

JACKSON WALKER L.L.P.

PRESENTS

2005 LEGAL UPDATE FOR THE TEXAS & SOUTHWESTERN CATTLE RAISERS ASSOCIATION

FRIDAY, MARCH 18, 2005
FORT WORTH, TEXAS

CONTENTS

OUR EXPERIENCE

Agriculture

LEGAL UPDATES

Edward C. Small – *Water Law Issues*

James D. Bradbury – *City of Waco v. Texas Dairy Industry et al: Enforcing Private Regulation Through Litigation*

M. Keith Branyon – *Estate Planning for Farmers and Ranchers*

Bart Wulff – *Risk Management Issues: You paid for the insurance-What happens when you suffer a loss?*

John B. Holden, Jr. – *What Ranch Owners need to know about Oil and Gas, Water and Wind Leases*

Jay K. Rutherford – *Employment Issues for the Cattle Raiser*

ROSTER

OUR EXPERIENCE

AGRICULTURE

Jackson Walker attorneys provide a wide range of legal services to members of the agricultural industry. The Agriculture practice group is comprised of attorneys who have experience in varied practice areas, including regulatory, business transactions, litigation, real estate, environmental, labor and employment, tax, and oil and gas. In January 1999, the attorneys of Small, Craig & Werkenthin joined Jackson Walker. Among them are some of the most prominent members of the Texas legal community who serve agricultural businesses. The collective experience of those attorneys is unparalleled, and in conjunction with the geographic scope and attorney depth offered by Jackson Walker, the Agriculture practice group is prepared to handle matters of any size which arise for a client in the agricultural industry.

ADMINISTRATIVE, LEGISLATIVE, AND REGULATORY

AGRICULTURE PRODUCT CONTAINER DISPOSAL TASK FORCE - Represented several agriculture industry trade groups in evaluating regulation of hazardous waste residue in grain and other agriculture product containers for permit-exempt regulation under Chapter 361, Tex. Health & Safety Code.

ANIMAL HEALTH REGULATORY ACTIONS - Drafted statutory language and regulation language for Brucellosis and tick regulations.

GOVERNMENT FARM PROGRAMS - Assisted farmers and ranchers in their participation in government farm programs, including the structure of farming and ranching entities, determination of eligible “persons,” and appeals process through the ASCS program.

WASTEWATER /AIR ENVIRONMENTAL REGULATIONS - Represented several agriculture industry trade groups before the Texas Natural Resource Conservation Commission and Texas Legislature relating to permit-exempt regulation under both Chapter 26, Tex. Water Code, and Chapter 382, Tex. Health & Safety Code.

AGRICULTURE

COMMERCIAL TRANSACTIONS, REAL ESTATE, AND CORPORATE

COMMERCIAL LIVESTOCK TRANSACTIONS - Drafted and negotiated agreements between parties relating to embryo transfers and sales and leasing of livestock.

DEVELOPMENT - Assisted in the development of rural land and subdivisions which included issues involving endangered species habitat regulation, ad valorem tax “roll-back” provisions, utilities, and platting issues.

ENTITY FORMATION - Negotiated and formed family and commercial limited partnerships, closely held corporations, limited liability companies, limited liability partnerships, general partnerships, and other entities for the purposes of estate planning, asset protection, and the facilitation of transferability and management of agriculture property.

FARMING, GRAZING, AND HUNTING LEASES - Negotiated and drafted farming (sharecrop and cash leases), grazing (including leases based upon gain and cash leases), and hunting leases and subleases.

FINANCING - Structured, negotiated, and documented the financing of agricultural property from both lender and borrower perspectives, including the financing of ranches, farms, crops, livestock, and mineral property; structured and documented the public financing of rural and urban waterworks.

SALES AND ACQUISITIONS - Negotiated, drafted, and closed transactions involving the sale of livestock, crops, machinery, farms, ranches, and other agriculture property.

TITLE, BOUNDARY, AND EASEMENT ISSUES - Negotiated title, boundary, and easement disputes between adjacent landowners, tenants and other claimants; negotiated and litigated fencing, adverse possession, and prescriptive rights claims; conducted title examinations; prepared and analyzed title curative documents.

AGRICULTURE

EMPLOYMENT / SAFETY

EMPLOYMENT ISSUES FOR RANCHERS, FARMERS, AND AGRICULTURAL INDUSTRY - Advised agriculture client on compliance with state and federal non-discrimination law, employment-at-will, hiring and background checks, disciplinary actions and discharges, and workers' compensation.

SAFETY / OSHA COMPLIANCE FOR AGRICULTURAL OPERATIONS - Developed safety programs and policies; participated in OSHA accident investigations and inspections; prosecuted contests of OSHA citations and agricultural exemptions.

WAGE AND HOUR COMPLIANCE - Represented clients in Texas Employment Commission audits, unemployment compensation matters, and employee/independent contractor determinations.

ENVIRONMENTAL

AIR QUALITY ENFORCEMENT ACTION - Defended client in an air emissions enforcement action, involving nuisance odors, brought by the Texas Air Control Board.

AQUACULTURE WASTEWATER DISCHARGE PERMIT - Represented major user of Edwards Aquifer water in a contested case hearing involving a Texas Natural Resource Conservation Commission wastewater discharge permit. Representation entailed issues of regulatory jurisdiction over previously unregulated process streams as a result of client's production activities and included representation in related state court proceedings, as well as mandamus action in Texas Supreme Court.

DEFENSE OF ENFORCEMENT ACTION - Represented a major dairy product cooperative in successfully negotiating significant reduction in proposed administrative penalty and in related actions, including negotiating a compliance directive (the first to be issued since the creation of the Texas Natural Resource Conservation Commission) authorizing the on-site land application of an industrial solid waste, resulting in significant profit savings to the client without danger to neighboring landowners.

AGRICULTURE

WASTEWATER DISCHARGE PERMIT - Represented major dairy product cooperative in defending challenges to wastewater permit amendment on jurisdictional grounds, securing Texas Natural Resource Conservation Commission staff support for aggressive action in pursuing successful issuance of wastewater permit amendment under high profile circumstances.

WASTEWATER DISCHARGE PERMIT PROTEST - Negotiated an alternate discharge route for a landowner who would have been adversely affected by a proposed wastewater discharge permit.

LAND USE REGULATION

ENDANGERED SPECIES REGULATION - Represented several landowners in negotiations with U.S. Fish & Wildlife Department concerning potential endangered species modification and actions necessary to avoid need for an incidental take permit.

LANDOWNER CONDEMNATION - Participated in all facets of landowner representation of condemnation of private property for governmental use, including highways, reservoirs, pipelines, powerlines, and endangered species regulation.

LITIGATION

ANIMAL HEALTH WARRANTY LITIGATION - Participated in litigation concerning warranty of livestock to be free of animal disease.

ENVIRONMENTAL / SUPERFUND LITIGATION - Currently representing ranching industry client in a district court proceeding challenging a Texas Natural Resource Conservation Commission order which arbitrarily identified client as a potentially responsible party and ordered payment of certain costs associated with a remedial investigation of a state superfund site. Issue involves cost-effective representation of client in multi-party, complex district court proceeding involving numerous potentially responsible parties, perfection and assertion of deed-recorded contract claim against non-appealing responsible party, and representation of client in numerous related toxic tort cases filed in several Texas counties.

AGRICULTURE

OIL AND GAS LITIGATION, DAMAGES, AND OTHER COMPENSATORY NEGOTIATION - Represented royalty and mineral owners in disputes and litigation involving the determination of “fair market value” of oil and gas, the liability for and the amount of surface damages, subsurface formation damages, bonuses, delay rentals, and miscalculation of royalty percentages; represented royalty and mineral owners obtaining rightful share of “hidden settlement” (received by oil and gas operators and producers) from pipeline companies, claims made by the Texas Railroad Commission to force landowners to plug holes abandoned by producers, actions to terminate leases based on non-production and other defaults in the lease, disputes involving the breach of express or implied covenant in the lease concerning reasonable and prudent operation, and development and improper “pooling.”

WATER RIGHTS LITIGATION - Participated in water rights adjudication proceedings, riparian boundaries and rights, permit requirements for private lakes, mined water, and developed water.

OIL AND GAS

MINERAL AND ROYALTY TITLE DISPUTES - Represented landowners in disputes or transactions concerning title and ownership in mineral and royalty interests, executive rights, and claims made by the General Land Office of the State of Texas in connection with the Relinquishment Act lands and partition of mineral estate.

OIL AND GAS LEASING - Represented landowners in the negotiation and documentation of oil and gas leases, pipeline easements, surface leases for the storage and/or transportation of oil and gas, agreements concerning the use of the surface and subsurface water for drilling and production purposes, division orders and ingress and egress easements for producers and operators.

TAXATION

AD VALOREM TAX - Represented numerous landowners before various tax appraisal districts regarding qualification for “ag use” or “open space” exemptions for ad valorem valuation purposes.

ESTATE PLANNING - Drafted all types of estate and tax planning documents involving farm and ranch property, including

AGRICULTURE

wills and trusts; participated in all facets of will contests, estate administration, and trust administration.

RURAL WATER UTILITIES - AD VALOREM TAX

EXEMPTION - Represented rural water utility trade association in securing legislative enactment of exemption from ad valorem taxation; assisted in voter approval of accompanying constitutional amendment; worked with Office of Texas Comptroller in securing approval of amendments to corporate by-laws for rural water utilities to enact special provisions relating to ad valorem tax exemption. Collateral representation of several members of trade group in proceedings before various taxing districts to successfully challenge preliminary denials of ad valorem tax exemption requests.

STATE SALES AND FRANCHISE TAX - Represented taxpayers in resolutions of pending audits, advance planning for state tax compliance including private response letters and negotiations with Texas Comptroller's Office in Austin.

WATER RIGHTS

EDWARDS AQUIFER "RIVER" LITIGATION - Represented major party to lawsuit to set aside a Texas Natural Resource Conservation Commission regulation that declared the Edwards Aquifer a "river" and imposed water use regulations.

WATER DISTRICTS - Participated in litigation concerning rights with water districts, creation of water districts, rates within water districts, and flood control issues.

WATER RIGHTS LITIGATION - Participated in water rights adjudication proceedings, riparian boundaries and rights, permit requirements for private lakes, mined water, and developed water.

LEGAL UPDATES

EDWARD C. SMALL

Water Law Issues

(No Handouts Enclosed)

EDWARD C. SMALL

Edward C. Small is a partner in the Governmental Affairs section of Jackson Walker. He has more than 25 years experience representing clients before the Texas Legislature and Texas regulatory agencies, in addition to his litigation practice.

Mr. Small has served as counsel to entities and associations with legislative and regulatory issues. He has appeared for clients before the Texas Legislature and State and Federal agencies. His clients include associations and entities seeking solutions to issues affected by State Government.

Mr. Small's litigation experience include water rights, boundary issues, condemnation, oil and gas, and other land-related issues.

MEMBERSHIPS

Mr. Small is a member of the State Bar of Texas, the Travis County Bar Association, and is a Texas Bar Foundation Fellow.

COMMUNITY INVOLVEMENT

Mr. Small is Past-President of the Austin Independent School District Board of Trustees and Past-President of the Headliners Club. Mr. Small also served on the Board of Directors for the UT Parent Association and is on the Advisory Committee for the UT Department of Education.

EDUCATION

Mr. Small received his B.B.A. and J.D. degrees from the University of Texas.



Ed Small is a litigator with significant experience in state government affairs.

B.B.A., University of Texas

J.D., University of Texas

esmall@jw.com

JAMES D. BRADBURY

*City of Waco v. Texas Dairy Industry et al: Enforcing
Private Regulation Through Litigation*

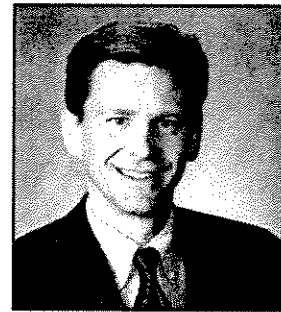
JAMES D. BRADBURY

James D. Bradbury is a Partner in the Litigation section of Jackson Walker and is a member of the firm's Eminent Domain industry group. Mr. Bradbury represents foreign and domestic corporations and is principally focused on the resolution of business problems through negotiation, arbitration or litigation. He represents his clients tenaciously but firmly believes that clients deserve efficient representation. He has represented clients in real estate matters, railroad litigation, breach of fiduciary duty litigation, fraud actions, and all aspects of commercial law and litigation. Mr. Bradbury has directed forensic audits regarding financial improprieties and embezzlement.

Mr. Bradbury has extensive trial experience and has served as counsel in over forty trials including thirty three trials as lead counsel. He recently obtained a judgment in excess of \$5 million dollars on behalf of a general contractor regarding a federal highway construction project. He also acts as lead counsel in appellate proceedings, and regularly appears in both state and federal courts. He is admitted to practice before all appellate courts in Arkansas and Texas as well as the United States Courts of Appeal for the Fifth and Eighth Circuits. Currently, he is representing a utility corporation in a federal anti-trust suit, a corporation in a merger dispute, a closely held corporation in a breach of fiduciary duty action, and defending several dairy farms in a multi-party pollution lawsuit brought by the City of Waco.

Other recent representation includes:

- Successful defense of a long term care insurance carrier in a federal action including Fair Housing Act claims;
- Defense of major real estate development firms in actions involving claims of fraud, misrepresentation and contractual disputes;
- Defense of a commercial lender in connection with claims of fraud and misrepresentation over a failed mall redevelopment project; and
- Primary counsel to a variety of private interests on transactional matters as well as litigation in various jurisdictions across the United States.



James Bradbury practices litigation.

B.A., Texas A&M University

J.D., University of Idaho

jbradbury@jw.com

JAMES D. BRADBURY

MEMBERSHIPS

Mr. Bradbury is a member of the State Bar of Texas (International Section), the State Bar of Arkansas (International Committee), the Defense Research Institute, International Law Committee, the American Bar Association, and the National Association of Railroad Trial Counsel. Mr. Bradbury has also completed the International Association of Defense Counsel Trial Academy. He serves on the Advisory Board of the Institute for Transnational Arbitration of the Center for American and International Law and on the Economic Development Committee for the Fort Worth Chamber of Commerce. Mr. Bradbury chairs the International Law Committee for the Tarrant County Bar Association.

SIGNIFICANT CASES

- *Kelley v. Life Investors* (U.S. District Court, Northern District of Texas) Summary judgment on behalf of long term care insurance carrier on Fair Housing Act claims, which was a case of first impression in the federal courts.
- *Champagne Webber v. Peachtree Construction* (Tarrant County District Court) Five million dollar judgment in favor of general contractor against subcontractor arising out of multiple fatalities on interstate construction project.
- *Brown v. State of Arkansas* Representation of wrongfully convicted defendant in habeas trial, which resulted in the nullification of the conviction after seven years in prison. Conviction was based on perjured testimony.
- *Thomas v. Andrews and City of Jonesboro* (U.S. District Court, Eastern District of Arkansas) Defense of police officer in suit where alleged act of brutality was videotaped. Plaintiff publicized the case on Good Morning America. Case was settled after plaintiff's deposition.

JAMES D. BRADBURY

- *Dobbins v. Hawks Enterprises, et al.*, 198 F.3d 715 (8th Cir. 1999). Reversed U.S. District Court's decision to lift automatic stay and avoid arbitration based on claimant's defense of unconscionability. The Eighth Circuit reversed and ordered arbitration to proceed.
- *Newcourt Financial v. Canal Insurance Company*, 15 S.W.3d 328, 341 Ark. 181 (2000). Reversed trial court's refusal to award statutory penalties and fees to a lender that prevailed in an insurance coverage action.
- *Ford v. St. Paul Fire & Marine Ins. Co.*, 5 S.W.3d 460, 339 Ark. 434 (1999). Affirmed trial court's grant of summary judgment in a medical malpractice action where plaintiff failed to show that a delay in surgery on an aortic aneurysm was a proximate cause of death.
- *Harmon v. Bank of the West*, 2-02-056-CV (Tex. App. – Fort Worth, 2003). Affirmed trial court's summary judgment in favor of lender on borrower's "lender liability" claims.
- *Wimberly/Elrod v. Burlington Northern*, Defense verdict on behalf of railroad in a crossing accident fatality.
- *American Eagle Insurance v. Thompson*, Determination of coverage in fatal aircraft fire case.
- *Pratt v. St. Bernards R.M.C.*, Defense verdict on behalf of regional hospital in medical malpractice action.
- *Qualls v. Burlington Northern*, Settlement during trial in fatality arising out of train/vehicular collision.
- *In re: Watkins Estate Trust*, Recovery of wrongfully appropriated funds from family trust based on breach of fiduciary duty.

JAMES D. BRADBURY

- *Newcourt Financial v. Canal Insurance*, Judgment in favor of lender in arson trial involving total loss of semi-tractor and trailer.

PUBLICATIONS / SPEAKING ENGAGEMENTS

Mr. Bradbury was recently named as one of the top professionals under 40 years of age by the Fort Worth Business Press. He has also been selected as one of the “Best Lawyers in Fort Worth” by *Fort Worth Magazine*.

On numerous occasions, Mr. Bradbury has authored materials and lectured on insurance coverage issues and has written articles for the business community on international arbitration, how foreign businesses can incorporate in the U.S. and the impacts of terrorism legislation. His lecture, “International Law: Observations, Issues and Changes Affecting U.S. and Fort Worth Businesses,” was presented to The World Affairs Council of Greater Fort Worth. Mr. Bradbury has also guest lectured to undergraduate and law school classes.

Mr. Bradbury has authored and presented Insurance Coverage Law in Arkansas in 1997 and 1999. He has also written “Patriot Act” published in the *Fort Worth Business Press* and “International Arbitration” published in the *Fort Worth International Center Newsletter*.

COMMUNITY INVOLVEMENT

Mr. Bradbury is active in community and civic affairs and serves on the Board of the Fort Worth World Affairs Council. He is also a member of the Dallas Committee on Foreign Relations.

EDUCATION

Mr. Bradbury received his B.S. degree from Texas A & M University and his J.D. degree, cum laude, from the University of Idaho. While in law school, Mr. Bradbury studied for one year at Southern Methodist University where he participated in the Jessup International Moot Court Competition.

**Texas Southwest Cattle Raisers
Association**

***City of Waco v. Texas Dairy Industry et al:*
Enforcing Private Regulation Through
Litigation**

**James D. Bradbury
Jackson Walker L.L.P.
301 Commerce Street
Suite 2400
Fort Worth, Texas 76102**

Texas Southwest Cattle Raisers Association

City of Waco v. Texas Dairy Industry et al: Enforcing Private Regulation Through Litigation

- A. Introduction—current status of litigation, venue and parties.
- B. Prelude to litigation:

Discussion of past studies, industry cooperation and regulatory environment.
- C. Filing of litigation.
 - 1) Claims Asserted
 - a) CERCLA
 - b) CLEAN WATER ACT
 - c) NEGLIGENCE
 - 2) Financial and political pressure: Defendants include small operators and association board members.
 - 3) Causation and alleged damages.
 - 4) Private permitting and regulation.
- D. Industry response and threats posed by the litigation.
 - 1) Planning for litigation against members.
 - 2) Alliances with related producer groups.
 - 3) Threat of similar litigation (air and water) modeled on Waco-type case.
 - 4) Agency reaction.

Star-Telegram.com

Posted on Sun, Jan. 30, 2005

Manure dispute lands in Waco judge's hands

By Barry Shlachter
Star-Telegram Staff Writer

Dairy farmer Keith Broumley looks over a big hole in the ground below his sprawling cattle barn that by late April will be transformed into a device that generates electricity using methane gas derived from cow manure.

Construction of the state-of-the-art anaerobic digester, built with \$1.5 million in grants, is just one of several unusual turns taken in what seemed an endless war between Erath and Hamilton county dairies along the Bosque River and Waco, about 100 miles downstream.

For at least nine years, the Central Texas city has claimed that manure runoff from the state's heaviest concentration of dairy cattle was largely responsible for odor and taste problems in Lake Waco water.

But just when dairy farmers thought that progress was being made in negotiations between them, state environmental officials and Waco, the city suddenly sued 14 dairies a year ago.

It was a move that some in the industry saw as outgoing Waco Mayor Linda Ethridge's parting shot. Ethridge, who had campaigned vigorously and loudly against the farmers for years, was stepping down because of a two-term limit on her office.

"We were disappointed in how the talks turned out," Ethridge told the *Star-Telegram*, explaining the move toward civil lawsuits. The Texas Commission on Environmental Quality's "implementation plan lacked any teeth. All of it was based on voluntary compliance."

But some dairy farmers were foxed by the lawsuits filed by the Waco firm of Naman, Howell, Smith & Lee, which did not return calls seeking comment.

One of the dairies was in bankruptcy, one farmer had left the region more than a year before, and another, Broumley, is involved in technical research projects to fix the problem, said Stefan Byl, a dairy farmer in Dublin.

Byl is still baffled over why Dutch Cowboy Dairy, which he runs with his brother Paul, was among those singled out.

After spending \$70,000 on his \$400-an-hour Dallas attorney, Byl said he decided to sit down and discuss the lawsuit with Waco, something his dairy association advised against. He and his wife settled out of court in less than two hours, he said.

Byl maintains that he was complying with virtually all of the environmental measures Waco demanded.

"There's been much miscommunication," said Byl, 43, who grew up in Haarlam, the Netherlands, immigrated here 27 years ago and is now a U.S. citizen. "They were not getting the answers." He said he couldn't understand why no one from Waco ever bothered to visit his farm and meet with him.

The only thing new that was demanded was the right for Waco to inspect his farm.

Byl readily agreed, saying he had nothing to hide.

In fact, he had publicly invited the new mayor and City Council to visit his operation before the settlement during an interview with a Waco TV station, and renewed the invitation afterward.

Nearly six months after the settlement, the city still has not sent anyone to inspect his operation. And he said he hasn't heard back from the mayor or council.

Waco dropped the lawsuits against the departed farmer, the bankrupt operation and the two farmers working on technical solutions.

Three farmers moved their cows from leased dairies in Erath County to get out from under the lawsuit, said John Cowan, executive director of the Texas Association of Dairymen.

Aside from the Byl brothers, Alan Vander Horst of Excel Dairy, also near Dublin, settled out of court by agreeing to various dairy-waste measures and on-site inspections. Ten defendants remain, including at least two idle farms, Cowan said.

Both the Texas Association of Dairymen and the Brazos River Authority say that the water-quality issues are more complicated than just runoff from Erath County dairy farms.

"Some of the phosphorus definitely comes from dairies, but not all of it -- maybe a little over half," said Charlie Brown, the river authority's strategic planning manager. Farms all along the North Bosque use phosphorus-rich fertilizer, not to mention city dwellers who spread fertilizer on their lawns, he said.

And taste and odor problems at Lake Waco were reported back in 1967, decades before the heavy concentration of large, confined dairy operations moved into the watershed, according to the Texas Institute for Applied Environmental Research at Tarleton State University in Stephenville.

Erath cow census down

Dairy herds averaged about 500 head in Erath County in 1978, compared with 1,000- to 1,200-cow operations now, *Southwest Farm Press*, an agricultural journal, quoted former extension agent Joe Pope as saying in November.

Erath's cow census peaked at about 100,000 in 1997 and now, because of stiffer environmental regulations, higher land prices and the difficulty getting permits to build or expand dairies, the number has dropped to below 70,000, Pope said.

Byl said he has waited five years for a permit to enlarge his dairy herd, but the application is invariably blocked by objections.

As a result, he has diversified into beef cattle -- which requires no permitting -- and has purchased 1,500 acres in Utah as a contingency in case Erath County becomes untenable for dairy operations.

Despite the publicity Broumley's manure-to-power project has generated, the high cost of construction and the relatively low wholesale price paid for electricity by Texas utilities will likely keep it from being widely replicated anytime soon, said Brown of the Brazos River Authority, which is participating in the venture.

"It's absolutely expensive," Brown conceded. "But it's a pilot project. And one of the goals is to find out just how expensive it is, and how much [selling] electricity will offset costs."

The local electricity cooperative has agreed to pay the retail price of about 7 cents per kilowatt hour for two years, instead of the wholesale price of less than 3.5 cents. Brown predicted that the digester apparatus will save Broumley about three-fourths of his annual \$75,000 power bill.

But Byl is convinced that no matter what Erath County farmers do, it will not stop Waco from agitating against dairy expansion.

"They will never let this area grow again, because we're upstream," he said.

Barry Shlachter, (817) 390-7718 bshlachter@star-telegram.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

THE CITY OF WACO
Plaintiff

v.

DENNIS SCHOUTEN, ET AL.
Defendants

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CIVIL CAUSE NO. W-04-CA-118

SECOND AMENDED COMPLAINT

NOW COMES the City of Waco, Plaintiff, herein and alleges the following:

JURISDICTION

1. Plaintiff City of Waco brings this suit seeking remedies for pollution and damage caused by Defendants to Plaintiff's property and Plaintiff's water rights, including Plaintiff's right to store water in Lake Waco, and Plaintiff's water treatment and related facilities. Plaintiff is asserting causes of action under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), the federal Clean Water Act, the Texas Solid Waste Disposal Act, and state common law causes of action for negligence, negligence per se and trespass. This Court has jurisdiction over the subject matter of this lawsuit pursuant to 28 U.S.C. §§ 1331 & 1332, 42 U.S.C. §§ 9607 & 9613(b) (CERCLA), and 33 U.S.C. § 1365(a) (the Clean Water Act). The amount in controversy exceeds the sum of \$75,000.00.

VENUE

2. Plaintiff's water supply system, a municipal water supply system under Texas law, which includes Lake Waco, is located within this District and is the drinking water supply for approximately one hundred and fifty thousand (150,000) citizens who live in the City of Waco and surrounding communities, all within this District. Plaintiff is located within this

District. Defendants have engaged in acts and omissions which have caused substantial damage to Plaintiff's water supply. This is an action for damages and injunctive relief to remedy the Defendants' wrongful pollution, which has harmed Plaintiff's water rights, Plaintiff's water treatment facilities and Plaintiff's water supply. Therefore, venue is proper pursuant to 28 U.S.C. § 1391(b)(2) and 42 U.S.C. § 9613(b).

3. Under the local action doctrine, venue in the Western District is proper because this case necessarily involves a determination of the title to the water rights owned by the City of Waco. Defendants' actions, as set forth herein, constitute a cloud on the title to Plaintiff's property rights. Venue is also proper based on the local action doctrine because the case involves damage to Plaintiff's water rights including water stored in Lake Waco and to the Plaintiff's water handling and treatment equipment. The City has the right to take water from Lake Waco and the right to store water in Lake Waco. Thus, the City of Waco has water rights relating to the water in Lake Waco and also effectively owns water within Lake Waco. The location of the City's water, the City's water rights and the City's water handling and treatment equipment is in the Western District.

4. Furthermore, venue in the Western District is proper because the entire suit is one cause of action for damage to water rights and water and equipment owned by the City. There are various claims for relief but only one cause of action, and venue is proper for that action.

THE PARTIES

5. The City of Waco ("the City") is an incorporated Texas home-rule municipality and a political subdivision of the State of Texas. The City of Waco has approximately 110,000 residents. The sole source of public drinking water for those 110,000 persons is Lake Waco. The City's principal place of business is in Waco, McLennan County, Texas.

6. Defendant Schouten Dairy with Permit No. 04133 is located at Route 4, Box 113, Stephenville, Texas 76401.

7. Defendant Dennis Schouten, Individually and d/b/a Schouten Dairy, is an owner and/or operator of Defendant Schouten Dairy and/or is an owner of land on which Schouten Dairy is located and has entered an appearance in this cause.

8. Defendants Cornelius T. Schouten, Jr., Joan Schouten, Nicholas Schouten, Linda Schouten, and Nancy Schouten, Individually and d/b/a Schouten Dairy, are owners and/or operators of Defendant Schouten Dairy and/or are owners of land on which Schouten Dairy is located and have entered an appearance in this cause.

9. Defendant J & L Dairy (a.k.a. J & L Pack Dairy) d/b/a Jimmy Don and Larry Pack with Permit No. 03563 is located at 863 CR 415, Stephenville, Texas 76401-8747.

10. Defendants Jimmy Don Pack, Larry Pack, Alma Marilyn Pack and Meine Huisman (a.k.a. Huisman Dairy) are owners of J & L Dairy and/or are owners of land on which Defendant J & L Dairy is located and have entered an appearance in this cause. Defendants Jimmy Don Pack and Meine Huisman (a.k.a. Huisman Dairy) are also operators of J & L Dairy.

11. Defendant Cen-Tex Dairy L.L.C., a.k.a. Hammonds Dairy with Permit No. 03132 is located at Route 1, Box 474, Hico, Texas 76457.

12. Defendant Lonnie Hammonds is the owner/operator of Defendant Centex Dairy and/or is the owner of land on which Centex Dairy is located and has entered an appearance in this cause.

13. Defendant Dutch Cowboy Dairy with Permit No. 03316 is located at Route 5, Box 166, Dublin, Texas 76446.

14. Defendants Steve Byl, Paul Byl and Yvonne Byl are owners and/or operators of

Defendant Dutch Cowboy Dairy and/or are owners of land on which Dutch Cowboy Dairy is located, and have entered an appearance in this cause.

15. Defendant Excel Dairy, L.L.C. with Permit No. 03077 is located at 9715 FM 2156, Dublin, Texas 76446, and has entered an appearance in this cause.

16. Defendant Mear Family Trust, Thomas H. Mear, Tom Mear and Eleanore Mear, Individually and as Authorized Representatives or Trustees of the Mear Family Trust, are owners of Excel Dairy and/or are owners of land on which Excel Dairy is located and have entered an appearance in this cause.

17. Defendant Alan Vanderhorst is an owner and operator of Excel Dairy and has entered an appearance in this cause.

18. Defendant Triple Dutch Dairy (a.k.a. Triple Dutch #2), a General Partnership, with Permit No. 02922 is located at 19184 North FM 219, Dublin, Texas 766446.

19. Defendants Mr. Paul Van Leeuwen and Mr. Andy Van Die are owners of Triple Dutch Dairy (a.k.a. Triple Dutch #2) and/or are owners of land on which Triple Dutch Dairy is located and have entered an appearance in this cause.

20. Defendant Hidden View Dairy, a partnership, with Permit No. 03197 is located at 1684 PR 1401, Dublin, Texas 76446.

21. Defendant William C. DeJong and William N. DeJong are owners and/or operators of Hidden View Dairy and/or are owners of land on which Hidden View Dairy is located and have entered an appearance in this cause.

22. Defendant Aztex Dairy, Inc. with expired Registration No. WQ0002953-000 is located at 1137 County Road 347, Dublin, Texas 76446-5474 and has entered an appearance in this cause.

23. Defendants Fred R. Lueck, Sr. (a.k.a. Fred Lueck a.k.a. Fred Ray Lueck) and Judy A. Lueck are owners and/or operators of Aztex Dairy and /or are owners of land on which Aztex Dairy is located and have entered an appearance in this cause.

24. Defendant Bill Schouten Dairy, a.k.a. Tex Ag Dairy a.k.a. Tex-S Dairy a.k.a. S Cow 10 (hereinafter "Bill Schouten Dairy") with Registration No. WQ003640 is located at Route 2, Box 112-A, Hico, Texas 76457 or 12070 N. Hwy 281, Hico, Texas 76457.

25. Defendant Tex-S, L.L.C. is an owner of Bill Schouten Dairy and/or is an owner of land on which Bill Schouten Dairy is located, and Defendant Bill Schouten is an owner and/or operator of Bill Schouten Dairy and/or is an owner of the land on which Bill Schouten Dairy is located and have entered an appearance in this cause.

26. Defendants Pete Schouten and M.D. Schouten are owners and/or operators of Bill Schouten Dairy and/or are owners of land on which Bill Schouten Dairy is located and have entered an appearance in this cause.

27. Defendant Golden Star Dairy a.k.a. Schouten Golden Star Dairy a.k.a Schouten Dairy (hereinafter "Golden Star Dairy") with Permit No. 03656, and which is located at Route 2, Box 229, Hico, Texas 76457.

28. Defendant Robert J. Schouten is an owner and/or operator of Golden Star Dairy and/or is an owner of the land on which Golden Star Dairy is located and has entered an appearance in this cause.

29. Defendant Pete Henry Schouten is an owner and/or operator of Golden Star Dairy and/or is an owner of land on which Golden Star Dairy is located and has entered an appearance in this cause.

30. Defendant Pieter Bakker a.k.a. Pieter Barker is an operator of Golden Star Dairy

and has entered an appearance in this cause.

