

Oregon Seed Growers League 2009 Annual Meeting

Responding to “Why Own the Farm,
When you Can Own the Farmer?”
by David Leonard

This Slide Show is Available at www.churchill-law.com



Under the Resources tab. URL: http://churchill-law.com/downloads/contract_stdtermsorseedprod.pdf

**Why Own the Farm If You Can Own the Farmer (and
the Crop)?: Contract Production and Intellectual
Property Protection of Grain Crops**

Neil D. Hamilton, 1994 University of
Nebraska, Nebraska Law Review

Roger Johnson, North Dakota, Agricultural
Commissioner



Growers and Dealers

Both are Essential to
a Successful Oregon
Grass Seed Industry



Causes of...

Current Economic Downturn in
the Oregon Grass Seed
Industry



Causes of Current Economic Downturn in the Oregon Grass Seed Industry

Interrelated- no party to blame



Causes of Current Economic Downturn in the Oregon Grass Seed Industry

1. Naturally occurring economic forces in a maturing industry



Causes of Current Economic Downturn in the Oregon Grass Seed Industry

2. Industrialization of US Agriculture



Causes: *Industrialization of US Agriculture* (Steve Smith)

Three Factors of Agriculture



**Causes: *Industrialization of US
Agriculture*- Three Sectors of Agriculture**

1. Farming



**Causes: *Industrialization of US
Agriculture* - Three Sectors of Agriculture**

1. Farming
2. Input Sector



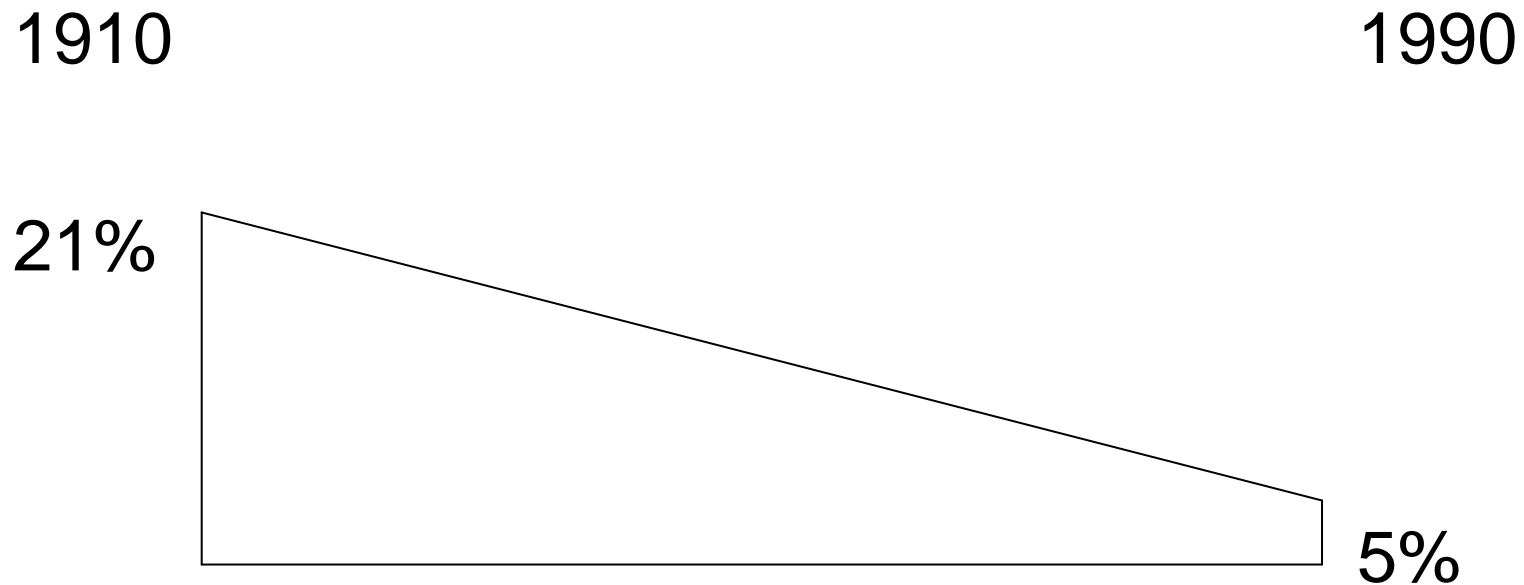
**Causes: *Industrialization of US
Agriculture* - Three Sectors of Agriculture**

