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Agricultural Law Update

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Tax questions surrounding deferred payment contracts

On October 4, 1996, the IRS officially issued a previously written Technical Advice Memorandum in a case involving a potato farm. Tech. Adv. Mem. 96-40-003. The advisory opinion concluded that the potato farmers should have reported the entire income from the sale of potatoes in their income for purposes of the alternative minimum tax in the year of sale rather than the year when cash payments were received, even though a portion of the proceeds was paid in a later tax year. Under agreements entered into between the potato farmers and potato buyers, the farmers received as much as seventy-five percent of the proceeds following delivery and inspection in the fall, with the balance payable on or before January 15 of the next calendar year.

The IRS Technical Advice Memorandum was dated December 31, 1995, and generally had been available on electronic research services used by tax lawyers and accountants for most of the year. Federal tax law expressly provides that technical advice memoranda may not be used or cited as precedent. In fact, such advisory opinions are not even binding on IRS auditors or appeals officers. Thus, the official release did not change the non-binding nature of the memorandum.

In late October, a U.S. district court judge in Iowa issued a ruling in a case involving a hog farming operation that specifically addressed the issue of whether the farmers were required to include proceeds from agricultural deferred payment contracts as alternative minimum taxable income in the tax year such contracts were signed. *Coohey v. U.S.*, No. C95-163 (N.D. Iowa, Cedar Rapids Division, Oct. 21, 1996).

The court found that section 56 of the Internal Revenue Code requires cash-basis taxpayers to include the total sales price in income for purposes of the alternative minimum tax in the year such contract is entered into, even though receipt of the proceeds is deferred to a later year.

In the Iowa case, the farmers sold hogs for $915,967 in 1990 under deferred payment contracts, for actual payment in January 1991. While the farmers included the sales proceeds in income for regular tax purposes in calendar year 1991, the IRS successfully argued that the proceeds should have been included in income for purposes of the alternative minimum tax in calendar year 1990.

The Tax Reform Act of 1986 substantially restructured and expanded the alternative minimum tax concept. Prior to 1986, the use of the installment method of accounting was not treated as a tax preference item for purposes of the alternative minimum tax.

The number of taxpayers potentially subject to the alternative minimum tax was changed by the Revenue Reconciliation Act of 1993. That law increased the alternative minimum tax rate from twenty-four percent to a two-tiered system with twenty-six and twenty-eight percent rates. That tax rate increase is one reason more taxpayers potentially are affected by the alternative tax treatment. Congress' Joint Committee on Taxation estimates that 600,000 taxpayers currently are subject to the alternative minimum tax. But since the alternative minimum tax calculations are not indexed to inflation, the Joint Committee on Taxation projects that 6.2 million taxpayers will be affected by this tax by the year 2006.

The alternative minimum tax is calculated using IRS Form 6251. Income from "installment sales" is one of the adjustments or preferences to a taxpayer's regular income listed on the form and addressed in the accompanying instructions. If a taxpayer does not report any regular income from an installment sale in the current tax year, the IRS argument accepted by the Iowa federal court means the taxpayer should nevertheless report the full amount of the sale in the alternative minimum tax income calculation.

Whether or not farmer-taxpayers owe more tax if the IRS argument is upheld depends on several factors. First, there are a number of adjustment and preference items that can result in income for purposes of alternative minimum tax (e.g., charitable contributions, incentive stock options, passive losses, net operating loss deduction, etc.). The more items of adjustment or preference a particular taxpayer

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has, the more likely he or she will owe extra tax. However, most individual taxpayers filing a joint return are entitled to a $45,000 exemption deduction from their alternative minimum tax income before calculating the tax. The exemption deduction will eliminate tax consequences for some taxpayers. Once a taxpayer finishes the alternative minimum tax calculations, the result is compared to the taxpayer's regular tax liability to determine if more tax is owed. The taxpayer pays the higher amount.

It is expected that the farmers in the Iowa case will appeal the district court judge's decision to the U.S. Court of Appeals for the Eighth Circuit.

It should be noted that as recently as July 22, 2996, the publication *Tax Notes Today* reported that the IRS conceded the issue involving alternative minimum tax on deferred crop sales in favor of the taxpayer in two U.S. Tax Court cases involving peanut farmers.

Many tax professional argue that the IRS position accepted by the Iowa federal court is contrary to other portions of the federal tax law and the legislative history surrounding adoption of the Tax Reform Act of 1986. Some tax professionals also have tried to draw a distinction between deferred payment contracts and installment sale contracts.

Legislation to clarify the law was introduced during the just-completed session of Congress. The release of the Iowa decision almost certainly will result in renewed legislative attention once Congress reconvenes in January 1997.

—David C. Barrett, Jr., National Grain and Feed Association, Washington, D.C.

[69] *See generally,* Kendall Thu and E. Paul Durrenburger, *supra* note 40.

[70] *See generally,* Mike King, *The New Smell of Money,* Pork 94. Sept. 1994, at 22.

[71] DeVore, *supra* note 2, at 9-10.

[72] Rhodes, *supra* note 25, at 9.

[73] Lynn A. Hayes, *Statement Before the Minnesota Corporate Farming Law Task Force,* 9-12 December 8. 1994.

[74] Haroldson, *supra* note 52, at 11.

[75] Neil D. Hamilton, *Why Own the Farm If You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Protections for Grain Crops,* 73 Neb. Law Rev. 56 (1994)

[76] Minnesota Environmental Initiative, supra note 14, at 83.