31. Scenic Ridge Dairy a.k.a. Senic Ridge Dairy a.k.a Pigeon Road Dairy a.k.a Beltman Dairy a.k.a Tony Beltman Dairy a.k.a. Dewit #2 Dairy (hereinafter "Scenic Ridge Dairy") with Registration No. 03162 located at 588 Private Road 928, Stephenville, Texas 76401-8787 and with a mailing address of P.O. Box 181, Lingleville, Texas 76461.

32. Scenic Ridge Dairy, Inc. is an owner of Scenic Ridge Dairy and/or an owner of land on which Scenic Ridge Dairy is located and has been served with process through its Registered Agent, Tony Beltman at Route 4, Box 254, Stephenville, Texas 76401.

33. Defendant Tony Beltman is an owner and/or operator of Scenic Ridge Dairy and/or is an owner of the land on which Scenic Ridge Dairy is located and has been served with process at Route 4, Box 254, Stephenville, Texas 76401.

34. Defendant Russell Carpenter Dairy with Registration No. WQ0003185-000 Route 4, Box 206, Stephenville, Texas 76401.

35. Defendant Russell Carpenter is an owner and/or operator of Russell Carpenter Dairy and/or is an owner of the land on which Russell Carpenter Dairy is located and has entered an appearance in this cause.

36. Defendant Parks Hill Dairy a.k.a. Double "S" Dairy a.k.a. Smulder #1 Dairy (hereinafter "Parks Hill Dairy") with Registration No. 03315, has the address P.O. Box 152, Lingleville, Texas 76461.

37. Defendant Harold Wayne Parks d.b.a. Double "S" Dairy is an owner and/or operator of Parks Hill Dairy and/or is an owner of the land on which Parks Hill Dairy is located and has entered an appearance in this cause.

FACTUAL ALLEGATIONS

A. History and Characteristics of Lake Waco

38. Lake Waco is located in the southeastern portion of the Bosque River Watershed, Brazos River Basin, entirely within McLennan County, Texas. Lake Waco is a lake on the northwestern edge of the Waco city limits.

39. In or about 1928, construction of a dam to impound Lake Waco began and was completed in or about 1930. The project was owned and operated by the City of Waco.

40. Lake Waco is fed by the North Bosque, the Middle Bosque, and the South Bosque rivers, and by Hog Creek.

41. The contributing watershed to Lake Waco is approximately 1,652 square miles with about 1,260 square miles in the North Bosque River watershed.

42. The North Bosque River and its tributaries flow downstream and terminate in Lake Waco.

43. Pollutants dissolved and entrained in the waters of the North Bosque are carried into Lake Waco.

44. In or about 1958, the City of Waco, with the assistance and support of the U.S. Army Corp of Engineers, began construction of a second larger dam on Lake Waco to provide additional flood control and drinking water.

45. That project was completed, and the dam, as it presently exists, was completed in or about 1965.

46. Lake Waco has a surface area of approximately 8900 surface acres and has approximately 72 miles of shoreline. It has a maximum depth of approximately 85 feet and has a storage capacity of approximately 50 billion gallons at conservation level.

47. All adjudicated and permitted rights to the water impounded in Lake Waco are owned by the City. These water rights are permanent.

48. As a result of its rights to store water in and to divert and use water from Lake Waco, the City of Waco has a real property interest in Lake Waco and the water contained in Lake Waco.

B. Uses of and Importance of Lake Waco

49. Lake Waco represents the sole source of public drinking water for the City of Waco and a significant source of drinking water for many surrounding communities.

50. Lake Waco is the primary source of drinking water and domestic use for approximately 150,000 citizens who reside in Waco and smaller municipalities in the area.

51. Lake Waco is used for a wide variety of recreational activities, including fishing, boating, swimming, and water skiing. In addition to the activities available on its waters, Lake Waco shores provide recreational activities and amenities in the form of parks, picnic areas, boat docks and camping facilities. Lake Waco is also put to a variety of other municipal purposes, including irrigation and conservation.

52. A clean and reliable source of drinking water is indispensable to the health and welfare of the citizens of Waco and is also essential to the existence and growth of business and industry in Waco. A substantial supply of clean water is also critical to the City's ability to maintain and attract industrial enterprises.

53. Lake Waco is the regional water supply. There is no viable alternative to it as the regional water supply, and that will continue to be the case into the foreseeable future.

C. Cows of Defendant Dairies in Plaintiff's Watershed

54. Each of the Defendants is an owner or operator of an Animal Feeding Operation

(AFO) or a Concentrated Animal Feeding Operation (CAFO) which is located in the North Bosque River Watershed, which feeds into Lake Waco.

55. The dairy industry as it exists in the North Bosque River Watershed in Erath, Hamilton, and Comanche counties, generates approximately \$303 million-a-year.

56. Defendant Schouten Dairy is permitted for operations with 650 dairy cattle.

57. Defendant J & L Dairy is permitted for operations with 450 dairy cattle.

58. Defendant Cen-Tex Dairy is permitted for operations with 1900 dairy cattle.

59. Defendant Dutch Cowboy Dairy is permitted for operations with 700 milking cows.

60. Defendant Excel Dairy is permitted for operations with 3,000 dairy cattle.

61. Defendant Triple Dutch Dairy is permitted for operations with 900 dairy cattle.

62. Defendant Hidden View Dairy is permitted for operations with 2,000 dairy cattle, and seeking to expand to operations with 3,000 head.

63. Defendant Aztex Dairy is permitted for operations with 1,300 dairy cattle.

64. Defendant Bill Schouten Dairy is permitted for operations with 999 dairy cattle.

65. Defendant Golden Star Dairy is permitted for operations with 400 dairy cattle.

66. Defendant Scenic Ridge Dairy is permitted for operations with 990 dairy cattle.

67. Defendant Russell Carpenter Dairy is permitted for operations with 750 dairy cattle.

68. Defendant Parks Hills Dairy is permitted for operations with 500 dairy cattle.

69. In total, Defendant dairies conduct operations which are permitted for approximately 14,500 cows in the North Bosque Watershed. Defendants, because of their poor management practices and consistent failure to comply with applicable rules and regulations, are

substantial contributors to the pollution problems with Lake Waco water.

D. Dairies Produce Huge Amounts of Waste

70. A dairy cow generates up to 115 pounds of manure per day or more, versus a beef cow which produces approximately 75 pounds of manure per day.

71. Defendant dairies' permitted cows would account for in excess of 1,600,000 pounds of manure per day. In addition to the solid waste generated by the dairy cows, the cows produce large amounts of liquid waste.

72. In addition to the milking cows and the waste they produce, some Defendant dairies maintain additional cows on their dairy which are not milked on a daily basis. Those "dry cows", as they are called, can add another 7 to 15 percent to the overall size of the cow population on the dairy.

73. Best management practices indicate that to properly dispose of waste, a dairy operator should maintain 1.5 to 3 acres of land per dairy cow. The concentration of Defendants' cows is far greater than that. In many instances, Defendants maintain less than 1/4 to 1/5 an acre per cow.

74. The solid and liquid cow waste contains many pathogens and bacteria.

75. The huge amounts of solid and liquid waste generated by the dairy cows contain very high concentrations of phosphorus.

76. A single dairy cow may produce as much as 40 pounds of phosphorus in manure per year or more.

77. The phosphorus being released by Defendants is a pollutant and is poisonous. Both CERCLA and the Clean Water Act recognize phosphorus as a hazardous substance.

78. Because of the enormous amounts of waste generated on a daily basis by dairies,

it is critical that the dairy operators dispose of such waste properly and in a way which ensures that the waste does not reach the water supply. Plaintiff sues Defendants in this cause because Defendants have failed to properly manage and dispose of the waste from their large commercial dairy operations and because they continue to fail to do so and because that failure has resulted in pollution of Lake Waco and substantial damage and injury to Plaintiff.

E. Defendants Have Failed To Properly Handle Liquid and Solid Waste Which Has Resulted in Pollution of Lake Waco

i. Lagoons

79. Liquid waste from cows and slurry resulting from washwater being combined with solid waste from cows is collected in “lagoons” located on the dairies. Because the lagoons are comprised of liquid waste, as well as some substantial percentage of solid waste, the contents of those lagoons is very high in phosphorus and other hazardous substances. Those lagoons are supposed to be specially and properly lined to ensure that the liquid waste is contained and does not leach into the ground and into the groundwaters and water supplies. Defendants have failed to construct and maintain their lagoons in a way which prevents leaching.

80. Dairy operators are supposed to control the levels of the lagoons to ensure that they do not overflow during rain and other events. Those overflows, which are referred to as unauthorized discharges, are to be prevented because, when they do occur, the waste runs, in an uncontrolled manner, onto and over the land, off of the dairies and into the groundwaters and surface water supplies. Defendants have failed to control the levels of their lagoons and have improperly maintained their lagoons. These failures and omissions have resulted in wastewater running out of the lagoons and into the watershed. This runoff occurs not only in significant rains, but also at times when there is no or relatively small rainfall events. Such occurrences are in violation of Defendants’ permits and in violation of state and federal law.

81. On those occasions when Defendants have reduced the volume of materials in their lagoons by spreading it on their fields, they have frequently done so in a manner which results in contents of the lagoons entering the creeks, the watershed and the Lake Waco water supply.

ii. Improper Maintenance of Waste Application Fields and Waste Storage Areas

82. Defendants generate and have to dispose of enormous amounts of phosphorus-containing manure. With their permitted cows, Defendants would generate in excess of 800 tons of solid cow waste per day, which has to be disposed of on-site or is stored in piles while waiting to be transported off-site.

83. Defendants routinely store large amounts of solid waste on their property in waste storage areas. The waste in the waste storage areas will be disposed on-site or transported off-site. The phosphorus in such manure waste is present at levels which are far greater than those present in normal agricultural operations. Several times a year, there are heavy rains which turn portions of this stored waste into liquid manure that runs off of Defendants' property and into the watershed which supplies Lake Waco.

84. As a result of Defendants' conduct, large amounts of manure-laden waste make its way into the North Bosque River. This has dramatic detrimental effects on Lake Waco.

85. Defendants also dispose of some of the waste they generate by spreading it on fields on their facilities. Because the land they possess is so relatively small, the Defendants long ago exceeded the natural capacity of much of the soils and vegetation on their facilities to absorb the phosphorus or for the soil to otherwise assimilate the phosphorus.

86. Fields containing phosphorus at levels in the range of 60 to 80 parts per million (ppm) greatly exceed the amount of phosphorus needed for optimal growth for any type of plant.

At levels of 200 ppm and higher, not only is there far more phosphorus than can be used by plants, but there is also a very high risk that the phosphorus will run off of the fields and into the water supply at concentrations detrimental to the water supply. Once soil phosphorus reaches levels in excess of 200 ppm, the time required for the phosphorus levels to decline is considerable; that process can take years or even decades. Thus, the risk of runoff from fields with phosphorus levels in excess of 200 ppm is considerable and extended.

87. Defendants have greatly overapplied waste to their fields and have thereby caused those fields to reach soil phosphorus levels that greatly exceed 200 ppm. At the same time, Defendants have failed to properly maintain their fields, and therefore the risk of runoff is even greater.

88. In 2003, soil tests for fields on Defendant Schouten Dairy were as high as 460 ppm.

89. In 2003, soil tests for fields on Defendant J & L Dairy were as high as 280 ppm.

90. In 2003, soil tests for fields on Defendant Cen-Tex Dairy were as high as 400 ppm.

91. In 2001, soil tests for Defendant Dutch Cowboy Dairy were as high as 475 ppm.

92. In 2003, soils tests for fields on Defendant Excel Dairy were as high as 386 ppm.

93. In 2004, soil tests for fields on Defendant Triple Dutch Dairy were as high as 559 ppm.

94. In 2003, soil tests for fields on Defendant Hidden View Dairy were as high as 442 ppm.

95. In 2003, soil tests for fields on Defendant Aztex Dairy were as high as 352 ppm.

96. In 2001, soil tests for Bill Schouten Dairy were as high as 350 ppm.

97. In 2003, soil tests for Golden Star Dairy were as high as 540 ppm.

98. In 2003, soil tests for Scenic Ridge Dairy were as high as 578 ppm.

99. In 2003, soil tests for Russell Carpenter Dairy were as high as 400 ppm.

100. In 2003, soil tests for Parks Hill Dairy were as high as 300 ppm.

101. Because Defendants maintain fields with such high phosphorus levels, anytime there are heavy rains, phosphorus runs off of the fields and into the watershed.

102. Each of these occurrences constitutes an unauthorized discharge and causes pollutants to run into the watershed and ultimately into Lake Waco.

103. Defendant dairies have permits issued to them by the State of Texas which require them to conduct their operations in accordance with various laws, rules and regulations. Defendants have operated their dairies and maintained their land in such a way as to have consistently and egregiously violated the applicable laws and regulations, and they continue to do so. Specific conduct by Defendants which violates applicable law and which has caused and continues to cause pollution is set out in Exhibits A through M attached hereto and incorporated herein.

104. Discharges by Defendants into the North Bosque Watershed have caused the quality of the water in Lake Waco to deteriorate.

105. The manure-laden waste entering the watershed from the Defendant dairies pollutes and fouls Lake Waco. Among the problems such pollution creates, is that the phosphorous contained in such waste causes the growth of algae, which generates substantial taste and odor problems with the water in Lake Waco.

F. Taste and Odor Problems

106. Prior to the late 1980's the City of Waco experienced taste and odor problems with the water from Lake Waco only on a sporadic and episodic basis. Those sporadic and

episodic taste and odor problems in the water resolved without effective special water treatment.

107. In or about the late 1980's, large industrial dairy operators like Defendants began moving into Erath County and into the North Bosque watershed.

108. In or about 1988 there were very notable increases in the levels of algae in Lake Waco. The mass and volume of algae increased to levels which had never before occurred in Lake Waco. There was and is a direct correlation between the increased levels of phosphorus in Lake Waco resulting from dairy waste runoff, increased levels of algae in the Lake and the taste and odor problems with the water in Lake Waco. As the algae level in the lake increased, so did the taste and odor problems with the water.

109. The problems became so bad and so greatly affected the quality of the water that the City began using a different and additional treatment process in order to make the water acceptable for human consumption.

110. From in or about 1988 to December of 1996, the frequency and severity of the taste and odor problems with the water in Lake Waco continued to increase dramatically. There was a corresponding increase in the efforts and expense required of the City to reduce such taste and odor problems to an acceptable level. During that timeframe, those efforts increased in both frequency and degree.

111. In or about December of 1996, the City of Waco experienced a tremendous algae bloom and a severe episode of taste and odor problems in the water in Lake Waco. Since that time the City of Waco has had to continually employ treatment methods it would not otherwise use. Those treatment methods involve adding a substance to the water whose sole purpose is to reduce the substantial taste and odor problems of the water from Lake Waco. Unfortunately, the City's increasing efforts are also becoming increasingly less effective.

112. The City treats the taste and odor problems by putting additives into the water. The City is putting those additives into the water continually and in very high levels. Despite the high levels at which the additives are being put into the water, those additives are becoming much less effective at improving the taste and odor problems, and, over time, such problems with the City's water source have continued to increase. Additionally, the City is reaching the upper limit of the level at which those additives can be put into the water, because, at very high levels, those additives cause adverse side effects by producing undesirable chemical byproducts and by adversely affecting other aspects of the treatment process.

113. The water quality of Lake Waco is substantially impaired. The City of Waco's water rights have been substantially damaged.

G. Damages and Costs to City of Treating Taste and Odor Problems Caused by Defendants

114. The taste and odor problems with the water in Lake Waco are the result of algae, which is generated by phosphorus coming into Lake Waco from waste and pollutants produced by the dairies in the North Bosque Watershed, and the defendant dairies are substantial contributors to and causes of those problems.

115. The City of Waco has suffered actual and special damages as a result of the acts and omissions of Defendants. Since in or about 1995, the City of Waco has spent close to \$3.5 million to address taste and odor problems in Lake Waco. Those expenditures are in excess of those which would have otherwise been made for water treatment. Ongoing remedies for treatment of taste and odor problems which are caused by excessive phosphorus from dairies currently consume more than half (as much as 55 percent) of the City of Waco's chemical water treatment budget. Prior to 1996, that figure was about 10 percent.

116. Even though the City has been and continues to be very aggressive and diligent in

its efforts to treat the taste and odor problems in Lake Waco's water in an efficient and effective manner, its current treatment methods are only able to remove approximately 70 percent of the substance which causes the offending tastes and odors. Although greatly reduced, the remaining 30 percent is still at a level which causes the water from Lake Waco to be quite offensive in taste and smell to the average person. The taste and odor problems have affected and will continue to affect the value of the City of Waco's water rights and of water owned by the City of Waco. Further, because the City is currently unable to sufficiently reduce such taste and odor problems and because of concerns about this problem increasing in the future, the City has found it necessary to consider additional, advanced water treatment to include a new water treatment facility. Projected costs of the new water treatment facility exceed \$50 million dollars. A new water treatment facility would do nothing to improve the quality of water in Lake Waco.

H. Other Concerns

117. Phosphorus and the resulting taste and odor problems are just one of the problems which have developed with the water in Lake Waco as a result of pollution from the dairies. Runoff and pollution from the dairies have resulted in pathogens and pollutants, in addition to phosphorus, entering and imperiling the water of the North Bosque River and Lake Waco. The pathogens, which are borne in the cow manure and which enter Lake Waco, have created concern about the health of the citizens and the safety of the water to the citizens who fish, swim, ski and engage in other water activities in Lake Waco. If this pollution is allowed to continue unabated, there is the potential for substantial risk to the health and welfare of the users and consumers of Lake Waco water.

I. Polluted/Impaired State of Lake Waco

118. Many scientific and peer-reviewed studies have established that there is pollution

in the North Bosque watershed and that one of the pollutants is phosphorus from the dairies.

119. In or about 1998 the Texas Natural Resource Conservation Commission, now called the Texas Commission on Environmental Quality ("TCEQ"), designated those portions of the North Bosque River, which are in Lake Waco's watershed, as impaired. The designation of the River as impaired was due to the failure of the River to meet water quality standards and because of the known dangers associated with engaging in contact recreation in the River due to the presence in the water of bacteria and other pathogens. The Upper North Bosque River has been placed on the Environmental Protection Agency's impaired water list.

120. Each of the Defendants has caused and continues to cause pollution to Lake Waco through their wrongful discharge of waste and other pollutants into the North Bosque River watershed. Through their acts and omissions, each Defendant is causing ongoing and immediate damage to the environment, to the quality of the water in Lake Waco, and to City of Waco water rights.

121. The continued pollution caused by these Defendants will result in future costs and expenses to investigate and treat the problem until a final remedy is developed and implemented. If this problem is not quickly addressed and the polluting conduct not abated, the current water supply may be irreparably damaged.

FIRST CAUSE OF ACTION

Cost Recovery and Contribution Under CERCLA §§ 107 and 113

122. Plaintiff realleges and incorporates by reference all allegations set out in Paragraphs 1 through 121.

123. Plaintiff and each Defendant is a "person" within the meaning of § 101(21) of CERCLA.

124. Each Defendant owned or operated a dairy, including associated areas used to apply waste. Those dairies and the areas used to apply waste are “facilities” within the meaning of § 101(9) of CERCLA.

125. By their inappropriate environmental conduct, each Defendant has arranged for disposal of hazardous substances at Lake Waco. Lake Waco therefore is a “facility” within the meaning of § 101(9) of CERCLA.

126. “Hazardous substances” within the meaning of CERCLA § 104(14), including in particular but not limited to phosphorus, which is a listed hazardous substance, were disposed of in the North Bosque River watershed, through the Defendants’ industrial dairy operations and their acts and omissions, resulting in “releases” and/or “threatened releases” (within the meaning of CERCLA § 102(22)) of hazardous substances into Lake Waco.

127. As a result of such releases or threatened releases, Plaintiff has incurred and will continue to incur necessary response costs (as defined in 42 U.S.C. § 9601(25)) in a manner consistent with the National Contingency Plan (NCP), or alternatively, not inconsistent with the NCP.

128. By reason of the foregoing, Plaintiff is entitled under CERCLA § 107 to recover from the Defendants, jointly and severally, all of Plaintiff’s past and present necessary response costs.

129. Plaintiff is also entitled to a declaratory judgment holding the Defendants jointly and severally liable for future necessary response costs incurred by Plaintiff.

130. Plaintiff has not contributed to the pollution of the facility and therefore is without liability. Alternatively, if Plaintiff is deemed to have made some contribution to the facility, Section 113(f) of CERCLA provides that “any person may seek contribution from any other

person who is liable or potentially liable under CERCLA § 107(a),” and “the court may allocate response costs among responsible parties using such equitable factors as the court determines are appropriate.” *See* 42 U.S.C. § 9613(f).

131. In the alternative to Plaintiff’s CERCLA § 107 claims for direct costs, Plaintiff is entitled to judgment under CERCLA § 113 against the Defendants for contribution to Plaintiff’s response costs, as well as declaratory judgment that the Defendants are liable to Plaintiff for contribution for Plaintiff’s future response costs.

SECOND CAUSE OF ACTION

Clean Water Act

132. Plaintiff realleges and incorporates by reference all allegations set out in Paragraphs 1 through 121.

133. Based on and in connection with those acts, Plaintiff alleges a citizen suit claim against all Defendants under the federal Clean Water Act, 33 U.S.C. § 1365(a)(1).

134. Plaintiff gave notice of the Clean Water Act violations alleged in this Complaint in compliance with 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. Part 135. *See* Exhibits A through M (Notice of Intent to Sue letters dated February 12, 2004, and June 8, 2004). Accordingly, all conditions precedent have been satisfied.

135. More than sixty (60) days have passed since the notice letters were served on the recipients.

136. The violations complained of in this Complaint are continuing and ongoing and/or were intermittent or sporadic and were likely to occur in the future. Such violations include but are not limited to improper application of waste, improper waste disposal, unauthorized discharges and failure to properly conduct and report soil analysis.

137. Neither the EPA nor the TCEQ has commenced or diligently prosecuted a civil or criminal action in a court of the United States, or a State, to require compliance with applicable statutes and regulations and to correct the violations alleged in this Complaint.

138. The EPA has not commenced or diligently prosecuted an action for administrative penalties for the violations alleged in this Complaint. The TCEQ has prosecuted formal enforcement actions for administrative penalties against certain of the Defendant dairies and has issued notices of violations of permits to certain Defendant dairies. These administrative actions do not preclude Plaintiff from filing this citizen suit. *See Texans United v. Crown Central Petroleum Corp.*, 207 F.3d 789 (5th Cir. 2000).

139. Section 1311 of the Clean Water Act prohibits the discharge of pollutants except as in compliance with provisions of the Clean Water Act, 33 U.S.C. § 1311. Section 1342 of the Clean Water Act provides for permits that regulate the discharge of pollutants. 33 U.S.C. § 1342. The discharge of any pollutant without a permit is an unlawful act under Section 1311. *See Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996). The discharge of a pollutant in violation of a permit issued under a federal program delegated to a state is an unlawful act. *See Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205, 96 S.Ct. 2022, 2025, 48 L.Ed.2d 578 (1976) and 33 U.S.C. § 1342(k).

140. The Clean Water Act defines “discharge of a pollutant” as “(A) any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

141. The Clean Water Act defines “pollutant” as “dredged spoil, solid waste,... sewage, garbage,... chemical wastes, biological materials,... heat,... rock, sand cellar dirt and industrial, municipal, and *agricultural waste* discharged into water.” 33 U.S.C. § 1362(6) (emphasis added).

142. The Clean Water Act defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). The definition of “navigable waters” has been construed by the courts to include streams, rivers, creeks, and other tributaries of larger waters. See, e.g., *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 915 (5th Cir. 1983).

143. The Clean Water Act defines “point source” as “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation* [“CAFO”],... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (emphasis added). See also, the regulatory definition of CAFOs at 40 C.F.R. § 122.23(a) (2003) (“Concentrated animal feeding operations are point sources subject to the NPDES permit program.”) This provision defines a CAFO as an animal feeding operation (“AFO”) that is defined as a Large CAFO or as a Medium CAFO under section 122.23. 40 C.F.R. § 122.23(b)(2).

144. Even if Defendant dairies are not CAFOs, Defendants would still be liable for discharges because runoff from overapplied fields is a point source, and all persons, even if not CAFO’s, can be liable for “point source” discharges.

145. The definition of “point source” includes “any discernible, confined, and discreet conveyance, including but not limited to, any pipe, ditch, channel, . . . conduit, . . . container, . . . from which pollutants are or may be discharged.” (See the full text of the definition of “point source” in 40 C.F.R. § 122.2.) These terms in the definition consistently have been broadly construed in such cases as *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 44-47 (5th Cir. 1980); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 370-74 (10th Cir. 1979); and *Reynolds v. Rick’s Mushroom Service*, 246 F. Supp. 2d 449, 456-58 (E.D. PA. 2003), in order to further

congressional intent to regulate all identifiable sources of pollution and, therefore, to apply to the means by which Defendants channel wastewater from animal confinement areas to wastewater lagoons. Wastewater from the Defendants' dairy operations is then pumped from the lagoons through a pipe, to a "big gun" sprayer or other irrigation system, that sprays it onto waste application fields. From those fields (during the saturated soil conditions occurring during rainstorms) the waste runs into tributaries of the North Bosque River. The definition of "discharge of a pollutant" begins with the express statement that "[T]his definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man." Defendants' operations and conduct clearly come within these definitions.

146. These discharges of wastewater from the Defendant dairies' waste application fields, which result from chronic and catastrophic rainstorms and otherwise, are "point source" discharges.

147. Section 1362(14) excludes "agricultural stormwater discharges and return flows from irrigated agriculture" from this definition. However, Defendants' discharges do not qualify for these exemptions under the reasoning given in *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 115(2nd Cir. 1994) (holding that an overapplication of manure or wastewater to fields by a CAFO owner or operator is a discharge and violation under the meaning of the CWA) (citing *Weber, et al v. Trinity Meadows Raceway, Inc.*, 1996 U.S. Dist. LEXIS 15302 (N.D. Tex. 1996)).

148. By discharging wastewater containing pollutants from the dairies into waters of the United States in violation of their Texas Pollutant Discharge Elimination System permits, Defendants have violated the Clean Water Act. 33 U.S.C. § 1311.

THIRD CAUSE OF ACTION

Cost Recovery and Contribution Under the Texas Solid Waste Disposal Act

149. Plaintiff realleges and incorporates by reference all allegations set out in Paragraphs 1 through 121.

150. Plaintiff and each Defendant is a “person” within the meaning of § 361.003(23) of the Texas Solid Waste Disposal Act (TSWDA).

151. Each Defendant is a person responsible for the disposal of Solid Waste within the meaning of § 361.271 of the TSWDA.

152. Each Defendant owned or operated a dairy, including associated areas used to dispose of waste. Those dairies and the areas used to dispose of waste are “solid waste facilities” within the meaning of § 361.003(36) of TSWDA.

153. By their dairy operations and failure to contain solid waste, each Defendant has arranged for disposal of solid waste into Lake Waco. Lake Waco therefore is a “solid waste facility” within the meaning of § 361.003(36) of TSWDA.

154. The City of Waco has conducted a removal or remedial action within the meaning of § 361.344 of TSWDA. Such removal or remedial action is necessary to address the release or threatened release of solid waste and has been approved by the TCEQ. The TCEQ annually inspects the City of Waco’s water treatment operations and compliance records and has approved the City’s measures, including the use of powdered activated carbon, to address the taste and odor problems caused by manure-laden waste entering the watershed from the Defendant dairies.

155. In connection with such removal and remedial action, the City of Waco has incurred and will continue to incur significant costs and expenses.

156. The City of Waco has made reasonable attempts to notify all Defendants of the

existence of the release or threatened release of solid waste and that the City of Waco intended to take steps to eliminate the release or threatened release. Defendants had actual notice of the existence of releases and threatened releases of manure-laden waste from the Defendant dairies into the watershed and of the City of Waco's efforts to eliminate the release and to address the resulting damages to its drinking water supply. In addition, the City of Waco individually advised Defendants of specific violations, including violations involving unauthorized discharges of manure-laden waste, and advised each of them of the City's intention to seek civil penalties and injunctive relief to stop ongoing and future releases and other violations. The City of Waco has satisfied all conditions precedent to seeking recovery of such costs and expenses from Defendants, and hereby seeks recovery of such costs and expenses from Defendants.

FOURTH CAUSE OF ACTION

Negligence

157. Plaintiff realleges and incorporates by reference all allegations set out in Paragraphs 1 through 121.

158. Each Defendant has a duty to not pollute the waters of the State of Texas and not to damage the water rights and property of the City of Waco and others. That duty extends to the North Bosque Watershed and Lake Waco, specifically, and to the water rights of the City of Waco and others who have water rights in the North Bosque Watershed and/or Lake Waco. Further, each Defendant has a duty to not engage in other conduct which causes harm to Plaintiff's property or to the public health and environment.

159. The Defendants, jointly and severally, have engaged in conduct and committed acts and omissions which have breached their duties.

160. Defendants were and continue to be negligent in the operation, maintenance or

supervision of the their dairy operations. Their negligent acts and omissions include, but are not limited to: applying cow manure and other waste to the land in such quantities, at such frequencies, and under such conditions as to cause that waste to run off of their property, into the North Bosque watershed and ultimately into Lake Waco; failing to follow reasonably prudent agricultural management practices; and failing to take reasonable precautions and use other available waste disposal practices to eliminate excessive waste in the watershed.

161. Each Defendant knew or should have known, and could certainly reasonably foresee, that their activities would result in the pollution of Lake Waco and damage to the owners of water rights in the North Bosque Watershed and Lake Waco, including Plaintiff.

162. Defendants' acts and omissions have combined to directly and proximately cause and/or constitute a substantial factor in causing the past, present and future harm alleged and described hereinabove.

163. As a result of Defendants' negligent acts and omissions, Plaintiff is entitled to recover from Defendants, jointly and severally, for all of the damages proximately caused thereby, and hereby seeks such recovery.

FIFTH CAUSE OF ACTION

Negligence Per Se

164. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 121.

165. Defendants have violated the federal Clean Water Act and the Texas Solid Waste Disposal Act as described hereinabove including in paragraphs 132 through 156. Further Defendants have violated § 26.121 of the Texas Water Code which prohibits unauthorized discharges of waste and pollutants.

166. Each Defendant knew or should have known, and could certainly reasonably foresee, that their activities would result in the pollution of Lake Waco and damage to the owners of water rights in the North Bosque Watershed and Lake Waco to the detriment of Plaintiff.

167. In this manner, Defendants' conduct constitutes negligence per se, which negligence is a proximate cause of damages to Plaintiff, and Plaintiff hereby seeks to recover from Defendants, jointly and severally, all such costs, expenses and damages.

SIXTH CAUSE OF ACTION

Trespass

168. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 121.

169. In connection with owning, operating and maintaining the Defendant dairies, Defendants intentionally, knowingly, negligently, willfully, and/or recklessly caused the release and discharge of pollution and hazardous substances into the soil, groundwaters and North Bosque Watershed.

170. This pollution and the hazardous substances have entered and continue to enter Lake Waco and the City's treatment works and water system. The pollution and the hazardous substances have entered and continue to enter into water to which the City of Waco has water rights. These invasions were not authorized, approved or agreed to by Plaintiff and constitute unauthorized entries to Plaintiff's property.

171. The trespasses by Defendants have caused and will continue to cause damage to Plaintiff and to Plaintiff's property including Plaintiff's water, Plaintiff's water rights and Plaintiff's water treatment facilities. Therefore, Defendants are jointly and severally liable for

the damages, costs and expenses which Plaintiff has incurred and will continue to incur in the future, and Plaintiff hereby sues to recover such damages, costs and expenses.

172. The trespasses by Defendants are repeated and continuing. Accordingly, Plaintiff also seeks injunctive relief to restrain Defendants from engaging in the future in such trespasses.

DEMAND FOR JURY TRIAL

173. Plaintiff hereby demands a trial by jury.

PRAYER FOR RELIEF

NOW WHEREFORE, Plaintiff requests judgment against Defendants, jointly and severally, on each of Plaintiff's Causes of Action set out above, and Plaintiff further asks the Court for the following relief:

(1) All past monetary damages, costs (including response costs under CERCLA) and expenses incurred by Plaintiff as a result of Defendants' conduct;

(2) All future monetary damages, costs and expenses Plaintiff will incur in the future as a result of Defendants' wrongful conduct and for so long as Plaintiff continues to suffer consequences from Defendants' conduct;

(3) An order of the court establishing and clarifying (a) Plaintiff's water rights and other property interest (b) that such water rights and other property interests are not subject to damage and interference by Defendants and (c) removing the cloud from Plaintiff's title to such water rights and property interests caused by Defendants activities.