1. Farming
2. Input Sector
3. Market Sector



Causes: *Industrialization of US Agriculture* - Three Sectors of Agriculture

Farm Sector

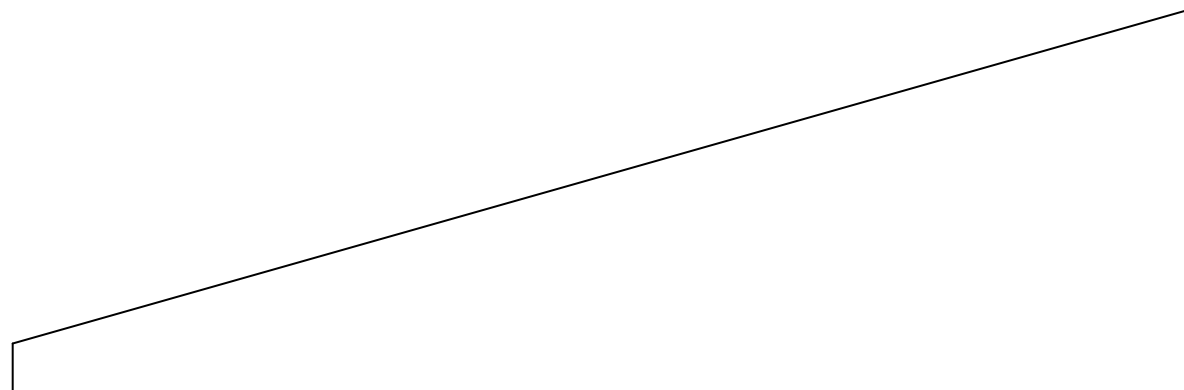


Causes: Industrialization of US Agriculture - Three Sectors of Agriculture

Input Sector

1910

1990



Causes of Current Economic Downturn in the Oregon Grass Seed Industry

3. Economic Strength (or Weakness) of the grower



US Supreme Court Justice: Harry Blackmun

Few farmers...had sufficient economic power to wait out an unfavorable situation.

HARRY A. BLACKMUN: 436 US 816 National Broiler Marketing Association v. United States; 56 L.Ed.2d 728;98 S.Ct. 2122; 436 U.S. 816; NATIONAL BROILER MARKETING ASSOCIATION, Petitioner, v. UNITED STATES.; No. 77-117.; Argued Feb. 21, 1978; Decided June 12, 1978.



US Supreme Court Justice: Harry Blackmun

...processors and distributors...were able to take from the farmer a good share of whatever profits might be available from agricultural production.

HARRY A. BLACKMUN: 436 US 816 National Broiler Marketing Association v. United States; 56 L.Ed.2d 728;98 S.Ct. 2122; 436 U.S. 816; NATIONAL BROILER MARKETING ASSOCIATION, Petitioner, v. UNITED STATES.; No. 77-117.; Argued Feb. 21, 1978; Decided June 12, 1978.



US Supreme Court Justice: Harry Blackmun

Farmers were perceived to be in a particularly harsh economic position. They were subject to the vagaries of market conditions that plague agriculture generally, and they had no means individually of responding to those conditions. Often the farmer had little choice about who his buyer would be and when he would sell. A large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to bring his harvest to market at an unfavorable time. Few farmers, however, so long as they could act only individually, had sufficient economic power to wait out an unfavorable situation. Farmers were seen as being caught in the hands of processors and distributors who, because of their position in the market and their relative economic strength, were able to take from the farmer a good share of whatever profits might be available from agricultural production.

HARRY A. BLACKMUN: 436 US 816 National Broiler Marketing Association v. United States; 56 L.Ed.2d 728;98 S.Ct. 2122; 436 U.S. 816; NATIONAL BROILER MARKETING ASSOCIATION, Petitioner, v. UNITED STATES.; No. 77-117.; Argued Feb. 21, 1978; Decided June 12, 1978.



Causes of Current Economic Downturn in the Oregon Grass Seed Industry

4. Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history



Causes: Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history

Two Factors Combine



Causes: Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine

1. Plant Variety Protection Act- 1970



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine: Plant Variety Protection Act- 1970*

Restricts, based on statute, rather than contract. The ability of a grower to sell seed.



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine: Plant Variety Protection Act- 1970*

Exceptions

- Contract Defaults



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine: Plant Variety Protection Act- 1970*

Exceptions

- Contract Defaults
 - “May 1”



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine: Plant Variety Protection Act- 1970*

Exceptions

- Contract Defaults
 - “May 1”
- Variety not Stated (VNS)



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine*

2. Production Contracts



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine:*
Production Contracts

Grower no longer selects a
Buyer- the Buyer is
predetermined



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine:*
Production Contracts

Other Changes



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine: Production Contracts: *Other Changes**

- No longer a fixed price



-
- No longer a fixed price
 - Grower is subject to risks in the market place.

Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine:*
Production Contracts: *Other Changes*

- No longer a fixed price
- Payment has been delayed



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine:*
Production Contracts: *Other Changes*

- No longer a fixed price
- Payment has been delayed
- Obligation to store and insure has been extended



Causes: *Disequilibrium caused by the most significant change to the Oregon Grass Seed Industry in its history- Two Factors Combine:*
Production Contracts: *Other Changes*

- No longer a fixed price
- Payment has been delayed
- Obligation to store and insure has been extended
- Other economic costs to the grower



Standard Terms of Oregon Seed Production

- Standard Terms- 3 parts
 - 20 terms and 4 pages



Standard Terms of Oregon Seed Production: *Standard Terms*

Section 1. TERM OF AGREEMENT. The term of this Agreement shall commence upon the earlier of: (a) delivery of stock seed to GROWER; (b) or the acceptance of the terms by signature or otherwise by GROWER and DEALER and shall continue for the term of years hereinafter set forth. If no term of years is set forth, then the term of this Agreement shall be the life of the stand.



Standard Terms of Oregon Seed Production: *Standard Terms*

Section 3. SEED STOCK AND ACREAGE.

DEALER will provide GROWER with seed stock of the variety, together with a current seed test, sufficiently in advance of reasonable planting dates at no charge for use of the seed stock. Said seed is to be planted on an aggregate of the acres described below at a sufficient rate per acre. GROWER agrees to return or make available to DEALER all unused seed stock within ten (10) days after planting.



Standard Terms of Oregon Seed Production: *Standard Terms*

Section 3. SEED STOCK AND ACREAGE. DEALER will provide GROWER with seed stock of the variety, together **with a current seed test**, sufficiently in advance of reasonable planting dates **at no charge** for use of the seed stock. Said seed is to be planted on an aggregate of the acres described below at a sufficient rate per acre. GROWER agrees to return or make available to DEALER all unused seed stock within ten (10) days after planting.



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 4. PRICING AND PAYMENT FOR SEED PRODUCTION.** For all seed produced under the terms of this Agreement and meeting or exceeding the specifications for various qualities, DEALER agrees to make payment in the amount set out below for each crop year FOB Oregon State Certification Approved Warehouse. Unless otherwise specified: (1) payment to GROWER; and (2) risk of loss and the obligation to provide storage shall transfer to the DEALER on: the earlier of: (1) 30 days after shipment; or (2) the date of the last test indicating the seed meets the contract specifications.
- As to all seed not meeting contract specifications, DEALER agrees to either pay for the seed, or release the seed to GROWER as follows: within 30 days of written notice from GROWER; DEALER and GROWER will agree to a price (or pricing formula), and a payment schedule. DEALER shall confirm such terms with GROWER. If DEALER does not so confirm, DEALER shall be deemed to have released the seed to GROWER who shall be entitled to sell such seed as VNS, in such manner that it will not be replanted for seed production, and without reference, by inference or otherwise to a variety name. DEALER shall invoice and deduct from GROWER, at the final settlement for the seed which meets contract specifications, DEALER's cost for any specially designed bags supplied by DEALER and any amounts due to breeder, if any.
- The price of any lot of seed containing noxious weeds will be discounted to the extent DEALER is unable to effectively market the seed.



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 4. PRICING AND PAYMENT FOR SEED PRODUCTION.** For all seed produced under the terms of this Agreement and meeting or exceeding the specifications for various qualities, DEALER agrees to make payment in the amount set out below for each crop year FOB Oregon State Certification Approved Warehouse. **Unless otherwise specified: (1) payment to GROWER; and (2) risk of loss and the obligation to provide storage shall transfer to the DEALER on: the earlier of: (1) 30 days after shipment; or (2) the date of the last test indicating the seed meets the contract specifications.**
- **As to all seed not meeting contract specifications, DEALER agrees to either pay for the seed, or release the seed to GROWER as follows: within 30 days of written notice from GROWER; DEALER and GROWER will agree to a price (or pricing formula), and a payment schedule. DEALER shall confirm such terms with GROWER. If DEALER does not so confirm, DEALER shall be deemed to have released the seed to GROWER who shall be entitled to sell such seed as VNS, in such manner that it will not be replanted for seed production, and without reference, by inference or otherwise to a variety name. DEALER shall invoice and deduct from GROWER, at the final settlement for the seed which meets contract specifications, DEALER's cost for any specially designed bags supplied by DEALER and any amounts due to breeder, if any.**
- The price of any lot of seed containing **noxious weeds will be discounted** to the extent DEALER **is unable to effectively market** the seed.



