"Top Ten" Agricultural Law and Tax Developments of 2021

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Overview: Numbers 10 and 9

Agricultural law and agricultural tax law intersect with everyday life of farmers and ranchers in many ways. Some of those areas of intersection are good, but some are quite troubling. In any event, it points to the need for being educated and having good legal and tax counsel who is well-trained in the special rules that apply to agriculture.

Each year for the past 25 years I have compiled what are, in my view, the most important developments in agricultural law (which includes taxation that impacts farmers and ranchers) to the sector as a whole. The developments primarily are focused on the impact to production agriculture, but the issues involved will also have effects that spillover to rural landowners and agribusinesses as well as consumers of agricultural products.

The Tenth and Ninth most important agricultural law and tax developments of 2021 – it's the topic of today's post.

10. No Expansion of Public Trust Doctrine in Iowa. The "public trust doctrine" derives from the seas being viewed as the common property of the public that cannot be privately used or owned. They are held in "public trust." This concept from England ultimately became part of the U.S. common law and has its primary application to the access of the seashore and intertidal waters.

The U.S. Supreme Court's first application of the public trust doctrine was in 1842 in *Martin v. Lessee of Waddell, 41 U.S.367 (1842).* In the case, the issue was who had the right to submerged land and oyster harvesting off the coast of New Jersey. The Court, largely based on the language in the charter granted by the King to a Duke to establish a colony and for policy and economic reasons, determined that the land area in issue belonged to the state of New Jersey for the benefit of the people of the state. The Court dealt with the issue again in 1892 in a case involving a railroad that had been granted a large amount of the Chicago harbor*. Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892).* The Court determined that the government cannot alienate (interfere with) the public's right to access land under waters that are navigable in fact except for situations where the land involved wouldn't interfere with the public's ability to access the water or impair navigation.

A long-standing battle in Iowa over the level of nitrates and phosphorous in an Iowa waterway and farm field runoff came to a head in *Iowa Citizens for Community Improvement, et al. v. State, 962 N.W.2d 780 (Iowa 2021).* For approximately the past decade activist groups and certain academics have sought more regulatory control over farming practices that they deem contribute to excessive nutrients in an Iowa river and higher drinking water prices in Des Moines and elsewhere. They have sought to remove from the state legislature the power to make these decisions and have also sought more federal control.

The plaintiffs, two social justice organizations, sued the State of Iowa and state officials and agencies associated with agriculture and the environment, claiming that the public trust doctrine required them to enact legislation and rules forcing farmers to adopt farming practices that would significantly reduce levels of nitrogen and phosphorous runoff into the Raccoon River. The plaintiffs claimed that such a requirement would improve members' feelings by enhancing aesthetics and recreational uses of the river and by reducing members' water bills (at least in the Des Moines area). They sought declaratory and injunctive relief.

In response, the State argued that the plaintiffs lacked standing to sue and that the issue was nonjusticiable (i.e., not capable of being decided by a court). After the trial court denied the defendants' motion to dismiss, the defendants sought an interlocutory appeal (i.e., an appeal of the trial court's ruling while other aspects of the case proceeded).

On review, the state Supreme Court first noted that the scope of the public trust doctrine in Iowa is narrow, and that the doctrine should *not* be overextended. The Supreme Court noted that for a party to have standing to sue, they must have a specific personal or legal interest in the litigation and be "injuriously affected." For a party to be injuriously affected, the Supreme Court stated that the injury complained of must be likely to be redressed by the court's favorable decision. On that point, the Supreme Court determined that it would be speculative that a favorable court decision would result in a more aesthetically pleasing river or lower water rates.

Further, the Supreme Court determined the injunctive relief was not appropriate and that what the plaintiffs were seeking could only be accomplished through legislation. The Supreme Court pointed out that the plaintiffs admitted that the defendants lacked authority to require limits for nitrogen and phosphorous from agricultural nonpoint sources – the matter was up to the legislature. As a result, the Supreme Court determined the plaintiffs' claims must be dismissed due to lack of standing.

The plaintiffs also claimed that constitutional due process rights were at stake and the Court should address them. The Supreme Court disagreed, pointing out that the plaintiffs' own arguments cut against the Court being able to address such a claim. Because the plaintiffs were asking the Court to broaden the application of the public trust doctrine, the plaintiffs were essentially asking the Court to inject itself into political matters where there would be a lack of judicially discoverable and manageable standards. As the Supreme Court pointed out, "different uses matter in different degrees to different people." Publicly elected policy makers decide these matters. Not the courts.

Consequently, the Court determined that granting any meaningful relief to the plaintiffs would result in the judicial branch asserting superiority over the legislature. An impermissible outcome under the co-equal system of government.

The Iowa Supreme Court decision has significant implications for agriculture in terms of the manner in which public policy decisions are made (by elected politicians and not non-elected government bureaucrats and/or courts). The reach of the Court's decision is likely to have application beyond Iowa. Courts in other states facing novel issues tend to look at how courts in other states have ruled on those novel but similar issues.

9. IRS Regulations on Farm Net Operating Losses (NOLs). During 2021, the IRS issued guidance in *Rev. Proc. 2021-14, 2021-29 I.R.B* on how farm taxpayers are to handle carryback elections related to farm NOLs in light of all of the legislative rule changes in recent years. Those changes involved the Tax Cuts and Jobs Act (TCJA) of 2017, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) of 2020, and the COVID-Related Tax Relief Act (CRTA) of late 2020. The TCJA limited the deductibility of an NOL arising in a tax year beginning after 2017 to 80 percent of taxable income (computed without the NOL deduction). Under the TCJA, no NOL carryback was allowed unless the NOL related to the taxpayer's farming business. A farming NOL could be carried back two years, but a taxpayer could make an irrevocable election to waive the carryback. The 80 percent provision also applied to farm NOLs that were carried back for NOLs generated in years beginning after 2017. Under the TCJA, post-2017 NOLs do not expire.

The CARES Act suspended the 80 percent limitation for NOLs through the 2020 tax year. The suspension applies to all NOLs, farm or non-farm, arising in tax years beginning in 2018-2020. The CARES Act also removed the two-year carryback option for farm NOLs and replaced it with a five-year carryback for all NOLs arising in a tax year beginning after 2017 and before 2021. Under the carryback provision, an NOL could be carried back to each of the five tax years preceding the tax year of the loss (unless the taxpayer elected to waive the carryback).

The COVID-Related Tax Relief Act (CTRA) of 2020 amended the CARES Act to allow taxpayers to elect to disregard the CARES Act provisions for farming NOLs. This is commonly referred to as the "CTRA election." Under the CTRA election, farmers who had elected the two-year carryback under the TCJA can elect to retain that carryback (limited to 80 percent of the pre-NOL taxable income of the carryback year) rather than claim the five-year carryback under the CARES Act. In addition, farmers who previously waived an election to carryback an NOL can revoke the waiver.

The CTRA also specifies that if a taxpayer with a farm NOL filed a federal *income tax return* before December 27, 2020, that disregards the CARES Act amendments to the TCJA, the taxpayer is treated as having made a "deemed election" unless the taxpayer amended the return to reflect the CARES Act amendments by the due date (including extensions of time) for filing the return for the first tax year ending after December 27, 2020. This means that the taxpayer is deemed to have elected to utilize the two-year carryback provision of the TCJA.

On June 30, 2021, the IRS issued *Rev. Proc. 2021-14, 2021-29 I.R.B.* to provide guidance for taxpayers with an NOL for a tax year beginning in 2018-2020, all or a portion of which consists of a farming loss. The guidance details how the taxpayer can elect to not apply certain NOL rules of the CARES Act, and how the CTRA election can be revoked. Rev. Proc. 2021-14 is effective June 30, 2021.

