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rate formalities are ignored, both limited liability and corporate tax deductions may be lost. The decision to incorporate is important and can be made only after carefully considering of all advantages and disadvantages.

Limited liability company networking. Another possibility is networking through family farm LLCs. Smith could form an individual LLC consisting of his 10 acres and building, while Jones could form his own LLC consisting of his sows. Then the two LLCs could form a partnership. However because both LLCs would have limited liability, Smith and Jones' liability exposure would be limited to the property in their respective LLCs. Note that in this case both Smith and Jones would have to provide daily labor and management for each of their LLCs to qualify as a family farm LLC.

LLCs do have some operational advantages over corporations. The corporate formalities of shareholder meetings, election of officers and directors, and maintaining records of shareholder, officer and director meetings are not required. Capital gains on appreciated property generally are not imposed if the LLC is dissolved. However, certain employee benefits that may be fully deductible only in a corporation are not fully deductible within an LLC.

In addition to networking through FFCs or family farm LLCs, combination of FFCs and family farm LLCs could network through a livestock production partnership, with each partner having limited liability as a FFC or family farm LLC. Even though partners generally have unlimited personal liability for partnership debts and legal obligations, if the partner is a limited liability entity (like a FFC or family farm LLC) then that partner's partnership liability is limited to the assets of the FFC or family farm LLC.

If you have questions about networking and how to legally structure a networked livestock operation, contact an attorney.

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Feedlot Nuisance and the Nebraska Right to Farm Act

J. David Aiken¹

Livestock operations located near private dwellings (including farmsteads) are often the subject of nuisance lawsuits because of the odor and flies generated. For many years the Nebraska Supreme Court ruled that a feedlot was legally not a nuisance as long as it was properly maintained, regardless of the feedlot's effect on neighbors. Beginning in 1975, however, the Court changed its position, ruling that feedlots could legally constitute a nuisance even if they were maintained with due care. If the feedlot is a nuisance, the operator could be required by the court:

1. to pay money damages to the neighbor,
2. to control the nuisance, or
3. to discontinue the feedlot.

In 1982 the Nebraska Right to Farm Act was adopted, which protects feedlots from nuisance lawsuits if the feedlot was there first. The Right to Farm Act, however, does not protect feedlots when they expand and a neighbor objects.

No negligence, no nuisance. For many years the Nebraska Supreme Court ruled that feedlots were not nuisances as long as they were properly maintained. In a typical 1943 decision, the Court concluded that the feedlot operator used reasonable techniques to minimize feedlot odors, and ruled that a feedlot was a nuisance only when improperly maintained or conducted, regardless of its effect on neighbors.

Feedlot a rural nuisance. This legal philosophy changed in 1976. A

Colfax county farmer sued his neighbor for maintaining a large livestock operation as a nuisance. The livestock operation was across the road from neighbor's farm house. Between 408 to 3,746 cattle were fed. The trial judge found that the neighbors were subject to "intolerable" dust, odors, and flies from the feeder's four livestock waste lagoons, and that the neighbors' property value had been reduced. However, the trial judge dismissed the case, following the "no negligence, no nuisance" rule. The trial judge determined that a feedlot could not legally constitute a nuisance in the country in Nebraska unless the feedlot was improperly operated.

On appeal the Nebraska Supreme Court reversed the trial judge and ruled that the case could go to trial. The court ruled for the first time in Nebraska that due care in the operation of a feedlot was not a defense to a nuisance suit. The fact that the feedlot was located in a rural area was one factor to consider, but was not enough alone to prevent the feedlot from legally constituting a nuisance. The court stated that a feedlot cannot be maintained in a manner to injure a neighbor even in a rural area. In short, the mere showing by the feedlot operator that he used reasonable techniques to minimize feedlot odors etc. was no longer enough to win the case for the feedlot.

Feedlot operation improved. In the second phase of the Colfax county cattle feedlot case, the Nebraska Supreme Court ruled in 1980 that the feedlot legally constituted a nuisance due to the flies and odors generated. The court gave the feedlot operator two choices,

(Continued on next page)



to control the nuisance or discontinue operations.

In response to the court order, the feedlot operator relocated three of the original four feedlot waste lagoons away from the neighbor's farmhouse, a portion of feedlot was relocated, and the former lagoons and feedlot area were filled and converted to pasture. The manure was bladed up, combined with dirt, and mounded spring and fall. Many witnesses testified that they no longer noticed the feedlot odor from the road.