[77] Neil D. Hamilton, *supra* note 45, at 20.

[78] Rhodes, *supra* note 25, at 4.

[79] DeVore. *supra* note 2, at 9.

[80] *Id.*

[81] Christopher R. Kelley, *Production Contracts Present New Issues and Concerns,* Lindquist and Vennum Agricultural Law Report, October/November 1993. at 12.

[82] Haroldson, *supra* note 52, at 13. "What you've got is a feudal system almost. [Contract growers] are at the total whim and mercy of the processors." *Id.* (*quoting* Christopher Sullivan, *Chicken Growers Claim "Federal" Contracts Keep Them From Riches,* Des Moines Sunday Register, Nov 25, 1990 at 2J).

[83] *Id.* at 413

[84] DeVore, *supra* note 2, at 9.

[85] *Id.*

[86] *Id.*

[87] Randi Ilyse Roth, *Contract Farming Breeds Big Problems for Growers,* 17 Farmers' Legal Action Report 12 (1992).

[88] Scott Killman, *Some States Resist the Advent of Corporate Hogs,* Wall St. J., March 28. 1994. at A1

[89] Roth, *supra* note 87, at 13.

[90] *Id.*

[91] *Id.* at 15

[92] Haroldson, *supra* note 52. at 12 For an example of such a case see *Braswell v. ConAgra. Inc.,* 936 F 2d 1169 (11th Cir. 1991).

[93] Rhodes, *supra* note 26, at 9.

[94] J. Warren Mather and Homer J. Preston, *Cooperative Benefits and Limitations,* USDA Agricultural Cooperative Service, Cooperative Information Report 1. April 1980. at 1

[95] Minnesota Environmental Initiative, *supra* note 14, at 20.

[96] Mather and Preston. *supra* note 94, at 2.

[97] Egerstrom, *supra* note 13

[98] Minnesota Environmental Initiative. *supra* note 14. at 20.

[99] Lazarus, *supra* note 18, at 6.

[100] Bruce Reynolds and John Reilly. *Furrow to Farrow: New Hog Technology Helps Local Cooperatives Add Value to Corn,* Farmer Cooperatives. April 1994, at 4.

[101] Lazarus, supra note 18, at 6.

[102] *Id.*

[103] Amy Jo Brandel, *Protestors Bring Hog Manure to Pollution Agency's Doorstep,* Agri News, Nov. 3,1994, at A1.

[104] Minn. Stat. § 500.24. subd. 3(e).

[105] Reynolds and Reilly. *supra* note 19 at 4.

[106] Minn. Laws. Ch. 622 § 2(d)(2)(v) (1994).

[107] Minn. Laws. Ch. 622 § 2(d)(2)(i) (1994).

[108] Minn. Laws. Ch. 622 § 2(j) (1994). (A Schedule F is filed to report personal agricultural income).

[109] Minn. Laws. Ch. 622 § 2(k) (1994).

[110] Reynolds and Reilly, *supra* note 19, at 10.

Federal Register *in brief*

The following is a selection of items that were published in the *Federal Register* from October 16 through November 13, 1996.

1. Natural Resources Conservation Service; notice of proposed change to the Natural Resources Conservation Service's National Handbook of Conservation Practices. 61 Fed. Reg. 54152.

2. PSA; Clear title protection of purchasers of farm products; interim rule; effective date 10/22/96; comments due 12/23/96. 61 Fed. Reg. 54727.

3. FCA; adjusting civil money penalties for inflation; final rule; effective date 10/23/96. 61 Fed. Reg. 54728. Also Farm Credit System Insurance Corporation; 61 Fed. Reg. 55079.

5. CCC; Disaster Reserve Assistance Program; notice "announcing availability of assistance under DRAP to relieve the distress of livestock producers whose production of livestock feed has been adversely affected by nature/disasters." 61 Fed. Reg. 55783.

6. FCIC; Ineligibility for programs under the Federal Crop Insurance Act; proposed rule; effective date 12/30/96. 61 Fed. Reg. 56151.

7. USDA; Export reporting for meat and meat products; proposed rule; effective date 1/13/97. 61 Fed. Reg. 58343.

—Linda Grim McCormick, Alvin, TX

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Agricultural law bibliography

Animal rights

Comment, *The European Union's Steel Leghold Trap Ban: Animal Cruelty Legislation in Conflict With International Trade*, 7 Colo. J. Int'l Envtl. L. & Pol'y 441-461 (1996).

Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 Animal L. 123-154 (1996).

Aquaculture

Fernandez, *Public Trust, Riparian Rights, and Aquaculture: a Storm Brewing in the Ocean State*, 20 Wm. & Mary Envtl. L. & Pol'y Rev. 293-331 (1996).

Biotechnology

Book Review, *Biotechnology and the Federal Circuit*, 9 Harv. J. L. & Tech. 577-584 (1996).

Cooperatives

General

Messina, *Debt Covenant Violations of Private Lending Agreements*, 11 J. Coop. 29-37 (1996).

Moller, Featherstone & Barton, *Sources of Financial Stress in Agricultural Cooperatives*, 11 J. Coop. 38-50 (1996).

Organizational issues

Fulton, Popp & Gray, *Strategic Alliance and Joint Venture Agreements in Grain Marketing Cooperatives*, 11 J. Coop. 1-14 (1996).

Harris, Stefanson & Fulton, *New Generation Cooperatives and Cooperative Theory*, 11 J. Coop. 15-28 (1996).