The Rev. Proc. specifies that a taxpayer with a farming NOL, other than a taxpayer making a deemed election, may make an "affirmative CTRA election" to disregard the CARES Act NOL amendments if the farming NOL arose in any tax year beginning in 2018-2020. An affirmative election allows the farm taxpayer to carryback a 2018-2020 farm NOL two years instead of five years. Certain procedural requirements had to be satisfied. In addition, it's an all-or-nothing election the taxpayer must choose either the two-year farm NOL carryback provision for all loss years within 2018-2020, or not. For taxpayers who follow the Rev. Proc. and make an affirmative election, the Rev. Proc. specifies that the 80 percent limitation on NOLs will apply to determine the amount of an NOL deduction for tax years beginning in 2018-2020, to the extent the deduction is attributable to NOLs arising in tax years beginning after 2017. In addition, the CARES Act carryback provisions will not apply for NOLs arising in tax years beginning in 2018-2020.

The IRS also set forth the procedure for a taxpayer to follow to not be treated as having made a deemed election. For taxpayers that made a deemed election under the CARES Act, the election applies unless the taxpayer amends the return. For a taxpayer that elected not to have the two-year carryback period apply to a farming NOL incurred in a tax year beginning in 2018 or 2019, the Rev. Proc. specifies that the taxpayer may revoke the election if the taxpayer made the election before December 27, 2020, and makes the revocation on an amended return by the date that is three years after the due date, including extensions of time, for filing the return for the tax year the farming NOL was incurred. If the NOL is not fully absorbed in the five-year earlier carryback year, the balance carries forward to the fourth year back and subsequent years in the carryback period until it is fully absorbed. The taxpayer may also amend the returns for the years in the five-year carryback period, if needed, to utilize the benefits of I.R.C. §1301 (farm income averaging).

Note: What remains unclear after the issuance of Rev. Proc. 2021-14 is whether the affirmative CTRA election can be made to use the two-year carryback if a farmer had previously waived the five-year carryback. The Rev. Proc. is not clear on this point.

If a taxpayer has an NOL that is a mixture of farm and non-farm activities, the portion of the NOL that is attributable to the farming activity may be carried back either two or five years consistent with the guidance of the Rev. Proc. The non-farm portion of the NOL may not be carried back two years. Also, the election to waive the carryback period is all-or-nothing. It is not possible to separately waive a farm NOL carryback from a non-farm NOL.

Conclusion

The next article will detail the Eighth and Seventh most important ag law and tax developments of 2021. Stay tuned.

Overview: Numbers 8 and 7

As I pointed out in Sunday's article, agricultural law and agricultural tax law intersect with everyday life of farmers and ranchers in many ways. Some of those areas of intersection are good, but some are quite troubling. In any event, it points to the need for being educated and having good legal and tax counsel that is well-trained in the special rules that apply to agriculture.

This is the second installment in my list of the "Top Ten" agricultural law and tax developments of 2021. The list is comprised of what are, in my view, the most important developments in agricultural law (which includes taxation that impacts farmers and ranchers) to the sector as a whole. The developments primarily are focused on the impact to production agriculture, but the issues involved will also have effects that spillover to rural landowners and agribusinesses as well as consumers of agricultural products.

The Eighth and Seventh most important agricultural law and tax developments of 2021 – it's the topic of today's post.

8. Ag Nuisance Litigation in North Carolina. In recent years, North Carolina has been the focus of much ag nuisance litigation, particularly targeted at large-scale hog confinement operations. Legal developments flowing from the various cases has influenced the North Carolina legislature as well as legislatures in other states (such as Florida and Indiana) to modify their Right-To-Farm (RTF) laws in an attempt to provide greater legal protection to agricultural operations. In 2021, there were further developments in North Carolina involving nuisance and that state's RTF law.

The North Carolina RTF law was originally enacted in 1979 with the state policy goal to: "[R]educe the loss to the State of its agricultural and forestry resources by limiting the circumstances under which an agricultural or forestry operation may be deemed a nuisance." After many nuisance suits were filed against confinement hog operations, the legislature amended the RTF in 2013. The amendment specified that an ag operation that has been in business for at least a year and has not fundamentally changed is protected from a nuisance action as a result of changed conditions surrounding it if the ag operation was not a nuisance at the time it began. The plaintiffs refiled their suits in 2014 in federal district court based on the amended law. The federal court held that the RTF law did not apply to shield hog producers and five juries rendered verdicts for the plaintiffs. The legislature again amended the RTF law in 2017 and 2018 to expand its protection for agricultural operations.

There were two additional court opinions in 2021 involving the North Carolina RTF law. In *Barden v. Murphy-Brown, LLC, No. 7:20-CV-85-BR, 2021 U.S. Dist. LEXIS 47809 (E.D. N.C. Mar. 15, 2021),* the plaintiff sued the defendant in 2020 for trespass, negligence, civil conspiracy and unjust enrichment arising from odor, dust, feces, urine and flies from a neighboring hog facility that housed 20,000-head of the defendant's hogs. The plaintiff sought compensatory and punitive damages. The defendant sought to dismiss the complaint for failure to join to the lawsuit the farmer that operated the hog facility via a contact with the defendant as an indispensable party. The court disagreed, as the farmer's conduct was likely irrelevant to the outcome of the litigation and any impact that an adverse judgment against the defendant might have on the farmer's interests at the farm was speculative. The defendant also sought dismissal on the basis that the plaintiff's complaint failed to state a claim for relief that was other than speculative. The defendant cited the North Carolina RTF law as barring all of the plaintiff's claims.

The federal trial court disagreed with the defendant, noting that conditions constituting a nuisance can also constitute a trespass (and other causes of action). Thus, the plaintiff's complaint was not restricted to allegations of a nuisance cause of action which the RTF law would bar. The court noted that the RTF law was different from other state RTF laws that covered non-nuisance tort claims related to farming operations along with nuisance claims. The RTF law only covered nuisance-related claims and had no application to non-nuisance claims. As to whether the plaintiff adequately alleged the non-nuisance claims, the court concluded that the plaintiff sufficiently alleged, at a minimum, a claim for unintentional trespass by not consenting to dust, urine and fecal matter from entering its property. On the plaintiff's negligence claim, the court determined that it was reasonably foreseeable that if the defendant did not act reasonably in managing the facility that dust and animal waste would be present on the plaintiff's property. As such, the defendant owed the plaintiff a duty and there was a causal link with any potential breach of that duty. Thus, the plaintiff properly stated a claim for negligence. The plaintiff also alleged that the defendant conspired with its corporate parent to mislead the public about the science of hog manure removal and various constitutional violations. The court rejected this claim because any conspiracy was between the defendant and its corporate parent and not with any independent party. The plaintiff also claimed that the defendant unjustly enriched itself by using the plaintiff's property for a de facto easement without paying for it. The court rejected the claim because the plaintiff had conferred no benefit on the plaintiff which gave rise to any legal or equitable obligation on the defendant's part to account for the benefit received. However, the court refused to strike the plaintiff's allegations relating to the defendant's Chinese ownership, influence and exploitation as well as the defendant's financial resources. The court determined that such allegations had a bearing on the defendant's motivation, extent of harm and ability to implement alternative technology.

A second court opinion involving the North Carolina RTF law was issued in late 2021. In *Rural Empowerment Association for Community Help v. State, No. COA21-175, 2021 N.C. App. LEXIS 733 (N.C. Ct. App. Dec. 21, 2021),* the plaintiffs filed suit in 2019 challenging the constitutionality of the RTF law. The plaintiffs sued in 2019 challenging the constitutionality of the RTF law on its face because they claimed the law exceeded the scope of the state's police power. The defendants moved to dismiss the case and the trial court granted the defendant's motion to dismiss and denied the plaintiffs' motion for summary judgment. On appeal, the appellate court affirmed. The state appellate court agreed with the trial court that limiting the potential nuisance liability from ag, forestry, and related operations furthered the state's goal of protecting ag activities and encouraging the availability and continued production of agricultural products. The appellate court also determined that the RTF law amendments were a valid exercise of legislative and state police powers and did not violate the state Constitution's Law of the Land Clause or the Due Process Clause. The appellate court also determined that the amendments were not a special or private law, and didn't deprive any prospective plaintiff of the right to a jury trial.

Note: It is anticipated that the state appellate court opinion, if upheld on any appeal, will provide further guidance to other states and RTF laws.

