

Modern Farm Leases in Nebraska

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Types of Leases

Cash Rent

- Typically assumed to be a straight cash payment
- However, is actually any lease that has a
 - Guaranteed dollar amount, OR
 - Fixed quantity of the crop, OR
 - Guaranteed amount (dollar or crop) & share of the crop proceeds

Crop Share

- Rent based on
 - Amount of crop produced, AND
 - The proceeds derived from the crop



Written or Oral

- Encourage your clients to get all leases in writing. Especially between family members or family corporations.
- Kennedy v. Kennedy (Exhibit #1)
 - “Of course, these contrasting positions demonstrate the shortcomings of oral agreements in that everything works fine—until it does not—at which point a trial court is often called upon to resolve what has often colloquially been referred to as a ‘swearing contest.’” page 6.

Termination of the Lease

If the lease is silent as to expiration of the term of the lease, notice of termination must be given by September 1.

- Case law discussion, see Kennedy v. Kennedy (exhibit 1), page 7.
- Automatic Extension
 - "The term of the Lease shall be extended automatically by one (1) year terms unless either party gives the other written notice of their intention to terminate the Lease on or before thirty (30) days prior to expiration of the lease."
- Definitive Expiration
 - "This Lease shall not extend beyond the term set forth above. Holding over or a continuance of possession of the Leased Premises shall not work as an extension of the lease term."

Improvement Language

- "Tenant shall have the exclusive use of all buildings and improvements on the Leased Premises, except Tenant shall receive possession of the grain storage facilities, if any, on or before September 1, of the first year of this Lease. By taking possession of the Leased Premises Tenant acknowledges that Tenant accepts the condition of the premises. If Tenant does not accept the condition, Tenant is to give Landlord notice of the problem before the start of the initial term of this Lease. At Tenant's own expense, Tenant shall care for and maintain the premises in a reasonably good and serviceable condition. Tenant may at any time, make additions, alterations, improvements, or repairs on the premises without the prior approval of Landlord, provided, however, Tenant must seek the consent of Landlord to remove or demolish any of the buildings or improvements located on the Leased Premises. All such repairs and improvements shall remain with the Leased Premises and shall be owned by Landlord at the end of the term of this Lease."
- "After the final year of this Lease, Tenant may continue to use the grain storage facilities under the terms of this Lease without additional charges until the September 1 following the end of the lease term."
- "If there are any buildings located on the Leased Premises which are destroyed by fire or other hazard, Landlord shall have no obligation of replacing the building or buildings destroyed."



Irrigation Equipment Language

- First: Who Owns the Equipment???
- "Landlord shall provide, in good working order, the irrigation pump, gearhead, and pivot irrigation system Landlord presently owns to the exclusive use of Tenant. The expense of all irrigation fuel and the cost of maintaining the equipment in good and proper operating condition shall be provided by Tenant without charge. Tenant shall be expressly liable for any loss arising from Tenant's misuse of the irrigation equipment or negligence in care and maintenance of the equipment."
- "In the event of a major breakdown of irrigation equipment not caused by the misuse, lack of maintenance, or neglect of Tenant, Landlord shall take all necessary steps, at Landlord's expense to return the equipment to operating condition as soon as possible. For all purposes of this Lease a major breakdown shall be defined as a repair that costs over \$500.00 for a single incident. Landlord shall not be liable for any loss or damage that may result from any delay in repairing such a major breakdown nor shall Landlord be liable for any loss or damage that may result from any destruction or defective condition of either land or equipment thereon or failure of the water supply."

Miscellaneous Provisions

- **SECURITY AGREEMENT.**

"Landlord shall have first lien on all planted and unplanted crops on the Leased Premises to secure the payment of the rent as state above and Tenant further agrees that this lease shall constitute a financing statement and security agreement in favor of Landlord on all agricultural inputs on the Leased Premises and also on all crops planted or now growing or standing and shall extend to and shall cover such crops after they have matured, whether the same are in the field, in cribs, or bins, in elevators, in the stack, barns, or any other place on said Leased Premises as security for the payment of the rent.

In addition, to secure the performance of the terms and conditions of this lease, Tenant shall give to Landlord, upon demand, a separate financing statement and security agreement upon all or any part of the crops growing or gathered on said land during the term of this lease. If Tenant shall refuse or neglect to give such instruments on demand, or if Tenant shall give or attempt to give any other person any lien upon said crops, or any portion thereof, then at Landlord's option, this lease shall terminate and Landlord may at once recover possession of the Leased Premises. The security interest created herein shall attach to the proceeds of the sale of crops by Tenant."

Miscellaneous Provisions

- o **GOVERNMENT PROGRAMS.**

Tenant shall comply with all government programs to which the farm may be subject during the term of this lease. Upon modification of any such program, Tenant shall plan and perform according to such modification so as not to jeopardize the rights of Landlord and the farm to further participation in government programs. The farm shall not be combined with any other tract operated by Tenant for government program purposes without the prior written consent of Landlord. Any price support payments or diversion payments paid shall be shared by Landlord and Tenant in the same proportion as the above stated crop shares. Tenant further agrees to maintain the current corn base measurement, if any, upon the above described real Leased Premises, and such corn base measurement shall not be reduced without the prior written consent of Landlord.

- o **HUNTING RIGHTS.**

Landlord reserves all hunting rights and privileges. Tenant may not hunt on or permit others to hunt on the Leased Premises without the written permission of Landlord. Landlord or any person who has obtained written permission to hunt from Landlord shall have access to the Leased Premises for hunting purposes.

- o **LIABILITY INSURANCE.** Tenant shall procure and maintain at his own expense, casualty and liability insurance in amounts presently carried by Tenant to protect both Landlord and Tenant against claims for damages, costs or expenses on account of injury to any person or persons or any Leased Premises belonging to any person or persons by any casualty, accident or other happening on or about the leased premises during the term of this Lease. Tenant shall hold Landlord harmless from any personal injury or Leased Premises damage incurred as a result of Tenant's use of the above premises. Tenant shall provide Landlord a copy of such insurance policy upon Landlord's written request for same.



Situation #1

Your landlord has never been active in the farming business, and has no idea what is a fair rental rate. Landlord is leery about listening to their neighbors – he has heard everything from \$150/acre to \$300/acre.

Solution #1

- Nebraska Farm Real Estate Market Highlights
- Published yearly by UNL Dept. of Ag Econ
 - See Exhibit #2
 - www.agecon.unl.edu/realestate.html



Situation #2

Landlord wants to take advantage of rising rental rates on farmland.

On the other hand, Tenant needs to lock in a multi-year lease in order to effectively plan for their operation and apply longer-term fertilizers.

Solution #2

Rent Indexing

- Rent for 2012 and 2013 crop years shall remain the same. Rent for 2014, 2015, and 2016 shall be adjusted as follows:
 - Data to compute the rent index adjustment shall be taken from the Nebraska Farm Real Estate Market Developments Appendix Table "Historical Average Cash Rental rates of Nebraska Farmland for Different Types of Land by Agricultural Statistics District" for center pivot irrigated crop land in Southeast Nebraska. Landlord shall compute the adjustment and notify Tenant thirty days before the March 1 rent is due.
 - The rent adjustment for 2014 will be based on the change from 2012 to 2013 in accordance with the *Nebraska Farm Real Estate Market Development* published by the University of Nebraska Extension Service published on or about June, 2013.
 - The rent shall be adjusted a second time for 2015 and will be based on the adjusted 2014 rent plus the change from 2013 to 2014 times the adjusted 2014 rent in accordance with the *Nebraska Farm Real Estate Market Development* published by the University of Nebraska Extension Service published on or about June, 2014.
 - For example, the reported rental rate for Center Pivot Irrigated Cropland Southeast District in 2011 is \$257.00 and for 2010 is \$214.00 which would result in a 20.1% adjustment $[(\$257 - \$214)/\$214]$ according to the *Nebraska Farm Real Estate Market Development* published by the University of Nebraska Extension Service published on or about June, 2011. In this example the \$30,000 rent would increase by \$6,030 $[\$30,000 \times 20.1\%]$ to \$36,030.