(4) Injunctive relief requiring Defendants to cease all acts and omissions which are causing or contributing to the pollution of Lake Waco, and further requiring Defendant to remediate those conditions currently existing which are contributing to that pollution;

(5) Imposition of civil penalties;

(6) Punitive damages reasonable and proper under the law; and

(7) All attorneys' fees, court costs, litigation and investigation expenses, and such other response costs as are allowed by any applicable federal or state law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Second Amended Complaint has been mailed by certified mail, return receipt requested, on this 12th day of October, 2004, to the following:

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Roy L. Barrett

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

THE CITY OF WACO
Plaintiff

v.

DENNIS SCHOUTEN, ET AL.
Defendants

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§
§

CIVIL CAUSE NO. W-04-CA-118

APPENDIX TO PLAINTIFF'S SECOND AMENDED COMPLAINT

TABLE OF CONTENTS TO APPENDIX

| | |
|------------------|---|
| EXHIBIT A | Clean Water Act Notice Letter to Dennis Schouten Dairy |
| EXHIBIT B | Clean Water Act Notice Letter to J & L Dairy |
| EXHIBIT C | Clean Water Act Notice Letter to Cen-Tex Dairy |
| EXHIBIT D | Clean Water Act Notice Letter to Dutch Cowboy Dairy |
| EXHIBIT E | Clean Water Act Notice Letter to Excel Dairy |
| EXHIBIT F | Clean Water Act Notice Letter to Triple Dutch Dairy |
| EXHIBIT G | Clean Water Act Notice Letter to Hidden View Dairy |
| EXHIBIT H | Clean Water Act Notice Letter to Aztex Dairy |
| EXHIBIT I | Clean Water Act Notice Letter to Bill Schouten Dairy |
| EXHIBIT J | Clean Water Act Notice Letter to Golden Star Dairy |
| EXHIBIT K | Clean Water Act Notice Letter to Scenic Ridge Dairy |
| EXHIBIT L | Clean Water Act Notice Letter to Russell Carpenter Dairy |
| EXHIBIT M | Clean Water Act Notice Letter to Parks Hill Dairy |

Respectfully submitted,



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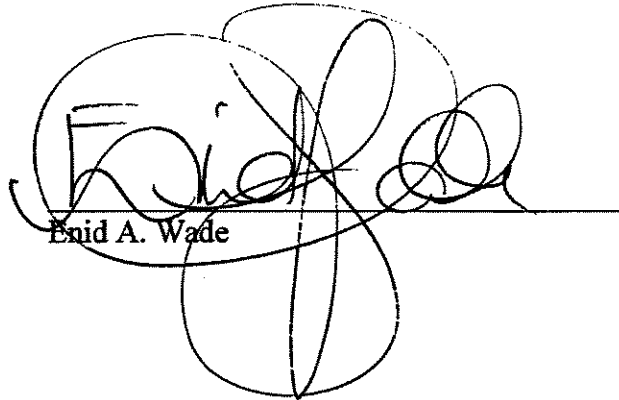
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Estate Planning for Farmers and Ranchers

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MEMBERSHIPS

He is a member of the Tax Section and the Real Estate, Probate and Trust Section of the State Bar of Texas. Mr. Branyon is certified by the Texas Board of Legal Specialization in Estate Planning and Probate Law and in Tax Law, and he currently serves as Chair of the Advisory Commission for the Estate Planning and Probate speciality, Texas Board of Legal Specialization. He is also a Certified Public Accountant.

PUBLICATIONS / SPEAKING ENGAGEMENTS

Mr. Branyon has been a frequent speaker at seminars sponsored by the State Bar of Texas, the National Business Institute and other organizations on topics related to his practice areas.

COMMUNITY INVOLVEMENT

Mr. Branyon is currently serving as Vice-President of the Humane Society of North Texas, Inc. He is also a singing member of Schola Cantorum of Texas.

EDUCATION

Mr. Branyon received both his B.B.A. (Accounting) and J.D. degrees from Baylor University.



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**Texas & Southwestern Cattle Raisers Association
Fort Worth Convention Center
Room 204 A
Fort Worth, Texas
Friday, March 18, 2005**

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Texas Board of Legal Specialization
Chair, Advisory Commission for Estate Planning and Probate Law,
Texas Board of Legal Specialization (2002-2005)
Member, Advisory Commission for Estate Planning and Probate Law,
Texas Board of Legal Specialization (2000-2005)
Certified Public Accountant
Fellow – American College of Trust & Estate Counsel

LAW RELATED PUBLICATIONS

Author/Speaker, National Business Institute, June 2-3, 1992
Planning Opportunities with Living Trusts in Texas
Author/Speaker, National Business Institute, February 11, 1994
Texas Probate: Beyond the Basics
Author/Speaker, State Bar of Texas, 20th Annual Advanced Estate Planning and Probate
Course, 1996
The Slayer's Rule Revisited
Author/Speaker, National Business Institute, July 15-16, 1999
How to Draft Wills and Trusts in Texas
Author/Speaker, State Bar of Texas, 24th Annual Advanced Estate Planning and Probate
Course, 2000
Independent Administration from Start to Finish
Author/Speaker, National Business Institute, March 13, 2001
*How to Draft Wills and Trusts in Texas; Basic Tax Considerations – What
You Need to Know in Order to Choose the Appropriate Plan*
Author/Speaker, Legal Assistants Division, State Bar of Texas, September 5-8, 2001
What Do You Do With Four-Legged Beneficiaries?

Author/Speaker, National Business Institute, February 22, 2002
The Probate Process From Start to Finish in Texas

Author/Speaker, 2002 Legal Update for the Texas & Southwestern Cattle Raisers
Association, March 17, 2002
Wills and Estates

Author/Speaker, Tarrant County Bar Association, Tax and Estate Planning Section
May 30, 2002
Dealing with the Insolvent Estate

Author/Speaker, State Bar of Texas, 26th Annual Advanced Estate Planning and Probate
Course,
2002
Dealing with the Insolvent Estate

Author/Speaker, Tarrant County Probate Bar Association, December 4, 2003
Representing Beneficiaries in Independent Administrations

Author/Speaker, National Business Institute, February 13, 2004
The Probate Process from Start to Finish

Author, National Business Institute, February 3, 2005
Fundamental Probate Procedures and Practice in Texas

PREFACE

In one sense, the estate planning needs of farmers and ranchers are no different than for any other member of society. The two primary goals remain the same; owners of property want to pass their estates to their desired beneficiaries and avoid or eliminate estate taxes along the way. However, farmers and ranchers do have at least one problem which is unique in American society. For most of them, land is a large portion of the estate, and considerable care must be taken to ensure that the operation of the farm or ranch is not adversely affected by the death of the owner.

Absent a bequest of all property to a favorite charity, there is often no way to completely avoid estate taxes. The purpose of this paper is not to discuss all of the various estate planning techniques available to farmers and ranchers. Instead, the paper is focused on three specific topics. First, the possibility of granting a Conservation Easement (as authorized by Sections 2055(f) and 2031 of the Internal Revenue Code) on a portion of real property will be discussed along with the estate tax (and possible income tax and gift tax) savings that can be achieved. The second technique will deal with Special Use Valuation as authorized by Section 2032A of the Internal Revenue Code. Both the “conservation easement” and “special use valuation” are methods by which the value of farm or ranch property can be greatly reduced, thereby reducing the size of the gross estate and the corresponding estate tax at death.

Assuming all efforts to eliminate estate taxes have been tried without complete success, the third technique will discuss how estate taxes can be paid in installments pursuant to Section 6166 of the Internal Revenue Code. While an installment payment arrangement with the Internal Revenue Service is seldom preferable to borrowing money from a bank, it may be the only choice available to the executor who is faced with a “land rich, cash poor” estate.

CONSERVATION EASEMENT

One source of estate tax reduction for farmers and ranchers may be through the deductions for conservation easements under sections 2055(f) and 2031 of the Internal Revenue Code (the “Code”). A conservation easement is an agreement between a landowner and typically a charitable, non-profit or government organization restricting the use or development of the land for certain qualified purposes as outlined in the Code. For 2004, there are actually two benefits – a *value reduction* and an *exclusion*.

The *value reduction* allows the executor of an estate to reduce the fair market value of the land by the value of the easement (as determined by an appraiser). In addition, an *exclusion* is allowed in an amount up to 40% of the value of the land subject to the easement to a maximum of \$500,000. For example, assume that the fair market value of a tract of land was \$1,000,000 at the date of death. If the value of the conservation easement is determined to be \$250,000, the estate tax value would then be \$750,000. If the requirements for the *exclusion* were also met, the estate would get an additional charitable deduction of \$300,000 (40% x \$750,000).

It should be noted that not every conservation easement will be entitled to the *exclusion*. In order to qualify, the easement must contain a prohibition on “more than a *de minimus* use for a commercial recreational activity” and the easement land must have been owned by the taxpayer or by a member of her family for at least three years prior to death. Unfortunately, the Internal Revenue Code does not define “*de minimus* use” or “commercial recreational activity.”

The technical definition of a qualified conservation easement sets out three specific requirements: the easement must be (1) a contribution of a qualified real property interest (2) to a qualified organization (3) exclusively for conservation purposes. First, the land must be qualified land which constitutes a qualified real property interest. Specifically, qualified land is

land located in the United States that the decedent (or one of decedent's family members) owned for the three years immediately preceding the decedent's death. The decedent does not have to own the entirety of the property nor must the decedent directly own the property. The conservation easement provisions apply to interests in a partnership, corporation or trust so long as the decedent's ownership interest in the entity constitutes at least thirty percent of that entity. Moreover, although an easement may be created after the date of a decedent's death, the easement must be created by the time the election is made by the executor on the estate tax return. Further, a qualified real property interest may be the entire interest of a donor, a remainder interest or a perpetual restriction on the specific use that may be made of the land.

Second, the organization to whom the easement is granted must be a "qualified organization." This requirement necessitates that the organization be a federal or state government entity, agency or political subdivision (so long as the easement is exclusively for a public purpose), a charitable organization (as defined in section 170(c)(2)) that generally receives a significant amount of its support from a government source or the general public, or an organization that qualifies under Section 170(h)(3)(B).¹ The typical type of organization used for these purposes is called a "land trust." Texas Parks & Wildlife publishes a directory of land trusts which are in existence today. The TP&W website has a link with much information about these entities (<http://www.tpwd.state.tx.us/conserves/tlrc/>). It is not necessary to use an existing Land Trust; anyone can create a new entity for the purpose of receiving a Conservation Easement. However, it may be much easier to research the TP&W list and use an existing land trust which has views similar to the goals of the client.

¹ These organizations include corporations and any community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, test for public safety, literary or education purposes or to foster national or international amateur sports competition or for the prevention of cruelty to children or animals and constitutes a private foundation as defined in Section 509(a)(2) or (3).

Finally, the easement must be used or restricted for qualified conservation purposes. These conservation purposes are divided into four general categories which include protecting a natural habitat of plants or wildlife, preserving the land for open space (including farmland or forest land) for the scenic enjoyment of the general public or according to government conservation policy, reserving the land for outdoor recreation or education purposes of the general public and restricting the use for historical preservation. Ultimately, there will be negotiations between the client and the qualifying organization as to the use and restrictions of the land.

As stated above, the size of the deductions for a qualified conservation easement is equal to the lesser of the value of the easement itself (the charitable deduction) or \$500,000. The value of the easement is equal to the difference between the value of the land without the easement and the value of the land with the easement. The actual size of the tax reduction, however, depends on a variety of factors including, perhaps most importantly, the location of the land and the type of easement utilized.

Conservation easements which restrict development of land appear to be of the greatest value in tax savings. Development restrictions may be an excellent estate planning option for farmers and ranchers who want to pass their property on to their children but do not want the land to be developed in the future. Such a restriction would allow a farmer or rancher to maximize estate tax savings while still maintaining the integrity of the farm or ranch property and permitting the heirs of a farmer or rancher to enjoy the property in its undeveloped state. A development restriction placed on land within the development vicinity of a city typically provides the largest deductions. However, development restrictions placed on purely rural land may produce sizeable deductions as well.

Land actively used for farming and ranching can qualify for a conservation easement provided the other requirements are met. Additionally, the easement does not require any particularly unique characteristic of land. This issue, again, depends on the location of the land, the size of the easement and the type of restriction or designation placed on the land. The easement terms can allow continued mineral exploration and timber management on the property as well as hunting and fishing rights and other uses (horse stabling, pet kennels, etc.).

SPECIAL USE VALUATION

Section 2032A of the Code allows an executor to value certain types of qualifying farm real property at its farm use value rather than its fair market value (“FMV”). The cumulative decrease in the estate tax value of the property from FMV may not exceed \$850,000 for decedents dying in 2004. To take advantage of this benefit, several requirements must first be met.

The special use valuation provision requires both qualified real property and a qualified use. Qualified real property is defined as real property located in the United States that was being used for a qualified use at the time of decedent’s death and is acquired from or passed from a decedent to an heir of the decedent. In order to be “qualified real property,” at least 50% of the adjusted value of the gross estate must consist of the adjusted value of real or personal property *that was being used as a farm or in a closely held business*. Qualified real property includes residential buildings, structures and other improvements which are regularly inhabited or used by the owner or lessee of the real property. In addition, qualified real property also encompasses roads, buildings and similar structures that are purposefully connected to the qualified use. Finally, mineral rights which are not related to a farm are ineligible for special use valuation and do not constitute qualified real property.

Special use valuation also requires the property at issue be put to a qualified use. Qualified use means use as a farm or for farming purposes or use in a trade or business other than farming. The word “farm” in this context encompasses a variety of activities, including, stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, as well as orchards and woodlands. “Farming purposes” includes the

cultivation of soil or the raising or harvesting of any agricultural or horticultural commodity on a farm (including raising, shearing, feeding, caring for, training and managing animals), the storage, processing, packing, and other related activities on a farm of any agricultural or horticultural commodity in an unmanufactured state (but only if the owner or operator of the farm regularly produces over fifty percent of said commodity) and the planting, cultivating, caring for and cutting of trees or preparation of trees for market (not including milling).

The primary method for valuing real property used for farming purposes is the annual gross cash rental technique. Gross cash rental is the total amount of cash received in a year for the use of actual tracts of comparable farm real property in the same locality as the property undergoing special valuation.² Under this method, the average annual state and local real estate taxes on actual tracts of comparable real property are subtracted from the average annual gross cash rental for the same comparable property.³ The result is then divided by the average annual effective interest rate for all new Federal Land Bank loans.

A second method of specially valuing farm property is the net share rental technique. This method is only used, however, if the prior method cannot be used. Net share rental is the difference between the gross value of produce received by a lessor and the lessor's cash operating expenses of growing that produce. The production of this produce must be the specific business purpose of the farm attempting to use this method. Moreover, for purposes of this technique, produce includes livestock.

² The rental must result from an arms-length transaction, the amount of rent may not be reduced by the amount of expenses and liabilities associated with farm operations and appraisals or other statements regarding rental values may not be used.

³ Comparable property is determined by considering a variety of factors including but not limited to soil similarity, effect of certain crops on soil depletion, soil conservation techniques practiced, slope of the property, carrying capacity of the land (as to livestock), comparability of timber on the land, and number, type and condition of all buildings and improvements on the property.

Finally, the Code provides an exception to this provision for any dispositions of specially valued property or cessations of qualified use that occur within the ten years following the decedent's death and before the death of the heir. In such event, an additional estate tax is imposed. In this situation, disposition does *not* include qualified conservation contributions (such as a qualified conservation easement). Disposition also does not include the disposal of property by an heir to a family member. Additional tax may be imposed whether it is a full disposition of property or cessation of use or only a partial disposition or cessation. If, however, the qualified use begins within two years of the decedent's death, no additional tax will be imposed for the time period following the decedent's death but prior to the heir using the property.⁴

⁴ The ten year period, however, will be extended and will be considered to begin at the commencement of the qualified use by the heir.

INSTALLMENT PAYMENTS

For gross estates that include an interest in a closely held business, section 6166 of the Code provides an option for executors to elect to pay a portion of estate taxes in installments over fifteen years. The maximum amount of estate tax which may be paid in installments is the portion of the estate tax attributable to the interest in the closely held business. To qualify for installment payments under section 6166, the value of the decedent's interest in the closely held business which is included in the gross estate must be greater than thirty-five percent of the adjusted gross estate ("AGE").⁵ Additionally, no passive assets may be included (assets which are not used in conducting that trade or business) in computing the value of an interest in a closely held business.

An interest in a closely held business may include an ownership of a trade or business used as a proprietorship. Further, a partnership interest may likewise constitute an "interest" under this provision so long as the partnership has no more than forty-five partners or twenty percent of the total capital interest is included in decedent's gross estate. Stock in a corporation carrying on a trade or business where the corporation had forty-five or fewer shareholders or twenty percent or more in value of voting stock is included in the determination of the gross estate of the decedent may also constitute an interest in a closely held business. Further, an interest in a closely held farm business includes interests in residential buildings and improvements occupied by the owners, lessees or operators of the farm.

For qualifying estates, an executor may, under section 6166, elect to defer payment of qualified estate tax (not including interest) for up to five years from the original due date of the estate tax. Interest, however, must be paid during the deferral period on an annual basis. At the

⁵ AGE is computed by subtracting from the gross estate any expenses, indebtedness, taxes and losses.

time of the first installment is made and for all future installments, interest becomes payable annually at the same time and as a part of the installment tax payment. Once the first installment is made, each successive installment must be made annually on the same day the first installment was made. A maximum of ten equal installment payments are allowed for each qualifying estate.

Furthermore, estates taking advantage of section 6166 installment payments must first provide a surety bond or elect the special lien provision of section 6324A which results in a lien in favor of the United States on the section 6166 property in an amount equaling the amount of tax deferred plus interest for the first four deferral years. In addition, the distribution, sale, exchange or disposal of an interest in a closely held business will terminate the extension period and any unpaid portion of estate tax owed will be due upon notice and demand of the Secretary of the Treasury. In this instance, however, transfer of an interest in closely held property from a decedent to a person entitled to receive the property under the decedent's will, by the laws of descent and distribution or under a trust created by the decedent does not constitute a disposition of the interest.

BART WULFF

*Risk Management Issues: You paid for the insurance-
What happens when you suffer a loss?*

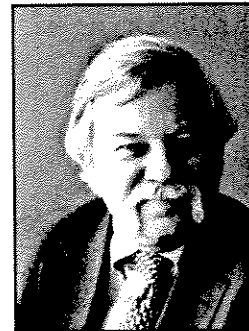
BART WULFF

Bart Wulff is a partner in the Litigation section of Jackson Walker. A founding partner of Cohan, Simpson, Cowlishaw & Wulff, L.L.P, Mr. Wulff joined Jackson Walker when the two firms combined in April 2001. He is engaged in a commercial litigation and business tort practice.

Mr. Wulff has handled complex litigation matters for major national and international insurance agencies, policyholders, technology distribution companies, transportation companies, financial institutions, agri-business, commodity trading, and motion picture distributing firms, among others. His recent representations include representing the Marsh & McLennan Companies in a range of E&O and commercial disputes, representing policyholders in coverage disputes with carriers, representing attorneys who have been joined as parties in litigation, and representing Ingram Micro in business disputes arising from its computer product distribution business. Other representations have included representing Alexander & Alexander Inc. in the three-month trial of an reverse bad faith and insurance agent malpractice case, representing Alexsis Inc. in the case of Natividad vs. Alexsis, in which he secured a Texas Supreme Court decision that his client owed no duty of good faith and fair dealing under Texas law, and representing Southwest Airlines in a range of litigated matters over a period of more than 20 years. Mr. Wulff had also previously been involved in major litigation involving commodity anti-trust issues in the cotton and peanut industries, letter of credit disputes, financial institution surety bond litigation on behalf of financial institutions and insurance agents, and business tort issues in a wide variety of industries.

MEMBERSHIPS

Mr. Wulff is a member of the State Bars of Texas and Georgia, and is admitted to practice before the Texas courts and a number of Federal District Courts and Courts of Appeal. He has served as Chair of the Courthouse Committee of the Dallas Bar association and in other bar association committee leadership positions. He is the 2005 chair of the Business Litigation Section of the Dallas Bar Association. Mr. Wulff is



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also a member of the Executive Committee of the Dallas-based Committee for a Qualified Judiciary which is devoted to promoting the selection of qualified judicial candidates without regard to political party. Mr. Wulff also serves on the Board of Directors of the North Dallas Chamber of Commerce. Mr. Wulff also serves as a director of Texas and Southwestern Cattle Raisers Association and is a trustee of the Texas and Southwestern Cattle Raisers Foundation.

EDUCATION

Mr. Wulff received his B.A. degree from Yale University and his J.D. degree from the University of Texas Law School having served as a Note & Comment Editor on the Texas Law Review in his final year.

*RISK MANAGEMENT
FOR RANCHERS*

MARCH 18, 2005
FORT WORTH, TEXAS

CLAIMS HANDLING

OR:
YOU PAID FOR THE
INSURANCE
YOU SUFFERED A LOSS
WHAT NOW?

WHO CAN HELP WITH CLAIM?

- COMPANY AGENT
- INDEPENDENT AGENT
- ATTORNEY
- YOUR ACCOUNTANT
- FORENSIC ACCOUNTANT
- EXPERT (APPRAISER, FSA)

WHAT TYPE OF CLAIM

- FIRST PARTY
- THIRD PARTY
- REIMBURSEMENT FOR COSTS ASSOCIATED WITH CLAIM ITSELF
- CONSEQUENTIAL, PUNITIVE DAMAGES

FIRST PARTY

- YOU WANT TO BE REIMBURSED FOR YOUR LOSS
- EXAMPLE: CROP LOSS INSURANCE

FIRST PARTY POLICIES

- PROPERTY
- AUTOMOBILE COLLISION/COMPREHENSIVE
- FIDELITY BONDS
- BURGLARY/ROBBERY
- COMPUTER

THIRD PARTY

- SOMEONE ELSE WANTS YOU TO REIMBURSE THEM FOR THEIR LOSS
- IF THEY WIN YOU WANT INSURANCE COMPANY TO PAY RATHER THAN YOU
- EXAMPLE: HERBICIDE DRIFT

THIRD PARTY POLICIES

- GENERAL LIABILITY
- AUTOMOBILE LIABILITY
- D & O LIABILITY
- WORKER'S COMP
- EPL

CLAIM COST RECOVERY

- COST OF PRESENTING FIRST PARTY CLAIM
- COST OF DEFENDING THIRD PARTY CLAIM

CONSEQUENTIAL DAMAGES

- DAMAGES SUFFERED AS A RESULT OF CLAIMS HANDLING
- EXAMPLE 21.55

PUNITIVE DAMAGES

- PUNISHMENT
- DETERRENCE

HOW DO YOU MANAGE A CLAIM?

**A. FIND AVAILABLE
COVERAGE**

1. IDENTIFY TYPE OF POLICY

- DETERMINE WHICH POLICIES YOU
HAVE MIGHT COVER LOSS
- MAY BE OBVIOUS – CAR WRECK
- MAY NOT – CONTINGENT BI
- ALWAYS READ POLICY CAREFULLY
- SOMETIMES SEEK HELP

**2. IDENTIFY WHICH POLICY
OF THAT TYPE**

- OCCURRENCE POLICY
- CLAIMS MADE POLICY

OCCURRENCE POLICY

- TRIGGERED BY DATE ON WHICH INSURED EVENT OCCURRED
- EXAMPLE : AUTO WRECK IN 2002,
 - SUIT FILED IN 2004 - 2002 AUTO POLICY COVERS SUIT

CLAIMS MADE POLICY

- POLICY IS TRIGGERED BY DATE WHEN CLAIM MADE
- EXAMPLE: WORKER FIRED IN 2002, DEMAND LETTER FOR DISCRIMINATION IN 2003, SUIT FILED IN 2004
 - 2003 POLICY COVERS SUIT

3. IDENTIFY POLICY PART

- FOR EACH POLICY IDENTIFIED IN #1 & #2:
- WHAT COVERAGE PROVISIONS MAY APPLY?
- WHAT DOES EACH REQUIRE FOR COVERAGE?
- WHAT EXCLUSIONS ARE THERE?

B. FOLLOW RULES IN POLICY TO TRIGGER COVERAGE

1. REPORTING RULES

- EACH POLICY WILL CONTAIN PROVISIONS ON RULES FOR WHEN AND HOW CLAIM MUST BE REPORTED TO POLICY:
 - 1. WHEN SERVED WITH SUIT
 - 2. WITHIN X DAYS OF LOSS EVENT
 - 3. AS SOON AS PRACTICABLE
 - 4. MANY POSSIBILITIES
 - 5. FAILURE TO DO MAY RESULT IN LOSS

2. PAYMENT RULES

- PAY ON BEHALF OF INSURANCE POLICY
- INDEMNITY POLICY
- SURETY BOND

PAY ON BEHALF OF POLICY

➤ INSURANCE COMPANY PAYS CLAIM DIRECTLY TO INJURED PARTY

INDEMNITY POLICY

➤ YOU PAY INJURED PARTY AND THEN INSURANCE COMPANY REIMBURSES YOU

SURETY BOND

➤ INSURANCE COMPANY ASSUMES DUTY OF DEFAULTING PARTY AND ASSUMES COST OF ITS PERFORMANCE

3. COOPERATION RULES

- WHO CONTROLS DEFENSE?
- WHO PICKS COUNSEL?
- WHO ADMITS LIABILITY?
- WHO DECIDES TO SETTLE?
- DUTY TO PROVIDE INFORMATION?
- DUTY TO ASSIST IN DEFENSE
- DUTY TO GIVE STATEMENT?
- DUTY TO BE REASONABLE?

4. COORDINATION RULES

- WHAT IF TWO POLICIES COVER SAME LOSS?
- 1. EXCESS/PRIMARY
- 2. SHARE PRO RATA (FORMULA?)
- 3. CONFLICTING POLICY LANGUAGE

C. CLAIM AVAILABLE COVERAGE

PICK CLAIM TO MAKE

- ONCE YOU HAVE LOOKED AT ALL THESE FACTORS YOU CAN PICK WHICH POLICY(IES) TO PRESENT CLAIM AGAINST

PRESENTATION OF CLAIM

- 1. EVALUATE SEVERITY OF CLAIM
- 2. ASSOCIATE HELPERS AS NEEDED.

FIRST PARTY CLAIM

- 1. DETERMINE AMOUNT, NATURE OF CLAIM COVERED BY POLICY
- 2. DOCUMENT CLAIM
- 3. PRESENT CLAIM TO INSURANCE COMPANY
- 4. COOPERATE WITH REASONABLE REQUESTS FOR INFORMATION
- 5. DOCUMENT ALL STEPS IN CASE IT IS NECESSARY TO FORCE PAYMENT

THIRD PARTY CLAIM

- 1. NOTIFY INSURANCE COMPANY OF CLAIM
- 2. AGREE ON DEFENSE COUNSEL AND STRATEGY
- 3. COOPERATE WITH INS CO DEENSE OR KEEP INS CO INFORMED OF YOUR DEFENSE

THIRD PARTY CLAIM PROBLEMS

- 1. INSURANCE COMPANY DENIES COVERAGE
- 2. INSURANCE COMPANY ISSUES RESERVATION OF RIGHTS
- 3. INSURANCE COMPANY NOTIFIES OF EXCESS EXPOSURE
- 4. INSURANCE COMPANY HIRES UNACCEPTABLE COUNSEL OR PROVIDES UNACCEPTABLE DEFENSE
- 5. INSURANCE COMPANY WANTS UNACCEPTABLE SETTLEMENT

MISCELLANOUS ISSUES

- STOWERS
- MARY CARTER
- LIENS
- DECLARATORY JUDGMENTS

JOHN B. HOLDEN, JR.

*What Ranch Owners need to know about Oil and Gas,
Water and Wind Leases*

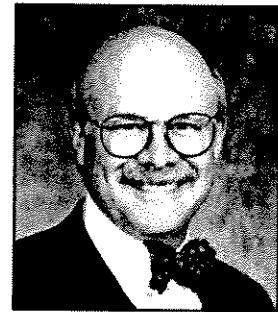
JOHN B. HOLDEN, JR.

John Holden is Of Counsel in the Business Transactions section and a member of the Energy practice group of Jackson Walker. He has more than 28 years experience representing clients in the natural resources area. Mr. Holden has advised clients with respect to projects in all aspects of exploration, production, transportation, processing, sale and marketing of oil and gas and other natural resources. This includes the formation of and utilization of entities, both public and private, and the financing of the acquisition and development of hydrocarbons and related assets. He is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization.

He advises clients on the preparation of merger and acquisition agreements, joint exploration agreements, lease acquisition agreements, seismic option agreements, leases, operating agreements, farmouts, oil and gas sales contracts, transportation agreements, processing agreements, pipeline construction and operating agreements, as well as other related documents.

Mr. Holden also has significant experience in energy lending and debt and equity financing. His representation of financial institutions includes the preparation and negotiation of documentation of lending transactions involving hydrocarbon reserves, drilling rigs, service companies, landfill gas recovery projects, wind projects and other forms of national resource and fixed site power lending. He has worked with financial institutions in the foreclosure on and the subsequent sale of various energy assets. He has also negotiated and documented equity participation in the foregoing.

In addition, Mr. Holden has considerable experience representing clients on projects in Latin America. He directed the privatization of \$750 million worth of assets of YPF, the national oil company of Argentina. That process required the analysis of the applicable laws, rules, decrees and regulations of that country and the creation of appropriate entities to accomplish the country's objectives. Mr. Holden has participated in transactions in other foreign venues and has represented foreign entities doing business in the United States.



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MEMBERSHIPS

Mr. Holden is a member of the American Bar Association and the State Bars of Texas and the District of Columbia, as well as the Dallas Bar Association. He is a member of the Corporation and Business Law Section, Vice Chairman of the Energy Law Section, and past Chairman of the International Law Section of the Dallas Bar Association. Mr. Holden also is a member of the State Bar's Corporate, Banking and Business Section, the Oil, Gas and Mineral Law Section and International Law Sections. He is also a member of the Association of International Petroleum Negotiators and many other regional and national energy associations and is an Adjunct Professor of International Law at Baylor University Law School.

PUBLICATIONS / SPEAKING ENGAGEMENTS

Mr. Holden is a frequent speaker on oil and gas related topics to business and legal audiences.

EDUCATION

Mr. Holden received his A.B. from Ohio University in 1965 and his J.D. from the George Washington School of Law in 1968. In 1976, he completed his L.L.M. in oil and gas and taxation from Southern Methodist University School of Law.

**WHAT RANCH OWNERS NEED TO KNOW ABOUT OIL AND GAS,
WATER AND WIND LEASES**

Texas and Southwestern Cattleman's Association
Fort Worth, Texas

March 18, 2005

John B. Holden, Jr.
Board Certified
Oil, Gas and Mineral Law
Texas Board of Legal Specialization

WHAT RANCH OWNERS NEED TO KNOW ABOUT OIL AND GAS, WATER AND WIND LEASES

I. What are the objectives of the management of the Ranch?

Animal, grazing, crop, water, wildlife and recreational objectives

II. What are the various rights and responsibilities owed to the differing interests (some undivided) which are involved, as well as the objectives of each?

Production of income; preservation of family unit and economic interest (principal and income)

Interaction of surface with oil and gas, water and wind developers

Weigh the burden against the potential revenue (and/or value) against potential lost revenue (and/or value) from other uses and potential liability

III. What are the primary components of ownership of each of the various interests involved in oil and gas, wind and water and their impact on the Ranch as a whole?

Impact on the surface

Need for internal transportation and access to the exterior of fee

Areas where these various interests compete and conflict

IV. What are the rights and responsibilities of the various parties and the economic impact of the exercise of those rights and consequences of the responsibilities?

Contractual and developed by common law and statutory law

V. What governmental authorities are involved with the foregoing interests?

Federal, State and local

Texas Railroad Commission, Public Utilities Commission, Water districts

- EXHIBIT A Oil and Gas Lease
- EXHIBIT B Ground Water Lease
- EXHIBIT C Option Agreement (Wind)
- EXHIBIT D Surface Lease (Wind)

SUMMARY OF TERMS OF TYPICAL OIL AND GAS LEASE

1. Granting Clause: Gives lessee the right to explore for and produce oil and gas, along with the right to use the surface in conducting such operation.
2. Term Clause: Describes the primary term a specific term of years. . ."and so long thereafter..."
3. Royalty Clause: Describes how royalties are to be calculated on oil and gas production, and provides for payment of "shut in royalties" on nonproducing gas wells.

