



South Dakota Legislative Research Council

Issue Memorandum 98-17

CONSTITUTIONAL AMENDMENT E -- CORPORATE FARMING

Introduction

Proposed Constitutional Amendment E, which will be presented to South Dakota voters in the 1998 general election, would revise South Dakota's corporate farming laws by placing corporate farming restrictions in the state constitution. Adoption of Amendment E would supersede South Dakota's existing corporate farming statutes (SDCL 47-9A) and would make it necessary for the Legislature to repeal or amend SDCL 47-9A to conform with the new constitutional provisions. Amendment E is modeled closely on the corporate farming restrictions in the Nebraska State Constitution, which were added to its constitution by the voters in 1982 and are known as "Initiative 300."

South Dakota's Current Corporate Farming Law

South Dakota's current corporate farming law (SDCL 47-9A) is known as the "Family Farm Act of 1974." Basically, the current law in SDCL 47-9A-3 prohibits corporations from engaging in farming or acquiring real estate that is used for farming or is capable of being used for farming. The remainder of the statute is a list of exceptions or clarifications to this prohibition that were either included in the original 1974 legislation or added later by the Legislature or by the voters through the initiative process. The primary exemption from the corporate farming restriction in

Chapter 47-9A is that "family farm corporations" and "authorized farm corporations" are allowed to engage in farming under the statute. (See SDCL 47-9A-13, 47-9A-14, and 47-9A-15 for definitions of family farm and authorized farm corporations.) Chapter 47-9A also includes numerous other exemptions or exceptions, including certain greenhouses, poultry producers, banks, trust companies, previously owned or leased land, encumbrances, lands taken in collection of debt, research and experimental farms, nurseries and seed farms, gifts to nonprofit corporations, breeding stock operations, livestock feeding operations, and land acquired for certain non-farming uses. The chapter also contains certain reporting and enforcement requirements. In addition the voters in 1988 adopted SDCL 47-9A-13.1 as an initiated measure to restrict certain hog confinement facilities, a provision that has received further attention recently.

Corporate Hog Farming Operations and South Dakota's Corporate Farming Law

In recent years, South Dakota's most visible corporate farming issue has involved the introduction of large-scale corporate hog feeding operations into the state. In 1987 and 1988, a proposed hog feeding facility in the Pierre area generated controversy and resulted in legislation to tighten the definition of prohibited corporate farming activity by specifically prohibiting corporations from operating facilities for the "breeding, farrowing, and

raising” of hogs. The definition of farming in effect at the time, and still in effect today (SDCL 47-9A-2(4)), only restricts certain corporate farming activities that involve the cultivation of land, an interpretation that was reinforced by the Attorney General’s Memorandum Opinion 87-02. In that opinion, the Attorney General noted that although it may seem strange to conclude that a hog feeding operation did not constitute “farming,” the statutory definition of farming in SDCL 47-9A ties farming to the cultivation of land. The 1988 legislation was vetoed but was subsequently approved by the voters in the 1988 election as an initiated measure that created SDCL 47-9A-13.1 and amended SDCL 47-9A-14. Meanwhile, the proposed hog confinement operation project was canceled.

The large-scale hog operation controversy resurfaced in the 1990s and continues to be an issue in South Dakota and around the nation. Two Attorney General’s Opinions (Memorandum Opinion 89-05 and Official Opinion 95-02) noted that the language in SDCL 47-9A-13.1, which was added by the 1988 initiated measure, would only prohibit corporate hog operations that were engaged in each of three activities: breeding, farrowing, and raising hogs because the language of that section used the conjunction “and” rather than “or”. An operation not engaged in all three activities would not be subject to the restrictions of SDCL 47-9A-13.1. Although the issue of large-scale hog farming received much attention during the 1997 and 1998 legislative sessions, SDCL 47-9A-13.1 has so far not been amended.

Provisions of Amendment E

During the 1997 Legislative Session, Senate Joint Resolution 3 would have submitted a proposed constitutional amendment concerning corporate farming to the voters. The amendment proposed by SJR 3, which was

essentially the same as Amendment E, was defeated by the Legislature. Following the defeat in the Legislature, supporters of the proposed amendment circulated petitions to place the measure on the 1998 general election ballot. One of the primary differences between South Dakota’s existing corporate farming laws and proposed Amendment E is that the constitutional amendment would shift South Dakota’s corporate farming regulations from their current statutory status under the control of the Legislature to the state constitution, which cannot be directly amended by the Legislature.

