MARCH 2010 | AGRICULTURE & EQUINE INDUSTRY LEGAL INFORMATION NEWS & COMMENTARY

INSIDE THIS ISSUE

We speak from experience

Welcome to the inaugural edition of ***McAfee & Taft AgLINC***, a publication specifically designed for clients and friends of the firm who are engaged in agriculture, equine and livestock-based businesses as well as for the organizations which actively support their efforts.

RICHARD NIX
Managing Director

For years, McAfee & Taft lawyers have served as trusted counsel to clients in the agriculture and related industries — both locally and throughout the region — and last year we became the only law firm in Oklahoma to establish an Agriculture and Equine Industry Group specifically dedicated to providing full-service legal services to individuals, families, public and private companies, and organizations who make their living through these vital industries. Together, our lawyers provide clients with comprehensive business and legal solutions across a broad range of areas, including family wealth preservation and asset protection, business succession planning, business transactions and taxation, real estate and development, environmental issues, employee and labor relations, workplace safety, trademarks and branding, invention protection and licensing, and business dispute resolution.

For the majority of our 26 industry lawyers, understanding the realities, complexities and concerns of the agriculture and equine industries has been the result of years of hands-on experience working in the industry. In addition, our lawyers serve as outside general counsel to major farming and ranching operations and are actively involved in industry organizations such as the National Reining Horse Association, Oklahoma Cattlemen's Association, Oklahoma Farm Bureau Legal Foundation, Oklahoma Quarter Horse Racing Association, Sirloin Club of Oklahoma and Oklahoma Youth Expo. They are also frequent speakers at the Governor's Conferences on Agriculture and Water Law and other ag-related seminars and conferences.

We hope you find the information provided to you through this newsletter valuable. Likewise, if you know of any other person or business that would like to start receiving this information, please let us know. We'd also like to know if you have any suggestions for future article topics.

To learn more about the comprehensive business and legal consulting services we offer through our Agriculture and Equine Industry Group practice, please visit our website at **www.mcafeetaft.com/ag**.

McAfee&Taft

OKLAHOMA CITY
TENTH FLOOR
TWO LEADERSHIP SQUARE
211 N. ROBINSON
OKLAHOMA CITY, OK 73102
405.235.9621

TULSA
500 ONEOK PLAZA
100 WEST 5TH STREET
TULSA, OK 74103
918.587.0000

www.mcafeetaft.com

Landowner considerations when negotiating wind energy leases

As a result of the recent push for "green" energy and alternatives to fossil fuel, wind farms have been sweeping the plains. State and federal tax credits and other incentives for renewable energy helped drive financial resources to support and grow the wind energy industry in the United States. Indeed, the United States has now surpassed Germany as the world leader in installed wind energy. Despite a dismal national economy in 2009, the wind energy industry continued to grow.


Jeff Todd

The majority of our nation's wind turbines are found in the Midwest and Western states (see awea.org for a state-by-state assessment). Wind farms generally require three acres of land per turbine and a location that can be dedicated to the long-term development of tens to hundreds of turbines. As a result, wind farm developers have and will continue to approach farmers and ranchers across the country seeking to utilize their land for wind farm developments.

Lawyers from McAfee & Taft's Agriculture and Equine Industry Group have worked closely with members of the firm's Renewable and Sustainable Energy industry group to help clients negotiate wind energy leases in several states. Such combined talent has provided us with the experience and expertise necessary to address the many aspects of wind energy leases which often exceed 30 pages and include complicated provisions that impact the use of one's land during the term of the multi-year lease.

When approached about a wind energy lease, the landowner must first determine whether the impact and intrusion of a wind farm operation outweighs the current and future use of the land. The answer is not always yes. While wind energy leases provide a new source of income from the land and development terms can be fairly lucrative, there are many factors to consider before agreeing to tie up one's land for potentially the next 30 to 50 years. The location of turbines and access roads on the leased land should not be the sole consideration.

Wind leases grant wind companies the exclusive right to capture the wind flowing across the land. As a result, the construction of improvements on leased land is generally prohibited without the express consent of the wind company. Residential development of leased land will generally be out of the question. In addition, potential plans for irrigation, construction of grain bins or even wind breaks could be prohibited. Land encumbered by a wind lease may also be less attractive to an oil company because of potential disputes between the wind company and oil company over the location of drilling sites, wells, tank batteries and pipelines in relation to wind energy facilities.