Situation #3

Landlord has grain storage capability and enjoys marketing his grain. He wants to take advantage of the market.

Solution #3

Crop Share

- 30%, no expenses split
- Other splits with shares of income & expenses

Consideration should be given to:

- Tenant's responsibility for trucking grain – Landlord will need to contract with tenant
- Does Landlord bear a cost for transport of grain?
- Should landlord procure crop insurance?
- What about condition of stored grain? Risk of loss?



Situation #4

Landlord wants to take advantage of the higher yields and prices in the current agriculture sector. However, Landlord is entirely dependent on the cash flow and is very risk averse.

Solution #4

- Agree on a guaranteed minimum:
 - Landlord shall receive 30% of gross crop value as of harvest date based on [insert local elevator cash price] with a guaranteed minimum yield of 175 bushels of corn per acre.

Example:

- Tenant harvests 160 acre field averaging 215 bushels/acre on Oct. 13, 2011, where ending cash price at Aurora Co-op, Geneva Location was \$6.06/bushel.
- The guaranteed payment is \$50,904. $[175 \times 160 \times \$6.06 \times 30\%]$
- However, the total rent for that field is \$62,539.20. $[215 \times 160 \times \$6.06 \times 30\%]$

Solution #4 Considerations

Is this crop share or cash rent?

- Considered cash rent by FSA due to the guaranteed minimum
- See Exhibit #3 – Handbook of Procedural References used by FSA offices and boards written to guidelines of the federal regulations.

Tenant should be able to provide landlord with written report of yield from third party system (precision agriculture systems)

Situation #5

Landlord wants to take advantage of higher yields and market variations. He is not risk averse. Landlord is aware that lowest prices for crops are during harvest; however, Landlord has no ability to truck, store or market the grain. Further, Landlord is prepared to procure crop insurance.

Solution #5

- Crop share lease based on a percentage of yield and an average of local cash prices.
- Example:
 - Total rent shall be calculated by multiplying:
 - the average price of the commodity grown on the parcel in the current lease year on the first trading day of each month at the [insert local elevator] location from March through December of each lease year
 - by
 - thirty percent (30%) of the total average bushel yield for each type of crop land on the leased premises as calculated by Tenant's GPS records as determined during harvest of the crop on the leased premises for the lease year in which payments are being made.

Situation #6

Father, 70, is retired from farming and is working on his estate plan. Father is leaving land to his two children: Son and Daughter. He wants to make sure that Son, 45, has ability to farm the land until Son is 65. Father is concerned that non-farming Daughter will charge extremely high rental rates or rent to a third party.

Solution #6

- Record a written lease against the land
- Make sure to include all relevant terms of the lease
- Key source for information: Agricultural Law Manual by Neal Harl

More Options for Planning

OPTION TO PURCHASE:

Landlord hereby grants to Tenant the exclusive option to purchase Leased Premises for the consideration and upon the terms and conditions hereinafter set forth:

- Tenant may elect to purchase all or any portion of the Leased Premises on or before the expiration date of this Lease the last day of February 2012, provided however, Tenant's purchase is limited to not less than approximately 40 acre units or multiples thereof. This option may be exercised at one or more times during the lease period.
- The election of Tenant to exercise the option shall be evidence by a written notice directed to Landlord, plus a down payment of 10% of the purchase price.
- The purchase price to be paid by Tenant to Landlord for the purchase of the Leased Premises shall be the sum of Six Thousand Dollars (\$6,000.00) per acre.
- Up to one-half of the purchase price shall be reduced by the accumulated cash rent paid, (\$60 per acre). The credit for cash rent paid shall accumulate from year to year, but may not be used more than once. The credit for the cash rent may be applied against any parcel, such credit application is not limited to the purchase of the parcel for which the rent is paid.
- Upon Landlord's receipt of Tenant's notice to exercise the option, Landlord shall deliver within twenty days (20) to Tenant, an abstract of title or title insurance duly certified to the date of the option election.
- It is understood that the documentary revenue stamps and abstracting expense or title insurance shall be paid by Landlord.
- Closing shall be within sixty (60) days after notice of election of the option is delivered to Landlord.
- Upon payment in full of the purchase price, less the credit for cash rental, marketable title to the Leased Premises shall be conveyed by Landlord to Tenant by Warranty Deed free and clear of any mortgage or other encumbrance, lien or charge of any kind whatsoever.
- The right to exercise this option is conditioned upon the faithful performance by Tenant of all the covenants, conditions and agreements required to be performed as Tenant under this Lease including the payment by Tenant of all rent and charges as required in this Lease to the date of the closing of the purchase of the Leased Premises by Tenant.
- This option shall be a covenant and running with the Leased Premises, and no conveyance, transfer or encumbrance of such shall defeat or adversely affect this option.
- If Tenant does not exercise this option as provided herein, this option shall be null and void and have no further legal effect.

More Options for Planning

RIGHT OF FIRST REFUSAL:

Landlord hereby grants Tenant a first right of refusal to buy the real estate that shall extend for as long as Tenant is actively farming and/or managing a farming operation. The purchase price for the real estate shall be 95% of its determined value. The value will be determined as follows.

- The value can always be agreed to by the Landlord and Tenant.
- However, if the parties do not agree to the value, the parties are to agree upon an appraiser that is licensed to appraise real estate in Nebraska and split the fees associated with any such. If the parties cannot agree on a licensed real estate appraiser, the Landlord will retain its own licensed real estate appraiser licensed to appraise real estate in Nebraska and the Tenant will retain its own licensed real estate appraiser licensed to appraise real estate in Nebraska to conduct an appraisal of the aforementioned real estate.
- If the parties have agreed to an appraiser as contemplated in subpart __ and the appraised value is not acceptable, the Landlord or Tenant that does not favor the appraised value shall retain its own licensed real estate appraiser. If there is more than one Landlord, all of the Landlord must agree to a single licensed real estate appraiser. If there is more than one Tenant, all of the Tenants must agree to a single licensed real estate appraiser.
- If the difference between the Landlord's appraisal and the Tenant's appraisal is equal to or less than 20% of the value of the lesser-appraised amount, the parties agree the two appraised values shall be averaged and will be the agreed value for purposes of determining the land's purchase price.
- If the difference between the Tenant's appraisal and the Landlord's appraisal is not equal to or less than 20% of the value of the lesser-appraised amount, the parties respective appraisers will choose a third independent licensed real estate appraiser who will conduct a third appraisal without any foreknowledge of the results of the prior appraisals. Thereafter, the two closest of the three appraised values shall be averaged and will be the agreed value for purposes of determining the land's purchase price.
- Tenant may choose not to purchase all or any portion of the property.
- **NOTICE.** Landlord must provide notice to Tenant of Landlord's intention to sell the subject real estate in person or by certified mail to Tenant's last known address. Within thirty (30) days or less after Landlord provides notice of Landlord's intention to sell, Tenant must give Landlord notice of Tenant's intention to exercise the right of first refusal. Tenant will deliver to Landlord payment for the purchase price as described herein within sixty (60) days after notifying Landlord of Tenant's intention to exercise the right of first refusal. Provided Tenant may assign this Right of First Refusal to an entity controlled and owned by Tenant and Tenant's spouse and issue.
- **ASSIGNMENT.** Tenant shall not encumber, assign, or otherwise transfer this right of first refusal, or any right or interest to the property without Landlord's approval, except Tenant may assign his interest in this First Right of Refusal to an entity which he owns and/or controls provided such entity agrees to the terms of this agreement. Any encumbrances, assignment, or transfer without the prior written consent of Landlord, whether it be voluntary or involuntary, by operation of law or otherwise, is void, and shall at Landlord's option, terminate this right of first refusal.
- **CONSIDERATION.** Tenant will pay Landlord a total of \$50.00 as consideration for the right of first refusal. By signing hereunder Landlord acknowledges receipt of the consideration and agrees that it is adequate.