* Watch out for "market value" gas royalty provisions, especially in Texas.
4. Delay Rental Clause: Provides for payment of annual rentals during primary term in lieu of drilling or production.
5. Pooling Clause: Authorizes lessee to combine all or part of the lease with other acreage to form a voluntary unit.
6. Dry Hole/Cessation of Production/Continuous Operations Clause: Provides for continuation of lease after drilling dry hole or production has ceased, either by resuming operations or (if within the primary term) by resuming rental payments. It also provides for the extending the lease beyond the primary term by continuous operations.
7. Proportionate Reduction Clause: Provides for a proportionate reduction of rentals and royalties if the lease covers less than a full mineral interest.
8. Surface Use Clause: Supplements the Granting Clause by describing the lessee's rights and obligations concerning certain specific surface uses. Consider the necessity of specifying "location damages".
9. Assignment Clause: Describes the right and effect of an assignment by either the lessor or the lessee.
10. Surrender Clause: Authorizes the lessee to surrender the lease in whole or in part.
11. Force Majeure Clause: Relieves the lessee of his obligations whenever performance is prevented by circumstances beyond his control.
12. Warranty Clause: The lessor warrants his title to the interest described in the Granting Clause. Consider modification

Various Modifying Provisions

Affiliate Sales

Application to Lease Operations

Assignment by Lessee

Assignment/Surrender

Bury Pipelines

Commencement and Cessation

Compliance with Environmental Laws and Regulations

Covenant to Fully Develop

Cutting of Fences

Damage to and Maintenance on Existing Access roads

Damage to Trees, Animals, Litter

Damages for Transmission Routes

Depth Limitation

Discharges

Force Majeure

Freestone Rider

Gates Locked

Geological and Geophysical Operations

Governmental Proration Unit

Inclusion of Entire Lease Premises in Pooling

Indemnification

Insurance

Maintenance of Access Roads

Mineral Definition

Most Favored Nation
No Post Production Costs
No Warranties of Title
Noise Attenuation
Notice
Other Activities
Other Damages
Permanent Structures and Equipment
Pipelines and Other Lines
Removal or Abandonment of Property
Reports
Right to Data
Royalty Payment
Selection of Well Sites and Access Roads
Settlements
Shut-in Limitation
Specific Limitations on Lease Operations
Surface Use/Restriction
Termination
Water Wells
Well Information
Well Site Appearance
Well Site Restoration

EXHIBIT A

OIL, GAS AND MINERAL LEASE

THIS AGREEMENT made this _____ day of _____, 19____, between

Lessor (whether one or more), whose address is: _____

and _____, Lessee, WITNESSETH:

1. Lessor in consideration of _____ Dollars

(\$ _____), in hand paid, of the royalties herein provided, and of the agreements of Lessee herein contained, hereby grants, leases and lets exclusively unto Lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, conducting exploration, geologic and geophysical surveys by seismograph, core test, gravity and magnetic methods, injecting gas, water and other fluids, and air into subsurface strata, laying pipe lines, building roads, tanks, power stations, telephone lines and other structures thereon and on, over and across lands owned or claimed by Lessor adjacent and contiguous thereto, to produce, save, take care of, treat, transport and own said products, and housing its employees, the following described land in _____

_____ County, Texas, to-wit:

This lease also covers and includes all land owned or claimed by Lessor adjacent or contiguous to the land particularly described above, whether the same be in said survey or surveys or in adjacent surveys, although not included within the boundaries of the land particularly described above.

2. This is a paid up lease and subject to the other provisions herein contained, this lease shall be for a term of _____ years from this date (called "primary term") and as long thereafter as oil, gas or other mineral is produced from said land or land with which said land is pooled thereunder.

3. As royalty, lessee covenants and agrees: (a) To deliver to the credit of lessor, in the pipe line to which lessee may connect its wells, the equal one-eighth part of all oil produced and saved by lessee from said land, or from time to time, at the option of lessee, to pay lessor the average posted market price of such one-eighth part of such oil at the wells as of the day it is run to the pipe line or storage tanks, lessor's interest, in either case, to bear one-eighth of the cost of treating oil to render it marketable pipe line oil; (b) to pay lessor for gas and casinghead gas produced from said land (1) when sold by lessee, one-eighth of the amount realized by lessee, computed at the mouth of the well, or (2) when used by lessee off said land or in the manufacture of gasoline or other products, one-eighth of the amount realized from the sale of gasoline or other products extracted therefrom and one-eighth of the amount realized from the sale of residue gas after deducting the amount used for plant fuel and/or compression; (c) To pay lessor on all other minerals mined and marketed or utilized by lessee from said land, one-tenth either in kind or value at the well or mine at lessee's election, except that on sulphur mined and marketed the royalty shall be one dollar (\$1.00) per long ton. If, at the expiration of the primary term or at any time or times thereafter, there is any well on said land or on lands with which said land or any portion thereof has been pooled, capable of producing oil or gas, and all such wells are shut-in, this lease shall, nevertheless, continue in force as though operations were being conducted on said land for so long as said wells are shut-in, and thereafter this lease may be continued in force as if no shut-in had occurred. Lessee covenants and agrees to use reasonable diligence to produce, utilize, or market the minerals capable of being produced from said wells, but in the exercise of such diligence, lessee shall not be obligated to install or furnish facilities other than well facilities and ordinary lease facilities of flow lines, separator, and lease tank, and shall not be required to settle labor trouble or to market gas upon terms unacceptable to lessee. If, at any time or times after the expiration of the primary term, all such wells are shut-in for a period of ninety consecutive days, and during such time there are no operations on said land, then at or before the expiration of said ninety day period, lessee shall pay or tender, by check or draft of lessee, as royalty, a sum equal to one dollar (\$1.00) for each acre of land then covered hereby. Lessee shall make like payments or tenders at or before the end of each anniversary of the expiration of said ninety day period if upon such anniversary this lease is being continued in force solely by reason of the provisions of this paragraph. Each such payment or tender shall be made to the parties who at the time of payment would be entitled to receive the royalties which would be paid under this lease if the wells were producing, and

may be deposited in the _____ Bank at _____

_____, or its successors, which shall continue as the depositories, regardless of changes in the ownership of shut-in royalty. If at any time that lessee pays or tenders shut-in royalty, two or more parties are, or claim to be, entitled to receive same, lessee may, in lieu of any other method of payment herein provided, pay or tender such shut-in royalty, in the manner above specified, either jointly to such parties or separately to each in accordance with their respective ownerships thereof, as lessee may elect. Any payment hereunder may be made by check or draft of lessee deposited in the mail or delivered to the party entitled to receive payment or to a depository bank provided for above on or before the last date for payment. Nothing herein shall impair lessee's right to release as provided in paragraph 5 hereof. In the event of assignment of this lease in whole or in part, liability for payment hereunder shall rest exclusively on the then owners of this lease, severally as to acreage owned by each.

4. Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof as to oil and gas, or either of them, with any other land covered by this lease, and/or with any other land, lease or leases in the immediate vicinity thereof to the extent hereinafter stipulated, when in Lessee's judgment it is necessary or advisable to do so in order properly to explore, or to develop and operate said leased premises in compliance with the spacing rules of the Railroad Commission of Texas, or other lawful authority, or when to do so would, in the judgment of Lessee, promote the conservation of oil and gas in and under and that may be produced from said premises. Units pooled for oil hereunder shall not substantially exceed 40 acres each in area, and units pooled for gas hereunder shall not substantially exceed in area 640 acres each plus a tolerance of ten percent (10%) thereof, provided that should governmental authority having jurisdiction prescribe or permit the creation of units larger than those specified, for the drilling or operation of a well at a regular location or for obtaining maximum allowable from any well to be drilled, drilling or already drilled, units thereafter created may conform substantially in size with those prescribed or permitted by governmental regulations. Lessee under the provisions hereof may pool or combine acreage covered by this lease or any portion thereof as above provided as to oil in any one or more strata and as to gas in any one or more strata. The units formed by pooling as to any stratum or strata need not conform in size or area with the unit or units in- to which the lease is pooled or combined as to any other stratum or strata, and oil units need not conform as to area with gas units. The pooling in one or more instances shall not exhaust the rights of the Lessee hereunder to pool this lease or portions thereof into other units. Lessee shall file for record in the appropriate records of the county in which the leased premises are situated an instrument describing and designating the pooled acreage as a pooled unit; and upon such recordation the unit shall be effective as to all parties hereto, their heirs, successors, and assigns, irrespective of whether or not the unit is likewise effective as to all other owners of surface, mineral, royalty, or other rights in land included in such unit. Lessee may at its election exercise its pooling option before or after commencing operations for or completing an oil or gas well on the leased premises, and the pooled unit may include, but it is not required to include, land or leases upon which a well capable of producing oil or gas in paying quantities has theretofore been completed or upon which operations for the drilling of a well for oil or gas have theretofore been commenced. In the event of operations for drilling on or production of oil or gas from any part of a pooled unit which includes all or a portion of the land covered by this lease, regardless of whether such operations for drilling were commenced or such production was secured before or after the execution of this instrument or the instrument designating the pooled unit, such operations shall be considered as operations for drilling on or production of oil or gas from land covered by this lease whether or not the well or wells be located on the premises covered by this lease and in such event operations for drilling shall be deemed to have been commenced on said land within the meaning of paragraph 5 of this lease; and the entire acreage constituting such unit or units, as to oil and gas, or either of them, as herein provided, shall be treated for all purposes, except the payment of royalties on production from the pooled unit, as if the same were included in this lease. For the purpose of computing the royalties to which owners of royalties and payments out of production and each of them shall be entitled on production of oil and gas, or either of them, from the pooled unit, there shall be allocated to the land covered by this lease and included in said unit (or to each separate tract within the unit if this lease covers separate tracts within the unit) a pro rata portion of the oil and gas, or either of them, produced from the pooled unit after deducting that used for operations on the pooled unit. Such allocation shall be on an acreage basis—that is to say, there shall be allocated to the acreage covered by this lease and included in the pooled unit (or to each separate tract within the unit if this lease covers separate tracts within the unit) that pro rata portion of the oil and gas, or either of them, produced from the pooled unit which the number of surface acres covered by this lease (or in each such separate tract) and included in the pooled unit bears to the total number of surface acres included in the pooled unit. Royalties hereunder shall be computed on the portion of such production, whether it be oil and gas, or either of them, so allocated to the land covered by this lease and included in the unit just as though such production were from such land. The production from an oil well will be considered as production from the lease or oil pooled unit from which it is producing and not as production from a gas pooled unit; and production from a gas well will be considered as production from the lease or gas pooled unit from which it is producing and not from an oil pooled unit. The formation of any unit hereunder shall not have the effect of changing the ownership of any shut-in production royalty which may become payable under this lease. If this lease now or hereafter covers separate tracts, no pooling or unitization of royalty interest as between any such separate tracts is intended or shall be implied or result merely from the inclusion of such separate tracts within this lease but Lessee shall nevertheless have the right to pool as provided above with consequent allocation of production as above provided. As used in this paragraph 4, the words "separate tract" mean any tract with royalty ownership differing, now or hereafter, either as to parties or amounts, from that as to any other part of the leased premises.

5. If at the expiration of the primary term, oil, gas, or other mineral is not being produced on said land, or from land pooled therewith, but Lessee is then engaged in drilling or reworking operations thereon, or shall have completed a dry hole thereon within 60 days prior to the end of the primary term, the lease shall remain in force so long as operations on said well or for drilling or reworking of any additional well are prosecuted with no cessation of more than 60 consecutive days, and if they result in the production of oil, gas or other mineral, so long thereafter as oil, gas, or other mineral is produced from said land, or from land pooled therewith. If, after the expiration of the primary term of this lease and after oil, gas, or other mineral is produced from said land, or from land pooled therewith, the production thereof should cease from any cause, this lease shall not terminate if Lessee commences operations for drilling or reworking within 60 days after the cessation of such production, but shall remain in force and effect so long as such operations are prosecuted with no cessation of more than 60 consecutive days, and if they result in the production of oil, gas, or other mineral, so long thereafter as oil, gas, or other mineral is produced from said land, or from land pooled therewith. Any pooled unit designated by Lessee in accordance with the terms hereof, may be dissolved by Lessee by instrument filed for record in the appropriate records of the county in which the leased premises are situated at any time after the completion of a dry hole or the cessation of production on said unit. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within 330 feet of and draining the leased premises, or land pooled therewith, Lessee agrees to drill such offset well or wells as a reasonably prudent operator would drill under the same or similar circumstances. Lessee may at any time execute and deliver to Lessor or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered.

6. Lessee shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land, including the right to draw and remove all casing. When required by Lessor, Lessee will bury all pipe lines below ordinary plow depth, and no well shall be drilled within two hundred (200) feet of any residence or barn now on said land without Lessor's consent.

7. The rights of either party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns; but no change or division in ownership of the land, or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee; and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished by registered U.S. mail at Lessee's principal place of business with a certified copy of recorded instrument or instruments evidencing same. In the event of assignment hereof in whole or in part, liability for breach of any obligation hereunder shall rest exclusively upon the owner of this lease or of a portion thereof who commits such breach. If six or more parties become entitled to royalty hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

8. The breach by Lessee of any obligation arising hereunder shall not work a forfeiture or termination of this lease nor cause a termination or reversion of the estate created hereby nor be grounds for cancellation hereof in whole or in part. No obligation reasonably to develop the leased premises shall arise during the primary term. Should oil, gas or other mineral in paying quantities be discovered on said premises, then after the expiration of the primary term, Lessee shall develop the acreage retained hereunder as a reasonably prudent operator, but in discharging this obligation it shall in no event be required to drill more than one well per forty (40) acres of the area retained hereunder and capable of producing oil in paying quantities and one well per 640 acres plus an acreage tolerance not to exceed 10% of 640 acres of the area retained hereunder and capable of producing gas or other mineral in paying quantities. If after the expiration of the primary term, Lessor considers that operations are not at any time being conducted in compliance with this lease, Lessor shall notify Lessee in writing of the facts relied upon as constituting a breach hereof, and Lessee, if in default, shall have sixty days after receipt of such notice in which to commence the compliance with the obligations imposed by virtue of this instrument.

9. Lessor hereby warrants and agrees to defend the title to said land and agrees that Lessee at its option may discharge any tax, mortgage or other lien upon said land, either in whole or in part, and in event Lessee does so, it shall be subrogated to such lien with right to enforce same and apply royalties accruing hereunder toward satisfying same. Without impairment of Lessee's rights under the warranty in event of failure of title, it is agreed that if this lease covers a less interest in the oil, gas, sulphur, or other minerals in all or any part of said land than the entire and undivided fee simple estate (whether Lessor's interest is herein specified or not), or no interest therein, then the royalties, and other monies accruing from any part as to which this lease covers less than such full interest, shall be paid only in the proportion which the interest therein, if any, covered by this lease, bears to the whole and undivided fee simple estate therein. All royalty interest covered by this lease (whether or not owned by Lessor) shall be paid out of the royalty herein provided. Should any one or more of the parties named above as Lessors fail to execute this lease, it shall nevertheless be binding upon the party or parties executing the same.

10. Should Lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or reworking operations thereon or from producing oil or gas therefrom by reason of scarcity of or inability to obtain or to use equipment or material, or by operation of force majeure, and Federal or state law or any order, rule or regulation of governmental authority, then while so prevented, Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling or reworking operations on or from producing oil or gas from the lease premises; and the time while Lessee is so prevented shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

IN WITNESS WHEREOF, this instrument is executed on the date first above written.

STATE OF _____
COUNTY OF _____

INDIVIDUAL ACKNOWLEDGMENT

Before me, the undersigned authority, on this day personally appeared _____

known to me to be the person _____ whose name _____ is (are) subscribed to the foregoing instrument, and acknowledged to me that _____ executed the same as _____ free act and deed for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 19 _____.

My Commission Expires _____

Notary Public in and for the State of Texas

Notary's Printed Name

STATE OF _____
COUNTY OF _____

HUSBAND AND WIFE ACKNOWLEDGMENT

Before me, the undersigned authority, on this day personally appeared _____

and _____ husband and wife, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same as their free act and deed for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 19 _____.

My Commission Expires _____

Notary Public in and for the State of Texas

Notary's Printed Name

No. _____

Oil, Gas and Mineral Lease

FROM

TO

Dated _____, 19 _____

No. Acres _____

County, Texas

Term _____

This instrument was filed for record on the _____

day of _____, 19 _____, at

_____ o'clock _____ M., and duly recorded in

Book _____, Page _____

of the _____ records of this office.

County Clerk

By _____, Deputy

When recorded return to

EXHIBIT B

GROUNDWATER LEASE

This Lease is dated as of _____, 2003, between _____, a _____, (“Lessor” whether one or more), whose address is _____, and _____, a _____ (“Lessee”).

A. Description. In consideration of a royalty and a net profits interest as described in this Lease and covenant to market water, Lessor hereby leases the following land (the “Land”) to Lessee, its successors and assigns:

Exhibit “A” Attached Hereto And Made A Part Hereof

See Rider for Additional Provisions to this Lease

in _____ containing _____ acres, whether more or less, and which acreage figure may be relied upon by Lessee in calculating royalty and net profits hereunder, Notwithstanding this specific description, Lessor intends to include within this Lease all land owned or claimed by Lessor up to the boundaries of any abutting landowner,

B. Grant. Lessor leases the Land to Lessee to exclusively explore, conduct geological, hydrogeological and geophysical surveys, drill., operate, produce, store and treat the water that is under said Land included within Lessee's AMI (Area of Mutual Interest) in the _____ aquifer (the “Water), and lay pipelines, build roads, tanks, pumping stations, power lines, telephone lines and all other structures that are useful to Lessee’s operations with rights of ingress and egress, all to produce, save, measure, treat, process, store, transport and sell the Water. Anything herein to the contrary notwithstanding, no well for the pin-poses provided for herein shall be less than 1000 feet in depth. Rights and title to the Water are vested exclusively and absolutely in Lessee, as well as any and all permits, licenses, historical use rights or governmental approvals that now or hereafter pertain to such Water production and use. Lessor assigns all of the following to Lessee during the term of this Lease, whether they now exist or are created during this Lease: all permits, applications for permits, and historical production and withdrawal rights (except water used by Lessor as permitted under Water (excluded from Royalty below). Lessee, upon its election and upon payment to Lessor of reasonable consideration may designate up to two (2) acres of the Land as a well site, in the form of a square surrounding and centered on a water well pursuant to this Lease during the term of this Lease, Lessee may construct a fence around each well or other surface facility located on the Land. Lessee may drill, develop and maximize, to the extent permitted by law, the maximum quantity of well Sites, and the maximum allowable production from each well.

C. Term. Subject to the other provisions of this Lease, this Lease is for a term of five (5) years from this date (the “primary term”) and as long thereafter as Water is produced from the Land or land with which the Land is pooled, In this Lease “produced” or “production” mean production of any quantity so that a royalty payment is payable to Lessor and/or any activity or circumstance that generates Net Profits (as defined below),

D. Royalty. Lessee Will pay Lessor ten percent (10%) of the total amount Lessee receives from the sale of Water from the Land (subject to Pooling below) computed at the

wellhead (the "royalty"); however, as provided below in Water Excluded from Royalty, Lessee will not pay royalty on any Water used by Lessor and/or Lessee in field operations. Lessee will pay the first royalty payment within ninety (90) days after date of sale. Thereafter Lessee will pay said royalty on or before the end of each month with respect to amounts received in the preceding month.

E. Net Profits. Beginning when Lessee first has Net Profits and continuing through the term of this Lease, Lessee will pay Lessor monthly on or before the last day of each month during the term of this Lease Lessor's pro rate share (based upon the ratio of the acreage of the Land to the total acreage under lease to Lessee in the AMI) of fifty-one percent (51%) of its Net Profits, if any, during the prior month, "Net Profits" for purpose of this Lease shall be defined as total revenues from the sale of ground water (excluding capital contributions and loan proceeds) minus all Lessee's expenses, overhead, debt service, taxes, royalty payments, and a reasonable allowance as determined by Lessee in good faith for contingencies and working capital since inception. Lessee will deliver to Lessor a monthly Net Profits calculation during the term of this Lease, The Area of Mutual Interest ("AMI") is any land believed to be containing the stratigraphic horizon known as the Simsboro member of the _____ Aquifer located in _____ Counties, Texas and such area for the purposes of this lease and AMI not to exceed 1,200,000 acres. Lessee will use reasonable efforts to market the water that is wider lease to it in the AMI during the primary term. Lessee covenants to Lessor that in the event Net Profits on a rolling twelve (12) month basis are, subject to Force Majeure and other events that are beyond Lessee's control, less than 55% of the total revenues of Lessee from the sale of ground water as defined in this Paragraph 5, then in such event Lessor shall receive as an alternate payment a combined total royalty payment including the royalty described in Paragraph 4 above of thirty (30%) percent on the sale of ground water by Lessee for that period of time Net Profits are less than 55% of the total revenues of Lessee from the sale of ground water on a rolling twelve month basis. For purposes hereof "a rolling twelve month basis" shall mean the prior twelve months provided that no calculation shall be made hereunder until Lessee has been in operation twelve months.

F. Diligence. If after the expiration of the primary term herein, production of Water ceases for any reason, this Lease Will not terminate if Lessee commences operations for drilling or reworking an existing or new well within twelve months thereafter on this land or any land pooled therewith. If at the end of the primary term, Water is not being produced from the Land, or land with which the Land is pooled, but Lessee is conducting any drilling or reworking operations, then this Lease will remain in force as long as operations on that well or for drilling or reworking any well continue with no interruption lasting more than twelve (12) months. If those operations result in Water production, this Lease remains in force so long as Water is produced from the Land, or land with which the Land is pooled.

G. Warranty of Title: Quiet Enjoyment; Proportionate Reduction. Lessor warrants and agrees to defend title to the Land and the Water rights therein. Lessor covenants that Lessee shall peaceably and quietly hold and enjoy the Land without hindrance from Lessor or any party claiming by, through or under Lessor, if Lessor's interest in the Water is less than the entire undivided fee simple estate or if due to statutory limitation this Lease covers an interest that is less than the entire undivided fee simple estate, then the royalty and net profits payments in this Lease shall be paid to Lessor in the proportion which Lessor's actual interest bears to the entire fee simple estate. All royalty and net profits interests covered by this Lease (whether or not owned by Lessor) shall be paid out of the royalty and net profits provided for in this Lease. If

any one or more of the parties named herein as Lessor fails to sign this Lease, it will nevertheless be binding on all parties who do sign it, Lessee at its Option may discharge any tax lien on Lessor's interest in the Land (unless such tax lien is being appropriately contested in good faith by Lessor) and, if Lessee does so, Lessee shall have the right to apply royalty and net profits payments to reimburse that payment.

H. Pooling. Lessee shall pool (combine) all the Land or interests covered by this Lease with all of Lessee's other lands, leases, and interests within the AMI from time to time. Lessee is hereby granted the right, and without the need of Lessor's further consent or joinder, to pool or unitize this lease, these lands, and all associated rights, benefits or interests, associated With, covered by, or created by this lease, with any other land, lease or leases. Operations or production from any part of the pooled land shall be deemed as operations or production conducted on the Land. For the purpose of computing Lessor's royalty and net profits interest in this Lease, Lessor shall receive on production from all the pooled lands, such portion of the royalty and net profits as the number of surface acres of the Land bears to the total number of surface acres in all the pooled lands, Drilling a well on any part of the pooled land constitutes drilling a well on the Land, The word "operations" in this Lease means any of these: drilling, testing, completing, recharging, reworking, recompleting, deepening, plugging back or repairing of a water well in search for or in an effort to produce Water, as well as production of Water. The size and configuration of the pooled land within the AMI will be revised, increased, decreased in size and changed in configuration by Lessee as the land under lease to Lessee in the AMI changes and such changes will occur without the joinder of Lessor. Any change in ownership under this lease or lands pooled therewith, shall be calculated at the end of such month that said change occurs and effective the ____ day of the following month for the purposes of payments calculated hereunder.

I. Water Excluded from Royalty. Lessor may construct or continue to operate, water well(s) to withdraw Water solely for Lessors domestic, agricultural or livestock watering purposes, but not for any industrial/commercial purpose nor for sale to third parties. Lessor's free use must not challenge Lessee's title to the Water or violate any sanitary control easement. Lessee shall have the right, free from the payment of royalty, to use Water from its wells in connection with its field operations and such Water shall be metered separately.

J. Surface Use. No water well shall be drilled nearer than one hundred fifty feet (150') from any house or barn now on the Land without Lessor's written consent. If requested by Lessor, all pipelines will be buried at least 30 inches from the top of the pipe below the ground, Lessee must pay for any actual damages to roads, fences, improvements, trees and/or growing crops it causes, and must fill and level all pits, mounds, and restore the surface of the Land to as near its original condition as is reasonably practicable within a reasonable period of time after ceasing operations.

K. Contesting Taxes and Fees. Lessee may (but is not required to) prosecute any administrative proceedings relating to the Land and the rights conveyed herein including, but not limited to, (i) contesting any taxes or fees assessed or levied upon the Land pursuant to water withdrawal rights, or (ii) protesting, defending or preserving the right to withdraw Water. If required by law or administrative practice, Lessee may take any administrative action in the name of Lessor.

L. Force Majeure. If operations are delayed or interrupted by events such as storm, flood, other Acts of God, fire, war, riot, strike, differences with workers, failure of transport, or some government action, the time of such interruption shall not be counted against Lessee.

M. Sanitary Control Easement. Lessee has the right to designate a sanitary control easement consisting of a circular tract of land centered on each completed water well having a radius of ISO feet from the well or such reasonable size and configuration necessary to comply with any governmental rules relating to water produced for sale to a potable water system or utility. Lessor will not interfere with any sanitary control easement nor impair the quality of the Water from its natural condition. The following items or activities are prohibited within a sanitary control easement: any feed lot or poultry facility, septic or sewage-related tank, apparatus, or other facility or infrastructure regulated by any governmental authority. Upon request by Lessee, Lessor will execute a Sanitary Control Easement as described in Title 30 Texas Administrative Code, Section 290.47, as amended, (or any similar or successor regulation) which will provide for a sanitary control easement around each well site.

N. Condemnation: Insurance Proceeds. Lessor assigns to Lessee an interest in and to any condemnation awards or insurance proceeds which would otherwise be payable to Lessor to the extent they are for the water rights conveyed by this Lease or are for improvements, equipment or property installed by Lessee on or within the surface or subsurface interests covered by this Lease.

O. Miscellaneous. All notices given pursuant to this Lease shall be in writing mailed by first class U.S. mail postage prepaid, certified, return receipt requested, addressed to the addresses above. A party may change its address for notice by giving notice to the other. This Lease may not be amended except in a writing signed by Lessor and Lessee. No third party shall be deemed a third party beneficiary hereof. Interpretation and construction of this Lease shall be governed by the laws of the State of Texas. This Lease constitutes the entire agreement between Lessor and Lessee and supersedes all oral statements and prior understandings relating hereto. except as set forth in this Lease, prior representations, warranties, or agreements have been made by Lessor or Lessee to the other with respect to this Lease or the obligations of Lessor or Lessee. If any part of this Lease is illegal, invalid or unenforceable under present or future Laws, then the remainder of this Lease shall not be affected and in lieu of such part there shall be added a clause or provision as similar in terms to such illegal, invalid, or unenforceable part as may be possible and be legal, valid, and enforceable.

P. Audits. Once per calendar year during this Lease (at Lessee's expense), Lessee shall engage, an independent reputable accounting firm to audit Lessee's books and records relating to this Lease and all other leases of land in the AMI. Lessee will make the results of each audit available to Lessor and will promptly correct any errors revealed in such audits.

Q. Memorandum of Lease: Future Assurances. Lessor and Lessee agree to execute a Memorandum of Lease to be recorded in each county where the Land is located. Lessor and Lessee shall execute and deliver to each other any document that Lessee determines to be necessary or useful to fully carry out the transactions covered by this Lease. Lessee may file a copy of this Lease, the Memorandum or any document referred to in this paragraph, in any public office or in compliance with any governmental regulations, transfer program rules or recording requirements.

R. Information from Lessor. As a condition for the payment of proceeds to Lessor, Lessee shall be entitled to receive a signed instrument or division order containing the fractional or decimal interest in production claimed by Lessor, a warranty of title as to such interest, an indemnification for payments made for such interest, the taxpayer identification number of Lessor and any other information needed by Lessee to make payments hereunder. If Lessor's interest in the Land is subject to a deed of trust, mortgage or other lien, Lessor shall provide Lessee with an instrument that subordinates such lien to the terms of this Lease.

S. Counterpart. This lease may be executed in counterparts, each of which shall be considered an original for all purposes.

T. Assignments. The rights and estate of any party hereto may be assigned from time to time in whole or in part. No change or division in the ownership of said land or of the royalties, or other monies, or the right to receive the same, however effected, shall be binding upon the then record owner of this lease until thirty (30) days after there has been furnished to such record owner at his or its principal place of business by lessor, or lessor's heirs, successors, assigns, notice of such change or division, supported by either originals or duly certified copies of the instruments, which evidence _____ change or division, or other documents as shall be necessary in the opinion of such record owner to establish the validity of such _____ division.

LESSOR:

LESSEE:

By: _____

By: _____

Tax ID/SSN: _____

Name and Title: _____

THE STATE OF TEXAS

§

COUNTY OF _____

§

§

This instrument was acknowledged before me on _____, 200____, by
_____ in his capacity as _____ of _____, a
_____ on behalf of said _____.

Notary Public – State of Texas

THE STATE OF TEXAS

§

COUNTY OF _____

§

§

This instrument was acknowledged before me on _____, 200____, by
_____ in his capacity as _____ of _____, a
_____ on behalf of said _____.

Notary Public – State of Texas

Exhibit "A"

Attached To Arid Made A Part Of That Certain Memorandum of Groundwater Lease Executed
the _____ day of _____, 200__, by and between _____, a
_____, as Lessor, and _____, as Lessee

COVERING THE FOLLOWING DESCRIBED LANDS:

SIGNED FOR IDENTIFICATION:

By: _____

MEMORANDUM OF GROUND WATER LEASE

STATE OF TEXAS

KNOW ALL MEN BY THESE PRESENTS:

COUNTY OF _____

THAT, effective as of _____, 2003 a Groundwater Lease was made by and between _____, a _____, whose address is _____, (hereinafter referred to as "LESSOR"), and _____, a _____, whose address is _____ (hereinafter referred to as "LESSEE"), whereby Lessor granted exclusively unto Lessee the right to explore, drill, produce and market water from the _____ n the following described lands in _____, covering _____ acres of land, more or less, (hereinafter referred to "said Land");

Exhibit "A" Attached Hereto And Made A Part Hereof

Subject to the other provisions therein contained, said Groundwater Lease shall be for a primary term of ___ years. Complete executed copies of said Groundwater Lease are in the possession of Lessor and Lessee.

The undersigned recognizes and ratifies all of the terms and provisions of the above Lease and hereby acknowledges receipt of full and adequate consideration for same in hand paid and/or provided for in said lease.

This Memorandum may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute but one and the same instrument.

IN WITNESS WHEREOF, THIS MEMORANDUM is dated and effective the _____ day of _____ 200_, and is executed as of the date of each acknowledgement a part hereof.

LESSOR:

By: _____

LESSEE:

By: _____
Name and Title: _____

THE STATE OF TEXAS

§
§
§

COUNTY OF _____

This instrument was acknowledged before me on _____, 200____, by
_____ in his capacity as _____ of _____, a
_____ on behalf of said partnership.

Notary Public – State of Texas

§

THE STATE OF TEXAS

§
§

COUNTY OF _____

This instrument was acknowledged before me on _____, 200____, by
_____ in his capacity as _____ of _____, a
_____ on behalf of said partnership.

Notary Public – State of Texas

EXHIBIT C

OPTION AGREEMENT

THIS OPTION AGREEMENT (the "Agreement") is entered into by and between the five (5) persons or groups identified below as landowners (individually, a "Landowner" and collectively, the "Landowners"), and _____, a Texas limited liability company, and its successors and assigns (the "Optionee").

RECITALS:

A. The following Landowners are the legal and equitable owners of the following affected property situated in _____ County, Texas:

* is Landowner #1 and owner of the property described on Exhibit "A-1" attached hereto; * is Landowner #2 and owner of the property described on Exhibit "A-2" attached hereto; * is Landowner #3 and owner of the property described on Exhibit "A-3" attached hereto; * is Landowner #4 and owner of the property described on Exhibit "A-4" attached hereto; and * is Landowner #5 and owner of the property described on Exhibit "A-5" attached hereto. Exhibits "A-1" through "A-5" attached hereto, are hereby incorporated herein and made a part hereof for all purposes. The land described on such exhibits collectively is referred to herein as the "Property," and for all purposes hereunder, each of the Landowners shall be deemed to own the number of acres specified on Exhibits "A-1" through "A-5" attached hereto.

