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KANSAS CORPORATE FARMING LAW

The following summarizes former and current corporate farming statutes in Kansas and discusses legal challenges to other state corporate farming laws.

Background

The original Kansas law prohibited certain types of corporate farming in Kansas and was first passed in 1931. That law prohibited corporate farming for the purpose of growing wheat, corn, barley, oats, rye, or potatoes and the milking of cows. Following the enactment of the initial corporate farming law, several amendments were made, among which was an amendment to allow a domestic or foreign corporation, organized for coal mining purposes, to engage in agricultural production on any tract of land owned by the corporation which had been strip mined for coal.

In 1965, major amendments were made to the law. Grain sorghums were added to the list of crops that were restricted. In addition, these amendments made it possible for certain types of corporations, which met detailed specifications, to engage in agricultural production of those restricted crops and also the milking of cows. However, issues with the statute continued to exist. As a result, the Legislature had special interim committees study the issues with corporate farming in 1972, 1975, and 1978. As a result of the 1972 interim study, the 1973 Kansas Legislature passed additional reporting requirements for corporations which held agricultural land in the state. Neither the 1975 nor the 1978 study resulted in legislation being adopted. Additionally, discussions of the problems associated with the corporate farming statute were held throughout this time period. Numerous discussions continued between 1972 and 1981.

As a result of these concerns the 1981 Legislature introduced and enacted SB 298.

Since the 1981 enactment, the law has undergone numerous modifications. For the most part, these modifications have not impacted significantly the intent or policy of the 1981 legislation.

The law generally prohibits corporations, trusts, limited liability companies, limited partnerships, or corporate partnerships other than family farm corporations, authorized farm corporations, limited liability agricultural companies, limited agricultural partnerships, family trusts, authorized trusts, or testamentary trusts from either directly or indirectly owning, acquiring, or otherwise obtaining or leasing any agricultural land in Kansas.

From the initial consideration of the 1981 legislation legislators recognized certain circumstances or entities which may have a legitimate need or situation that requires the acquisition of agricultural land in Kansas. As a result, exemptions to the general prohibitions

have been included in the corporate farming law. Several of these exemptions have been added since the time of the 1981 enactment.

Permitting Corporate Hog Operations. One of the most significant issues of the Kansas Corporate Farming Law has been the issue of permitting corporate hog operations (sometimes referred to as “swine confinement facilities”) to expand their acreages or to acquire agricultural land to establish new facilities. This issue was first brought to the Legislature in 1984 as a result of a desire on the part of Dekalb Swine Breeders to expand its operation near Plains in a partnership with the Seaboard Corporation and Pauls & Whites International. Legislation considered would have added an additional exemption to the provisions of the Corporate Farming Law to allow “swine confinement facilities” owned or leased by a corporation to own or acquire agricultural land. However, the legislation eventually died.

The next time the issue of corporate hog operations came before the Legislature was in 1987 as a result of entities involved with economic development. Again the Legislature heard from Dekalb Swine Breeders, Inc. indicating a need to expand its facilities in Kansas while being prevented from doing so because of the State’s Corporate Farming Law. As a result, legislation was introduced to expand the Kansas Corporate Farming Law to permit a corporation to own or lease agricultural land for the purpose of operating a swine confinement facility. At this time the legislation included the expansion of the law to allow entities associated with the poultry industry.

During Conference Committee on the legislation, the swine confinement facility exemption was deleted. The Governor signed the version exempting poultry and rabbit confinement facilities and prohibiting them from taking advantage of certain tax exemptions.

Other bills were introduced during the 1987 Session designed to address, either directly or indirectly, the swine confinement facility issue. None of these bills were enacted.

Eventually, the 1987 Special Committee on Agriculture and Livestock was assigned to study the topic of corporate farming and its impact on Kansas swine producers. The legislation resulting from this study did not receive approval by the Legislature.

The 1988 Legislature, however, did approve amendments to the Kansas Corporate Farming Law, amending the definition of the terms “processor” and “swine confinement facility”; making it unlawful for processors of pork to contract for the production of hogs of which the processor is the owner or to own hogs except for 30 days before the hogs are processed; making pork processors violating the ownership of hogs restriction subject to a \$50,000 fine; and clarifying that, except for the pork processors’ limitation, agricultural production contracts entered into by corporations, other entities and farmers are not to be construed to mean the ownership, acquisition, obtainment, or lease of agricultural land. The bill also prohibited any “swine confinement facility” from being granted any economic development incentives.

Three bills were introduced during the 1989 Legislative Session that proposed amendments related to the corporate farming issue. None of these bills were enacted.

Limited Liability Companies—1991 and 1992 Proposals. The 1991 amendments were made to the law to add “limited liability companies” to the list of entities that are generally prohibited from indirectly or directly owning, acquiring, or otherwise obtaining or leasing any agricultural land. In addition, this legislation amended the exemptions to the general prohibitions by permitting certain limited liability *agricultural* companies to own and acquire agricultural land.

