Top Ag Law and Tax Developments of 2022 – Part 1

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Overview

At the beginning of each year for about the past 25 years, I have made a point to catalogue the immediately prior year's top developments in agricultural law and taxation. It's important to look back at what the major issues were because they can also provide insight into what might be the big issues in the coming year. Insight into trends in the law and taxation impacting farmers, ranchers, rural landowners and agribusiness is important because it can aid planning to avoid legal issues in the future. The law and taxation can have a significant economic impact on a farming operation, or on a family legacy. While it is very true that issues involving agronomy or animal science or horticulture or other similar disciplines are important and each have their role in the success of a farming business, where "the rubber meets the road" is in the law and taxation. The law and tax rules set the framework within which all other disciplines must operate. A deviation outside those boundaries can result in costly litigation, family disputes and an inefficiently run operation that might not survive into the next generation.

With that in mind, today's article is the beginning of several that highlight the major legal and tax issues of 2022 that were significant for agriculture. Some are important developments at that state level that could spill over to other states, but the major developments, of course, are those at the federal level – in the federal courts all the way up to the U.S. Supreme Court and with the IRS.

The major developments in ag law and tax from 2022 – the "Almost Top Ten." It's the first in a multi-part series.

Nuisance Law

The first development that was significant in 2022, but not important enough nationally to make the Top Ten, involves a nuisance lawsuit in Iowa that resulted in a significant Iowa Supreme Court decision. But, first a bit of background on the issue of ag nuisance

In general. An issue that is of significance to agriculture is that of nuisance. Nuisance law prohibits land uses that unreasonably and substantially interfere with another individual's quiet use and enjoyment of property. It's based on two interrelated concepts: (1) landowners have the right to use and enjoy property free of unreasonable interferences by others; and (2) landowners must use property so as not to injure adjacent owners. Because each claim of nuisance depends on the fact of the case, there are no easy rules to determine when an activity will be considered a nuisance.

Defenses. There are no common law defenses that an agricultural operation may use to shield itself from liability arising from a nuisance action. However, courts do consider a variety of factors. Of primary importance are priority of location and reasonableness of the operation. Together, these two factors have led courts to develop a "coming to the nuisance" defense. This means that if people move to an area they know is not suited for their intended use, they should be prohibited from claiming that the existing uses are nuisances.

While there are no common law defenses to a nuisance suit, every state has enacted a right-to-farm law that is designed to protect existing agricultural operations by giving farmers and ranchers who meet the legal requirements a defense in nuisance suits. The basic thrust of a particular state's right-to-farm law is that it is unfair for a person to move to an agricultural area knowing the conditions which might be present and then ask a court to declare a neighboring farm a nuisance. Thus, the basic purpose of a right-to-farm law is to create a legal and economic climate in which farm operations can be continued.

The continued Iowa saga of ag nuisance and "right-to-farm" legislation. Iowa has had a lengthy history of litigation involving animal confinement operations and nuisance suits. In 2004, the Iowa Supreme Court, in *Gacke v. Pork XTRA, L.L.C., 684 N.W.2d 168 (Iowa 2004)* addressed the constitutionality of the Iowa right-to-farm law. Under the facts of the case, the defendant built a confinement hog facility 1,300 feet to the north of the plaintiffs' farmstead which the plaintiffs had occupied since 1974. In the summer of 2000, the plaintiffs filed a nuisance action against the defendant claiming damages for personal injury, emotional distress and a decrease in the value of their property, and seeking a permanent injunction, compensatory and punitive damages. The defendant raised the Iowa right-to-farm statute as a defense**.** The pertinent part of the statute provides:

"An animal feeding operation…shall not be found to be a…nuisance under this chapter or under principles of common law, and the animal feeding operation shall not be found to interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action." *Iowa Code §657.11.*

Importantly, the statutory protection applies regardless of whether the animal feeding operation was established (or expanded) before or after the complaining party was present in the area. However, the protection of the statute does not apply if the animal feeding operation is not in compliance with all applicable federal and state laws for operation of the facility, or the facility unreasonably and for substantial periods of time interferes with the plaintiff's comfortable use and enjoyment of the plaintiff's life or property and failed to use generally accepted best management practices.

The plaintiffs claimed that the statute was an unconstitutional taking of their private property without just compensation in violation of both the Federal and Iowa constitutions. The trial court held that the statute did amount to an unconstitutional taking of the plaintiffs' property, determined that the value of their property had been reduced by $50,000, and that the plaintiffs should be awarded $46,500 to compensate them for their past inconvenience, emotional distress and pain and suffering. However, the court refused to award any future special or punitive damages or injunctive relief.