Environmental Issues

Comment, *Groundwater Jurisdiction Under the Clean Water Act: the Tributary Groundwater Dilemma*, 23 B.C. Envtl. Aff. L. Rev. 603-644 (1996).

Comment, *The Shrinking Reach of the Commerce Power: Is Wetland Jurisdiction In Danger?* 10 J. Nat. Resources & Eenvtl. L. 341-356 (1995).

Comment, *Selenium in San Joaquin Valley Agricultural Drainage: a Major Toxic Threat to Fish and Wildlife Inadequately Addressed by the Central Valley Improvement Act*, 27 Pac. L. J. 303-348 (1996).

Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: the Clean Water Act's Bleak Present and Future*, 20 Harv. Envtl. L. Rev. 515-540 (1996).

Note, *Does the Recent Supreme Court Decision in United States v. Lopez Dictate the Abrogation of the "Migratory Bird Rule"? [Leslie Salt Co. v. United States, 55 F.3d 1388, 9th Cir. 1995]*, 14 Temp. Envtl. L. & Tech. J. 277-292 (1995).

Student article, *Prairie Wetlands: a Reflection of Why We Need a Land Ethic*, 1 Greater N. Cent. Nat. Resources J. 315-350 (1996).

Equine law

Comment, *The Legal Prevention of Equine Insurance Fraud—How We Can Stop the Killing Game*, 22 Ohio N.U. L. Rev. 845-894 (1996).

Farm labor

General & social welfare

Norton & Linder, *Down and Out in Weslaco, Texas and Washington, D.C.: Race-Based Discriminationn Against Farm Workers under Federal Employment Insurance*, 29 U. Mich. J. L. Reform 177-216 (1996).

Note, *Picking Produce and Employees: Recent Developments in Farmworker Injustice*, 38 Ariz. L. Rev. 433-472 (1996).

Forestry

Comment, *Clear-cutting Public Participation in Environmental Law: the Emergency Salvage Timber Sale Program*, 29 Loy. L.A. L. Rev. 1859-1894 (1996).

Wilson, *Barking Up the Right Tree: Proposals for Enhancing the Effectiveness of the International Tropical Timber Agreement*, 10 Temp. Int'l & Comp. L. J. 229-254 (1996).

Fruits & vegetables — perishable agricultural commodities

Comment, *Must Peaches be Preserved At All Costs? Questioning the Constitutional Validity of Georgia's Perishable Product Disparagement Law*, 12 Ga. St. U.L. Rev. 1187 (1996).

Comment, *Can Generic Products Be Disparaged? the "Of and Concerning" Requirement After Alar and the New Crop of Agricultural Disparagement Statutes*, 71 Wash. L. Rev. 517-541 (1996).

Note, *Veggie Libel Meets Free Speech: a Constitutional Analysis of Agricultural Disparagement Laws*, 15 Va. Envtl. L.J. 403-442 (1996).

Hunger & food issues

American Bar Association Section of International Law and Practice, Report to the House of Delegates: Food and Agriculture Organization, 30 Int'l Law. 425-440 (1996).

International trade

Buckingham & Gray, *North American Wheat Wars and the End-Use Certificate —Compromising Free Trade?*, 30 J. World Trade 191-210 (1996).

Franck, *European Trade Restrictions on the Importation of Polish Fruit*, 5 San Fransciso L. Rev. 1-16 (1995).

Land reform

Mulimbwa, *Rural Land Tenure in Zambia and Agricultural Development*, 8 Lesotho L. J. 113-142 (1993).

Land use regulation

Land use planning and farmland preservation techniques

Comment, *New Jersey's Farmland Assessment: Welfare to New Jersey's Landed Gentry or Beneficial Open Space Program?* 15 Temp. Envtl. L. & Tech. J. 83-100 (1996).

Livestock and packers & stockyards

Legislative Note, *Pork, Pollution, and Pig Farming: the Truth About Corporate Hog Production in Kansas*, 5 Kan. J. L. & Pol'y 219 (1996).

Patents, trademarks & trade secrets

Note, *Patents Claiming Genetically Engineered Inventions: a Few Thoughts on Obtaining Broad Property Rights*, 30 New Eng. L. Rev. 1019-1071 (1996).

Pesticides

Casenote, *Does FIFRA Label State Claims for Inadequate Warning "Preempted?" Welchert v. American Cyanamid, Inc.*, 7 Vill. Envtl. L. J. 313-338 (1996).

Curry, Antonucci, & Portuguese, *Federal Preemption of Pesticide Labeling Claims*, 10 St. John's J. Legal Comment. 325-341 (1995).

Trade regulation/antitrust

Azelius & Remnelid, *The Swedish Competition Rules for the Agricultural Sector*, 17 Eur. Competition L. Rev. 318-322 (1996).

Uniform Commercial Code

Article Seven

Kershen, *Article 7: Documents of Title —1995 Developments*, 51 Bus. Law. 1433-1440 (1996).

Water rights: agriculturally related

Comment, *Permitting a Natural Flow In a Prior Appropriation System [Dekay v. United States Fish and Wildlife Service*, 524 N.W.2d 855, S.D. 1994, reh'g denied, 1995], 1 Greater N. Cent. Nat. Resources J. 159-186 (1996).

Looney, *Diffused Surface Water in Arkansas: Is is Time for a New Rule?*, 18 U. Ark. Little Rock L. J. 393-416 (1996).

