

# The Big Issues for 2024 in Agricultural Law

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## Introduction

What are likely to be the most prominent issues in agricultural law and tax in 2024? I have just finished looking back at 2023 as to what I viewed as the top issues of 2023, so it's time to take a look forward to what might be the key issues in law and tax that will impact ag producers and the sector as a whole.

Looking ahead at what might be the biggest issues in ag law and tax in 2024 – it's the topic of today's post.

## Important "Takings" Case at the Supreme Court

### ***DeVillier v. Texas, 63 F.4th 416 (5th Cir. 2023)***

What are likely to be the big issues in ag law and tax in 2024? One involves a case currently at the U.S. Supreme Court with the matter concerning the government's taking of private property and the requirement under the Fifth Amendment that the government pay for what it takes. The case involves a Texas farmer and was argued last month.

The family involved in a case has farmed the same land for a century. There was no problem with flooding until the State renovated a highway and changed the surface water drainage. In essence, the renovation turned the highway into a dam and when tropical storms occurred, the water no longer drained into the Gulf of Mexico. Instead, the farm was left flooded for days, destroying crops and killing cattle. In essence, the farm had been turned into a retention pond.

The farmer sued the State to get paid for the taking. Once the case got to federal court, the appellate court dismissed it, saying he couldn't sue under the Fifth Amendment – only State officials can because Congress hadn't passed a law saying a private citizen could sue the state. But the appellate court's opinion is out-of-step with other court opinions on the issue. The Fifth Amendment contains a remedy when the government takes your property – you get paid for it. The Constitution matters.

The outcome will be an important one for agriculture.



## Taxing Wealth and the U.S. Supreme Court

### ***Moore v. United States, 36 F.4th 930 (9th Cir. 2022)***

This year the U.S. Supreme Court will decide a case on whether the Congress can tax a person's wealth without a tax realization event such as a sale. It's a huge issue for agriculture.

A case presently before the U.S. Supreme Court involves the question of whether the Congress can tax wealth without a tax realization event. The taxpayers in the case owned 11 percent of a corporation in India that is more than 50 percent controlled by U.S. persons. It doesn't pay dividends but reinvests its earnings into its business of making tools for sale to farmers. Under the 2017 tax law in the U.S., the company was subjected to a tax that year on its undistributed earnings and profits from 1986 to 2017 which became the obligation of the taxpayers to the extent of their ownership. They got a \$15,000 tax bill from the IRS.

They sued because they hadn't sold any stock or done anything to trigger the tax. They lost and the Supreme Court heard arguments in early December. If the law is upheld it's estimated it will bring in \$340 billion in revenues. And it would open the door for the Congress to tax your unrealized gains that could wipe out the stepped-up basis rule at death. That would be a tough result for many farming operations.

### **USDA's "Climate Smart Projects"**

Another big issue in 2024 will likely involve the USDA's attempts to manipulate producers' behavior by providing taxpayer funding for what it calls "Climate-Smart Agriculture." Presently, USDA has poured about \$3 billion tax dollars into getting farmers to enroll in projects such as those designed to reduce methane emissions and sequester carbon. It's termed the USDA's "Partnership for Climate Smart Commodities Projects," and flows from the SEC's plans that were announced in 2022 to force all publicly traded companies to submit an Environmental, Social, Governance" (ESG) report. Five months later the USDA's project was announced. It's not just farmers that are on the take. So far, \$90 million has been paid to agricultural giant Archer Daniels Midland; \$95 million to the Iowa Soybean Association; and \$40 million dollars to Farm Journal. 27 universities have also received various amounts (all in the millions of dollars each).

But with the funding comes a loss of freedom. Just ask a Dutch, Polish, Irish, French, German or Sri Lankan farmer how such an agenda has worked for them. The USDA's expressed goal is to get farmers and ranchers to calculate greenhouse gas emissions. In the USDA's words, "implementation and monitoring of climate smart practices." Once monitored the emissions will be regulated. Indeed, USDA has worked with Colorado State University to develop a "planner tool" to be able to measure conservation practices on farms. Once the emissions from a farm become measurable, they will be regulated. With regulation comes a loss of freedom and a further loss of smaller farming and ranching operations that are least likely to be able to bear the compliance cost.



Consumers will also be harmed. A new study published by the Economic Research Center at the Buckeye Institute finds that, as a result of the USDA's climate agenda, a typical family of four will have to spend an extra \$1,300 annually for food. This is on top of the double-digit inflation consumers have faced since 2021. The study also explains that the USDA's climate agenda will result in much higher costs for diesel, propane, fertilizer and other ag production inputs. The authors of the study note that, "Federal policymakers are pursuing expensive climate-control and emissions policies that have largely failed in Europe." The study can be accessed here: <https://www.buckeyeinstitute.org/library/docLib/2024-02-07-Net-Zero-Climate-Control-Policies-Will-Fail-the-Farm-policy-report.pdf>

In 2024, will questions arise concerning the premise underlying the USDA's efforts? Also expect further questions to be raised about the funding. The Ag Secretary says he can use the CCC to fund the climate agenda for agriculture. Some in Congress don't agree.