The approach taken by Amendment E is similar to South Dakota’s existing corporate farming law, with a basic prohibition of corporate farming activities coupled with a series of exceptions or exemptions, although portions of the proposed amendment are probably more stringent than the current corporate farming restrictions in SDCL 47-9A. The definition of “farming” is broader under Amendment E than in the current statute. Under Amendment E, farming includes “cultivation of land for the production of agricultural crops, fruit, or other horticultural products, *or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.*” Under Amendment E, farming is not limited to the cultivation of land, and the regulation of feeding operations is broader than simply singling out corporate hog confinement facilities, as in SDCL 47-9A-13.1. Unlike the current law, which provides an exemption for livestock feeding operations (SDCL 47-9A-11), Amendment E only exempts livestock that are purchased for slaughter within two weeks or purchased and resold within two weeks.

Many of the other exemptions and exceptions under Amendment E are similar to those under existing law, including exemptions for family farm corporations and certain cooperatives. Amendment E also grandfathers in certain

farming activities that are in existence on the effective date of the amendment. Although speculating on the effects of proposed legislation can be risky, it does appear that livestock feeding operations would be more tightly regulated under Amendment E than under the current law. That, plus the difficulty of amending the constitution rather than amending statute, appear to be the main differences between South Dakota's current corporate farming laws and proposed Amendment E. (The text of Amendment E is included as an appendix at the end of this article.)

Supporters and Opponents

Proponents of Amendment E maintain that making South Dakota's corporate farming laws a part of the state constitution would make them more stringent and would command more respect because of the difficulty of amending them, particularly in the face of short-term political pressures or economic promotional plans. Their basic concern is to prevent South Dakota agriculture from becoming dominated by large corporations, especially the large-scale corporate hog feeding operations that have been proposed in recent years. They feel that the current statutes do not address large-scale corporate hog feeding operations except in the limited circumstances specified in SDCL 47-9A-13.1, and they cite the failure of the Legislature to address some of the shortcomings of the current law. Proponents argue that the state's current corporate farming laws are not adequate to protect family farms and that as statutes, rather than constitutional provisions, they are even more vulnerable to transient political pressures.

Opponents of Amendment E fear that placing these provisions in the constitution would make them overly difficult to amend if they turn out to be ineffective or detrimental, particularly in view of increasing divisions in

South Dakota between rural and urban voters. Opponents also believe that Amendment E is too broad in its restrictions on livestock feeding and would affect many more livestock operations than the large-scale hog feeding facilities that have been proposed recently. Opponents feel that the provisions of Amendment E, which are modeled after Nebraska's strict corporate farming law, may have a negative impact on South Dakota's general economy and on prospects for development of the state's agricultural economy. Opponents also contend that the language of Amendment E is unclear and that the proposal will result in much litigation without solving the underlying problems of improving the agricultural economy.

Various agricultural groups in the state have taken opposing positions on the corporate farming issue and on Amendment E, as have other economic development and political groups. The issue does not divide clearly on partisan or economic lines or along urban versus rural lines.

Summary

As noted above, it is difficult to predict the legal or economic implications of the changes proposed for South Dakota's corporate farming laws as technologies, markets, business climates, and agricultural practices change. The measure's effects in Nebraska are also difficult to assess, given the variety of other intervening factors that can affect business decisions and economic activity. It is clear that placing South Dakota's corporate farming provisions in the state constitution rather than statute will make them more difficult to amend and may strengthen their impact as project sponsors assess the chances of amending any provisions that in some way hinder their plans. The provisions of Amendment E also appear to be more stringent than current law in the

regulation of corporate livestock feeding and other corporate livestock operations.

This issue memorandum was written by Tom Magedanz, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.

APPENDIX – Text of Constitutional Amendment E

Section 1. That Article XVII of the Constitution of the State of South Dakota be amended by adding thereto new sections to read as follows:

§ 21. No corporation or syndicate may acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any real estate used for farming in this state, or engage in farming. The term, corporation, means any corporation organized under the laws of any state of the United States or any country. The term, syndicate, includes any limited partnership, limited liability partnership, business trust, or limited liability company organized under the laws of any state of the United States or any country. A syndicate does not include general partnerships, except general partnerships in which nonfamily farm syndicates or nonfamily farm corporations are partners. The term, farming, means the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or the ownership, keeping, or feeding of animals for the production of livestock or livestock products.