The 1992 Legislature considered but did not enact HB 3082, which would have eliminated the permission for limited liability agricultural companies to own, acquire, obtain, or lease, either directly or indirectly, any agricultural land in this state.

Legislative Actions and Amendments—1994. Two bills received approval during 1994. These bills, among other things, permitted the acquisition of agricultural land by corporations for the purposes of developing either swine production facilities or dairy production facilities. Both types of entities could be approved by either county resolution or by an affirmative vote upon petition.

Legislative Modifications—1996 and 1998. In 1996, the Legislature considered and approved additional amendments to the Kansas Corporate Farming Law by adding “family farm limited liability agricultural companies” to the list of entities which are permitted to hold agricultural land in Kansas.

In addition, the bill modified the definition of the term “authorized farm corporation,” which is one of the recognized entities permitted to own and acquire agricultural land in Kansas. The incorporators of an “authorized farm corporation” could include “family farm corporations” and “family farm limited liability agricultural companies” as well as Kansas residents. Likewise, under the bill, the stockholders of “authorized farm corporations” could include “family farm corporations” and “family farm limited liability agricultural companies” as well as natural persons.

In addition, the bill modified the definition of the term “limited liability agricultural company,” which is one of the recognized entities permitted to own and acquire agricultural land in Kansas. Under the bill, the members of a “limited liability agricultural company” could include “family farm corporations” and “family farm limited liability agricultural companies” as well as natural persons. The bill also restricted the requirement in this definition that at least one of the members of the “limited liability agricultural company” be a person residing on the farm or actively engaged in the labor or management of the farming operation to the situation where all of the members are natural persons.

In 1998, among numerous other provisions dealing with swine production, the Legislature modified provisions dealing with the issue of the authority of the board of county commissioners. The bill allowed a board of county commissioners, in any county which has conducted an advisory election on the question of rescinding a resolution allowing swine production facilities, to adopt a resolution rescinding a resolution adopted under the Corporate Farming Law. The resolution would be submitted to the qualified electors of the county at the next state or countywide regular or special election which occurs more than 60 days after the adoption of the resolution. The bill sunsetted this section on December 31, 1998.

Swine and Dairy Production Facilities—2012. Amendments to the provisions of law which permit certain dairy production facilities and swine production facilities to be established in counties under the Kansas Corporate Farming Law were aligned so that the approval process for the establishment of a swine production facility and that of a dairy production facility are the same.

The bill added that denial by the county commissioners of such a production facility, which had been an absolute rejection, also is subject to a petition protesting said denial following the guidelines of a petition protesting the establishment of such a facility.

Challenges to State Corporate Farming Laws

Throughout the Midwest and in Kansas, corporate farming laws exist which restrict corporations and other corporate farms, excepting family farm operations, from owning, acquiring, or leasing any agricultural land in the state for farming activities.¹ The purpose behind corporate farming laws was and is to protect local family farms from corporations coming in and creating competition that would have negative economic impacts on smaller family farms.²

Since their inception, corporate farming laws have been challenged in the courts under the Equal Protection Clause, Due Process Clause, Privileges and Immunities Clause, and finally the Contract Clause of the *United States Constitution*.³ They have been consistently upheld as constitutional until recently, when Nebraska's and South Dakota's corporate farming laws were struck down by the Eighth Circuit for violating the Dormant Commerce Clause of the *U.S. Constitution*.

Constitutional Challenges to Corporate Farming Laws. Corporate farming laws have been brought before the Eighth Circuit three times in recent years under the Dormant Commerce Clause. First in South Dakota where the Court struck down a constitutional amendment which had passed, second in Iowa where the Iowa Legislature amended the statute during the trial, and most recently in Nebraska where the Court struck down a corporate farming constitutional provision. The following is a summary of the Dormant Commerce Clause and the decisions made by the Eighth Circuit.

Dormant Commerce Clause. The Dormant Commerce Clause of the *U.S. Constitution* grants Congress the power to regulate interstate commerce and any state law that conflicts with a federal law enacted under the Commerce Clause will be held to be unconstitutional.⁴ The Dormant Commerce Clause comes from this authority in that even if Congress has not expressly acted pursuant to its power under the Commerce Clause, states may still not enact laws that discriminate against or unduly burden interstate commerce.

In examining whether a state has violated the Dormant Commerce Clause, a court will look first to whether the enacted law discriminates against interstate commerce by examining whether in-state and out-of-state interests are treated differently, with the in-state interests benefiting at the cost of burdening out-of-state interests.⁵ If a law is found to be discriminatory on its face, then it will be held to be unconstitutional.⁶

If a law is not found to be facially discriminatory through its purpose or effect, then it may still be held unconstitutional under a second analysis. Under the second analysis, a challenged law will be struck down if the burden it imposes on interstate commerce is clearly excessive when compared to its supposed local benefits.⁷

South Dakota. In 1998, South Dakota amended its state constitution to prohibit corporations and syndicates from acquiring or obtaining any interest in real estate used for

1 See KSA 17-5904 (2011).

2 Pittman, Harrison M., *The Constitutionality of Corporate Farming Laws in the Eighth Circuit*, The National Agricultural Law Center, 1 (2004).

