

Ag Law Update 2020

Presented at the ASFMRA & RLI Iowa Chapters Virtual Seminar
September 23, 2020

Erin Herbold-Swalwell



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Drainage and Wetlands Update: Most Common Question

- ▶ “The landowner whose land drains onto mine is adding more tile and my tile line won’t be big enough to handle it. Doesn’t he have to help pay for a larger tile line on my land? Can’t I refuse to allow him to hook onto my tile line?”



What is the answer?

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

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What is the law?

- ▶ Iowa Code section 468.2(1): “The drainage of surface waters from agricultural lands and all other lands or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare.”



The Common Law

- ▶ Modified Civil law rule recognizing a servitude of natural drainage between adjoining lands
- ▶ Servient estate must accept waters
- ▶ Owner of dominant estate not required to retain water in ponds or depressions
- ▶ Owner may divert water by surface drainage even though additional water enters the servient estate
- ▶ However, this is subject to limitations



Natural flow doctrine

- ▶ “The natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominant proprietor.” *Thome v. Retterath*, 433 N.W.2d 51, 53 (Iowa App. 1988).
- ▶ Recent Case: *Sobotka v. Salamah*, 828 N.W.2d 325 unpub. (Iowa Ct. App. Jan. 9, 2013). Case stands for the long-standing common law rule in Iowa that the owner of servient land cannot interfere with the natural water drainage from a dominant land owner and breach of the duty could result in a significant damage award

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How do you analyze a drainage case?

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



Good resources



- ▶ *Iowa Surface Drainage Law and Groundwater Quality Protection: Is There Potential Landowner Liability for Plugging Agricultural Drainage Wells and Sinkholes?*, - Sec. II, *Principles of Iowa Drainage Law*, Neil Hamilton, Drake Law Review, Vol. 39, No. 4, pp. 813-826 (1989-1990).
- ▶ Iowa Drainage Law Manual, available online
http://www.ctre.iastate.edu/pubs/drainage_law/
 - ▶ FAQ's
 - ▶ Practical solutions
 - ▶ Drainage Easements and Agreements



Dealing with NRCS and FSA

- ▶ Farm Program Appeals
- ▶ Wetlands and drainage
- ▶ Burden on the producer to overcome FSA/NRCS findings



Drainage and farm lease supplements

- ▶ Lease Supplement for Use in Obtaining Tile and Drainage Improvements between Land Owners and Tenants, available at <http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-29.html>
- ▶ Agreed upon and listed in written farm lease
- ▶ Who will provide labor? Costs? Separate Lease Supplement?



Drainage and farm lease supplements

- ▶ Lease Supplement for Obtaining Conservation Practices and Controlling Soil Loss, publication available at <http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-08.html>
 - ▶ Landlord and Tenant agree to follow specific conservation practices that will control soil loss for a field or farm.
- ▶ Written Drainage Easement-
 - ▶ Useful when considering a sale of the property
 - ▶ Tile drain easements, including express easements, implied easements and prescriptive easements. An express easement, or written agreement, recorded in the property records is the easiest and most practical to enforce.



Farm leasing

- ▶ Farm leasing times of financial stress
 - ▶ Common situation: “As a tenant, I didn’t terminate my 2019 cash rent lease because I didn’t think the landlord would renegotiate and I didn’t want to lose the land. Banker is telling me I need to lower the cash rent.”
- ▶ Sept. 1 termination applies to all tenancies except animal feeding operations (even under 40 acres)



Current issues related to working with and engaging ag clients

- ▶ The Farm Economy- Dealing with Uncertainty
 - ▶ Land values
 - ▶ Input Costs
 - ▶ Grain and livestock prices
 - ▶ Farm leasing
 - ▶ Understanding Farm Programs



Advising Ag Clients- Business Succession and Estate Planning

- ▶ The uniqueness of farming in today's economy and atmosphere
- ▶ Goals and objectives of farmers may differ from other small businesses
- ▶ Every operation is different
- ▶ The plan depends on the operation