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Minnesota's anti-corporate farm statute: the legislature's recent attempt to empower livestock farmers*

By Richard F. Prim

* This article is an abbreviated version of the article that appeared in the Spring 1995 Hamline Law Review Symposium on Agricultural Law.

The industrialization of agriculture and the trend towards large-scale, vertically integrated livestock operations are controversial subjects in Minnesota.[1] Changes in the livestock industry are pushing farmers to remain competitive by either increasing the size of their operations or by forming linkages with large corporate agribusinesses through production contracts. Farmers are concerned about this trend for several well-justified reasons including the environmental risks posed by large livestock operations and the loss of management independence caused by contracting. The largest cause for concern, however, is the fear of market foreclosure.[2] Small livestock producers fear they will be squeezed out through the loss of their traditional markets either by large operations filling the meat packer's demand or by the packers themselves contracting with producers for their supply requirements.[3] At the center of the debate over the industrialization of livestock production is Minnesota's anti-corporate farm statute,[4] which has as its stated purpose the preservation of the family farm.[5] The 1994 Minnesota state legislature added to this debate through its controversial amendment to the statute to allow potentially larger livestock operations.[6]

Minnesota's anti-corporate farm statute

Several organizational advantages enjoyed by corporations are fueling the industrialization of livestock production.[7] The most important of these advantages, from a competition standpoint, is the corporation's ability to raise capital. This advantage is important because capital is one of the primary limits on the size of farming operations. The corporation's ability to raise capital allows it to increase the size of farm operations beyond that obtainable by individual farmers, which in turn, gives it competitive advantages through economies of scale.[8] Because of these advantages, Minnesota's Anti-Corporate Farm Statute attempts to accomplish its purpose of saving the family farm by restricting the corporation from entering agriculture and competing with the family farm. The statute does so in two ways. It prevents corporations from owning agricultural land and from "engaging in farming."[9]

Although the corporate form is restricted, it is not fully prevented. The statute exempts two types of corporations from the general prohibition.[10] These two types of exempted corporations include "family farm corporations"[11] and "authorized farm corporations."[12] Both categories of exempted corporations signify the legislature's intent to allow farmers to enjoy some of the advantages of the corporate form while retaining two specific legislative goals.

The first goal is to limit the size of farms. The statute attempts to regulate farm size by controlling the amount of available capital through limits on the number of shareholders. In the family farm context, the limit is that the majority of shareholders must be related within the third degree of kindred. In the authorized farm, the primary limit is a flat five-shareholder limitation.

The second goal is to prevent a few large corporate agribusinesses from moving into Minnesota and dominating the livestock industry.[13] This goal is again addressed by the shareholder limitations because many of the large agribusinesses are organized as publicly-owned corporations with many shareholders.

The statute has succeeded in achieving these two goals. However, the statute has not been nearly as successful in achieving its larger purpose of saving the family farm. In fact, the overall effect of the legislation may harm small farmers by causing them to lose economic opportunities to other states and by hindering their chances of success by limiting their financial tools.[14] The reason for the failure of Minnesota's anti-corporate farm legislation is that the state can only regulate by statute what happens within its borders.[15] Furthermore, prior to the statute's recent amendment, it did nothing to help Minnesota farmers compete with those entities located elsewhere.

Changes affecting the livestock industry

The first change is in the way livestock production is viewed from a business perspective. Livestock is no longer perceived merely as a "mortgage-lifter" or side business to row crop farming.[16] It is now its own business, with much of production being carried out on specialized livestock-only operations. In addition, the industry is also currently responding to perceived consumer demand for a uniform low-fat product.[17] For producers to respond to this demand, they need to deliver large numbers of genetically similar animals. This means they need larger, capital intensive operations and access to improved breeding genetics.[18] However, many farmers do not have the capital required to expand, and producers are often required to enter into a production contract with large agribusiness companies to gain access to the improved genetics.[19] Other technological advances that require significant capital investment include "high health strategies including all-in, all-out and multiple site production and nutritional improvements such as split sex feeding."[20] However the most significant factor of change is the intense competition over market share that is occurring nationwide.

Although nine other states have explicit anti-corporate farming statutes,[21] there is an intense nationwide competition for the livestock industry.[22] States, with or without corporate restrictions, are in direct competition with one another over market share.[23] Minnesota and the other states that place restrictions on agricultural production place their states at a competitive disadvantage in the war over market share.[24] Furthermore, because of the static nature of domestic consumption of pork, one state's gain is another's loss.[25]

The national leader in the swine industry is Iowa, with an annual swine inventory of 14.6 million.[26] While Iowa's position seems secure, many other states have attempted to significantly increase their swine numbers by either loosening corporate restrictions or by attracting large operations to their state.[27] By far the most successful of these states has been North Carolina, which has no restrictions on corporate farming and has openly welcomed corporate livestock production.[28] As a result, North Carolina in 1993 became the third-largest hog producer by moving ahead of Minnesota and Nebraska.[29] It currently ranks second.[30] North Carolina has increased its market share by ninety-four percent since 1990, and 300% over the past twenty years.[31] Between 1986 and 1992 alone it gained over 2.1 million hogs, growing from 2.4 million to 4.5 million, making it by far the

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fastest growing hog-producing state.[32] North Carolina has been so successful hat many states are using it as a model in an attempt to grow rapidly in the industry.[33]