B. Optionee is desirous of acquiring the exclusive right and option (but without any obligation) to lease the Property, at an agreed price and terms, all subject to the conditions and other agreements hereinafter set forth, and Landowners are agreeable to granting such an option to Optionee, upon such conditions and agreements.

NOW, THEREFORE, for and in consideration of the aforementioned recitals, the mutual covenants and undertakings of the parties hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency thereof being acknowledged and confessed, Landowners and Optionee agree as follows:

1. Grant and Term of Option. For the consideration expressed in Paragraph 2 below, Landowners hereby grant to Optionee the exclusive right and option (the "Option") during three (3) successive one (1) year terms (collectively, the "Term") to lease the Property. In the event the Option is exercised in accordance with the terms hereof, the parties shall enter into the lease attached hereto as Exhibit "B" and made a part hereof for all purposes (the "Lease").

2. Consideration for Grant of Option. The Option is granted for the first year of the Term in consideration of Optionee's payment to each of the Landowners the sum of _____ and No/100 Dollars (\$ _____) for each acre owned by such Landowner, as set forth on Exhibit "A" attached hereto, simultaneously with the full execution hereof, the receipt and sufficiency of which are hereby acknowledged and confessed by Landowners. If Optionee desires to extend the Option for the second and third years of the Term, Optionee shall pay a like sum to Optionee on or before each anniversary of the effective date hereof, as applicable. Once the Option has been exercised, or the Term allowed to lapse, no further option fee shall be payable. If the Option is not exercised during the Term, the aforementioned sums previously paid

by Optionee to Landowners shall be retained by Landowners in full consideration of the granting of the Option. If the Option is exercised during the Term, the aforementioned sure shall not be credited to the rents under the Lease.

3. Exercise of Option. Optionee may exercise the Option by delivery of written notice to Landowners of its decision to do so at any time during the Term. Within ten (10) business days following delivery of such Landowners and Optionee shall execute the following: (a) the Lease; (b) a Memorandum of Lease in recordable form to give public notice of the existence of the Lease and the Property affected, but not the economic terms thereof; and (c) such other documents and instruments as may be reasonably necessary to consummate the transaction contemplated hereby. All closing costs shall be paid by Optionee; provided, however, that each party shall pay its own attorneys' fees.

4. Operation of Property During the Term. During the Term, Optionee shall have full access to the Property, to conduct any feasibility or other tests, studies, borings or investigations Optionee deems necessary or desirable in connection with Optionee's determination, in its sole and absolute discretion, whether or not the Property is suitable for the purpose of developing a wind farm (i.e., the construction, installation, operation and maintenance of a site for the conversion of wind energy to electricity, the collection and transmission of wind generated electric power, with wind turbines, transmission lines and all other related equipment). Without limiting the generality of the foregoing, Optionee is specifically entitled to construct, maintain and utilize one (1) or more eighty (80) meter test towers. Such investigations and studies shall be at the sole cost, expense and liability of Optionee, and Landowners shall not be liable or responsible therefor. In the event that the Option lapses without exercise, Optionee shall promptly restore the Property to its prior condition, or with the consent of Landowners to another condition reasonably acceptable to Landowners. Subject to the foregoing, Landowners may continue to operate the Property as now operated for farm and ranch purposes, so long as the same does not interfere with such tests and studies. Landowners may not further develop the Property during the Term.

5. Representations and Warranties. Each party hereto represents and warrants to the other that such party (a) has and, to the extent applicable, the person executing this Agreement on behalf of such Landowner, has received all requisite power and authority to execute this Agreement and consummate the transactions contemplated hereby, without the joinder or consent of any other person or party; (b) has not been represented by a real estate broker or agent; and (c) has been represented by counsel of its own choosing. Landowners further represent and warrant to, and covenant agree with, Optionee that no portion of the Property is (1) encumbered by a lien or mortgage and that any future lien or mortgage shall be subject to the Option and/or Lease, as applicable; and (ii) subject to any lease or rental, occupancy or other agreement, including, without limitation, any oil, gas or other mineral lease, that would interfere with Optionee's development, maintenance and operation of the Property as a wind farm, as more fully described in the Lease.

6. Confidentiality. Landowners agree that the terms and conditions of this Option, and of the Lease, and any documentation or information provided by Optionee to Landowners in connection with the Option or the Lease (including, without limitation, the payment of the rent under the Lease) shall be kept confidential subject to state or federal

laws that require disclosure or reporting of any of the foregoing documentation or information.

7. Memorandum of Option. The parties shall execute and deliver a Memorandum of Option simultaneously with the execution and delivery hereof, and Optionee shall be entitled to record same at its own expense.

8. Notices. All notices, demands, statements, and requests (collectively, a "notice") required or permitted to be given under this Agreement must be in writing and shall be deemed to have been properly given or served as of the date hereinafter specified: (i) on the date of personal service upon the person to whom the notice is addressed or if such person is not available the date such notice is left at the address of the person to whom it is directed, (ii) on the next business day following the date the notice is postmarked by the United States Post Office, provided it is sent prepaid, registered or certified mail, return receipt requested, and (iii) on the date the notice is delivered by a courier service (including Federal Express, Express Mail or similar operation) to the address of the person to whom it is directed, provided delivery is confirmed by the courier service. The addresses of the signatories to this Agreement are set forth below:

To Landowners: To _____

9. Miscellaneous.

(a) This Agreement contains the entire agreement between the parties relating to the Option herein granted and shall be amended only by an instrument in writing executed by the parties hereto.

(b) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns, as the case may require.

(c) In the event of any controversy, claim or dispute between the parties hereto which arises out of, or relates to, this Agreement or the breach hereof, the prevailing party shall be entitled to recover reasonable attorneys' fees, costs and expenses.

(d) This Agreement shall be performable in _____ County, Texas, and is to be construed in accordance with the laws of the State of Texas.

This Agreement may be executed in multiple counterparts, each of which shall constitute an original.

Optionee may assign this Option without the prior written consent of Landowners.

All references in this Agreement to the "date hereof" or the "effective date" or "the full execution hereof" shall be deemed to refer to the last date, in point of time, which all parties hereto have fully executed this Agreement and their signatures have been acknowledged.

[A separate signature page for each party is attached to the Option Agreement. Examples follow for the Optionee and a Landowner.]

**EXHIBIT D
LEASE FORM**

SURFACE LEASE

This SURFACE LEASE (the "Lease") is made and entered into effective as of the Effective Date by and between (collectively, the "Owner") and _____, a Texas limited liability company (the "Lessee").

1. Basic Lease Information/Definitions.

"Effective Date" _____

"Owner" _____

"Lessee" _____, a Texas limited liability company

Approximately _____ acres of land, more or less, as more fully described on Exhibit "A" attached hereto and incorporated herein for all purposes.

"Lease Term:" The period commencing on the Effective Date and continuing for a period of *thirty* (30) years thereafter, expiring on _____. The term "Lease Term," as used herein, shall include all renewals or extensions hereof unless the context clearly indicates to the contrary.

"Renewal Option:" A period of thirty (30) years, commencing on the expiration of the Lease Term.

"Rental:" Rental shall be paid in accordance with Section 3 hereof.

"Permitted Use:" Lessee may continuously use and occupy the Premises for the purpose of wind energy conversion to electricity on the Premises, including, without limitation, (a) the collection and transmission by Lessee of wind generated electric power on the Premises; (b) the construction, installation, operation and maintenance by Lessee of wind turbines, transmission lines and all other related equipment and facilities on the Premises (the "Improvements") for their use or operation in conjunction with large wind turbines on the Premises (the "Wind Energy Projects"); and (c) access by Lessee to and from Wind Energy Projects on the Premises and for any purposes incidental thereto. Lessee shall be entitled to use or remove any improvements, if any, now located on the Premises solely for the purposes herein intended.

"Owner's Address:"

Telephone: Fax:

with copy to:

Telephone: Fax:

"Lessee's Address:" _____, President

Telephone: Fax:

with a copy to:

Telephone: Fax:

Each reference in the Lease to any of the information and definitions set forth in this Section 1 shall mean and refer to the information and definitions hereinabove set forth and shall be used in conjunction with and limited by all references thereto in the provisions of this Lease.

2. Granting Clause. Owner, for and inconsideration of the Rental and other charges to be paid hereunder and the other covenants and agreements to be performed by Lessee, hereby demises and leases the Premises to Lessee, and Lessee hereby leases the Premises from Owner on the terms and conditions set forth herein, commencing on the Effective Date and ending on the last day of the Lease Term unless sooner terminated or extended as herein provided.

3. Rental. Lessee shall pay to Owner, at Owner's Address or at such other address as Owner may designate by notice in writing to Lessee, the following Rental (herein so called), for the Lease Term.

a. Royalty. Commencing with the first day of production of wind generated electric power on the Premises (the "Production Commencement Date"), Lessee will pay Owner the following "Royalty": (i) from the Production Commencement Date through the fifteenth (15th) anniversary of the Production Commencement Date, four percent (4%) of Gross Revenues (as defined below); (ii) from the day after the fifteenth (15th) anniversary of the Production Commencement Date, through the thirtieth (30th) anniversary of the Production Commencement Date, six percent (6%) of _____ the Gross Revenues, and (iii) from the day after the thirtieth (30th) anniversary of the Production Commencement Date until the expiration of the Renewal Option (if exercised) eight percent (8%) of the Gross Revenues. Each payment made in accordance with this subsection shall be referred to as a "Royalty Payment." Each percentage referenced above shall be referred to as a "Royalty Rate". Royalty Payments shall be made quarterly within forty-five (45) days after the end of each calendar quarter (being February 15th, May 15th, August 15th and November 15th) beginning with the first calendar quarter after the Production Commencement Date; provided however, Royalty for the full or partial calendar quarter in which this Lease terminates or expires shall be due and payable on the effective date of such expiration or termination ("Termination Date"). As between the parties constituting "Owner," the Royalty Payments shall be divided in the following ratio:

b. Definition of "Gross Revenues."

i. For the purposes of this Lease, "Gross Revenues" is defined as the sum of all gross receipts of Lessee from the sale of electricity generated by Lessee on the Premises, net of all expenses of collection, including, without limitation, attorneys' fees and court costs. Gross revenues shall not include any tax or other credits received by, or paid to, Lessee by any governmental or quasi governmental authority, including, without limitation, any renewable energy credits, carbon dioxide credits or other federal income tax credits or any property tax credits or abatements.

ii. For purposes of determining payments in accordance with the foregoing, when electricity from wind energy projects on both the Premises and other property is delivered to a common meter, the number of kilowatt hours of electricity generated on the Premises shall be determined for each quarterly period in accordance with the following formula:

$$(CM) \left(\frac{P}{PCM} \right) = TKW$$

where (i) CM is the total number of kilowatt hours available for sale at such common meter, (ii) P is the total number of kilowatt hours generated by Wind Energy Projects located on the Premises, as measured by individual meters for each such _____ Wind Energy Project, (iii) PCM is the total number of kilowatt hours generated by wind energy projects located on all properties (including both the Premises and other properties) that deliver electricity to such common meter, as measured by individual meters on each wind energy project that delivers electricity to such meter, and (iv) TKW is the total number of kilowatt hours generated by Lessee on the Premises for use in determining the payments due to Owner in accordance *with* this Section 3.

iii. In conjunction with each Royalty Payment made to Owner, Lessee shall furnish to Owner a statement setting forth the amount of Gross Revenues received by Lessee during the calendar quarter and the Royalty Payment due Owner for such calendar quarter.

4. Delinquent Payments. If Lessee should fail to pay Owner any sum to be paid by Lessee to Owner hereunder within thirty (30) days after such payment is due, interest on the unpaid amount shall accrue at a rate of ten percent (10%) per annum *or* the maximum rate allowed by law, whichever is lesser, from the date payment was due until the date payment is made. An adjustment payment made by Lessee as the result of an independent audit conducted at Lessee's expense shall not be subject to a late charge as described herein.

5. Renewal and Extension. Should Lessee wish to exercise the Renewal Option, Lessee should advise Owner in writing of Lessee's desire not later than one hundred eighty (180) days after the expiration of this Lease.

6. Use of the Premises.

a. Permitted Use. Lessee may use the Premises for the Permitted Use specified in Section 1, and for any other lawful purpose or purposes associated therewith, including, without limitation, the removal of any fences, tanks and other fixtures and personalty on or under the surface in order to install or have access to the fixtures and equipment necessary for the Permitted Use .

b. Owner's Use. Subject to Lessee's rights under Section b.a., Owner shall have the subordinate and inferior right to use of the Premises for farm and ranch purposes which do not, in Lessee's judgment, interfere with Lessee's use, enjoyment, and occupancy of the Premises. Any such use by Owner shall be at its own risk, expense and liability and Lessee shall have no responsibility therefor.

7. Installation and Maintenance of the Improvements.

a. Installation of Improvements. Other than the Improvements, Lessee shall not cause any improvements to be installed on the Premises without the prior written consent of Owner, which consent shall not be unreasonably withheld or delayed. All construction work done by Lessee on the Premises shall be in compliance with all governmental requirements. All

improvements installed by Lessee shall be and retrain the property of Lessee and may be removed by Lessee.

b. Keeping the Premises Clear. Lessee shall take good care of its Improvements and use good faith efforts to keep the same free from debris and waste at all times, except those caused by Owner. Lessee shall use commercially reasonable efforts to keep the Premises neat and clean at all times, and shall remove all refuse, litter and debris created by Lessee and its invitees, licensees, agents and contractors from the Premises; provided, however, that Lessee shall not be required to remove the remains of any improvements on the Premises as of the Effective Date or subsequently constructed by Owner.

c. Utilities. Lessee shall pay promptly before same is due, all electrical and other utility charges, if any, relating to the Wind Energy Projects. Lessee shall cause all such accounts for utilities, if any, to be placed in Lessee's name.

8. Holding Over. In the event Lessee occupies the Premises or any part thereof after the expiration or earlier termination of this Lease, unless otherwise agreed in writing by Owner, Lessee shall hold the Premises as a tenant-at-will only at a daily rental equal to the average Rental over the preceding calendar year of the term of the Lease calculated on a *per diem* basis. In no event shall such holding over constitute or be construed as a renewal or extension of this Lease and, upon the expiration of the Lease Term and/or the term of the Renewal Option, as the case may be, or the earlier termination of this Lease, Lessee shall immediately surrender the Premises to Owner on demand by Owner.

9. Eminent Domain.

a. Definitions. The following definitions apply in construing provisions of this Lease relating to a taking of all or any part of the Premises or the Improvements or any interest in them by eminent domain or inverse condemnation:

i. "Taking" means any taking by eminent domain or by inverse condemnation or for any public or quasi-public use under any statute. The transfer of title may be either a transfer resulting from the recording of a final order in condemnation or a voluntary transfer or conveyance to the condemning authority or entity under threat of condemnation in avoidance of an exercise of eminent domain. The Taking shall be considered to take place as of the later of (x) the date actual physical possession is taken by the condemnor or (y) the date on which the right to compensation and damages accrues under the law applicable to the Premises.

ii. "Total Taking" means the Taking of the fee title to all the Premises.

iii. ii "Substantial Taking" means the Taking of so much of the Premises that the remaining Premises would not be economically and feasibly usable, in Lessee's opinion, by Lessee in connection with the Permitted Use.

iv. "Partial Taking" means any Taking other than a Total Taking or Substantial Taking.

b. Notice to Other Party. The party receiving any notice of the kinds specified below shall promptly give the other party notice of the receipt, contents and date of the notice received:

- i. Notice of intended Taking.
- ii. Service of any legal process relating to condemnation of the Premises.
- iii. Notice in connection with any proceedings or negotiations with respect to such condemnation.
- iv. Notice of intent or willingness to make or negotiate a private purchase, sale or transfer in lieu of condemnation.

c. Representative of Each Party; Effectuation. Owner and Lessee shall each have the right to represent its respective interests in each proceeding or negotiation with respect to a Taking or intended Taking and to make full proof of his or its claims. Owner and Lessee each agrees to execute and deliver to the other any instruments that maybe required to effectuate or facilitate the provisions of this Lease relating to condemnation.

d. Total or Substantial Taking. On a Total Taking, Lessee's obligation to pay Rent shall terminate on the date of Taking. If Lessee determines that the Taking is a Substantial Taking, Lessee may, by notice to Owner given within one hundred twenty (120) days after Lessee receives notice of intended Taking, elect to treat the Taking as a Substantial Taking. If Lessee does not so notify Owner, the Taking shall be deemed a Partial Taking.

e. Delivery of Possession. Lessee may continue to occupy the Premises until the day of Taking.

f. Award for Total Taking or Substantial Taking. On a Total Taking or Substantial Taking, the award therefor shall be distributed and paid to Lessee and Owner as their respective interests under this Lease (as if the same had not been terminated) may appear. In determining their respective interests:

- i. The interest of Owner shall be based on the value of Owner's reversionary interest in the Premises (excluding any of Lessee's Improvements) taking into account the leasehold estate created by this Lease, the amount of rental paid by Lessee hereunder and all of the other terms and provisions of this Lease; and
- ii. The interest of Lessee shall be based on the value of Lessee's interest in the Premises, including the value of the Lessee's Improvements for the Term and the value of Lessee's leasehold estate and interests under this Lease.

g. Partial Taking. In the event of a Partial Taking, Owner shall be entitled to a portion of the award equal to the value of the fee simple title to the portion of the Premises taken, exclusive of the value of Lessee's Improvements and Lessee shall be entitled to the balance of the award. In such event, this Lease shall remain in full force and effect covering the remaining portion of the Premises.

h. Taking the Less than Fee Title. On any Taking of the temporary use of all or any part or parts of the Premises for a period, or of any estate less than the fee, ending on or

before the expiration date of the Term, neither the Term nor the Rent shall be reduced or affected in any way, and Lessee shall be entitled to any and all awards for the use or estate taken. If any such Taking is for a period extending beyond the expiration date of the Term, the Taking shall be treated under the foregoing provisions for Total, Substantial and Partial Takings.

10. Taxes and Assessments. Lessee shall pay only the additional taxes, assessments and charges, general and specific, that may be levied or assessed by reason of Lessee's use of the Premises and Improvements and equipment situated thereon, including without limitation taxes, assessments, and charges of any nature levied or assessed against Lessee's leasehold interest hereunder or any Improvements on the Premises constructed by or belonging to Lessee. Lessee shall not be responsible at any time during the term of this Lease for any taxes or assessments currently levied or assessed against the Premises, or the Owner's estate concurrent use, or occupancy, as the same may be adjusted from time to time. Owner shall be responsible for all other taxes, assessments and charges. Notwithstanding the foregoing, Owner and Lessee agree to reasonably cooperate with each other to reduce the taxes, assessments and charges that may be levied or assessed with respect to the Premises and Lessee's use thereof

11. Default and Remedies.a. Events of Default. The following events shall be deemed to be events of default by Lessee under this Lease:

i. Lessee shall fail to pay within thirty (30) days after written notice from Owner to Lessee of its failure to pay when due any Rental or any other sum payable by Lessee under this Lease.

ii. Lessee shall fail to comply with any other term, provisions or covenant of this Lease within ninety (90) days after notice from Owner to Lessee specifying wherein Lessee has failed to comply; provided, however, that if the nature of Lessee's obligation is of such a nature that it cannot reasonably be cured within such 90 day period, Lessee shall not be deemed to be in default so long as Lessee commences curing such failure within such 90 day period and diligently prosecutes same to completions.

b. Remedies. Upon occurrence of any event of default by Lessee, Owner may enforce the provisions of this Lease in any manner provided by law or in equity. With respect to any amounts due to Owner hereunder and collected by an attorney after default or through judicial, bankruptcy, or probate proceedings, Lessee shall pay all reasonable costs of collection, including, without limitation, reasonable attorney's fees and court costs.

12. Waiver of Statutory Liens. In consideration of the mutual benefits arising under this Lease, Owner, to the extent permitted by the laws and Constitution of the State of Texas, hereby waives its statutory liens created under Chapter 54 of the *Texas Property Code* (or the successor thereto) in any property of Lessee (including, but not limited, to all fixtures, machinery, equipment, furnishings, and other articles of personal property now or hereafter placed in or on the Premises by Lessee). Owner shall execute any waivers or other written evidence of the provisions of this section as Lessee may reasonably request. Owner shall also execute any easements over, across or under the Premises that Lessee may reasonably request.

13. Exclusion of Mineral Estate. This Lease covers only the so-called surface estate of the Premises and does not include any part of the mineral estate. However, Lessee may make

such use of the subsurface as may be necessary or desirable to support and utilize the Improvements or as is otherwise necessary for the Permitted Use.

14. Owner's Representations and Covenants. Owner hereby represents and covenants as follows:

a. Owner's Authority. Owner is the sole owner and holder of fee simple title to the surface estate of the Premises subject to any and all easements, rights-of-way, covenants, conditions, restrictions, outstanding mineral leases, interests or royalty interests, if any, relating to the Premises, to the extent, the same may be in force and effect and either shown of record in the Office of the County Clerk of _____ County, Texas, or apparent on the Premises.

b. No Interference. Lessee shall peaceably and quietly hold and enjoy the Premises from and after the Effective Date and continuing until the expiration or earlier termination of this Lease, without hindrance from Owner or those claiming title or possession by, through or under Owner, subject to the terms and conditions of this Lease, including the performance by Lessee of all of the terms and conditions of this Lease to be performed by Lessee. Owner shall not materially interfere with the wind speed or wind flow over the Premises by any act or omission by Owner on the Premises.

c. Liens. Owner represents that Owner has not granted any mortgages, deeds of trust, or voluntary liens or security interests encumbering all or any portion of the Premises.

d. Third Parties. There are no currently existing purchase options, rights of refusal or sales contracts in favor of any third parties relating to the Premises or any interest therein that could materially interfere with the development, construction or operation of Wind Energy Projects on the Premises or that could materially and adversely affect or change the wind flow over the Premises.

15. Notices.

a. Payments. All Rental and other payments required to be made by Lessee to owner hereunder shall be payable to Owner at the address set forth in Section 1 or at such other address as Owner may designate in writing,

b. Notices. All notices required by this Lease shall be delivered by hand or sent by United States mail, postage prepaid, certified or registered mail, addressed as set forth in Section 1, or at such other address as any of said parties have theretofore specified by written notice delivered in accordance herewith. Any notice or document (excluding Rental and other payments) required to be delivered hereunder shall be deemed to be delivered upon receipt if personally delivered, and whether or not received, when deposited in the United States mail, postage prepaid, certified or registered mail (with or without return receipt requested), addressed as indicated above. Either Owner or Lessee may change its respective addressee, address, copy recipient and/or its address by giving notice of such change to the other *party* in the manner provided herein; provided, however, that for this purpose only, unless and until such written notice is actually received, the addressee, address, copy recipient and its address specified for each party shall be deemed to continue in effect for all purposes.

16. Mortgagee Provisions.

a. Right to Mortgage Interest. Notwithstanding anything herein to the contrary, Lessee may mortgage, pledge or otherwise encumber Lessee's leasehold interest in the Premises and any improvements constructed on the Premises by Lessee to a Mortgagee. The *term* "Mortgagee" means either (i) the mortgagee under a Mortgage, or (ii) the trustee and beneficiary under a deed of trust which for purposes hereof shall constitute a Mortgage; in each case, prior to the time such person becomes the lessee under this Lease. The term "Mortgage" means an indenture of first mortgage or first deed of trust and/or other lien instruments to secure borrowings or obligations of Lessee to a Mortgagee. No Mortgage shall encumber or affect in any way the interest of Owner hereunder or Owner's fee interest in and to the Premises.

b. The Mortgagee under the Mortgage affecting the Premises shall be entitled to receive notice of any default by Lessee, provided that such Mortgagee shall have delivered a copy of a notice in the manner provided in this subsection and in the form hereinafter contained to Owner. The form of such notice shall substantially be as follows:

The undersigned, whose address is _____, does hereby certify that it is the Mortgagee, as defined in that certain Surface Lease, a memorandum or short form of which was recorded on _____, in the Real Property Records of _____ County, Texas, of the Premises, as defined in said document. In the event that any notice shall be given of the default of the Lessee, a copy thereof shall be delivered to the undersigned who shall have all rights of the Lessee to cure such default. Failure to deliver to copy of such notice to the undersigned shall in no way affect the validity of the notice of the default as it respects the Lessee, but shall make the same invalid as it respects the Mortgage of the undersigned.

Any such notice to a Mortgagee shall be given in the same manner as provided in Section 15. The giving of any notice of default or the failure to deliver a copy to the Mortgagee shall not create any liability on the part of Owner. If any notice shall be given of the default of Lessee and Lessee has failed to cure or commence to cure such default within the initial 90 day cure period provided in Section I 1 of this Lease, then any such Mortgagee, which has given notice as above provided, shall be entitled to receive an additional notice given in the manner provided in this section that Lessee has failed to cure such default and such Mortgagee shall have *thirty* (30) days after said additional notice to cure any such default or, if such default cannot be cured within thirty (30) days, to diligently commence curing within such time and diligently pursue such cure to completion within a reasonable time thereafter.

c. Owner agrees that upon the occurrence of any event of default under the documents, instruments or agreements executed by Lessee in connection with the Mortgage, the Mortgagee may (but shall not be obligated to) assume, or cause a new lessee or purchaser of the leasehold estate created hereby to assume, all the interests, rights, and obligations of Lessee thereafter arising under this Lease.

d. Owner agrees to reasonably consider any written documentation reasonably requested by a Mortgagee to confirm the rights that are provided to the Mortgagee in this Section 16.

17. Miscellaneous.

a. Confidentiality. Owner agrees that the terms and conditions of this Lease and any documentation or information provided by Lessee to Owner in connection with the confirmation of Royalty Payments made by Lessee hereunder shall be kept confidential subject to state or federal laws that require disclosure or reporting of any of the foregoing documentation or information.

b. Applicable Law Venue. This Lease shall be construed and interpreted in accordance with the laws of the State of Texas. Any dispute arising out of or in connection with this Lease shall be resolved in the state or federal courts located in County.

c. Severability. In case any one or more of the provisions contained in this Lease shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Lease shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

d. Entire Agreement. This Lease constitutes the sole and entire agreement between the parties and cannot be amended except by written instrument signed by both parties.

e. Binding Nature. This Lease shall be binding upon and shall inure to the benefit of Owner and Lessee, and their respective heirs, successors, assigns, and legal representatives,

f. Authority to Enter into this Lease.

i. Lessee has the unrestricted right and authority and has taken all necessary action to authorize Lessee to execute this Lease and to grant to Owner the rights hereunder. Each person signing this Lease on behalf of Lessee is authorized to do so. When signed by Lessee, this Lease constitutes a valid and binding agreement enforceable against Lessee in accordance with its terms.

ii. Owner has the unrestricted right and authority and has taken all necessary action to authorize Owner to execute this Lease and to grant to Lessee the rights hereunder. The person signing this Lease on behalf of Owner is authorized to do so. When signed by Owner, this Lease constitutes a valid and binding agreement enforceable against Owner in accordance with its terms.

g. Relationship of the Parties. The relationship created hereby shall be the relationship of landlord and tenant and shall not be construed in any manner to constitute a partnership, joint venture, or principal-agent relationship between the parties hereto, and neither party shall have authority to bind the other, except as expressly provided herein.

h. Captions. The captions used herein are for convenience only and do not limit or amplify the provisions hereof.

i. Gender. Words of any gender used in this Lease shall be held and construed to include any other gender and words in the singular number shall be held to include the plural, unless the context otherwise requires,

j. Memorandum of Lease. Lessee shall have the right to record a memorandum of this Lease in a form mutually acceptable to Lessee and Owner, and Owner shall execute any such memorandum upon written request of Lessee. Neither Owner nor Lessee shall record this Lease in its entirety.

k. Counterparts. This Lease may be executed in multiple counterparts, no one of which need be executed by all parties hereto, each of which shall constitute an original. Counterparts thus executed shall together constitute one and the same instrument.

l. Right to Inspect Records. Lessee shall keep true, accurate and complete books, records, accounts, contracts and data sufficient to support and to verify calculation of Rental owned under this Lease. Owner shall have the right at all reasonable times and upon reasonable notice, personally or by representative, to inspect the books, accounts, contracts, records and data within the possession or control of Lessee pertaining to the production, transportation or sale of electricity produced from the Premises at the office of Lessee, including, (without limitation) statements from third parties which verify price, value or quantity of electricity generated by wind energy projects on the Premises; provided that Owner may not take copies of any such information unless agreed to in writing by Lessee. Owner shall be required to keep any such information confidential subject to state or federal laws that require disclosure or reporting of any of the foregoing documentation or information (and if allowed by law, shall execute a confidentiality agreement evidencing same).

m. Meter Calibration. Lessee shall test and calibrate the meters at the common substations and/or meters at property lines in accordance with the power purchase contracts for purchase of electricity generated by Wind Energy Projects on the Premises and, in any event at least one (1) time during any three (3) consecutive calendar years.

n. Operated as single property. The parties constituting Owner are acting in concert. Lessee shall be entitled to treat the Property as a single property and the Owner as a single owner. Lessee shall not be required to see to allocations among the parties constituting Owner.

o. Assignment. Lessee may freely assign all or any portion of, or interest in, Lessee's rights, title and interest created hereby, and upon any such assignment, the previous Lessee shall be fully released herefrom, but only as to the rights, title and interest so assigned.

18. Exhibits. All exhibits referred to in this Lease are listed below and attached hereto and incorporated herein for all purposes.

Exhibit "A" - Legal Description of Premises

IN WITNESS WHEREOF, the parties have executed this Lease to be effective as of (although not necessarily on) the Effective Date set forth in Section I above.

SIGNATURE PAGES FOLLOW.

[Separate signature pages for each Landowner follow, in the following format.]

SIGNATURE PAGE TO THE SURFACE LEASE

EXECUTED by Landowner on this _____ day of _____, 200__.

LANDOWNER:

Printed Name: Landowner #1

THE STATE OF TEXAS §

COUNTY OF §

BEFORE ME, the undersigned authority, a Notary Public in and for said state, on this day personally appeared _____, known or proved on acceptable evidence to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that (s)he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this _____ day of _____, 200__.

Notary Public in and for the State of Texas

JAY K. RUTHERFORD

Employment Issues for the Cattle Raiser

JAY K. RUTHERFORD

Jay K. Rutherford is a partner in the Labor and Employment section of Jackson Walker. He is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. His practice consists primarily of representing management in labor, employment discrimination, wrongful termination, sexual harassment and civil rights litigation. His practice also consists of counseling clients in all matters affecting the employer-employee relationship and compliance with all state and federal employment laws and regulations including all discrimination and wrongful termination laws, the Fair Labor Standards Act, Title VII of the Civil Rights Acts of 1964 and 1991, the Age Discrimination in Employment Act, the Americans With Disabilities Act, the Family and Medical Leave Act, and all other state and federal labor and employment statutes. He also advises clients on all aspects of personnel and employment policies and practices.

Mr. Rutherford was named a Super Lawyer by *Texas Monthly Magazine* in 2003 and 2004. He was also named one of the top Tarrant County Employment Lawyers by *Fort Worth, Texas* magazine in December, 2001 and again in 2002 and 2003. He was honored as one of the Top 40 Under 40 by *Fort Worth Business Press* in 2002. He was the recipient of the John Collier Award by Camp Fire USA First Texas Council in 2002 and received the President's Award in 2003. Mr. Rutherford was also named in the "Who's Who in American Law, 2002."

Mr. Rutherford is admitted to practice in all Texas state courts, United States District Courts for the Northern, Eastern, Southern and Western Districts of Texas, the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court.

MEMBERSHIPS

Mr. Rutherford is a member of the State Bar of Texas (Labor and Employment Section) and the American Bar Association (Labor and Employment Section). He is currently serving as Chairperson of the Tarrant County Bar Association's Labor and Employment Law section after previously serving as



Jay Rutherford practices labor and employment law.

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JAY K. RUTHERFORD

Secretary, Treasurer and then Vice-Chairman for the section. He has served as Chairman of the Texas Association of Business/Tarrant County Chapter and currently is serving on the State Board of Directors and is a Regional Chairman.

COMMUNITY INVOLVEMENT

Since 1996, he has served on the Board of Directors for Junior Achievement of the Chisolm Trail and is currently the Vice President of Administration of the organization after serving as Secretary/Treasurer. He also serves on the First Texas Council of Campfire Board of Directors and its Executive Committee and serves as Vice Chairman of administration. He was also a member of the Leadership Fort Worth Class of 2000. He currently is a director for the Texas Lyceum.

PUBLICATIONS / SPEAKING ENGAGEMENTS

Mr. Rutherford has appeared as a lecturer at numerous seminars and workshops for clients and for entities such as the Texas Association of Business and Lorman Business Institute.