§ 22. The restrictions in § 21 of this Article do not apply to:

- (1) A family farm corporation or syndicate. A family farm corporation or syndicate is a corporation or syndicate engaged in farming or the ownership of agricultural land, in which a majority of the partnership interests, shares, stock, or other ownership interests are held by members of a family or a trust created for the benefit of a member of that family. The term, family, means natural persons related to one another within the fourth degree of kinship according to civil law, or their spouses. At least one of the family members in a family farm corporation or syndicate shall reside on or be actively engaged in the day-to-day labor and management of the farm. Day-to-day labor and management shall require both daily or routine substantial physical exertion and administration. None of the corporation's or syndicate's partners, members, or stockholders may be nonresident aliens, or other corporations or syndicates, unless all of the stockholders, members, or partners of such entities are persons related within the fourth degree of kinship to the majority of partners, members, or stockholders in the family farm corporation or syndicate;
- (2) Agricultural land acquired or leased, or livestock kept, fed or owned, by a cooperative organized under the laws of any state, if a majority of the shares or other interests of ownership in the cooperative are held by members in the cooperative who are natural persons actively engaged in the day-to-day labor and management of a farm, or family farm corporations or syndicates, and who either acquire from the cooperative, through purchase or otherwise, such livestock, or crops produced on such land, or deliver to the cooperative, through sale or otherwise, crops to be used in the keeping or feeding of such livestock;
- (3) Nonprofit corporations organized under state non-profit corporation law;
- (4) Agricultural land, which, as of the approval date of this amendment, is being farmed, or which is owned or leased, or in which there is a legal or beneficial interest, directly or

indirectly owned, acquired, or obtained by a corporation or syndicate, if such land or other interest is held in continuous ownership or under continuous lease by the same such corporation or syndicate. For the purposes of this exemption, land purchased on a contract signed as of the approval date of this amendment is considered as owned on that date;

(5) Livestock, which as of the approval date of this amendment, is owned by a corporation or syndicate. For the purposes of this exemption, livestock to be produced under contract for a corporation or syndicate are considered as owned, if the contract is for the keeping or feeding of livestock and is signed as of the approval date of this amendment, and if the contract remains in effect and is not terminated by either party to the contract. This exemption does not extend beyond the term of any contract signed as of the approval date of this amendment;

(6) A farm operated for research or experimental purposes, if any commercial sales from the farm are only incidental to the research or experimental objectives of the corporation or syndicate;

(7) Land leases by alfalfa processors for the production of alfalfa;

(8) Agricultural land operated for the purpose of growing seed, nursery plants, or sod;

(9) Mineral rights on agricultural land;

(10) Agricultural land acquired or leased by a corporation or syndicate for immediate or potential nonfarming purposes, for a period of five years from the date of purchase. A corporation or syndicate may hold such agricultural land in such acreage as may be necessary to its nonfarm business operation, but pending the development of the agricultural land for nonfarm purposes, such land may not be used for farming except under lease to a family farm corporation or family farm syndicate or a non syndicate or noncorporate farm;

(11) Agricultural lands or livestock acquired by a corporation or syndicate by process of law in the collection of debts, or by any procedures for the enforcement of a lien, encumbrance, or claim thereon, whether created by mortgage or otherwise. Any lands so acquired shall be disposed of within a period of five years and may not be used for farming before being disposed of, except under a lease to a family farm corporation or syndicate, or a nonsyndicate or noncorporate farm. Any livestock so acquired shall be disposed of within six months;

(12) Agricultural lands held by a state or nationally chartered bank as trustee for a person, corporation or syndicate that is otherwise exempt from the provisions of sections 21 to 24, inclusive, of this Article;

(13) A bona fide encumbrance taken for purposes of security;

(14) Custom spraying, fertilizing, or harvesting;

(15) Livestock futures contracts, livestock purchased for slaughter within two weeks of the purchase date, or livestock purchased and resold within two weeks.

§ 23. If a family farm corporation or family farm syndicate that has qualified under all the requirements of a family farm corporation or a family farm syndicate ceases to meet the defined criteria, it has twenty years, if the ownership of the majority of the stock of such corporation, or the majority of the ownership interest of such syndicate, continues to be held by persons related to one another within the fourth degree of kinship or their spouses, and their land holdings are not increased, to either requalify as a family farm corporation or family farm syndicate or dissolve and return to personal ownership.

§ 24. Any corporation or syndicate that owns agricultural land or engages in farming is required to report information necessary for the enforcement of sections 21 to 24, inclusive, of this Article to the Secretary of State on an annual basis, under rules promulgated by the Secretary pursuant to state law. The Secretary of State shall monitor such reports and notify the Attorney General of any possible violations, and any resident of the state may also notify the Attorney General of any possible violations. If a corporation or syndicate violates any provision of sections 21 to 24, inclusive, of this Article, the Attorney General shall commence an action in circuit court to enjoin any pending illegal purchase of land or livestock, or to force divestiture of land or livestock held in violation of sections 21 to 24, inclusive, of this Article. The court shall order any land held in violation of sections 21 to 24 of this Article to be divested within two years and any livestock to be divested within six months. If land so ordered by the court has not been divested within two years, the court shall declare the land escheated to the state. If the Attorney General fails to bring an action in circuit court to enforce sections 21 to 24, inclusive, of this Article, any resident of the state has standing in circuit court to sue for enforcement.