Background and Historical Information

- ▶ Farmland ownership trends- 2012 Study and 2017 survey
 - ▶ Increasing amount of land cash rented (77%, leased farmland cash rented in 2012 - trending away from crop share)
 - ▶ 2012- $\frac{3}{4}$'s farmland held without debt
 - ▶ Aging landowners
 - ▶ Significant increase in land owned by people over the age of 65
 - ▶ 2012 - 56% owned by over 65



Background and Historical Information

- ▶ Increase in out-of-state ownership
 - ▶ \$523 million of land rents left the state in 2009
 - ▶ In 2012, 79% of land owned by people who were full-time residents of Iowa
 - ▶ See “Farmland Ownership and Tenure in Iowa”
 - ▶ <https://www.extension.iastate.edu/agdm/articles/zhang/ZhaJul18.html>

Statistics – Women in Ag

- Source: “Iowa Farmland Ownership and Tenure Survey 1982-2017: A Thirty-Five Year Perspective”, June 2018 by W. Zhang, A. Plastina, and W. Sawadgo, Iowa State

Table 4.14. Distribution of Iowa Farmland by Gender

	1982	1992	2002	2007	2012	2017
Male	53%	51%	53%	53%	53%	53%
Female	47%	49%	47%	47%	47%	47%

Statistics – Women in Ag

Table 4.15. Distribution of Iowa Farmland Owners and Acres by Gender in 2017

	Owners	Acres
Male	51%	53%
Female	49%	47%

Table 4.16. Distribution of Iowa Farmland by Age and Gender in 2017

	< 35	35-64	65-80	> 80
Males	1%	23%	21%	8%
Females	<1%	17%	17%	14%



Farm Leasing- Advising Landowners

- ▶ Flex leases growing in popularity- Approximately 12% of cash leases in Iowa are now flex leases (Maybe more)
- ▶ Advantages
 - ▶ Shared risk
 - ▶ Owners still paid cash
 - ▶ Actual rent adjusts with adjustment in yields and prices
 - ▶ Options for flex leasing:
 - ▶ Share of gross revenue
 - ▶ Base rent plus a bonus

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Dealing with uncertainty

- Land Values in Iowa- increased emotions and strained family relationship when mom and dad are gone
 - How do we deal with this situations?
 - Case Study:
 - Mom and dad own 660 acres of Iowa farmland
 - No one ever discusses the “plan”
 - One on-farm heir, seven off-farm heirs
 - Mom and dad leave “the farm” to all 8 children as tenants in common
 - Hard feelings develop (some children want to sell out, some don’t)
 - How do we fix this situation?
 - Planning is key



The Importance of Goal Setting

What is the farm family's primary goal?

- Avoiding taxes? Federal Estate Tax
- Continuity of the family farming operation?
 - Is there an on-farm heir? What is the expectation? What is their age? Problem of the 65 year old heir who has never been assured of their place on the farm.
- Liquidation of the farm assets?
- Resources available for goal setting
 - It takes a team
 - There are resources available through Iowa State University Extension and other entities



Step One: Communicating with the farm family

- ▶ Asking the right questions
- ▶ Understanding the farming operation
- ▶ Who is involved in the estate and business succession plan?
 - ▶ Is this a surprise to the on-farm heir?
 - ▶ Consider parents/children communicating
 - ▶ To implement an estate plan that works, you all need to understand it
 - ▶ Sit the family in a room
 - ▶ Throw out scenarios- if this happens, then....
 - ▶ Conflict of interest? Let the family have these discussions, make it clear who your client is



How do you treat the off-farm heir?

- ▶ Are they still involved in the business? If not, you could consider...
 - ▶ Gifts of non-business assets
 - ▶ Beneficiaries of Life Insurance, Retirement Plans
 - ▶ Monetary gifts
 - ▶ \$15,000 per year per donee tax free

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Things to discuss...