EDUCATION

Mr. Rutherford earned his J.D. degree from the University of Texas and his B.S. degree, *magna cum laude*, in Agricultural Economics, from Texas Tech University.

EMPLOYMENT ISSUES FOR THE CATTLE RAISER

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***Board Certified in Labor and Employment Law
by the Texas Board of Legal Specialization***



Table of Contents

| | <u>Page</u> |
|---|-------------|
| I. Introduction..... | 1 |
| II. Fair Labor Standards Act (“FLSA”)..... | 1 |
| A. Application of the Act..... | 1 |
| B. Overtime Pay Provisions..... | 1 |
| C. Minimum Wage Provisions | 1 |
| D. Child Labor Provisions | 2 |
| E. Reporting Requirements | 3 |
| III. Texas Payday Law | 4 |
| IV. Federal Income Tax/Social Security Withholding | 4 |
| V. Unemployment Compensation..... | 5 |
| VI. COBRA Coverage | 6 |
| VII. Workers’ Compensation Laws..... | 7 |
| A. Who Must Comply..... | 7 |
| B. Exemptions | 7 |
| C. Subscribers vs. Non-Subscribers | 8 |
| VIII. Authorized Workers..... | 8 |
| A. Who Must Comply..... | 9 |
| B. Required Documentation | 9 |
| C. Do’s and Don’ts for Compliance | 9 |
| D. Acceptable Documentation -- See Exhibit “C.”..... | 10 |
| IX. Child Support Reporting Requirements..... | 10 |
| X. Temporary Agricultural Workers- H-2A Visas | 10 |
| XI. Migrant and Seasonal Workers..... | 12 |
| A. Requirements | 12 |
| XII. Employee vs. Independent Contractor..... | 13 |
| XIII. Safety and Health..... | 14 |
| A. Worker Protection Standard..... | 14 |
| B. Agricultural Hazard Communications Act of Texas (Right To Know)..... | 21 |
| XIV. Employment Handbooks..... | 25 |
| A. Pros and Cons | 25 |
| B. Preparation | 25 |
| C. Special Policies..... | 26 |

I. Introduction

In addition to the rigors of the job, compliance with the many Federal and State laws affecting ranchers, farmers and other agricultural employers and small businesses can be demanding. The goal of today's seminar is to alleviate some of your concerns regarding compliance by generally familiarizing you with some of the laws specific to the agricultural industry, as well as those that affect small businesses with fifteen or fewer employees.

[Brief Introduction of Topics Covered]

II. Fair Labor Standards Act ("FLSA")

A. Application of the Act

The FLSA prescribes standards for wages, overtime pay and the employment of minors. The Act covers employees whose work involves production of agricultural goods which will leave the state directly or indirectly and become a part of interstate commerce. Because they produce goods for interstate commerce, virtually **ALL** employees in agriculture are covered by the FLSA. The FLSA does, however, exempt certain employees from the overtime pay provisions, minimum wage provisions, or both.

B. Overtime Pay Provisions

Employees who are employed in "agriculture" as that term is defined in the Act are exempt from the overtime pay provisions of the FLSA. Thus, employers are not required to pay agricultural employees time and one-half of their regular rates of pay for hours worked in excess of forty (40) hours per week. The term "agriculture" as defined in the act is expansive and consists of farming and all its branches, including cultivation & tillage of soil, dairying, production, growing, cultivation, and harvesting of agricultural commodities, as well as the raising of livestock, animals or poultry. What it does not include, however, is work performed on a farm, which is not incidental to or in conjunction with such farmer's farming operations or work performed off a farm if performed by employees employed by someone other than the farmer whose agricultural products are being worked on.

C. Minimum Wage Provisions Besides being exempted from the overtime pay provisions, agricultural employers who meet the 500 "man days" test are exempt from the minimum wage provisions of the Act. An employer in agriculture who did not utilize more than 500 "man days" of agricultural labor (the Equivalent of About Seven Full-time Employees Working 5 Days a Week) in any calendar quarter of the preceding calendar year is exempt from the minimum wage and overtime pay provisions of the FLSA for the current calendar year. "**Man-day**" is defined as any day during which an employee performs agricultural work for at least one hour.

In addition to those employees of employers meeting the 500 man day test, the following employees are exempted from the minimum wage and provisions regardless of whether their employer meets the 500 man day test:

1. Employees who must be available at all hours to care for range livestock;
2. Migrant employees under 16 years who work with their parents in hand harvesting crops and are paid on the same piece rate basis as their parents;
3. Employees who:
 - (a) Are paid on a piece rate basis; and
 - (b) Were employed as hand harvest laborers fewer than 13 weeks in the previous year; and
 - (c) Commute to work daily;
4. Employees engaged in fishing or seafood processing. With respect to employees who are not exempt from the minimum wage requirements, the Act requires the following of employers:
 1. Pay minimum wage—currently \$5.15;
 2. Maintain payroll records for 3 years for each employee;
 3. Keep a statement from each exempt piece rate employee showing the number of weeks employed in agriculture during the preceding year;
 4. Keep records indicating the date of birth and parent’s name for each exempt minor paid on piece rate basis;
 5. Keep a file showing the full name, address, and date of birth for any minor under 19 who works when school is in session or in a hazardous occupation;
 6. Display “Notice to Employees” Poster—*See Exhibit “A.”*

D. Child Labor Provisions

The FLSA and Texas Child Labor Laws govern employment of minors in farm-related employment. When both the FLSA and Texas laws apply the one with the higher standard should be observed.

FLSA

Farm Employers must comply with the FLSA if they employ minors under sixteen (16) years old. Additionally, sixteen (16) years old is the minimum age for agricultural jobs:

1. Declared hazardous; and

2. During school hours.

Fourteen (14) years old is the minimum age for working in agricultural jobs:

1. Outside school hours; and

2. Not declared hazardous. Twelve (12) and thirteen (13) year olds may be employed with written parental consent or on a farm where the minor's parents are also employed. Minors under 12 may be employed with written parental consent on farms exempt from the federal minimum wage provisions (500 man-day test). Minors of any age, however, may work at any time in any job on a farm owned or operated by their parents.

Texas Child Labor Laws

Under the Texas Child Labor Laws, the employment of children fourteen (14) to seventeen (17) years of age is governed by the Act. However, the employment of children outside of school hours is exempt from the law. For employment during school hours, children who are fourteen (14) or fifteen (15) may not work more than eight (8) hours a day or forty-eight (48) hours per week. They may not work between 10:00 p.m. and 5:00 a.m. on a day followed by a school day and may not work between 12:00 a.m. and 5:00 a.m. on a day not followed by a school day. Children fourteen (14) to seventeen (17) years of age may not work in any occupation considered hazardous.

Youth Opportunity Wage

Employers of employees who are under twenty years of age may be able to pay such employees a rate of not less than \$4.25 an hour during the first ninety (90) consecutive calendar days of initial employment. This rate is a separate minimum wage established for the initial employment of workers under twenty (20) years of age. The ninety (90) days are calculated beginning with the first day of work and continue for ninety (90) days thereafter, regardless of the actual number of days the employee actually works. The rate is not mandated, but may be paid to qualifying youths during the ninety (90) day period.

E. Reporting Requirements

The FLSA requires employers to maintain certain records for covered employees. Most of this information is the type employers generally maintain in the ordinary course of business practices. Some of the required records include:

1. Full Name of Employee;
2. Complete Home Address;
3. Sex & Occupation in Which Employed;
4. Identification of Employees Who Are:
 - (a) Immediate Family;

- (b) Piece Rate Hand Harvest Workers; and
 - (c) Employees Principally Engaged in Range Livestock Production.
5. Other Information regarding hours worked and wages of employees.

In addition to the payroll records required to be kept, employers who employ minors must keep the following records for minor employees:

- 1. Full Name;
- 2. Place where minor lives and his or her permanent address;
- 3. Date of Birth;
- 4. Evidence of parental consent in writing;
- 5. An employment certification or a file containing the minor employee's age.

III. **Texas Payday Law**

Generally, all employers must comply with the Texas Payday law. The Act requires employers to pay employees who are not subject to the overtime provisions of the FLSA at least once a month. Employers are required to pay all other employees at least twice a month. The employer is required to designate a payday and post notices from the Texas Workforce Commission in both Spanish and English. For the required Notice, *see* Exhibit "B."

Additionally, the Act prohibits an employer from withholding wages unless the employer:

- 1. is authorized to do so by a court of law;
- 2. is authorized to do so by state or federal law; or
- 3. has written authorization from the employee to deduct a part of the wages for lawful purposes.

An employer must also pay a fired employee within 6 calendar days after dismissal and an employee who quits by the next regularly scheduled payday.

IV. **Federal Income Tax/Social Security Withholding**

Generally, farm employers are required to withhold federal income taxes on the wages of agricultural labor. A farm employer should obtain a completed W-4 form from each employee. Farm employees must also prepare and give a form W-2 for each farm employee by January 31 for the preceding year's withheld taxes. There are different rules as

to what constitutes “wages” for social security and federal income tax purposes. For income tax withholding, “wages” include **cash payments** as well as the fair market value of items provided to employees, such as **payment for services**.

Whether or not a farm employer has to withhold for social security depends on the amount of wages paid for agricultural labor during the year. If the farm employer pays more than \$2,500 to all employees during the year, they must make social security deductions. Even if the farmer does not pay more \$2,500 in wages to all employees, it still must deduct social security on an individualized basis for any individual receiving more than \$150 during the year. For purposes of social security deductions, “wages” include only **cash payments**.

V. **Unemployment Compensation**

Agricultural employers must comply with the requirements of the law if the particular employer either has in the current calendar year or had in the preceding calendar year:

1. a payroll of at least \$6,250 in a calendar quarter or three (3) or more employees for some portion of a day in twenty or more weeks during the year;
2. employed migrant labor;
3. employed seasonal workers on truck farms, orchards or vineyards; or
4. employed seasonal workers and migrant workers at the same time and if both types of workers perform the same work at the same location.

For covered employers, the following are required:

1. pay unemployment compensation tax on the first \$9,000 of annual payroll earnings for each employee;
2. submit tax and wage reports as required under the Act;
3. furnish information regarding job separation within 10 days of receiving notice that a claim was filed;
4. display poster “to Employees” in a conspicuous location;
5. have records available for inspection at any reasonable hour during the business day;
6. maintain such records for five (5) calendar years.

In addition to requirements on the employer, the employee must meet certain requirements to be eligible for unemployment compensation benefits. The employee must be:

1. employed less than full time;

2. able to work;
3. available to work;
4. actively seeking employment;
5. not subject to any disqualification or ineligibility; and
6. possess the necessary wage credits during the base period., which consists of the first four of the last five completed calendar quarters preceding the effective date for the worker's initial claim.

One of the many ways employees become ineligible for benefits is by being disqualified. Farm workers may not be eligible for unemployment benefits if it is found that:

1. they quit without good cause attributable to the employer;
2. they were discharged for misconduct;
3. they fail to apply for or accept suitable work;
4. their unemployment is due to a labor dispute;
5. they have willfully misrepresented their case to the Texas Workforce Commission;
6. they are eligible to receive or are receiving a retirement income other than disability;
7. they are receiving or seeking unemployment under a law of another state or the United States; or
8. they are an illegal alien.

VI. COBRA Coverage

COBRA contains provisions which give certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health care coverage at group rates. Coverage under the Act is only available when health care coverage is lost due to certain specified or qualifying events. There are three (3) elements to qualifying for COBRA benefits:

1. plan coverage;
2. qualified beneficiaries; and
3. a qualifying event.

Generally, COBRA will not have a significant impact on many agricultural employers as it applies only to group health plans for employers with twenty (20) or more employees on more than fifty (50) percent of its typical business days in the previous calendar year. If COBRA does apply, to be covered an individual, who is either an employee, the employee's spouse or an employee's dependent child must be covered by a group health plan on the day before the happening of a qualifying event. A child born to or placed for adoption with a covered employee during the period of COBRA coverage is also considered a qualified beneficiary.

Qualifying events are generally those events that cause an individual to lose health care coverage (i.e., termination, reduced hours, etc.). The specific type of qualifying event determines who the qualified beneficiaries are and the amount of time that a plan must offer health care coverage.

Employers subject to the Act must comply with certain notice requirements. First, employers must provide initial notice describing COBRA rights to employees at the time coverage under the plan commences. Employers must also notify plan administrators of qualifying event within thirty (30) days after an employee's death, termination, reduced hours of employment or entitlement to Medicare.

VII. **Workers' Compensation Laws**

Workers' Compensation is a state regulated insurance program addressing on-the-job injuries and the corresponding insurance benefits provided to injured workers. Workers' Compensation laws covering agricultural laborers took effect January 1, 1985. Employers in Texas may choose whether or not to maintain coverage and those who choose to cover their employees may do so by either purchasing private insurance or self insuring their employees. Employees who are not covered by insurance maintain their statutory and common law claims arising from an on-the-job injury.

A. Who Must Comply

Even though the law does not require employers to purchase insurance, all employers must comply with specific provisions of the Act. However, certain agricultural workers may still be exempt from coverage: Migrant workers, who are defined as persons employed in seasonal or temporary jobs and are required to be away from their permanent residences overnight; Seasonal workers, defined as persons employed in Seasonal or temporary jobs, but are not required to be away from permanent residences overnight; and Certain other farm and ranch laborers. Exemptions

Migrant workers are generally NOT exempt, regardless of the number employed or the gross annual payroll. Also there are no exemptions for seasonal workers employed on a truck farm, orchard or vineyard or for seasonal workers who perform the same work at the same time and location as migrant workers. Seasonal workers who do not fall into the above two categories are exempt from the law if their employer's gross income was less than \$37,871 in 1998. For exemptions in subsequent years, the preceding year's payroll must be

less than the prior year's required payroll amount adjusted for inflation. For all other farm and ranch laborers, to be exempt, the employer must employ fewer than three (3) persons, excluding seasonal or migrant workers, and must have had a payroll during the preceding year that was less than the threshold amount outlined for seasonal workers.

C. Subscribers vs. Non-Subscribers

Agricultural employers who elect to provide coverage must do the following:

1. display posters stating that the employees are covered by workers' compensation insurance;
2. allow new employees to waive coverage;
3. display posters regarding the ombudsman program;
4. file an injury report within eight (8) days of certain accidents; and
5. have a "drug free workplace" policy in place.

Agricultural employers who are not exempt must comply with the following requirements:

1. display posters stating that employees are not covered by workers' compensation insurance;
2. provide a written statement to new employees that they are not covered by insurance; and
3. file notice with the Texas Workers' Compensation Commission.

VIII. Authorized Workers

The Immigration Reform and Control Act of 1986 (IRCA) and the Immigration and Nationality Act of 1990 include provisions addressing employment eligibility, employment verification and non-discrimination. Under the IRCA employers may only hire persons who may legally work in the United States such as citizens, nationals of the U.S. and authorized aliens. Among other things, the law requires each employer to verify and document that their workers have a legal right to work in the United States and prohibits employers from discriminating based on national origin or citizenship status.

A. Who Must Comply

All persons or businesses who have at least one (1) employee must comply with the law by maintaining completed I-9 Forms for all employees. *See* Exhibit "C." This is subject to very few exceptions. The following is a list persons for whom no I-9 is required to be maintained:

1. Persons hired before November 6, 1986, who have been continuously employed;

(a) NOTE: It is important to note that this does not apply to any separation in the employment relationship where the employee is later rehired.

2. Persons employed in the home for casual domestic work on a sporadic or intermittent basis;
3. Independent Contractors; and
4. Persons who provide labor, but are employed by a contractor providing contract labor.

B. Required Documentation

The documentation requirements of the Act are easily met by maintaining a completed Form I-9 for each employee. The completed I-9 must be maintained on file by the employer for the longer of three (3) years or one (1) year after employment is terminated. All employees must present to their employer proof of identity and work authorization within 72 hours of hire unless hired for work that takes less than 72 hours to complete, at which time the employee must present evidence of identity and authority by the end of the first day.

C. Do's and Don'ts for Compliance

The following is a list of employment practices that should be implemented to ensure compliance as well as practices that should not be implemented to avoid compliance concerns.

Do's—Things Employers Should Do

- Hire applicants before requesting authorization and identity documents or if you require these documents before an applicant is hired, be sure to require ALL applicants to provide such documentation at that time.
- Allow employees to choose the documentation they provide as proof of identity and work authorization.
- Verify that you have seen the documentation.
- Finally, keep all I-9 forms in a separate file apart from personnel files.

Don'ts—Things Employers Should not Do

- DO NOT treat applicants differently based on their foreign looks or accent.
- DO NOT require employees to provide specific documentation as verification.
- DO NOT refuse to accept a valid work authorization that has a future expiration. Many times such authorizations are renewed.
- DO NOT refuse to accept a valid work authorization because you are unfamiliar with that particular type of documentation.
- DO NOT demand that applicants speak only English on the job.

D. Acceptable Documentation -- See Exhibit "C."

IX. **Child Support Reporting Requirements**

Employers play a crucial role in collecting child support and reporting newly hired employees to the child support program. Last year alone, Texas employers withheld over \$750 million in child support through income withholding for Texas children.

Every U.S. employer, large and small must comply with the requirements of the Child Support Enforcement Program in three (3) respects:

1. Employers must report information about newly hired employees to the State Directory of new hires within twenty (20) days;
2. After receiving an order or notice to withhold income, employers must comply with the order or notice; and
3. Employers must provide information to the state or local child support enforcement agency for information about an employee, such as earnings, residence and health insurance coverage and report the termination of an employee for whom you are withholding child support regardless of reason for the separation of employment.

X. **Temporary Agricultural Workers- H-2A Visas**

Under the Immigration and Control Act of 1986, a program was created which allows agricultural employers to bring agricultural workers into the country on a temporary immigrant basis. Before bringing in foreign workers, employers must apply to the Employment Training Administration (ETA) for certification that:

1. there are not sufficient workers who are able, willing and available to perform the work; and
2. the employment of foreign workers will not adversely affect working conditions of similarly employed workers in the U.S.

The Act provides that an agricultural employer who anticipates a shortage of domestic workers needed for temporary or seasonal labor may apply. Also an association of agricultural employers may file as a sole employer to bring in foreign workers under the H-2A visas. The application must be made at least sixty (60) days before the date needed.

There are certain procedures and conditions that must be satisfied before an employer can hire foreign workers under the H-2a visas:

- **Positive Recruitment**—the employer must make an active effort, including radio/newspaper advertisements, in areas of expected labor supply.
- **Wages**—The employer must provide the same wage rate for U.S. and H-2A workers.

- **Housing**—The employer must provide free housing to all workers who are not reasonably able to return to their permanent residence the same day.
- **Meals**—the employer must either provide three meals a day or provide sufficient kitchen facilities to allow workers to prepare their own meals.
- **Workers' Compensation Insurance**—must be provided where required by law.
- **Tools and Supplies**—necessary tools must be provided at no cost to the worker.
- **¾ Guarantee**—the employer must guarantee each worker employment for at least three-fourths of the work contract period or pay equivalent in wages for such period.
- **Fifty Percent Rule**—the employer must hire any qualified and eligible U.S. worker who applies for the job until 50% of the work contract has elapsed.
- **Transportation**—The employer must provide certain transportation for workers.
- **Labor Disputes**—The employer must provide assurances that the vacancy for which H-2A workers is needed was not a result of a labor dispute.
- **Certification Fee**—upon certification, \$100 per certification in addition to \$10 for each job opportunity to a maximum of \$1,000.
- **Other conditions**— certain reporting requirements must also be met.

XI. Migrant and Seasonal Workers

The Migrant and Seasonal Worker Protection Act protects migrant and seasonal workers in their interactions with farm labor contractors, agricultural employers and providers of migrant housing. The Act requires agricultural employers and farm labor contractors who recruit, hire, solicit employ, furnish, transport and house agricultural workers to meet certain minimum requirements in dealing with migrant and seasonal workers.

A. Requirements

Farm labor contractors must register with the Department of Labor before recruiting, soliciting hiring, employing, furnishing, transporting or housing seasonal and migrant agricultural workers.

NOTE: *Farmers and Ranchers who use labor contractors are now in most circumstances defined as joint employers and are jointly responsible for compliance with the employment related obligations of the MSPA.*

All labor contractors and agricultural employers must comply with the following requirements:

1. **Disclosure**—Employers must describe the terms and conditions of employment and post notices; *See Exhibit “D.”*
2. **Record Keeping**—Employers must maintain payroll records (Wages, hours worked, deductions, total pay, net pay, etc.) for three (3) years;
3. **Transportation Safety**--Vehicles used for transport must be insured and meet federal and state safety standards;
4. **Wages, Supplies & Arrangements**—Employers must pay wages owed when due and are prohibited from requiring workers to purchase goods solely from contractor. Also Employers may not violate terms of working arrangement without adequate justification; and
5. **Safety and Health of Housing**—Employers must ensure that housing offered to migrant workers complies with federal and state safety standards. Any housing offered may not be occupied until inspected and certified and the certification must be posted.

XII. Employee vs. Independent Contractor

Time and time again the question arises whether work being performed is by an employee or an independent contractor (contract laborer). The decision has many ramifications in several areas of the law, including workers' compensation, unemployment compensation, and the record keeping requirements of the INA to name a few. Although, there are no clear cut, specific definitions or formulas that can be applied, the following table represents certain guidelines to follow in making the determination. As you may see, the overall common theme running through each of these guidelines is who retains control and direction of the performance of the work. Usually, if the farmer retains such control the worker is an employee. If the laborer retains such control, he is usually a contractor. Some employers choose to utilize independent contractor agreements with their contract laborers so there is no confusion as to the status of the employment. *See Exhibit "E."*

| Employee | Contractor |
|---|---|
| An employee receives instructions. | Does the job his or her own way. |
| The services of an employee are usually merged in the firm's overall operation and the firm's success may depend on the specific employee services. | Services are usually separate from the client's business and are not integrated or merged into it. |
| Employee often continues to work for the same employer on a continuing basis month after month. | Usually hired to do one job of limited duration and has no expectation of continuing work. |
| Ordinarily devotes full-time service to the employer or the employer may have a priority on the employee's time. | Sets his or her own hours. |
| Furnished with all necessary tools, materials and equipment to perform their job by the employer | Ordinarily provide their own tools and equipment. |
| Generally as little or no investment in the business, and is economically dependent on the employer. | Usually have a substantial financial investment in their own independent business. |
| Does not ordinarily realize a profit or loss in the business, but rather, is paid for services rendered. | Can either realize a profit or suffer a loss depending on the management of expenses, revenues and job performance. |

XIII. Safety and Health

A. Worker Protection Standard

The new Worker Protection Standard (WPS) contains requirements designed to reduce the risks of illness or injury resulting from pesticide handlers and agricultural workers occupational exposures.

Starting in 1994, agricultural employers must comply with any WPS requirement spelled out on a pesticide product label. This includes statements regarding personal protective equipment (PPE), restricted-entry interval (REI) and “double notification.”

Who must comply - Agricultural employers who are using pesticides in the production of agricultural plants on farms, forests, nurseries, and greenhouses.

Exceptions - WPS does not cover pesticides applied:

1. on pasture/rangeland, rights-of-way and in structural pest control;
2. on livestock or in and around livestock premises;
3. in post-harvest activity;
4. in control of vertebrate pests;
5. as attractants/repellents in traps;
6. in habitations, gardens, lawns, etc.;
7. in government-sponsored public pest control programs; or
8. for research uses of unregistered pesticides.

Exemptions - The owner and his/her immediate family are exempt from generic provisions, principally training, notification, decontamination and emergency assistance. They must comply with pesticide-specific requirements, such as personal protective equipment (PPE) and restricted-entry intervals (REIs).

Key Definitions - Under the WPS there are two types of agricultural employers:

1. one who hires or contracts for the services of agricultural workers and
2. one who owns or is responsible for the management and condition of an agricultural establishment that uses such workers.

A **handler** is one who:

1. mixes, loads, transfers or applies pesticides;
2. disposes of pesticides or unrinsed containers;
3. handles open containers;
4. flags;
5. cleans, adjusts, handles or repairs contaminated equipment;
6. assists with applications;
7. enters enclosed area after use of airborne pesticide before PEL or ventilation criteria are met;
8. enters area treated with soil fumigant to adjust or remove tarps; and/or
9. performs task as a crop advisor during application or an REI.

A **worker** performs tasks (other than handler tasks) related to the production of agricultural plants on an agricultural establishment.

Employers must make sure that the following protections are provided to workers/handlers that they employ.

1. Establish a central location to:
 - a. display a poster containing WPS-specified information;
 - b. list the location and the pertinent information about the nearest emergency medical facility; and
 - c. post information about each pesticide application in the establishment, including:
 - location and description of treated area
 - product name, EPA registration number and active ingredient(s),
 - restricted entry interval for the pesticide.
2. Keep information about applications posted until at least 30 days after the REI expires and inform workers/handlers where the poster is located and allow them access.
3. In the case of a suspected pesticide poisoning the employer must make available prompt transportation to an appropriate medical facility and provide the worker or handler or the treating medical personnel with information from the pesticide label and information about how the suspected exposure occurred.
4. Provide workers with a decontamination site while the workers are performing permitted activities in a treated area where an REI is in effect or performing any activities in a treated area where an REI had expired within the past 30 days.
5. Provide pesticide handlers with a decontamination site while handlers are performing handling activities.
6. Supplies for washing pesticides from the skin and eyes must be provided within 1/4 mile of all workers and handlers. For

mixing activities, supplies for decontamination must be in the immediate mixing area of handlers.

These supplies include:

- a. enough water for washing (water must be of a quality and temperature that will not cause illness or injury when it contacts the skin or eyes or if it is swallowed);
 - b. an adequate supply of soap and single-use towels; and
 - c. clean coveralls (at handler sites).
7. Eyeflush water must be made immediately available to handlers and early-entry workers if they are required to wear protective eyewear.
 8. An agricultural employer must be informed when a pesticide is to be applied on the agricultural establishment by a commercial handler and must be provided the information needed to be posted at the central location plus:
 - a. whether both oral warnings and treated area posting are required; and
 - b. any other protection requirements on the label for the workers or other people.

Protection for workers -

1. The employer must keep workers other than trained and protected pesticide handlers out of an area being treated.
2. Under some application conditions, employers must keep nursery or greenhouse workers out of locations that are near an area being treated.
3. If contact with pesticides is possible, the employer must keep workers from entering a treated area until the REI is over.

Exceptions -

- a. Non-hand labor tasks can take place up to 1 hour/week/day.
 - b. Tasks can take place if necessary due to a declared agricultural emergency.
 - c. Additional exceptions can be request of EPA.
4. Employers must protect early-entry workers by making sure of the following:
 - a. No entry for the first 4 hours following the end of the application and until any label-specified inhalation exposure level or the WPS ventilation criteria have been met.
 - b. Workers are informed about health effects and safety information from pesticide labeling.
 - c. PPE are provided, cleaned and maintained for the worker.
 - d. Worker wears and uses PPE correctly.

- e. Workers are instructed how to put on, use and remove the PPE and about the importance of washing thoroughly after removing PPE.
 - f. Workers are provided a clean place to put on and take off PPE and to store personal clothing.
 - g. Action is taken, if necessary, to prevent heat-related illness while wearing PPE.
 - h. Soap, towels and water are provided when PPE is removed.
 - i. Make sure no contaminated PPE are worn or taken home.
5. Each worker must be trained. This requirement is met if the worker or handler:
- a. has been trained within the last 5 years as a worker or handler even if they have changed employers or
 - b. is currently a certified applicator of restricted use pesticides or
 - c. is currently trained as a handler who works under the supervisor of a certified applicator.

Who can conduct the training -

- 1. Those who conduct handler training must:
 - a. currently be a certified applicator of restricted-use pesticides (in any category of certification), OR
 - b. currently be designated as a trainer of certified pesticide applicators of pesticide handlers by a state, federal, or tribal agency having jurisdiction, OR
 - c. have completed a pesticide safety train-the-trainer program approved by a state, federal, or tribal agency having jurisdiction.
- 2. Those who conduct worker training must:
 - a. currently be qualified to present handler training, as described immediately above, OR
 - b. currently be trained (as specified in EPA's certification and training regulations) as handler who works under the supervision of a certified pesticide applicator, OR
 - c. currently be trained as a WPS handler, OR
 - d. have completed a pesticide safety train-the-trainer program approved by a stated, federal, or tribal agency having jurisdiction.

Notice of applications -

- 1. On farms, nurseries and forests, each worker who might enter a treated area or walk within 1/4 mile of a treated area during

- application or an REI must be warned orally or by posting warning signs at the treated area.
2. In green houses, each worker who might enter a greenhouse during an application or an REI must be warned by posted warning signs at entrances to treated areas.
 3. Some pesticides will have a statement on the product labeling requiring both posting of warning signs and oral warnings to workers.

The posted warning sign must -

1. include the words: "Pesticides/Pesticidas - Danger/Peligro - Keep Out/No Entre,"
2. contain the WPS warning-sign symbol (a stem face and an upraised hand);
3. meet size and color requirements; and
4. be visible at all usual entrances to the treated area.

The oral warning must -

1. give the location and description of treated areas;
2. state the time during which entry is restricted; and
3. instruct workers not to enter the treated area until the REI is over.

Prohibition Statement - All product labeling must include a statement prohibiting application of the product in a way that will contact workers or other persons directly through drift.

Restricted entry intervals (REI) -

1. All product labeling must include a statement prohibiting entry during the restricted entry interval.
2. All product labeling must specify a restricted entry interval(s). Minimum interim restricted entry intervals based on the acute toxicity of the active ingredient by the dermal, skin irritation and ocular routes of exposure are established.
3. Previously established entry intervals will be retained if they are based on entry data that meets Agency guidelines. Any other previously established entry guideline is "interim" and would only be retained if it is longer than the interim REI established by the WPS.
4. A 48 hour REI is established for any product containing an active ingredient in Toxicity Category I (highly toxic). [The REI for organophosphate is extended by 72 hours if these products are applied outdoors in areas with less than 25 inches rainfall/year.]

5. A 24 hour REI is established for any product containing an active ingredient in Toxicity Category II.
6. A 12 hour REI is established for all other products.

Personal protective equipment -

1. All product labeling must specify required personal protective equipment (PPE). Minimum PPE and work clothing requirements for pesticide handlers and for early-entry workers are established. (Long-sleeved shirts, long pants, shoes, and socks are defined as clothing and not PPE.)
2. Minimum PPE requirements for handlers are based on the acute toxicity of the formulated pesticide product by dermal, ocular and inhalation routes of entry.
 - a. **Ocular:** Protective eyewear is required for Toxicity Category I all II products.
 - b. **Inhalation:** A respirator is required for Toxicity I and II products. The labeling must specify whether the required respirator is a dust/mist filtering respirator, or organic-vapor-removing respirator with a dust/mist prefilter or air-supplying respirator. Registrants must base this specification on the criteria in the WPS and in the guidance that will be issued to registrants.
 - c. **Dermal:** Chemical-resistant gloves are required for Toxicity I, II and III products. The labeling must specify a particular type of chemical-resistant glove. Registrants must base this specification on the criteria in the WPS and in the guidance that will be issued to registrants. Chemical-resistant footwear and socks are required for Toxicity I and II products; shoes and socks are required for all other products. Coveralls worn over another layer of clothing are required for Toxicity I and II products; long-sleeved shirt and long pants are required for all other products.
3. Additional PPE based on exposure pattern are specified:
 - a. Handlers and early entry workers with overhead exposure also must wear chemical-resistant headgear.
 - b. Mixers, loaders and equipment cleaners also must wear a chemical-resistant apron.
4. Early Entry PPE requirements are the same as the PPE required for applicators, except any respirator requirement is waived and coveralls and chemical-resistant (or waterproof) gloves are the minimum allowed attire for early entry workers.

PPE substitutions and exceptions -

1. Handlers using closed systems for mixing and loading are exempted from all PPE except chemical-resistant gloves and aprons; long-sleeved shirt, long pants, shoes and socks are required. If the closed systems is pressurized, protective eyewear is also required.
2. Handlers using enclosed cabs are exempted from all PPE except for any respirator requirement; long-sleeved shirt, long pants, shoes and socks are required. Respirators are waived if the enclosed cab offers respiratory protection equal or greater than the type of respirator specified.
3. Handlers or early entry workers working with plants with sharp thorns may wear leather gloves over chemical-resistant glove liners.
4. Handlers or early entry workers working in rough terrain may wear leather boots instead of chemical resistant footwear.