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Exhibit #1

Kennedy v. Kennedy

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

KENNEDY V. KENNEDY

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STEVEN L. KENNEDY AND KELLIE H. KENNEDY, APPELLEES,
V.
ROBERTA KENNEDY, APPELLANT.

Filed August 16, 2011. No. A-10-941.

Appeal from the District Court for Nemaha County: DANIEL E. BRYAN, JR., Judge.
Affirmed in part, and in part reversed and remanded with directions.

Angelo M. Ligouri, of Ligouri Law Office, for appellant.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellees.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Roberta Kennedy owns approximately 80 acres of farm ground in Nemaha County, Nebraska, known as Farm 1949, that is involved in this litigation. Of the 80 acres, 64.55 acres are tillable. Steven L. Kennedy is Roberta's nephew and has farmed in Nemaha County for more than 30 years--raising corn, soybeans, alfalfa, and wheat, as well as having a cow-calf operation. Leased farm ground is an important part of Steven's farming operation, and he began cash renting Roberta's Farm 1949 in the crop year 2000. This lawsuit involves the claim of Steven and his wife, Kellie H. Kennedy, against Roberta for lost profits, because Roberta did not allow Steven to farm the ground during the 2008 crop year. There is no question that Roberta did not give Steven timely written notice of termination of a year-to-year farm lease as required by Nebraska law with respect to the 2008 crop year. The district court entered judgment for \$24,885.44 in Steven and Kellie's favor. Roberta appeals, contending that while she did not provide written notice by September 1, 2007, there was a prior oral agreement reached between Roberta and Steven that he would not be farming the ground during the 2008 crop year, and that he breached the terms of the lease.

We have previously ordered this case submitted for decision without oral argument pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008).

FACTUAL BACKGROUND

When Steven and Roberta first began the farm lease at issue, it was pursuant to an oral agreement, the terms of which were a year-to-year tenancy with one-half of the \$6,000 yearly cash rent due on March 1 and the second half due on December 1 of the crop year. The lease carried over year-to-year, and Steven paid Roberta the rent as required for each crop year up to 2005 under this arrangement. However, in November 2005, Steven and Roberta renegotiated the terms of the year-to-year tenancy for Farm 1949 so that Steven would continue to pay \$6,000 in cash rent, on the same dates as before, plus he would perform or pay for approximately \$1,200 in conservation work, such as terracing, each crop year. Steven testified that the conservation work could be done any time during the lease year, running from March 1 of the year to February 29 of the following year, and that Steven could perform the work himself. Roberta argues that to satisfy the conservation work requirement, such work had to be done before spring planting. For crop year 2006, Steven hired Robert Taft of T & F Construction to perform conservation work on Roberta's farm, including bulldozer work, rebuilding broken terraces, and removing an unneeded terrace for which Steven was billed on April 19 by T & F Construction in the amount of \$1,350, which Steven paid.

For several years before 2006, Steven had performed conservation work himself, including using his soil mover to fill in ditches, partially build terraces, and clean out terrace channels. Steven testified that he satisfied the conservation requirement in 2007 by doing the work himself. He testified that at that time, \$50 per hour was a reasonable rate in Nemaha County for soil movers such as the one he owned and \$25 per hour was a reasonable rate for clearing brush. Steven testified that he kept track on his home calendar of the number of hours he spent doing conservation work as far back as crop year 2004 as well as in crop year 2007. He said he did conservation work on Farm 1949 on May 8 through 11, 2007. Steven testified that he recorded 21½ hours of dirt moving and 3½ hours of brush clearing on his calendar for those dates--which at the rates he testified to would come between \$30 to \$40 of meeting his obligation.

The harvest of Roberta's Farm 1949 in 2007 occurred on October 17 and November 22. Even though, as detailed shortly, Steven had received Roberta's written notice of lease termination dated October 22, 2007, Steven nonetheless contacted Taft to finish the terrace work in order to satisfy his 2008 crop year obligation under the lease to do \$1,200 worth of conservation work on Farm 1949. Steven indicated that he also sent Taft a check for \$2,500 dated November 29, 2007. He proceeded with these arrangements for conservation work because he considered the termination notice invalid under Nebraska law and because he intended to farm the ground in 2008. This conservation work was not done because Steven, according to his testimony, was directed not to let Taft on the property. Taft also testified that he received a telephone call from Roberta in which she specifically told him not to do any work on her farm. And Steven did not personally do any further conservation work for the 2008 crop year after the 2007 crop was out because, according to his testimony, he was directed by Roberta's counsel to stay off of the farm.

Roberta's mother and Steven's grandmother, Lola Kennedy, passed away on October 17, 2006, and Roberta was appointed personal representative of her estate. On approximately December 21, there was a meeting attended by Steven and Roberta at her attorney's office along with other family members. According to Steven's testimony, at this meeting he sat next to Roberta and, in contrast to Roberta's testimony, Steven denied that she told him during that meeting that he would not be farming her ground after the 2007 year. There was another meeting at the attorney's office on about February 16, 2007, and there is in the record a second account in which Roberta said she informed Steven at the February meeting that he would not be farming the ground after the 2007 crop year. Steven denied that Roberta told him this. Steven's sister testified that she attended this February 2007 meeting, that she was within "ear and eye shot" of Steven during the entire meeting, and that Roberta did not tell Steven he would not be farming the ground after 2007.

Steven testified that he received a notice of termination of farm tenancy, exhibit 6, from Roberta's attorney on October 23, 2007, by certified mail but that he considered it "invalid" because it was not done by September 1 as required by Nebraska law. Steven retained counsel, who wrote to Roberta's counsel indicating Steven's belief that the cash-rent lease for crop year 2007 had carried over for 2008 and that thus Steven was planning on farming the ground for crop year 2008 on the same terms and conditions as in 2007. On February 23, 2008, Steven tendered to Roberta a check for \$3,000 sent via certified mail for the first half of the 2008 cash rent, but such was returned by Roberta's attorney to Steven's attorney.

Steven's testimony was that he typically plants soybeans around May 10 and that even though he was denied access to the farm ground and did not plant a crop, he tendered the second half of the rent of \$3,000 by a check dated November 21, 2008, which was likewise returned.

With respect to damages, Steven's testimony was that he calculated the number of tillable acres at 64.55 based on Farm Service Agencies records for Farm 1949. Steven then testified as to various expenses of raising a crop, which are summarized as follows:

Cash rent	\$112.32 per acre
Planting expense	8.00 per acre
Spraying expense	4.00 per acre
Seed expense	36.65 per acre
Chemical expense	11.39 per acre
Crop insurance	13.31 per acre
Harvest expense	<u>20.00 per acre</u>
Total expenses for 2008 crop year	\$205.67 per acre

Thus, based on those figures and tillable acreage of 64.55 acres, Steven's calculation of expenses that he would have incurred in a crop of soybeans which he intended to plant in 2008 was \$13,276. With respect to production, the court received exhibit 35, the Agro National Crop Production report for crop year 2008, from which Steven calculated a soybean crop yield for 2008 at 50.4 bushels per acre. With respect to the price per bushel for soybeans, Steven introduced a "forward contract" for soybeans that he had with a facility in Brownville, Nebraska, which produced a final figure of \$11.73 per bushel for soybeans for a gross crop price of

\$38,161.44. After deduction of the cost of raising the crop, Steven calculated damages at \$24,885.44--the exact amount awarded by the district court.

