lessor's share of Corn is..... 50% ;
2. Lessor's share of Soybeans is..... 50% ;
3. Lessor's share of Oats is..... 50% ;
4. Lessor's share of Wheat is..... 50% ;
5. Lessor's share of Alfalfa is..... 50% ;
6. Lessor's share of Clover Hay is..... 50% ;
7. Lessor's share of Straw is..... 50% ;
8. Lessor's share of Silage is..... 50% ;
9. Lessor's share of Clover and Grass Seed is..... 50% ;
10. Lessor's share of \_\_\_\_\_ is... 50% ;
11. Lessor's share of \_\_\_\_\_ is..... 50% .

B. **Livestock Share Rent.** The Lessee agrees to pay rent to the Lessor, to the Lessor's agent, or to the Lessor's assign according to the following shares of the livestock which are raised or grown:

1. Lessor's share of Livestock is..... 50% ;
2. Lessor's share of Breeding Livestock is..... 100% ;
3. Lessor's share of \_\_\_ is..... %.

C. **Bin Rental.** The Lessee agrees to store, at the Lessor's request, as much of the Lessor's share of the crops as is possible. The Lessee agrees not to use more than [n/a for 2000-01] percent of the total space provided by the Lessor in cribs, grain bins, granaries, or barns that are located on the land.

D. **Supplemental Rent and Adjustments.** The Lessee agrees to pay additional or supplemental rent to the Lessor, to the Lessor's agent, or to the Lessor's assign for each year of this lease and any holdover period associated with such:

1. **Supplemental Rent and Adjustments.** The Lessee agrees to pay to the Lessor the sum of [\$0.00 for 2000-01] for supplemental adjustments relating to the livestock facilities, buildings, and other livestock related improvements. This Supplemental Adjustment shall be paid in equal monthly installments to the Lessor on or before the first day of the month.

2. **Supplemental Rent for Grain Storage.** The Lessee agrees to pay to the Lessor the sum of Ten Cents Per Bushel for storage of the Lessee's grain on the Lessor's property or bin(s). This Supplemental Adjustment shall be paid no later than February 1 following the harvest of such crops.

3. **Rebates, Refunds, Price Concessions, Discounts, and Special Promo-**

**tions.** The Lessee agrees to pay the Lessor for the Lessor's portion of any rebates, refunds, price concessions, discounts, commissions earned, special promotions, or other income received.

4. **Genetically Altered Seed.** The Lessor and Lessee will agree on the seed to be used on the Lessor's land.

5. **Specialty Corn, Soybeans, and Grains.** The terms of this Lease will be renegotiated if high protein, high oil, or other forms of grains or specialty crops are raised on the Land and intended for commercial sale rather than as feed for the Livestock.

## Section 2 - Division of Investments and Expenses

A. **Shared Input, Labor, and Capital.** The Lessor and the Lessee each agree to furnish the investment items, labor, and shares of expenses, unless otherwise shown in the exceptions or alternatives contained in Clause B., in the following manner [see "Description of Investment or Expense Item" table on next page]:

## Section 3 - Lessee's Duties in Operating Farm.

A. The Lessee agrees to perform and carry out the following:

1. To give priority to the Land that is owned by the Lessor;

2. To cultivate the farm faithfully and in a timely, thorough, and businesslike manner;

3. To do fall plowing with the mutual consent of the Lessor;

4. To follow the Lessor's wishes as to where corn, beans, wheat, oats, and any other grains are to be planted and to cooperate fully in carrying out the wishes and directions of the Lessor as to the care, raising, and marketing of any Livestock;

5. To inoculate and treat all seeds that are not known to be thoroughly inoculated for the particular crop planted;

6. To prevent noxious weeds from going to seed on the Land and adjacent to such Land and to destroy the same and keep the weeds and grass cut;

7. To keep no livestock without Lessor's written permission;

8. To keep ditches, tile drains, tile outlets, grass waterways, and terraces open and in good repair;

9. To protect and preserve established watercourses or ditches, and to refrain from any operation or procedure that will injure such;

10. To prudently protect and preserve the blacktopped lane leading to the residence by restricting its use to light-duty vehicles;