7. Federal Court Determines Whether Withheld Taxes and Other Pre-Paid Taxes Can Be Deprioritized in Chapter 12 Bankruptcy. As originally enacted, Chapter 12 did not create a separate tax entity for Chapter 12 bankruptcy estates for purposes of federal income taxation. That shortcoming precludes debtor avoidance of potential income tax liability on disposition of assets as may be possible for individuals who file Chapter 7 or 11 bankruptcy. But, an amendment to Chapter 12 in 2005 made an important change. As modified, tax debt associated with the sale of an asset used in farming can be treated as unsecured debt that is not entitled to priority and ultimately discharged. Without this modification, a farmer faced with selling assets to satisfy creditors could trigger substantial tax liability that would impair the chance to reorganize the farming business under Chapter 12. Such a farmer could be forced into liquidation.

A question that was addressed by a federal trial court in Indiana in 2021 was how taxes that the debtor had already paid are to be treated. Can previously paid or withheld taxes be pulled back into the bankruptcy estate where they are "stripped" of their priority (i.e., deprioritized)? That is a very significant question for a Chapter 12 farm debtor that also has off-farm income of a spouse that helps support the farming operation.

In *United States v. Richards, No. 1:20-cv-02703-SEB-MG, 2021 U.S. Dist. LEXIS (S.D. Ind. Sept. 30, 2021), t*he debtors, a married farm couple, filed Chapter 12 bankruptcy in 2018 after suffering losses from negative weather events and commodity market price declines during 2013 through 2015. The primary lender refused to renew the loan which forced liquidation of the farm's assets in the spring of 2016. During 2016, the debtors sold substantially all of the farm equipment, vehicles and other personal property assets as well as grain inventory. The proceeds were paid to the primary lender as well as other lenders with purchase money security interests in relevant assets. After filing Chapter 12, the debtors sold additional farmland. The asset sales triggered substantial income tax obligations for 2016, 2017 and 2018 tax years. The debtors Chapter 12 plan made no mention concerning whether off-farm earnings, tax withholdings or payments the debtors voluntarily made to the IRS, or a claim or refund would remain property of the bankruptcy estate after Plan confirmation. The plan did, however, divide the debtors federal tax obligations into 1) tax liabilities for income arising from the sale, transfer, exchange or other disposition of any property used in the debtors' farming operation "Section 1232 Income"; and 2) tax liabilities arising from other income sources – "Traditional income." Tax liabilities associated with Traditional Income would retain priority status, but taxes associated with Section 1232 Income would be de-prioritized (regardless of when the liability was incurred) and treated as general unsecured claims that would be discharged upon Plan completion if not paid in full. Under the reorganization Plan, the debtors would pay directly the tax liability associated with Traditional Income incurred after the Chapter 12 filing date. Under the Plan, unsecured claims would be paid on a "pro rata" basis using the "marginal method" along with other general unsecured claims. The Section 1232 taxes would be computed by excluding the taxable income from the disposition of assets used in farming from the tax return utilizing a pro forma tax return. The Plan was silent concerning how the Debtors' withholding payments and credits for each tax year were to be applied or allocated between any particular tax year's income tax return and the corresponding pro forma return.

The IRS filed a proof of claim for the 2016 and 2017 tax years in the amount of $288,675.43. The debtors objected to the IRS's claim, but did seek to reclassify $5,681 of the IRS claim as general unsecured priority status. The IRS failed to respond, and the bankruptcy court granted the debtors approximately $280,000 in tax relief for 2016 and 2017. The debtors then submitted their 2018 federal and state returns showing a tax liability of $58,380 and their pro forma return for 2018 excluding the income from the sale of farm assets which showed a tax liability of $3,399. The debtors, due to withholding and estimated tax, inadvertently paid $9,813 to the IRS during 2018. They claimed $6,414 was an overpayment and listed that amount on the Pro Forma return as a refund. The IRS amended its proof of claim and asserted a general unsecured claim of $42,200 for the 2018 tax year (excluding penalties and interest). The IRS claimed that none of the debtors' tax liability qualified for non-priority treatment under 11 U.S.C. §1232, and that it had a general unsecured claim for $42, 220 for the 2018 tax year. To reach that amount, the IRS allocated tax withholdings and credits of $9,813 to the assessed tax due on the debtors' pro forma return which reduced that amount to zero, and then allocated the remaining $6,414 of withholdings, payments and credits to the outstanding tax liability of $48,634. IRS later added $6,347 of net investment income tax that the debtors had reported on their return but IRS had excluded due to a processing error. The debtors objected to the IRS's claim and asserted it should not be increased by either the $6,414 overpayment or the $6,347 of net investment income tax. The debtors sought to adjust the IRS claim to $54,981 and have the court issue a refund to them of $6,414 or reduce distributions to the IRS until the refund obligation had been satisfied. The IRS objected on the basis that the court lacked jurisdiction to compel the issuance of a refund or credit of an overpayment, and that the debtors were not entitled to the refund or credit of the overpayment shown on the pro forma return as a matter of law.

The bankruptcy court sustained the debtors' objection to the extent the 2018 refund was applied to the IRS's claim in a manner other than provided for under the confirmed plan. Specifically, the bankruptcy court held that the IRS had exercised a setoff that was not permitted under 11 U.S.C. §553 which violated the plan's bar against any creditor taking any action "to collect on any claim, whether by offset or otherwise, unless specifically authorized by this Plan." But, the bankruptcy court held that it lacked jurisdiction to compel the issuance of a refund or credit of an overpayment and that the debtors were not entitled to the refund or credit of overpayment as a matter of law. This was because, the court determined, the refund was not "property of the estate" under 11 U.S.C. § §542 and 541(a). Later, the bankruptcy court held that the overpayment reflected on the pro forma return was "property of the estate" and withdrew its prior analysis of 11 U.S.C. §§542 and 505(a)(2)(B). Thus, the bankruptcy court allowed the IRS's 2018 general unsecured tax claim in the amount of $54,981 and ordered the Trustee to pay distributions to the debtors until the overpayments had been paid to the debtors.

The IRS appealed, claiming that the bankruptcy court erred in allowing the IRS's proof of claim in the amount of $54,981 rather than $48,567, and ordering the IRS to issue the debtors a refund or credit of any overpayment in the amount of $6,414. Specifically, the IRS asserted that 11 U.S.C. §1232 did not provide the debtors any right to an "overpayment" or "refund" because it only applies to "claims" - tax liability after crediting payments and withholdings. The IRS based its position on *Iowa Department of Revenue v. DeVries, 621 B.R. 445 (8th Cir. B.A.P. 2020).* However, the trial court noted distinctions with the facts of *DeVries.* Here, the sale of property at issue occurred post-petition and involved a claim objection after the Plan had already been confirmed. The appellate court noted that the IRS did not object to the terms of the Plan, and under 11. U.S.C. §1232 the debtors can deprioritize all post-petition Sec. 1232 liabilities, not just a portion. The application of the marginal method resulted in a tax liability of $54,981 to be paid in accordance with 11 U.S.C. §1232. The non-§1232 tax liability was $3,399. The debtors inadvertently paid $9,813 to the IRS and were entitled to a refund of $6,414, and the IRS could not apply that amount against the Sec. 1232 liabilities in calculating its proof of claim. The refund amount was "property of the estate" under 11 U.S.C. §1207(a)(2).

Note: On November 30, 2021, an appeal was docketed with the U.S. Circuit Court of Appeals for the Seventh Circuit.

Devries and *Richards* are important cases for practitioners helping farmers in financial distress. 11 U.S.C. §1232 is a powerful tool that can assist making a farm reorganization more feasible. The Indiana case is a bit strange. In that case, the debtors were also due a refund for 2016. A pro-forma return for that year showed a refund of $1,300. Thus, the issue of a refund being due for pre-petition taxes could have been asserted just as it was in the Iowa case. Another oddity about the Indiana case is that the 2018 pro-forma (and regular) return was submitted to the IRS in March of 2019. Under 11 U.S.C. §1232, the "governmental body" has 180 days to file its proof of claim after the pro forma tax return was filed. The IRS timely filed its proof of claim and later filed an amended proof of claim which was identical to the original proof of claim. The IRS filed an untimely proof of claim in one of the other jointly administered cases.

