

2023 IN REVIEW – AG LAW AND TAX

By Roger A. McEowen

Overview

As 2024 begins, it's good to look back at the most important developments in agricultural law and tax from 2023. Looking at things in retrospect provides a reminder of the issues that were in the courts last year as well as the positions that the IRS was taking that could impact your farming/ranching operation. Over the next couple of weeks, I'll be working my way through the biggest developments of last year, eventually ending up with what I view as the Top Ten developments in ag law and tax last year.

The start of the review of the most important ag law and tax developments of 2023 – it's the topic of today's post.

Labor Disputes in Agriculture

Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174, 143 S. Ct. 1404 (2023)

In 2023, the U.S. Supreme Court ruled that an employer can sidestep federal administrative agency procedures of the National Labor Relations Board and go straight to court when striking workers damage the company's property rather than merely cause economic harm. The case involved a concrete company that filed a lawsuit for damages against the labor union representing its drivers. The workers filled mixer trucks with concrete ready to pour knowing they were going to walk away. The company sued for damage to their property – something that's not protected under federal labor law. The Union claimed that the matter had to go through federal administrative channels first.

The Court said the case was more like an ordinary tort lawsuit than a federal labor dispute, so the company could go straight to court. Walking away was inconsistent with accepting a perishable commodity.

There's an important ag angle to the Court's decision. Where there are labor disputes in agriculture, they are often timed to damage perishable food products such as fruit and vegetables. Based on the Court's 8-1 opinion, merely timing a work stoppage during harvest might not be enough to be deemed economic damage, unless the Union has a contract. But striking after a sorting line has begun would seem to be enough.

Swampbuster

Foster v. United States Department of Agriculture, 68 F. 4th 372 (8th Cir. 2023)

Another 2023 development involved the application of the Swampbuster rules on a South Dakota farm. In 1936, the farmer's father planted a tree belt to prevent erosion. The tree belt grew over the years and collects deep snow drifts in the winter. As the weather warms, the melting snow collects in a low spot in the middle of a field before soaking into the ground or evaporating. In 2011, the USDA



called the puddle a wetland subject to the Swampbuster rules that couldn't be farmed, and it refused to reconsider its determination even though it had a legal obligation to do so when the farmer presented new evidence countering the USDA's position.

The farmer challenged the determination in court as well as the USDA's unwillingness to reconsider but lost. This seems incorrect and what's involved is statutory language on appeal rights under the Swampbuster program. The Constitution limits what the government can regulate, including water that doesn't drain anywhere. In addition, the U.S. Supreme Court has said the government cannot force people to waive a constitutional right as a condition of getting federal benefits such as federal farm program payments.

We'll have to wait and see whether the Supreme Court will hear the case.

Railbanking

Behrens v. United States, 59 F. 4th 1339 (Fed. Cir. 2023)

Abandoned rail lines that are converted to recreational trails have been controversial. There are issues with trespassers accessing adjacent farmland and fence maintenance and trash cleanup. But perhaps a bigger issue involves property rights when a line is abandoned. A federal court opinion in 2023 provided some guidance on that issue.

In 2023, a federal court clarified that a Fifth Amendment taking occurs in Rail-to-Trail cases when the trail is considered outside the scope of the original railway easement. That determination requires an interpretation of the deed to the railroad and state law. Under the Missouri statute involved in the case the court said the railroad grant only allowed the railroad to construct, maintain and accommodate the line. Once the easement was no longer used for railroad purposes, the easement ceased to exist. Trail use was not a railroad purpose. The removal of rail ties and tracks showed there would be no realistic railroad use of the easement and trail use was unrelated to the operation of a railway.

The government's claim that the trail would be used to save the easement and that the railway might function in the future was rejected, and the court ruled that the grant was not designed to last longer than current or planned railroad operation. As a result, a taking had occurred.



CAFO Rules

Dakota Rural Action, et al. v. United States Department of Agriculture, No. 18-2852 (CKK), 2023 U.S. Dist. LEXIS 58678 (D. D.C. Apr. 4, 2023)

In 2023, USDA's 2016 rule exempting medium-sized CAFOs from environmental review for FSA loans was invalidated. A medium-sized CAFO can house up to 700 dairy cows, 2,500 55-pound hogs or up to 125,000 chickens. The rule was challenged as being implemented improperly without considering the impact on the environment in general. The USDA claimed that it didn't need to make any analysis because its proposed action would not individually or cumulatively have a significant effect on the human environment. So, the agency categorically exempted medium-sized CAFOs from environmental review.

But the court disagreed with the USDA and vacated the rule. The FSA conceded that it made no finding as to environmental impact. The court determined that to be fatal, along with providing no public notice that it was going to categorically exempt all loan actions to medium-sized CAFOs.

Don't expect this issue to be over. In 2024, it's likely that the agency will try again to exempt medium-sized CAFOs from environmental review for FSA loan purposes.

Charitable Remainder Annuity Trust Abuse

Gerhardt v. Comr., 160 T.C. No. 9 (2023)

In 2023, the U.S. Tax Court decided another case involving fraud with respect to a charitable remainder annuity trust. It can be a useful tax planning tool, particularly for the last harvest of a farmer that is retiring. But a group centered in Missouri caught the attention of the criminal side of IRS.

The fact of the case showed that farmers contributed farmland, harvested crops, a hog-finishing barn and hog equipment to Charitable Remainder Annuity Trusts. The basic idea of a CRAT is that once property is transferred to the trust the donor claims a charitable deduction for the amount contributed with the income from the CRAT's annuity spread over several years at anticipated lower tax brackets. But contributing raised grain to a CRAT means you can't claim a charitable deduction because you don't have any income tax basis in the grain. In addition, there are ordering rules that govern the annuity stream coming back to the donor. Ordinary income is taxed first – which resulted from the contribution of the crops and depreciation recapture on the hog-finishing barn and equipment.

The farmers involved got into the CRATs by reading an ad in a farm magazine. The Department of Justice prosecuted the promoters that dished out the bad advice.

Get good tax advice if you consider using a CRAT. They can be a good tax planning tool but can create a mess if the rules aren't followed.



Conclusion

This is the first pass at some of the biggest developments in ag law and tax during 2023. In my next post, I'll continue the journey.

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