11. To keep the buildings, fences, and other improvements in as good of repair and condition as they are when the

Description of Investment or Expense Item	Share (%) or Amount (\$) to be Paid or Furnished by:	
	Lessee	Lessor
<b>LAND:</b>		
1. _____ acres of cropland	0%	100%
2. _____ acres of other land	0%	100%
3. _____ acres of permanent pasture	0%	100%
<b>IMPROVEMENTS:</b>		
1. Older Farmhouse and Garage	0%	100%
2. Other Farm Buildings	50%	50%
3. Lessor's Residential Driveway	20%	80%
4. Ingress & Egress @ _____ Farm	50%	50%
5. Tile, Fences, Culverts & Bridges	0%	100%
6. Major Repairs on Improvements	50%	50%
7. Minor Repairs on Improvements	100%	0%
8. Painting of Residence Exterior	0%	100%
9. Painting of Residential Interior	0%	100%
10. Other: _____		
["FA": Subject to Future Agreement of the Lessor and the Lessee' ["Minor" repairs are those repairs and items of maintenance that the Lessee can perform with his, own skill and equipment or with equipment furnished by the Lessor. These types of repairs are generally considered maintenance.] ["Major" repairs are those repairs which would generally be considered as replacement and are the primarily responsibility of the Lessor, unless otherwise noted herein]		
<b>MACHINERY and EQUIPMENT:</b>		
1. Crop and Field Equipment	100%	0%
2. Livestock Equipment	100%	0%
3. Grain Dryers and Equipment	0%	100%
4. Grain Dryer Repairs	50%	50%
5. Elevators, Augers, and Grain Legs		
6. Motors	50%	50%
7. Machinery, Equipment Repairs on Lessee's Machinery	100%	0%
8. Machinery, Equipment Repairs on Lessor's Machinery	0%	100%
9. Other: _____		
<b>LIVESTOCK RELATED:</b>		
1. Baling Hay	100%	0%
2. Feed Grinding and Mixing	100%	0%
3. Manure Handling and Removal	100%	0%
4. Electricity for Livestock Product	50%	50%
5. Fuel for Feeding, Manure Handling, Baling	50%	50%
6. Water and Other Utilities at the _____ Farm	50%	50%
7. Water and Other Utilities at the _____ Farm	50%	50%
8. Other: _____		
<b>ITEMIZED EXPENSES:</b>		
1. Seed Corn	50%	50%
2. Seed Beans	50%	50%
3. Wheat, Oats and Other Crop Seeds	50%	50%
4. Legume and Grass Seeds	50%	50%
5. Burndown Herbicide(s)	50%	50%
6. Additional Herbicides	50%	50%
7. Pesticides and Fungicides	50%	50%
8. Combining	100%	0%
9. Grain Drying Fuel and Electricity	50%	50%
10. Residential Utilities	0%	100%
11. Hauling Lessor's Grain Less Than Ten Miles	100%	0%
12. Hauling Lessor's Grain More Than Ten Miles	50%	50%
13. Other: _____		
<b>GENERAL LABOR:</b>		
1. Labor to operate the farm, make minor improvements, repairs, and provide general farm maintenance	100%	0%
2. Labor to raise and care for the livestock	100%	0%
3. Other: _____		
<b>FERTILIZERS:</b>		
1. Limestone, hauling and spreading	50%	50%
2. Anhydrous Ammonia	50%	50%
3. Anhydrous Ammonia Application	100%	0%
4. Bulk Fertilizer and Application	50%	50%
5. Mixed and Other Fertilizer	50%	50%
6. Other: Pasture Fertilizer - 80 A.	0%	100%
7. Other: _____		

The Lessor agrees to have new soil tests taken during the 2000-2001 Lease Year and will apply recommended rates in a timely manner. For all following lease years, the Lessor and the Lessee will divide equally the cost of limestone and its application.

**B. Exceptions, Other Arrangements, and Explanations:**

1. Other: \_\_\_\_\_
2. Other: \_\_\_\_\_

Lessee takes possession or in as good of repair as they may be put by the Lessor during the term of the lease-ordinary

wear, loss by fire, or unavoidable destruction excepted:

12. To take proper care of all

trees, vines, and shrubs, and to prevent injury and disease to the same;

13. To keep the farmstead neat and orderly to the satisfaction of the Lessor;

14. To prevent all unnecessary waste, or loss, or damage to the Lessor's property;

15. To comply with pollution control and environmental protection requirements, and to implement soil erosion control practices that are prudent and in compliance with the soil loss standards mandated by any governmental agency;

16. To practice fire prevention, follow safety rules, and abide by restrictions in the Lessor's insurance contracts;

17. To keep Lessee's business property insured with a reputable insurance company on terms and conditions that are satisfactory to the Lessor;