Procedurally, in the Indiana case, a Notice regarding the use of 11 U.S.C. §1232 should have been filed with the court to clarify the dates of Notice to the IRS (and other governmental bodies) of the amount of the priority non-dischargeable taxes and 11 U.S.C. §1232 taxes to be discharged under the plan. That is when the issue of the refund would have been raised with the IRS. However, there was no Notice of the filing of the pro-forma return with the court. It will be interesting to see how the U.S. Court of Appeals handles the Indiana case on appeal.

Note: Going forward, Chapter 12 reorganization plans should provide that if a pro-forma return shows that the debtor is owed a refund the governmental bodies will pay it.

Conclusion

The next article will detail the Sixth and Fifth most important ag law and tax developments of 2021. Stay tuned.

Overview: Numbers 6 and 5

As I pointed out in the previous articles in this series, agricultural law and agricultural tax law intersect with everyday life of farmers and ranchers in many ways. Some of those areas of intersection are good, but some are quite troubling. In any event, it points to the need for being educated and having good legal and tax counsel that is well-trained in the special rules that apply to agriculture.

This is the third installment in my list of the "Top Ten" agricultural law and tax developments of 2021. The list is comprised of what are, in my view, the most important developments in agricultural law (which includes taxation that impacts farmers and ranchers) to the sector as a whole. The developments primarily are focused on the impact to production agriculture, but the issues involved will also have effects that spillover to rural landowners and agribusinesses as well as consumers of agricultural products.

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6. The Potential Peril Associated With Deferred Payment Grain Sales. On November 8, a group of Mississippi farmers filed a class action against UMB Bank, N.A. for misleading them about the financial status of a grain elevator they sold grain to that filed bankruptcy before paying them. *Island Farms, LLC, et al. v. UMB Bank, N.A., No.___, (S.D. Miss. filed Nov. 8, 2021).* The case is a grim reminder of the financial peril a farmer can be in when grain is delivered to an elevator, but payment is not made on delivery. After grain is delivered, but before it is paid for, the seller is an unsecured creditor of the buyer. If the buyer files bankruptcy before making payment, the seller is not likely to recover much, if anything.

Based on the plaintiffs' complaint, they delivered grain to a grain elevator that, unbeknownst to them, was insolvent and being propped up by the defendant bank. The elevator's grain purchases involved the farmers delivering and transferring title to the grain to the elevator. The elevator would then weigh, inspect and access the grain, and deliver payment in the form of a check within a period of a few days, or at another date if any particular farmer so desired.

The elevator is one of the largest grain elevator operations serving farmers in the Mississippi Delta, and was highly leveraged with massive amounts of debt. The elevator's principal creditor was the bank, with loans dating back to 2015. The total balance on the loans was approximately $70 million as of September 2021. $37 million was the balance on a revolving loan and $33 million was the balance on a term note. The bank required the grain elevator to post collateral, which meant that virtually all of its assets were collateralized. The loan agreements gave the bank a continuing security interest upon all property of the grain elevator, whether then owned or later acquired. The elevator's most valuable collateral was the grain they stored, and the amount they could borrow was determined in part by the amount of grain in inventory.

By the spring of 2021, the elevator was in serious financial distress, having less than $4,000 cash on hand, and was effectively insolvent. In addition, throughout 2021 the elevator failed to make payments to reduce the balance of the revolving loan, which it was contractually obligated to reduce. However, the bank permitted the elevator to keep the balance of the loan at the maximum level throughout the year. The elevator was required to furnish audited financial statements to the bank within 120 days of December 31, the end of its fiscal year.

The plaintiffs claim that the elevator was kept afloat by the bank's forbearance on their loans. The bank was aware that if it called the loans, there would be little grain it could claim as security for the grain elevator's debt. As a result, the plaintiffs claim that the bank proposed to wait until the grain elevator had as much grain as practicable before calling the loan and thereby effectively forcing the grain elevator into bankruptcy – which it filed for Chapter 11 (reorganization) bankruptcy on September 29, 2021.

Although the elevator was in financial distress, the farmers claim that it continued to hold out to farmers the opposite. In the spring of 2021, the elevator issued an update that stated it would be better prepared financially than in years past. The update also mentioned that the elevator had funding in place from multiple sources to ensure everyone got paid on time. However, several checks that the elevator wrote bounced during the harvest season. By the end of September, the bank notified the elevator that all amounts owed under the loan would be due immediately. As a result, the elevator filed Chapter 11 on September 29, 2021, effectively placing the bank in priority position as a secured creditor in accordance with its security agreements and the farmers in non-priority, general unsecured creditor status.

The plaintiffs claim that the elevator made knowingly false representations and concealed information that it had a duty to disclose. Additionally, they claim the bank aided and abetted the elevator's fraud by remaining silent while knowing that the farmers would deliver their crops with a time interval before being paid. The plaintiffs specifically claim that the bank deliberately propped up the grain elevator until the crops were delivered during harvest season. The plaintiffs claim that the bank was the beneficiary of the elevator's fraud, and that it has been unjustly enriched at the plaintiffs' expense. The plaintiffs further claim that in addition to equitable title of the crops, they had a constructive trust over the grain for the purpose of getting paid. They assert that had the grain elevator clearly indicated its financial position, the plaintiffs would have sold their crops elsewhere. Ultimately, the plaintiffs seek forfeiture of all money received by the bank in the matter.

The Mississippi case points out the problems that a farmer can encounter when a buyer fails before making paying on delivered grain. While state indemnity funds and bonding programs might be available, they often don't go far in making any particular farmer whole. Certainly, the financial status of a buyer should be examined carefully before delivery is made. That means seeing a certified audit of the buyer *before* making delivery. Also, carefully using a letter of credit or an escrow account might provide security against a buyer's default and achieve deferability. In any event, planning is required anytime an ag commodity is sold on a deferred basis to a buyer.

Update: Shortly after the elevator filed bankruptcy, two farming entities sued for an expedited determination that the grain contracts they had with the debtor were executory and subject to an immediate deadline for the executor to assume them. In *In re Express Grain Terminals, LLC, No. 21-11832-SDM, 2021 Bankr. LEXIS 3415 (Bankr. N.D. Miss. Dec. 14, 2021),* the court determined that the contracts were executory and set deadlines for the debtor to assume or reject them. The debtor was required to provide adequate assurance of performance of both the monetary and non-monetary requirements of the executory contracts. The issues became whether the executory contracts were a part of a "single contract" under the Master Trade Agreement (MTA), and whether the executory contracts were actually contracts for "financial accommodations" under 11 U.S.C. §365(c)(2). The court determined that the individual farmer contracts were the executory contracts that the debtor could assume or reject. Based on state law, the court found that the individual farmer contracts were severable. In addition, the language of the MTA and the individual grain contracts demonstrated the severable nature of the individual grain contracts. In addition, the court determined that the parties' conduct indicated the severable nature of the individual grain contracts. The court also held that the individual grain contracts with farmers were not contracts for financial accommodation because they were not contracts for the extension of cash or line of credit.

5. U.S. Supreme Court May Decide Whether FIFRA Preempts State Law – Roundup Litigation. Since 2015, thousands of cancer victims have sued Monsanto in state and federal court, alleging that Roundup caused their non-Hodgkins lymphoma. In 2021, a state court in California and a federal court in California issued important decisions on whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) pre-empts a state-law failure-to-warn claim when the warning cannot be added to the Roundup product without the Environmental Protection Agency's (EPA's) approval.

