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UNDERSTANDING THE PRODUCER'S LEGAL
RIGHTS UNDER H.B. 1284

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George E. Radosevich, J.D.
and
Kenneth S. Copple, J.D.

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George E. Radosevich, J.D.*
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On April 18, 1986, Governor Richard Lamm signed into law the Omnibus Partial Farmstead Redemption and Rural Economic Stabilization Act. The legislation provides major improvements in the legal rights of financially troubled farmers and ranchers in Colorado.

This legislation, which will be referred to as "The Act" or "the new law", provides that:

1. A producer has the right, under certain circumstances, to retain possession of machinery, equipment, livestock, inventory and feed, even though these items are pledged as collateral on a past due loan.
2. If a producer meets the requirements of a "qualified farm owner-tenant" that producer has a right to:
 - a) lease back his farm or ranch following the foreclosure;
 - b) the producer also has a right of first refusal to match the highest offer made by a Third Party to purchase the property from the lender after the foreclosure.
3. A producer in foreclosure has a right to buy back his home, outbuildings and at least five acres from the party that purchases

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the farm at the foreclosure sale. The producer does not have to buy back the entire farm.

This brief report was written in order to answer questions farmers and ranchers may have regarding the new law. It does not explain or discuss every single provision of The Act, nor is not intended to be a substitute for a reading of the actual Act. Rather, it is intended to be a summary of the sections of The Act which the authors believe are most important to Colorado's financially troubled farmers and ranchers. Farmers, ranchers and other interested or affected parties having more detailed questions about The Act should consult a qualified attorney. Producers are cautioned against representing themselves in negotiations with lenders or in a court of law on complex matters covered by the Act.

I. KEEPING YOUR EQUIPMENT, MACHINERY, LIVESTOCK, INVENTORY AND FEED

This section discusses the rights of a producer to keep his machinery, equipment, livestock, or feed or inventory held for livestock, when these items are pledged as collateral on a past due loan. Under the old law once the lender called the past due loan, the producer had to pay the entire balance due in order to keep these items if they were pledged as collateral. Under the new law the producer can keep, or regain possession of the collateral by using one of several legal avenues allowed under the Act. One such legal avenue is for the producer to "cure" the default by paying, or agreeing to pay, the past due payments, plus interest and costs. The producer does not have to pay the entire balance due, under this method. Note that this portion of The Act deals with farm or ranch machinery or equipment, livestock, or feed or inventory held for livestock, when such items are pledged as collateral. These items will be referred to as "collateral".

Does the lender have a right to take possession of my collateral without going to court?

Yes, but only if you have vacated or abandoned the collateral, or if you have voluntarily surrendered it to the lender and waived your rights under the new law.*** A waiver which you signed prior to April 18, 1986 is invalid in this regard. Waivers signed after April 18, 1986, may be invalid if not worded properly. As a general rule, you should not sign this type of waiver for the lender unless you want to relinquish the collateral.

After the lender has possession of my collateral can the lender sell it without giving me notice?

The lender must give you at least 20 days notice of a sale of the collateral unless you have voluntarily surrendered the collateral and waived your rights to such notice under the new law. A waiver you signed prior to the new law is invalid. In other words, if you signed a waiver prior to April 18, 1986, the lender must still give you notice of the sale. Some waivers signed after April 18, 1986 may also be invalid.

What should I do if I receive notice that the lender is going to sell my collateral?

When you receive such notice you should decide whether you want to keep the collateral. If you do, you and your attorney need to discuss which legal method is best for you. There are two basic methods. One is to prepare a payment plan. The other is redemption which will be discussed below. The payment plan is an offer or bid to buy back the collateral with a portion of

***The secured party (lender) does not need to obtain a court order if the judge finds that your plan for repayment is not feasible or that you are acting in "bad faith", or that you have breached an agreement for repayment. However, you will have already been to court at least once before this situation occurs.

the proceeds from your crops or livestock for the current year. The plan must be filed in court and served on the lender not less than ten days before the sale. You do not need to make any type of payment at this time.

If the lender wants to contest the feasibility of your plan, the matter will be set for hearing before a judge. If the court finds your plan to be feasible, an order will be entered declaring the amount which you are able to pay, and fixing the present discounted value of that amount.**** If the court finds that the plan is not feasible, the lender may go ahead and dispose of the collateral without further proceedings and without further notice or court order. If the lender elects to go ahead with the sale of the collateral, and your plan is the most favorable offer made, the lender must sell the collateral to you under the terms of your plan. If another party makes a higher bid at the sale, the lender is free to sell the collateral to the other party. If this happens, your rights to retain the collateral will be terminated.