But one thing's for sure, the current political climate surrounding agriculture is seeking greater restrictions on farming practices. That will assuredly increase the cost of farming and make it more difficult for smaller operations to survive.

### **Farm Bill Developments**

An issue on the radar in ag law and tax in 2024 will be the continued discussions about a new Farm Bill. The 2018 Farm Bill is set to expire at the end of September. Cost will be an issue. The CBO projects that continuing the current Farm Bill for ten years would cost more than \$1.4 trillion with 84 percent of that going into nutrition programs. Given increasing budget deficits, the debt ceiling and budget battles, the cost of the Farm Bill will be a big discussion point in 2024.

Crop reference prices will be on the table as will whether nutrition spending should be meshed with farm income and ag conservation. Other key issues will likely involve the amount of crop insurance premium subsidies, the amount of acreage in the CRP and eligibility for SNAP benefits.

All of this depends on the political process. Possibly, the Congress will view the Farm Bill as a way to compromise on a bill critical to rural economies. Or the opposite could occur, and agreements reached only when they absolutely must be. If that happens, that will cause uncertainty for markets, consumers, ag retailers and producers in general.

The Farm Bill debate will be an issue to monitor throughout 2024.



## SCOTUS on *Chevron* Deference

***Relentless, Inc. v. United States Department of Commerce, 62 F.4th 621 (1st Cir. 2023)***

***Loper Bright Enterprises v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022)***

A big issue in the world of ag law and tax in 2024 will involve the issue of government administrative agency deference. The U.S. Supreme Court is considering two cases involving the issue of how much deference should be given administrative agency rules such as those of the USDA or the EPA, for example.

The two cases involve whether the National Marine Fisheries Service can require the herring industry to bear the costs of observers on fishing boats who monitor conservation and management practices. The lower courts simply deferred to the determination of the fishery service that the *industry* should pay the costs. That's the typical outcome – you lose a dispute with the USDA, for example, and once you get to court the court simply defers to the agency unless the agency was completely out of bounds with its interpretation of the law. If the agency's interpretation was reasonable, the agency wins. That's the standard the Court established in 1984 in its *Chevron* decision.

In 2022, the Supreme Court limited the deferential standard (it completely ignored *Chevron* in another 2022 case) when a question of national economic policy is involved, but now the court has an opportunity to lower the deferential standard on a broader scope. If it does, farmers and ranchers may have better luck in disputes with government agencies and be able to more frequently overcome the presumption that the government is almost always right when Congress hasn't written a clear statute.

## Court Vacates Dicamba Registrations

***Center for Biological Diversity v. United States Environmental Protection Agency, No. CV-20-00555-TUC-DCB, 2024 U.S. Dist. LEXIS 20307 (D. Ariz. Feb. 6, 2024)***

Recently, a federal court vacated the registrations of three Dicamba products that EPA had approved for over-the-top applications. The decision comes at a time when many soybean and cotton farmers have already purchased seed and chemicals and will soon be planting the 2024 crop.

The court said the EPA didn't follow the notice and comment provisions of the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) when it issued the registrations and also violated the Administrative Procedure Act (APA) (and the Endangered Species Act) by not allowing public input on whether over-the-top Dicamba has unreasonable adverse effects on the environment.

In 2020 a federal appellate court vacated the registrations finding that the EPA failed to assess risks and costs for non-users of over-the-top Dicamba. *National Family Farm Coalition v. United States Environmental Protection Agency, 960 F.3d 1120 (9th Cir. 2020)*. The EPA made amendments in 2022 and 2023 and approved new uses which the court has now said were approved improperly.



The ruling cancels any benefits of planting Dicamba seeds, and there may not be enough supply of other traits to replace the Dicamba market share. If farmers are forced to plant Dicamba trait soybeans or cotton without the correct chemical to utilize the gene, they will likely use alternatives that will, in turn, magnify the known issues of the Dicamba chemical problems.

**Comment:** While the timing of the court's decision is awful, the result is good overall in that it holds the "feet" of the EPA to the "fire" of the administrative process. It also raises the question of whether the EPA deliberately violated the public notice and comment procedures that are clearly established in the law. It's difficult to believe that the EPA lawyers, particularly after losing in the Ninth Circuit on virtually the same issue in 2020, didn't know that failing to follow the procedural rules for approving the registrations would lead to the registrations being invalidated.

Perhaps the judge in the case will stay the ruling until the next crop year to reduce the potential for even more harm from a herbicide that should never have been allowed to be used.

Certainly, this issue will be one that stays on the "front burner" for some time.

## Conclusion

That's what I see as being the biggest issues in law and tax facing agriculture in 2024. Only time will tell, but I suspect some of these will end up on my 2024 "Top Ten" list next January.

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