Background. In 2005, the U.S. Supreme Court, in *Bates, et al. v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) provided guidance on how courts are to analyze FIFRA preemption claims in the future. The plaintiffs in *Bates* were 29 Texas peanut farmers who claimed that in the 2000 growing season their crops were severely damaged by the application of the defendant's pesticide. The farmers claimed that the defendant knew or should have known that the pesticide would stunt the growth of peanuts in acidic soils. However, the pesticide label stated that the pesticide was recommended in all areas where peanuts were grown. Before the 2001 growing season, the defendant reregistered the pesticide with the EPA, and the EPA approved a supplemental label that specified that the product was not to be used on peanuts grown in soils with a high acidity level (pH of 7.2 or greater). After negotiations failed, the farmers gave notice of intent to sue under Texas law, and the defendant filed a motion for declaratory judgment in Federal District Court on the grounds that FIFRA preempted the farmers' claims. The farmers also brought tort claims based in strict liability and negligence, fraud, breach of warranty and violation of the Texas Deceptive Trade Practices-Consumer Protection Act. The District Court granted the defendant's motion, finding that FIFRA preempted the farmers' claims, and the U.S. Court of Appeals for the Fifth Circuit affirmed. The Fifth Circuit reasoned that the farmers' claims were preempted because if the claims were successful, the defendant would be induced (as opposed to being actually required) to change its label. Accordingly, the farmers' successful claim would impose an additional "requirement" on the defendant under state law – something the states cannot do under FIFRA.

The Supreme Court began its analysis in *Bates* by noting that FIFRA preemption applies to state rules that: (1) establish a requirement for labeling or packaging that; (2) is in addition to or different from what FIFRA requires. The Court noted, therefore, that rules that require manufacturers to design reasonably safe products, use due care in conducting appropriate testing of their products, market products free of manufacturing defect, and to honor their express warranties or other contractual commitments are not preempted because they do not qualify as requirements for labeling or packaging. Thus, the Court ruled that the farmers' claims for defective design, defective manufacture, negligent testing and breach of express warranty were not preempted. The Court rejected the Fifth Circuit's "inducement" test as overbroad – that the farmers' claims were preempted because, if successful, the defendant would be induced to change the pesticide label. However, the Court ruled that the farmers' fraud and negligent- failure-to-warn claims were premised on common law rules that qualified as "requirements" for labeling or packaging. But, such claims are only preempted, the Court reasoned, if the state level common law rules establish requirements that are "in addition to or different from" FIFRA's standards. The farmers claimed that their claims based on fraud and failure-to-warn were not preempted because these common law duties were equivalent to FIFRA's requirements that a pesticide label not contain "false or misleading" statements, or inadequate instructions or warnings.

Ultimately, the Court ruled that it had not received sufficient briefing on whether FIFRA preempted the farmers' fraud and failure-to-warn claims brought under Texas law, and remanded the case to the Fifth Circuit for a resolution of those claims. In remanding on these claims, the Court emphasized that a state law labeling requirement must in fact be equivalent to a requirement under FIFRA to survive preemption. If, for example, the element of falsity contained in a Texas common law fraud action imposes a broader obligation than FIFRA's requirement that labels not contain "false or misleading statements," the action would be preempted to the extent of the difference. The Court also opined that state law requirements must be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards. Likewise, the Court stated that jury instructions must ensure that nominally equivalent labeling requirements are genuinely equivalent such that a pesticide manufacturer should not be held liable under a state labeling requirement unless the manufacturer is also liable for misbranding under FIFRA.

In rejecting the "inducement" test of the Fifth Circuit and utilizing a "parallel requirements" test for determining FIFRA preemption, it is likely that more claims against pesticide manufacturers will survive preemption. It is no longer a valid ground for preemption that a state-based claim, if successful, would induce a manufacturer to change a label. Under the "parallel requirements" test, preemption applies only to claims that, if successful, would actually require a label to be changed. Thus, the key is whether applicable state law imposes broader obligations on pesticide manufacturers than does FIFRA.

Note: Nothing in FIFRA precludes states from providing a remedy to farmers and state law claims can be asserted based on alleged FIFRA violations to the extent that the claims would not impose a requirement that is in addition to or different from FIFRA requirements. However, a federal claim cannot be asserted. *See, e.g., G & M Farms, Inc. v. Britz-Simplot Grower Solutions, LLC, et al., No. 1:13-cv-0368 LJO MJS, 2013 U.S. Dist. LEXIS 75458 (E.D. Cal. May 29, 2013).*

Based on the Court's opinion in *Bates*, it became reasonable to believe that additional litigation would be brought against applicators and other parties that have some connection with the activity that caused damages along with pesticide manufacturers, and that some state legislatures might reexamine state statutes governing pesticides with an eye toward conformity with FIFRA. In any event, the Court illustrated its preference against preemption without clear direction from the Congress.

2021 developments. In a California case, a married couple claimed that their usage of Roundup on their properties for several decades caused the husband's non-Hodgkin's lymphoma. They made numerous legal claims, including a claim that Monsanto knew or had reason to know that its Roundup products were defective and inherently dangerous and unsafe when used in the manner that Monsanto instructed. The jury determined that Monsanto had designed Roundup in a manner that was a substantial factor causing the husband's harm; that Roundup had potential risks that were known or knowable in light of scientific and medical knowledge that were generally known in the scientific community at the time of manufacture, distribution and sale; that Monsanto was negligent in designing, manufacturing and supplying Roundup; and that Monsanto negligently failed to warn and instruct of Roundup's danger. The trial court jury awarded $2,055,000,000 to the plaintiffs. The trial court reduced the total damage award to $86.7 million.

In 2021, the appellate court affirmed in *Pilliod v. Monsanto Co., 67 Cal. App. 5th 591 (2021), pet. for review den., No. S270957, 2021 Cal. LEXIS 7965 (Cal. Sup. Ct. Nov. 17, 2021).* The appellate court determined that Monsanto had not shown that FIFRA preempted the plaintiffs' design defect and failure to warn claims because it failed to identify any state-law requirements that were in addition to or different from FIFRA's misbranding requirements.

Also in 2021, the U.S. Circuit Court of Appeals for the Ninth Circuit issued its opinion on the application of FIFRA preemption in a bellweather case involving Roundup. *Hardeman v. Monsanto Co., 997 F.3d 941 (9th Cir. 2021).* In *Hardeman*, the trial court jury returned a verdict in the plaintiff's favor of $5,267,634.10 in compensatory damages and $75 million in punitive damages for the plaintiff's non-Hodgkin's lymphoma allegedly caused by long-term used of Roundup. Monsanto appealed claiming that FIFRA preempted the plaintiff's failure to warn claims; that the trial court committed numerous errors; and that the punitive damage award was excessive in violation of California law and the Constitution's Due Process Clause. The appellate court disagreed, holding that the plaintiff's failure-to-warn claims based on Roundup's labeling were consistent with FIFRA and, therefore, neither expressly nor impliedly preempted. FIFRA's requirement, the appellate court found, that a pesticide not be misbranded were consistent with (if not broader) than California's common law duty to warn. Thus, Monsanto could comply with both FIFRA and California law which eliminated any preemption claim. The appellate court also held that the trial court had applied the correct standard for the admission of the plaintiff's expert witness testimony, and properly included and excluded various evidence as to Roundup being likely carcinogenic – a risk that was known at the time of the plaintiff's exposure. The appellate court also upheld the trial court's reduction of punitive damages from $75 million to $20 million was proper.

Note: On August 16, 2021, Monsanto filed a petition for certiorari with the U.S. Supreme Court. The Supreme Court held a conference on the matter on December 10. While the Court did not decide whether to take the case at its conference on December 10, on December 13 the Court invited the U.S. Solicitor General to file briefs expressing the views of the United States on the matter. *Monsanto Co. v. Hardeman, No. 21-241, 2021 U.S. LEXIS 6152 (U.S. Sup. Ct. Dec. 13, 2021).* The issue the Court may consider is whether FIFRA preempts a state law failure-to-warn claim when the warning cannot be added to a product without the EPA's approval and the EPA has repeatedly concluded that the warning is not appropriate. A side issue in the case is whether the Ninth Circuit's standard for admitting expert testimony is inconsistent with the Court's precedent and Rule 702 of the Federal Rules of Evidence.

Conclusion

The next installment in this series will detail what I view as the fourth and third most important developments in ag law and ag tax from 2021. Stay tuned and keep reading.

Overview: Numbers 4 and 3

As I pointed out in the previous articles in this series, agricultural law and agricultural tax law intersect with everyday life of farmers and ranchers in many ways. Some of those areas of intersection are good, but some are quite troubling. In any event, it points to the need for being educated and having good legal and tax counsel that is well-trained in the special rules that apply to agriculture.