If your offer is the high bid, and you are the purchaser of the collateral, you must make the payments as set forth in your plan. If you don't, the lender may dispose of the collateral without further court proceedings and without further notice.

What are my rights if the lender cancels the sale?

If the lender cancels the sale after giving you notice, and after your plan has been approved, then you shall have the right to possession and use of the collateral. Your use of the collateral will be on fair and reasonable terms agreed to by you and the lender, or, if such agreement cannot be reached,

****The amount you will be able to pay from the future sale of your crops and livestock is discounted for the time value of money.

the court will fix the terms. If the lender wants to offer the collateral for sale again, the lender must give you a new notice.

Do I have a right to redeem the collateral before the sale?

Yes, there are three ways to redeem and retain possession of the collateral. Redeeming the collateral differs from the offer to repurchase, described above, in that when you redeem there is no sale, and thus you don't need to be concerned about another party making a higher bid than yours. The first way to redeem is by tendering a lump sum payment to the lender. The amount must include the entire balance that is secured by the collateral with interest, as well as the lenders reasonable expenses incurred in holding the collateral and in preparing it for sale. In some cases you will also have to pay the lenders reasonable attorney fees and legal expenses. This is probably the least attractive method of redeeming because you must pay off the entire loan.

The second method of redeeming the collateral is by tendering to the court an amount necessary to "cure" the past due payments. In other words you do not have to pay the entire amount secured by the collateral. You only have to pay the past due payments, with interest from the date of default, plus reasonable costs incurred by the lender, and any attorney fees approved by the court. By paying the past due payments, with interest and costs, you will have "cured" the default in the eyes of the law. Thus, the lender can neither proceed with the sale, nor demand that you pay the entire balance due.

The third method of redeeming the collateral is to prepare an agreement with a payment plan, whereby you agree to "cure" (pay) the past due payments, plus interest, with proceeds from your crops or livestock during the current crop year. (You may also have to pay certain costs and legal fees.) This payment

plan is submitted to the court. If the court finds it to be reasonably feasible and fair, you will then be allowed to redeem the collateral according to your plan. This plan shall be accompanied by your affidavit which shall state the facts upon which your plan and agreement are founded. These documents must be filed with the court and served upon the lender no later than 10 days prior to the sale. If it is found to be feasible by the court, the plan will be a sufficient tender of redemption, and you will be entitled to possession and use of the collateral. Note that under this legal method you do not have to come up with any money at the time the plan is submitted to the court. You will cure the past due payments (plus interest) with your future income from your crops and livestock. It is essential that you make all the payments as provided in your plan. If you don't the lender may proceed to dispose of the collateral.

Each of these three methods of redeeming the collateral must be carried out before your lender has disposed of the collateral or has entered into a contract for its sale. As you can see, time is of the essence. If you want to keep your collateral, or regain possession of it, you will probably need to submit your proposal to the court and the lender at least 10 days prior to the sale.

II. RIGHTS OF A QUALIFIED FARM OWNER-TENANT

This section will discuss the producers rights to lease back his land, and his right to match any written offer made to buy the land following foreclosure. It should be noted that in order to have these rights, the producer must meet the requirements of a Qualified Farm Owner/Tenant.

What is a Qualified Farm Owner/Tenant?

To qualify as a farm owner/tenant you must:

- a. have been the titled owner or equitable owner of the property which was foreclosed upon;
- b. have been the producer on the property at the time the lender proceeded to foreclose;
- c. have resided within a reasonable distance from the property and actively managed the farm or ranch operation on that property;
- d. have had farming or ranching as your primary occupation;
- e. agree to continue the operation in a reasonable manner; and
- f. show that the debt which was foreclosed upon existed on January 1, 1986, and the redemption period didn't expire before April 18, 1986. Debts which existed on January 1, 1986, but were latter refinanced, will qualify.

The Act assumes that you will qualify. The lender bears the burden of proof to disqualify you as a qualified Farm Owner/Tenant, so long as you assert your rights in the eviction proceedings.

How and when do I assert the right to lease back the land?

