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NO. STATE OF NEBRASKA
OFFICIAL
APR 30 1992
DEPT. OF JUSTICE

DATE: April 29, 1992

SUBJECT: Eligibility of Retired Grain Sorghum Grower For Position On Sorghum Board.

REQUESTED BY: Nebraska Grain Sorghum Development, Utilization and Marketing Board

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

The Nebraska Grain Sorghum Development, Utilization and Marketing Board (the "Board") has requested an opinion relating to the eligibility requirements for membership on the Board. Specifically, at issue is whether a "retired" sorghum grower meets the eligibility requirements of the Nebraska Grain Sorghum Resources Act to serve as a member of the Board under the following circumstances: The "retired" sorghum grower: 1) still owns land, which he or she rents on a crop-share basis; 2) still owns farming equipment, which he or she leases out; 3) occasionally works for the tenant who farms some of his or her land, receiving grain as payment; and is listed as an "owner," rather than "operator" on ASCS records.

Pursuant to the Grain Sorghum Resources Act, Neb.Rev.Stat. §§2-4001 to 2-4020 (Reissue 1991), the Board "shall be composed of seven members who . . . have been <u>actually engaged in growing grain sorghum</u> in this state for a period of at least five years, and . . . derive a substantial portion of their income from <u>growing</u> grain sorghum." Neb.Rev.Stat. §2-4004(1)(c),(d) (emphasis added). Although this section uses the phrase "have been" growing grain sorghum (rather than "are" growing), when the section is read in its entirety and in context with other sections of the Act, it is

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clear the members must be currently actually engaged in growing grain sorghum. Section 2-4004(1)(d) requires that members derive a substantial portion of their income from growing grain sorghum (present tense). Furthermore, pursuant to §2-4009, "a member of the board shall be removable for ceasing to . . . be actually engaged in growing grain sorghum in the state." Thus, a grain sorghum grower who completely retires is ineligible for board membership.

The question here, however, is whether a person qualifies as one who is "actually engaged in growing grain sorghum" under the specific circumstances described above.

In making this determination, it is necessary to examine the term "actually engaged." The word "actual" is defined as follows:

> Real; substantial; existing presently in fact; having a valid objective existence as opposed to that which is merely theoretical or possible. Opposed to potential, possible, virtual, theoretical, hypothetical, or nominal. Something real, in opposition to constructive or speculative; something existing in fact. It is used as a legal term in contradistinction to virtual or constructive as of possession or occupation. Actually is opposed to seemingly, pretendedly, or feignedly, as actually engaged in farming means really, truly in fact.

Pinder v. Dean, 520 A.2d 1119, 1124 (Md.App. 1987) (quoting Black's Law Dictionary 33 (5th ed. 1979)) (emphasis added). The word "engage" is defined as "to employ or involve one's self; to take part in; to embark on." Black's Law Dictionary at p. 528.

As quoted above, "actually" in the context of "actually engaged in farming" means "really, truly in fact." We conclude a retired grain sorghum grower who retains ownership of land and equipment and occasionally performs labor is, despite these facts, not actually engaged in growing grain sorghum for purposes of the Nebraska Grain Sorghum Resources Act.[1] Thus, we conclude such

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[1]We would note this conclusion is not intended to reflect on the policy of excluding such persons from the Board. Nor does this conclusion necessarily mean such persons are not farmers. We would also note that this opinion is consistent with informal legal advise given previously to another commodity board under a similar statutory scheme.

individuals do not meet statutory requirements for Board membership.

Respectfully submitted,

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