The trial judge ruled that the nuisance had been stopped. The Nebraska Supreme Court affirmed in 1981. The Court stated that the defendants were not required to operate their feedlot with zero flies, odors or dust, but were required to control the nuisance so as not to interfere with the neighbor's residence.

Feedlot ordered to close. In a 1981 feedlot case from Franklin county, the feedlot operator was under court order to control the nuisance or discontinue the feedlot. The neighbor's farmstead predated the feedlot. Even though feedlot management improved, the feedlot itself was so large and so close to the neighbor's farmstead that the feedlot still constituted a nuisance, regardless of method of operation. The feedlot operator's own expert witness conceded that it would be impossible to operate this feedlot (800 sows and 6,000-7,000 hogs) without creating an odor problem for farm residences located within a half mile of the feedlot. The plaintiff's home was 1,030-1,400 feet from the defendant's closest holding pond, less than one-quarter mile.

The Nebraska Supreme Court in 1985 affirmed the order of the trial court closing the feedlot. The court noted once again that due care (i.e. lack of negligence) in operating a business is not in and of itself a defense to nuisance. The defendants had 20 months to control the nuisance and were unable to do so. The court stated "it is inconceivable that so many hogs could be kept in the defendants' [hog] facility in such close proximity to the plaintiff's [farmstead] and not be offensive."

Feedlot nuisance damages. In two feedlot cases the feedlot was required to pay damages for flies and odors from the feedlot. In a 1980 case from Merrick county, a cattle feedlot owner was required to pay his neighbor \$50,000 for building a feedlot across the road from the neighbor's farmhouse. In a 1994 case from Holt county, the Nebraska Supreme Court affirmed a \$376,000 jury award against National Farms for flies and odors from its feedlot. The feedlot had 85,000-90,000 hogs and generated considerable flies and odors. The neighbors suing National Farms lived 2-1/4 mile northeast of the feedlot. These decisions indicate that livestock feeders may be subject to substantial financial penalties if they locate too close to a neighbor.

Right To Farm Act. In 1982 the Nebraska Right to Farm Act was adopted. The act provides that a farming operation [of at least 10 acres] is not a nuisance if it would not have constituted a nuisance before the neighboring land uses or occupancy changed. "A farm or a farming operation is not a public nuisance if the farm or farming operation existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation and before such change in land use or occupancy of land the farm or farm operation would not have been a nuisance." NRS §2-4403.

The Right to Farm Act protects existing feedlots if a neighbor "comes to the nuisance," i.e. moves next door to an existing feedlot. However, Right to Farm does not protect new or expanded feedlots. If a feeder expands his lot, existing neighbors may challenge the expanded feedlot as a nuisance even if the neighbor could not have objected to the original feedlot under Right to Farm.

The Right to Farm Act has been interpreted only once by the Nebraska Supreme Court, in a 1985 feedlot case from Gage county. The farmer began farming in 1961, and sold an acreage in 1968. In 1981 the farmer established a 400-head confined hog facility within 133 feet of the neighbor's house on the acreage. The neighbor sued, arguing that the confinement facility constituted a nuisance. The neighbor was

awarded \$2,000 in damages and the feedlot was ordered to be shut down.

On appeal to the Nebraska Supreme Court, the feeder argued that he was protected by Right to Farm because he had been farming since 1961 and the acreage was not established until 1968. However the Nebraska Supreme Court ruled that because the hog operation was not started until 1981, the 1968 acreage was protected under Right to Farm not the 1981 feedlot.

Feedlot location. Feedlot operators should take into account the location of neighbor's residences when making a decision to locate a feedlot. If possible, the feedlot should not be visible from the road. The feedlot operator should also use best available management techniques to minimize odors, flies, and other feedlot nuisance factors. The same factors should be considered where an existing feedlot is significantly expanded.

In Nebraska, the courts have consistently ruled that a new or expanded feedlot operation must be located so as to not constitute a nuisance for existing neighbors. This legal rule is not modified by the Right to Farm Act. Where the feedlot has the earliest occupancy date (i.e. is first in time) it generally will not constitute a nuisance to those who have "come to the nuisance."

Where a new feedlot is installed, however, or an existing feedlot is expanded, the feedlot operator faces the likelihood of having to relocate if the new or expanded feedlot causes a nuisance to any current neighbors. In light of this, feedlot operators must make locational decisions very carefully--if they ignore the potential nuisance effect of their operation on their neighbors, they risk having to either discontinue the feedlot or else pay significant money damages. Feedlot operators ignore this blunt legal fact at their peril.

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