- ▶ General distribution plan for assets?
- ▶ What is everyone's role?
 - ▶ Role of trustees and executor
 - ▶ Powers of attorney (springing or effective immediately)- What is everyone's role?
- ▶ Business entity plan- Does the operation currently operate a farm entity?
Can this be useful down the road? Consider and entity structure



The Fair v. Equal Debate

Treating the heirs fairly: Concept of fair v. equal

- ▶ What is the contribution of the on-farm heir?
 - ▶ Can the off-farm heir and on-farm heir work together?
- ▶ Do you have access to life insurance to compensate the off-farm heir? Other assets? Be careful about leaving some liquidity in the estate. Don't leave the shell of the business to the on-farm heir and the cash to the off-farm heir
- ▶ Discussing fair v. equal with the client
 - ▶ Often one of the hardest concepts to explain



Asking the right questions:

- Do any of your children have any special needs you may want to provide for?
- Have you or your spouse made gifts in one year in excess of the annual gift exclusion?
- What is your ultimate goal with respect to estate distribution?
- Specific bequests to persons or charity?
- Inventory of life insurance policies and retirement plans
- Inventory of assets

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Assets passing outside of the will

- ▶ Unequal distribution of these assets?
 - ▶ The importance of beneficiary designations
 - ▶ Think about IRA's, Life Insurance
- ▶ Make sure these items pass in accordance with your overall estate and business succession plan



Providing for the “off-farm” heir with Life Insurance, Retirement

- ▶ Concept of “Fair v. Equal”
- ▶ Valuing the contribution of the on-farm heir
- ▶ Providing options for a possible buy-out of siblings
- ▶ What are the tax consequences to your heirs of gifts of retirement funds? Does this force some heirs to pay tax and some to inherit from the estate tax free?

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Some life insurance options

- ▶ Survivorship life insurance, second to pass- doesn't pay out until both spouses are deceased (insurance on two lives)- generally less expensive
- ▶ Convertible term life insurance (convertible to permanent product)- can be an important tool for a younger person, beginning farmer or to deal with uncertainty in estate tax



Family conflict and the need to plan

- ▶ Hinderks v. Hinderks (Iowa Ct. App. Nov. 9, 2016)
 - ▶ Farmer died without a will, survived by 3rd wife and sons from prior marriage
 - ▶ Farmer also survived by mother, farmer's father died 13 years earlier, and mother at the time disclaimed her interest in farm machinery and one-half interest in family farmland (farmer was sole beneficiary of property)
 - ▶ Wife appointed to be administrator of farmer's estate, starts arranging for auction; Farmer's mother and son disputed the estate's ownership of machinery and property; Argued it belonged to father's mother; mom placed chains across driveway, no trespassing signs; canceled sale
 - ▶ At trial, mother and son ordered to return all but three of the disputed items to wife; Awarded some damage to wife. Court of Appeals agreed with district court- ruled that mother's disclaimer was all-inclusive; For 14 years, son exercised control over property and used it for his business
 - ▶ Lesson: Get an estate plan and think through how the process will work



How do we avoid conflict in the farm family?: Communicate...

- ▶ Given what we know, what the courts have told us, and our experience, how do we avoid costly litigation, miscommunication between family members?
- ▶ Don't just get a plan, get a good plan and think it through
 - ▶ Who do I trust to be trustee or executor?
 - ▶ Have I talked to all of my kids?



Estates and Testamentary Capacity

- ▶ New case Iowa Court of Appeals regarding a will executed by man who suffered from mental illness (schizophrenia).
 - ▶ Leads us to the question of what does it take to make a will, what does it take to set aside a will for lack of testamentary capacity
 - ▶ Iowa Courts said that man did have capacity to create a will and deed his Iowa farmland to distant relatives- man got a successful score on some cognitive testing and illness was controlled by medication; nursing home notes show that the decedent began to suffer from confusion
 - ▶ Man owned farmland with his family; Man set up a will to leave his interests in farmland to cousin's family
 - ▶ Sister petitioned court to open intestate estate saying her brother did not have testamentary capacity
 - ▶ Testamentary capacity is presumed unless rebutted



Undue Influence and the “Vulnerable Elder”