In her original answer, Roberta alleged that she “verbally informed” Steven “in January/February 2007 that she planned on having another farmer cash rent her property for at least the 2008 farm year because of all the conflicts the parties were having involving the distribution of [Lola’s] estate.” This answer was verified, but as earlier detailed, Roberta also testified at trial that she gave such notice to Steven verbally on December 21, 2006, at the meeting previously mentioned concerning Lola’s estate.

TRIAL COURT DECISION

After a bench trial on August 25, 2010, the trial court rendered its decision on August 31. The court found the existence of an oral farm lease and that there was no oral notice of termination of the lease given in December 2006. The court then found that the written notice of termination of the farm lease, postmarked October 22, 2007, was not timely. Implicit in the court’s decision and award of damages is the conclusion that Roberta had breached the farm lease by not allowing Steven on the ground to farm it. The court awarded Steven and Kellie damages of \$24,885.44. Roberta has filed this timely appeal.

ASSIGNMENTS OF ERROR

Roberta’s brief assigns 13 numbered assignments of error. We have carefully reviewed such to determine which are actually argued. See *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party assigning error). Furthermore, we have reviewed Roberta’s assignments to determine which are merely duplicative and thus can be properly combined and restated. Therefore, the assigned and argued errors, as restated, that we have considered are as follows:

Roberta assigns that the trial court erred in (1) ruling that her answer did not set forth as an affirmative defense that Steven had breached the verbal farm lease for the 2007 farm year; (2) in determining that the parties’ “conduct and actions were irrelevant” in determining Steven’s right to farm the ground in 2008, including Steven’s attitude and demeanor toward Roberta during the course of the probate of Lola’s estate; (3) in determining that Steven had a right to farm the ground in 2008; (4) in not allowing the person who actually farmed the ground in 2008 to testify about the actual 2008 crop production; and (5) in awarding damages when there was no evidence that Steven and Kellie had lost profit in 2008 and when their evidence of damages was based on speculation and hearsay.

STANDARD OF REVIEW

The parties do not disagree about our standard of review. It has been articulated in many cases, including *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 812-13, 594 N.W.2d 283, 285-86 (1999):

A suit for damages arising from breach of a contract presents an action at law. . . . In a bench trial of a law action, a trial court’s factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. . . . The appellate

court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

(Internal citations omitted.)

ANALYSIS

Admissibility of Evidence of Parties'

Conduct and Demeanor.

Roberta apparently challenges an evidentiary ruling in her assignment that the trial court erred in determining that the parties' "conduct and actions were irrelevant" in deciding whether Steven had a contractual right to farm the ground in 2008. We quote from Roberta's brief: "The district court absolutely refused to consider the parties conduct, intentions, or circumstances in determining whether or not [Steven] breached the parties' oral lease agreement for 2007." Brief for appellant at 14. Rather than the "absolute refusal to consider" stated above, we find, after reviewing the record, and in particular the citations in Roberta's brief to the record, that the trial court actually allowed considerable evidence concerning the parties' "conduct, intentions, or circumstances." However, the court did draw the line at the details of the claim that Steven filed in Lola's estate case in county court--which seems to be the main focus of this claim. But, even then, the trial court allowed evidence of the filing of such claim in the estate and that Steven was unsuccessful, and the court said that it would consider such facts with respect to credibility. However, the court refused to admit other details of that estate litigation on grounds of relevancy. The rule is that when the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009). A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion. *Id.*

The trial court said that it would not allow Roberta's counsel to "retry" the claim Steven had filed against Lola's estate. The trial court was not persuaded by the argument made by Roberta's counsel that "the parties' conduct and their acts, their intention, and how they treat one another or what they think about the other individual are relevant in the breach of the contract." Accordingly, the trial court rejected an offer of proof, exhibit 43, the county court's order in Lola's estate case disposing of the claims that Steven advanced against the estate as well as approving the proposed distribution of assets. Having reviewed the exhibit, we find that it is not relevant to the issue on trial in this case--whether Steven's oral farm lease of Roberta's Farm 1949 was effective for crop year 2008. Evidence must be relevant to be admissible. *State v. Fick*, 18 Neb. App. 666, 790 N.W.2d 890 (2010). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.* Relevancy has two components: materiality and probative value. *Id.* Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. *Id.* Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case. *Id.*

Using these well-known concepts, we find that the estate litigation is neither material nor probative of any fact in issue in this case, other than possibly with respect to the parties' credibility, as the trial court found. And, for this purpose, the fact that the claims were filed and Steven lost was sufficient. Therefore, the trial court did not abuse its discretion in ruling that the estate proceedings, beyond what it considered on the issue of the parties' credibility, were not relevant.

In advancing this claim of error, Roberta seems to ignore the fact that as to the conduct of the parties, the trial court did receive in evidence the facts about Steven's crop rotation between corn and soybeans on Farm 1949. From this evidence, Roberta was able to advance the argument that planting the ground all to corn in 2007 shows that he did not intend to farm it in 2008 because if he had, he would have planted part of the ground to soybeans. Extensive evidence was offered and received about when and how the conservation work was done under the renegotiated farm lease beginning in 2006. In short, the claim that the trial court did not allow evidence of the parties' conduct in order to show whether or not they thought the lease was ongoing or terminated is simply not supported by the entirety of the trial record. The fact that the trial court was not persuaded that Steven knew and had agreed that the lease would not continue for crop year 2008 is not clearly erroneous in light of the entirety of the record. This naturally brings us to the next assignment of error.

*Did Trial Court Err in Concluding That Roberta Had Not Pleaded
Affirmative Defense That Steven Had Breached Farm Lease
by Not Complying With Requirement for
Performing Conservation Work?*

After the matter of the relevancy of the estate litigation was dealt with by the trial court as summarized above, the cross-examination of Steven moved to the subject of the conservation work that was or was not done for the 2007 crop year. In this regard, we can summarize the parties' positions. Roberta maintains that the oral agreement required that \$1,200 of conservation work had to be done after the harvest of the 2006 crop and before planting the 2007 crop--which Steven did not do prior to planting the 2007 crop. This basic position is alleged in Roberta's answer. No reply was filed to the answer. Steven asserts that the conservation work could be done anytime during the crop year under the oral lease and that he complied by contracting with and paying Taft on November 29, 2007, except that neither of them was allowed to go onto Farm 1949. Of course, these contrasting positions demonstrate the shortcomings of oral agreements in that everything works fine--until it does not--at which point a trial court is often called upon to resolve what has often colloquially been referred to as a "swearing contest." Our standard of review for a bench trial, as a practical matter, is rarely going to allow us to make a different factual finding than the trial court in such circumstances.

That said, we have closely examined the discussion between the court and counsel covering some 4½ pages in the record on the subject of whether Roberta's allegation that Steven had not done the conservation work between the end of harvest of the 2006 crop and the planting of the 2007 crop, and thus was in breach of the lease, was a properly raised affirmative defense. The discussion began when the trial court asked about whether the allegation was a "counterclaim," at which point counsel asserted that it was an affirmative defense and that

Roberta was not seeking damages. This lengthy discussion ended as follows when the court said “so the lawyers don’t have to set out their affirmative defenses?”

[Roberta’s counsel]: I think we did set it out, our affirmative defense, in our answer.

THE COURT: Okay, all right.

[Roberta’s counsel]: Now, [m]ay I ask my question, your Honor?

THE COURT: Go right ahead.

[Roberta’s counsel]: Thank you.

Accordingly, we do not see that there was any adverse ruling by the trial court about which to complain--beyond the fact that the court implicitly concluded that Steven complied with the lease or, if he did not, that such did not excuse Roberta’s failure to provide timely written notice of termination of the oral year-to-year farm lease--which we soon discuss. During the trial, the “how, what, and when” of the conservation issue was thoroughly covered and no evidence about the matter was excluded. Thus, the only reasonable conclusion, given the exchange quoted above, is that the court ultimately agreed that alleging the issue as part of the answer was sufficient, and thus this assignment of error is without merit.