Minnesota as an agricultural region has many advantages in livestock production.[34] Even so, the state recently dropped to fourth in hog production and is threatened with dropping to fifth.[35] "Minnesota's share of the national pork market has stagnated over the past several years. The number of hog producers in Minnesota has plummeted from 30,000 in 1980 to 15,000 in 1990."[36] Minnesota's 1994 swine inventory is 4.6 million, down two percent since 1990.[37] Minnesota's breeding stock numbers as a livestock market share indicator are even more ominous. A comparison of Minnesota and North Carolina breeding stock figures shows a drastically different picture in terms of where hogs are likely to be grown in the future. Between 1983 and 1993 Minnesota's sow inventory dropped five percent, while North Carolina's increased 103 percent over the same time period.[38]

Minnesota farmers have good reason to be concerned by the shifting of the national hog market share because with market share goes the packing industry. However, Minnesota policy makers should keep in mind the disadvantages to such aggressive expansion. While the number of hogs in the state of North Carolina nearly doubled between 1986 and 1992, its number of pork producers fell by nearly the same ratio.[39] Unfortunately, North Carolina is also now starting to show the effects in terms of environmental quality.[40] The policy challenge facing Minnesota is how to compete with states like North Carolina without suffering the same negative ramifications. This problem will be solved or exacerbated by the livestock production structure Minnesota endorses. The choice has already been made.[41] However, before examining that production structure choice, a better understanding can be obtained by first reviewing the structure options that were available to the state.

Competing visions in agriculture: an examination of the available policy options in selecting Minnesota's livestock production structure

The decline of independent production

Independent production is widely regarded as the most socially and environmentally sound method of agricultural production.[42] Socially, a network of small independent farmers provides the base for the duplication of services needed to serve the state's small rural communities.[43] Such a system provides the population and tax base needed to support schools, hospitals, churches and main street businesses.[44] Environmentally, long-term familial ownership provides a connection with the land that is difficult to explain to a primarily urban population. It is this emotional connection to the land, along with a rational maximization on the part of the farmer as businessman, that deters small independent family farmers from exploiting the land, their primary asset.[45]

The emotional and economic connections to the land define the concept of stewardship.[46] Historically, small independent farmers have been considered the best stewards of the land.[47] Unfortunately, at both the state and national level, this system is failing.[48] In Minnesota there has been a "tremendous exodus" of young people, from rural parts of the state to the Twin Cities because they do not view farming as a viable occupation.[49] There is not a single county in the state where the majority of the people live on the farm.[50] In fact, state-wide only five percent of the population lives on a farm.[51] Other states are not doing any better. Nationally, farmers and those living on farms, make up only three percent of the population.[52] In fact, the number of farmers recently fell to its lowest point since the Civil War.[53]

These changes in demographics are a part of a fifty-year trend.[54] "Rapidly changing market conditions, devastating rates of rural depopulation, and heightened concern with the environmental impact of agriculture have made the farming systems of ten years ago unprofitable. Farmers that want to stay in business and make farming an option for their children, must respond to these changes."[55] Also, the changes in the industry are hitting small independent farmers the hardest, thereby driving the change to larger operations.[56]

Livestock production is not exempt from the changes occurring in farming in general. It is increasingly difficult for independent farmers to survive by producing livestock using traditional farming practices.[57] While Minnesota has lost twenty percent of its farms in the last ten years,[58] the livestock industry has lost thirty-five percent of its operations since 1980.[59] In Minnesota, the average size breeding herd is between 100 and 125 sows.[60] Some farmers are trying to follow the advice of agricultural extension agents to expand to 600-sow operations simply to remain competitive.[61] However, such expansion requires capital, and under the prior corporate farm law, most independent farmers, or even farm families, could not raise the kind of capital required for such expansions.

"Super producers"

The structure of hog production is shifting toward larger farms.[62] While small independent farmers have been gradually increasing their size, a new breed of "super producers"[63] has emerged. Such super producers include National Farms of Nebraska and Colorado, Tyson Foods in Arkansas, and Murphy Farms and Carroll Foods in North Carolina.[64] Together these four firms market approximately four million head annually.[65] Super producers also represent the fastest growing segment of the U.S. swine industry.[66] Minnesota would benefit from super producers because they would bring investment to depressed parts of the state and their production would help preserve the packing industry for independent producers.[67]

Critics point out however, that the purchasing trend associated with the large operations indicates they are not as socially beneficial because they are less likely to support their local communities.[68] Critics also argue that much of the larger farms' proffered efficiency is the result of lax state environmental regulations.[69] What was once jokingly termed the "smell of money" by earlier generations is now a serious environmental consideration.[70] Furthermore, in terms of impacts on ground and surface water, the long term effects of large manure lagoons is still in question even though Minnesota is one of the strictest states in the nation when it comes to the environmental regnlation of agriculture.[71] Finally, a policy choice of attracting these operations to Minnesota could be devastating to the state's small producers. "Given the static or slowly expanding demand for pork, ...each expansion in output of 1 million hogs by the super-producers will lead to the exit of 2,000 less efficient operations of the 30-35 sow size."[72] Because of the potential environmental effects and the potential loss of farmers, a policy choice encouraging a horizontally expanding production structure consisting solely of super producers would be a mistake for Minnesota. The question, then, is whether vertical integration would be any better.