- ▶ Under Iowa Code, is a person a “vulnerable elder” merely because of his/her age?
- ▶ Iowa Supreme Court has said that if a person’s age makes person unable to protect him or herself from elder abuse, that person is a vulnerable elder- no proof of mental or physical condition is required
- ▶ July 1, 2019- modified by Iowa legislature to state that a vulnerable elder is over the age of 60 and cannot protect themselves from elder abuse because of personal circumstance which results in an increased risk of harm to the person....
- ▶ Iowa Supreme Court recently said that age alone is not enough



Partition Lawsuits and Iowa's changing laws

- ▶ We now have a completely new partition law! Went into effect on July 1, 2018
- ▶ Now statutory
- ▶ Iowa's partition law, as it applies to family farms, has been in the spotlight since the end of 2016, when the Iowa Supreme Court decided [Newhall v. Roll, 888 N.W.2d 636 \(Iowa 2016\)](#). This opinion illustrated that it's very hard to get a partition in kind in Iowa. Unlike most other states, Iowa is "unequivocal in favoring partition by sale."
- ▶ Law now favors family farm property- Biggest Change: Subchapter III will apply whenever a cotenant requests a partition in kind in an action to partition "heirs property." This section is based upon the Uniform Partition of Heirs Property Act.
- ▶ "Heirs property" is defined as: Real property held in tenancy in common that satisfies all of the following requirements as of the date of the filing of a partition action:
 - ▶ There is not a recorded agreement that binds all of the cotenants that governs the partition of the property.
 - ▶ One or more of the cotenants acquired title from a living or deceased relative.
 - ▶ Any of the following apply: Twenty percent or more of the interests are held by cotenants who are relatives, Twenty percent or more of the interests are held by an individual who acquired title from a living or deceased relative, Twenty percent or more of the cotenants are relatives.

FENCES- 2020





Iowa Fence Law Update

- 2017 case: The plaintiff filed an action asking the court to require the defendant to comply with the terms of the agreement. In the alternative, he asked for damages to make the repairs himself.
- The defendant, who represented himself at trial, attempted to introduce evidence showing that the plaintiff could not maintain his action because the plaintiff himself was not in compliance with the agreement. The defendant alleged that the plaintiff had allowed brush and vegetation to grow up along the fence, in direct violation of an agreement provision requiring that it be removed.
- The trial court did not allow the defendant to introduce his evidence at trial because he had not properly disclosed it to the plaintiff during discovery. The trial court then entered an order requiring the defendant to comply with the terms of the fence agreement. The trial court also ordered the defendant to pay \$19,358.75 of the plaintiff's attorney fees and litigation expenses because the fence agreement provided for such recovery to the prevailing party.
- On appeal, the Iowa Court of Appeals affirmed the judgment. The court also remanded for a determination of the amount of the plaintiff's appellate fees, which the defendant will be required to pay. The court found that the testimony of a neutral fence viewer was substantial evidence that the plaintiff was in substantial compliance with his obligations under the fence agreement.



Nuisance Suits

- ▶ Since 2018, producers in North Carolina have seen two additional verdicts finding a nuisance with twenty more cases set to go to trial. Despite these outcomes in North Carolina there have been recent jury verdicts, one in 2015 in Iowa, one in 2016 in Illinois and another in 2017 in Minnesota, where juries found that hog farms were not a nuisance and awarded no money to the neighbors.
- ▶ Of note, since those cases, there have been two jury verdicts in 2019 in Iowa where juries found livestock operations not to be nuisances and awarded no money to the neighbors who filed suit.
- ▶ Lympus: The three neighbors alleged that the odor was unbelievable and obscene, a heavy, wet smelling ammonia type odor and that the odor and flies prevented them from enjoying their property. However, four tenants who lived in a house at the feedlot at various times, as well as the mail carrier who delivered to all three residences, testified that while the odor was strong at times, it was not very often and the odor and flies were normal for the country. Interestingly, one of the tenants even had her wedding in the backyard.

Take a guess at what this crop is?