Once the issue of whether the land is right for wind development is determined, there are a multitude of other details to closely consider. These include:

1. Length of the lease. Leases generally include an option term that allows the wind company to hold the land pending further wind speed testing, leasing of adjacent lands and other considerations, and a development term for the actual construction and operation of the wind farm.
2. Financial considerations, such as payments during each term and for construction of access roads and other necessary improvements such as power lines, transmission lines and maintenance facilities.
3. Allocation of rights to the land and site development. Who gets to decide where to put access roads, turbines and powerlines? What restrictions are placed on wind company employees and the landowner or his tenants such as hunting, mining, oil and gas exploration?
4. Liability allocation, such as indemnification for negligence, insurance requirements, bonding, allocation of taxes, environmental issues
5. Assignment of the lease. Many companies that lease land and develop wind farms "flip" them to utilities for the long-term operation.
6. Restoration after expiration. What happens to the turbines and other facilities when the lease ends, the turbines are no longer useful, or the company goes bankrupt?

Wind energy leases provide a tremendous opportunity for landowners across the United States. However, the implications of a wind lease are far reaching and should not be taken lightly. If you're contemplating a wind energy lease, be sure to consult an attorney who can explore and thoroughly explain all your rights and options.

Jeff Todd is the co-leader of the firm's Agriculture and Equine Industry Group. He can be reached at ***jeff.todd@mcafeetaft.com****.*

Avoiding pitfalls associated with crop insurance

Federal crop insurance is available for most commercial crops to those with a bonafide interest in the crop. The Federal Crop Insurance Corporation (FCIC) manual defines a bonafide interest as an owner-operator, landlord, tenant or sharecropper with a share in the crop. The FCIC manual also sets out a multitude of detailed requirements for crop insurance applications and acreage reports. Particular care should be taken to make sure crop insurance documents are accurately completed. In addition, one should make sure that crop insurance documents are consistent with how the insured crop and land is certified with the Farm Service Agency (FSA). This is sometimes difficult to police because deadlines for crop insurance expire in the fall or spring in advance of a crop whereas FSA certifications are typically in the summer of the crop year. In addition, crop insurance agents who assist in filling out crop insurance documents are typically not involved in certification of the same crop with the FSA.

Differences between crop insurance documents and FSA certifications may also go unnoticed for several years when there are no or only small crop insurance claims. However, they could become very important and have huge financial impacts at the point when the farmer needs the crop insurance the most — namely, when he has a large loss and large insurance claim. The FCIC requires that large claims (any claim that could result in an indemnity in excess of $100,000) be audited by the insurance company. The manual also authorizes the insurance company to utilize FSA certifications during the audit to verify acreage and information reported on the crop insurance documents. Discrepancies are often used by the insurance company to reduce or even deny the large claim.

Avoid the potential pitfall by providing your crop insurance agent with a detailed explanation of your operation and carefully reviewing crop insurance documents in conjunction with how you have or plan to certify your crops with the FSA.

Author Jeff Todd, along with colleagues Spencer Smith and Jeremiah Buettner, form the firm's Crop Insurance Dispute team. Together, they have successfully represented more than 150 wheat, corn, cotton and grain sorghum farmers in all three crop insurance dispute forums — administrative appeals, arbitration, and federal court judicial reviews — and have had their cases highlighted in the American Agricultural Law Association's Agricultural Law Update newsletter.

DOL issues rule change for workers on farms

On February 12, 2010, the U.S. Department of Labor ("DOL") issued a final rule changing the regulations governing the labor certification process for the temporary agricultural employment of H-2A aliens. The revised regulations, which go into effect on March 15, 2010, are, in large part, designed to reverse changes made to the H-2A program by the outgoing administration of George W. Bush.

Nathan Whatley

The H-2A program is designed to help provide a more reliable workforce for American agriculture. The program applies to agricultural jobs that are "temporary or seasonal in nature," which is defined as employment performed at certain seasons of the year, usually in relation to the production and/or harvesting of a crop, or for less than one year when an employer can show that the need for the foreign worker is truly temporary. Through this program, domestic employers receive approval from the DOL to hire seasonal guest workers. In 2007, approximately 51,000 seasonal guest visas were approved under this program.

The new regulations are designed to increase protections for workers. Some of the most important changes made by the new regulations include: a new wage formula that will require that workers be paid $1.00/hour more; an obligation to pay for the transportation from the workers' homes; a requirement that an employer open the housing locations for H-2A workers to ensure that the locations meet OSHA standards and are safe and healthy; a prohibition on certain deductions from worker's wages; a required disclosure of job terms in a language the worker understands, including the identity of the grower and the period of work; requirement that the employer provide meals and/or cooking facilities to workers; strengthened requirements for posting a surety bond; tougher labor certification requirements and advertising requirements.

The new regulations significantly impact how the H-2A regulations apply to agricultural businesses. Employers should take steps to ensure they are in compliance with the H-2A program.

