

Top Ten Developments in Agricultural Law and Taxation in 2023-Part 6 Foreign Ownership of Agricultural Land

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Overview

Today's article is the sixth in a series concerning the Top Ten ag law and tax developments of 2023. To recap, here's the list of the top developments so far:

- 10 - Court orders removal of wind farm.
- 9 – Reporting Rules for Foreign Bank Accounts
- 8 – New Business Information Reporting Requirements
- 7 – “Renewable” Fuel Tax Scam
- 6 – Limited Partners and Self-Employment Tax
- 5 – COE Mismanagement of Missouri River Water Levels
- 4 – The Employee Retention Credit
- 3 – California's Proposition 12 and the Dormant Commerce Clause

I am now up to what I view as the second most significant development in ag law and tax in 2023. It's an issue that received attention in numerous state legislatures as well as at the federal level. It's the issue of foreign ownership of agricultural land – and it's the topic of today's post.

Background

The issue of foreign ownership of agricultural land received a lot of attention in 2023 – both at the federal as well as at the state level in numerous states. It's not a new issue. It's an issue that's been around for centuries. Under the English common law, aliens could not acquire title to land except with the King's approval. The King understood that control and ownership of the land was critical to national security and the food supply and did not want disloyal subjects owning or acquiring an interest in land. As a result, the notion of limiting alien ownership of agricultural land was well imbedded in United States jurisprudence.

Federal law. In the 1970s, the issue of foreign investment in and ownership of agricultural land received additional attention because of several large purchases by foreigners and the suspicion that the build-up in liquidity in the oil exporting countries would likely lead to more land purchases by nonresident aliens. The lack of data concerning the number of acres actually owned by foreigners contributed to fears that foreign ownership was an important and rapidly spreading phenomenon.



AFIDA. As a result of the scant data available on foreign investment in agricultural land, the Congress enacted the Agricultural Foreign Investment Disclosure Act (AFIDA). 7 U.S.C. §3501 *et seq.* Under AFIDA, the USDA obtains information on U.S. agricultural holdings of foreign individuals and businesses. In essence, AFIDA is a reporting statute rather than a regulatory statute. The information provided in reports by the AFIDA helps serve as the basis for any future action Congress may take in establishing direct controls or limits on foreign investment in agricultural land and provides useful information to states considering limitations on foreign investment. The Act requires that foreign persons report to the Secretary of Agriculture their agricultural land holdings or acquisitions. The Secretary assembles and analyzes the information contained in the report, passes it on the respective states for their action and reports periodically to the Congress and the President.

During 2023, legislation was proposed in the Congress that would increase oversight and restrict foreign investments in and acquisitions of land located within the U.S.

Note: On January 18, 2024, the U.S. Government Accountability Office (GAO) issued a report that reviews foreign investments in U.S. farmland and evaluates the effectiveness (or lack thereof) of the USDA's procedures for obtaining and disseminating the data on foreign investment that it receives via the AFIDA. The GAO also provided recommendations to the USDA on how it can improve the reliability of the data it collects and how it can improve its procedures in distributing the collected information to other federal agencies.

FSA request for public comments. In early 2024, the USDA's Farm Service Agency (FSA) announced that it was seeking public comments on the AFIDA reporting Form (FSA-153). Comments are being solicited concerning how the Form can be improved to gather AFIDA-required reporting information. FSA proposes to update Form FSA-153 to gather information on long-term leases, the impact of foreign investment on ag producers and rural communities, and certain geographic information. FSA asserts the updated Form will provide the government with "precise and meaningful" data under the AFIDA.

State action. Recently, the issue of restricting foreign investment in and/or ownership of agricultural land has been raised in Alabama, Arizona, Arkansas, California, Florida, Indiana, Iowa, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Each of these states have proposed, or planned to propose, legislation restricting foreign ownership and/or investment in agricultural land to varying degrees. Several high-profile events have spurred this renewed interest including a Chinese-owned company acquiring over 130,000 acres near an Air Force base in Texas and a 300-acre purchase by another Chinese company near a different Air Force base in North Dakota. Also, the China-originated virus in late 2019, the slow "fly-over" of a Chinese spy balloon from Alaska to South Carolina in 2023, as well as mysterious damages to many food processing facilities, pipelines and rail transportation have contributed to the growing interest in national security and restrictions on ownership of U.S. farm and ranchland by "known adversaries."

State Enactments in 2023



Arkansas. Senate Bill 383, enacted in 2023, restricts investors from certain countries, including China, from acquiring an interest in land within the state. In October, Arkansas became the first in the nation to enforce a state foreign ownership law when the Arkansas Attorney General ordered a subsidiary of Syngenta Seeds, a company owned by an arm of the Chinese communist party, to divest its ownership interest in farmland it owned within the state.

Florida. S.B. 264 was signed into law on May 8, 2023, and is codified at Fla. Stat. Ann. §§ 692.201-205. The new law limits landownership rights of certain noncitizens that are domiciled either in China or other countries that are a “foreign country of concern” (FCOC). *Fla. Stat. §§692.201-.204*. The countries considered as a FCOC under the law include China; Russia; Iran; North Korea; Cuba; Venezuela’s Nicolás Maduro regime; and Syria.

