

Top Ten Developments in Agricultural Law and Taxation in 2023-Part 3

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Overview

Today's article is third in a series concerning the Top Ten ag law and tax developments of 2023. So far, I've looked at a court-ordered removal of an entire wind farm, the reporting of foreign bank accounts, new business information reporting requirements, a massive "renewable" fuel tax scam, and a significant Tax Court case concerning self-employment tax on distributions to limited partners. That brings me to the remaining 'top five' developments in today's post.

Development number 5 – it's the topic of today's post.

5. Corps of Engineers Mismanages Water Levels in Missouri River

Ideker Farms, Inc. et al. v. United States, 71 F.4 th 964 (Fed. Cir. 2023), afn'g. in part, vacn'g. in part and remanding, 151 Fed Cl. 560 (Fed. Cl. 2020).

In 2023, the U.S. Court of Appeals for the Federal Circuit largely affirming a lower court ruling that the U.S. Army Corps of Engineers (COE) unconstitutionally violated the property rights of certain farmers along the Missouri River. The case stemmed from changed in the COE's manual for managing waters levels in the river. The court's decision is not only very important for the particular farmer's involved but is also an important victory for private property rights in general.

Background facts. In 2014, almost 400 farmers along the Missouri River from Kansas to North Dakota sued the federal government claiming that the actions of the U.S. Army Corps of Engineers (COE) led to and caused repeated flooding of their farmland along the Missouri River. The farmers alleged that flooding in 2007-2008, 2010-2011, and 2013-2014 constituted a taking requiring that compensation be paid to them under the Fifth Amendment. The litigation was divided into two phases – liability and compensation for an unconstitutional taking of theirs farms.

The liability phase was decided in early 2018 when the court determined that some of the 44 landowners selected as bellwether plaintiffs had established the COE's liability. In that decision, the court held that the COE, in its attempt to balance flood control and its responsibilities under the Endangered Species Act, had released water from reservoirs "during periods of high river flows with the knowledge that flooding was taking place or likely to soon occur." The court, in that case, noted that the COE had made changes to its "Master Manual" in 2004 and made other changes after 2004 to reengineer the Missouri River and reestablish more "natural environments" to facilitate species recovery. Those changes led to unprecedented releases from Gavins Point Dam in South Dakota after



heavy spring rains and snowmelt in Montana during early 2011. The large volume of water released caused riverbank destabilization which led to flooding and destroyed all of the levees along the lead plaintiff's farm and an estimated \$2 billion in damages. The COE claimed it acted appropriately to manage the excess water. Ultimately, the court, in the earlier litigation, determined that 28 of the 44 landowners had proven the elements of a takings claim – causation, foreseeability and severity. The claims of the other 16 landowners were dismissed for failure to prove causation. The court also determined that flooding in 2011 could not be tied to the COE's actions and dismissed the claims for that year.

Damages. Subsequent litigation involved a determination of the plaintiffs' losses and whether the federal government had a viable defense against the plaintiffs' claims. The trial court found that the "increased frequency, severity, and duration of flooding post MRRP [Missouri River Recovery Program] changed the character of the representative tracts of land." The trial court also stated that, "[i]t cannot be the case that land that experiences a new and ongoing pattern of increased flooding does not undergo a change in character." The trial court determined that three representative plaintiffs, farming operations in northwest Missouri, southwest Iowa and northeast Kansas, were collectively owed more than \$10 million for the devaluation of their land due to the establishment of a "permanent flowage easement" that the COE acquired along with repairs to a levee. The easement and levee damage constituted a compensable taking under the Fifth Amendment. However, the trial court determined that the COE need not compensate the plaintiffs for property and crop losses, and that flooding from 2011 was not compensable. The impact of the trial court's ruling meant that hundreds of landowners affected by flooding in six states would likely be entitled to compensation for the loss of property value due to the new flood patterns that the COE created as part of its MRRP. Both parties appealed. The Corps claimed that the trial court lacked jurisdiction and that the plaintiffs' claims accrued in 2007. As such those claims, the COE argued, were barred by a six-year statute of limitations. The Corps also claimed the trial court's December 31, 2014, accrual date was arbitrary. The Federal Circuit rejected both arguments.

Appellate decision. The appellate court determined that the plaintiffs' claims were not time-barred and that the accrual date of December 31, 2014, was not arbitrary. The appellate court affirmed on the compensable taking issue but determined that the trial court erred by excluding crop damages occurring between 2007 and 2014 from the damage calculation. Thus, the appellate court vacated the trial court determination not to award compensation for crop and property damage for those years and remanded for a determination of the amount of the crop damage to both mature and immature crops.

The compensable taking was for both a flowage easement and crop damage because the appellate court concluded that a per se taking had occurred – it was foreseeable that the COE's 2004 changes would cause intermittent flooding into the future. This meant that the permanent flowage easement was not simply a trespass. It was a per se taking. The appellate court also determined that the trial court failed to consider whether the actions of the COE actions in accordance with its Master Manual changes increased the severity or duration of the 2011 flooding compared to what was attributable to the record rainfall that year.



On the damages issue, the appellate court concluded that lost profit and the cost of moving into new facilities are not compensable under the Fifth Amendment, but that destroyed crops are. Crop damage, both mature and immature must be compensated because they were taken as a direct result of the COE's permanent flowage easement. The appellate court remanded the case to the trial court to determine the value of the immature crops the COE's action unconstitutionally took.

Implications. As noted above, the appellate court held that not only had a Taking occurred, but that the farmers in the case had to be paid for all of the crops that were destroyed over the seven-year period at issue (2007-2014). The appellate court's opinion is important for the fact that it establishes that the government must pay for the damages it causes when it floods farmland and destroys crops. Certainly, the government has the power to "take" property that it wants. The Constitution ensures that the government pays for what it takes. That principle was appropriately applied in this instance.

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