*Nathan Whatley can be reached at **nathan.whatley@mcafeetaft.com**.*

Do you need to update your estate plan?

Susan Shields

Everyone is probably aware that anytime there is a big event in the family — a death, a divorce, a new child or grandchild — wills, trusts and other estate planning documents should be reviewed to make sure they are still current. Also, it's a good idea to review those documents every 3 to 5 years just to make sure no changes are needed. However, due to changes in the estate tax laws in 2010, everyone (and particularly those people with large estates) should take time to review their estate planning documents in light of the uncertainty of the federal estate tax laws. Massive changes occurred in the federal estate tax planning arena as of January 1, 2010, including the following:

- There is no federal estate tax for decedents dying in 2010.
- There is no generation-skipping transfer (GST) tax in 2010.
- The federal gift tax remains effective with a maximum federal gift tax rate for 2010 of 35% (down from 45% in 2009) and a continued $1 million lifetime exemption.
- Beneficiaries who receive property from a decedent dying in 2010 will receive a carryover basis in the property for income tax purposes (the same basis as the decedent had at death), rather than a step-up in basis.
- The Oklahoma estate tax was repealed beginning in 2010. This change is separate and apart from the federal law changes.

It is likely that Congress will pass legislation in 2010 to amend these rules, and if that occurs, such changes may be made retroactive to January 1, 2010. However, if no legislation is passed in 2010, then beginning January 1, 2011, the estate, gift, and GST exemptions and rates in effect in 2001 will be reinstated. This means that there is a possibility of a return to a $1 million federal estate and GST exemption in 2011 and a 55% estate and gift tax rate.

If your current estate plan provides for formula bequests to your spouse, children/grandchildren or to charity, or if your documents leave the "federal estate tax exempt amount" to certain persons or trusts, your current plan may need immediate revision as a result of the 2010 changes. Many wills and trusts include formula clauses that divide an estate between a "marital" share and a "credit shelter" or "exempt" share. These formula clauses worked perfectly well in 2009 and prior years, but may result in very unintended consequences in 2010 when there is no estate tax. Such clauses could be construed to leave spouses with far less than the creator of the estate plan intended, and in some cases, even nothing.

> ***Example:*** An individual has a $5 million estate. His will leaves the "exempt amount" (stated as a formula) to his children from his first marriage and the balance to his current spouse. Had he died in 2009, the children would have received $3.5 million and his spouse would have gotten $1.5 million. The marital deduction coupled with unified credit, which sheltered $3.5 million for 2009 transfers, would have prevented any federal estate tax from being owed. Now assume he dies in 2010. Read literally, the formula clause could be interpreted as giving the full $5 million of assets to his children and nothing to his spouse.

The future of the federal estate tax laws remains uncertain. Many planners believe it is likely that legislation, when it is passed, will result in a return to something akin to the 2009 rules, which provided for a $3.5 million per person federal estate and GST tax exemption and a tax rate of 45%. Some opportunity may exist this year for high net worth clients to make GST gifts to grandchildren or to trusts without the imposition of GST tax. Also, for people who have been considering transfers by gift or sale to children or grandchildren, this could be an opportune time to make those transfers. Of course, any planning implemented at the present time should only be done after careful consideration of the potential impact of a retroactive repeal and a return to the higher gift tax rates and GST tax.

Susan Shields is the leader of McAfee & Taft's Tax & Family Wealth practice group.
*She can be reached at **susan.shields@mcafeetaft.com**.*

AGRICULTURE AND EQUINE INDUSTRY GROUP LAWYERS

Jennifer Callahan *Co-leader*
Tax and Employee Benefits

Jeff Todd *Co-leader*
Litigation and Agricultural Law

Tim Bomhoff
Litigation

Jeremiah Buettner
Litigation and Environmental Law

Steven Bugg
Litigation and Creditors' Rights

Jacque Brawner Dean
Workers Compensation Defense

Cliff Dougherty
Intellectual Property

Sam Fulkerson
Labor & Employment

Spencer Haines
Tax

Stephen Hetrick
Real Estate and Business Law

John Kenney
Litigation

Myrna Schack Latham
Real Estate and Business Law

Cole Marshall
Real Estate and Business Law

Alison McCalla
Employee Benefits

Lincoln McElroy
Litigation

Andy Peterson
Intellectual Property

Tony Rahhal
Intellectual Property

Natalie Ramsey
Labor & Employment

Bill Rodgers
Business Law

Paul Ross
Labor & Employment

Scott Sewell
Tax & Family Wealth

Jim Sharrock
Real Estate and Business Law

Susan Shields
Tax & Family Wealth

Spencer Smith
Litigation

Mary Ellen Ternes
Environmental Law

Nathan Whatley
Labor & Employment