*Did Trial Court Err in Finding That Farm Lease
Extended to 2008 Crop Year?*

The issue set forth in this assignment of error is of course the crux of the case. We begin with the basic Nebraska law on termination of year-to-year farm leases. In *Holtman v. Lallman*, 122 Neb. 183, 239 N.W. 820 (1931), the court said: “Generally in this state, in the absence of any different agreement, a yearly lease of farm lands begins on March 1 and ends on February 28, of the succeeding year, and the rental becomes due at the expiration of the term.” (Syllabus of the court.) See *Moudry v. Parkos*, 217 Neb. 521, 349 N.W.2d 387 (1984). The parties in the case before us are in agreement that these were the beginning and ending dates for each year’s lease. *Moudry* then set forth the “roadmap” for termination of a year-to-year farm lease, as is involved here, and we quote:

The owner is entitled to terminate a lease of his property with a tenant so long as he does it in accordance with law and in a timely fashion. This means that 6 months in advance of when the owner wishes to terminate the lease, he should prepare and send to the tenant a notice indicating that the owner intends to terminate the tenancy on February 28 and demands possession of his property. And if the tenant fails to give up possession, the owner may then file suit and, in attempting to prove the termination of the lease, can offer in evidence a copy of the notice supported by evidence of its service upon the tenant.

217 Neb. at 527, 349 N.W.2d at 391. Clearly, the *Moudry* opinion contemplates written notice of termination being served on the tenant in a manner that service can be readily proved. Roberta’s written notice of October 22, 2007, was not timely as it occurred well after September 1, and thus, the notice was ineffective to terminate the lease for the 2008 crop year.

It is true that the case law indicates that a year-to-year farm lease can also be terminated by the agreement of the parties to the lease. *Stuthman v. Stuthman*, 2 Neb. App. 173, 507 N.W.2d 674 (1993). We understand Roberta to argue that there was an agreement formed in December 2006 or February 2007 when she says she told Steven that he would farm the ground in 2007 but

not in 2008. Her daughter supports Roberta's testimony that she told Steven this. Steven denied that any such conversation occurred, and his sister, who was present at the February 2007 meeting, supports his testimony. However, it is noteworthy that Roberta's testimony was not that Steven agreed to this termination, but, rather, that he was upset and did not speak with her thereafter, whereas previously they had been "close." The district court made a finding that there was "no oral notice given" in December 2006. But it is apparent that even if we assume that oral notice was given as Roberta testified in December 2006, there was no evidence whatsoever that an agreement was formed between Roberta and Steven to terminate the lease after the 2007 crop year such that the written notice from the landlord to the tenant required by *Moudry, supra*, was not necessary. Therefore, we find that the district court was not clearly wrong when it determined that Steven was entitled to farm Roberta's Farm 1949 for the 2008 crop year.

*Did Trial Court Err in Not Allowing Farmer
Who Raised Crop on Leased Land in 2008
to Testify as to His Yields?*

Andrew Brown, who had farmed in Nemaha County for over 30 years, testified that he had farmed "the other half of this quarter" beginning in 2006, and he also raised a soybean crop on Farm 1949 in 2008. He was asked what yield he got on the ground at issue to which an objection was interposed on foundation and relevance. In his objection, counsel suggested that differences in "spray and bean variety" made the evidence irrelevant. At that point the court said, "I'll sustain on foundation at this time." We believe it goes without saying that the actual yield from Farm 1949 would be relevant evidence, a view that the trial judge apparently shared given that he sustained the objection only on the ground of foundation.

Thus, the first question for us is whether there was adequate foundation when the question was asked--which at that juncture did not include the fact that Brown had farmed in Nemaha County for over 30 years. Nonetheless, we have to ask who would have foundation to testify as to the 2008 yield, if not the person who actually farmed the ground and raised the soybean crop in 2008? The answer is quite obvious that it would be Brown. Accordingly, we find that the trial court abused its discretion in sustaining the objection to the question to Brown about what his yield was for the 2008 crop. The matters suggested in the objection (spraying and variety planted--as well as other factors we can imagine) are matters for cross-examination and go to the weight to be given the evidence. We note that even after further questioning of Brown that could be seen as laying additional foundation, he was not asked again about the yield in 2008 on Roberta's farm. And there never was an offer of proof of the 2008 yield.

Because we find that the foundation was adequate and that the foundational objection should have been overruled, we must now assess whether Roberta was prejudiced by the erroneous ruling. It is fundamental that exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence excluded. See, Neb. Rev. Stat. § 27-103(1)(b) (Reissue 2008); *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001). Because there was no offer of proof we do not know what the evidence would have been about the yield that Brown got in 2008 from Roberta's farm. However, § 27-103(1)(b), as well as abundant case law, allows an appellate court to find error in a ruling excluding evidence when the substance of the evidence was apparent from the context even without an offer of proof.

We conclude that the substance of the evidence, as well as its purpose, were apparent even without an offer of proof. Steven calculated a soybean crop yield for 2008 of 50.4 bushels per acre. The substance of the evidence to be adduced by the question to Brown would have been that Brown's actual yield was less than the 50.4 bushels per acre used in Steven's damage calculation. Roberta would have nothing to gain by introducing evidence that Brown's actual yield was equal to or greater than 50.4 bushels. The purpose of the evidence would be to allow the fact finder to conclude that Steven's calculation of damages resulting from being prevented from farming the ground was inflated and inaccurate. This could only be done by evidence that the actual yield was less than what Steven used in his damage calculation. Because the evidence would go to the proper calculation of damages, and could have resulted in a lesser award of damages, the error was prejudicial. However, before we are finished, we must briefly address Roberta's assignments of error concerning Steven's calculation of damages.

*Must Steven Sustain "Loss of Profit" in 2008
Before He Can Recover Damages for
Breach of Farm Lease?*

Roberta assigns as error that the trial court determined that Steven had been damaged by the breach of the farm lease when Steven did not produce "evidence that [he] incurred a loss of profit in 2008." Brief for appellant at 4. The argument advanced in support of this assignment is that there was no proof that Steven's farmed acreage decreased from 2007 to 2008. But, there is no authority that such would be a prerequisite to recovery of damages from a breach of a farm lease--which incidentally is simply a contract. The general rule for recovery of damages in breach of contract cases is that the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008). Stated another way, in a case involving a breach of contract, the proper measure of damages is an amount which will compensate the injured party for loss which fulfillment of the contract would have prevented or breach of it has entailed. *Wells Fargo Alarm Serv. v. Nox-Crete Chem.*, 229 Neb. 43, 424 N.W.2d 885 (1988). In this case, it is not whether Steven farmed the same, greater, or fewer acres in 2008 than he did in 2007 that entitles him to damages, but, rather, that he was prevented from farming Roberta's ground when a valid year-to-year lease gave him a legal right to farm the ground. Determining damages would entail a calculation of the cost of raising and harvesting the crop deducted from the value of the crop. This is how Steven's calculation of damages, summarized in exhibit 34, was done. As a general proposition, such a calculation would present Steven's position as to what was needed in damages to "make him whole"--as the measure of damages dictates. This assignment of error is without merit.

*Did Trial Court Use Improper Methodology
and Inadmissible Evidence to Calculate
Its Award of Damages?*

Roberta's final two assignments of error are not in accordance with our rules of appellate procedure. We quote the assignments, but we only discuss them to a limited extent:

8. The trial court erred in allowing numerous hearsay documents in evidence, over Appellant's objection, being offered by the Appellee to prove damages.