3 See *id.*

4 *Id.* at 3.

5 *Jones v. Gale*, 470 F.3d 1261, 1267 (8th Cir. 2006).

6 See *id.* at 1270.

7 Pittman at 4.

farming and to engage in farming.⁸ An exemption was created for a “family farm corporation or syndicate.” Additionally, family members in a family farm corporation had to reside on or be actively engaged in the “day-to-day labor and management” of the farm; “day-to-day labor and management” requiring daily or routine substantial physical exertion and administration.⁹ The Eighth Circuit ultimately found the amendment to be unconstitutional as a violation of the Dormant Commerce Clause.

Based on the evidence, the Eighth Circuit concluded that the constitutional amendment was motivated by a discriminatory purpose, thus making it unconstitutional unless the state could demonstrate that there were no other reasonable alternatives by which the state could achieve its legitimate local interest of promoting family farms and protecting the environment.¹⁰

Nebraska. In 1982, Nebraska passed a constitutional amendment which prohibited ownership of Nebraska farm or ranch land by any corporation, domestic or foreign, which was not a Nebraska family farm corporation.¹¹ The prohibition did not apply to family farm corporations or limited partnerships in which at least one family member resided on or engaged in the daily labor and management of the farm.¹² The Eighth Circuit found that because the prohibition on farming by corporations did not apply to the family farm corporations in which a family member resided, or engaged in the daily labor and management of the farm, the law essentially required a person to be within a physically and economically feasible commute of Nebraska farms and therefore favored Nebraska residents.¹³

After finding the constitutional amendment to be discriminatory, the Court then looked for whether the state could show that it had no other way to advance a legitimate local interest. Nebraska argued that the amendment was necessary to deal with absentee owners of land and negative effects on the social and economic culture of rural Nebraska.¹⁴

In 2009, the Nebraska Legislature attempted to pass a statute which found it to be in the public interest of the state to encourage ownership and control of agricultural production and agricultural assets by individuals and families engaged in day-to-day labor and management of farming or ranching operations.¹⁵ However, the bill failed to receive enough support in the legislature, and since the finding of unconstitutionality of the constitutional amendment, Nebraska has been without a corporate farming law or constitutional provision.¹⁶

Comparing the Kansas Corporate Farming Law. KSA 17-5904 states that “no corporation, trust, limited liability company, limited partnership or corporate partnership [. . .] shall, either directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state.” The statute exempts family farm corporations and authorized farm corporations, as well as other forms of limited liability family farm companies and partnerships.¹⁷ Much like the corporate farming laws described above, Kansas’ law requires family farm corporations, authorized farm corporations, and limited agricultural partnerships to have at least one stockholder or partner residing on the farm or actively engaged in the labor or management of

8 *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 587 (8th Cir. 2003).

9 *Id.* at 588.

10 *Id.* at 597.

11 *Jones v. Gale*, 470 F.3d 1261, 1264 (8th Cir. 2006).

12 *Id.* at 1265.

13 *Id.* at 1268.

14 *Id.* at 1270.

15 Anthony B. Schutz, *Corporate-Farming Measures in a Post-Jones World*, 14 Drake J. Agric. L. 97, 143 (2009).

16 *Id.*

17 *Id.*

the farming operations.¹⁸ Additionally, all incorporators of “authorized farm corporations” must be Kansas residents.¹⁹

Kansas is in the Tenth Circuit, which has not yet addressed the constitutionality of corporate farming laws under the Dormant Commerce Clause. While the Tenth Circuit is not required to follow the Eighth Circuit’s analysis, circuit courts often will look to the analysis of other circuits when considering an issue for the first time. Under the Eighth Circuit’s analysis, Kansas could face potential problems with its statute because it requires at least one of the stockholders or partners to physically reside on the farm or be actively engaged in the labor or management of the farming operations. The statute could also run into problems with its requirement that all incorporators be Kansas residents in order to qualify as an authorized farm corporation. Any language that explicitly or implicitly favors in-state residents runs the risk of being found discriminatory by a court under the Dormant Commerce Clause.

However, there is some flexibility in the Kansas Corporate Farming Law in that it requires either physical residence on the farm or active engagement. Active engagement can be achieved through either physical labor or management.

While the initial question in determining whether the Kansas statute is discriminatory would focus on the differential treatment of in-state and out-of-state individuals, the second part of the analysis, if the court were to find discrimination, would be to look at whether the state has no reasonable alternative to achieve its legitimate local interest. Additionally, the State would need to provide a legitimate local interest that was acceptable in the Tenth Circuit. The Eighth Circuit found promoting family farms and protecting the environment to be an acceptable local interest, but maintaining the status *quo* in rural communities not to be.²⁰ It is unclear what the Tenth Circuit would consider to be acceptable, as the issue has yet to be considered in that circuit.

18 KSA 17-5903(j).

19 KSA 17-5903(k).

20 *South Dakota Farm Bureau, Inc. v. Hazeltine* at 597; *Jones v. Gale* at 1270.