18. To maintain recommended levels of fertilizer for the Land;

19. To use prudence and care in transporting, storing, handling, and applying all fertilizers, pesticides, herbicides, and other chemicals and similar substances, and to read and follow instructions on the labels for the use of such materials in order to avoid injury or damages to persons or property or both on the land and adjoining areas;

20. To minimize soil erosion losses and preserve the productivity of the Land.

**B. Restricted Activities.** The Lessee agrees that, absent the written consent of the Lessor, he will not do the following:

1. Assign this Lease to any person or persons or sublet any part of the leased Land and improvements;

2. Erect or permit to be erected any structure or building or to incur any expense to the Lessor for such purposes;

3. Add electrical wiring, plumbing, or heating to any building(s) without obtaining the Lessor's consent, all such work and materials being done or added being in accordance with the standards and requirements of power and insurance companies;

4. Permit, encourage, or invite other persons to use any part or all of the Land and its improvements for any purpose

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or activity which is not directly related to its use for lawful purposes relating to agriculture;

5. Plow permanent pasture or meadowland;

6. Allow any animals on the Land;

7. Burn or remove cornstalks, straw, or other crop residues grown upon the Land;

8. Cut live trees for any reason;

9. Erect or permit to be erected any commercial advertising signs on the farm of a nature and type that are other than the customary sign(s) used to denote the type of seed which has been planted and its origin, such as signs that are usual and customary for a seed test plot being expressly permitted.

#### C. Additional Agreements:

### Section 4 - Management and Business Procedures

The lessor and Lessee agree to the following provisions:

1. Active Management: The Lessee agrees to the Lessor's active management in the operation of the Land, on all decisions on the acreage and rotation of crops, as well as the kind and quality of seed, chemicals, and fertilizer to be used. The Lessee further agrees to the Lessor's active and involved participation in all aspects of the livestock operation and acknowledges the Lessor's expertise that has come from many years of raising livestock. The parties acknowledge the good health and Adams County residence of the Lessor and further understand and acknowledge that future adjustments may be required to reflect the abilities and desires of the Lessor in the future. The parties agree to bargain in good faith as to any changes which may be advisable because of a future change in the Lessor's health and/or residence.

2. Joint Decisions by the Lessor and the Lessee. The Lessor and the Lessee shall jointly decide upon the following matters:

a. Kind of livestock to be purchased together with the time and terms of such purchase.

b. Time when the livestock shall be sold and the manner of such sale together with the sales agency to be used.

c. Kind of feed and supplements to be purchased together with the time, place, and terms of such purchase.

d. Composition of the feeding rations, sources of feed supplements, and sources and use of veterinary services.

e. Buying and selling of jointly owned crops, other farm produce, materials, and supplies in amounts of more than Five Hundred Dollars (\$500.00), sales and purchases below this amount being made in the discretion of the Lessee.

3. Unspecified Decision Making. All

unspecified decision-making, including the day-to-day implementation and execution of mutually agreed upon operating and maintenance plans, shall be the Lessee's responsibility.

4. Business and Accounting Procedures. The Lessor desires to remain separate and independent from the Lessee to the extent that such is prudent, practical, and reasonable. The Lessor wishes to have direct and separate billing and accounting for Lessor's share. The Lessee agrees to keep complete financial and production records of the farming operation and to furnish an annual report to the Lessor upon request of the year following harvest that reflects the income and expenses associated with the Land owned by the Family's trust.

5. Government Farm Programs and Entitlements. The Lessor and Lessee shall decide each year whether to participate in governmental programs, entitlements, and other benefits designed to assist agriculture or increase income to those who farm. The Lessor and the Lessee shall decide how payments and the cost involved shall be shared between them. In the event that the parties shall be unable to agree within thirty days, then the decision shall be made by the County Manager for the Adams County Farm Bureau or his designee.

6. Post-term Leasing Reimbursements. At the end of the Lease, the Lessor agrees to reimburse the Lessee for the following items:

a. The Lessee's remaining cost in limestone which is calculated by first subtracting, from the Lessee's original cost, governmental payments received by the Lessee, and then depreciating the Lessee's net cost at the rate of twenty-five percent (25%) per year or as considered usual and typical for the particular form of limestone utilized.

b. For the Lessee's cost of legume and grass seed in seedings made on more than ten acres in the last year of the Lease.

c. For the Lessee's cost of soluble phosphate and potash fertilizers applied on crops harvested for grain in the last year of this lease minus the amount of these plant food elements, valued at the same rates, contained in the Lessee's share of these crops.

d. For the Lessee's cost of major improvements or repairs as such is subsequently agreed to by the Lessor and the Lessee.