9. The trial court erred in awarding damages based on speculation and hearsay.

First, we set forth exhibit 34, a summary of Steven's testimony about how he calculated his loss from not being allowed to farm Roberta's Farm 1949 for the 2008 crop year:

Expenses - per acre:

Cash rent	\$ 112.32
Planting	8.00
Spraying	4.00
Seed	36.65
Crop insurance	13.31
Harvesting	20.00
Chemical	

Roundup Power Max

\$63.75/gallon (128 ounces) =

.498/ounce - 22 ounces/acre 10.96

Choice \$17.25/gallon

1 quart/100 gallons of water

1 gallon covers 40 acres or

\$17.25/40 acres .43

TOTAL EXPENSES PER ACRE \$ 205.67

64.55 acres × \$205.67 = \$13,276.00

Income:

Average of closest farms in proximity of Farm 1949 (per 2008 production report for 2009 APH computation for crop insurance):

50.40 bushels/acre × 64.55 acres = 3,253.3 bushels × \$11.73 =

\$38,161.44 - \$13,276 = \$24,885.44.

In our discussion in the previous section of the proper measure of damages, we indicated that the above methodology is proper in a case such as this. It includes the cost of the land, the cost of planting and raising the crop, and the cost of harvesting it. That total expense is then deducted from what Steven thought the price per bushel of soybeans would have been. Generally, this is an appropriate methodology, but because we must remand the cause for a new trial on the sole issue of damages, we do not attempt to rule on the two assignments of error quoted in this section. Nor do we comment on the validity of the costs and values used in the calculation.

However, we do comment that these two assignments are very much a "shotgun" approach whereas our rules require a "rifle" approach, because we should not have to wander through a trial record, look at each hearsay objection, and figure out whether it is one that the appellant is serious about and meant for us to examine. Rather, the Supreme Court rules of practice require that the appellant's brief shall contain "[a] separate, concise statement of each error a party contends was made by the trial court." Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2008). The rules also require that the argument shall present each question separately. See

§ 2-109(D)(1)(i). Therefore, for several reasons, we need not discuss these two assignments further. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

CONCLUSION

We affirm the trial court's decision that Steven and Kellie were entitled to farm Roberta's Farm 1949 for the 2008 crop year under the year-to-year farm lease. We further affirm the trial court's conclusion that Roberta breached the lease when she prevented Steven from farming Farm 1949 and that she is liable in damages. However, we reverse the trial court's award of damages and remand the cause for a new trial solely on the issue of damages caused by the breach because of the evidentiary error we have discussed above.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

Exhibit #2

Nebraska Farm Real Estate Market Highlights

[Abbreviated Version]



Nebraska Farm Real Estate Market Highlights 2010-2011

By
Bruce Johnson
Sara Van NewKirk
and
Tyler Rosener



The University of Nebraska–Lincoln does not discriminate based on gender, age, disability, race, color, religion, marital status, veteran's status, national or ethnic origin, or sexual orientation.

Nebraska Farm Real Estate Market Highlights 2010-2011

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* * * * *

Sincere appreciation goes to the survey reporters for their participation in the annual UNL Nebraska Farm Real Estate Market Survey. Without their valuable input, much of the information within this report would not exist.

Special appreciation also goes to Diane Wasser, Project Coordinator, for her significant contributions throughout the survey process, report analysis, and preparation.

NOTE: This report is available as a downloadable PDF file at the following website:
<http://www.agecon.unl.edu/realestate.html>

If electronic copies are not accessible, hard copies of these highlights can be requested for \$7.00 per copy from:

Department of Agricultural Economics
University of Nebraska–Lincoln
Attn: Diane Wasser
314 Filley Hall
Lincoln, NE 68583-0922

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Introduction

The Department of Agricultural Economics, UNL has conducted a state-wide study of agricultural land markets each year for the past 33 years. The state is richly endowed with productive agricultural land, which results in Nebraska ranking among the top five states in agricultural production.

A primary aspect of the UNL land market series is an annual land market panel survey conducted February 1 of each year. In the 2011 survey, some 130 panel reporters from across the state provided their professional insight into the dynamics of the agricultural land markets in their areas of the state. These individuals are closely associated with the land markets through their professions as agricultural real estate appraisers, professional farm managers, agricultural lenders, etc. Moreover, continuity of the survey is maintained over the years as the vast majority of reporters have responded annually for a number of years. The reporters provide *point-in-time* estimates of current agricultural land values and cash rents as well as more detailed information of actual agricultural real estate sales that have occurred over the previous year. Comparing these current measures against previous years' results provide valuable trend indicators of this dynamic market. The historical UNL data series for agricultural values going back to 1978 and agricultural cash rents back to 1981 are included in the appendix.

In most instances, the information series provides sub-state perspectives. This is considered critical given the great variability of land, water, and climate across the state. Consequently, regional information is presented by Nebraska Agricultural Statistics District as noted in Figure 1 below. The reader is cautioned, however, to use this information primarily for trend analysis and not to assume that the information provided is accurately depicting values and cash rents of a local agricultural land market, let alone a particular parcel of land. If more specific information is deemed necessary, we highly recommend seeking services of a certified agricultural real estate appraiser.

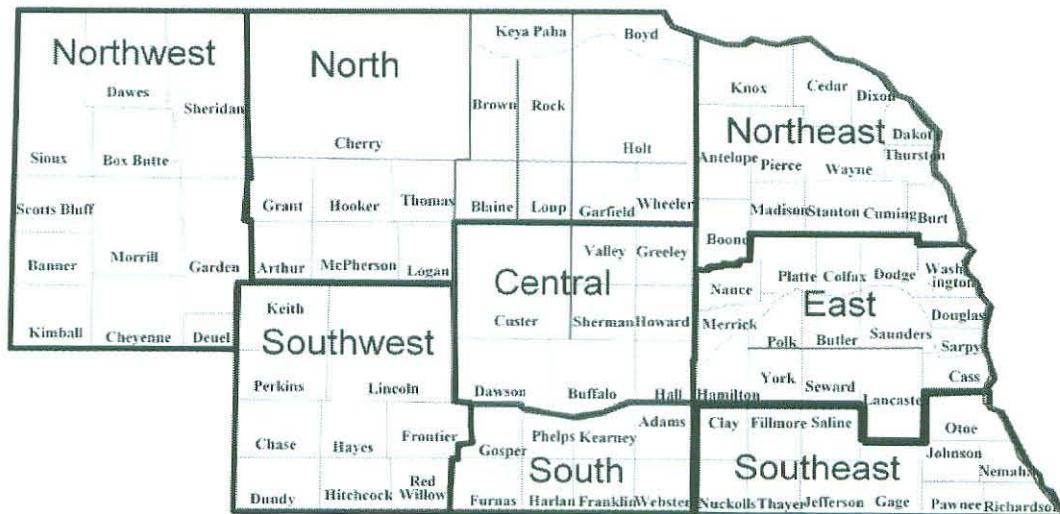
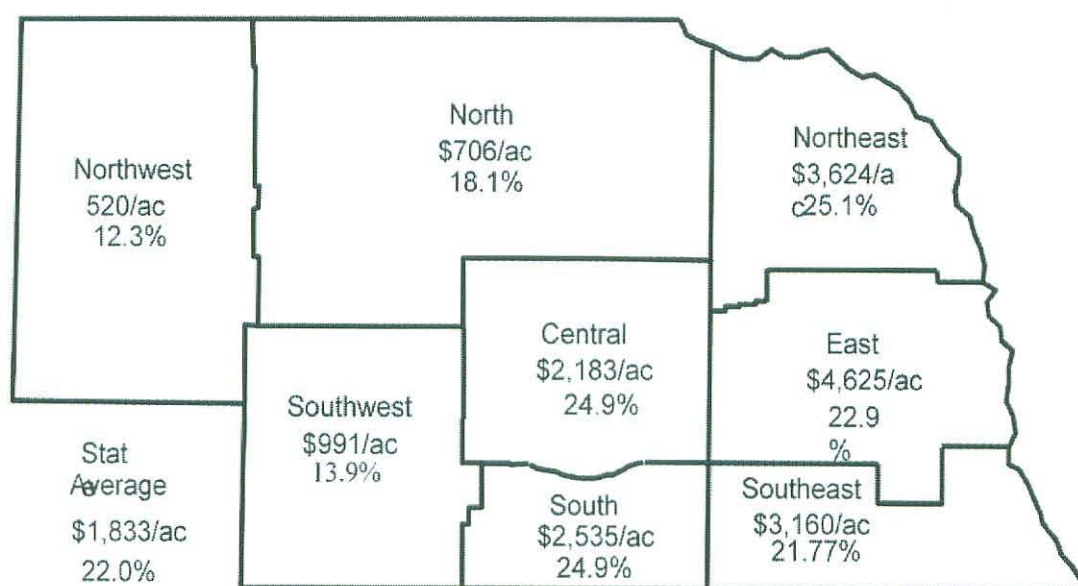