Providing hazard information -

1. The employer must provide hazard information to any worker who enters a pesticide-treated area on an agricultural establishment where, within the last 30 days, a pesticide has been applied or a restricted entry interval (REI) has been in effect.
2. The employer must provide hazard information to any handler of a pesticide that is being handled or that has been handled within the past 30 days.
3. The employer must provide hazard information to any handler or worker who may be exposed to the pesticide during its normal conditions of use or in a foreseeable emergency.
4. The information must be provided at a central location: accessible to workers and handlers during working hours and readily obtainable in an emergency.
5. The information must be provided in written form within a reasonable amount of time, on request from the worker or handler, the worker's or handler's representative, or medical personnel treating the worker or handler.

Format of hazard information - Hazard information must be either:

1. A Material Safety Data Sheet for the product, or for each active and inert ingredient listed on the label of each product,
or
2. A Fact Sheet that has been prepared or approved by a state or federal agency for the pesticide.

Content of fact sheets -

1. Each fact sheet shall contain information, expressed in non-technical terms, except for items specifically targeting towards medical personnel, such as antidotes or emergency treatment.
2. Fact sheet information must be accurate and updated as necessary.
3. The information shall include the following.
 - a. Typical brand name(s) of the pesticide, and the chemical name and common name of the pesticide.
 - b. Information on the physical characteristics of the pesticide.
 - c. Information on the comparative toxicity of the pesticide, including acute, allergic, chronic and delayed-onset effects.
 - d. Information on any special protection needed in handling the product.
 - e. Information on spill or leak cleanup procedures and disposal methods for excess chemical and for containers.
 - f. The date the fact sheet was prepared or revised to its present form.
 - g. The telephone number of the National Pesticide Telecommunications Network and the name, address and telephone number of any responsible party who could provide more information about the product or ingredients or about emergency procedures.
 - h. If certain information is not obtainable, the fact sheet will so indicate.

Notification to workers - The labeling of any product containing an active ingredient that is in Toxicity Category I because of dermal toxicity or skin irritation potential and of any product that is a fumigant that may be applied in a greenhouse must have a statement requiring both posting of warning signs and oral warnings to workers.

B. Agricultural Hazard Communications Act of Texas (Right To Know)

The Texas Agricultural Hazard Communication (Right to Know) Act of 1987 was enacted to provide farm operators and agricultural workers with information about hazardous chemicals that they will work with. The main purpose is to provide better information about working safely with agricultural chemicals.

Who must comply - The following employees are subject to the Emergency Reporting Requirement.

1. agricultural employers who themselves or through labor agents hire migrant or seasonal workers and whose gross

annual payroll for those workers is \$15,000 or more and who annually use or store 55 gallons or 500 pounds of any pesticide;

2. agricultural employers who themselves or through labor agents hire permanent agricultural workers (other than migrant or seasonal workers) whose gross annual payroll is \$50,000 or more and who annually use or store 55 gallons or 500 pounds of any pesticide;
3. agricultural workers who plant, cultivate, harvest or handle an agricultural or horticultural commodity in its unmanufactured state or who handle a chemical covered by this law; and other entities that normally store pesticides in an amount in excess of 55 gallons or 500 pounds are subject to the Emergency Reporting Requirement.

An agricultural laborer is a person who plants, cultivates, harvests or handles an agricultural commodity, and this includes a laborer who handles chemicals covered by this Act. With regard to payroll, thresholds for seasonal, migrant, permanent workers and all such employees, regardless of their duties, are to be included in the gross payroll calculation.

Responsibilities - Covered agricultural employers will be responsible for collecting, storing and making available to agricultural workers information about pesticide use. The law requires agricultural employers to:

1. provide workers with relevant crop sheets and ensure that they are read aloud to workers at least once each work season;
2. inform workers about relevant pesticide reentry intervals;
3. maintain Workplace Chemical Lists and Material Safety Data Sheets and make these accessible to workers, treating medical personnel, or a member of the community upon request;
4. provide other basic health and safety information, approved by the Texas Department of Agriculture, to their workers on the first pay day of each work season; and
5. provide emergency information to their workers, local fire chiefs, medical personnel and designated farm worker representatives, upon request.

Crop Sheets - The Texas Department of Agriculture (TDA), in coordination with the Texas Agricultural Extension Service (TAEX) develops crop sheets for most major Texas crops. The crop sheets are in Spanish and English and contain:

1. a list of the most commonly used pesticides;
2. the months of pesticide application;

gives health, safety and emergency information about the pesticide. Material Safety Data Sheets are provided by chemical manufacturers and distributors to purchasers in the state. Dealers are required to provide MSDS, if available, on request. The employer must keep the most current MSDS available on file for each pesticide listed on the Workplace Chemical List.

Emergency reporting requirement - This clause applies to operations that normally store more than fifty-five (55) gallons or 500 pounds of pesticides at a location within 1/4 of a mile of a residential area with three or more private dwellings. Those covered by this clause are required to notify their local fire chief of the name(s) and phone number(s) of responsible person(s) who can be contacted for further information. Upon request by the fire chief, they must:

1. provide copies of the Workplace Chemical Lists and Material Safety Data Sheets; and
2. allow inspection of the storage area.

Agricultural workers' rights - Agricultural workers are entitled to:

1. receive copies of crop sheets and to have this information read to them by the covered agricultural employers or their representatives;
2. have access to Material Safety Data Sheets and Workplace Chemical Lists, upon request;
3. be informed of the last and future dates of pesticide applications and applicable reentry periods;
4. be provided with other basic health and safety information on the first pay day of the work season as approved by TDA;
5. contact TDA to report suspected violations of this law without fear of retaliation or any disciplinary action, and to request anonymity, when necessary; and
6. designate a representative to act on their behalf.

Designated representatives - A designated representative is an individual or an organization to whom an agricultural worker gives written authorization to exercise the worker's rights under this law. A certified union representative is not required to have written authorization.

Members of the community - Anyone who lives, works or attends school, or is treated in a hospital, or is in a nursing home within a 1/2-mile radius of a nursery operation, or 3 (three) mile radius of any other workplace.

Legal ramifications - Upon receiving a complaint, the Texas Department of Agriculture will complete an investigation within ninety (90) days.

3. the reentry interval or length of time that farmers are required to wait before allowing workers to enter a pesticide-treated field;
4. the acute or short-term symptoms of pesticide exposures, as well as their chronic or long-term health effects;
5. a summary of agricultural workers' rights under the law;
6. emergency procedures for pesticide poisoning;
7. summary of basic safety measures to prevent pesticide poisoning;
8. information about the availability of Material Safety Data Sheets and Workplace Chemical lists;
9. information about training programs to be provided statewide by TDA and TAEX;
10. a space for the name and phone number of the employer to be contacted for more information.

Copies of the crop sheets will be provided on request by TDA or TAEX to agricultural employers for reproduction and distribution to workers in their employment. The sheets will be updated periodically to reflect changes in use patterns and health information.

Workplace Chemical Lists: The Workplace Chemical List is a form provided to agricultural employers by TDA and is to be used for recording information about the pesticides used or stored in the workplace. The employer shall maintain one form for each crop, workplace or work area, whichever is most practical, and keep these records annually for chemicals in excess of fifty-five (55) gallons or 500 pounds used or stored in the workplace. The following information is to be included on the Workplace Chemical List:

1. employer's name, address and other means of identification;
2. name of crop;
3. date of each pesticide application or storage;
4. product name of pesticide;
5. environmental Protection Agency (EPA) registration number from the label;
6. locations(s) or site(s) treated or where stored;
7. number of acres treated;
8. an estimate of the total quantity of pesticide used; and
9. location of pesticide storage area.

The law requires that the lists be updated as pesticides are applied or stored and shall be maintained by the employer for thirty (30) years. Or, employers may file these lists with TDA annually by January 31, and TDA shall store the data and make them available upon request.

Material Safety Data Sheets - A Material Safety Data Sheet (MSDS) is a document that specifically identifies the chemical and its ingredients and

1. Employers who knowingly disclose false information or negligently fail to disclose a hazard are subject to a civil penalty of not more than \$5,000 per violation.
2. Employers who cause an injury to an individual by knowingly disclosing false hazard information or knowingly failing to disclose hazard information are subject to a criminal fine of not more than \$25,000.

XIV. **Employment Handbooks**

Few hard and fast rules exist in creating employment policies for a company. The most important considerations are that the policies be understandable, effectively communicated to all employees, and consistently applied.

A. Pros and Cons

Employers and employees can both benefit from a mutual understanding about the policies governing their relationship. However, there are certain pros and cons to implementing such handbooks.

1. **Pros**

A manual that effectively describes important policies and practices has the benefit of minimizing lost time spent by addressing employee questions. An effective manual can facilitate consistent application of employment practices and procedures. Additionally, a properly worded manual can build pride in the work force, help create a “team” atmosphere, discourage employment related lawsuits, and reinforce the at-will relationship.

2. **Cons**

The decision to communicate policies to employees in writing does have negative aspects as well. First, the initial effort to organize the issues the policy will cover can be challenging and time consuming. Second, a written manual can do more harm than good if it confuses rather than clarifies employment policies, or if it unintentionally impedes the at-will employment relationship.

Texas courts will presume employment relationships to be “at-will” absent specific contractual terms to the contrary. *Federal Express Corp. v. Dutschman*, 846 S.W.2d 282, 283 (Tex. 1993). This presumption may be overcome, however, by evidence that the employer and the employee entered into a written or oral contract limiting the employer’s ability to discharge the employee. *See, e.g., Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1200 (5th Cir. 1987).

B. Preparation

In general, employers should prepare personnel policy manuals with four objectives in mind. First, employers should strive to supply employees with necessary information

about the employer, employment benefits, work and attendance rules, and disciplinary policies. Second, to minimize the risk that employees or a court will construe the manual as a contract between employer and employee, it is imperative that employee handbooks be couched in terms that are non-contractual and which serve to protect management flexibility to make employment decisions. Third, employers must evaluate policies and employee handbooks to make certain they do not directly violate employment discrimination laws or disproportionately affect employees or applicants in protected minority groups. Finally, employers and employees alike should be aware that a handbook cannot answer all questions that may arise and the employer must preserve residual discretion. Employee manuals should serve only as general guidelines, and the employer should communicate this view to employees.

C. Special Policies

1. **Sexual Harassment**

Since sexual harassment is a form of prohibited discrimination, the EEOC guidelines encourage employers to take all steps necessary to prevent it. Employers should adopt and publish a policy that relates to sexual harassment separate and apart from the employer's other policies. If an employer fails to adopt and publish a policy prohibiting sexual harassment and does not provide a mechanism for employees to come forward with such complaints, that employer may substantially diminish its ability to defend against sexual harassment lawsuits. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

As a result, employers should adopt and post a carefully drafted sexual harassment policy, in addition to the employer's general EEOC policy. The policy should be in writing and should:

- be specific with respect to sexual harassment and contain a definition of sexual harassment
- should set forth an effective complaint procedure to be followed by employees who believe they have been a victim of harassment (grievance or complaint procedure)
- contain a complaint procedure which sets forth in the policy:
 - i. a clear explanation of prohibited conduct;
 - ii. assurance that the employer will protect the employees who make complaints of harassment or provide information related to such complaints against retaliation;
 - iii. a clearly described complaint process that provides accessible avenues of complaint other than the employee's supervisor with whom the employee can discuss the situation;
 - iv. assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
 - v. a complaint process that provides a prompt, thorough, and impartial investigation; and
 - vi. assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

- be widely disseminated to the employees and posted on company bulletin boards;
- be uniformly followed and strictly enforced; and
- reinforce the substance of its policy against sexual harassment with its managers and supervisors and provide them with training concerning matters such as how to respond if an employee lodges a complaint of harassment and how to recognize conduct that might be subject to harassment claims.

2. **Drug and Alcohol/Drug Testing**

Many employers have adopted policies aimed at eliminating the use of drugs and/or alcohol on the job, or off the job if it affects on-the-job performance. Under the Texas Workers' Compensation Act, each employer that maintains workers' compensation insurance and has fifteen (15) or more employees must adopt a policy designed to eliminate drug abuse and its effects in the workplace. The Act required employers to have a policy in place by April 15, 1991, or within 45 days after the law became applicable. Any employer subject to this requirement that is not in compliance may be subject to an administrative penalty of \$500.

The regulations issued by the Texas Workers' Compensation Commission specifically state that an employer must provide a copy of the drug abuse policy to each employee on or before the first day of employment or within 30 days of the date the employer adopts the policy. Employers must also deliver a copy of their policy to the Workers' Compensation Commission upon written request not later than 30 days after receipt of such request.

The policy designed to eliminate drug abuse and its effects in the workplace must include:

- a statement of purpose and scope;
- a statement that the term "drug" includes alcohol, prescription drugs when not taken as directed by the employee's doctor, illegal inhalants and illegal drugs;
- a statement of any consequences the employee may suffer if found violating the policy;
- a description of available treatment programs, if any, and how an employee may request them;
- the availability of and the requirements for participation in drug and alcohol abuse education and training programs, if any; and
- a description of any drug testing program that the employer has enforced.

Although the Workers' Compensation Commission regulations do not require employers to conduct drug testing, a number of other issues exists which an employer should consider before ultimately deciding to conduct testing. These issues include:

- determining the conditions under which the employer will require testing;
- determining the method by which the employer will collect urine specimens;
- selecting an appropriate testing laboratory;
- determining the substances to be tested for;
- ensuring proper chain of custody;
- utilization of a medical review officer;
- ensuring the confidentiality of test results; and
- obtaining the employees consent to testing.

If an employer is subject to regulation by a federal agency, such as the Department of Transportation, federal regulations will govern many of these decisions. However, even if no applicable federal regulations apply, an effective drug testing policy should address all of the above elements.

Searches pursuant to drug and alcohol abuse policies also present problems. Many companies include provisions in their policies where they reserve the right to make general or random searches of company property such as lockers, closets, and desks for alcohol, prohibited drugs, or drug paraphernalia without the consent of the employee. If a policy contains search provisions such as this, the employer should include a disclaimer in the policy that states that a search does not imply an accusation of any wrongdoing. If possible, the employer should do the search privately and with the consent of the employee involved. Also, the reasons for any search as well as its result should be kept confidential. The employer should never use force, even if an employee refuses to cooperate. Employers should conduct interviews pursuant to a drug and alcohol policy in a regularly used office, and the employee should have the right to leave at any time. These steps should help lessen the possibility of claims of defamation, invasion of privacy, assault, and false imprisonment.

EXHIBIT A

Your Rights Under the Fair Labor Standards Act

Federal Minimum Wage

\$4.75 *per hour*
beginning October 1, 1996

\$5.15 *per hour*
beginning September 1, 1997

Employees under 20 years of age may be paid \$4.25 per hour during their first 90 consecutive calendar days of employment with an employer.

Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

Tip Credit – Employers of “tipped employees” must pay a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee’s tips combined with the employer’s cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions must also be met.

Overtime Pay

At least 1½ times your regular rate of pay for all hours worked over 40 in a workweek.

Child Labor

An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:

No more than –

- 3 hours on a school day or 18 hours in a school week;
- 8 hours on a non-school day or 40 hours in a non-school week.

Also, work may not begin before 7 a.m. or end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Different rules apply in agricultural employment.

Enforcement

The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.

Fines of up to \$10,000 per violation may be assessed against employers who violate the child labor provisions of the law and up to \$1,000 per violation against employers who willfully or repeatedly violate the minimum wage or overtime pay provisions. This law prohibits discriminating against or discharging workers who file a complaint or participate in any proceedings under the Act.

Note:

- Certain occupations and establishments are exempt from the minimum wage and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa.
- Where state law requires a higher minimum wage, the higher standard applies.

For Additional Information, Contact the Wage and Hour Division office nearest you – listed in your telephone directory under United States Government, Labor Department.

This poster may be viewed on the internet at this address: <http://www.dol.gov/esa/regs/compliance/posters/flsa.htm>

The law requires employers to display this poster where employees can readily see it.



EXHIBIT B

ATTENTION EMPLOYEES

The Texas Payday Law, Title 2, Chapter 61, Texas Labor Code, requires Texas employers to pay their employees who are exempt from the overtime pay provisions of the Fair Labor Standards Act of 1938 at least once per month. All other employees must be paid at least as often as semi-monthly and each pay period must consist as nearly as possible of an equal number of days.

Scheduled paydays: (You must indicate date or dates of the month for employees paid monthly or semi-monthly, and day of the week for employees paid weekly or at other times.)

MONTHLY _____
SEMI-MONTHLY _____
WEEKLY _____
OTHER _____

For more information write or contact the Texas Workforce Commission in Austin or contact your nearest TWC office. TWC offices are located in major cities throughout the state.

TEXAS WORKFORCE COMMISSION
Labor Law Section
101 East 15th Street, Suite 110
Austin, Texas 78778-0001

1-800-832-9243
TDD 1-800-735-2989 (Hearing Impaired)

TO EMPLOYERS: *The law requires that this notice or its equivalent be posted (in full view) at your business.*

EXHIBIT C

INSTRUCTIONS

PLEASE READ ALL INSTRUCTIONS CAREFULLY BEFORE COMPLETING THIS FORM.

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work eligible individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1 - Employee. All employees, citizens noncitizens, hired after November 6, 1986, must complete Section 1 of this form at the time of hire, which is the actual beginning of employment. **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

Preparer/Translator Certification. The Preparer/Translator Certification must be completed if Section 1 is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete Section 1 on his/her own. However, the employee must still sign Section 1 personally.

Section 2 - Employer. For the purpose of completing this form, the term "employer" includes those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors.

Employers must complete Section 2 by examining evidence of identity and employment eligibility within three (3) business days of the date employment begins. If employees are authorized to work, but are unable to present the required document(s) within three business days, they must present a receipt for the application of the document(s) within three business days and the actual document(s) within ninety (90) days. However, if employers hire individuals for a duration of less than three business days, Section 2 must be completed at the time employment begins. **Employers must record:** 1) document title; 2) issuing authority; 3) document number, 4) expiration date, if any; and 5) the date employment begins. Employers must sign and date the certification. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. These photocopies may only be used for the verification process and must be retained with the I-9. **However, employers are still responsible for completing the I-9.**

Section 3 - Updating and Reverification. Employers must complete Section 3 when updating and/or reverifying the I-9. Employers must reverify employment eligibility of their employees on or before the expiration date recorded in Section 1. Employers **CANNOT** specify which document(s) they will accept from an employee.

- If an employee's name has changed at the time this form is being updated/ reverified, complete Block A.
- If an employee is rehired within three (3) years of the date this form was originally completed and the employee is still eligible to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.

- If an employee is rehired within three (3) years of the date this form was originally completed and the employee's work authorization has expired or if a current employee's work authorization is about to expire (reverification), complete Block B and:
 - examine any document that reflects that the employee is authorized to work in the U.S. (see List A or C),
 - record the document title, document number and expiration date (if any) in Block C, and
 - complete the signature block.

Photocopying and Retaining Form I-9. A blank I-9 may be reproduced provided both sides are copied. The instructions must be available to all employees completing this form. Employers must retain completed I-9s for three (3) years after the date of hire or one (1) year after the date employment ends, whichever is later.

For more detailed information, you may refer to the INS Handbook for Employers, (Form M-274). You may obtain the handbook at your local INS office.

Privacy Act Notice. The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 U.S.C. 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by officials of the U.S. Immigration and Naturalization Service, the Department of Labor, and the Office of Special Counsel for Immigration Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

Reporting Burden. We try to create forms and instructions that are accurate, can be easily understood, and which impose the least possible burden on you to provide us with information. Often this is difficult because some immigration laws are very complex. Accordingly, the reporting burden for this collection of information is computed as follows: 1) learning about this form, 5 minutes; 2) completing the form, 5 minutes; and 3) assembling and filing (recordkeeping) the form, 5 minutes, for an average of 15 minutes per response. If you have comments regarding the accuracy of this burden estimate, or suggestions for making this form simpler, you can write to both the Immigration and Naturalization Service, 425 I Street, N.W., Room 5304, Washington, D. C. 20536; and the Office of Management and Budget, Paperwork Reduction Project, OMB No. 1115-0136, Washington, D.C. 20503.

Please read instructions carefully before completing this form. The instructions must be available during completion of this form. **ANTI-DISCRIMINATION NOTICE.** It is illegal to discriminate against work eligible individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because of a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins

| | | | |
|---|-------|---|--------------------------------|
| Print Name: Last | First | Middle Initial | Maiden Name |
| Address (Street Name and Number) | | Apt. # | Date of Birth (month/day/year) |
| City | State | Zip Code | Social Security # |
| I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form. | | I attest, under penalty of perjury, that I am (check one of the following): A citizen or national of the United States A Lawful Permanent Resident (Alien # A _____) An alien authorized to work until ___/___/___ (Alien # or Admission # _____) | |
| Employee's Signature | | | Date (month/day/year) |

Preparer and/or Translator Certification. (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

| | |
|---|------------|
| Preparer's/Translator's Signature | Print Name |
| Address (Street Name and Number, City, State, Zip Code) | |
| Date (month/day/year) | |

Section 2. Employer Review and Verification. To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C as listed on the reverse of this form and record the title, number and expiration date, if any, of the document(s)

| List A | OR | List B | AND | List C |
|---------------------------------------|----|-------------|-----|-------------|
| Document title: _____ | | _____ | | _____ |
| Issuing authority: _____ | | _____ | | _____ |
| Document #: _____ | | _____ | | _____ |
| Expiration Date (if any): ___/___/___ | | ___/___/___ | | ___/___/___ |
| Document #: _____ | | _____ | | _____ |
| Expiration Date (if any): ___/___/___ | | _____ | | _____ |

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) ___/___/___ and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment).

| | | |
|--|---|-----------------------|
| Signature of Employer or Authorized Representative | Print Name | Title |
| Business or Organization Name | Address (Street Name and Number, City, State, Zip Code) | Date (month/day/year) |

Section 3. Updating and Reverification. To be completed and signed by employer

| | |
|--|--|
| A. New Name (if applicable) | B. Date of rehire (month/day/year) (if applicable) |
| C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility. | |
| Document Title: _____ | Document #: _____ |
| Expiration Date (if any): ___/___/___ | |

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

| | |
|--|-----------------------|
| Signature of Employer or Authorized Representative | Date (month/day/year) |
|--|-----------------------|

LISTS OF ACCEPTABLE DOCUMENTS

| LIST A | LIST B | LIST C |
|---|------------------|--|
| <p>Documents that Establish Both Identity and Employment Eligibility</p> <ol style="list-style-type: none"> 1. U.S. Passport (unexpired or expired) 2. Certificate of U.S. Citizenship (<i>INS Form N-560 or N-561</i>) 3. Certificate of Naturalization (<i>INS Form N-550 or N-570</i>) 4. Unexpired foreign passport, with <i>I-551</i> stamp or attached <i>INS Form I-94</i> indicating unexpired employment authorization 5. Alien Registration Receipt Card with photograph (<i>INS Form I-151 or I-551</i>) 6. Unexpired Temporary Resident Card (<i>INS Form I-688</i>) 7. Unexpired Employment Authorization Card (<i>INS Form I-688A</i>) 8. Unexpired Reentry Permit (<i>INS Form I-327</i>) 9. Unexpired Refugee Travel Document (<i>INS Form I-571</i>) 10. Unexpired Employment Authorization Document issued by the INS which contains a photograph (<i>INS Form I-688B</i>) | <p>OR</p> | <p>Documents that Establish Identity</p> <ol style="list-style-type: none"> 1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address 2. ID card issued by federal, state, or local government agencies or entities provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address 3. School ID card with a photograph 4. Voter's registration card 5. U.S. Military card or draft record 6. Military dependent's ID card 7. U.S. Coast Guard Merchant Mariner Card 8. Native American tribal document 9. Driver's license issued by a Canadian government authority <p style="text-align: center;">For persons under age 18 who are unable to present a document listed above:</p> <ol style="list-style-type: none"> 10. School record or report card 11. Clinic, doctor, or hospital record 12. Day-care or nursery school record |
| | AND | <p>Documents that Establish Employment Eligibility</p> <ol style="list-style-type: none"> 1. U.S. social security card issued by the Social Security Administration (<i>other than a card stating it is not valid for employment</i>) 2. Certification of Birth Abroad issued by the Department of State (<i>Form FS-545 or Form DS-1350</i>) 3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal 4. Native American tribal document 5. U.S. Citizen ID Card (<i>INS Form I-197</i>) 6. ID Card for use of Resident Citizen in the United States (<i>INS Form I-179</i>) 7. Unexpired employment authorization document issued by the INS (<i>other than those listed under List A</i>) |

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)

EXHIBIT D

Notice

Migrant and Seasonal Agricultural Worker Protection Act

This federal law requires agricultural employers, agricultural associations, farm labor contractors and their employees to observe certain labor standards when employing migrant and seasonal farmworkers unless specific exemptions apply. Further, farm labor contractors are required to register with the U.S. Department of Labor.

Migrant and Seasonal Farmworkers Have These Rights

- To receive accurate information about wages and working conditions for the prospective employment
- To receive this information in writing and in English, Spanish or other languages, as appropriate
- To have the terms of the working arrangement upheld
- To have farm labor contractors show proof of registration at the time of recruitment

Avètissman

Ak ki Proteje Ciltivate cap fe va e vien e cultivate cap travay pa saison (MSPA)

Lwa fédéral ça mandé patron, associasion agriculté contracté agricilti è ouvrié yo pou yo obsevè ou sèri de règ, le yap employé ciltivatè cap fe va e vien ou bien ciltivatè ki travay pa recolte. Ce pou yo obsevè lwa ça yo a moins ke se ou kote la lwa fe exception. Le fini, yo mandé contracté agricilti pou yal enrejistré yo nan depatman di travay amèricain.

MIN DWA CILTIVATE CAP FE VA E VIEN OU BIEN CAP TRAVAY PA RECOLTE GIN YIN

- Pou yo résèrwa infomasyon exacte sou travay yo pral fè ya.
- Cè pou infomasyon ça ékri nan you lang ké yo palé é compran bien, swa anglé ou bien panyol ou bien you lot lang.
- Pou yo ba yo condition travay la é pou yo akonpli sa yo promèt o
- Pou contracté ya montré yo prév ké li enrejistré nan depatman di travay, le lap pran yo pou travay la.
- Pou péyé yo lé yo dwé yo.

- To be paid wages when due
- To receive itemized, written statements of earnings for each pay period
- To purchase goods from the source of their choice
- To be transported in vehicles which are properly insured and operated by licensed drivers, and which meet federal and state safety standards
- For migrant farmworkers who are provided housing
 - * To be housed in property which meets federal and state safety and health standards
 - * To have the housing information presented to them in writing at the time of recruitment
 - * To have posted in a conspicuous place at the housing site or presented to them a statement of the terms and conditions of occupancy, if any

Workers who believe their rights under the act have been violated may file complaints with the department's Wage and Hour Division or may file suit directly in federal district court. The law prohibits employers from discriminating against workers who file complaints, testify or in any way exercise their rights on their own behalf or on behalf of others. Complaints of such discrimination must be filed with the division within 180 days of the alleged event.

For further information, get in touch with the nearest office of the Wage and Hour Division, listed in most telephone directories under the U.S. Government, Department of Labor.

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division



The law requires employers to display this poster where employees can readily see it.

- Pou yo réséwa an délay prèy lejans ké yo fé pou chak fousa ké yo touchée puo yo bay yo rézon si contracté pran nan lejans a.
- Pou yo achete koté ki fé yo plési.
- Pou yo monte machin ki gin bon assirans, ké chofé ki gin licens condi, é machin ça yo dwé an rüg avèk sékrité fédéral é sékrité nan coté ké yap viv la.
- Pou citivité cap fé va é vien ké yo ba yo cay
 - * Cé pou yo rété nan you cay ki gin sékrité ak ijijène.
 - * Pou yo ba yo sou papie tout condition lejeman an lé yap pran yo pou travay la.
 - * Tout condition ki ginyin koté yo pral rété a fé pou koté you koté ké tout mounn ka oué yo ou bien ekri sou papie.

Ouvrié ki koué ké patron yo violé lwa ça kapab poté plint nan départman di travay, nan séksion Wage & Hour ou bien yo ka fé patron yo procé dirékteman nan tribinal fédéral. La lwa pa pémèt patron baye ouvrié au kin traca ni punition lé il poté plint, sévi témouin, ou bien réclaté dwa li nan tribinal pou li mim ou pou lot. Si patron nou révoké nou pou ça, nou gln 180 jou pou nou poté plint nan départman di travay.

Si nou bezouin gin plis informasion pran kontak avèk biro di rayay ki pi pré nou. Nap join adres é téléfon yo nan liv téléfon nan, koté ki maké U.S. Government Department of Labor.

Depatman di Travay

Administration de Gestion de Travail
Séksion Wage and hour

La lwa di ké tout patron obligé posté papie saa koté pou tout travayé kab oué li bien

EXHIBIT E

SAMPLE INDEPENDENT CONTRACTOR AGREEMENT

This Independent Contractor Agreement (the "Agreement") is made and entered into this _____ day of _____, 200_, by and between _____ ("_____"), and _____, the undersigned independent contractor ("Contractor"). In consideration of the mutual promises, covenants, and other good and valuable consideration set forth in this Agreement, and intending to be legally bound, the Parties agree as follows:

1. Terms and Conditions. _____ hereby engages the services of Contractor and Contractor hereby agrees to render services to _____, as an independent contractor, for a term beginning on _____, 200_ through _____, 200_, unless earlier terminated in accordance with section 2 of this Agreement. Although Contractor, rather than _____, shall have ultimate control over Contractor's activities pursuant to this Agreement, in general, the services to be rendered by Contractor are set forth on Schedule I attached hereto. The description of services may be modified and supplemented from time to time by written agreement of the Parties in order to revise the description of the services or to accommodate new projects under this Agreement. All services rendered by Contractor on behalf of _____ pursuant to this Agreement shall be performed to the reasonable satisfaction of _____, to the best of Contractor's ability, and in furtherance of the welfare and objectives of _____. **[Attach a complete description of the tasks and services to be completed by the independent contractor as Schedule I.]**
2. Termination of Agreement. _____ may terminate this Agreement in whole or in part for any reason at any time by written notice. Upon receipt of any termination notice, Contractor shall immediately discontinue services on the date of and to the extent specified in the notice. Contractor may terminate his performance of the services under this Agreement upon ___ days advance written notice to _____. All compensation, earned by Contractor during the period of ___ days after the receipt by Contractor of such notice of termination shall be paid by _____ to Contractor, provided that, in the event of termination of this Agreement, Contractor shall only be entitled to compensation earned through the date of receipt by Contractor of the notice of termination. Provisions of this Agreement which by their express terms extend beyond termination or which by their nature so extend to give effect to their meaning shall survive and continue in full force and effect after any termination of this Agreement.
3. Payment. _____ agrees to pay Contractor a fee of _____ Dollars (\$_____.00) per _____ for services rendered and accepted by _____ during the Term of this Agreement. The Fee shall be paid upon _____. **[This paragraph should describe how and when the contractor will be paid.]**
4. Representations and Warranties. Contractor warrants and represents that he has the right to enter into this Agreement and is not subject to any obligation or disability which will or might prevent or interfere with the performance by Contractor of all of the covenants, conditions, and agreements to be performed and observed by him hereunder, and Contractor has not made nor will he make any contractual or other commitments which would inhibit the full performance of this Agreement by Contractor.

5. Indemnity; Release. Contractor agrees to indemnify, defend, and hold _____ and its successors, heirs, administrators, assigns, officers, directors, employees, agents and licensees harmless from any and all actions, causes of action, claims, demands, costs, liabilities, expenses, and damages (including attorneys' fees) arising out of, or in conjunction with, any claim for injury or death of any person, or for damage to any property, arising out of or in connection with the services performed by Contractor. Contractor further agrees to hereby release _____ and its successors, heirs, administrators, assigns, officers, directors, employees, agents and licensees from any and all claims, demands, actions, damages, causes of action, and liabilities for personal injury or property damage or loss of whatsoever kind or nature, directly or indirectly arising from Contractor providing the services hereunder. This Section shall survive termination of this Agreement.
6. Independent Contractor. In rendering services hereunder it is expressly understood and agreed that Contractor is not an employee of or controlled by _____, but that Contractor is, in all respects, an independent contractor, and as such Contractor has no right or authority to make any disbursements or purchases or to incur any liabilities on behalf of _____ or to otherwise obligate _____ in any manner whatsoever unless expressly authorized by _____, in writing, to do so. All of Contractor's services will be subject to _____'s final approval, but Contractor shall direct the details and means by which the services are accomplished. Contractor will be compensated on a 1099 basis and, accordingly, Contractor will be liable for any and all federal, state and local employment, sales, use, excise, and other taxes arising out of his performance of this Agreement and will furnish evidence of compliance or an applicable waiver of requirements to _____ upon request.
7. Employee Benefits; Retirement Benefits. Contractor understands and agrees that he is not entitled to any employment benefits, paid leaves, paid holidays or retirement benefits from _____ and that no active employee benefits are available to Contractor pursuant to the services performed by Contractor under this Agreement including, without limitation, workers' compensation or unemployment benefits. It is further understood that performance of the services shall not constitute employment with _____ for the purposes of determining retirement benefits.
8. Control. Contractor shall determine the means and manner of performance of any services rendered pursuant to this Agreement. Contractor shall not be subject to direction or control by _____ except to the extent such direction or control may be specifically allowed by applicable law or regulation. In conformity with the status of the Parties, Contractor shall not hold himself out to be an employee of _____. Except as otherwise expressly provided in this Agreement, Contractor will at all times be free from the control of _____ as to the time and manner in which he will work and otherwise. Contractor will pay all of his own expenses, costs and charges, and will furnish all needed equipment and materials, in connection with services rendered under this Agreement, except to the extent _____ agrees to do so.
9. Severability. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the

provisions of this Agreement. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and that provision shall be enforced to the greatest extent permitted by applicable law.