On appeal, the Iowa Supreme Court held the right-to-farm law unconstitutional, but only to the extent that it denied the plaintiffs compensation for the decreased value of their property. In essence, the Court held that the statute gave the defendant an easement to produce odors over the plaintiffs' property, for which compensation had to be paid. Importantly, the Court did not opine that right-to-farm laws are not a legitimate purpose of state government. To the contrary, the Court noted the Iowa legislature's objective of promoting animal agriculture in the state and that the right-to-farm law bore a reasonable relationship to that legitimate objective. The Court also seemed to indicate that the statute would not be constitutionally defective had the plaintiffs "come to the nuisance" (i.e., moved next door to the defendant's existing hog operation).

Note: Post *Gacke*, the Iowa right-to-farm law could be found to be unconstitutional on a case-by-case basis as determined by a three-part test with the burden on the plaintiff of establishing each element: 1) that the plaintiff personally had not benefitted from the right-to-farm law beyond what the general public enjoyed; 2) that the plaintiff suffered significant hardship; and 3) that the plaintiff lived on their property before the defendant's operation began and that both the plaintiff and the defendant spent considerable funds in property improvements.

2022 development. In 2022, the Iowa Supreme Court again issued an opinion involving a nuisance suit against a confined animal feeding operation (CAFO). In *Garrison v. New Fashion Pork LLP*, *977 N.W.2d 67 (Iowa Sup. Ct. 2022),* the plaintiff claimed that the defendant's neighboring confined animal feeding operation (CAFO) violated both the Clean Water Act and the Resource Conservation Recovery Act due to manure runoff that caused excessive nitrate levels in the plaintiff's water sources. The federal court dismissed the suit on summary judgment for lack of expert testimony to establish the plaintiff's claim, finding that the alleged violations where wholly past violations, and that water test results showed no ongoing violation of either statute, but rather a slight *decrease* in nitrate levels since the start of the defendant's confined animal feeding operation (CAFO). The federal court also declined supplemental jurisdiction over the plaintiff's state law claims. The plaintiff then sued the defendant in state court for nuisance, trespass and violation of state drainage law. The defendant moved for summary judgment based on statutory immunity of Iowa Code § 657.11 and the plaintiff's lack of evidence or expert testimony.

The plaintiff, relying on *Gacke,* claimed that Iowa Code §657.11 as applied to him was unconstitutional under Iowa's inalienable rights clause. The trial court, noting that the plaintiff's own CAFO (raising of 500 ewes, and at times over 1,000 ewes and lambs, on his property for over 40 years, along with a six-foot tall manure pile) had benefited from immunity, rejected the plaintiff's constitutional challenge for failure to satisfy *Gacke's* three-part test. The trial court then granted the defendant's summary judgment motion based on the plaintiff's failure to provide any expert testimony or other evidence to support any exception to the statutory immunity defense or to prove causation or damages.

On further review, the Iowa Supreme Court affirmed, overruled the three-part test of *Gacke* and applied rational basis review to reject the plaintiff's constitutional challenge to Iowa Code §657.11. The court noted that the statue did not eliminate nuisance claims against CAFOs, but rather established reasonable limitations on recovery rights. The Iowa Supreme Court concluded that the plaintiff failed to preserve error on his takings claim under article I, section 18 of the Iowa Constitution and failed to

generate a question of fact precluding summary judgment on statutory nuisance immunity or causation for his trespass and drainage claims. Specifically, the Iowa Supreme Court noted that without accompanying expert testimony, the plaintiff's water tests showed neither an increase in nitrate levels nor a spike in nitrate levels that would correlate with manure spreading. The Supreme Court further noted that even assuming an increase in nitrate levels, the plaintiff lacked expert testimony to attribute or correlate any increase in nitrate levels in the stream to the defendants' actions. Thus, without expert witness testimony that tied the defendant's alleged misapplication or over-application of manure to the nitrate levels in the plaintiff's stream, the plaintiff could not, as a matter of law, satisfy his burden of proving that any trespass or drainage violation proximately caused his damages. Ultimately, the Supreme Court concluded, "balancing the competing interests of CAFO operators and their neighbors is a quintessentially legislative function involving policy choices…[belonging] with the elected branches."

Note: The Iowa Supreme Court's opinion didn't explain how the attorneys for the plaintiff failed to preserve error on the plaintiff's takings claim and failed to provide expert witness testimony on the tort claims for trespass and drainage issues. However, the Iowa Supreme Court clearly focused on those deficiencies in its opinion.

Going forward, if a jury finds that a nuisance exists the ag operation can use the nuisance defense if the operation is in full compliance with state and federal regulations, exercises generally accepted management practices, and has for substantial periods of time not interfered with the use and enjoyment of the complaining party's property. The nuisance defense will apply regardless of the established date or expansion of the operation. In other words, there is no "first-in-time" requirement.

Conclusion

There have been several significant developments over the past couple of years either legislatively or in the courts involving ag nuisances in several states. Expect that to continue and also expect that the 2022 development in Iowa to have an impact on other state legislatures and courts grappling with the ag nuisance issue.