Figure 1: Nebraska Agricultural Statistics Districts

2011 Nebraska Land Values

- Recent conditions of high crop commodity prices and record-level farm incomes propelled the state's agricultural land values upward an average of 22% for the year ending February 1, 2011 (Figure 2 and Table 1).
- The 2011 current all-land average of \$1,833 per acre is double the all-land average from just six years previously in 2006.
- Besides being an all-time high in nominal dollars, the current all-land average value represents a new high in real (inflation-adjusted) dollars as well—exceeding the previous high set in 1981.
- While all land classes of farmland posted large percentage gains over the year, the cropland classes showed the strongest gains.
- Sub-state regional differences in value advances over the past year are noteworthy. The Northeast, Central, and South Districts all saw overall gains of about 25%.
- For the first time in the UNL land value series, a land class in a sub-state district exceeded an average value of \$6,000 per acre (center pivot cropland in the East District).



Source: 2011 UNL Nebraska Farm Real Estate Market Developments Survey.

Figure 2: Average Value of Nebraska Farmland, February 1, 2011 and Percent Change from a Year Ago

**Appendix Table 6. Historical Average Cash Rental Rates of Nebraska Farmland for
Different Types of Land by Agricultural Statistics District, 1981-2011.^a**

Type of Land and Year	Agricultural Statistics District							
	Northwest	North	Northeast	Central	East	Southwest	South	Southeast

----- Dollars Per Acre -----

Center Pivot Irrigated Cropland

1981	b	71	117	102	118	91	126	119
1982	98	82	116	108	120	93	127	119
1983	90	86	101	100	114	83	117	116
1984	98	81	99	101	118	80	120	114
1985	b	69	93	90	104	81	111	96
1986	b	60	86	75	99	69	91	86
1987	b	62	83	77	97	66	82	86
1988	b	67	91	82	100	73	89	93
1989	b	88	99	98	110	81	101	100
1990	77	97	106	99	114	91	104	108
1991	85	98	108	109	120	94	115	110
1992	79	96	105	102	120	92	119	113
1993	79	83	107	108	124	93	124	114
1994	85	104	115	116	130	98	126	122
1995	86	100	118	117	128	101	127	122
1996	80	107	117	119	130	105	128	124
1997	90	115	124	130	142	110	138	132
1998	95	115	125	132	143	111	138	132
1999	90	109	122	124	143	110	136	127
2000	93	105	125	124	144	111	135	129
2001	94	106	130	129	144	113	132	134
2002	96	108	132	131	146	115	133	135
2003	97	105	137	134	145	115	135	138
2004	97	114	144	139	151	117	139	143
2005	107	119	142	139	155	121	143	147
2006	102	120	147	140	157	120	139	152
2007	118	136	173	156	176	128	154	169
2008	140	159	208	185	211	139	183	198
2009	135	158	207	182	216	160	190	208
2010	140	168	232	193	234	162	198	214
2011	171	195	279	221	273	193	233	257

**Appendix Table 6. Historical Average Cash Rental Rates of Nebraska Farmland for
Different Types of Land by Agricultural Statistics District, 1981-2011.^a**

Type of Land and Year	Agricultural Statistics District							
	Northwest	North	Northeast	Central	East	Southwest	South	Southeast

----- Dollars Per Acre -----

Dryland Cropland

1981	b	b	60	43	68	35	38	55
1982	b	b	67	38	71	34	38	60
1983	b	b	63	43	66	25	41	57
1984	b	b	63	41	72	29	44	57
1985	b	b	55	38	65	26	40	50
1986	b	b	52	29	58	25	35	45
1987	b	b	55	29	58	23	35	45
1988	b	b	58	35	62	25	38	48
1989	b	b	65	42	70	26	43	52
1990	b	b	65	44	72	31	41	54
1991	b	b	64	45	73	27	41	58
1992	b	b	60	47	73	28	43	57
1993	24	28	65	46	74	28	47	60
1994	b	33	66	44	79	32	45	62
1995	21	36	69	48	79	29	46	61
1996	21	35	69	49	81	31	47	62
1997	22	38	74	53	85	32	49	65
1998	22	39	79	53	88	32	51	70
1999	21	38	79	51	85	30	49	67
2000	20	38	79	53	86	29	49	66
2001	20	37	78	53	87	29	51	64
2002	21	38	85	54	87	31	53	69
2003	22	32	86	59	89	32	52	71
2004	22	35	91	60	94	33	55	75
2005	24	37	92	62	99	33	56	79
2006	24	38	97	63	102	31	52	83
2007	26	41	109	71	113	34	56	93
2008	33	50	134	86	135	40	69	113
2009	29	49	136	81	136	38	72	112
2010	31	b	144	83	146	41	74	116
2011	35	52	180	94	178	48	96	142

Exhibit #3

FSA Handbook Paragraph 352

Handbook of Procedural References used by
FSA offices and boards written to
guidelines of the federal regulations

Section 2 Division of Payments

352 Eligibility to Receive Payments and Determining Cash or Share Leases

A Sharing of DCP or ACRE Program Payments

[7 CFR 1412.54] Sharing of contract payments. (a) Each eligible producer on a farm will be given the opportunity to annually enroll in a DCP or ACRE Program contract, as applicable, and receive payments determined to be fair and equitable as agreed to by all the producers on the farm and approved by the county committee.

(b) Each producer must provide a copy of their written lease to the county committee and, in the absence of a written lease, must provide to the county committee a complete written description of the terms and conditions of any oral agreement or lease. An owner's or landlord's signature, as applicable, affirming a zero share on a contract may be accepted as evidence of a cash lease between the owner or landlord and tenant, as applicable, as determined by CCC. Such signature or signatures, if entered on the contract to satisfy the requirement of furnishing a written lease, must be entered on the contract no later than as prescribed in § 1412.41.

Note: The completed CCC-509, with signatures, may be considered the written description of terms and conditions of valid leases provided there are no undisclosed terms. See paragraph 394.

(c) When base acres are leased on a share basis, neither the landlord nor the tenant will receive 100 percent of the contract payment for the farm.

(d) CCC will approve a contract for enrollment and approve the division of payment when all of the following apply:

(1) The landlords, tenants and sharecroppers sign the contract and agree to the payment shares shown on the contract;

(2) CCC determines that the interests of tenants and sharecroppers are being protected; and

(3) CCC determines that the payment shares shown on the contract do not circumvent either the provisions of 7 CFR part 1412 or 7 CFR part 1400.