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 5. CONDITIONING OF SEED.** It is agreed that each seed crop will be conditioned (cleaned) on a timely basis as agreed to by DEALER and the GROWER. Unless otherwise specified by DEALER, all seed is to be packed in specially designed bags supplied by DEALER. In any event, GROWER shall pay, out of crop settlement, the cost of a “plain poly” bag for each bag used.



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 5. CONDITIONING OF SEED.** It is agreed that each seed crop will be conditioned (cleaned) on a timely basis as agreed to by DEALER and the GROWER. Unless otherwise specified by DEALER, **all seed is to be packed in specially designed bags supplied by DEALER. In any event, GROWER shall pay, out of crop settlement, the cost of a “plain poly” bag for each bag used.**



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 11. REASONABLE PRICE.** The term “reasonable price” shall be a price sufficient to equal the cost of production of a typical grower in GROWER’s production area producing seed as called for in this Agreement, plus a margin of 7.5% of the price. Except to the extent the GROWER wishes to demonstrate otherwise, Enterprise Data Sheets produced by Oregon State University will be sufficient evidence of GROWER’s cost of production and the current year and two prior years (three years) average yield for the production area, (as determined by the Oregon State University Extension Service) will be considered the yield for the purposes of calculating the cost of production. Unless otherwise stated herein, the price to be paid for the seed meeting contract meeting specifications will be a reasonable price.



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 13. EQUAL VALUE.** DEALER represents and warrants to GROWER that upon waiver or modification of the Standard Terms that GROWER will receive a benefit which is the actuarial equivalent of the modification proposed by DEALER. Actuarial equivalent means “equal value”, an equivalent actuarial present value when computed on the basis of interest, time, and historical risks and rates of return in the seed industry.



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 16. MEDIATION.** The parties agree to mediate any issue related to this Agreement in accordance with ORS 576.610 to 576.650.



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 18. INTERPRETATION.** The construction, interpretation and performance of this Agreement shall be governed by the laws of the State of Oregon, including the Uniform Commercial Code (UCC) (and in particular Article 2 of the UCC). The parties acknowledge that though there is not a sale of goods, to protect DEALER's rights in its proprietary seed; that in all other particulars, the transaction is analogous to a sale of goods between merchants.



Standard Terms of Oregon Seed Production: *Standard Terms*

- **Section 18. INTERPRETATION.** The construction, interpretation and performance of this Agreement shall be governed by the laws of the State of Oregon, **including the Uniform Commercial Code (UCC) (and in particular Article 2 of the UCC).** The parties acknowledge that though there is not a sale of goods, to protect DEALER's rights in its proprietary seed; that in all other particulars, the transaction is analogous to a sale of goods between merchants.



Standard Terms of Oregon Seed Production: *Standard Terms*: Specific Provisions

PAYMENT

DEALER agrees to pay for all seed meeting contract specifications:

- Within the earlier of 30 days of the date of an acceptable test, or the date GROWER delivers or transfers the seed to the DEALER or DEALER's agent pursuant to a notice from the DEALER.
- One-third on November 15th following harvest;
One-third on December 31st following harvest; and
One-third on April 15th following harvest



Standard Terms of Oregon Seed Production: *Standard Terms: Optional Terms*

MEDIATION ARBITRATION. In the event of a dispute between the parties regarding the terms or conditions of this agreement, and in lieu of Section 15, the parties hereto agree to resolve their differences by means of mediation and, if necessary, binding arbitration. Each of the parties shall select a representative within five (5) working days and such representatives shall agree as a condition of appointment to, within a period of two (2) working days, select a single person who shall act as a neutral third party mediator and who shall continue to serve as a binding arbitrator in the event mediation is unsuccessful. The mediator shall agree as a condition of appointment to meet with the parties in the role of mediator within ten (10) days of appointment. If the mediator determines that the mediation is not progressing appropriately, then the mediator shall have the authority to declare an impasse. Upon declaring an impasse, the mediator shall indicate to the parties those legal and factual issues, if any, on which the mediator, now acting in the role of an arbitrator, requires additional evidence or information, which information will be provided within 96 hours. The mediator shall then within a period of an additional 96 hours, based upon the information obtained at the mediation and that additional evidence or information subsequently provided, issue an arbitrator's award. The parties hereby consent to the waiver of confidentiality as to information provided to the mediator as a mediator and consent to the mediator using such information in the formation of an award. The parties may, by unanimous consent, extend the time deadlines without waiver of any other provision. If a party fails to appoint a representative, or a representative fails to appoint a mediator within the time period called for, the presiding judge of the county where the seed is being produced shall appoint such person upon request of any party.