Iowa Legislature

- ▶ SF 599- Iowa Hemp Production Act- Signed by the Governor in May 2019 and passed by an overwhelming majority
- ▶ Just one of many hurdles before growers can legally plan and market industrial hemp in Iowa
- ▶ Resulted from the 2018 Farm Bill which exempted hemp from the federal list of Schedule I controlled substances and added it to the list of commodities eligible for crop insurance.
- ▶ Problem: The implementation has lagged behind; USDA stated in February that they wouldn't review state plans until they issued their own regulations
- ▶ The Iowa Act restricts each producer's hemp production to 40 acres and you can't have been convicted of a drug offense from raising hemp for 10 years...
- ▶ Oct. 29, 2019- USDA issued their interim final rule for the establishment of Domestic Hemp Production Program- deals with how to implement the program
- ▶ IDALS will soon be submitting a plan for USDA



Renewable Energy: Wind and solar leases

- ▶ New “solar collector farm” (photovoltaic) projects proposed. Landowners contacted, asking to enter into long-term leasing agreements/easements
 - ▶ Common questions: What if the company runs into financial problems, declares bankruptcy, and walks away from these solar installations? Are these companies dependent on a government subsidy or tax credit to make the project work? Is the use compatible with my farming operation and where will transmission lines be installed? What incentives (i.e. government subsidies) are available to these companies? In the event of financial distress, what will the company do to ensure that I am paid?
- ▶ Mid-American is in the process and has announced plans for additional wind turbine projects in the state of Iowa.
- ▶ On a smaller-scale, landowners are often approached by their county governments with easements or offers to purchase small portions of land for the improvement of highways, bridges, or other infrastructure.
- ▶ Remember, a lease is really just a contract where the party owning land conveys a portion of land to another party to use for a specific time, usually for a specific periodic payment. An easement is a similar concept, but is a grant of a right given to another to use land you own. For instance, utility companies generally request easements for utility line installations.



List of important questions to ask:

- ▶ What is the term of the agreement? How many years? Are there options to renew after the initial term expires?
- ▶ Is the agreement assignable? (Can the company assign their rights to another company?)
- ▶ What is the payment and how is it structured?
- ▶ Am I protected from liability as a landowner, if a catastrophic event occurs?
- ▶ What access rights, and through what routes, does the company have? If the company damages my crops or compacts my soil, what does the agreement provide for compensation?
- ▶ In the event of a legal dispute, is there a mandatory arbitration or mediation clause? Do I have to give up my right to a trial by jury?



2020 Derecho

- ▶ Federal crop insurance rules are very strict, and farmers need to understand their policies and know that they must strictly comply with the rules to ensure indemnity payments are made as expected.
- ▶ Communication with your adjuster, agent and insurance provider is key to ensure you receive the maximum payment under your policy.
- ▶ Decision to harvest or not, even if possible.
- ▶ One of the areas that can impact the “bottom-line” in an already tough farm economy is jeopardizing a claim by making a reporting mistake or not understanding the type of policy you are entering into.



2020 Derecho

- ▶ RMA will continue to monitor claims over \$200,000 and if the level of claims in excess of \$200,000 rises above 5% of all claims within the state, RMA may provide relief on the \$200,000 review requirement by issuing an emergency bulletin/order
- ▶ Resources: RMA has developed an online checklist identifying the steps necessary to successfully file a crop insurance claim based on the August 10 Derecho event.
- ▶ See <https://www.rma.usda.gov/en/News-Room/Frequently-Asked-Questions/August-10-2020-Derecho/>
- ▶ Also, Iowa State University Extension specialist Alejandro Plastina has written a practical guide for producers filing claims. It can be found at <https://blogs.extension.iastate.edu/agdm/2020/08/21/practical-guidelines-to-file-crop-insurance-losses-due-to-the-derecho/>.



Farm Bankruptcy

- ▶ Iowa State University, Center for Agricultural Law and Taxation has several good resources regarding farm bankruptcy, including Farm Bankruptcy Basics:
- ▶ <https://www.calt.iastate.edu/farm-bankruptcy-resources>

Thank you!

➤ Erin Herbold-Swalwell



- 6701 Westown Parkway, Suite 100
- West Des Moines, Iowa, 50266
- 515-271-5908
- Erin.herbold@brickgentrylaw.com