This is the fourth installment in my list of the "Top Ten" agricultural law and tax developments of 2021. The list is comprised of what are, in my view, the most important developments in agricultural law (which includes taxation that impacts farmers and ranchers) to the sector as a whole. The developments primarily are focused on the impact to production agriculture, but the issues involved will also have effects that spillover to rural landowners and agribusinesses as well as consumers of agricultural products.

The Fourth and Third most important agricultural law and tax developments of 2021 – it's the topic of today's post.

4. U.S. Supreme Court Says Equitable Apportionment Doctrine Applies to Underground Water. In *Mississippi v. Tennessee, 211 L. Ed. 2d 230 (U.S. 2021) the facts of this case revealed that* the city of Memphis, Tennessee gets its drinking water from the Middle Claiborne Aquifer. The aquifer lies beneath eight states, and wells extract water from the aquifer by pumping it to the surface which lowers the water pressure around each well's location ("cones of depression"). Memphis has more than 160 wells that pump about 120 million gallons of water daily from the aquifer. The pumping caused a cone of depression in the part of Mississippi across the state line closest to the wells. Mississippi sued Memphis in 2005 claiming that the pumping wrongfully appropriated Mississippi's groundwater. The trial court dismissed the case because the State of Tennessee wasn't joined as an indispensable party.

The appellate court affirmed and also held that interstate aquifers are similar to interstate rivers and, as such, are subject to the doctrine of equitable apportionment which allows the U.S. Supreme Court to allocate rights in disputes involving interstate waters when one state sues another unless a statute, compact or other apportionment controls. Equitable apportionment provides that each state has an equality of right to use the waters at issue. As such, Tennessee was an indispensable party that couldn't simply be added because the lawsuit was really between states. That meant that the lawsuit should have been filed with the U.S. Supreme Court. Mississippi sought U.S. Supreme Court review, which was denied.

Note: Under the Constitution and the Judiciary Act, jurisdiction over interstate controversies is original and exclusive to the Supreme Court.

In 2014, Mississippi sought approval to file a complaint with the U.S. Supreme Court claiming that the pumping had depleted Mississippi's groundwater by altering the historic flow of the underground water which required Mississippi to drill deeper wells and use more electricity to get the water to the surface. Mississippi also claimed that it had absolute ownership of the groundwater in its state, even the water that crossed the border by flowing underground into Mississippi. As such, Tennessee's pumping of groundwater was a tortious taking of its property. Mississippi claimed that equitable apportionment did not apply in the case, and sought $615 million in damages and injunctive as well as declaratory relief. The Supreme Court granted Mississippi's request to file the complaint and appointed a Special Master to manage the case.

In late 2020, the Special Master recommended dismissal of the complaint with leave to amend. Against Mississippi's technical argument that the aquifer was distinct from the water it contained, the Special Master found that the aquifer is an interstate water resource and a single hydrological unit. The Special master also found that Tennessee's pumping affected groundwater beneath Mississippi, disrupting the flow between Tennessee and Mississippi. Equitable apportionment was determined to be the only available remedy, but because the complaint did not seek equitable apportionment, the Special Master recommended the

Supreme Court dismiss the complaint with leave to file an amended complaint to seek equitable apportionment.

In a case of first impression, the Supreme Court dismissed the case, but without leave to amend. However, the Court did rule on the application of equitable apportionment to the aquifer. The Court noted that it had, in prior cases, applied the doctrine to interstate rivers and streams and to disputes over interstate river basins. Such cases include interstate compact cases where the pumping of hydrologically connected groundwater reduced surface flows into downstream states.

The Court determined, with little thorough legal analysis, that the water in the aquifer was sufficiently similar to the water in the other cases where it had applied the doctrine. The Court also rejected Mississippi's absolute ownership argument noting that such argument would allow an upstream state to completely cut-off the flow to a downstream state. Such a result would be contrary to the equitable apportionment doctrine. Because the Court determined that the aquifer was subject to equitable apportionment, the Court adopted the Special Master's recommendation to dismiss the complaint.

Note: Because Mississippi had not sought leave to amend, the case was dismissed without leave to amend. However, in future cases, the Court said it would apply the doctrine of equitable apportionment to interstate aquifers where the aquifer involves multiple states with water flowing between the states and the actions of one state affects the portion of the aquifer below another state and there is no overriding statute, compact or other water sharing agreement between the states.

Implications for agriculture. The application of the equitable apportionment doctrine apportions the *benefits* of the water use between or among the competing states. The doctrine does not apportion the water itself. That is an important point as applied to agriculture. Ag uses of water, compared to non-ag uses of water, generally involves the use of a greater volume of water with perceived lower economic value. For example, in the case, the use of water from the aquifer by Memphis for drinking water and other municipal uses would have a higher economic value than the use for agricultural purposes in Mississippi This, indeed, could be the reason that Mississippi did not argue for application of the equitable apportionment doctrine. In addition, the Court, in a 1907 case, made clear that the geographical/hydrological origin of the interstate river has no significance on the apportionment. The Court also restated this in the early 1980s. That made Mississippi's trespass and conversion theory quite weak. Unfortunately, the Court didn't provide any guidance on how states might consider equitable apportionment of groundwater when it is the only water supply source, and how the apportionment might affect hydrologically connected (and isolated) surface supplies.

Note: For an excellent article discussing other points of the case and interstate groundwater issues in general, see Griggs, *"Interstate Litigation, State Reaction, and Federalism in the Age of Groundwater,"* Rocky Mountain Mineral Law Foundation, proceedings of 65th annual Rocky Mountain Mineral Law Institute (2019).

3. Supreme Court Says Government Cannot Force Private Property Owners to Allow Trespassing. In *Cedar Point Nursery, et al. v. Hassid, et al., No. 20-107, 2021 U.S. LEXIS 3394 (U.S. Sup. Ct. Jun. 23, 2021),* the lead plaintiff was a large strawberry growing operation in California, employing over 400 seasonal workers and about 100 full-time workers. A California labor regulation, based on the California Agricultural Labor Relations Act of 1975 that gives ag employees a right to self-organize, grants labor organizations a "right to take access" to an ag employer's property in order to solicit support for unionization. Cal Code Regs., tit. 8, §20900(e)(1)(C). Under the regulation, an ag employer must allow union organizers onto their property for up to three hours daily, 120 days per year. In the fall of 2015, at 5 a.m., members of the United Farm Workers entered the plaintiff's property without any prior notice being given. They entered the plaintiff's trim shed where hundreds of workers were preparing strawberry plants. The organizers used bullhorns to stir up the workers and encourage them to join in a protest. Other workers left the worksite. The plaintiff filed charges against the union for taking access without notice. In return, the union claimed that the plaintiff had committed an unfair labor practice similar to the claim it had made during the summer of 2015 against a California grower and shipper of table grapes and citrus.

The ag businesses believed that the union would try to enter their properties again in the future, and sued claiming that the access regulation was an unconstitutional per se physical taking of an easement that was given, without compensation, to union organizers. The trial court held that the regulation did not amount to a per se physical taking because it did not "allow the public to access their property in a permanent and continuous manner for whatever reason." Instead, the trial court held that the regulation was a non-physical taking to be evaluated under a muti-factor balancing test that the U.S. Supreme Court had set forth in the past.

The appellate court affirmed, identifying the various types of non-physical takings and determining that the balancing test applied. The U.S. Supreme Court agreed to hear the case and reversed.

The Supreme Court determined that an actual physical appropriation of private property was involved. It was a per se governmental taking. The Court noted that the regulation didn't merely restrict the use of private property, it appropriated it for the use and enjoyment of third parties. One aspect of property ownership is the right to exclude others, and the Court determined that the ability of the union to take access of a part of an ag operation's private property took that right away. In addition, the right of access, even though temporary, still constitutes a taking. There was no benefit of the loss of a property right flowing back to the ag businesses.