7. Responsibility for Labor. The Lessee is solely responsible for all employer obligations on hired labor together with instilling and promoting respect for safety requirements and for the payment of required taxes and compensation.

### Section 5 - Farm Chemicals

The Lessor and Lessee agree to the

following provisions:

1. All chemicals used by the Lessee on the Lessor's property shall be applied by a licensed operator (whenever such is required by the laws of the State of Illinois), in a prudent and proper manner, including the use of equipment which is in good working order, and at levels which do not exceed the manufacturer's recommendation. The application of any chemicals on the Lessor's property shall at all times be in a manner which is generally consistent with prudent farming practices, any rules and regulations of the Environmental Protection Agency, and any guidelines and recommendations provided by the chemical manufacturer. Each chemical container shall be used and stored in a manner that minimizes the risk of an accidental spill and discharge.

2. No chemicals will be stored on the Lessor's property for more than one year from the purchase date. Any chemicals or petroleum products stored or maintained on the Lessor's property will be in clearly marked closed tight containers located above the ground.

3. No excess chemicals or chemical containers will be disposed of on the Lessor's property. All excess chemicals, chemical containers, or other hazardous waste will be removed in a timely, prudent manner by the Lessee at his expense and, under no circumstances, shall such remain after the end of the final lease year.

4. During the life of this lease, Lessee shall record all applications of chemicals and fertilizer by field, including the name and source of each item applied, the quantity applied and the date of the application. Lessee shall furnish a copy of this record to the Lessor within twenty-one days following the Lessor's request for such record. Lessee agrees to make such record available for inspection by the Lessor at any reasonable time during the year.

5. Lessee shall pay for the cleanup of any hazardous chemical spill occurring on the Lessor's property when said spill is the direct or indirect result of the Lessee's farming activities and operations. Lessee shall keep the Lessor safe, harmless, and indemnified as to any claims, fees, damages, legal fees, causes of action including all costs of cleanup, and other costs and expenses resulting from said spill.

### Section 6 - Default, Possession, Lessor's Lien and Other Lease Related Terms and Conditions

The Lessor and Lessee agree to the following provisions:

1. Termination Upon Default. If either party fails to substantially carry out the terms of his or her duties and responsibilities in due and proper time, the lease may be terminated by the other party by serving a written notice giving the

reason(s) or instance(s) of default and specifying a termination date of thirty days from the date of such notice.

2. Yielding Possession. The Lessee agrees at the expiration or termination of this Lease to yield possession of the Land and improvements to the Lessor without further demand or notice, in as good order and condition as when they were entered upon by the Lessee, loss by fire, flood, or tornado, and ordinary wear excepted. If the Lessee fails to yield possession, then the Lessee shall pay to the Lessor an amount of rent per day which is equal to the statutory double rent based upon payments made during the prior year for each day the Lessee remains in possession, in addition to court costs and attorney's fees, and any damages caused by the Lessee to the Lessor's Land, improvements, livestock, or other related farm personal property. Payments made by the Lessee do not give the Lessee any interest in or to the Land the improvements.

3. Lessor's Lien. The Lessor's lien provided by law on crops grown or growing shall be the security for the rent specified in this Lease and for the faithful performance of the terms of this lease. Within ten days of being requested by the Landlord, the Lessee shall provide the Lessor with the names of persons to whom the Lessee intends to sell crops grown on the Lessor's Land. Additionally the Lessee agrees to cooperate fully in enabling the Lessor to timely "perfect" its interest in any lien which may be provided by law, as such laws now exist and as they may be altered or amended in the future. The Lessee agrees to timely provide the Lessor or the Lessor's attorney with the information that is considered necessary in order to protect and preserve Lessor's rights as provided by law. If the laws affecting this paragraph are changed in any manner, then the Lessee agrees to cooperate fully with any efforts of the Lessor to protect its interest.