Contract production

Vertical integration accomplished through contract production is also threatening Minnesota's independent livestock producers.[73] Vertical integration occurs when "a company involved in one phase of a business absorbs or joins a company involved in another phase in order to guarantee a supplier or a customer."[74] Through contracting, the processors are not looking to move into farming as such; instead they simply want to control production so that they can guarantee their

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supply and the price at which they buy. Commentators have captured this attitude in the phrase "why own the farm when you can own the farmer?"[75] The poultry industry is commonly used as an example of a vertically integrated industry because nearly ninety percent of all poultry production is done under contract[76] with only roughly a hundred processors.[77] Through contract production, several benefits accrue to the farmers as well. First, the farmer is given a guaranteed price.[78] Second, because much of the decision making is done by the processor, the producer's management input is reduced.[79] Finally, because of the reduced decision making and because of greater access to financing, contract feeding is often promoted as way for young farmers to enter the industry.[80]

Contract production is currently expanding into hog production.[81] There are serious disadvantages to this system of production. First, through such contracts, the processors close off the market to independent growers. Second, with so few processors, there is diminished competition, and farmers have little or no bargaining strength. Third, critics charge that the loss of control under the contract system makes farmers little more than hired labor, working as serfs on their own land.[82] Finally, the contract itself is also usually written to the disadvantage of the farmer.[83]

Production contracts normally require the farmer to build and finance the buildings.[84] The processor then provides the farmer with the animals, supplies, specified feed rations, and veterinary services.[85] The farmer is paid a flat rate per animal plus premiums based on the animal's performance.[86] Under this system, the farmer does not control his own economic viability because he does not control most of the productivity factors, such as the quality of the animals when delivered or the quality of the feed.[87] Ultimately, the farmer earns approximately $6 an hour.[88] Furthermore, the farmer must finance the expensive structures built to the corporation's specifications; and the length of the average contract is not long enough to fully amortize the cost of the buildings.[89] Moreover, when the farmer is close to paying off his buildings the processor oftentimes will require him to make substantial improvements. Farmers are forced to make the improvements because, if the changes are not made, the processor will cancel the contract.[90] Several poultry producers have had their contracts canceled after complaining, so many are afraid to speak out.[91] Additionally, several lawsuits have been filed alleging corporate assignment of false weights to animals and illegal cancellation of producer contracts.[92]

Because of the potential this system has for closing the market to independent producers, and because of the serious disadvantages that stem from the unequal bargaining strength, Minnesota farmers have cause for concern about this type of production system taking over the swine industry. However, without change in Minnesota's corporate farm law enabling farmers to compete against such a trend, more and more farmers will be forced to enter into such contracts simply to survive.[93]

Cooperative production and value-added processing

A cooperative is a business entity based upon democratic ownership and control.[94] Because most agricultural cooperatives are farmer-owned, they offer a self-help option for farmers.[95] Cooperatives differ from normal corporations in that the cooperative is not supposed to have a "corporate mentality." In other words, the cooperative is not in business to make a profit. Instead, "farmer ownership allows producers to determine services and operations that will maximize their own farming profits rather than profits for the cooperative itself."[96] Farmers faced with the threats posed by horizontal and vertical integration, and the limitations posed by remaining independent, are looking to pool resources in production cooperatives. By pooling resources and taking advantage of economies of scale, farmers are able to compete at the same level as larger farms. "It's pretty obvious when you look at changes in the hog industry, for instance, that there are two models for the future,...[e]ither you have farmers banding together to use the latest genetics and technology to be the low-cost producers,...or you have food companies doing it themselves."[97] The livestock industry is changing, and "cooperatives offer a way for Minnesota farmers to be a part of that change and mold that change without becoming low-paid, contract labor as has happened in some other states."[98]

As an example of such cooperatives, Minnesota farmers have been setting up gilt multiplier units under a cooperative structure for the past several years.[99] By organizing as cooperatives, the farmer/members receive several benefits. First, many of the members sell their corn or other row crops to the cooperative, usually receiving a higher than market price through the value added processing of the corn.[100] Second, the farmers are able to "farm out" the complex and expensive process of improving the genetic quality of their herd.[101] Finally, members receive high quality replacement females at lower than market price.[102] All of these advantages make cooperative multiplier unit operations attractive to many farmers. Nevertheless, these operations have raised considerable controversy.[103] First, because of the number of shareholders involved, these operations usually fall under a "breeding stock" exception to the corporate farm law.[104] Critics charge that these operations are abusing a loophole, that they are competing with the independent family farmer, and that large concentrations of animals at the breeding sites raise the environmental concerns posed by the large corporate operations.[105] Despite these concerns Minnesota recently made a very clear policy choice endorsing the cooperative method of production.

Minnesota's amendment of its anti-corporate farm law: a move towards cooperative production

The primary weakness of the Minnesota anti-corporate farm law is its shareholder restrictions and the resulting limit on the amount of available capital. Independent farmers complain that they cannot compete with their present farm operations, and the statute limits their access to capital. Farmers, are therefore, left with the choice of either entering into contract production or leaving the industry to the super producers.