352 Eligibility to Receive Payments and Determining Cash or Share Leases (Continued)

A Sharing of DCP or ACRE Program Payments (Continued)

Individuals or entities who are producers with a crop share interest on base acres must have a share in direct and counter-cyclical payments. Individuals and entities may share in payments if the individual or entity is entitled to an ownership share of a crop and is:

- an owner on an eligible farm who meets the definition of producer on either base acres or acres of a covered commodity on a farm enrolled under an ACRE Program contract
- a producer, other than an owner, on base acres or acres of a covered commodity or farm enrolled under an ACRE Program contract with a share-rent arrangement or cash-lease agreement who has a crop share interest in those acres.

Note: A landowner or landlord who cash leases land to another is not a producer on the cash rent land.

A producer on a farm with an interest in only nonbase acres shall not share in direct or counter-cyclical payments.

Individuals or entities with a crop share interest in acres of a covered commodity or peanuts planted on a farm enrolled in ACRE must have a share of the crop reported on FSA-578 according to paragraph 187. Individuals or entities wanting ACRE payments must sign an ACRE Program contract. See paragraphs 12, 207, and 397.

Important: The amount of nonbase acres available to be planted to FAV and wild rice without resulting in a payment reduction or violation may be reduced when there is a producer on a farm with interest in only nonbase acres. See:

- paragraph 470 for examples
- 4-CP to calculate nonbase acres on a farm available to be planted to FAV or wild rice without resulting in a payment reduction or violation.

352 Eligibility to Receive Payments and Determining Cash or Share Leases (Continued)

B Review of Leases

[7 CFR 1412.54] For the 2009 through 2012 crop years:

- (1) A lease will be considered to be a cash lease if the lease provides for only a guaranteed sum certain cash payment, or a fixed quantity of the crop (for example, cash, pounds, or bushels per acre).
- (2) If a lease contains provisions that require the payment of rent on the basis of the amount of crop produced or the proceeds derived from the crop, or the interest such producer would have had if the crop had been produced, or combination thereof, such agreement will be considered to be a share lease.
- (3) If a lease provides for a guaranteed amount and share of the crop or crop proceeds, such agreement will be considered a cash lease if the lease provides for both:
 - (i) A guaranteed amount such as a fixed dollar amount or quantity; and
 - (ii) A share of the crop proceeds.
- (4) If the lease is a cash lease, the landlord is not eligible for direct, counter-cyclical, or ACRE Program payments. The leasing of grazing or haying privileges is not considered cash leasing.

Notes: Lease terms and CCC's view about whether a lease is cash or share impact a decision about who must sign CCC-509. They also could impact claimed shares on CCC-509, or for the ACRE Program, shares of covered commodities reflected on FSA-578.

There are no requirements in DCP or the ACRE Program that specify that leases comport with any sort of reasonableness test. These matters could impact other decisions, such as payment limitation or eligibility provisions.

Important: FSA-578 shares are used to determine shares of ACRE payments. Offices should not enter acreage certifications using defaulted shares from CCC-509 if those share interests do not reflect the actual producer crop share of the covered commodity or peanuts on the farm.

352 Eligibility to Receive Payments and Determining Cash or Share Leases (Continued)

C Current Regulations About Division of Payment Shares

7 CFR 1412.54 regulations provide the following provisions about lease types applicable for DCP or ACRE Program purposes.

Type of Lease	Definition
Cash	<p>A <u>cash lease</u> provides for only a guaranteed sum, certain cash payment, or a fixed quantity of the crop.</p> <p>Example: Cash, pounds, or bushels per acre.</p> <p>A fixed or standing commodity payment is the payment a tenant or operator provides a landlord for using the land and the landlord's reduced risk on the crop, including the following:</p> <ul style="list-style-type: none"> • a fixed amount of production, such as 10,000 bushels or pounds • an amount of production per acre, such as 40 bushels or pounds per acre • a guaranteed amount and share of the crop or crop proceeds • both a: <ul style="list-style-type: none"> • guaranteed amount, such as a fixed dollar amount of quantity • share of the crop proceeds.
Share	<p>A <u>share lease</u> contains provisions that require any of the following:</p> <ul style="list-style-type: none"> • payment of rent based on the amount of crop produced • proceeds derived from the crop • interest the producer would have had, if the crop had been produced.

D Example 1

In this example, the lease agreement specifies that the rent is based on a share of the gross revenue of the crop proceeds. The rental amount is equal to \$142.80 per acre based on the following variables:

- rent equal to 40 percent of the gross crop value
- guaranteed minimum yield of 170 bushels per acre
- actual price of \$2.10 per bushel.

While the landowner does not actually receive 40 percent of the crop produced, this lease shall be considered a cash lease because other rental amount is based on a guaranteed sum or minimum amount.

352 Eligibility to Receive Payments and Determining Cash or Share Leases (Continued)**E Example 2**

In this example, the lease agreement specifies that there is a base, or minimum, cash rent amount that must be paid, but the landowner receives a share of the gross revenue in excess of the base value. The rental amount is based on the following variables:

- base, or minimum, cash rent is \$100 per acre
- additional rent is 50 percent of the gross revenue in excess of \$250 per acre
- yield of 52 bushels per acre
- price of \$6.50 per bushel.

While the landowner does not actually receive 50 percent of the crop produced, this lease shall be considered a "combination" lease or cash lease because the lease agreement includes a guaranteed amount and an additional amount based on a share of the crop proceeds.

F Example 3

In this example, the lease agreement specifies that the cash rent is based on a fixed number of bushels; however, the price is based on the value that will be set on a future date, but it is not based on the actual price received by the producer. The rental amount is based on the following variables:

- fixed number of bushels is 55 bushels per acre
- actual price is the price at the local elevator on December 1.

This lease shall be considered a cash lease.

G Payment of Cash Bonuses

Questions have been raised about how payment of cash "bonuses" to landowners impacts program eligibility. Tenants entering into agreements with landowners for the contract period may be considering paying landowners a "bonus" payment because of higher than expected yields or increased market prices. The payment of a bonus to a landowner, in itself, is not a violation of DCP or ACRE Program regulations.

352 Eligibility to Receive Payments and Determining Cash or Share Leases (Continued)

H Eligibility to Receive Payment

Each eligible producer on a farm shall have the opportunity to enroll in a DCP or ACRE Program contract. The type of farm lease and the terms of the lease will define the appropriate sharing of payments.

The following defines the general eligibility to receive payment on a farm.

Situation	Eligible to Receive Payment?	
	Lessor	Lessee
Landowner cash leases entire farm to lessee.	No, because the farm has been cash leased to another. Landowner has no share of any crop.	Yes, if all other eligibility requirements are met.
Landowner leases grazing or haying rights or privileges on base acres to another, but land itself is not leased.	Yes, if all other eligibility requirements are met, because the land itself has not been leased, only the right to graze or hay.	No, lessee is not leasing land, the lessee is only leasing the right to graze or hay.
Landowner cash leases all base acres and lessee grazes or hays the land.	No, because all the base acres have been cash leased to the lessee.	Yes, if all other eligibility requirements are met, because the lessee has leased the land, not just grazing or haying rights. The fact that the lessee uses the land for grazing or haying is not relevant.
Landowner share leases all base acres to lessee.	Yes, if all other eligibility requirements are met. However, neither the lessor nor the lessee may receive 100 percent of DCP or ACRE Program payments.	Yes, if all other eligibility requirements are met. However, neither the lessor nor the lessee may receive 100 percent of DCP or ACRE Program payments.
Landowner leases (cash or share lease) only nonbase acres to lessee.	Landowner may be eligible to receive DCP or ACRE Program payments depending on lease arrangements for base acres on the farm.	No, because the lessee leases only nonbase acres. See subparagraph B.

Notes: See paragraph 447 if a crop subject to a commercial grower contract is grown on base acres.

COC shall review grazing and haying leases to determine fair treatment of tenants/sharecroppers.