Note: The distinction between an outright physical and a non-physical (regulatory) taking is not always clear. But, the Court's decision in *Cedar Point Nursery* is a clear indication that the loss of the right to exclude others, even on a temporary basis, when no benefit inures to the property owner, is a fundamental property right that will be classified and protected as a physical taking with no balancing test required. Applied more broadly, the Court's decision is a major victory for farmers and ranchers and other private property owners.

Conclusion

The next installment in this series will detail what I view as the two biggest developments in agricultural law and agricultural taxation in 2021. Can you guess what they might be?

Overview: Numbers 2 and 1

The time has come to "unveil" the two biggest two developments in agricultural law and taxation for 2021. As I have been pointing out in the previous articles in this series, agricultural law and agricultural tax law intersect with everyday life of farmers and ranchers in many ways. Some of those areas of intersection are good, but some are quite troubling. In any event, it points to the need for being educated and having good legal and tax counsel that is well-trained in the special rules that apply to agriculture.

This is the fifth and final installment in my list of the "Top Ten" agricultural law and tax developments of 2021. The list is comprised of what are, in my view, the most important developments in agricultural law (which includes taxation that impacts farmers and ranchers) to the sector as a whole. The developments primarily are focused on the impact to production agriculture, but the issues involved will also have effects that spillover to rural landowners and agribusinesses as well as consumers of agricultural products.

The Second and First most important agricultural law and tax developments of 2021 – it's the topic of today's post.

2. Developments Involving "Waters of the United States" (WOTUS).

Background. The scope of the federal government's regulatory authority over wet areas on private land, streams and rivers under the Clean Water Act (CWA) has been controversial for more than 40 years. Many court opinions have been filed attempting to define the scope of the government's jurisdiction. On two occasions, the U.S. Supreme Court attempted to clarify the 1986 regulatory definition of a WOTUS, but in the process of rejecting the regulatory definitions of a WOTUS developed by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (COE), the Court didn't provide clear direction for the lower courts. See *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. United States, 547 U.S. 175 (2006).* The lower courts have also had immense difficulties in applying the standards set forth by the U.S. Supreme Court.

Particularly with its *Rapanos* decision, the Court failed to clarify the meaning of the CWA phrase "waters of the United States" and the scope of federal regulation of isolated wetlands. The Court did not render a majority opinion in *Rapanos*, instead issuing a total of five separate opinions. The plurality opinion, written by Justice Scalia and joined by Justices Thomas, Alito and Chief Justice Roberts, would have construed the phrase "waters of the United States" to include only those relatively permanent, standing or continuously flowing bodies of water that are ordinarily described as "streams," "oceans," and "lakes." In addition, the plurality opinion also held that a wetland may not be considered "adjacent to" remote "waters of the United States" based merely on a hydrological connection. Thus, in the plurality's view, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between the two, are "adjacent" to such waters and covered by permit requirement of Section 404 of the CWA.

Justice Kennedy authored a concurring opinion, but on much narrower grounds. In Justice Kennedy's view, the lower court correctly recognized that a water or wetland constitutes "navigable waters" under the CWA if it possesses a significant nexus to waters that are navigable in fact or that could reasonably be so made. But, in Justice Kennedy's view, the lower court failed to consider all of the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. Without more specific regulations comporting with the Court's 2001 SWANCC opinion, Justice Kennedy stated that the COE needed to establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to non-navigable tributaries, in order to avoid unreasonable application of the CWA. In Justice Kennedy's view, the record in the cases contained evidence pointing to a possible significant nexus, but neither the COE nor the lower court established a significant nexus. As a result, Justice Kennedy concurred that the lower court opinions should be vacated, and the cases remanded for further proceedings.

Justice Kennedy's opinion was neither a clear victory for the landowners in the cases or the COE. While he rejected the plurality's narrow reading of the phrase "waters of the United States," he also rejected the government's broad interpretation of the phrase. While the "significant nexus" test of the Court's 2001 SWANCC opinion required regulated parcels to be "inseparably bound up with the 'waters' of the United States," Justice Kennedy would require the nexus to "be assessed in terms of the statute's goals and purposes" in accordance with the Court's 1985 opinion in *United States v. Riverside Bayview Homes*. *474 U.S. 121 (1985).*

The "Clean Water Rule." The Obama Administration attempted take advantage of the lack of clear guidance on the scope of federally jurisdictional wetland by issuing an expansive WOTUS rule. The EPA/COE regulation was deeply opposed by the farming/ranching and rural landowning communities, and triggered many legal challenges. The courts were, in general, highly critical of the regulation, invalidating it in 28 states by 2019. The CWR became a primary target of the Trump Administration.

The "NWPR Rule." The Trump Administration essentially rescinded the Obama-era rule and replaced it with its own rule – the "Navigable Waters Protection Rule" (NWPR). *85 Fed. Reg. 22, 250 (Apr. 21, 2020).* The NWPR redefined the Obama-era WOTUS rule to include only: "traditional navigable waters; perennial and intermittent tributaries that contribute surface water flow to such waters; certain lakes, ponds, and impoundments of jurisdictional waters; and wetlands adjacent to other jurisdictional waters. In short, the NWPR narrowed the definition of the statutory phrase "waters of the United States" to comport with Justice Scalia's approach in *Rapanos*. Thus, the NWPR excluded from CWA jurisdiction wetlands that have no "continuous surface connection" to jurisdictional waters. The rule much more closely followed the Supreme Court's guidance issued in 2001 and 2006 that did the Obama-era rule, but it was challenged by environmental groups. Indeed, the NWPR has been challenged in 15 cases filed in 11 federal district courts.

2021 developments. In early 2021, the U.S. Court of Appeals for the Tenth Circuit reversed a Colorado trial court that had entered a preliminary injunction barring the NWPR from taking effect in Colorado as applied to the discharge permit requirement of Section 404 of the CWA. The result of the appellate court's decision is that the NWPR became effective in every state. *Colorado v. United States Environmental Protection Agency, 989 F.3d 874 (10th Cir. 2021).*

A primary aspect of the litigation involving the NWPR is whether it should apply retroactively or whether it is limited in its application on a prospective basis. For example, in *United States v. Lucero, 989 F.2d 1088 (9th Cir. 2021),* the defendant, in 2014, operated a business that charged construction companies for the dumping of soil and debris on dry lands near San Francisco Bay. The Environmental Protection Agency (EPA) later claimed that the dry land was a "wetland" subject to the dredge and fill permit requirements of Section 404 of the Clean Water Act (CWA). As a result, the defendant was charged with (and later convicted of) violating the CWA without any evidence in the record that the defendant knew or had reason to know that the dry land was a wetland subject to the CWA.

On further review, the appellate court noted that the CWA prohibits the "knowing" discharge of a pollutant into covered waters without a permit. At trial, the jury instructions did not state that the defendant had to make a "knowing" violation of the CWA to be found guilty of a discharge violation. Accordingly, the appellate court reversed on this point. However, the appellate court ruled against the defendant on his claim that the regulation defining "waters of the United States" was unconstitutionally vague, and that the 2020 Navigable Waters Protection Rule should apply retroactively to his case.

The NWPR was also held to apply prospectively only in United States v. Acquest Transit, LLC, No. 09-cv-555, 2021 U.S. Dist. LEXIS 40143 (W.D. N.Y. Mar. 3, 2021) and United States v. Mashni, No. 2:18-cv-2288-DCN, 2021 U.S. Dist. LEXIS 123345 (S.D. S.C. Jul. 1, 2021).

Most recently, a federal district court in South Carolina remanded the NWPR to the EPA. South Carolina Coastal Conservation League, et al. v. Regan, No. 2:20-cv-016787-BHH, 2021 U.S. Dist. LEXIS 132031 (D. S.C. Jul. 15, 2021). The NWPR was being challenged on the scope issue. Even though the NWPR was remanded, the court left the rule intact. That fit with the strategy of present Administration. If the court had invalidated the NWPR, then the Administration would have had to defend the Obama-era rule in court. By not vacating the NWPR allows the current administration to proceed in trying to write a new rule without bothering to defend the Obama-era rule in court.