Of the two allowed corporate forms, the authorized farm corporation with its flat five-shareholder limitation deserves the most criticism. The mechanism the statute used was flawed because the limitations landed the hardest on the class of persons the statute was designed to protect. The statute limited small farm operations more than the large. The large operations were not prevented from entering the national market. They simply located elsewhere. Meanwhile, smaller operations were unable to add the shareholders needed to make themselves competitive. This practical reality prompted the legislature, during the 1994 session, to pass an amendment that provided for a second way of qualifying as an authorized farm corporation. The previous five-shareholder limitation remains for row crop and dairy farm operations, while a new standard was created for livestock operations. This new way of qualifying as an authorized farm corporation requires seventy-five percent of the control and financial investment in the operation to be held by Minnesota farmers.[106] Furthermore, fifty-one percent of the required percentage of farmers must be farmers actively engaged in livestock production.[107]

The new standard raises some serious interpretation issues, such as the definition of who is a farmer and what constitutes "actively engaged in livestock production". However, the statute has attempted to address these issues by providing somewhat loose definitions. A "farmer" is defined as "a person who regularly participates in physical labor or operations management in the farmer's farming operation and files "Schedule F" as part of the person's annual form 1040 filing with the United States Internal Revenue Service."[108] The new statute defines "actively engaged in livestock production" as "perform[ing] day-to-day physical labor or day-to-day operations management that significantly contributes to livestock production and the functioning of a livestock operation."[109] The new standard is more open to interpretation than the flat five-shareholder standard. However, the advantages to farmers will hopefully outweigh the interpretive problems.

The 1994 change reflects the legislature's attempt to endorse a small-scale, producer-owned, cooperative production structure. The change provides farmers the self-help option of banding together in unlimited numbers to form the various types of production operations they need to be successful. The legislature realized that the anti-corporate farm law, while it has a place in Minnesota agricultural policy and should not be completely repealed, needed to become more flexible in order to give farmers access to the capital they need to gain competitive advantages. Instead of endorsing super producers or contract production, the legislature encouraged a system designed to maintain a degree of farmer independence, and to preserve an open marketplace for independent producers. However, the opportunity created by the legislature must be taken advantage of while there still is an independent system to empower.[110] Otherwise, Minnesota will continue to lose market share, and the pressure to give in to the other, more harmful, production structures will increase. Moving toward producer-owned cooperative production is controversial. However, the family farm is threatened more by outside forces, than whether or not the state has a anti-corporate farm law.

Conclusion

Minnesota's anti-corporate farm law as previously formulated was not successful in achieving its stated purpose. The statute probably had the opposite effect. The statute worked only to weaken Minnesota's livestock farmers because it did not have the flexibility necessary to support independent production. Conversely, the new changes empower livestock producers. When the individual members of the livestock industry are successful, then the industry as a whole prospers and infrastructure will remain. Furthermore, the success of individual farmers preserves rural areas demographically and socially by ensuring a stable rural population and the social benefits associated with small agrarian communities. The industrialization of agriculture is likely to continue. Minnesota's anti-corporate farm law still has a role in preventing, or at least slowing, such a transformation. Therefore, while the adequacy of Minnesota's anti-corporate farm statute will remain an issue for the future, the recent changes to the statute were a step in the right direction. Rather than continuing to isolate the state through protectionist restrictions, the amended statute empowers Minnesota's livestock farmers while retaining the ability to control the type of production structures the state finds to be the most desirable.

[1] *See generally*, James Walsh, *Hog Heaven: Small Farmers Raise Stink over Unlimited Growth of Pork*, Minneapolis Star Tribune, September 4, 1994, at A1.

[2] *See* Brian DeVore, *The Unsustainability of Factory Hogs: Assembly Line Pork Won't Bring Home the Bacon for Rural America*, Land Stewardship Letter, Aug./Sept., 1994 at 8.

[3] *Id.*

[4] Minn. Stat. § 500.24 (1994).

[5] Minn. Stat. § 500.24, subd. 1.

[6] Minn. Laws. Ch. 622 § 2, (1994).

[7] Winston Smart & Allen C. Hoberg, National Center for Agri. Law Research & Info., Corporate Farming in the Anti-Corporate Farming States, 1-2 (1989). Such advantages include: the corporation's ability to access capital by pooling resources, the limited liability protections of the corporate form, and tax advantages.

[8] Don L. Boroughs, *Business Bets the Farm*, U.S. News and World Report, October 21, 1991, at 71.

[9] Minn. Stat. § 500.24, subd. 3.

[10] Minn. Stat. § 500.24 subd. 3(b).

[11] Minn. Stat. § 500.24 subd. 2(c).

[12] Minn. Stat. § 500.24 subd. 2(d).

[13] Lee Egerstrom, *The New Co-ops*, St. Paul Pioneer Press, August 8th, 1994 at 3E.

[14] *Corporate Farm Law and Livestock Confinement Issues: The Social, Economic, and Environmental Challenge: Conference Report*, Minnesota Environmental Initiative, March 31, 1994 at 23.

[15] Charles Siler, *Where Did All the Pigs Go?*, Forbes, Mar. 19, 1990, at 156.

[16] DeVore, *supra* note 2, at 1.

[17] William F. Lazarus and Brian L. Buhr, Minnesota Pork Industry Review Committee, Minnesota Pork Industry Review (June 1994) at VI. *See also* Scott Killman, *Power Pork: Corporations Begin To Turn Hog Business Into an Assembly Line*, Wall St. J., March 28, 1994, at A1.

[18] *See generally*, William F. Lazarus, *The Controversy Over Swine Multiplier Units*, Minn. Agric. Economist, Fall 1991.

[19] Bruce Reynolds and John Reilly, *Integrator Innovators: How Cooperatives are Responding to a Changing Hog Industry*, Farmer Cooperatives, March 1994, at 10.

[20] Lazarus and Buhr, *supra* note 17, at VI.

[21] Smart & Hoberg, *supra* note 7, at 4. "The nine states are Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota and Wisconsin."

[22] Betsy Freese and Rod Fee, *Livestock-Hungry States: Some States Offer Carrots, Others Turn Their Backs on Livestock Expansion Within Their Borders*, Successful Farming, January 1994, at 53.