10. Notices. All notices and consents required to be given or made by the Parties shall be deemed properly made if sent by facsimile or mailed, postage prepaid, to the persons and addresses specified on the signature page or to such other address as designated in writing by each Party. Notices given pursuant to this Section shall be deemed received on the third business day after deposit or when actually received, whichever is sooner.
11. Assignment. This Agreement and the rights and obligations under this Agreement are personal with respect to Contractor and may not be assigned or delegated by any act of Contractor or by operation of law. _____ reserves the right to assign this Agreement and the rights and obligations under this Agreement to the successor in interest to _____ or to the purchaser of any assets of _____. This Agreement shall be binding on the Parties' heirs, administrators, successors and assigns.
12. Governing Law. This Agreement, and the rights and obligations of the Parties hereto, shall be governed by and construed in accordance with the laws of the State of Texas, exclusive of any rules with respect to conflict of laws.
13. Venue. This Agreement is to be performed in _____ County, Texas. Venue for any suit relating to this Agreement will lie exclusively in the courts of _____ County, Texas. The Parties agree that _____ County, Texas is the most convenient venue for any suit arising from this Agreement.
14. Headings. The headings used in this Agreement have been included only in order to make it easier to locate the subject covered by each provision and are not to be used in construing this Agreement.
15. Waiver of Default. A waiver by either Party of a breach of any provision of this Agreement is not a waiver of any subsequent breach.
16. Entire Agreement. This Agreement constitutes the entire agreement between _____ and Contractor, and supersedes all prior communications, representations or agreements, whether oral or written, with respect to the subject matter hereof. No agreement hereafter made between the Parties shall be binding on either Party unless reduced to writing and signed by an authorized officer of the Party sought to be bound thereby.

IN WITNESS WHEREOF, the Parties have executed this Agreement as the day and year stated below.

Date: _____

(“_____”):

Contractor:

Name: _____

Name: _____

Signature: _____

Signature: _____

Address: _____

Address: _____

SCHEDULE I¹

Pursuant to the terms and conditions agreed to by the Parties under the attached Agreement, Contractor shall perform the following tasks and services for _____, as an independent contractor:

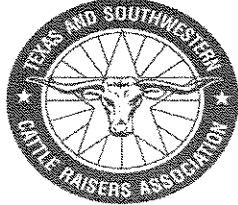
1. Contractor shall tend to the livestock located on the farm and/or ranch, including cattle, chickens, sheep, swine, goats, horses and other equines. Duties include feeding, watering, herding, grazing, and grooming the animals.
2. Contractor shall be responsible for filling the feed troughs with feed, marking livestock using brands, tags, paint, or tattoos, assisting with castrating, de-beaking, de-horning, and milking of animals, and segregating and loading animals onto scales, trucks, or other enclosed areas as necessary.
3. Contractor shall examine livestock on a daily basis to detect diseases and injuries, assist with birth deliveries of animals when required, and apply and administer medications, vaccinations, or insecticides as appropriate.
4. Contractor shall maintain up-to-date records regarding the livestock, including growth, feeding, vaccination, production, and cost records. These records are to remain on ranch property at all times and may not be removed from the property without prior approval.
5. Contractor shall clean, maintain, and repair ranch buildings, animal housing areas, and ranch-related equipment. Duties include cleaning barns, stalls, pens, using disinfectant solutions, brooms, brushes, shovels and water hoses, repairing fences, stalls, and pens on the property, cleaning, maintaining, and repairing tack and other equipment.
6. Contractor shall be responsible for helping to cut and maintain trails on the ranch, assisting with irrigation of ranch property, plowing fields as required, and planting or harvesting crops as needed either by hand or with the use of machinery.

Additional Options:

7. Contractor shall construct a barbed wire fence enclosing the ranch property. _____ will provide Contractor with the specific coordinates and dimensions of the property to be enclosed and the barbed wire to be utilized in the construction of the fence. All other equipment and materials necessary to complete this task shall be provided by Contractor. Unless otherwise agreed to by the Parties in writing, Contractor shall complete this task by the ____ day of _____, 200__.
8. Contractor shall assist with the construction of a six-stall barn on the ranch property. The barn shall be constructed in accordance with the design and layout plans provided as an attachment to this document. All supplies, equipment, and materials necessary to complete this task shall be provided by _____. Construction shall begin on the ____ day of _____, 200__ , and is anticipated to run through the ____ day of _____, 200__.

¹This document was created as an example only. As such, I have provided a variety of tasks and services characteristically associated with the farming and/or ranching industry. The tasks and services included in this document may or may not be applicable to your situation. Consequently, any actual Schedule used in conjunction with the attached Independent Contractor Agreement or any similar agreement should clearly and accurately detail the specific tasks and services contemplated under your particular agreement.

**EMPLOYMENT ISSUES FOR THE
CATTLE RAISER**



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**State and Federal Topics
Relating to Agricultural Labor**

- Fair Labor Standards Act (FLSA)
- Unemployment Compensation & COBRA
- Workers' Compensation
- Authorized Workers/Immigration
- Child Support Reporting Requirements
- Migrant & Seasonal Agricultural Worker Protection Act
- Employee vs. Contract Laborer
- Occupational Safety and Health Act (OSHA)
- Employment Handbooks

Fair Labor Standards Act

Application of the Act

- The FLSA covers employees whose work involves production of agricultural goods which will leave the state directly or indirectly and become a part of interstate commerce.
- Virtually ALL employees in agriculture are covered by the FLSA because they produce goods for interstate commerce.
- The FLSA does, however, exempt certain employees from the overtime pay provisions, minimum wage provisions, or both.

Fair Labor Standards Act

Overtime Pay Provisions

- Employees who are employed in "**agriculture**" are EXEMPT from the overtime pay provisions.
- They do not have to be paid time and one-half their regular rates of pay for hours worked in excess of 40 per week.
- "**Agriculture**"—includes farming in all its branches, including cultivation & tillage of soil, dairying, production, growing cultivation, and harvesting of agricultural commodities, as well as the raising of livestock, animals or poultry.
- It does **NOT** include work performed on a farm which is NOT incidental to or in conjunction with such farmer's farming operation.

Fair Labor Standards Act

Minimum Wage Provisions

- 500-"man days"
 - "**Man-day**"—is defined as any day during which an employee performs agricultural work for at least one hour.
 - An employer in agriculture who did not utilize more than 500 "man days" of agricultural labor (the Equivalent of About Seven Full-time Employees Working 5 Days a Week) in any calendar quarter of the preceding calendar year is exempt from the minimum wage and overtime pay provisions of the FLSA for the current calendar year.

Fair Labor Standards Act

Minimum Wage Provisions *cont.*

- **The Following Employees Are Exempt From the Minimum Wage Requirements Regardless of the 500-man-day Test:**
 - Employees who must be available at all hours to care for range livestock;
 - Migrant employees under 16 years who work with their parents in hand harvesting crops and are paid on the same piece rate basis as their parents;
 - Employees who:
 - Are paid on a piece rate basis; and
 - Were employed as hand harvest laborers fewer than 13 weeks in the previous year; and
 - Commute to work daily
 - Employees engaged in fishing or seafood processing

Fair Labor Standards Act

Minimum Wage Provisions *cont.*

- **What IS Required for Employers of Covered (Non-Exempt) Employees**
 - Pay minimum wage—currently \$5.15;
 - Maintain payroll records for 3 years for each employee;
 - Keep statement from each exempt piece rate employee showing # of weeks employed in agriculture during the preceding year;
 - Keep date of birth and parent's name for each exempt minor paid on piece rate basis;
 - Keep file showing full name, address, and date of birth for any minor under 19 who works when school is in session or in a hazardous occupation;
 - Display "Notice to Employees" Poster

Fair Labor Standards Act

Child Labor Provisions

- The Child Labor Provisions of the FLSA and Texas Child Labor Laws Govern the Employment of Minors
- When Both Acts Apply the Law Setting the Higher Standard Must be Observed

Fair Labor Standards Act

Child Labor Provisions *cont.*

- **FLSA**
 - Farm Employers must comply if they employ minors under 16 years old.
 - 16 years old is the minimum age for agricultural jobs:
 - Declared hazardous; and
 - During school hours.
 - 14 Years old is the minimum age for working in agricultural jobs:
 - Outside school hours; and
 - Not declared hazardous.
- **Texas Child Labor Law**
 - Governs Employment of Children 14-17 year of age.
 - The Employment of Children of Any Age Outside of School Hours is Exempt from this Law
 - Children 14 or 15 may not work more than 8 hours a day or more than 48 hours a week
 - Children 14 or 15 may not work between 10:00 p.m. and 5:00 a.m. on a day followed by a school day.

Fair Labor Standards Act

Child Labor Provisions *cont.*

- **FLSA *cont.***
 - 12 and 13 Year Olds May Be Employed With Written Parental Consent or on a Farm Where the Minor's Parents Are Also Employed.
 - Minors Under 12 May Be Employed With Written Parental Consent on Farms Exempt From Federal Minimum Wage Provisions (500 Man-day Test)
 - Minors of Any Age May Work at Any Time in Any Job on a Farm Owned or Operated by Their Parents.
- **Texas Child Labor Law *cont.***
 - Children 14 or 15 May Not Work Between Midnight and 5:00 a.M. On a Day Not Followed by a School Day
 - Children 14-17 Cannot Work in Any Occupation Considered Hazardous.

Fair Labor Standards Act

Child Labor Provisions *cont.*

- **Youth "Opportunity" Wage**
 - The 1996 Amendments Established a Separate Minimum Wage of Not Less Than \$4.25 an Hour for the First 90 Consecutive Calendar Days of Initial Employment for Youths Who Are Under 20 Years of Age; instead of \$5.15.
 - All Consecutive Calendar Days Beginning With the First Date of Work for an Employer Count Against the 90 Day Consecutive Calendar Days of Eligibility, Regardless of How Many Days During This Period the Youth Actually Performs Work.

Fair Labor Standards Act

Record Keeping Requirements

- **Payroll**
 - **Records:**
 - Full Name of Employee
 - Complete Home Address
 - Sex & Occupation in Which Employed
 - Identification of Employees Who Are:
 - Immediate Family
 - Piece Rate Hand Harvest Workers
 - Employees Principally Engaged in Range Livestock Production
 - Other information regarding hours worked and earnings of employees
- **Child Labor**
 - **Records:**
 - Full Name
 - Place Where Minor Lives and his/her Permanent Address
 - Date of Birth
 - Evidence in Writing of Any Required Parental Consent
 - Employment Certification or Minor Employee's Age on File

Texas Payday Law

- All Employers Must Comply
- General Provisions of the Law:
 - Must Pay Employees Not Subject to Overtime Provisions at Least Once a Month
 - Must Pay All Other Employees Twice a Month
 - Must Designate Paydays
 - Post Notices in Spanish and English

Federal Income Tax/Social Security Withholding for Farm Workers

- Income Withholding
 - Farm Employers Are Required to Withhold Federal Income Taxes on the Wages of Agricultural Labor.
 - For Income Tax Withholding, Wages Include Cash Payments, As Well As the Fair Market Value of Items Provided to Employees.
 - Farm Employers Must Prepare and Give to Each Employee a Form W-2 by January 31 for the Preceding Year's Taxes Withheld.
- Social Security
 - Farm Employers Must Make Social Security Deductions If They Pay More Than \$2,500 to All Employees for Agricultural Labor During the Year.
 - If the Above Test is Not Met, Individual Wages Will Be Subject to FICA for Any Individual Receiving More Than \$150 During the Year.
 - For Social Security, Wages Include Only Cash Payments Made to Employees
 - Self-Employed Farmers Who Report Net Income of \$400 or More Must Also Contribute.

Unemployment Compensation

- Who Must Comply
 - Any Employer of Farm Workers Who Either Has in the Current Calendar Year or Had in the Preceding Calendar Year:
 - A Payroll of at Least \$6,250 in a Calendar Quarter, OR 3 or More Employees for Some Portion of a Day in Twenty or More Weeks During the Year;
 - Employed Migrant Labor;
 - Employed Seasonal Workers on Truck Farms, Orchards or Vineyards; Or
 - Employed Seasonal Workers and Migrant Workers at the Same Time and If the Seasonal and Migrant Workers Did the Same Work at the Same Location.

Unemployment Compensation

Cont.

- **Requirements:**
 - Pay Unemployment Compensation Tax on the First \$9,000 of Annual Payroll Earnings for Each Employee.
 - Submit Tax and Wage Reports As Required.
 - Furnish Information Regarding Job Separation Within 10 Days of Receiving Notice That a Claim Was Filed.
 - Display Poster "To Employees" in a Conspicuous Location
 - Have Records Available for Inspection at Any Reasonable Hour During the Business Day and Maintain for 5 Calendar Years.

Unemployment Compensation

Cont.

- **Employee Eligibility**
 - To Be Eligible, an Individual Must:
 - Be Employed Less Than Full Time
 - Be Able to Work
 - Be Available for Work
 - Be Actively Seeking Work and
 - Not Be Subject to Any Disqualification or Ineligibility
 - Have the necessary Wage Credits during the base period, which consists of the first 4 of the last 5 completed calendar quarters preceding the effective date of the worker's initial claim.

Unemployment Compensation

Cont.

- **Disqualification**
 - Farm Workers May Not Be Eligible for Benefits If It Is Found That:
 - They Quit Without Good Cause Attributable to the Employer;
 - They Were Discharged for Misconduct Connected With Work;
 - They Fail to Apply for or Accept Suitable Work
 - Their Unemployment Is Due to Participation in a Labor Dispute
 - They Have Willfully Misrepresented Their Case
 - They Are Receiving or Are Eligible to Receive a Retirement Income Other Than Disability
 - They Are Receiving or Are Seeking Unemployment Under a Law of Another State or the United States; Or
 - They Are Illegal Aliens.

COBRA

- COBRA Contains Provisions Giving Certain Former Employees, Retirees, Spouses Former Spouses, and Dependent Children the Right to Temporary Continuation of Health Coverage at Group Rates.
- Coverage Is Only Available When Coverage Is Lost Due to Certain Specific Events.
- Three elements to qualifying for COBRA benefits
 - Plan Coverage
 - Qualified Beneficiaries
 - Qualifying Event

COBRA

Plan Coverage

- Group health plans for employers with 20 or more employees on more than 50 percent of its typical business days in the previous calendar year are subject to COBRA.
- Both full- and part-time employees are counted to determine whether a plan is subject to COBRA.

COBRA

Qualified Beneficiaries

- Generally an individual covered by a group health plan on the day before a qualifying event who is either an employee, the employee's spouse, or an employee's dependent child.
- In addition, any child born to or placed for adoption with a covered employee during the period of COBRA coverage is considered a qualified beneficiary.

COBRA

Qualifying Events

- Events that would cause an individual to lose health coverage.
- The type of event determines who the qualified beneficiaries are and the amount of time that a plan must offer the health coverage to them under COBRA.

COBRA

Notice Requirements

- Initial notice describing COBRA rights must be furnished to covered employees and their spouses at the time coverage under the plan commences.
- Employers must notify plan administrators of a qualifying event within 30 days after an employee's death, termination, reduced hours of employment or entitlement to Medicare.

Workers' Compensation Law

- **Introduction**
 - State Regulated Insurance Program
 - Pays Medical Bills and Replaces Some Lost Wages for Work-related Injuries, Diseases or Illnesses
 - Texas Employers May Choose Whether or Not to Maintain Coverage
 - Employers Who So Choose Can Purchase Private Insurance or Self Insure

Workers' Compensation Law

Who Must Comply

- While the Law Does **NOT** Require Employers to Purchase Workers' Compensation Insurance, All Employers Must Comply With Specific Provisions of the Law.
- Some Agricultural Workers Still May Be Exempted From Coverage:
 - **Migrant Workers**—those Persons Employed in Seasonal or Temporary Jobs and Required to Be Away From Their Permanent Residences Overnight.
 - **Seasonal Workers**—those Persons Employed in Seasonal or Temporary Jobs, but Are Not Required to Be Away From Their Permanent Residences Overnight.
 - **All Other Farm & Ranch Laborers**

Workers' Compensation Law

Exemptions

- **Migrant Workers**
 - There are NO exemptions with regard to migrant workers, regardless of the number employed or the gross annual payroll.
- **Seasonal workers**
 - No Exemptions for Seasonal Workers employed on a truck farm, orchard or vineyard.
 - No Exemption for seasonal workers who do the same work, at the same time and location as migrant workers.
 - Seasonal Workers who do not fall into the above two categories are exempt from the law if their Employer's Gross income was less than \$37,871 in 1998.
- **All Other Farm and Ranch Laborers**
 - To be exempt, their agricultural employer must employ fewer than 3 person who are not seasonal or migrant workers and had a payroll during the preceding year that was less than the threshold outlined under Seasonal Workers.

Workers' Compensation Law

Subscribers vs. Non-Subscribers

- | | |
|---|---|
| <ul style="list-style-type: none">• Subscribers<ul style="list-style-type: none">• Display Posters That Employees Are Covered• Allow New Employees to Waive Coverage• Display Posters Regarding Ombudsman Program• File an Injury Report Within 8 Days of Certain Accidents• Have a "Drug Free Workplace Policy" | <ul style="list-style-type: none">• Non-subscribers<ul style="list-style-type: none">• Must Display Posters That Employees Are Not Covered• Provide Written Statement That Not Covered to New Employees• File Notice With the Texas Workers' Compensation Commission |
|---|---|

Authorized Workers

- **Immigration Reform and Control Act of 1986 (IRCA) / Immigration and Nationality Act (INA)**
 - **Employment Eligibility**—Employers may hire only persons who may legally work in the U.S. (i.e., citizens, nationals of the U.S. and authorized aliens)
 - **Employment Verification**—the law requires employers to document (I-9) that their workers have a legal right to work in this country.
 - **Anti-Discrimination**—Prohibits Employers From Discriminating in Hiring or Discharge Based on National Origin and Citizenship Status.

Authorized Workers

Who Must Comply

- All Persons or Businesses Who Have One or More Employees Must Comply By Completing an I-9
 - **Exceptions (No I-9 Required For):**
 - Persons Hired Before November 6, 1986, Who Have Been in Continuous Employment
 - Persons Employed in Casual Domestic Work in a Private Home on a Sporadic, Irregular or Intermittent Basis
 - Independent Contractors
 - Persons Who Provide Labor to You, but Are Employed by a Contractor Providing Contract Labor
 - **NOTE:** *You Cannot Contract for the Work of an Alien If You Know the Alien Is Not Authorized to Work in the U.S.*

Authorized Workers

Required Documentation

- I-9—the Documentation Requirement Is Satisfied by Maintaining Duly Completed Immigration and Naturalization Service (INS) I-9 Forms for All Employees.
- Must Be Kept on File for at Least 3 Years or 1 Year After Employment Is Terminated, Whichever Is Longer.
- All Employees Must Show Their Employer Proof of Identity and Authorization Within 72 Hours of Being Hired.
 - **Note:** *If Employment Is for Less Than 72 Hours, Verification Must Be Established by the End of the 1st Day.*

Authorized Workers

Do's and Don'ts For Compliance

- **Do's**
 - Hire Applicants Before Requesting Authorization and Identity Documents
 - Allow Employees to Choose Which Document to Establish Eligibility
 - Verify That You Have Seen the Documentation
 - Keep All I-9 Forms in a Separate File Apart From Personnel Files
- **Don'ts**
 - Treat Applicants Differently Based on Looking or Sounding Foreign
 - Require Specific Documents for Verification
 - Refuse to Accept Valid Work Authorization With a Future Expiration Date
 - Refuse to Accept Valid Work Authorization Because Unfamiliar With Document
 - Demand That Applicants Speak Only English on the Job.

Authorized Workers

Acceptable Documentation

| LIST A Documents That Establish Both Identity and Employment Eligibility | OR | LIST B Documents That Establish Identity | AND | LIST C Documents That Establish Employment Eligibility |
|---|----|---|-----|--|
| 1. U.S. Birth certificate (copy) | | 1. U.S. Birth certificate (copy) | | 1. U.S. Social Security card (copy) |
| 2. U.S. Passport (copy) | | 2. U.S. Passport (copy) | | 2. U.S. Social Security card (copy) |
| 3. U.S. State Department (copy) | | 3. U.S. State Department (copy) | | 3. U.S. Social Security card (copy) |
| 4. U.S. Permanent Resident Card (copy) | | 4. U.S. Permanent Resident Card (copy) | | 4. U.S. Social Security card (copy) |
| 5. U.S. Naturalization Certificate (copy) | | 5. U.S. Naturalization Certificate (copy) | | 5. U.S. Social Security card (copy) |
| 6. U.S. Employment Authorization Document (copy) | | 6. U.S. Employment Authorization Document (copy) | | 6. U.S. Social Security card (copy) |
| 7. U.S. Permanent Resident Card (copy) | | 7. U.S. Permanent Resident Card (copy) | | 7. U.S. Social Security card (copy) |
| 8. U.S. Naturalization Certificate (copy) | | 8. U.S. Naturalization Certificate (copy) | | 8. U.S. Social Security card (copy) |
| 9. U.S. Employment Authorization Document (copy) | | 9. U.S. Employment Authorization Document (copy) | | 9. U.S. Social Security card (copy) |
| 10. U.S. Permanent Resident Card (copy) | | 10. U.S. Permanent Resident Card (copy) | | 10. U.S. Social Security card (copy) |
| 11. U.S. Naturalization Certificate (copy) | | 11. U.S. Naturalization Certificate (copy) | | 11. U.S. Social Security card (copy) |
| 12. U.S. Employment Authorization Document (copy) | | 12. U.S. Employment Authorization Document (copy) | | 12. U.S. Social Security card (copy) |

Reporting Requirements

Child Support

- **Every U.S. employer, large and small, must comply with the requirements of the Child Support Enforcement Program on three counts:**
 - Report Information about newly hired employees to the State Directory of New Hires within 20 days
 - Withhold Income After receiving the Order/Notice to Withhold Income for Child Support
 - Provide information to the state or local child support enforcement agency for information about an employee, such as information about his or her earnings, current residence, and health insurance coverage, and report the termination of an employee for whom you are withholding child support (whether the employee is fired, resigns or is temporarily laid off).

Temporary Agricultural Workers
(H-2A Visas)

- Program created under IRCA where employers may bring agricultural workers into the country on a temporary, non-immigrant basis.

Temporary Agricultural Workers
(H-2A Visas)

- **Who May Apply**
 - Agricultural Employer Who Anticipates a Shortage of Domestic Workers Needed for Temporary or Seasonal Labor May Apply With Department of Labor.
 - An Association of Agricultural Employers May File As a Sole Employer.
- **Conditions to be Satisfied**
 - Positive Recruitment
 - Same Wage Rate
 - Housing
 - Meals
 - Workers' Compensation Insurance
 - Tools and Supplies
 - ¾ Guarantee
 - 50% Rule
 - Transportation
 - Labor Dispute
 - Certification Fee
 - Other Conditions

Migrant and Seasonal Worker Protection Act (MSPA)

- MSPA protects migrant and seasonal workers in their interactions with farm labor contractors, agricultural employers and providers of migrant housing.
- Requires agricultural employers and farm labor contractors who recruit, hire, solicit, employ, furnish, transport and house agricultural workers to meet certain minimum requirements in dealing with migrant and seasonal agricultural workers.

Migrant and Seasonal Worker Protection Act (MSPA)

Requirements

- **Farm Labor Contractor Registration**—must register with the DOL before recruiting soliciting, etc. migrant and seasonal workers.

- **NOTE:** *Farmers and Ranchers Who Use Labor Contractors Are Now, in Most Instances, Defined As Joint Employers and Are Jointly Responsible for Compliance With Employment Related MSPA Obligations.*

Migrant and Seasonal Worker Protection Act (MSPA)

Requirements

- **Disclosure:**
 - Describe terms and conditions of employment
 - Post Notice
- **Record Keeping**
 - Maintain Payroll Records (Wages, hours worked, deductions, total pay, net pay, etc.)
 - Preserve for 3 Years
- **Transportation Safety**
 - Vehicles used for transport must be insured and meet federal and state safety standards
- **Wages, Supplies & Arrangements**
 - Pay wages owed when due
 - Employer prohibited from requiring workers to purchase goods solely from contractor
 - May not violate terms of working arrangement without adequate justification
- **Safety and Health of Housing**
 - Must ensure that housing offered to migrant workers complies with federal and state safety standards
 - Housing may not be occupied until inspected and certified
 - Certification must be posted

Employee vs. Contractor

| Employee | Contractor |
|--|---|
| An employee receives instructions | Does the job his or her own way |
| The services of an employee are usually merged in the firm's overall operation and the firm's success may depend on the specific employee services | Services are usually separate from the client's business and are not integrated or merged into it |
| Employee often continues to work for the same employer on a continuing basis month after month. | Usually hired to do one job of limited duration and has no expectation of continuing work |
| Ordinarily devotes full-time service to the employer or the employer may have a priority on the employee's time. | Sets his or her own hours, |
| Furnished with all necessary tools, materials and equipment to perform their job by the employer | Ordinarily provide their own tools and equipment |
| Generally as little or no investment in the business, and is economically dependent on the employer | Usually have a substantial financial investment in their own independent business |
| Does not ordinarily realize a profit or loss in the business, but rather, is paid for services rendered. | Can either realize a profit or suffer a loss depending on the management of expenses, revenues and job performance. |

Safety & Health
Worker Protection Standard

- Requirements designed to reduce the risks of illness or injury resulting from pesticide handlers and agriculture workers
 - Personal Protective Equipment (PPE)
 - Restricted – Entry Interval (REI)
- Who must comply
 - Agriculture employers who are using pesticides in the production of agricultural plants on farms, forests, nurseries, and greenhouses.

Safety & Health
Worker Protection Standard *cont.*

- **Exceptions**
 - On pasture/rangeland, rights-of-way and in structural pest control;
 - On livestock or in and around livestock premises
 - Post-harvest activity
 - Control of vertebrate pests
 - Attractants/repellents in traps;
 - Habitations, gardens, lawns, etc.
 - Government-sponsored public pest control programs or for research uses of unregistered pesticides

Safety & Health
Worker Protection Standard *cont.*

- **Exemptions**
 - Generic Provisions
 - Principally Training
 - Notification
 - Decontamination
 - Emergency Assistance

Safety & Health

Worker Protection Standard *cont.*

- **Two Types of Agriculture Employers**
 - One who hires or contracts for the services of agricultural workers
 - One who owns or is responsible for the management and condition of an agricultural establishment that uses such workers.

Safety & Health

Worker Protection Standard *cont.*

- **Handler**
 - Mixes, loads, transfers or applies pesticides
 - Disposes of pesticides or unrinsed containers
 - Handles open containers
 - Flags
 - Cleans, adjusts, handles or repairs contaminated equipment
 - Assists with applications
 - Enters enclosed area after use of airborne pesticide before PEL or ventilation criteria are met
 - Enters area treated with soil fumigant to adjust or remove tarps
 - Performs task as a crop advisor during application or an REI

Safety & Health

Worker Protection Standard *cont.*

- **Worker**
 - Performs Tasks (Other Than Handler Tasks) Related to the Production of Agricultural Plants on an Agricultural Establishment

Safety & Health

Worker Protection Standard *cont.*

- **Protection For Workers**
 - The employer must keep workers other than trained and protected pesticide handlers out of an area being treated
 - Under some application conditions, employers must keep nursery or greenhouse workers out of locations that are near an area being treated
 - If contact with pesticides is possible, the employer must keep workers from entering a treated area until the REI is over
- **Exceptions**

Safety & Health

Worker Protection Standard *cont.*

- **Protect early**
- **Must be trained**
 - Those who conduct handler training
 - Those who conduct worker training
- **Posted / oral warning sign**
- **Notice of applicants**

Safety & Health

Worker Protection Standard *cont.*

- **Prohibited Statement**
 - "All Product Labeling Must Include a Statement Prohibiting Application of the Product in a Way That Will Contact Workers or Other Persons Directly Through Drift"
- **Restricted Entry Intervals (REI)**
- **Personal Protective Equipment**
 - Ocular
 - Inhalation
 - Dermal
 - PPE Substitutions and Exceptions

Safety & Health
Agricultural Hazard Communications

- Provide better information about working safely with agricultural chemicals.

- Emergency Reporting Requirements

Safety & Health
Agricultural Hazard Communications *cont.*

- **The law requires agricultural employers to:**
 - Provide workers with relevant crop sheets and ensure that they are read aloud to workers at least once each work season
 - Inform workers about relevant pesticide reentry intervals
 - Maintain Workplace Chemical Lists and Material Safety Data Sheets and make these accessible to workers, treating medical personnel, or a member of the community upon request

Safety & Health
Agricultural Hazard Communications *cont.*

- **The law requires agricultural employers to:**
 - Provide other basic health and safety information, approved by the Texas Department of Agriculture, to their workers on the first pay day of each work season
 - Provide emergency information to their workers, local fire chiefs, medical personnel and designated farm worker representatives, upon request

Safety & Health

Agricultural Hazard Communications *cont.*

- Crop Sheets
- Workplace Chemical Lists
- Material Safety Data Sheets

Safety & Health

Agricultural Hazard Communications *cont.*

- Emergency Reporting Requirements
 - Applies to storage of 55 gallons or 500 pounds of pesticides within ¼ mile of a residential area with 3 or more dwellings
 - Must inform local fire chief of emergency contacts

Safety & Health

Agricultural Hazard Communications *cont.*

- **Agricultural workers are entitled to**
 - Receive crop sheets and have information read aloud by employers
 - Have access to Material Safety Data sheets and Workplace Chemical Lists
 - Be informed of pesticide application dates
 - Be provided with other basic health and safety information on the first pay do of the work season
 - Contact TDA to report violations
 - Designate a representative

Employment Handbooks

- Employers and employees can both benefit from a mutual understanding about the policies governing their relationship.
- Pros and Cons
- Preparation
- Special Policies
 - Drug Testing Policy
 - Harassment Policies

Employment Handbooks

Pros and Cons

- **Pros**
 - Minimizing lost time spent by addressing employee questions.
 - Facilitate consistent application of employment practices and procedures.
 - Build pride in the work force, help create a "team" atmosphere, discourage employment related lawsuits, and reinforce the at-will relationship.
- **Cons**
 - Effort to organize the issues the policy will cover can be challenging and time consuming.
 - Can do more harm than good if it confuses rather than clarifies employment policies or unintentionally impedes the at-will employment relationship.

Employment Handbooks

Preparation

- **Employers should prepare personnel policy manuals with four objectives in mind:**
 - Strive to supply employees with necessary information
 - Couch handbook in terms that are non-contractual and which serve to protect management flexibility to make employment decisions.
 - Evaluate policies and employee handbooks to make certain they do not directly violate employment discrimination laws or disproportionately affect employees or applicants in protected minority groups.
 - Be aware that a handbook cannot answer all questions that may arise and the employer must preserve residual discretion.

Employment Handbooks

Special Policies

- **Harassment Policy**
 - Be Specific With Respect to Sexual Harassment and Contain a Definition of Sexual Harassment
 - Should Set Forth an Effective Complaint Procedure to Be Followed by Employees Who Believe They Have Been a Victim of Harassment (Grievance or Complaint Procedure)
 - Contain a Complaint Procedure Which Sets Forth in the Policy a Clear Explanation of Prohibited Conduct.
- **Drug and Alcohol Policy**
 - Required for Certain Employers by Texas Workers' Compensation Act
 - Require Specific Provisions
- **Drug Testing**
 - Issues to be considered:
 - Conditions under which testing is required
 - Method of testing
 - Chain of Custody
 - Confidentiality of Results

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