Standard Terms of Oregon Seed Production: ***Standard Terms: Optional Terms***

[] **MOST FAVORED GROWER STATUS.** DEALER agrees to provide to GROWER, all production advantages, such as favorable terms of pricing, shipment, payment and quality standards and the first opportunity for additional acreage that any other growers receive. Upon reasonable request by a grower, DEALER shall provide to GROWER evidence of DEALER's compliance with this provision, including but not limited to, if necessary, review of DEALER's records, at a cost to be shared equally between GROWER and DEALER by a neutral third party CPA whose final report shall protect the confidentiality of DEALER. This provision shall apply on an annually renewing basis for a minimum period of three years and notice of termination may be given by DEALER at any time, effective with the final settlement of the third crop year.



Standard Terms of Oregon Seed Production:
Standard Terms: Optional Terms

[] **“BEST” TERMS.** DEALER warrants to GROWER that the terms of this Agreement are the most favorable terms provided for the production of the seed called for herein and if more favorable terms are provided to any other grower, DEALER shall provide such terms to GROWER.



AUTHORIZE BARGAINING

- Authorize and direct your Board of Directors to immediately form a new bargaining association to bargain for “Standard Terms of Oregon Production of Grass Seed”.

OR

- Authorize and direct your Board of Directors to request that the Oregon Grass Seed Bargaining Association to immediately commence negotiations with seed dealers to establish “Standard Terms of Oregon Production of Grass Seed”



AUTHORIZE BARGAINING

- The “Standard Terms of Oregon Production of Grass Seed” would apply to all production for which there is not a written contract otherwise.

OR

- The “Standard Terms of Oregon Production of Grass Seed” would apply to all production of proprietary Oregon grass seed.
- Note: A single standard contract would create a level playing field for the benefit of all dealers.



AUTHORIZE BARGAINING

- Authorize and direct your Board of Directors to request that the Oregon Department of Agriculture, under its existing ruling making authority, immediately adopt a new rule which establishes the “Standard Terms of Oregon Production of Grass Seed” under option 3 or 4 above.



AUTHORIZE BARGAINING

- Authorize and direct your Board of Directors to appoint a group to investigate the economic significance of seed breeding, especially grass seed breeding, on Oregon agriculture and Oregon's economy to determine if OSU or other entity in Oregon, should establish the pre-eminent worldwide seed breeding program.



AUTHORIZE BARGAINING

- Authorize and direct your Board of Directors to appoint a group to investigate the need to establish an ongoing “economic institute” dedicated to promoting Oregon grass seed. This institute would advise the Oregon grass seed industry on:
 - Competitive advantages
 - Potential weaknesses
 - Long-range strategy
- The information would be proprietary to the Oregon seed industry.
- The institute could provide a model for other unique Oregon crops.
- The study could justify economic development funding.



AUTHORIZE BARGAINING

- Authorize and direct your Board of Directors to appoint a group to investigate the use of federal marketing order for the Grass Seed Industry



LEGISLATIVE AGENDA

- Request the Oregon Seed Council, the Oregon Department of Agriculture, the Oregon Bankers Association, Agricultural Bankers, the Women for Agriculture, the Oregon Farm Bureau, the Oregon State Bar, Agricultural Law Section, and all other related entities and organizations to include in their 2011 Legislative Agenda:
- “Standard Terms of Oregon Production of Grass Seed” (under option 3 or 4 above)
- Develop a Legislative Agenda which incorporates key provisions of:
 - The Packers and Stockyard Act (Trust Funds)
 - The Perishable Agricultural Commodities Act (PACA)
- Prohibition of Unfair Conduct
- Investigations
- Grower Liens (statutory trusts)
- Strengthen bargaining association provisions
 - All benefit
 - All share in the cost (no free-riders)
- Require all “parent” corporations of Oregon subsidiaries which hold dealer licenses to be responsible for the action of the subsidiary.
- Require a system ranking (grading) “economic stability” of licensed seed dealers and require regular public posting of summary balance sheets.