[23] *Id.*

[24] Tom Morgan, *Border Wars: States That Allow Corporate Hogs are Growing in Market Share. It May Cause Their Neighbors to Take a Second Look at Anti-Corporate Laws*, Hogs Today March 1994.

[25] V. James Rhodes, *Cooperatives' Role in Hog Contract Production*, U.S.D.A. Agricultural Cooperative Service Research Report 116, 1993, at 9.

[26] Morgan, *supra* note 24.

[27] *See generally*, Freese & Fee, *supra* note 22.

[28] *See generally*, Marty Strange, *Corporate Farming Boosts Pigs, But Not Pork Producers, In North Carolina*, Corporate Farming Update, Spring 1994.

[29] Freese and Fee, *supra* note 22, at 56.

[30] Walsh, *supra* note 1.

[31] Morgan, *supra* note 24.

[32] Strange, *supra* note 28, at 1.

[33] Morgan, *supra* note 24.

[34] Minnesota has advantages similar to those enjoyed by Iowa in terms of abundant cheap feed, experienced labor, and mature markets. Morgan, *supra* note 24.

[35] Lazarus & Buhr, *supra* note 17, at V.

[36] Walsh, *supra* note 1. (*citing* David Preisler, Executive Director of the Minnesota Pork Producers Association).

[37] Morgan, supra note 24, at 13

[38] Lazarus and Buhr, *supra* note 17, at 54.

[39] "[D]uring this same time period the number of pork producers fell nearly in half, from 15,000 to 8,000." Strange, *supra* note 28, at 1

[40] *See generally*, Kendall Thu and E. Paul Durrenburger, *North Carolina's Hog Industry: The Rest Of The Story*, Culture and Agriculture, Spring 1994.

[41] Minn. Laws. Ch. 622 § 2

[42] *See generally*, Richard A. Levins, *What About Farming's Social Environment?*, Land Stewardship Letter, Aug./Sept., 1994, at 2.

[43] *See generally*, John W. Chism and Richard A. Levins, *Farm Spending and Local Selling: How Do They Match Up?*, Minn. Agri Econ., Spring 1994.

[44] Tim Kjos, *Too Many Farmers and Obsolete Towns: Demographer Says Changes in Rural Minnesota Part of Trend*, Detroit Lakes Tribune, March 24, 1994, at C7.

[45] Neil D. Hamilton, Agric. Law Center, Drake Univ. Law School, *Agriculture Without Farmers?: Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture*, White Paper 94-1, February (1994) at 8.

[46] *Id.*

[47] *Id.*

[48] Mary Hanks, *Management Intensive Grazing: One Tool for Sustaining the Livestock Industry in Minnesota*, Forage and Grassland Council Newsletter, Spring 1993.

[49] Kjos, *supra* note 44. Half of the state's 4 million people live in the metro county area, where 70 percent of the manufacturing employment, 75 percent of the manufacturing income, two-thirds of all retail sales and bank deposits are located. *Id.*

[50] *Id.*

[51] *Id.*

[52] Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anti-Corporate Farming Statutes and Production Contracts*, 41 Drake L. Rev. 393 (1992).

[53] According to the 1992 Census of Agriculture, the United States had 1,925,300 farms, the lowest number of any census since 1850. Benton Co. News. Nov. 24, 1994 at C2.

[54] Kjos, *supra* note 44.

[55] Minnesota Environmental Initiative, *supra* note 14, at 3.

[56] *Id.*

[57] Egerstrom, *supra* note 13.

[58] Minnesota Environmental Initiative, *supra* note 14.

[59] *Id.* at 5.

[60] DeVore, *supra* note 2, at 8.

[61] *Id.*

[62] Rhodes, *supra* note 26, at 1-2.

[63] A super producer is defined by the USDA Agricultural Cooperative Service as annually marketing 50,000 head or more. *Id.* at 1.

[64] *Id.* at 5.

[65] *Id.*

[66] Lazarus and Buhr, supra note 17, at V.

[67] Joe Spear, *Amboy Goes Whole Hog*, Mankato Free Press, July 18, 1994, at 5. Detailing the economic effects a single large operation has had on the town of Amboy Minnesota. The operation employs 35 people with an annual payroll of approximately a million dollars. The new jobs also meant the sale of new and existing homes, and 26 more children in the local school.

[68] Chism and Levins, *supra* note 43, at 2.

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1997 Dues

Dues for 1997 become payable in January. The dues notice will be mailed later this moth, however, for those members wishing to pay before the end of the year, the rates remain the same as last year: $75 Sustaining member, $50 regular member, $125 institutional membership, $20 student member and $65 for overseas members. Dues for those people who joined the Association after April of this year will be prorated. Operating funds for an Association our size are always tight. We appreciate the extra assistance we received from those persons who were sustaining members this year and ask that you consider becoming a sustaining member in 1997 as well.

Sustaining Members

William Abell, Daniel Adcock, Walter Armbruster, William Babione, John Baldrige, Lonnie Beard, William Bridgforth, Terence Centner, Mike Cone, Patricia Conover, Richard Dees, Margaret Grossman, Neil Hamilton, Drew Kershen, Phillip Kunkel, Thomas Lawler, David Myers, Donald Pedersen, Alexander Pires, William Schwer, Elvis Vaughn, and Glen Ziegler.

On behalf of our President, Walt Armbruster, the Board of Directors, Linda McCormick, Martha Presley and myself, may you have a happy holiday and our best wishes for the new year.

Bill Babione