You must remain in possession of the land after the foreclosure. Do not abandon the farm or ranch. When the lender starts an eviction case against you, you can assert your right to lease back the farm or ranch. Your attorney will prepare the necessary legal papers and present them to the court. Alternatively, you can attempt to enter into a voluntary lease agreement with the lender. You should have this lease implemented by a court order.

How much rent do I pay and what will the terms of the lease be?

The Act provides that you must agree in writing to lease the property on "fair and reasonable" terms. Fair and reasonable means crop rents in kind or cash equivalent to rents generally paid in your area. Note that if the lender has other farm leases in the area, you will pay the same rate the other tenants pay. Other terms of the written lease are those generally used in your area, but in no event can they be more favorable to the lender than other leases for farms held by your lender.

If a third party offers to rent the farm or ranch, and his offer is acceptable to the lender, you will have to match his offer if you want to continue operating on the property. However, you don't have to pay the rent "up front". You can pay the rent from future proceeds of your crops or livestock. Therefore, you don't have to pay any cash rent at the time you sign the lease. However, you will have to pay interest since your payment will be delayed. You cannot be denied a lease to the property for the reason that the third party's financial condition is more favorable than your financial condition.

You will also be required to provide the Court with a statement of the crops you will grow and the use you will make of the land. Further, you will be required to prepare a periodic statement of income and expenses on at least a quarterly basis. Both the Court and the lender are entitled to copies of these. Note that the lender will have to pay whatever costs and expenses other landlords in the area are paying.

What are the lenders rights as the landlord?

The lender, who becomes your landlord if you exercise your right to lease the property, has the same rights as any landlord. In other words, if you

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breach the lease the landlord can terminate it. Also, when the lease comes up for renewal the landlord can contest your ability to properly operate the farm or ranch. If the landlord can prove that you do not have the ability to properly operate the farm or ranch, the lease will be rejected and terminated.

It should also be noted that you must act in good faith at all times. This means that you must be honest with the landlord. The landlord has a similar obligation to be honest with you.

How long can I lease the property?

You can remain on the property as a renter on a year to year basis. On or before February 1 of each year you must submit to the court your proposal to renew the lease. Such renewals may continue until the end of the 1989 crop year. If the property is sold to an independent third party, the sale will be subject to your lease. However, you will not be able to renew the lease during the next year. This, of course, assumes that you do not exercise your right of first refusal to match a third party's offer to buy the land.

What are my rights of first refusal under The Act?

Your right of first refusal allows you the opportunity to buy back the land from the lender on the same terms as offered by a third party. In other words, if a third party makes a good-faith offer to buy the farm or ranch, you will have a right to buy it back on the same terms. If you don't offer to buy it back on the same terms, the lender can sell the property to the third party.

The lender must give you written notice of any written bona fide offer. You must be prepared to make payment within the shorter of the following two periods of time: a) ninety days after you receive notice of the offer to purchase the property; or b) thirty days after you receive notice of the

written offer if you had already been given at least 60, but no more than 120 days notice of the lenders proposal to sell the property. That notice must contain the offering price, the amount of downpayment required, the period of time over which the balance could be paid, and the interest rate. The thirty day time period does not apply if the conditions of the written offer to purchase vary by more than 15 percent from the terms set forth in the lenders listing information or proposal to sell.

What should I do if the lender notifies me that the farm or ranch is being listed for sale?

If you receive notice that the lender is listing the land for sale, the first thing you should do is find a source of financing. If you have a friendly lender you should review the terms under which the property is listed with that lender. You should do this in advance so that you will be prepared when a third party makes an offer to purchase the land. As noted above you will have to match the third party's offer.

If the lender doesn't receive a legitimate offer within 120 days of the listing date, the lender must send you an additional notice if the property is going to remain on the market. You should carefully read over each of these notices, as the asking price and other terms may change. You should also provide your attorney with a copy of each notice, as well as any other documents or papers you receive from the lender.

What are my rights if the land is sold?

The lender can sell the property at any time after the redemption period has expired. However, the lender must have provided you with the written notice described above. If you are leasing the land, any sale will be subject to your lease. This means you can stay on the farm until the next renewal.

You are entitled to your crop/livestock share regardless of whether or not you exercise your right of first refusal.