4. Lessor's Right of Entry. The Lessor reserves the right personally or by agents, employees, independent contractors, or assigns to enter upon the Land at any reasonable time to view them, to work or make repairs or improvements thereon, to care for and dispose of the Lessor's share of the crops, to develop mineral resources, or, after notice of termination has been given and following severance of crops, to plow and prepare a seed bed, make seedings, glean corn, apply fertilizers and chemicals, and any other operation necessary in good farming by a succeeding operator. Prior to any default by the Lessee, the Lessor shall not interfere with the Lessee's carrying out of the regular farming operations.

5. Mineral Rights. All mineral rights and interests, if any remain the sole property of the Lessor.

6. Hunting Rights. All hunting rights

and other related use of the Land shall remain the sole property and responsibility of the Lessor.

7. Binding Under Illinois Law. This Lease is binding on and inures to the benefit of the heirs, executors, administrators, assigns, and family members of the Lessor and the Lessee.

8. Premature Death of the Lessee. If the Lessee should die during the term of this lease and any extensions thereof and if such death occurs before August 1<sup>st</sup>, then the Lessor has the right to make such plans and arrangements for the remainder of the crop year as are determined to be appropriate, fair, and equitable. If such death occurs after August

#### Cotton exporter/Cont. from page 3

ment with the CCC. The CCC countered that the issues presented also concerned the agency's interpretations of its regulations and thus the applicable standard was the arbitrary and capricious standard under APA § 706(2)(A). The court rejected both parties contentions and concluded that the "substantial evidence" standard of APA § 706(2)(E), applied because the NAD determination under review comported with the formal adjudication requirements specified in APA §§ 554 and 556. Nevertheless, it acknowledged that "[t]he Eleventh Circuit has recently found that '[t]he substantial evidence test is no more than a recitation of the application of the 'arbitrary and capricious' standard to factual findings.'" *Production Marketing*, 2000 WL 1160432 at \*3 (citing *Fields v. United States Dep't of Labor Admin. Review Bd.*, 173 F.3d 811, 813 (11th Cir. 1999)).

Production Marketing fared no better on the merits. It essentially founded its various arguments on the premise that the program Agreement obligated the CCC to return insufficient applications for correction and re-submission. Hence, according to Production Marketing, it should have been given the opportunity to correct its applications before the money ran out. Alternatively, it contended that its applications were complete or that any deficiencies were "hyper-technicalities."

From these premises, Production Marketing advanced a variety of contentions, most of which attacked the KCCO memo which Production Marketing claimed defeated its right to the opportunity to correct the deficiencies in its applications for payment. For example, it argued that the KCCO memo was an improper basis for the agency's actions because it was impermissible parol evidence in that it contradicted the Agreement. Alternatively, Production Marketing argued that the memo was an abuse of authority because it both changed the definition of a "complete agreement" and altered agency procedures with respect

1<sup>st</sup> and prior to the harvesting of such crops, then it is the Lessor's responsibility to make arrangements for the harvesting of growing crops.

9. Lessor Liability. The Lessee takes possession of the Land and improvements subject to the hazards of operating a farm, assuming all risk of accidents personally as well as for family, employees, or agents in pursuance of farming operation, or in performing repairs on buildings, fences, tile, and other improvements.

#### Section 7 - Additional Agreements

Dated: \_\_\_\_\_, 2000 Dated: \_\_\_\_\_, 2000

to the returning of incomplete or incorrect applications.

It suffices here to say that the court rejected all of Production Marketing's arguments. It did agree, however, with Production Marketing's assertion that the Agreement allowed exporters to re-submit deficient applications. As the court noted, some of the earlier applications submitted by Production Marketing had been returned for correction and re-submission. Nonetheless, according to the court, the problem for Production Marketing was essentially two-fold. First, neither the Agreement nor the program regulations specified when a deficient application must be returned. Second, at the time the applications at issue were received, the KCCO was "inundated" with applications. In fact, over 1,100 applications were received during the first eleven business days in December. Consequently, by the time these applications were reviewed, all of the available funds had been expended. through payments to other exporters whose applications were complete and correct.

In the final analysis, the court was not persuaded by the Production Marketing's suggestion that the proper outcome of the application process was for its deficient applications to have been treated as if they were complete and correct. As the court put it, "Production Marketing would like to 'have it both ways.' It argues that KCCO was altering the Program requirements when it did not return the applications, but it wants KCCO to overlook specific Program requirements for what needs to be listed on the applications, on the basis that requiring strict compliance would amount to imposing 'hyper-technicalities.'" *Id.* at \*15. The moral of this story is that the paperwork matters when the money is running out.

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