In *Pasqua Yaqui Tribe v. United States Environmental Protection Agency, No. CV-20-TUC-RM, 2021 U.S. Dist. LEXIS 163921 (D. Ariz. Aug. 30, 2021). the* court vacated the NWPR. The court's order did not specify the scope of the vacatur, but the EPA and the COE soon announced that neither agency would implement the NWPR on a nationwide basis, and will rely on the pre-2015 regulatory definition of a WOTUS until a new rule is developed. This all means that projects that have already received a CWA permit based on the NWPR can continue to rely on the permit until it expires. If a project has received an approved jurisdictional determination based on the NWPR may rely on it for five years from the date of issuance regardless of whether the project has already received a CWA permit based on the jurisdictional determination. For projects that have received a preliminary jurisdictional determination after the date of the court's opinion may continue to rely on it.

New proposed rule. On December 7, 2021, the EPA and the COE published a proposed rule redefining a WOTUS in accordance with the pre-2015 definition of the term. *86 FR 69372 (Dec. 7, 2021).* Under the proposed rule, EPA states its intention to define a WOTUS in accordance with the 1986 regulations as further defined by the courts since that time. In addition, the proposed rule would base the existence of a WOTUS on the "significant nexus" standard set forth in prior Supreme Court decisions. As such, a WOTUS would include traditional navigable waters; territorial seas and adjacent wetlands; most impoundments of a WOTUS and wetlands adjacent to impoundments or tributaries that meet either the relatively permanent standard or the significant nexus standard; all waters that are currently used or were used in the past or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide. The proposed rule defines "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of State boundaries" regardless of whether those waters are also traditionally navigable. A "tributary" is also defined as being a WOTUS if it fits in the "other waters" category via a significant nexus with covered waters or if it is relatively permanent. The EPA and COE further define the "relatively permanent standard" as "waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters." The "significant nexus standard" is defined as "waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas (the "foundational waters")." The comment period on the proposed rule expires on February 7, 2022.

Related WOTUS issue. During 2021 another significant case with WOTUS-related issues continued to wind its way through the court system. In *Sackett v. Environmental Protection Agency, 8 F.4th 1075 (9th Cir. 2021), t*he plaintiffs bought a .63-acre lot in 2004 on which they intended to build a home. The lot is near numerous wetlands the water from which flows from a tributary to a creek, and eventually runs into a lake approximately 100 yards from the lot. The lake is 19 miles long and is a WOTUS subject to the CWA which bars the discharge of a pollutant, including rocks and sand into it. The plaintiffs began construction of their home, and the EPA issued a compliance order notifying the plaintiffs that their lot contained wetlands due to adjacency to the lake and that continuing to backfill sand and gravel on the lot would trigger penalties of $40,000 per day. The plaintiff sued and the EPA claimed that its administrative orders weren't subject to judicial review. Ultimately the U.S. Supreme Court unanimously rejected the EPA's argument and remanded the case to the trial court for further proceedings. The EPA withdrew the initial compliance order and issued an amended compliance order which the trial court held was not arbitrary or capricious. The plaintiffs appealed and the EPA declined to enforce the order, withdrew it and moved to dismiss the case. However, the EPA still maintained the lot was a jurisdictional wetland subject to the CWA and reserved the right to bring enforcement actions in the future. In 2019, the plaintiffs resisted the EPA's motion and sought a ruling on the motion to bring finality to the matter. The EPA claimed that the case was moot, but the appellate court disagreed, noting that the withdrawal of the compliance order did not give the plaintiffs final and full relief. On the merits, the appellate court noted that the lot contained wetlands 30 feet from the tributary, and that under the "significant nexus" test of *Rapanos v. United States, 547 U.S. 715 (2006),* the lot was a regulable wetland under the CWA as being adjacent to a navigable water of the United States (the lake).

Note: On September 22, 2021, the plaintiffs filed a petition with the U.S. Supreme court asking the Court to review the case. The Supreme Court set January 14, 2022, as the conference date to determine whether it will accept the case for review and decision.

Update: On January 24, 2022, the U.S. Supreme Court granted certiorari. The Court will be deciding whether the Ninth Circuit used the proper test to decide whether the wetlands at issue are "waters of the United States" for purposes of the CWA. The Sacketts are asking the Court to use the four-justice plurality in *Rapanos v. United States, 547 U.S. 175 (2006).* Under that test, wetlands are only subject to the CWA when they have a continuous surface water connection to regulated waters.

1. The Failure of "Build Back Better" to Become Law.

Without doubt, the biggest development of 2021 was the failure of H.R. 5376, known as "Build Back Better" (BBB) to become law. The BBB would have also been the biggest development had it also become law. There are numerous provisions in the BBB that would have impacted farmers and ranchers significantly. While the bill did pass the U.S. House on November 19, the version that passed was a "slimmed-down" version that did not contain many of the more onerous (as viewed by agriculture) provisions that were originally included. The Senate failed to take up the legislation before the end of 2021.

The following are some of the more significant provisions that were originally included in H.R. 5376 that *didn't* make it into the House passed version:

- Increase in corporate tax rate to 26.5 percent;
- Modifications to the "stepped-up" basis rule at death;
- Increase in top individual marginal rate to 39.6 percent;
- A phase-out or elimination of the 20 percent qualified business income deduction;
- Increase in top capital gain rate to 25%;
- Reduction in the federal estate/gift tax unified credit exemption equivalent;
- Change in the grantor trust rules;
- Change in the present interest annual exclusion rule;
- Increase in the top federal estate/gift tax marginal rate;
- Valuation discounting rules; and
- Increase in value reduction for land in decedent's estate under Sec. 2032A

But, there remained certain provisions in H.R. 5376 of relevance to agricultural producers. Those include the following:

- An increase in the state and local tax deduction (SALT) from the present $10,000 amount to $80,000 (MFJ);
- A surcharge on high income earners;
- Expansion of the NIIT (3.8 percent) to trade or business income for taxpayers with taxable income exceeding $400,000 (single); $500,000 (MFJ), and application of the NIIT to trade or business income of estates/trusts;
- Limit on contributions to traditional or Roth IRAs for persons with combined IRA and defined contribution account balances exceeding $10 million and adjusted taxable income exceeds the $400,000/$500,000 thresholds; required distributions for accounts where owner has combined values exceeding $10 million; no "backdoor" Roths;
- Expansion of Medicare to cover dental, hearing and vision care;
- No oil and gas drilling on non-wilderness portion or ANWR; and
- Moratorium on offshore oil and gas leasing in Eastern Gulf of Mexico, Atlantic and Pacific federal waters.

Going forward into 2022, Democrats are expected to make efforts to advance their priorities in a filibuster-proof reconciliation bill containing the White House economic recovery "blueprint." Disputes over the structure of several tax incentives remain at the center of bicameral talks aimed at clearing the way for the Senate to pass and the House to clear a revised version of H.R. 5376. The House appears to be focused on implementing H.R. 5376 and salvaging parts of it if the bill does not pass the Senate in the same form it passed the House. Democrats also are pushing to double the current IRS budget and are pitching the move as a revenue raiser by virtue of increased revenue from audits.

On the other side of the aisle, Republicans are pushing to make the point that temporary tax breaks followed by extensions would further fuel already high inflation and add to the deficit. Senate Republicans appear to be focused on keeping the corporate tax rate at 21 percent, the top individual rate at 37 percent and top capital gains rate at 20 percent.

As of today, there is no clear sign about how a deal will be cut on a fiscal 2022 omnibus spending deal before the February 18 expiration of the current stopgap spending law. There is no current ongoing negotiation with respect to H.R. 5376, Another issue for 2022 is what the Congress might do with respect to extending tax provisions that have currently expired. There are about two dozen provisions that expired at the end of 2021. Perhaps there will be a push for a separate extender bill for renewal of popular provisions such as a tax break for mortgage insurance premiums, the ($300/$600) above-the-line deduction for charitable deductions, and an increase to age 75 for the start of required minimum distributions from retirement plans.

Conclusion

So there you have it - five articles discussing the ten biggest developments in agricultural law and taxation for 2021. What else was the law concerned with involving agriculture in 2021 that didn't make the "Top Ten" list? Next, I will start looking at those issues.