Remember:

1. Most producers will qualify as a "qualified" farm owner/tenant. If you owned the land and managed the operation on it at the time the foreclosure was started, you will probably qualify.
2. Do not abandon or vacate the property if you want to continue farming it. Contact your attorney as soon as the lender starts the eviction action.
3. Just because you and the lender are not getting along, doesn't mean you can't lease the land back following the foreclosure. The judge will decide what lease terms are reasonable. You are responsible for obtaining operating money and you may have to demonstrate to the court that you have arranged for an operating loan.
4. If you want to exercise your right of first refusal, you should line up a lender to handle the financing.
5. You must act in good faith and fulfill the terms of the lease agreement. The lender also has an obligation to act in good faith.

III. PARTIAL HOMESTEAD REDEMPTION

Under the old law a producer had the right to redeem or buy back his entire farm during the six month period following the foreclosure sale. He did this by paying the redemption price which was the full amount of the bid, plus interest and costs. If a producer couldn't come up with the money to buy back the entire farm or ranch, then he couldn't redeem any of it.

The Act allows the foreclosed producer the right to buy back a part of the farm or ranch. Specifically, the producer can buy back a contiguous parcel of up to forty acres, but not more than five acres without the lenders consent.

The parcel will include the producers home, and may include outbuildings. Further, the parcel will include the mineral rights and access to domestic water. The redeemed parcel cannot include: a) outbuildings that are necessary for the operation of the remainder of the farm or ranch; b) interfere with access to water rights on the remaining portions of the property; c) interfere with access to the remainder of the property. (An easement can solve the access to water and property restriction). If the producer and the lender can't agree on a fair price for the parcel or the legal description of the parcel back the court will decide these matters.

When must I make an offer and what must the offer include?

You must make an offer at least 60 days prior to the end of the redemption period, which is six months after the sale. In other words, you have approximately four months after the sale to exercise your rights. The offer must include a legal description of the parcel you want to keep, the amount you are willing to pay for it, and a statement of the method of paying for the parcel. This offer, should be delivered to the public trustee or sheriff that conducted the foreclosure sale. A copy should be delivered to the lender. It is suggested that you have an attorney prepare the written offer.

What if I reach an agreement with the lender on the parcel I want to keep?

If you reach an agreement it should be put in writing. The written agreement should include a legal description, the amount you will pay for the parcel, and the method of financing of the agreement. This agreement should then be submitted to the court that heard your foreclosure case.

What if the lender and I cannot agree on the terms of a partial redemption?

When the parties can't agree, the matter is decided by the judge that presided over your foreclosure case. The dispute will generally be over the proportionate value of your home, compared to the value of the entire farm or ranch. It is suggested that you hire a qualified appraiser in order to testify on this matter.

How much should I pay for the parcel I want to keep?

A formula is set forth in The Act to help determine the amount you should pay. The formula is as follows: (partial homestead value ÷ farm value) X farm redemption price = partial homestead redemption price.

For example: A five hundred acre farm is valued at \$300,000. The cost of redeeming the entire farm is \$250,000. The farmer wants to redeem a five acre parcel valued at \$50,000.

5-Acre Parcel Value	\$ 50,000
Divided by Total Farm Value	<u>\$300,000</u>
Partial Redemption Portion Equals	16.6%
Farm Redemption Price	\$250,000
Multiply by 16.6%	
Partial Redemption Price = (cost of 5 acre parcel)	\$41,666.65

Note that if you and your lender can agree on a price, you will not need to use the above formula. If you cannot agree, you should hire an appraiser to assist you in determining the value. The same appraiser can provide helpful testimony at the hearing on your proposal.

Can the judge reduce the cost of the parcel I want to keep?

Yes. If it appears that the lender will realize a large profit on the sale of the parcel you want to keep when combined with the sale of the rest of the farm, the judge can reduce the amount you pay for the parcel you want to keep. In fact, he can reduce the cost of the parcel you want to keep to below market price. He can do this to prevent the lender from realizing a windfall on the sale of your farm.

Is this partial homestead redemption the same as a homestead exemption?

No. Under a homestead exemption you are allowed to retain \$20,000 from your property value, after the foreclosure sale. However, nearly all loan agreements contain a clause that waives the borrower's rights to this exemption. Such a waiver does not nullify or cancel out your rights under the new partial homestead redemption law.

CONCLUSION

Colorado and several other states recognize the economic crisis facing many farmers and ranchers. Legislature intervention designed to help address the problem is one of the most effective ways for the states to assist the troubled agricultural sector. The new law in Colorado was summarized, but producers should not attempt to represent themselves in a court of law. Further, producers should not transfer assets to lenders without fully understanding the tax consequences of such a transfer.