The law was almost immediately challenged in court. *Shen v. Simpson, No. 4:23-cv-208 (N.D. Fla., filed May 22, 2023)*. Four Chinese citizens living in Florida, along with a real estate brokerage firm, claimed that the law violated their equal protection rights because it restricts their ability to purchase real property due to their race. They also claimed that the law violated the Due Process Clause and the Supremacy Clause of the Constitution and the Fair Housing Act (FHA). Under the law, Chinese investors that are not U.S. citizens that hold or acquire an interest in real property in Florida on or after July 1, 2023, must report their interests to the state or be potentially fined \$1,000 per day the report is late. Chinese acquisitions after July 1, 2023, are subject to forfeiture to the state with such acquisitions constituting a third-degree felony. The seller commits a first-degree misdemeanor for knowingly violating the law. The plaintiffs sought an injunction against the implementation of the law before it went into effect on July 1, 2023. However, the law went into effect on July 1, with the litigation pending.

On August 17, the court denied the plaintiffs’ motion for an injunction. *Shen v. Simpson, No. 4:23-cv-208-AW-HAF, 2023 U.S. Dist. LEXIS 152425 (N.D. Fla. Aug. 17, 2023)*. The court determined that the Florida provision classified persons by alienage (status of an alien) rather than by race because it barred landownership by persons who are not lawful, permanent residents and who are domiciled in a “country of concern” while exempting noncitizens domiciled in countries that were not “countries of concern.” Thus, the restriction was not race-based (it applied equally to anyone domiciled in China, for example, regardless of race) and was not subject to strict scrutiny analysis which would have required the State of Florida to prove that the law advanced a compelling state interest narrowly tailored to achieve that compelling interest. Strict scrutiny, the court noted only applies to laws affecting lawful permanent aliens, and the Florida provision exempts nonresidents who are lawfully permitted to reside in the U.S. Thus, the law was to be reviewed under the “rational basis” test. *See, e.g., Terrace v. Thompson, 263 U.S. 197 (1923)*.

The court held that the State of Florida did have a rational basis for enacting the ownership restrictions – public safety and to “insulate [the state’s] food supply and...make sure that foreign influences...will not pose a threat to it.” This satisfied the rational basis test for purposes of the plaintiffs’ equal protection challenge and the FHA challenge (because the law didn’t discriminate based on race) and also meant that the court would not enjoin the law because the plaintiffs’ challenge on this basis was unlikely to succeed.



The Florida law, the court concluded, also defined “critical military infrastructure” and “military installation” in detail which gave the plaintiffs sufficient notice that they couldn’t own ag land or acquire an interest in ag land within 10 miles of a military installation or “critical infrastructure facility,” or within five miles of a “military installation” by an individual Chinese investor. Thus, the court determined that the plaintiffs’ due process claim would fail.

The plaintiffs also made a Supremacy Clause challenge claiming that federal law trumped the Florida law because the Florida law conflicted with the manner in which land purchases were regulated at the federal level. They claimed that federal law established a procedure to review certain foreign investments and acquisitions for purposes of determining a threat to national security. The court disagreed, noting the “history of state regulation” of alien ownership” and that the Congress would have preempted state foreign ownership laws conflicting with the federal review procedure.

North Dakota. S.B. 2371, effective through July 31, 2025, was enacted in 2023. The legislation gives counties and municipalities the power to prohibit local development by a foreign adversary. County commissions, city commissions, or city council may not authorize a development agreement with a foreign adversary whether individual or government. Any ordinance contrary to this section is void. During 2023, North Dakota also enacted H.B. 1135 and H.B. 1371, primarily dealing with existing law concerning ag business structures.

Oklahoma. S.B. 212 was enacted in 2023. The law specifies that no person who is not a US citizen shall acquire title to land either directly through a business entity or trust. These requirements don’t apply to a business entity that has legally operated in the US for at least 20 years. Any deed recorded with a county clerk shall include proof that the person or entity obtaining the land is in compliance. No application to lands now owned by aliens so long as they are held by the present owners nor to any alien who shall take up bona fide resident of the state or any lawfully recognized business entity. It is the duty of the attorney general or district attorney to institute a suit on behalf of the state if they have reason to believe any lands are being held contrary to the Act. The law also creates a citizen land ownership unit to enforce the provisions of the act within the office of the attorney general.

Other states. In 2023, in addition to the above-mentioned states, the following states also enacted various types of legislation designed to address foreign ownership/investment of agricultural land:

- Alabama (H.B. 379, enacted on May 24, 2023)
- Idaho (H.B. 173, enacted on April 3, 2024)
- Louisiana (H.B. 537, enacted on June 27, 2023)
- Mississippi (H.B. 280, enacted on March 22, 2023). This bill merely creates a committee to study the ownership of agricultural land in the state by a foreign government.
- Montana (S.B. 203, enacted on May 4, 2023)
- South Dakota (H.B. 1189, enacted on March 9, 2023). This bill is a reporting requirement only.
- Tennessee (H.B. 40, enacted on May 11, 2023)
- Utah (H.B. 186, enacted on March 13, 2023)
- Virginia (S.B. 1438, enacted on May 12, 2023)



Conclusion

Expect the foreign ownership of agricultural land issue to remain a big issue in 2024. As of January 26, 2024, bills addressing foreign ownership/investment in agricultural land have been filed in the following states:

- Alaska (HB 252)
- Arizona (HB 2407 and HB 2439)
- Florida (HB 1455),
- Hawaii (SB 2617; SB 2624; HB 2541; HB 2542; HB 2594)
- Maryland (SB 392)
- Mississippi (SB 2025; HB 348)
- Nebraska (LB 1301)
- New Jersey (A 191)
- Oklahoma (SB 1705; SB 1773; SB 1953; SB 2002; HB 3077; HB 3125)
- Tennessee (SB 1950)
- Washington (SB 6290)

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